Amendments to Privacy Laws: What Businesses Need to Know

October 4, 2021

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Bill 64, also known as the *Act to modernize legislative provisions respecting the protection of personal information*, was adopted on September 21, 2021, by the National Assembly of Québec. It amends some 20 laws relating to the protection of personal information, including the *Act respecting access to documents held by public bodies* ("**Access Act**"), the *Act respecting the protection of personal information in the private sector* ("**Private Sector Act**") and the *Act respecting the legal framework for information technology*.

While the changes will affect both public bodies and private businesses, this publication will focus on providing an overview of the new requirements for private businesses covered by the Private Sector Act.

We have prepared an amended version of the Private Sector Act in order to reflect the exact changes brought about by Bill 64.

Essentially, the amended Private Sector Act aims to give individuals greater control over their personal information and promote the protection of personal information by making businesses more accountable and introducing new mechanisms to ensure compliance with Québec's privacy rules. The following is a summary of the main amendments adopted by the legislator and the new requirements imposed on businesses in this area.

It is important to note that, for the most part, the new privacy regime will come into effect in two years.

1. Increasing transparency and individual control over personal information

The new Private Sector Act establishes the right of individuals to access information about themselves collected by businesses in a structured and commonly used technological format. Data subjects will now also be able to require a business to disclose such information to a third party, as long as the information was not “created or inferred” by the business (s. 27). This right is commonly referred to as the “right to data portability.”

Businesses now have an obligation to destroy personal information once the purposes for which it was collected or used have been fulfilled. Alternatively, businesses may anonymize personal information in accordance with generally accepted best practices in order to use it for meaningful and legitimate purposes (s. 23). However, it is important that the identity of concerned individuals can never again be inferred from the retained information. This is a significant change for private businesses which, under the current law, can still retain personal information that has lapsed.

In addition, Bill 64 provides individuals with a right to “de-indexation.” In other words, businesses will now have to de-index any hyperlink that leads to an individual’s personal information where dissemination of such personal information goes against the law or a court order (s. 28.1).

Additionally, whenever a business uses personal information to render a decision based exclusively on an automated processing of such information, it must inform the concerned individual of the process at the latest when the decision is made (s. 12.1). The individual must likewise be made aware of their right to have the information rectified (s. 12.1).

Bill 64 provides that the release and use of nominative lists by a private company for commercial or philanthropic prospecting purposes are now subject to the consent of concerned data subjects.

Furthermore, in an effort to increase transparency, businesses will now be required to publish their rules of governance with respect to personal information in simple and clear terms on their website (s. 3.2). These rules may take the form of a policy, directive or guide and must, among other things, set out the various responsibilities of staff members with respect to personal information. In addition, businesses that collect personal information through technology will also be required to adopt and publish a privacy policy in plain language on their website when they collect personal information (s. 8.2).

The amended Private Sector Act further provides that businesses that refuse access to information requests, in addition to giving reasons for their refusal and indicating the relevant sections of the Act, must now assist applicants in understanding why their request was denied when asked to (s. 34).

2. Promoting privacy and corporate accountability

Bill 64 aims to make businesses more accountable for the protection of personal information, as exemplified by the new requirement for businesses to appoint a Chief Privacy Officer within their organization. By default, the role will fall upon the most senior person in the organization (s. 3.1).

In addition, businesses will be required to conduct privacy impact assessments (“**PIA**”) for any information system acquisition, development or redesign project involving the collection, use, disclosure, retention or destruction of personal information (s. 3.3). This obligation forces businesses to consider the privacy and personal information protection risks involved in a project at its outset. The PIA must be proportionate to the sensitivity of the information involved, the purpose for which it is to be used, its quantity, distribution and medium (s. 3.3).

Businesses will likewise be required to conduct a PIA when they intend to disclose personal information outside Québec. In these cases, the purpose of the PIA will be to determine whether the information will be adequately protected in accordance with generally accepted privacy principles (s.

17). The extra-provincial release of personal information must also be subject to a written agreement that takes into account, among other things, the results of the PIA and, if applicable, the terms and conditions agreed to in order to mitigate identified risks (s. 17(2)).

The disclosure of personal information by businesses for study, research or statistical purposes is also subject to a PIA (s. 21). The law is substantially modified in this regard, in that a third party wishing to use personal information for such purposes must submit a written request to the *Commission d'accès à l'information* ("**CAI**"), attach a detailed description of their research activities and disclose a list of all persons and organizations to which it has made similar requests (s. 21.01.1 and 21.01.02).

Businesses may also disclose personal information to a third party, without the consent of the individual, in the course of performing a service or for the purposes of a business contract. The mandate must be set out in a written contract, which must include the privacy safeguards to be followed by the agent or service provider (s. 18.3).

The release of personal information without the consent of concerned individuals as part of a commercial transaction between private companies is subject to certain specific requirements (s. 18.4). The amended Private Sector Act now defines a business transaction as "the sale or lease of all or part of an enterprise or its assets, a change in its legal structure by merger or otherwise, the obtaining of a loan or other form of financing by it, or the taking of a security interest to secure an obligation of the enterprise" (s. 18.4).

Bill 64 enshrines the concept of "privacy by default," which means that businesses that collect personal information by offering a technological product or service to the public with various privacy settings must ensure that these settings provide the highest level of privacy by default, without any intervention on behalf of their users (s. 9.1). This does not apply to cookies.

Where a business has reason to believe that a privacy incident has occurred, it must take reasonable steps to reduce the risk of harm and the reoccurrence of similar incidents (s. 3.5). A privacy incident is defined as "the access, use, disclosure or loss of personal information" (s. 3.6). In addition, businesses are required to notify concerned individuals and the CAI for each incident that presents a serious risk of harm, which is assessed in light of the sensitivity of the concerned information, the apprehended consequences of its use and the likelihood that it will be used for a harmful purpose (s. 3.7). Companies will furthermore be required to keep a confidentiality incident log that must be made available to the CAI upon request (s. 3.8).

3. Strengthening the consent regime

Bill 64 modifies the Private Sector Act to ensure that any consent provided for in the Act is clear, free and informed and given for specific purposes. This means that consent must be requested for each of the purposes of the collection, in simple and clear terms and in a clearly distinct manner, to avoid consent being obtained through complex terms of use that are difficult for individuals to understand (art. 14).

The amended Private Sector Act now provides that minors under the age of 14 must have a parent or a guardian consent to the collection of their personal information. For minors over the age of 14, consent can be given either directly by the minor or by their parent or guardian (s. 14).

Within an organization, consent to the disclosure of sensitive personal information (e.g., health or other intimate information) must be expressly given by individuals (s. 12).

4. Ensuring better compliance

The Private Sector Act has likewise been amended by adding new mechanisms to ensure that

businesses subject to the Private Sector Act comply with its requirements.

Firstly, the CAI is given the power to impose hefty dissuasive administrative monetary penalties on offenders, which can be as high as $10,000,000 or 2% of the company's worldwide turnover (s. 90.12). In the event of a repeat offence, the fine will be doubled (s. 92.1).

In addition, when a confidentiality incident occurs within a company, the CAI may order it to take measures to protect the rights of affected individuals, after allowing the company to make observations (s. 81.3).

Secondly, new criminal offences are added to the Private Sector Act, which may also lead to the imposition of severe fines. For offending companies, such fines can reach up to $25,000,000 or 4% of their worldwide turnover (s. 91).

Finally, Bill 64 creates a new private right of action. Essentially, it provides that when an unlawful infringement of a right conferred by the Private Sector Act or by articles 35 to 40 of the *Civil Code* of *Québec* results in prejudice and the infringement is intentional or the result of gross negligence, the courts may award punitive damages of at least $1,000 (s. 93.1).

5. Coming into force

The amendments made by Bill 64 will come into force in several stages. Most of the new provisions of the Private Sector Act will come into force two years after the date of assent, which was granted on September 22, 2021. However, some specific provisions will take effect one year after that date, including:

The requirement for businesses to designate a Chief Privacy Officer (s. 3.1);
The obligation to report privacy incidents (s. 3.5 to 3.8);
The exception for disclosure of personal information in the course of a commercial transaction (s. 18.4); and
The exception to disclosure of personal information for study or research purposes (s. 21 to 21.0.2).

Finally, the provision enshrining the right to portability of personal information (s. 27) will come into force three years after the date of official assent.

The Lavery team would be more than pleased to answer any questions you may have regarding the upcoming changes and the potential impact of Bill 64 on your business.

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