Adoption of Bill 64: what do public bodies need to know?

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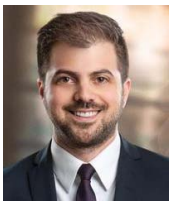

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Bill 64, also known as the *Act to modernize legislative provisions as regards the protection of personal information*, was adopted on September 21, 2021, by the National Assembly of Québec. This new bill amends some 20 laws relating to the protection of personal information, including the *Act respecting Access to documents held by public bodies and the Protection of personal information* ("**Access Act**"), the *Act respecting the protection of personal information in the private sector* (“**ARPIPS**”) and the *Act to establish a legal framework for information technology* (“**AELFIT**”).

While these changes will affect both public bodies and private businesses, this article focuses exclusively on the new requirements for public bodies covered by the Access Act.

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

1. Strengthening consent mechanisms and increasing individual control over personal information

By way of Bill 64, some important changes were made to the notion of consent when disclosing personal information to public bodies. From now on, any time an individual's consent is required by the Access Act, public bodies must ensure that the concerned individual's consent is given separately from any other disclosed information (s. 53.1). Furthermore, any consent to the collection of sensitive personal information (e.g., health or financial information that gives rise to a reasonable expectation of privacy) will have to be expressly obtained from the data subject (s. 59).

The amended Access Act now also 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. 53.1).

The right to data portability is one of the new rights enforced by Bill 64. These added provisions to the Access Act allow data subjects to obtain data that a public body holds on them in a structured and commonly used technological format and to demand that this data be released to a third party (s. 84).

Whenever a public body renders a decision based exclusively on automated processing of personal information, the affected individual must be informed of this process. If the decision produces legal effects or otherwise affects the individual concerned, upon request, the public body must also disclose to the individual (i) the personal information used in reaching the decision, (ii) the reasons and main factors leading to the decision, and (iii) the individual's right to have this personal information rectified (s. 65.2).

Furthermore, public bodies that use technology to identify, locate or profile an individual must now inform the affected individual of the use of such technology and the means that are available to them in order to disable such functions (s. 65.0.1).

2. New personal data protection mechanisms

Public bodies will now be required to conduct a privacy impact assessment whenever they seek to implement or update any information system that involves the collection, use, disclosure, retention or destruction of personal data (s. 63.5).

This obligation will effectively compel public bodies to consider the privacy and personal information protection risks involved in a certain project at its outset. In fact, the Access Act now states that every public body must create an access to information committee, whose responsibilities will include offering their observations in such circumstances.

3. Promoting transparency and accountability for public bodies

The changes brought about by Bill 64 also aim to increase the transparency of processes employed by public bodies in collecting and using personal data, as well as placing an emphasis on accountability.

As such, public bodies will now have to publish on their websites the rules that govern their handling of personal data in clear and simple language (s. 63.3). These rules may take the form of a policy,

directive or guide and must set out the various responsibilities of staff members with respect to personal information. Training and awareness programs for staff should also be listed.

Any public body that collects personal information through technological means will likewise be required to publish a privacy policy on their website. The policy will have to be drafted in clear and simple language (s. 63.4). The government may eventually adopt regulations to specify the required content of such privacy policies.

Moving forward, public bodies will also have to inform data subjects of any personal data transfer outside of the province of Quebec (s. 65). Any such transfer will also need to undergo a privacy impact assessment, which will include an analysis of the legal framework applicable in the State where the personal information will be transferred (s. 70.1). Furthermore, any transfer of personal data outside of Quebec must be subject to a written agreement that takes into account, in particular, the results of the privacy impact assessment and, if applicable, the agreed-upon terms to mitigate the risks identified in the assessment (s. 70.1).

A public body that wishes to entrust a person or body outside of Quebec with the task of collecting, using, communicating or retaining personal information on its behalf will have to undertake a similar exercise (s. 70.1 (3)).

4. Managing confidentiality incidents

Where a public body has reason to believe that a confidentiality incident (which is defined in Bill 64 as the access, use, disclosure or loss of personal information) has occurred, public bodies will be required to take reasonable steps to mitigate the injury caused to the affected individuals and to reduce the risk of further confidentiality incidents occurring in the future (s. 63.7).

In addition, where the confidentiality incident poses a risk of serious harm to the affected individuals, these individuals and the *Commission d'accès à l'information* ("**CAI**") must be notified (unless doing so would interfere with an investigation to prevent, detect or suppress crime or violations of law) (s. 63.7). Public bodies must now also keep a register of confidentiality incidents (s. 63.10), a copy of which must be sent to the CAI upon request.

5. Increased powers for the CAI

Bill 64 also grants the CAI an arsenal of new powers aiming to ensure that public bodies, as well as private companies, comply with privacy laws. For example, in the event of a confidentiality incident, the CAI may order any public body to take appropriate action to protect the rights of affected individuals, after allowing the public body to make representations (s. 127.2).

Furthermore, the CAI now has the power to impose substantial administrative monetary penalties, the value of which may reach up to $150,000 for public bodies (s. 159). In the event of repeat offences, fines will be doubled (s. 164.1).

6. Coming into force

The amendments made by Bill 64 will come into force in several stages. Most of the new provisions of the Access Act [DM1] 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 requirements regarding actions to be taken in response to confidentiality incidents (s. 63.7) and the powers of the CAI upon disclosure by an organization of a confidentiality incident (s. 137.2); and
> The exception to disclosure without consent for research purposes (s. 67.2.1).

Conclusion

The clock is now ticking for public bodies to implement the necessary changes in order to comply with the new privacy requirements outlined in Bill 64, which received official assent on September 22, 2021. We invite you to consult our privacy specialists to help ensure proper compliance with the new requirements of the updated Access Act.

The Lavery team would be more than pleased to answer any questions you may have regarding the upcoming changes and the potential impacts on your org