

Insights and Commentary from Dentons

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This document was authored by representatives of one of the founding firms prior to our combination launch, and it continues to be offered to provide our clients with the information they need to do business in an increasingly complex, interconnected and competitive marketplace.

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New Canadian Policy Position on On-Line Behavioural Advertising

By Timothy Banks

The Office of the Privacy Commissioner of Canada (OPC) has released a more detailed policy position regarding [on-line behavioural advertising](#). This is a must-read for companies conducting on-line behavioural advertising strategies in Canada.

The OPC defines on-line behavioural advertising as the practice of advertising service providers targeting website visitors with advertisements that are chosen based on tracking a person's browsing activity across multiple websites. The OPC provides the following example: "a user has visited websites about pets in the past, then ads related to pets might be shown on various web sites, even sites that are not related to pets (e.g., an online newspaper)." On-line behavioural advertising differs from first-party targeted advertising where the organization's advertising is based solely on the profile of an individual with whom that organization has a relationship and is not based on tracking the individual across multiple websites.

Some highlights from the position paper:

The OPC will generally consider information collected during on-line behavioural advertising to be personal information. The OPC

acknowledges that some information does not appear at first glance to be personal information when segmented. Nevertheless, the OPC reaches the default position that the information that is collected is personal information on the basis that (1) "the purpose behind collecting information is to create profiles of individuals that in turn permit the serving of targeted ads" and (2) the nature of on-line behaviour advertising is such that it involves "powerful means [...] for gathering and analyzing disparate bits of data and the serious

possibility of identifying affected individuals”; and, perhaps circularly, (3) the result of on-line behavioural advertising is “highly personalized”.

On-line behavioural advertising is not an unreasonable use of personal information.

The OPC acknowledges that the model for the commercial websites requires, in many cases, for consumers to accept advertising in return for access to free websites. However, advertisers must obtain meaningful consent, limit collection and safeguard information in accordance with Canadian privacy legislation.

Opt-out consent may be acceptable. In order to rely on opt-out consent, advertisers should meet what are essentially three conditions.

1. **Clear, upfront disclosure of the purposes of on-line behavioural tracking.** The disclosure cannot be “buried” in a privacy policy. The OPC encourages the use of website functionality to deliver information in layered disclosure, interactive media, and banners.
2. **Individuals must have the ability to easily opt-out of the practice.** Ideally this is to occur before or at the time the information begins to be collected. The opt-out technology must permit the opt-out to be immediate and persistent.
3. **The information collected should be limited and should be destroyed or de-identified as soon as possible.** The OPC wants to put sensitive information (examples include health/medical information) off-limits. Information should not be kept indefinitely. Instead organizations should destroy or de-identify information frequently.

Technologies that do not permit an individual to opt-out easily cannot be used. If an individual cannot control the technology by opting-out easily or would have to take extraordinary measures, the OPC’s position is that they should not be used. Essentially, these technologies do not offer any meaningful way to withdraw consent as is required by Canadian privacy laws.

Personal information from young children should not be collected through on-line behavioural advertising. The OPC’s position is that it is difficult to obtain meaningful consent for young children (even from their parents). For older children, the OPC’s position is that the disclosure and manner in which consent is obtained must be meaningful for the targeted age-group and the context.

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