

大成 DENTONS

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Understanding consent under Quebec's Law 25

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Speakers



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Guidelines regarding valid consent

Introduction

- On May 16, 2023, the *Commission d'accès à l'information* published draft guidelines (“Guidelines”) regarding valid consent under the recently updated public and private Quebec privacy acts
- The consultation period ends on **June 25, 2023**
- Once finalized, these Guidelines will be more important than the CAI’s previous documentation regarding consent
- Nonetheless, the Guidelines will not be binding

Guidelines regarding valid consent

Introduction

- In essence, the Guidelines seek to clarify the requirements for valid consent:
 - Manifest
 - Free
 - Informed
 - Specific
 - Granular
 - Request for consent must be understandable
 - Temporary
 - Request for consent must be distinct

Consent at the heart of the principle of control

Relying on exceptions to consent requirements

- **Demonstrate:** Organizations must be able to demonstrate that exceptions to consent requirements entitle them to use or to communicate PI without consent
 - Must meet all the criteria for exceptions
- **Describe:** Organizations should clearly describe how they use or communicate PI without consent in their privacy policy or in similar documentation
- **Irreversibility:** Once an individual declines to consent to the collection, use of communication of PI, an organization cannot rely on an applicable exception instead

Consent at the heart of the principle of control

Necessity

- **Establish necessity:** Personal information can only be collected, used or communicated where necessary
- **Consent doesn't override necessity:** The necessity requirement must be met even if an organization obtains consent or if an exception to consent obligations applies

Consent at the heart of the principle of control

Confidentiality incidents

- **Lack of valid consent = breach:** Confidentiality incidents include the failure to obtain valid consent and must be documented
 - If an organization detects an issue linked to a potential omission to obtain valid consent, it must respect its reporting obligations

Demonstrating compliance

Responsibility principle

- **Documentation is ongoing:** Organizations have an ongoing obligation to demonstrate their compliance with the law, which includes demonstrating that they obtained valid consent
- **Lack of documentation may affect consent validity:** Organizations must document the consent they have obtained in order to demonstrate its validity

Example: Keep a record of the factual elements linked to consent

- What information was provided in advance of consent? (i.e., notice – keep a copy of each version of policy/communication!)
- What action was taken to indicate consent (i.e., click, check box, signature)
- How was it separate/distinct from other actions (i.e., may need a screenshot to show it was distinct)

Demonstrating compliance

Consent records

- **Develop process/methods:** Organizations must develop appropriate methods to prove that they obtained valid consent
 - These methods must be adapted to the organization's activities
- **Minimize collection:** The guidelines specifically state that organizations must continue to minimize collection when documenting consent
 - Organizations should not require unnecessary additional personal information in order to document consent

Example: An organization may wish to retain call recordings in which a consumer's consent is obtained. However, if the purpose is to prove consent, it is not necessary to record the entire call. Record only consent portion, or simply document that call was made and consent was obtained.

Demonstrating compliance

Authentication

- **Reasonability:** Organizations must know who is consenting BUT authentication efforts must be reasonable i.e., for low risk activities, do not have to go to the ends of the earth to authenticate [risks overcollection])
- **Avoid over collection:** Organizations should not collect or use more personal information than necessary for the purposes of authentication

Example: An organization authenticates identity by collecting copies of consumer's driver licenses. This is an overcollection. Only visual confirmation is required.

A close-up photograph of a green leaf with several clear water droplets. A semi-transparent purple overlay covers the left and top portions of the image, with a diagonal cutout on the right side. The text "Criteria for valid consent" is written in white, bold, sans-serif font across the purple area.

Criteria for valid consent

Criteria for valid consent

Manifest

- **CAI position: “in general, consent must be express (explicit)”**
- **Positive:** Express or explicit consent is given when an individual makes a positive gesture or makes a statement to this effect
- **Acceptance, not refusal:** This act must indicate an individual’s acceptance, not only the absence of refusal

Example: Consumer must consent by checking an empty box. It is not acceptable to tell consumers the organization will collect consumer’s information, and they can decline by unchecking a box/calling customer service. **Opt in, not opt out!**
- **Clear:** Consent must be clearly given and should not be confused with another act or response from individual (i.e., not “click here to consent and get 10% off)

Criteria for valid consent

Manifest

- Express consent is required for sensitive personal information
- Quebec privacy acts require technologies **identifying, locating or profiling** an individual to be **deactivated by default**
 - An individual must be able to opt-in to these functions
 - Per the Guidelines, this amounts to a requirement for express consent
 - Example: An organization has an app that uses geolocation to display discounts to shops within a certain distance. This must be deactivated from the start, and only activated by the user once the user is advised of the collection, purposes, etc.

Criteria for valid consent

Manifest

- **Consent fatigue is the responsibility of the organization:** Consent fatigue is not an excuse for failing to obtain a positive indication from the individual
 - Organizations must take necessary measures to fight consent fatigue

Example: CAI recommendation is that an organization interrupt consent fatigue by using drop down menus, pop ups, asking simple skill-testing math questions, countdown timers, etc.
- However, query how this is intended to work with the requirement to keep process clear and understandable and easy, as well as distinct; **is introducing this degree of friction acceptable from a business perspective?**

Criteria for valid consent

Consent must be freely given

- **Balance of power affects validity:** In certain situations, the unequal balance of power between the parties can threaten an individual's ability to give free consent

Example: Employer/employee context is a perpetual dilemma. CAI acknowledges this....but does not offer a solution for this issue

- **Distinct purpose:** Consent is only freely given if it is obtained separately for each distinct purpose

Example: Check the boxes below to indicate consent for us to:

- send you marketing materials
- use your information for targeting ads
- help us improve our customer experience

Criteria for valid consent

Informed consent

- **Provide detailed information in advance:** An individual must be able to access the following information in order to give informed consent:
 - **Who?** The name of the organization requesting consent
 - **Why?** Purpose(s) for which consent is sought
 - **To whom?** The name or the categories of third-parties to whom personal information will be communicated, where applicable
 - **From whom?** The name or the categories of third-parties from whom personal information will be collected

Criteria for valid consent

Informed consent

- **What?** Categories of personal information collected
- **Accessible to whom?** Categories of persons within the organization who will have access to the personal information
- **When?** Period during which consent will be valid
- **If not?** Consequences of declining or withdrawing consent

Criteria for valid consent

Informed consent

- **What are the risks?** Reasonable foreseeable consequences associated with the use of personal information, if any
- **How?** How will the personal information be used or communicated
- **Where?** Indicate where the personal information may be communicated
- **What rights?** Right to withdraw consent, access rights, rectification rights

Criteria for valid consent

Informed consent

Old approach:

WidgetCo may use your personal information for marketing purposes and to improve your shopping experience. To do this, we may provide your personal information to our trusted service providers.

New approach:

WidgetCo uses your name, address, email address and phone number to send you marketing emails. We provide your information to use [Service Provider X] which helps us send these communications. These service providers are located in the United States. Our marketing team and other authorized individuals have access to this information. We keep your information as long you have an account with us and for [X] months thereafter, in order to support our documentation requirements. If you do not wish to consent, we will be unable to deliver our marketing materials and you may miss out on discounts or sales.

We use your browsing history and shopping history to deliver ads targeted to you move across websites. We provide your information to use [Service Provider X] which helps us deliver these ads. Our marketing team and other authorized individuals have access to this information. We keep your information as long you have an account with us and for [X] months thereafter, in order to support our documentation requirements. If you do not wish to consent, we will still deliver online ads, but they may not be relevant to you.

Criteria for valid consent

Informed consent

- Organizations must provide individuals with enough information for them to give informed consent
- However, they must not confuse individuals by providing them with too much information



Criteria for valid consent

Informed consent

- The CAI recommends providing the necessary information in two parts:
 - Part 1:
 - Name of the organization
 - Purposes
 - Third-parties
 - Types of personal information
 - Any other essential information for consent

Criteria for valid consent

Informed consent

- Part 2:
 - Privacy policies
 - Separate schedules
 - Icons

Criteria for valid consent

Informed consent

- **Separate for each purpose:** The necessary information to obtain informed consent should be provided separately for each specific purpose

Criteria for valid consent

Specificity

- **Purpose-specific consent:** Consent must be given for a specific purpose
- **Restrictive:** Consent is restrictive and only applies for the specific purposes for which it was obtained. New purposes require new consent.

Criteria for valid consent

Granularity

- Consent must be granular
- Consent must be requested for each of the purposes for which it is intended

Criteria for valid consent

Requests for consent must be comprehensible

- **Plain language:** Consent must be requested using plain, simple and concise language
- **Concise:** Consent should be requested using as few words as possible, while remaining clear and meeting consent requirements
- **Concrete:** Avoid using conditional verbs, unless unavoidable

Example:

No: We may use your personal information to train algorithms that deliver targeted ads.

Yes: We use your email address and shopping history to teach our software about your interests. We use this information to put ads on the websites you visit. These ads will reflect your interests.

Criteria for valid consent

Requests for consent must be comprehensible

- **Tailor to target audience:** Requests for consent must be adapted to an organization's target audience

Example: Consider the audience's level of literacy and privacy knowledge. What is their primary language? Are there disabilities you may need to consider? Is age a factor?

Criteria for valid consent

Consent is temporary

- **Automatic expiry of consent:** Consent is no longer valid once the purposes of collection, use or disclosure are fulfilled
- Continued use beyond this point would be considered a **confidentiality incident**

Criteria for valid consent

Consent is temporary

- **Special consideration for ongoing consent:** If consent is valid for an extended period of time, organizations should periodically remind individuals that they consented to the collection, use or communication of their personal information
- CAI recommends providing individuals with frequent updates and periodically reminding them of their right to withdraw consent

Criteria for valid consent

Distinct requests for consent

- **Separate written consents:** Written requests for consent should be submitted separately from other information
- **No bundling:** They should not be bundled with terms of use and privacy policies

Presumed & implied consent

- **Presumed consent:** If an individual willingly provides its personal information after having received the necessary information from an organization, it is presumed to have consented to the use of communication of its personal information
- **Implied consent:** Implied consent is possible for non-sensitive personal information, if it is not contrary to an individual's reasonable expectations and if there is no risk of serious harm
- When choosing implied consent, an organization must still be able to demonstrate that it was « obtained in an overt manner »

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