

August 6, 2019

*Sent by email to OPC-CPVPconsult2@priv.gc.ca*

Office of the Privacy Commissioner of Canada  
30 Victoria Street  
Gatineau, QC K1A 1H3

**RE:** *The Office of the Privacy Commissioner of Canada's 'Consultation on transfers for processing – Reframed discussion document'*

ACT | The App Association (App Association) appreciates the opportunity to submit comments to the Office of the Privacy Commissioner of Canada's (OPC) Notice of Consultation (Reframed Consultation) concerning data transfers for processing, including transborder transfers, and effective privacy protection during processing. The App Association strongly encourages OPC to withdraw its proposed new consumer consent requirement for cross-border data transfers. We instead ask OPC to promote policy approaches to Canadian consumer privacy consistent with needed scalability and flexibility in privacy and security rules, digital economy technical and business realities, and the ideals Canada has negotiated and agreed to in trade agreements.

The App Association represents thousands of small business software application development companies and technology firms, located both in and outside of Canada. These companies create technologies that generate internet of things (IoT) use cases across consumer and enterprise contexts and are primary drivers of the global digital economy. Today the ecosystem the App Association represents—which we call the app economy—is valued at approximately Can\$1.7 trillion and is responsible for tens of millions of jobs around the world, including 262,000 jobs in Canada.<sup>1</sup> Alongside the world's rapid embrace of mobile technology, our members provide innovative solutions that power IoT, a market projected to be worth more than Can\$18.5 trillion by 2022<sup>2</sup> across modalities and segments of the economy.

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<sup>1</sup> See Elliott Long, *The App Economy in Canada*, PPI, (July 2019) available at: [https://www.progressivepolicy.org/wp-content/uploads/2019/04/PPI\\_CandianAppEconomy\\_V7.pdf](https://www.progressivepolicy.org/wp-content/uploads/2019/04/PPI_CandianAppEconomy_V7.pdf) (noting that Canada has an estimated 262,000 App Economy workers as of November 2018).

<sup>2</sup> Michael Luciano, *Global IoT Market Value Could Exceed \$14 Trillion*, ECN, (April 16, 2018) available at: <https://www.ecnmag.com/blog/2018/04/infographic-global-iot-market-value-could-exceed-14-trillion>.

Canadian consumers that rely on our members' products and services expect that our members will keep their valuable data safe and secure. The small business developer community the App Association represents practices responsible and efficient data usage to solve problems identified across consumer and enterprise use cases. Their customers have strong data security and privacy expectations, and as such, ensuring that the company's business practices reflect those expectations by utilizing the most advanced technical protection mechanisms (e.g., end-to-end encryption) is a market-driven necessity.

The App Association serves as a leading resource in the privacy space for thought leadership and education for the global small business technology developer community. We regularly work to keep our members up to speed on the latest policy and legal developments and to translate those into practical and useable guidance to ease the burden of compliance.<sup>3</sup>

As regulators across key markets abroad continue to rush to utilize approaches to regulation of the digital economy which are often heavy-handed, Canada has remained one of the greatest markets in the world for building a digital economy startup due to its evidence-based and light-touch approach to regulating new industries. Across the world, other governments struggle to incent and sustain the digital economy growth because companies elsewhere often face great barriers to bringing novel products and services to market—slowing technological innovations to the pace of government approval.

Continued reports and revelations of data security breaches and companies' misuse of personal data have caused some Canadians' trust to recede, and some have even chosen to refrain from engaging in certain types of online activity. We agree with OPC that Canadian consumers must trust that organizations will respect their interests, understand what is happening with their personal data, and decide whether they are comfortable with this exchange. The App Association notes its support for the goals of the Personal Information Protection and Electronic Documents Act (PIPEDA). We believe that PIPEDA's implementation (and any amendments to PIPEDA) can and should include a balancing of (1) Canadian consumer expectations; (2) a flexible environment for innovators to compete both in the Canadian market and abroad; and (3) practical realities of the global digital economy and its reliance on the free flow of data across borders.

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<sup>3</sup> See e.g., ACT | The App Association, *General Data Protection Regulation Guide* (May 2018), available at: [https://actonline.org/wp-content/uploads/ACT\\_GDPR-Guide\\_interactive.pdf](https://actonline.org/wp-content/uploads/ACT_GDPR-Guide_interactive.pdf).

OPC's proposal to treat cross-border transfer of data as a disclosure as opposed to a use of information, thereby requiring consumer consent<sup>4</sup> would not further Canada's goals of improving consumer privacy. The App Association respectfully disagrees with OPC's proposal to provide separate rules for domestic and transborder data transfers and the rationale provided for the proposal. While the App Association recognizes OPC's goals of protecting consumers, this new classification would effectively constitute a data localization requirement. Data localization mandates ignore the advent of distributed cloud computing services that are more secure than legacy data storage methods.

Data localization requirements have no demonstrable relationship to improving consumer data privacy or security. The App Association notes its concern with the OPC's findings on cross-border data transfers, which represent a departure from a decade of OPC privacy guidance. Previously, OPC allowed a company to send a Canadian's personal information outside of Canada for processing if appropriate protections were in place and performed an organization-by-organization evaluation of privacy standards.<sup>5</sup> We suggest that the OPC maintain this posture and augment its approach by advancing pro-innovation cybersecurity risk management policies.

Additionally, data localization requirements are demonstrated to cause serious declines in imports and exports, reduce an economy's international competitiveness, and undermine domestic economic diversification.<sup>6</sup> Our small business members, including those located in Canada, do not have the resources to build, maintain, or use unique infrastructure in every country in which they may do business, and such requirements often effectively exclude them from commerce.

Further, the Considerations contained in the OPC's discussion document, and the OPC's proposed consumer consent requirement for cross-border data transfers, are inconsistent with the obligations provided in the Canada-U.S.-Mexico Agreement (CUSMA), which prohibits restrictions on cross-border data flows that are greater than necessary to achieve legitimate public policy objectives.<sup>7</sup> CUSMA also states that parties must ensure that "any restrictions on cross-border flows of personal information

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<sup>4</sup> See *Consultation on transfers for processing – Reframed discussion document*, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, (last visited Aug. 2019) <https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-transfers-for-processing/> ("[W]here there is a meaningful risk that a residual risk of harm will materialize and will be significant, consent should be express, not implied").

<sup>5</sup> See *Consultation on transborder dataflows*, OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, (last visited Aug. 2019) available at <https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-transborder-dataflows/> (describing that OPC's 2009 guidelines used an organization-by-organization approach to the protection of personal information being transferred for processing purposes).

<sup>6</sup> Matthias Bauer Martina F. Ferracane, et. al, *Unleashing Internal Data Flows in the EU: An Economic Assessment of Data Localisation Measures in the EU Member States*, ECIPE, (Nov. 3, 2016) available at: <https://ecipe.org/wp-content/uploads/2016/12/Unleashing-Internal-Data-Flows-in-the-EU.pdf>.

<sup>7</sup> USMCA chapter 19.11.2 (2019).

are necessary and proportionate”<sup>8</sup> to the risk. Building on App Association views above, we believe that the OPC’s proposed consumer consent requirement for cross border data transfers goes beyond the scope of being “necessary to achieve a legitimate public policy interest.” Similarly, the OPC’s proposed approach very likely runs afoul of similar obligations in the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP).<sup>9</sup>

In its consideration of both interpreting PIPEDA in its current form as well as in considering future changes to PIPEDA, the App Association would ask OPC that it invest in advancing cybersecurity risk management practices to protect Canadian consumers’ data without unnecessarily hindering transborder data flows. The exploitation of a single security flaw can destroy customer confidence, and our member companies tirelessly work to implement robust and scalable data security measures, such as secure coding and other security-by-design principles. We are at the center of efforts to drive better security and privacy through public-private partnerships. For example, the App Association supports the U.S. National Institute of Standards and Technology (NIST) Cybersecurity Framework<sup>10</sup> and Asia-Pacific Economic Cooperation (APEC) Cross Border Privacy Rules (CBPR) system.<sup>11</sup> PIPEDA can, and should, be implemented consistent with such scalable and flexible frameworks.

Further, PIPEDA should, both in its current form and in any future revised versions, reflect that no one-size-fits-all solution is appropriate for privacy regulation. First, any requirement should respect the ongoing and evolving privacy dialogue that exists between companies and the consumers they serve, so that notice and choice are presented in forms that work best with the type of service or product (and other contextual factors). Second, privacy regulation should allow for scalability based on the size, scope, and complexity of a business’s operation. For example, small businesses like the App Association members are simply not on the same compliance level as larger firms that have hundreds of compliance staff.

Based on the above, the App Association strongly encourages OPC to withdraw its proposed consumer consent requirement for cross-border data transfers, and to promote policy approaches to Canadian consumer privacy consistent with needed scalability and flexibility in privacy and security rules, digital economy technical and business realities, and the ideals Canada negotiated and agreed to in the CUSMA.

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<sup>8</sup> USMCA chapter 19.8.3.

<sup>9</sup> How to read the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), GOVERNMENT OF CANADA, (last modified February 15, 2019), available at: [https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/chapter\\_summaries-sommaires\\_chapitres.aspx?lang=eng](https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptppg/chapter_summaries-sommaires_chapitres.aspx?lang=eng).

<sup>10</sup> Version 1.1, NIST, *Framework for Improving Critical Infrastructure Cybersecurity*, (April 16, 2018) available at: <https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf>.

<sup>11</sup> APEC, *What is the Cross-Border Privacy Rules System?*, (April 15, 2019) available at: <https://www.apec.org/About-Us/About-APEC/Fact-Sheets/What-is-the-Cross-Border-Privacy-Rules-System>.

We appreciate careful consideration of our views and urge OPC to contact the undersigned with any questions or ways that we can assist moving forward.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brian Scarpelli'.

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