

What Businesses Need To Know About Their Legal Obligations When Outsourcing Data Processing To Third-Party Service Providers



Did you know that Canadian businesses have legal obligations under Canada's federal privacy law, the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), when they engage third-parties to process personal data?

By now, Canadian businesses should be aware of their [mandatory data breach reporting obligations](#) under *PIPEDA*. In short, those obligations require Canadian businesses to:

1. report to the Office of the Privacy Commissioner ("OPC") breaches of security safeguards involving personal information under the organization's **control** if it is reasonable in the circumstances to believe that the breach of the security safeguard creates a real risk of significant harm to an individual or individuals;
2. notify the affected individuals about those breaches; and
3. keep records of all breaches.

What you might not be aware of is that these data breach obligations apply to your business even if it is your third-party data processor who suffered the actual data breach. Additionally, if your business transfers personal data to a third-party for processing, your business is legally obligated to ensure appropriate contractual terms are placed with that third-party to protect the personal data while in the possession of the third-party.

Do You Use Third-Party Data Processors?

If you have a business, it almost certainly engages third-party service providers to process its data. For example, if your business uses any cloud services, you have engaged a third-party to process your data. Cloud services include things like online data storage, webmail, social networking websites, online business productivity applications, and software-as-a-service offerings. Any time you collect personal information about an individual (e.g. your customers or employees) and store that information in the cloud, you have engaged a third-party to process personal data thereby triggering legal obligations under *PIPEDA*.

It is important to keep in mind that third-party data processors are not limited just to cloud services providers. Processing does not necessarily require the application of a computer. For the purposes of *PIPEDA*, processing is better understood as a use of personal information by a third-party service provider where the third-party did not directly collect the personal information from the individual who is the subject of the personal information, but instead received the personal information from the organization (e.g. a business) that directly collected the personal information and obtained consent to use the personal information for the purposes that the third-party is now carrying out on behalf of the organization (i.e. the entity that originally collected the personal information). Consequently, a third-party data processor could be, for example, a third-party call centre you engage to contact your customers about important product information, a payroll company that provides your business with payroll services, or an insurance provider that provides group benefits to your employees.

Who Is Responsible In The Event of a Data Breach

It would be reasonable to assume that if your business transfers personal information to a third-party for processing, and that third-party suffers a data breach related to such personal information, the third-party would be legally obligated to comply with the mandatory data breach reporting obligations under *PIPEDA*; however, this is not the case. It is the outsourcing organization (i.e. the transferor of the data) – and not the third-party service provider – who is responsible for compliance with *PIPEDA*'s mandatory data breach reporting obligations. This is because the reporting obligation falls upon the organization in **control** of the personal information, and the OPC has taken the position that it is typically the outsourcing organization, and not the third-party service provider, who has **control** of the personal information. Consequently, if you engage a third-party service provider to process personal information that you have collected and that third-party service provider suffers a data breach, you (the outsourcing organization) have the reporting, notification, and record keeping obligations and the corresponding liability under *PIPEDA* for failure to comply with those obligations.

PIPEDA Compliant Contractual Terms

Since *PIPEDA* holds the *customer* (i.e. the outsourcing organization) of the third-party data processor liable for data breach reporting, it is crucial that contracts involving third-party data processing expressly address the customer's rights, and the third-party service provider's obligations, upon the occurrence of a data breach. Without data breach terms in your contracts, you might not even be notified by your third-party service provider that a data breach has occurred. This lack of notice would obviously undermine your ability to comply with *PIPEDA*'s data breach reporting, notification, and record keeping requirements. But to make matters worse, failing to have appropriate contractual arrangements with your third-party processors regarding data security and breaches is in and of itself a violation of *PIPEDA*'s accountability principle, which states:

An organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing. The organization shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party.

Unfortunately, third-party service provider contracts often completely omit data security and breach terms. This should be of immediate concern to customers of those third-party service providers, since the omission of contractual terms regarding data

security and breaches places the customer in contravention of *PIPEDA* (regardless of whether or not a breach has actually occurred) and exposes the customer to significant risk and uncertainty should their third-party service provider suffer a data breach.

So what contractual arrangements should be implemented? For one, outsourcing organizations should ensure that their third-party service providers are obligated to notify the outsourcing organization of data breaches within the time periods required by *PIPEDA*. The third-party processors should also be obligated to ensure the notice contains enough information to enable the outsourcing organization to comply with *PIPEDA*'s mandatory data breach reporting obligations. This means that, at the very least, the notice should contain information concerning:

1. Date and time of breach;
2. Duration of the breach;
3. How the breach was discovered;
4. When the breach was discovered;
5. Type of security safeguard breached or whether breach occurred due to lack of security safeguard;
6. The type of breach;
7. Whether there is evidence of criminal intent or a state sponsored attack;
8. Who may have had access to the personal information;
9. Steps taken to mitigate harms flowing the breach and prevent future breaches;
10. The types of information involved (e.g. financial information, health information, etc.);
11. The number of affected individuals;
12. The names and contact information of the affected individuals; and
13. Other information that would enable the outsourcing organization to determine if the breach creates a real risk of significant harm to an individual.

Outsourcing organization should also contractually obligate third-party processors to:

1. comply with all applicable privacy and data security laws to which they are subject;
2. limit their use of the personal data to specific purposes;
3. not disclose personal data to third parties, subject to certain exceptions;
4. protect personal data from unauthorized access or breach by implementing security safeguards and controls;
5. investigate data breaches and take actions directed by the outsourcing organization to contain the breach; and
6. cooperate with the outsourcing organization in connection with the outsourcing organization's reporting and notification obligations.

Although a good starting point, the above is not a complete statement of all contractual terms that should be included in agreements with third-party data processors and is of course a simplification of a complex topic. Deciding upon and drafting appropriate data security and breach contract terms requires an analysis of the totality of your circumstances by experienced legal counsel knowledgeable in privacy law.

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