Human Resources Legislative Update

The Right to Be Forgotten Comes to Canada

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On January 26, 2018, the Office of the Privacy Commissioner of Canada issued a new position on the protection of online reputation. In doing so the OPC recognized a right to have personal information de-indexed from search engine results if it is inaccurate, incomplete or out-of-date. Although the position is in draft, is nonetheless of critical significance to Canadians' use of the internet – creating a broader variant of the so-called European "right to be forgotten."

The OPC says the right arises out of two longstanding parts of the *Personal Information Protection and Electronic Documents Act* – Principle 4.6 and section 5(3).

Principle 4.6 is the accuracy principle. It reads as follows:

4.6 Principle 6 — Accuracy

Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used. [emphasis added]

4.6.1

The extent to which personal information shall be accurate, complete, and up-to-date will depend upon the use of the information, taking into account the interests of the individual. Information shall be sufficiently accurate, complete, and up-to-date to minimize the possibility that inappropriate information may be used to make a decision about the individual.

4.6.2

An organization shall not routinely update personal information, unless such a process is necessary to fulfil the purposes for which the information was collected.

4.6.3

Personal information that is used on an ongoing basis, including information that is disclosed to third parties, should generally be accurate and up-to-date, unless limits to the requirement for accuracy are clearly set out.

Principle 4.6 dovetails in part with Principle 4.9, which requires organizations to "amend" personal information if it is demonstrably "inaccurate or incomplete." (Principle 4.9 does not mention currency.)

The OPC's reasoning is simple. Search engines use and disclose personal information to "provide people with access to relevant information from the most reliable sources available." This purpose is not served by presenting search results that are not accurate, complete or up-to-date. Though accuracy, completeness and currency are the key concepts, the OPC says that search engines should interpret and apply them in light of the how materially the impugned content affects individuals' interests and the countervailing (public) interest in continued accessibility.

Section 5(3) of PIPEDA restricts organizations to handling personal information for purposes that a "reasonable person would consider are appropriate under the circumstances." The OPC says that section 5(3) could also be the basis of a valid de-indexing request, giving the following two examples:

- Where content is unlawful, or unlawfully published (e.g. where it contravenes a publication ban, is defamatory, or violates copyright etc.)
- Where the accessibility of the information may cause significant harm to the individual, and there is either no public interest associated with the display of the search result, or the harm, considering its magnitude and likelihood of occurrence, outweighs any public interest.

This newly-recognized right invites de-indexing requests to search engines as the primary means of obtaining relief from online reputational harm, though the OPC has also recognized a right to take down content. The right to take down content is a more limited right, in part because the OPC only has jurisdiction over those who publish personal information "in the course of commercial activity."

The significance of the new position cannot be understated; there are many Canadians who feel plagued by internet posts that are unflattering if not disparaging. Search engines will not embrace this development – leaving a possibility of an enforcement dispute (and Federal Court input) and vigorous lobbying for a legislative amendment. It may take some time, but watch for a *Charter* challenge.

You can read the draft report here.

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