



Ottawa, Canada K1A 0H5

Mr. Bob Zimmer, M.P.
Chair
Standing Committee on Access to Information, Privacy and Ethics
House of Commons
Ottawa, Ontario K1A 0A6

Dear Colleague:

Pursuant to Standing Order 109 of the House of Commons, I am pleased to respond on behalf of the Government of Canada to the report of the Standing Committee on Access to Information, Privacy and Ethics entitled *Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act*.

The Government of Canada extends its gratitude to the members of the Committee for their comprehensive review of the *Personal Information Protection and Electronic Documents Act* (PIPEDA). The Committee's recommendations provide valuable guidance as the government continues its commitment to protecting Canadians' right to the privacy of their personal information in a manner that also recognizes the needs of organizations to collect, use, or disclose personal information for reasonable purposes.

The government would also like to express its appreciation to the Office of the Privacy Commissioner of Canada (OPC), as well as to the numerous stakeholders, businesses, consumer advocates, and experts who appeared before the Committee as witnesses for this important study. The views voiced by these individuals and organizations provide valuable insight into the impacts of marketplace and technological changes on the application of the PIPEDA.

The management and use of personal information are crucial to the conduct of business, trade, and commerce in a modern and data-driven global economy. Nonetheless, the protection of privacy remains a fundamental value and concern for Canadians.

Overall, the Government of Canada shares the Committee's view that changes are required to our privacy regime to ensure that rules for the use of personal information in a commercial context are clear and enforceable and will support the level of privacy protection that Canadians expect.

These issues are complex, and ensuring that Canada can fuel innovation while also fostering trust and adoption by Canadians will require discussion and thoughtful consideration. While the Committee heard from a broad range of organizations, the government must further this dialogue with Canadians to take this important work to its next step. It will be critical to have a broader and deeper dialogue with Canadians, particularly as we approach any legislative amendments, and to ensure that the PIPEDA maintains its intended balance.

On April 18, 2018, the government announced regulations that will implement mandatory data breach reporting under the PIPEDA. This is a critical step in providing Canadians with the assurance that they will be informed about any risks to the distribution of their personal information while also ensuring there are meaningful penalties when appropriate steps are not taken in the event of a breach.

The next step will be to engage Canadians in a national conversation on data and digital issues, including not only how disruptive technologies can fuel innovation, but also how necessary safeguards, including privacy, must be in place for Canadians to trust, adopt, and be included in the data economy. This effort will need to explore how Canada can lead and succeed in a data and digitally driven economy while ensuring continued respect for individual rights.

To this end, please find below the Government of Canada's response to the Committee's report, grouped according to the following themes:

- Consent under the PIPEDA
- Online Reputation
- Enforcement Powers of the Privacy Commissioner
- Impact of the European Union (EU) *General Data Protection Regulation* (GDPR)

**Consent under the PIPEDA
(Pertaining to recommendations 1, 2, 4, 5, 6, 8, and 9)**

The Government of Canada agrees with the Committee that consent should remain a core element of the PIPEDA. As noted in the Commissioner's most recent annual report to Parliament, consent provides individuals with control over how their personal information is shared and thereby provides a means to protect one's privacy.

The PIPEDA, as with most progressive privacy regimes, places great value on consent. Canada's legal framework for privacy protection includes federal, provincial, and even municipal privacy laws that are based on the foundation of consent. At the federal level,

this framework includes two statutes: the *Privacy Act*, which governs the collection, use, and disclosure of personal information by government institutions, and the PIPEDA, which provides the basic legal framework for the private sector.

Maintaining a progressive view of consent also helps ensure that Canada remains aligned with internationally recognized standards. Interoperability of privacy regimes, in turn, facilitates digital trade and the emergence of a strong global digital economy.

The government also agrees that work is needed to ensure that consent remains meaningful under the PIPEDA and concurs with the view of the Committee and other stakeholders that the consent regime can be enhanced and clarified by a variety of means. Consultations on consent, conducted by the OPC, have resulted in a wide range of proposals to do so. Further examination of the viability of these options, incorporating all viewpoints, is a necessary next step. A key consideration when examining options is the need for continued applicability of the PIPEDA across all sectors of the economy.

There is a widespread acknowledgment that the principles-based approach to the PIPEDA has been a source of the Act's strength and resilience to date. The government is committed to maintaining this. For example, the Committee recommended expanding the scope of the existing exception to consent for the disclosure of personal information related to the prevention of activities pertaining to financial crime. While the objective of combatting financial crime is laudable, any expansion of existing exceptions to the consent provisions that appear to focus on a particular sector will need to be carefully studied to ensure that all stakeholders' views are taken into account and that the principles-based approach is maintained. As the number of sectors that rely on data expands, the desire for sector-specific or technology-specific approaches will grow. The government is committed to a robust and meaningful PIPEDA based on core principles, recognizing that more specific guidelines or regulations may need to be articulated for new or emerging business models or products.

Recent incidents in the public eye involving unintended uses of personal information obtained from social media have drawn attention to the risks of unconstrained access to individuals' personal information. They highlight the need to closely study the potential impacts of redefining "publicly available" information for the purpose of the PIPEDA. This issue is particularly acute as it pertains to minors' information, given their greater propensity to use social media and willingly disclose their personal information, which raises particular vulnerabilities.

The government notes the Committee's recommendation to provide specific rules that apply to the collection and use of minors' information. The protection of minors online was a central issue during the first statutory review of the PIPEDA, which resulted in

amendments to the PIPEDA's consent requirements such that consent can only be considered valid if the individual providing it can understand the nature and consequences of providing that consent. This amendment was aimed at prohibiting the deceptive collection of a child's personal information. The issue of applying explicit protections for minors under federal law presents unique challenges as it inherently involves the definition of a minor, which falls within provincial jurisdiction.

Online Reputation and Respect for Privacy (Pertaining to recommendations 11, 12, and 13)

The Government of Canada acknowledges public concerns about the accumulation of personal information online and concurs with the Committee that it poses a risk to privacy protection in general. There is a widespread acknowledgment that this risk is elevated for young people, who are known to disclose vast amounts of their personal information online while potentially being unable or less able to thoroughly comprehend the potential impacts on their future of doing so.

The government also acknowledges the work being undertaken by the OPC in this area, in particular, the draft position on Online Reputation that suggests that the PIPEDA currently provides for a right to de-indexing. It is noteworthy that the OPC paper acknowledges that there are legitimate concerns about the impacts of this position on other rights, namely the right to the freedom of expression. For this reason, the OPC has called for further study to ensure that the appropriate balance between these competing rights is met.

Public commentary highlights the divergent views on these matters among stakeholders. With this in mind, it seems that providing further certainty on how the PIPEDA applies in the various contexts presented by the Committee will be necessary to ensure a level playing field. The findings of the OPC based on responses to its draft position will inform the development of a proposal on the need for and approach to legislative changes in this area.

Given the potential far-reaching impacts of a right to erasure and right to de-indexing in numerous areas, including freedom of speech and the public record, and given that the PIPEDA only applies to commercial contexts involving personal information, the government would need to assess whether the PIPEDA would be the most appropriate statutory instrument for addressing these issues.

Finally, the government agrees, in principle, that appropriate destruction of information when it is no longer needed for its intended purpose is key to preventing unintended future uses of personal information, possibly leading to reputational harm. This issue was

the subject of discussion at a previous Parliamentary review of the PIPEDA and resulted in the development of clear guidance from the OPC for organizations on how to properly destroy information in accordance with Principle 5 of the Act.

Enforcement Powers of the Privacy Commissioner (Pertaining to recommendations 15 and 16)

The Government of Canada agrees with the Committee that the time has come to closely examine how the PIPEDA's enforcement model can be improved to ensure that the PIPEDA meets its objective of supporting innovation and the growth of the digital economy while providing robust protections for personal privacy.

It is noteworthy that similar recommendations were made by the Senate Standing Committee on Transport and Communications in a report following its study of connected and automated vehicles. The report, entitled *Driving Change: Technology and the future of the automated vehicle*, called for changes to the PIPEDA to empower the OPC to "proactively investigate and enforce industry compliance" with the Act.

In particular, the Senate report echoes calls by the Committee to provide the Privacy Commissioner with the appropriate powers and tools to ensure that connected and automated vehicles are compliant with the PIPEDA's requirements, particularly in regard to obtaining consent for the collection and use of drivers' and passengers' personal information.

To determine the optimal model for compliance and enforcement, the government must assess the viability of all options to strengthen the compliance and enforcement regime of the Act.

As part of this assessment, the government must look at other models of compliance and enforcement as options and must consider the potential impacts of these models on the overall mandate of the OPC, the principles of fundamental justice, and the countervailing risks associated with increased enforcement powers, notably the impacts on open dialogue between businesses and the OPC.

Options for change must also be assessed in the context of other potential changes to the PIPEDA, including those pertaining to consent. Changes to the Act's enforcement model may have an impact on the need for changes to other areas, and the reverse may also be true.

The government intends to undertake further study of the full range of options for ensuring compliance with the PIPEDA, with a view to presenting Canadians with proposals that will enhance personal privacy and support innovation in an era of rapid technological change and evolution in the use of data.

Impact of the European Union (EU) *General Data Protection Regulation* (GDPR)

(i) Canada's Adequacy Status (Pertaining to recommendations 17, 18, and 19)

The Government of Canada supports these recommendations. Data flows are a significant enabler in growing a digital economy, yet privacy regimes differ across countries. The key is to work towards harmonization of the different frameworks to ensure that the level of data protection is equivalent in different jurisdictions, rather than developing a single set of global rules. That is why the government is engaged with trade partners, including the EU nations and institutions, in the discussion of cross-border data transfers and interoperability of privacy regimes.

Using a cross-government approach, officials are working closely with the European Commission to understand the requirements for maintaining Canada's adequacy standing under the EU GDPR. Our standing will continue with the implementation of the regulations, but a review can be expected by 2020. Using existing mechanisms for engagement and collaboration, the government aims to maintain a dialogue with the provincial and territorial governments to ensure a broad understanding of federal engagement activities with the European Commission and specific impacts related to an eventual adequacy review.

The Committee's study has made a significant contribution to this work by providing the government with recommendations for ensuring the continued effectiveness of the PIPEDA in light of international developments.

(ii) New Rights to Align with GDPR (Pertaining to recommendations 3, 7, 10, and 14)

A number of the Committee recommendations pertain to aligning the PIPEDA with specific provisions of the GDPR and stem largely from witness testimony about the importance of retaining Canada's adequacy status.

In recognition of the importance of interoperability of privacy regimes, the EU has adopted the concept of "essential equivalence" in the GDPR to examine the adequacy of non-member regimes, rather than one-to-one mapping. Therefore, it is not clear that

the PIPEDA's requirements must reflect each of the GDPR's rights and protections to maintain its adequacy standing.

At the same time, the government agrees that concepts at the heart of these recommendations—such as algorithmic transparency, privacy by design, depersonalized data, and data portability—hold promise for enhancing privacy protection and supporting innovation. With this in mind, the government will consult broadly on the potential benefits and impacts of incorporating these concepts into Canada's privacy framework, with a view to addressing domestic priorities.

Moving forward, the Government of Canada will engage Canadians in a conversation on how to make Canada a more data-savvy society. There will be a focus, in particular, on how companies can gather, use, and share personal information to innovate and compete while at the same time protecting privacy—a value that Canadians continue to hold dear.

Once again, I would like to thank the Committee on the behalf of the Government of Canada for its thorough and careful examination of these important issues.

Sincerely,



The Honourable Navdeep Bains, P.C., M.P.
