

THE FACEBOOK REVOLUTION: TO WHAT EXTENT CAN USER PRIVACY BE PROTECTED?

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SOCIAL NETWORKS ARE NOT A NEW TREND, PEOPLE HAVE LONG SINCE HAD ACCESS TO INSTANT MESSAGING, ONLINE PHOTO ALBUMS AND THE WEB CREATION OF FRIENDS NETWORKS. HOWEVER, NOTHING HAS PERHAPS CHANGED THE FACE OF VIRTUAL SOCIALIZING MORE THAN FACEBOOK¹ WHICH ALLOWS ITS USERS TO DO ALL OF THE ABOVE, AND EVEN MORE, AT THE SAME TIME. AMONG OTHER THINGS, FACEBOOK CAN BUILD AN INDIVIDUAL'S BIOGRAPHY PROVIDED ENOUGH PERSONAL INFORMATION IS UPLOADED TO THE USER'S PROFILE. SINCE A USER'S PRIVATE LIFE MAY BE DISPLAYED ON ITS SITE, WHAT ARE FACEBOOK'S OBLIGATIONS IN TERMS OF THE PROTECTION OF PERSONAL INFORMATION?

After the Canadian Internet Policy and Public Interest Clinic (CIPPIC) filed a complaint against Facebook in May 2008, the Assistant Privacy Commissioner of Canada conducted an investigation under the *Personal Information Protection and Electronic Documents Act*² ("PIPEDA"). In July 2009, she tabled her final report outlining the results of her investigation, her conclusions and her recommendations³.

In her report, the Assistant Privacy Commissioner specifically focuses on the notions of knowledge and consent which, in her opinion, are the cornerstones of PIPEDA. While the Office of the Privacy Commissioner of Canada (the "Office") has generally required that an individual be informed and give his consent before the collection, use or communication of his personal information, the same does not necessarily hold true for Facebook. As Facebook is not based on a traditional business model, the Office's opinion had to be adapted in many respects.

¹ 12 million Canadians are currently members of the Facebook network which has 200 million members worldwide.

² S.C. 2000, ch. 5.

³ Office of the Privacy Commissioner of Canada, *Report of Findings into the Complaint Filed by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) against Facebook Inc.* (Elizabeth Denham, Assistant Privacy Commissioner), available online at http://www.priv.gc.ca/cf-dc/2009/2009_008_0716_e.pdf.

The Assistant Privacy Commissioner points out that priority must be given to real-time notification and consent, subject to Facebook's interests and as long as the users' experience with the site is not unduly complex.

The report's main conclusions on the allegations which the Assistant Privacy Commissioner deems well-founded are set out hereinafter⁴.

COLLECTION OF PERSONAL INFORMATION

To register a new user, Facebook requires his name, sex, date of birth and e-mail address. The Assistant Privacy Commissioner considered if the date of birth requirement was necessary for the legitimate purposes of the service which Facebook offers.

Moreover, it seems that even if the user can block his date of birth in his profile, it is only hidden, not inaccessible, since Facebook may still nonetheless send advertising to the user on the basis of his age.

Facebook justifies itself by explaining that user birth dates enable it to ensure that users are 13 years of age or older and to monitor the behaviour of adults toward children on the site. Doing so allows Facebook to comply, in particular, with the requirements under the U.S. Children's Online Privacy Protection Act which stipulates that an Internet site cannot collect personal information on children under 13 without parental consent.

The Assistant Privacy Commissioner was of the view that Facebook's objectives were legitimate under PIPEDA, but that the user was not sufficiently informed about these purposes, including, in particular, advertising targeted according to the age group. She asked Facebook to specify, in its Privacy Policy and in all other appropriate locations, the reasons why the date of birth is required and the purposes for which it is used. Facebook agreed to implement these recommendations and the Assistant Privacy Commissioner stated that she was satisfied.

FACEBOOK HAS NOT IMPLEMENTED ANY TECHNICAL SAFEGUARD THAT WOULD ACTUALLY PREVENT THIRD PARTIES FROM ACCESSING OTHER INFORMATION WITHOUT AUTHORIZATION.

THIRD-PARTY USE OF PERSONAL INFORMATION

Through a Facebook platform, companies ("third-party developers") can create applications, for instance, games and horoscopes. Users can then add these applications to their account, not without first giving their consent allowing these third-party developers to have access to their personal information and that of their friends.

Between the time the complaint was filed and the Office's report was published, Facebook added the obligation to its Statement of Rights and Responsibilities ("SRR") whereby third parties must inform users which personal information will be used and how it will be used. However, Face-

book acknowledged that it does not systematically verify the activities of third-party developers but rather puts this onus on users whom are asked to detect and report third parties who contravene the SRR or the platform guidelines.

In fact, Facebook offers no warranty that third parties only have access to necessary information. Of course, third parties contractually undertake to only consult personal information that is necessary to develop their applications and Facebook relies on the fact that they comply with such contractual obligations.

However, Facebook has not implemented any technical safeguard that would actually prevent third parties from accessing other information without authorization.

Furthermore, when users add an application, they must accept the Terms of Use of the Platform Applications. As is, they do not receive any notice in this respect. The only computer link whereby these Terms of Use can be read is located at the bottom of the SRR, with other links, and is merely entitled "Understanding the Platform".

⁴ The Assistant Privacy Commissioner dismissed four allegations as their validity was not supported by factual evidence, namely: the new uses of personal information; the collection of personal information from sources other than Facebook; Facebook Mobile safeguards; and deception and misrepresentations

The Assistant Privacy Commissioner recommended specific multi-faceted measures to Facebook. First, she suggested that third party access be restricted solely to information that is necessary to develop their applications. She also requested that users be notified, whenever they add a new application, of the information that will be used and the purposes for which it will be used. She also insisted on the fact that express user consent be required whenever third-party developers access their personal information.

When the Office's report was published, Facebook was still refusing to implement the proposed measures.

FACEBOOK'S PRESELECTION OF THE LEVEL OF ONLINE PRIVACY

The Assistant Privacy Commissioner explained that it is perfectly acceptable for Facebook to preselect the privacy parameters applicable to various sections of the site. Note that users can, of course, modify these parameters as they please.

However, in two cases, the preselection made by Facebook does not meet users' reasonable expectations within the meaning of PIPEDA: anyone can view the photo album whereas the "Search" function allows any user's name to be entered.

Moreover, a user who becomes a member of a network after his registration is not informed in real-time of the fact that his profile then becomes accessible not only to his friends but also to other members of such network.

According to the Assistant Privacy Commissioner:

"98.(...) Facebook needs to do more to ensure that new users can make informed decisions about controlling access to their personal information when registering. Facebook has given its users tools to control their personal information; it needs to ensure that users better understand these tools."

(emphasis added)

Facebook accepted the four suggestions submitted to it in this respect. First, Facebook plans to introduce a "Privacy Wizard", whereby users will be able to select a low, medium or high privacy setting. As the case may be, such users will or will not, for example, be excluded from search engines. Facebook will then introduce a privacy tool whereby users will be able to choose privacy settings on individual photos and on each element of content. In addition, Facebook stated that it is currently testing a new registration procedure that will provide users with more information on privacy settings. Lastly, Facebook agreed to inform users who join a network after registering in the same way it informs users who join a network when they register. The Assistant Privacy Commissioner stated that she was satisfied with these measures.

ONLINE ACTIVITY MONITORING

Admittedly, Facebook monitors activities on the site for tracking unacceptable behaviour. This practice is not inappropriate per se, quite the contrary, but the problem raised by the Assistant Privacy Commissioner was that Facebook does not provide enough information to users in this respect. It seems that only the "Site Security" section mentions such monitoring, without further details, while neither the SRR nor the Privacy Policy refer to it. Following the recommendations made by the Assistant Privacy Commissioner, Facebook decided to include a paragraph in its Privacy Policy explaining its monitoring of the online activities in which it engages. The Assistant Privacy Commissioner therefore deemed that these allegations were resolved.

FACEBOOK AND ADVERTISING

Two kinds of ads are earmarked for users: the so-called "Facebook Ads" that use the user's profile to establish a target audience and social ads that reflect the user's social interactions, for instance, the groups he joins or his fan pages. Facebook ads are automatic and cannot be deactivated; they allow Facebook to offer free services while maintaining profitability. Users can deactivate social ads by modifying their privacy settings.

The Assistant Privacy Commissioner noted that Facebook's business model differs from models usually scrutinized by the Office, inasmuch as, while the site in this case is free to users, it is not to Facebook, whose profits depend entirely on advertising. Since user registration is conditional on his agreeing to receive Facebook Ads, Facebook must be more transparent in regard to its practices in this respect and must better inform users.

The Assistant Privacy Commissioner recommended, and Facebook agreed, to provide more details on advertisement on the site in general, on the distinction between Facebook Ads and social ads and the possibility for users to deactivate them, as the case may be. However, Facebook refused to send reminders to users whenever a social ad might be created, but it agreed to change the configuration of its system so that users can be better informed in this respect. These undertakings are satisfactory to the Assistant Privacy Commissioner.

ACCOUNT DEACTIVATION AND DELETION AND RETENTION OF PERSONAL INFORMATION

A user may opt to deactivate or delete his Facebook account. In theory, deactivation is temporary and is intended to allow the user, where he reactivates his account, to find the account as it was prior to deactivation. Deletion is permanent. These two options are not presented to users on the same page – deactivation is found under the "Parameters" section of

THE ASSISTANT PRIVACY COMMISSIONER CONCLUDED THAT A REASONABLE PERSON WOULD NOT DEEM IT APPROPRIATE FOR FACEBOOK TO STILL RETAIN UNUSED PERSONAL INFORMATION.

the account, whereas users have to click on "Help" to get information on deletion – which may confuse users. Moreover, the distinction between the two possibilities is not explained on the site. In this respect, Facebook agreed to modify its site so that the deactivation and deletion options are now both found at the same location, that is, under the account parameters, and the difference between the options is explained.

The other problem raised by the Assistant Privacy Commissioner, which Facebook contests this time, pertains to the indefinite retention of information contained in deactivated profiles, contrary to the provisions of PIPEDA. The Assistant Privacy Commissioner indicated that, after a reasonable length of time, these profiles should be deleted so that Facebook does not indefinitely keep information derived from inactive accounts. Facebook maintained that users expect that their profiles will not be deleted when deactivated, regardless of the duration of the deactivation. The Assistant Privacy Commissioner concluded that a reasonable person would not deem it appropriate for Facebook to still retain unused personal information:

"245. While I acknowledge that by deactivating their accounts users are in effect choosing to have Facebook temporarily retain unused personal information, I would note that, the longer an account remains deactivated and the information in it unused, the more difficult it is to argue that retention of the user's personal information is reasonable for the social networking purposes for which it was collected."

As Facebook refused to implement an acceptable practice in this respect, the Assistant Privacy Commissioner declared the complaint well-founded.

Lastly, it seems that the profiles of deceased users remain active for a certain period of time for memorial purposes. In this respect, the Assistant Privacy Commissioner first indicated in her preliminary report that such retention of deceased user accounts constituted an unnecessary use of personal information. However, in her final report, she changed her mind and explained that such a practice probably constituted a reasonable expectation by users:

"279. In my view, most typical Facebook users would welcome the prospect of being posthumously remembered and honoured by their friends on the site. Likewise, I am sure that users generally would regard the freedom to pay their respects to deceased friends and fellow users as an important part of the Facebook experience."

THE ASSISTANT PRIVACY COMMISSIONER CONSIDERED THAT USERS TAG PHOTOS FOR PERSONAL USE; THUS, FACEBOOK IS JUSTIFIED IN MAKING USERS RESPONSIBLE FOR OBTAINING THE CONSENT OF NON-USERS. HOWEVER, SHE NOTED THAT FACEBOOK MUST NONETHELESS BE REASONABLY DILIGENT; SUCH DILIGENCE INVOLVES THE OBLIGATION TO PROPERLY INFORM USERS IN THIS RESPECT AND PROVIDE FOR PUNITIVE MEASURES FOR NON-COMPLIANCE.

Accordingly, she concluded that simple implicit consent from users was sufficient in this respect.

On the other hand, the Assistant Privacy Commissioner emphasized the fact that users were not sufficiently informed of this practice and that it should be explained in the Privacy Policy. When the report was filed, Facebook still refused to apply such a measure since it was of the view that the retention of data for memorial purposes did not constitute a new use of personal information within the meaning of PIPEDA.

PERSONAL INFORMATION OF NON-USERS

In many respects, Facebook contains information on non-users, which may give rise to many problems pursuant to PIPEDA. First, users who add photos or videos to their albums may "tag" them, that is, indicate the name of the persons appearing thereon. If a non-user is thus tagged, notices it and wants to have the tag removed, it is impossible unless he registers with Facebook.

In her preliminary report, the Assistant Privacy Commissioner stated that the onus was on Facebook to directly obtain consent from non-users with regard to the tagging of photos and the collection and use of their e-mail addresses. However, she changed her mind by the time of the final report. She considered that users tag photos

for personal use; thus, Facebook is justified in making users responsible for obtaining the consent of non-users. However, the Assistant Privacy Commissioner noted that Facebook must nonetheless be reasonably diligent; such diligence involves the obligation to properly inform users in this respect and provide for punitive measures for non-compliance. As Facebook refused to implement such a practice, the Assistant Privacy Commissioner ruled that it was contravening PIPEDA and that the allegation was well-founded.

On the other hand, Facebook encourages its users to provide it with the e-mail addresses of non-users so that it can invite them to join the site. Similarly, when a non-user has been tagged on a photo, Facebook asks the user concerned if he wants to post that individual's e-mail address. Facebook may send an e-mail to the non-user to inform him or her about the tagging. Of course, it is in the non-user's interest to know that he has been tagged, but sending such e-mail gives Facebook the opportunity to invite the person to register.

When non-users decline to register, their e-mail address is retained without their knowledge, both for reporting purposes and to avoid sending them a second invitation. This practice encompasses two difficulties: first, Facebook retains personal information on non-users without their consent; second, Facebook is likely to retain this information indefinitely. In this respect, Facebook reiterated that users must remain responsible for obtaining the consent of non-users and that it cannot delete information related to a user's actions without the user's intervention. Therefore, the Assistant Privacy Commissioner ruled that these allegations were well-founded.

SUDDEN TWIST: FACEBOOK FINALLY AGREES TO COMPLY WITH THE RECOMMENDATIONS OF THE OFFICE

Exchanges between Facebook and the Office of the Privacy Commissioner of Canada continued after the Assistant Privacy Commissioner's report was filed, and Facebook finally agreed to implement measures intended to allay the concerns of the Office and to comply with legislative requirements respecting the protection of personal

WHEN NON-USERS DECLINE TO REGISTER, THEIR E-MAIL ADDRESS IS RETAINED WITHOUT THEIR KNOWLEDGE.

information.

Note that following the discussions that surrounded the finalization of the Assistant Privacy Commissioner's report, Facebook was still in breach of PIPEDA insofar as the following practices are concerned:

- ▶ No measure prevented third-party application developers from having access to unnecessary personal information without users receiving the requisite information to give informed consent in that respect;
- ▶ Facebook indefinitely retained personal information in deactivated profiles;

- ▶ The Privacy Policy failed to explain to users that their profiles remained active for memorial purposes when they die;
- ▶ Facebook did not sufficiently inform users on their obligation to obtain consent from non-users before tagging them on a photo or video;
- ▶ Facebook indefinitely retained the e-mail addresses of non-users who declined its invitation to register on the site, without their consent.

This past August 27th, the Office announced these new measures with which Facebook concurred:

- ▶ Users will be able to restrict the scope of information accessible by third-party application developers. Where users want to add a new application, they will be informed of the information that will be provided to third-parties for these purposes and will thus be able to consent to this use of their personal information;

- Facebook agreed to include an explanation in its Privacy Policy clarifying the distinction between the account "Deactivation" and "Deletion" options. In this respect, it is interesting to note that the Office rethought the request it had made in its report pursuant to which a deactivated profile retention policy should be established so that it is automatically deleted after a certain period of time. In fact, the Office deems that the information which will henceforth be provided to users in this respect is sufficient;
- Facebook will modify its Privacy Policy in respect of the memorial for deceased users to ensure that users know that their account remains temporarily active in the event of death;
- To better protect non-users' personal information, Facebook will include information in this respect under the site user conditions. Facebook also assured the Office that the e-mail addresses of non-users were not kept on a separate list.

Given the significant technological changes necessary to implement these measures, Facebook expects that they will be carried out within a year. The Office is satisfied with the outcome of this investigation and intends to monitor Facebook's progress over the coming year.

THINGS TO REMEMBER

- The appropriateness of a practice in relation to PIPEDA does not exempt a company from properly informing its users or customers about the practice.
- A company's privacy policy is of utmost importance and it must contain all the information necessary for users in privacy protection matters. According to the Assistant Privacy Commissioner:

"368. [W]here an organization posts a formal Privacy Policy for reference by individuals, that document should be reasonably comprehensive. It should, in other words, endeavour to explain all the organization's privacy-related practices, even if they are explained in whole or part elsewhere."

(emphasis added)
- Other companies that offer services similar to Facebook's must take the necessary measures to ensure that they comply with Canadian laws, that is, to apply the principles and rules set out in the Facebook matter to their activities, in particular, with respect to information pertaining to non-users.

ATTENTION

In closing, note that this past August 17th, five users instituted proceedings against Facebook in the Superior Court of Orange County, California. Among other things, they blame the company for sharing personal information put online by users with third parties, mainly advertisers, contrary to California privacy legislation. It remains to be seen whether the plaintiffs' action will be allowed and if the American court, in reviewing the complaint, will take into account the recent conclusions of the Office pursuant to which Facebook's new practices comply with Canadian legislation.

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