

FRAMEWORK FOR INTERNATIONAL ENFORCEMENT COORDINATION

For Discussion at the 34th Annual Conference of Data Protection and Privacy Commissioners

INTRODUCTION

The 33rd International Conference of Data Protection and Privacy Commissioners resolved that privacy enforcement authorities (PEAs) should work together to coordinate their efforts with respect to cross-border investigations and enforcement actions. To promote that objective the Conference created a temporary working group chaired by the Information Commissioner of the United Kingdom and the Privacy Commissioner of Canada that was directed to report back to the 34th Conference on concrete actions that have taken place over the year as well as on elements that need further work and discussion.

During the past year, the Privacy Commissioner of Canada organized an enforcement coordination meeting in Montreal that was attended by several authorities, including almost all the members of the working group. The working group was directed to develop “a framework and processes to share information about potential or existing investigations or enforcement actions and to facilitate possible coordination.” The efforts of the working group are included in this document.

THE CASE FOR GREATER COORDINATION

The privacy and data protection community has made considerable progress in the last few years in working together.

The Organisation for Economic Cooperation and Development (OECD) adopted a Recommendation on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy in 2007. (<http://www.oecd.org/internet/interneteconomy/privacylawenforcementco-operation.htm>) The Recommendation urged member countries to establish an informal network of PEAs and other stakeholders to discuss the practical aspects of privacy law enforcement co-operation, share best practices and support joint enforcement initiatives and awareness raising campaigns.

The Recommendation provided the impetus for the creation of the Global Privacy Enforcement Network (GPEN) although GPEN’s membership now extends to authorities in non-OECD countries. (<https://www.privacyenforcement.net/>)

Regional and linguistic networks of PEAs have been created around the world. The Asia Pacific Economic Cooperation (APEC) Cross-border Privacy Enforcement Arrangement (CPEA) has Document Number: 366716 Version: 5

more than 20 members from seven economies. (<http://www.apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group/Cross-border-Privacy-Enforcement-Arrangement.aspx>) The European Commission's proposed Data Protection Regulation explicitly refers to international co-operation mechanisms in Articles 45 and 46 and European authorities work together through the Article 29 Working Party. (http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf)

A number of recent high profile incidents/events continue to demonstrate the need for, and the potential value of, greater enforcement coordination.

STATEMENT OF INTENT

Recognizing that greater international coordination is needed to protect the privacy of citizens in our respective jurisdictions, the members of the International Conference of Data Protection and Privacy Commissioners commit to

- working together to identify specific issues and technologies that raise privacy concerns; developing arrangements to share information and expertise; setting out their respective conditions for coordinated action on target organisations through effective coordinated investigation and enforcement strategies; and
- strengthening communication strategies to explain and promote their joint enforcement activities to inform citizens, governments and the media of our enforcement activities and outcomes.

ELEMENTS OF COORDINATION

PEAs have limited resources; by working together, they can avoid duplication of effort and use their existing resources more efficiently. A collaborative approach to enforcement matters that transcend national boundaries is in the interests of PEAs, individuals, governments and businesses. Coordination allows PEAs to use their resources more effectively, share their specialized expertise and have a greater impact. Collaboration can enhance the profile and perception of PEAs in the eyes of government, civil society, business and the general public. Other benefits may include a more consistent approach to enforcement and it can lessen the burden on respondent organizations.

Coordinated enforcement may take several forms. Coordination may include informing other PEAs that an investigation or action has commenced, sharing publicly available information or, conducting fully coordinated joint investigations and enforcement actions. The degree of coordination will depend on a number of factors including the type of incident, the applicable

- some PEAs could agree to defer any action until another authority has concluded its investigation or assessment.

The involvement of different PEAs may depend on factors such as the priorities of the authorities, the location of the incident or organisation, legal powers such as the ability to conduct inspections or compel evidence, the ability to share information with other PEAs, the ability to keep information and communications confidential, available resources and the expertise of the PEAs, etc.

COORDINATION PRINCIPLES

Successful coordination among PEAs needs to be based on trust and a common set of principles and expectations. The following principles have been developed to encourage and guide coordinated activity.

1. Identifying Possible Coordinated Activities

Authorities should identify possible issues or incidents for coordinated action and actively seek opportunities to coordinate cross-border actions where feasible and beneficial.

Where an authority identifies an issue with a cross-border aspect, and there is likelihood that authorities in other jurisdictions may have an interest in investigating the same matter, the authority should

- give early consideration to the feasibility and benefits of coordinated action; and
- if appropriate, promptly initiate any existing procedures established for coordinating action or, if no suitable procedures are available, directly inform other potentially affected authorities.

2. Assessing Possible Participation

Authorities should carefully assess participation in coordinated enforcement on a case-by-case basis and clearly communicate their decision to other authorities.

When considering whether to participate in a coordinated enforcement case, an authority should

- promptly and carefully consider whether to participate, taking into account such matters as their legal authority and applicable jurisdiction, priorities and resource considerations, and secrecy obligations;

- refrain from agreeing to participate in coordinated actions unless the matter is within their jurisdiction; and
- notify the coordinating authority or, if none has been identified, the other relevant authorities, of whether it is willing and able to participate and upon what terms.

3. Participating in Coordinated Actions

Authorities participating in a coordinated enforcement action should act in a manner that positively contributes to a constructive outcome and keep other authorities properly informed.

Authorities participating in a coordinated enforcement action should

- use their best efforts to contribute to a constructive outcome to the action;
- promptly inform the coordinating authority if, due to unforeseen circumstances, they cannot meet any commitments they have made with respect to their participation;
- inform the other participating authorities, where practicable and appropriate, before taking any investigatory and enforcement actions that could impact the other Authorities' ability to take action in a given matter;
- be responsible for their own costs of providing information or otherwise cooperating with other authorities unless an agreement has been made to share costs; and
- use their best efforts to avoid, or if need be, resolve any disagreements with other authorities in relation to the action.

4. Respecting Confidentiality

Subject to domestic legal requirements, when sharing or receiving information from other authorities, authorities should respect the confidentiality obligations of other PEAs.

To respect the confidentiality of coordinated actions, authorities should

- use their best efforts to safeguard any information received and respect any safeguards agreed to by the participating PEAs;
- not retain information longer than required by domestic law or as is necessary for the fulfillment of the purpose for which the information is to be used;
- seek consent of a complainant, where appropriate, before disclosing his or her personal information to another authority;
- limit the use of information obtained from another authority to the purposes specified in the request for assistance; and
- oppose, to the fullest extent possible consistent with their countries' laws, any application by a third party for disclosure of confidential information or materials received

from another authority unless the authority providing the information consents to its release.

5. Facilitating Coordination

Authorities should prepare in advance to participate in coordinated actions.

Authorities should consider taking the following practical measures to facilitate coordination

- designate one or more individuals as the primary point of contact within the authority and make this information known to other authorities;
- consider if they need to enter into generic or tailored bilateral or multilateral MOUs or other arrangements in order to share confidential information; and
- assess their ability to share information and more generally participate in coordinated actions. Authorities may need to assess their confidentiality obligations, including their ability to keep information received from others confidential, and determine how these obligations affect their ability to participate in coordinated actions.

6. Leading Coordinated Action

Authorities leading a coordinated action should make practical arrangements that simplify cooperation and support these principles

Coordinating authorities should

- prepare and maintain a list of authorities participating in a coordinated action, and of nominated contact points within each authority, for coordinating communications;
- ensure that the participating authorities are aware of the basis upon which the coordinated action is being undertaken;
- be explicit about the basis upon which information is being disclosed outside the group of participating authorities, including to non-participating authorities; and
- put in place practical arrangements to support the coordination principles.

OUTSTANDING ISSUES

A Common Secure Platform to Share Information

Successful coordination is based on communication. Authorities who have an interest in coordination need to have a common platform or mechanism to indicate that they are investigating or considering investigating an incident or organisation and to identify other authorities that might be interested in working together on that matter.

This mechanism or platform has to be secure. Authorities using this platform must have confidence that the organisation in question will not become aware that it may become the subject of an investigation. As well, many authorities are subject to confidentiality provisions that prevent them from disclosing the fact that they are conducting an investigation except in specific circumstances, such as when the disclosure is necessary to further the investigation. For example, an authority may be able to disclose that it is investigating a matter to another authority in order to obtain information to further an investigation. Or, an authority may be able to share information with another authority provided it is investigating the same matter.

GPEN is currently working on a proposal for a secure platform that would allow authorities to coordinate their enforcement matters and share information while respecting their confidentiality obligations. Those members who are participants in GPEN support the development of this platform and encourage other members to consider joining GPEN.

Global Privacy Enforcement Coordination Process Map

Privacy Issue/Incident with Cross-Border Impacts

- The Privacy Enforcement Authority (Originator) conducts minimal investigation and assessment to determine whether they have jurisdiction and whether it is suitable for coordinated action?



Alert out



The Privacy Enforcement Authorities receiving the alert should:

- Indicate if they are potentially interested in cooperating
- Determine if there are common objectives that would allow them to cooperate?
- Agree on the scope and scale of what they are trying to achieve?
- Agree on who is going to do what – i.e., how to divide the workload and pool expertise?



The participating Privacy Enforcement Authorities should agree on an investigation strategy and work plan and commence the investigation.



The participating Privacy Enforcement Authorities discuss the investigation findings and agree on the appropriate joint enforcement strategies and action.



The participating Privacy Enforcement Authorities agree the contents of any final report(s) and extent of the fine imposed if appropriate.



The participating Privacy Enforcement Authorities discuss and agree the outcomes of the investigation and communicate any learning's to promote good practice amongst Data Controllers and Privacy Enforcement Authorities.