

# CANAAN BRIDGES QUARTERLY

REGIONAL AND INTERNATIONAL IP, TRADE AND DEVELOPMENT UPDATES



## DATA PROTECTION

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## Introduction

June's issue of Canaan Bridges Quarterly addresses data protection and privacy. It is the first of a two part series in which we focus on data protection concepts, global developments in data protection and privacy, and intersections between data, intellectual property and trade. This issue explains the concept of data protection and discusses three dynamics that help to understand challenges and developments in the space. To good reads.

Sincerely,

*Marsha Simone Cadogan*



# DATA PROTECTION: AN EXPLAINER

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One of the impacts of the fourth industrial revolution is the increased use of technology to create, access and transfer information between different parties, some of whom are in different parts of the world. When we download applications on our smartphones, make online purchases, access healthcare, banking, and insurance services, we often provide personal and sensitive information about ourselves to other parties. How this information is recorded, stored, and the circumstances under which it is accessible and shared with third parties is one of the most topical issues in privacy talks.

Europe's General Data Protection Regulation has had sweeping effects on how businesses and policy makers deal with personal data within and outside of Europe. Over the past four years, several countries have developed, are developing, or overhauling their data privacy laws to keep abreast of the realities of the times. In other economies, businesses with European clientele but without similar legislation in their home country, seek to find a middle ground in how they handle privacy issues.

Awareness about data protection and privacy also resonate with consumers, and rightly so. Consumers want to know how their sensitive information is handled by entities they do transactions with, and whether their information is being sold or otherwise used in an unauthorized way. Discussions about data protection and privacy may relate to: what should be safeguarded as sensitive data, the extent of safeguard and control gatekeepers should have in relation to personal data, how cross border data transfers should be dealt with, the role of third parties in data transfers, or even what constitutes personal information. A few underlying currents are central to a sound understanding of all these issues. Three of these foundational matters are addressed below.

## Data Protection: A Definition

Data protection refers to laws, policies and rules that define and lay out how personal information is collected, stored, shared, accessed, and used by others. Most data protection and privacy concerns arise in a commercial, or contractual context, but there are moves by some jurisdictions to include charitable organizations as having an obligation to protect personal information which is disclosed to them.

It is impossible to discuss data protection without talking about what type of data "protection" applies to or should apply to. Personal data is personal information that relates to an identified or identifiable person. This includes information that directly or indirectly identifies a natural person. Examples include medical records, information about a person's online shopping activities and financial records. Data is identifiable if it can be used to identify a natural person (such as by email or home address, driver's licence or social insurance numbers). Consumer data protection laws do not protect company data - companies are not natural persons, they have a legal personality but are not humans.

## Nature of Data Protection: Consumers' Right

Most data protection laws are guided by specific principles. These principles include accountability, limited collection and use of personal information, meaningful consent, and identifying the purpose of data use and its disclosure. As overarching principles, they are intended to frame how businesses or entities engage with consumers' personal information. By far there is no harmonization of data protection laws. The extent of rights that consumers have over their data will differ across countries, depending on whether and the type of data protection law that exist, how much the law represent the interests of consumers, in particular, whether they are useful to address the concerns of consumers.

## DATA PROTECTION II: AN EXPLAINER

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A more expansive and representative approach to data protection will hold consumers' personal data as protected in other jurisdictions, that is, when the data crosses borders. In these situations, the onus is on both the company transferring the data to other countries, and the receiving party to have due diligence practices in place to protect the information being transferred. Driving change at the business level then, can influence national outlooks on data protection.

The rights consumers have over their personal information include the right to opt out the sale of their information to third parties, the right to withdraw consent, the right to request the personal data that the data controller or other parties have collected on them, the right for inaccurate data to be corrected, and the right to erase data. These rights do not exist in all countries. For example, in the United States, there is no stand alone law on data protection at the federal level. However, five states (California, Colorado, Connecticut, Utah and Virginia) have enacted legislation on data protection and privacy. California's consumer protection act applies to businesses with annual gross revenues of over \$25million USD. There is no similar threshold in Utah and Virginia's Personal Privacy Information Acts. In Canada and the EU, no revenue threshold applies for data protection obligations to exist.

### Consent Requirements

The enactment of personal information protection laws does not mean that a business will need the consumer's consent at all times in order to disclose their data. For example, under the GDPR, if the data being processed is for a legitimate purpose for which the individual is already a party, permission to use the personal data may not be required (such data required to complete a contract of which the data subject is a party). Stakeholders continue to grapple with when consent is required in disclosure situations.

In a recent Irish Court of Appeal decision, it was held that an employer cannot use CCTV footage of an employee for a purpose that was not contemplated by the employee. Footage from the CCTV camera was used to find out who had written racial graffiti in the employers' break room. While there was no footage or record of the employee committing the act, the recordings showed that he entered the break room on various times when he had no breaks. He was disciplined for taking breaks during work hours. On appeal of the decision through various court levels, the High Court held that while the employee had consented to his image being recorded for the legitimate purpose of public security, he had not consented to its use for disciplinary actions related to break times. Most data protection laws and regulation will provide guidelines on when consent is not required for data processing. As a general rule, a sound data protection policy will always ask the consumer for permission to use their personal data before doing so.

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Data breaches are almost a constant. Consumers' concerns about how their personal information is being used in commercial markets is likely to continue for years to come. How businesses and policymakers approach these concerns are crucial considerations in our global trade economy.



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Life in the City of Dirty Water, Clayton  
Thomas-Müller

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