CANON Canadian Anonymization Network

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Ms. Julie Samuël
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Re: Comments in response to the Québec government's consultation on the draft Regulation respecting the anonymization of personal information

Dear Ms. Samuël,

Thank you for the opportunity to provide comments as part of the consultation on the draft Regulation recently released by the Québec government respecting the anonymization of personal information (the "**Draft Regulation**").

This submission is made on behalf of the Canadian Anonymization Network (CANON), a not-for-profit organization whose members comprise large data custodians from across the public, private, and health sectors. One of CANON's core publicly-stated objectives is to advocate for balanced legislative and policy standards for anonymization that enable innovative and beneficial uses of data, while reasonably protecting against foreseeable privacy risks.

On January 30th, CANON and AccessPrivacy hosted a two-hour workshop to discuss the Draft Regulation, with a focus on its application to the *Act respecting the protection of personal information in the private sector* (the "**Act**"). The discussion was moderated by Adam Kardash, Chair of Osler, Hoskin & Harcourt LLP's Privacy and Data Management team and National Lead of AccessPrivacy, and included comments and insights from the following members of CANON's Steering Committee:

- Dr. Khaled El Emam, Canada Research Chair in Medical AI at the University of Ottawa and Co-founder and General Manager of Replica Analytics
- Keren Groll, Senior Special Counsel, Privacy & Data Innovation at TD Bank
- Suzanne Morin, VP Enterprise Conduct, Data Ethics and Chief Privacy Officer at Sun Life
- Pamela Snively, Chief Data & Trust Officer at TELUS Communications and TELUS Health

The workshop was attended by over 370 Chief Privacy Officers, senior counsel and privacy professionals across a breadth of industry sectors, including representatives from retail, health, banking, telecommunications, trade associations, and other public- and private-sector organizations. Key comments made during the discussion included the following:

Beneficial Features of the Draft Regulation

- There were multiple comments on the valuable clarity that Section 7 of the Draft Regulation provides with the statement that it is "not necessary to demonstrate that zero risk exists" for the process of anonymization.

- Several comments highlighted the practical benefits of the Draft Regulation setting out core requirements for the process of anonymizing personal information, where those requirements align with core elements set out in existing and well-established standards, including the recently-published ISO standard (ISO/IEC 27559:2022 - Information security, cybersecurity and privacy protection – Privacy enhancing data de-identification framework) and the Information and Privacy Commissioner of Ontario's De-identification Guidelines for Structured Data.

Challenges and Concerns

- Several comments highlighted that the Act's anonymization requirements are contained within Section 23 of the Act, which contemplates the process of anonymization as an alternative to the destruction of personal information. However, the Draft Regulation is drafted to regulate the process of anonymization generally, rather than the use of anonymization in place of destruction, as contemplated in Section 23 of the Act.

- There was discussion around Section 90(3.2) of the Act, which provides the statutory authority for the Québec government to make regulations "for the purposes of Section 23, to determine the criteria and terms applicable to the anonymization of personal information." Several participants pointed to the fact that Section 90(3.2) focuses on the criteria and terms applicable to the process of anonymizing personal information but does not refer to the regulation of data that has been anonymized. Once anonymized, such data would no longer be deemed "personal information" for the purposes of the Act, and it would therefore fall outside the scope of a statutory framework that regulates personal information.

- Several comments cited concerns with Section 3 of the Draft Regulation, which sets out requirements for organizations to establish the purposes for which it intends to use anonymized data. Comments noted that the requirements in this Section fall outside the scope of the regulation-making authority in Section 90(3.2) of the Act. There were also comments about the operational burden (and interoperability challenges) imposed by this requirement, especially since there is no similar requirement to identify the purposes for using anonymized data under other Canadian or foreign privacy statutes. Accordingly, several participants recommended removing Section 3 from the Draft Regulation.

- The comments consistently highlighted the need for a "less is more" approach to the drafting of the Regulation and pointed to the compliance burden likely to result from the Draft Regulation's use of prescriptive and unqualified language that does not allow for contextual analysis or application (e.g., lacking references to "where practicable", "where reasonably necessary in the circumstances", or any proportionality of the requirements based on the re-identification risk in the circumstances).

- There were concerns raised by certain participants about the language used in Section 4 of the Draft Regulation. While several participants seemed to agree that the requirement to involve an individual with appropriate knowledge and experience is generally a reasonable one and has precedent in other legislative regimes (e.g., under the U.S. Health Insurance Portability and Accountability Act of 1966), it was noted by some that the prescriptive language used in Section 4 goes further than is necessary (or perhaps workable) in the circumstances. For example, concerns were raised regarding the many instances where "supervision" of the process of anonymization is unlikely to be feasible in practice, and the reality that there are currently relatively few individuals who are considered "qualified in the field", which could pose practical challenges for meeting this requirement as it is currently drafted.

- There was a recommendation to remove from the Draft Regulation the references to each of "correlation criterion", "individual criterion" and "inference criterion", as these concepts have caused practical challenges in other jurisdictions.

- There were significant operational concerns cited with (and compliance burdens noted as arising out of) Section 8 of the Draft Regulation, which requires a regular assessment of information that has been anonymized, including the absence of any distinction between circumstances where organizations are using anonymized data internally versus externally, the lack of control that an organization has once anonymized data has been publicly disclosed, and the absence of any distinction between circumstances where organizations are engaged in static (i.e., one-time) versus more dynamic (i.e., recurring) disclosures of anonymized data. There was a related comment about the absence from the Draft Regulation of any mention of the need to consider re-identification risk contextually, including from the perspective of the data recipient.

- There were significant concerns raised by certain participants about Section 9, which requires organizations to establish a "register" that includes various prescribed information about the anonymization of personal information. While there seemed to be a shared view among participants that some form of documentation is needed, the primary concern raised by some was that the use of the term "register" with reference to prescribed elements would introduce a burdensome requirement that is novel in Canadian and foreign privacy laws, and that it otherwise appears unnecessary given that organizations who have engaged in the process of anonymization will presumably be required to document their assessment of re-identification risks as contemplated in Sections 5, 6 and 7 of the Draft Regulation, or otherwise in compliance with the privacy impact assessment obligation under Section 3.3 of the Act.

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We are pleased to provide a recording of the full session, available here, for consideration as part of the government's consultation process. A written transcript is being prepared and we will follow with a copy of same in both French and English.

Thank you for your thoughtful consideration of the comments and proposals raised in this session. We would be pleased to speak about these topics in more detail.

Yours sincerely,

Adam Kardash, on behalf of the Canadian Anonymization Network (CANON)