

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.362.2111 MAIN
416.862.6666 FACSIMILE

OSLER

Toronto

June 30, 2023

Adam Kardash
Direct Dial: 416.862.4703
akardash@osler.com

Montréal

Calgary

Ottawa

Commission d'accès à l'information
Bureau 2.36, 525 boulevard René-Lévesque Est
Québec (Québec), G1R 5S9

Vancouver

New York

Attention: M^e Diane Poitras
Présidente de la Commission

Dear M^e Poitras,

Re: Guidelines on the Criteria for the Validity of Consent (Personal Information)

We are pleased to provide comments as part of the consultation on the [draft guidelines](#) released by the Commission d'accès à l'information (CAI), regarding the criteria for the validity of consent under Law 25's amendments to the *Act respecting the protection of personal information in the private sector*.

This submission is made on behalf of [AccessPrivacy](#), a thought leadership platform established by the national Privacy and Data Management Team at Osler, Hoskin & Harcourt LLP. As you are aware, AccessPrivacy hosted an interactive online workshop on June 14, designed to help organizations (a) understand the scope, meaning, and impact of the proposed guidelines, and (b) prepare their own submissions for the CAI's consultation process.

The [recording of the full session is available here](#), for your consideration as part of the CAI's consultation process.

Over 140 Chief Privacy Officers, Senior Counsel and privacy professionals across a breadth of industry sectors, including representatives from retail, banking, telecommunications, trade associations, and other public- and private-sector organizations, registered for and attended the workshop. AccessPrivacy also extended an invitation to the CAI to join the workshop in an observational capacity, and two representatives were in attendance as observers during the discussion.

The workshop consisted of a two-hour discussion, moderated by [Adam Kardash](#), Chair of Osler's Privacy and Data Management team and National Lead of AccessPrivacy, and included comments and insights from [Joanna Fine](#) and [Julien Morissette](#). The workshop focused on the themes of the numerous queries and comments Osler has received from its Canadian and foreign-based clients about the CAI's draft consent guidelines, specifically:

- **Initial comments** about the process and structure of the consultation (8:30 in the recording), including:
 - the need for prompt English translation of the guidelines to promote accessibility, given that many companies striving to comply with Law 25 are based outside of Quebec or Canada,
 - the need for the CAI to expressly provide for a modified, phased enforcement approach, given both:
 - i. the CAI’s statement that final consent guidelines will only be published in October 2023 (i.e., after the consent requirements under Law 25 amendments come into force), and
 - ii. the considerable amount of time required by organizations to operationalize relevant aspects of the final guidelines,
 - the benefits afforded to the CAI and stakeholders of a more inclusive (i.e. open-invitation) and in-person dialogue as part of the consultation process, and
 - the recommendation to remove use cases from the guidelines, unless they have been developed through more active sectoral consultation or via CAI investigations over time.

- **Requirements and scope of the “profiling” provision** in s. 8.1 of the amended private sector privacy act (21:00 in the recording, discussing s. 31 of the draft guidelines);

- **Structure of the consent regime** (35:30 in the recording, discussing ss. 30, 49, and 50 of the draft guidelines);

- **Granularity of consent requests** (54:20 of the recording, discussing s. 59 of the draft guidelines);

- **Consent fatigue** (59:15 of the recording, discussing ss. 33-34 of the draft guidelines);

- **Demonstrable accountability** (77:00 of the recording, discussing ss. 23-25 of the draft guidelines);

- **Scope of confidentiality incident rules** (85:30 of the recording, discussing s. 16 of the draft guidelines);

- **Fairness indicators in the consent process** (94:10 of the recording, discussing s. 41 of the draft guidelines);

- **Irreversibility of choice once consent or an exception to consent has been relied upon** (106:30 of the recording, discussing s. 12 of the draft guidelines).

Thank you for your thoughtful consideration of the comments and proposals raised in this workshop session. Please let us know if you would like to speak about these topics in more detail.

Sincerely,

Adam Kardash

Chair: Privacy and Data Management
National Lead, AccessPrivacy