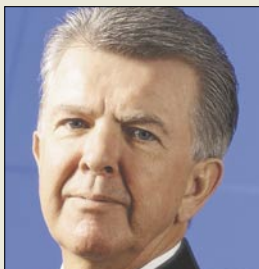


The Magazine About Magazines

Masthead

Q&A

St. Joseph Media Group President
Greg MacNeil



Q Twenty-three months ago, St. Joseph acquired Key Media (Toronto Life, Fashion, Where Toronto, WeddingBells, Quill&Quire, and others) along with some 250 staff. Was it a meeting of two different cultures?

A No. It was really a meeting of six different cultures. Historically, the Key titles that you listed operated quite independently. Moreover, although each was a part of Key, **continues on page 21** ▶



ARE YOU COVERED?

Here's what the federal **privacy legislation** means for magazines

It's referred to as Case #167. A subscriber complained that his magazine was selling or renting his name and address to third parties without his consent and hadn't notified him of this practice on his subscription card. The magazine removed his information from its database, requested that its list-renting third parties do the same and pointed out that each masthead contained a notification of this practice with the option to opt-out.

However, then-federal privacy commissioner George Radwanski was not satisfied, pointing out that the notice was buried in a paragraph at the bottom of the masthead in tiny print with only one means to opt-out—by mail. The magazine also failed to identify the third parties or the types of third parties to receive the subscriber's personal info and it didn't fully specify what kind of personal info would be disclosed. And there was no opt-out option on the magazine's subscription card.

The commissioner found the magazine failed to specify the purposes for collecting the data at or before the time of collection; did not obtain consent to collect and disclose per-

sonal info; and didn't make a reasonable effort to ensure the individual understood how the info will be used and for what purpose.

Sound like it could happen to you? Read on. Last April, the commissioner issued the following recommendations: (i) include a purpose statement and a check-off box on its subscription card; (ii) display the statement prominently in regular type size and include a description of the items to be disclosed (i.e., name and address) and the organizations to which the disclosures are to be made—at least by type. Provided that these actions are carried out and the only info disclosed is name and address, the commissioner stated that the publisher could continue using opt-out consent. He also recommended continually and prominently advertising a mechanism so that subscribers can conveniently, inexpensively, and promptly withdraw consent, including a toll-free number. The commissioner encouraged the magazine to present his recommendations to the Canadian Marketing Association so that "all CMA members will quickly adopt them by way of setting a new industry standard of compliance."

continues on page 8 ▶

CONTENTS



The concept is academic, page 14

DEPARTMENTS

Editor's Note
3

Reporter
4

Starts, Stops & Changes
14

People in Print
20

Source Directory
21

Point Taken
26



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Are you covered?

As you work your way through the legalese of privacy legislation, here's a look at what it means for magazines and how you could be affected

BY ANN MEREDITH BROWN

continued from cover >

As of Jan. 1, the third stage of the Personal Information Protection and Electronic Documents Act is now in effect. All companies that collect, use or disclose personal information for commercial use (including all provincial, interprovincial and international transactions) and whose province does not yet have its own "substantially similar" legislation must follow this federal privacy act. Only Quebec, with Alberta and British Columbia awaiting federal approval, has its own provincial privacy legislation. That means Quebec companies are exempt from the federal act for intraprovincial matters. Are you covered?

Business lists

First off, here's some good news for trade publishers: business information doesn't apply. PIPEDA deals with personal information—info about an identifiable individual, such as a person's name, residential address, home phone number, and E-mail address and other personal info like household income or age. It doesn't include the name, job title, business address or telephone number of an employee of an organization, in other words, information found on a business card.

Nevertheless, take a look at your mailing lists. Over at Transcontinental Media, they discovered that out of thousands of subscribers to one of its trade pubs, 200 subscriptions were paid and sent to home addresses, information that falls under the privacy legislation.

Instead of trying to figure out how to be compliant with 200 names out of thousands, Transcon refunded their money and informed them that they could no longer receive home delivery but were welcome to get the magazine at their place of business free of charge. "You need to make sure that, just because you have a trade title there isn't something in there that is personal information that you have to be compliant



about," says Darlene Storey, group marketing director at Transcontinental.

Same thing goes for trade shows. If you're collecting personal information at trade shows or venues, do you have procedures in place to make sure that the information that you're collecting is secure when you're away from the office? Keep reading because you may discover some more areas you need to cover.

Subscription lists

Bottom line, you need your subscribers' consent before you can collect, use or disclose their personal information. And it's important that you make sure this info is accurate and up-to-date. Keep in mind that there's no grandfathering provision excluding personal information collected before the law came into effect this month. If you have old information, or your method of collection doesn't meet current standards, you must either destroy your old data or contact individuals and re-establish consent. "If you have information in your possession and you didn't get permission [to use it] you must go back and get it," says John Matyskiel, group consumer marketing director at Rogers Publishing.

There are three types of consent: implied, opt-out and express (opt-in) consent. Companies must take into account the sensitivity of the information when determining what form of consent is required. Look at the context in which the info is being collected. The act uses this example: names and addresses of subscribers to a newsmagazine would generally not be considered sensitive but subscribers to some special-interest magazines might be.

Generally, seek express (opt-in) consent when the info is considered sensitive. *Canadian Geographic* provides a reader service insert card in every issue, from its advertising department, for readers to opt-in to receiving information from specific advertisers as



"Other organizations may ask *Chatelaine* if they may mail to a list of some of its subscribers to let them know about a product or service. If you prefer that we not provide your name and address please check here: postal email"

well as providing an opt-out option in the magazine. Have you seen St. Joseph Media's membership drive for its new Toronto Maple Leaf fan club? They ask for their subscribers' consent to use their info just to administer the program. And nobody's getting this list, says Multi-Vision Publishing's director of consumer marketing Zoila Johnson.

Implied consent is generally appropriate when the info is less sensitive but should only be used if you already have an existing business relationship with the individual. For instance, the Act says an individual buying a subscription to a magazine should expect that the organization, in addition to using the individual's name and address for mailing and billing purposes, would also send the person subscription renewals. In this case, an organization can assume that the individual's request constitutes consent for specific purposes.

Opt-out consent gives readers the opportunity to request that his or her name and address not be given to a third party. You must give subscribers a reasonable amount of time to read an opt-out option before you can disclose their personal information to a third party. Giving subscribers the option of opting out of third-party mailing lists is encouraged but not required at the acquisition stage. Besides insert cards, opt-out consent could also appear on renewal notices, contests, direct-mail packages and Web sites, when practical. Stephanie Barrington, director of consumer marketing for the style and urban group at St. Joseph Media, says *Toronto Life* is testing opt-out consent on its direct-mail packages. For its spring and fall campaigns, response rates decreased

10% with the opt-out option. "We're trying different ways of writing it, explaining it, where we put it on the order form, etcetera, so we don't see our overall response rate decrease." It also has an opt-out option on all of its subscription insert cards but is not testing that source.

Subscription order forms

Some magazines, such as Rogers' consumer titles, include an opt-out option on their subscription order forms (see sidebar for examples of opt-out language). The Canadian Marketing Association's requirements for opt-out consent consists of the "Three Easies": easy to see, easy to understand and easy to execute, with sufficient information for a reasonable individual to make an informed decision. An opt-out option should be clear and easy to find, meaning it shouldn't be buried at the bottom of your masthead in two-point type. Magazines such as *Chatelaine*, *Cottage Life* and *Canadian Living* allot a fair bit of real estate to their subscriber services information in every issue.

The language should include the frequency at which you will make your subscribers' personal information available. It should also specify what information will be made available, to whom and for what purpose. If the purpose for collecting the information changes, for example if you collected the information through a contest and would now like to use it for your list rentals, you have to notify the individual before the information is used.

You should also offer easy and inexpensive options

OPT-OUT WORDING EXAMPLES

- If you do not wish to receive product mailings from us or other reputable companies, please check: *Cottage Life*, 2003
- Occasionally, we may provide our subscriber list to external organizations that may have products or services of interest to our readers. Subscribers have the right to request their names not be used for such third-party purposes. If you do not wish to receive such communications, please contact Member Services above. *The Beaver*, December 2003 / January 2004
- From time to time, we make our customer list available to carefully screened organizations who want to let you know about a product or service that might interest you. If you would prefer that we do not share your name and address (e-mail or postal), you can easily remove your name from our mailing lists by contacting us (see above [1-800, mail or e-mail]). Details of our privacy policies are available from the same contacts or on our Web site at www.chatelaine.com. *Chatelaine*, August 2003
- Mail preference: On occasion, subscriber names and addresses are made available to select companies. To keep your name and address from being used in this way, contact us via one of the following: e-mail, mail, fax or phone. *Toronto Life*, August 2003
- Subscriber notice: Occasionally we make our subscriber list available to carefully approved companies whose products and services may be of interest to our subscribers. Should you not wish to be part of these mailings write to us at the address below, including a recent mailing label. Please state that you do not wish to be part of our Direct Mail Program. *Cycle Canada*, 2003

to opt-out, such as a check-off box on your subscription order form, a toll-free telephone number, a mailing address and/or the option to opt-out on your Web site. An individual may withdraw consent at any time, subject to reasonable notice. According to Transcontinental's Storey, customers who request "do not promote" are taken off its internal lists immediately and that request information is transferred to its list manager every week to be suppressed from list rental files.

List rentals

Beware! You are responsible for information that has been transferred to a third party, including list rentals. If your third party does not comply with the privacy laws, your company can also be held responsible when a complaint is made. How safe is your data when a third party is processing it? You should use a contractual agreement to ensure that your third parties and their associates are adhering to similar levels of protection while information is being processed and are complying with the privacy laws.

Outsourcing your list management? At the Circulation Management Association of Canada's privacy legislation seminar in November, Cornerstone's senior vice-president, Web media, Don Lange said your list manager should have asked you to sign a warrant stating that your list has been given the chance to opt-out before being made available for rental. List brokers can only recommend consumer lists that are compliant with the Act and they can ask to see, or have signed, a statement that supports compliance,

COVER STORY

said Lange. Consumers should be given a reasonable amount of time to see the opt-out option in your magazine before their information qualifies for list rental. "We try to give our customers an opportunity to opt-out before we do anything. We like them to see two or three opt-out opportunities so we don't disclose a name for 90 days [after they receive the first issue]," says Transcontinental's Storey.

Cottage Life launched on a controlled-to-paid-conversion circulation model where it sent a complimentary copy of the magazine to cottage owners in hopes of gaining a new paid subscriber. However, general manager Terry Sellwood says *Cottage Life* will no longer mail controlled copies of the magazine to anyone who has not requested or purchased a copy because its list has run its course. "Response rates have been declining over time, it happens with any list," says Sellwood. He also wants to eliminate any potential problems that could occur from mailing to individuals who haven't requested a copy of the magazine.

When you rent your list make sure your third-party mailers have signed a list-rental agreement stating that the list is for one-time list rental and only for the offer indicated. It should also state whether or not they're going to be holding onto the names of "non-responders." Names on the list should not be further transferred, sold or exchanged, with the exception of essential associate businesses such as printers and mailing houses. It is also important to be aware of how all of these companies will eventually destroy the data.

Gift subscriptions

Your magazine may be in the spirit of giving, but you can't give away consent. An opt-out consent option shouldn't be used on subscription order forms for subscribers who have not ordered themselves, such as gift subscription recipients, says Rogers' Matyskiel. "The person who is giving the gift, for example, does not have the right to give permission on behalf of the gift recipient, they would have to express permission themselves." How you want to deal with that is up to you, says Matyskiel. You have to get permission directly from the person whose information you're dealing with, unless they've delegated it. Having opt-out information available in every issue of your magazine is a great way to give all of your subscribers a chance to make informed decisions about your opt-out policies.

Expires

Use it or lose it. That's the motto for collecting and retaining info. You should only collect data that you need and hold onto it for as long as it takes to fulfill those purposes. Also, you shouldn't use personal info for any purpose other than those for which it was collected, unless you get consent. It's important for companies to develop guidelines that state the minimum and maximum periods of retention of personal data. Info no longer required should be destroyed or erased. For example, Transcontinental holds onto its expired subscriber lists for two years before it destroys the data. *Canadian Geographic* holds onto its data for five years. You may want to solicit

old subscribers to renew for a longer period of time. CMA president John Gustavson says to make sure that "if you are keeping information about people you are no longer doing business with, document why you are holding the information."

Legal obligations

Anyone around the office have a penchant for organizing personal info? Sounds like a good candidate for a privacy officer. Companies must designate someone who will be accountable for compliance to the privacy principles. Privacy officers are responsible for knowing who you are transferring personal data to, how it's being transferred and what it's being used for. Individuals have a right to that information.

The federal court has the power to award unlimited punitive damages for any humiliation that the complainant has suffered

Organizations are also responsible for implementing policies and procedures to protect personal info as well as receiving and responding to inquiries and complaints. So you have to make your procedures easy and accessible for customers to complain. Train your staff about your privacy policies and communicate them to your third parties, partner companies and the public. Why not post it on your Web site, advertise it through brochures and direct mail or provide a toll-free number? But "don't let lawyers write your policy," says Rogers' Matyskiel. Not to slag the lawyers; they should review your policy but you need something that's actually readable. "You don't want something that's going to be three pages of single-spaced legalese." Rogers' privacy policy is available at www.rogersmagazines.com/privacy.htm.

Companies are also responsible for developing security safeguards to protect personal information from loss, theft, and unauthorized access or disclosure. Take a look at where you are storing your information. Who has access to it? Sensitive information should only be accessible to the appropriate staff members and there should be levels of security in place to prevent others from accessing it. Pay attention to how you and your external associates are destroying private information and investigate to see whether your data are being transferred safely.

Penalties

So you've gone through the Act with a fine-tooth comb, carried out all of the appropriate measures to become privacy compliant but somebody still makes a complaint. Don't panic, just be co-operative. If you're found guilty of obstructing the com-

missioner during an investigation of a complaint or while conducting an audit, it could set you back up to \$100,000.

If a complaint is made to the privacy commissioner, the commissioner will, generally, write a report with her findings and recommendations. The commissioner may audit the personal information management practices of an organization if she has reasonable grounds to believe the company is not adhering to the privacy legislation. After receiving the commissioner's report, a complainant may apply to the federal court for a hearing. The commissioner can also, on behalf of the complainant, bring the case before the court. The court has the power to order an organization to correct its practices. It can also order a company to publish a notice of any action taken or to be taken to correct its practices and award actual damages to the complainant, including unlimited punitive damages for any humiliation that the complainant has suffered. Actual damages could be awarded when personal information is used without proper consent, such as Case #167. Punitive damages could be awarded in a case where personal information was used in a callous or abusive manner, which acts as a deterrent for others engaging in the same behaviour, says Michael Geist, editor-in-chief of the *Canadian Privacy Law Review*. "In fact it's been rare, if ever, that we've seen any of those financial penalties applied," says Geist, and "if the U.S. is any example, typically, privacy awards have been fairly low." Geist, who's also the Canada research chair in Internet and e-commerce law at the University of Ottawa and the technology counsel at Osler, Hoskin & Harcourt LLP, believes the stronger penalties are to a company's reputation. However, the commissioner has yet to reveal a company that's been found in contravention of proper privacy compliance—all of the decisions suppress identities. The best way to stay out of trouble, suggests Geist, is to be compliant with the legislation to begin with and take a pro-privacy approach to your business practices.

Conclusion

Since there hasn't been any case law set from this legislation, with no precedents to follow, much of this law is still open for interpretation. Case #167, however, is a good example to go by.

"If we want to be able to continue to use opt-out consent, we're going to have to get it right," says the CMA's Gustavson. "If we don't, the legislation is going to get a lot tougher [and] we're going to have to get express, positive consent from all of our consumers before we can use their information."

Try to avoid complaints by adhering to the privacy principles and developing privacy policies that a reasonable person would deem appropriate. You must weigh potential financial gains from not adhering to the principles against the business risk of legal and financial penalties and a damaged reputation. Said Ontario privacy commissioner Dr. Ann Cavoukian in a statement to CMA members: "Beyond the sound reasons for implementing good privacy practices, such as legal compliance and ethical business practices, good privacy is good business." ■