

Cybersecurity Risk Management



A Practical Guide for Businesses

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PART I: INTRODUCTION

Where there is data, there is the potential for data loss. How an organization prepares for and manages a data incident will have a measurable impact on the outcome. A data incident that could potentially cost millions of dollars and shatter an organization's reputation can, if handled effectively, be brought under control and have a significantly reduced impact. For instance, following a well-publicized data breach involving malware installed on Home Depot's self-checkout kiosks, two Canadian firms launched class action lawsuits seeking \$500 million; the lawsuits ultimately settled for \$400,000. The significant reduction was warranted, said the judge, because of Home Depot's "exemplary" response:¹

In the immediate case, given that: (a) Home Depot apparently did nothing wrong; (b) it responded in a responsible, prompt, generous, and exemplary fashion to the criminal acts perpetrated on it by the computer hackers; (c) Home Depot needed no behaviour management; (d) the Class Members' likelihood of success against Home Depot both on liability and on proof of any consequent damages was in the range of negligible to remote; and (e) the risk and expense of failure in the litigation were correspondingly substantial and proximate, I would have approved a discontinuance of Mr. Lozanski's proposed class action with or without costs and without any benefits achieved by the putative Class Members.

More Data

Data that can be used to identify an individual constitutes personal information, and the collection of this kind of data creates privacy obligations (and triggers privacy laws). With advances in technology, organizations are collecting, storing and transferring more personal information about their consumers, professionals, patients and employees than ever before. The accumulation of vast amounts of personal information in large databases increases both the risk and impact of unauthorized access to that information. A single data incident involving personal information can now affect millions of individuals.

1 *Lozanski v The Home Depot, Inc.*, 2016 ONSC 5447 (CanLII), <http://canlii.ca/t/gt65j>, at para. 70.

With biometric identifiers (e.g. fingerprints, voice prints, facial recognition) increasingly being adopted by businesses, there are now new risks created by the loss or misuse of these immutable identifiers.

Bigger, More Sophisticated Data Incidents

While data incidents continue to grow in size, the most notable development is the increasing sophistication of those behind such incidents. The perpetrators' business models have evolved and in addition to using more complex methods, their targets have shifted. Whereas once the modus operandi was to steal credit card information and use it for unauthorized transactions, increasingly, malicious actors are relying on social engineering methods (e.g. phishing – fraudulent emails used to dupe unsuspecting employees into provide confidential or sensitive information) to gain access to information of value to the company. This information is then monetized directly by using it for insider trading, selling it to competitors (in the case of intellectual property or trade secrets), or demanding a ransom for its return.

Senior managements' concern about a data incident has risen dramatically and it has become accepted wisdom that companies should not be asking *if* a data incident will occur, but *when*.

More Costly Data Incidents

Data incidents are becoming increasingly expensive. While new products (such as cybersecurity risk insurance) are available to help defray costs, litigation (especially class action litigation) is now the expected response to a report of a data incident. While damage awards have to date been relatively small, the cost of managing a data incident can be shockingly high.

OTHER RECENT MEGA BREACHES



eBay (2014)	145 million people affected
JPMorgan Chase & Co. (2014)	76 million households and 7 million small businesses affected
Home Depot (2014)	56 million people affected and 53 million email addresses taken
Yahoo (2014) <i>Disclosed 2016</i>	500 million people affected
U.S. Office of Personnel Management (2014 / 2015)	18 million people, including 5.6 million fingerprints
SWIFT Global Payments Network (2016)	At least \$81 million stolen
Mossack Fonseca Law Firm (2016)	2.6 TB of sensitive data on politicians, criminals, pro athletes, etc.

There are regulatory costs. Recent amendments to Canada’s Personal Information Protection and Electronic Documents Act (PIPEDA), introduced mandatory breach notification and penalties of CA\$100,000 per violation for non-compliance with this requirement, further increasing the financial and reputational costs related to data incidents.

The costs don’t end with damages – accountability for data incidents can reach into the boardroom. Gregg Steinhafel, Target’s CEO and chair of the board, resigned shortly after that company’s data incident.² A similar fate befell Amy Pascal, who stepped down as head of Sony Pictures in the wake of the Sony hack.

THE 2013 TARGET BREACH: HOW MUCH DID IT ALL COST?

Target booked **US\$162 million in expenses** across 2013 and 2014 related to its data breach, in which hackers broke into the company’s network to access credit card information and other customer data, affecting some 70 million customers.³ Target said that the gross number was offset in part by insurance receivables of \$46 million for 2014 and \$44 million for 2013.

Additionally, Target agreed **to settle the customer class action lawsuits for \$10 million**.⁴ Claimants must prove “actual damages” (including, but not limited to, fraudulent credit card charges) which may drive numbers down, but there is no reversion to Target if the money isn’t all claimed. Ultimately, the cost of settlement is likely greater than \$10 million because:

- **plaintiffs’ counsel are asking for \$6.75 million in costs;**
- **Target has to pay for the settlement administration system; and**
- **Target also has to adopt some cybersecurity protocols and appoint a Chief Information Security Officer.**

Finally, the settlement does NOT cover the lawsuits by credit card issuers’ claims against Target for fraudulent charges paid back to consumers with stolen credit card information.

2 “Target CEO resigns after data breach fallout”, CNet online, May 5, 2014, available at <http://www.cnet.com/news/target-ceo-gregg-steinhafel-resigns-after-data-breach-fallout/>

3 “Target Reports Fourth Quarter and Full-Year 2014 Earnings”, Business Wire, February 25, 2015, available at <http://www.businesswire.com/news/home/20150225005513/en/Target-Reports-Fourth-Quarter-Full-Year-2014-Earnings#.VQdSZo7F-Sp>

4 “Judge approves Target’s \$10m hack lawsuit deal”, Toronto Star, March 19, 2015, available at <http://www.thestar.com/business/2015/03/19/target-offers-10m-to-settle-hack-of-40-million-credit-cards.html>

PART II: WHY CYBERSECURITY PREPAREDNESS MATTERS

Better Outcomes

First 72 hours are critical. While not all data incidents are of headline-grabbing magnitude, the worst incursion can throw an entire organization into turmoil for months on end. The first 72 hours after a data incident are, in particular, a chaotic mix of moving parts, most of which have to be addressed simultaneously, using information which is not yet complete.

A cybersecurity incident response plan prepared in advance for a trained and tested incident response team goes a long way towards staving off the chaos, keeps key players on-message, and focuses the efforts of the team on identified priorities. Importantly, an incident response plan lends structure to the urgent work and can be an important brake on unfocused activity and the urge to “do something”. Moreover, a tightly scripted response reduces costs, reduces the over-involvement of outside vendors, helps preserve evidence that may establish that the organization met the applicable standard of care, and minimizes reputational damage.

Evolving Standard of Care

A properly designed, documented, and executed plan is critical to limiting data loss and organizational disruption. More importantly, it will assist in minimizing liability to third parties and to regulators **provided** it is regularly updated to reflect changes in cybersecurity awareness.

An organization, if sued, will ultimately have its incident response plan (and its implementation thereof) evaluated by a court against a standard of reasonableness. With new risks and threats (and responses and patches) being identified every week, an incident response plan cannot be a static document. A court charged with evaluating the reasonableness of an incident response plan will look not only at the paper documents that an organization relies on but, among other things, whether policies were followed, whether

appropriate technical, financial and employee resources were allocated, and whether senior management was involved in the creation and management of the plan.

The standard of care may also be evaluated against regulatory guidance in specific sectors. For instance, on September 27, 2016 the Canadian Securities Administrators (“CSA”) issued *CSA Staff Notice 11-332 – Cyber Security* (“2016 Notice”) and stated that, in its view, it is no longer sufficient for regulated entities to merely put in place a reactive “breach response plan”. What is required, according to the CSA, is a proactive “cybersecurity framework” to better manage and reduce cybersecurity risk. A “cybersecurity framework”, according to the CSA, consists of “a complete set of organizational resources, including policies, staff, processes, practices and technologies used to assess and mitigate cyber risks and attacks.” (see further discussion of the 2016 Notice in the section on Public Company Risk Disclosure, below).

From Compliance to Competitive Advantage

Previously viewed as an unwieldy compliance effort that saw little in the way of return on investment, savvy companies are beginning to realize that enhanced data protection and a robust incident response can be a competitive advantage. A 2015 research survey showed that 25 percent of respondents believe their organization’s C-level views security as a competitive advantage.⁵ More tellingly, **59 percent of respondents say C-level executives will view security as a competitive advantage by 2018.**

5 “2015 Global Megatrends in Cybersecurity”, Ponemon Institute Research Report, February 2015. The report surveyed 1,006 senior-level information technology and information technology security leaders in the US, UK/Europe and Middle East/North Africa (MENA) who are familiar with their organization’s cybersecurity strategies. Available online at <http://www.raytheon.com/news/rtnwcm/groups/gallery/documents/content/rtn_233811.pdf>

PART III: YOUR CYBERSECURITY PREPAREDNESS PROGRAM = FRAMEWORK + PLAN

While a data incident may seem almost inevitable, it need not be a catastrophe. Organizations which are prepared to handle an incident, and integrate incident preparedness and prevention into their overall cybersecurity risk management program, are significantly more likely to have favourable outcomes in the event of an incident (and more likely to avoid an incident altogether) than those organizations which adopt an ad hoc approach. In the context of a breach, a “more favourable outcome” includes an incident resolution process that attracts limited media attention, minimizes costs (particularly costs associated with the threat of litigation), limits reputational impact, streamlines stakeholder involvement and invites minimal scrutiny from regulators.

A **cybersecurity program** consists of a cybersecurity framework, along with a cybersecurity incident response plan. A **cybersecurity framework** is proactive, and is a complete set of organizational resources, including policies, staff, processes, practices and technologies used to assess and mitigate cyber risks and attacks. A **cybersecurity incident response plan** is reactive, and is an enterprise-wide undertaking that provides a protocol for the entire organization, assigns accountabilities and sets up metrics to track organizational efforts to resolve the incident. It includes a variety of specific elements and covers a wide range of disciplines. Importantly, it is comprehensive and detailed, consisting of more than check boxes and to-do lists.

Some of the key elements of a cybersecurity program are outlined on the next page.

KEY ELEMENTS



1. Governance
2. Training and Policies
3. Third Party Access / IT Service Agreements
4. IT Security, Malware and Monitoring
5. Cybersecurity Risk Insurance
6. Cybersecurity Incident Response Plan

Governance

Cybersecurity is not solely an information technology risk. It is an enterprise-wide risk, and should be part of a board of directors' general risk management mandate.

Cybersecurity needs to be addressed in the boardroom. In June 2014, SEC Commissioner Luis Aguilar spoke to the New York Stock Exchange about cybersecurity risks in the boardroom, noting that cybersecurity incidents have become more frequent and sophisticated, but they have also become more costly to companies.⁶ He emphasized that, in light of this, the role of boards of directors, noting that "ensuring the adequacy of a company's cybersecurity measures needs to be a critical part of a board of director's risk oversight responsibilities."

Regulators are beginning to move away from voluntary compliance.

On September 13, 2016, the New York State Department of Financial Services ("DFS") announced a proposed new cybersecurity regulation (the "Regulation") that will apply to banks, insurance companies, and other financial services institutions regulated by the DFS. The Regulation is intended to protect both the information technology systems of regulated entities and the non-public customer information they hold from the growing threat of cyberattack and cyber-infiltration. Among other things, the Regulation requires action in four key areas: (a) establishing a cybersecurity program; (b) establishing a cybersecurity policy; (c) designating a Chief Information Security Officer; and (d) reporting and records requirements.

The Canadian approach, to date, has been somewhat different. While no Canadian jurisdiction to date has passed any similar regulation, the CSA issued its 2016 Notice noting the failure of many issuers to fully disclose their exposure to cyber risks and indicating they intend to re-examine the disclosure of some of the larger issuers. (For more on this, see the section on Public Company Risk Disclosure below.)

6 "Boards of Directors, Corporate Governance and Cyber-Risks: Sharpening the Focus", U.S. Securities Exchange Commission, available at <<http://www.sec.gov/News/Speech/Detail/Speech/1370542057946>>

Courts have also begun to consider the role of directors in considering

cybersecurity risk. On October 20, 2014, a New Jersey Court dismissed a shareholder derivative suit that sought damages notably from the directors and officers of Wyndham Worldwide Corp. for several data breaches.⁷ This decision was the first decision issued in the United States in a shareholder derivative claim arising out of a data incident. Similar lawsuits were filed in the District of Minnesota against the directors and officers of Target. These lawsuits named 13 of Target’s directors and officers as defendants and asserted claims for breach of fiduciary duty and waste of corporate assets, among others. The shareholders challenged not only the directors’ and officers’ conduct before the data breach by alleging their misconduct allowed the data breach to happen, but also challenged their conduct following discovery of the data breach by asserting the directors and officers acted improperly in the way they disclosed, investigated, and remediated the data breach. These lawsuits were also dismissed.⁸

These decisions provide examples of approaches to cyber risk oversight that directors and officers may implement to help shield them from liability in the context of data incident.

In light of the decision rendered in the Wyndham case, the following are examples of steps that could be considered by management and boards of directors in identifying and assessing an organization’s cybersecurity risks.

ACTIONS OF DIRECTORS AND OFFICERS*	
POLICIES	<p>Adopt written cybersecurity policies, procedures and internal controls, including when and how to disclose.</p> <p>Implement methods to detect the occurrence of a cybersecurity event.</p>
APPOINTMENTS	<p>Discuss at the management and board level the appointment of a chief information officer or a chief information security officer with the expertise to meet regularly with and advise the board.</p> <p>Consider appointing a board member with cybersecurity expertise and experience (or the board should seek out an expert who can provide presentation(s) to the board in this regard), and consider appointing an enterprise risk committee.</p>

7 *Palkon ex rel. Wyndham Worldwide Corp. v. Holmes*, No. 2:14-cv-01234 (D.N.J., Oct. 20, 2014). (“Wyndham”)

8 *Mary Davis et al. v. Gregg W. Steinhafel et al.*, No. 0:14-cv-00203 (D. Minn., July 18, 2014).

REVIEWS AND REPORTS

Review annual **budgets for privacy** and **IT security programs**.
 Receive regular **reports on data incidents** and cybersecurity risks.
 Maintain a clear understanding of **who in management has primary responsibility** for cybersecurity risk oversight and for ensuring the adequacy of the company's cybersecurity risk management practices.

DIRECTION

Consider which risks are to be addressed and mitigated directly and which may be transferred through **insurance**.

* Drawn from the Wyndham case, the presentation by SEC commissioner Luis A. Aguilar's dated June 10, 2014 and the National Institute of Standards and technology's "Framework for Improving Critical Infrastructure Cybersecurity", available at <<http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214-final.pdf>>

Training and Policies

A key element of cybersecurity risk management program will be an organization's policies and procedures. While the content of policies may vary, there are certain common elements. For instance, no matter what the specific policies are, are they written in plain English and understandable by all levels of employees? Are they easily accessible (e.g. available on an intranet)? Do employees receive formal training?

The specific components of any program will vary from organization to organization depending upon jurisdiction, industry and an organization's risk tolerance.

Some specific areas for training and policies may include the following:

IT SECURITY

Does the organization have materials and training that provide guidance to the information security team? Items that such a policy might include are:

- Access control and password management
- Network connection and firewall management
- Viruses and malware management, including installing updates and patches, and change control mechanisms
- Encryption in transit and at rest
- Network security, including wireless network security
- Preparing for, recovering from and responding to a data incident, including a mechanism for reporting incidents
- Remote access to the organization's networks

-
- Disposal of IT assets, devices and data (including a data retention policy)
-
- Business continuity and disaster recovery
-

ACCEPTABLE USE AND USE OF IT ASSETS

- Does the organization have plain language policies available to employees that set out the acceptable use of information systems and assets, email and other communications services, internet, devices and so on?
-
- Does the organization's policy explain what will be an acceptable use of social media for business purposes and/or social media posts in which the organization is identified?
-
- Does the organization have a policy that addresses use of employee-owned devices (BYOD) for the organization's business?
-
- Does the organization have a policy that addresses employees working from home/home offices and the use of mobile devices and/or portable data storage (e.g. USB keys, portable hard drives, etc.)?
-

EMPLOYEE EDUCATION AND TRAINING

- Does the organization have formal written policies and do employees receive regular training, with successful completion of such training documented?
-
- Is this training done during onboarding, when the employee's role changes and/or on an ongoing basis and/or when there is a significant change to a policy? Is this training documented and/or do employees sign off each time they successfully complete it? Do departing employees receive an outgoing interview to remind them of their obligations and to ensure information assets are returned?
-

VENDOR DUE DILIGENCE

- Does the organization have a policy that sets out what will constitute ordinary and sufficient due diligence for all vendors that will have access of any kind to the organization's IT system?
(For vendors that are actually supplying IT assets or services, due diligence in respect of negotiating and enforcing the cybersecurity terms in their contract will be important and is discussed in more detail in the sidebar "Examples of Vendor Due Diligence Inquiries.")
-

In the event of a data incident, an organization's policies will likely be requested by the regulator and, if the organization has been sued, plaintiff's counsel. As a result, counsel should review all policies prior to finalization.

Third Party Access and IT Service Agreements

The most basic form of access control is user privileges, which refers to the right or rights a user has to access company systems and data. The prevailing principle is that of “least privileges”, which dictates that users be granted only the level of access necessary for them to do their job.

This principle applies not only to employees, but also to vendors and other third parties.

In many cases, these types of relationships will be governed by contracts, which can also become a key element of cybersecurity preparedness, with contract provisions geared towards prevention, response, mitigation, and remedy.

There are two general scenarios, the first where an organization is contracting with a vendor for actual IT services, the second is where organization is contracting with a vendor for some other product or service which requires access to the IT system (e.g. a lighting services supplier who needs access to an organization’s IT systems for environmental monitoring). While both require cybersecurity due diligence, the due diligence considerations go much deeper for the first scenario.

For an IT services agreement, the starting point will be to understand the organization’s cybersecurity risks (see sidebar).

In addition, doing proper due diligence on the vendor is an essential part of getting a best of breed contract in place. The structure and

EXAMPLES OF FACTORS IN EVALUATING AN ORGANIZATION’S CYBER SECURITY RISK PROFILE



Is the organization in an industry with a **regulatory framework** that dictates that certain cyber-protection measures? For instance, for an organization in the financial services industry in Canada, the agreement will have to comply with existing and emerging regulations promulgated by OSFI, IIROC, and CSA.

Does the organization do business in **multiple jurisdictions**? Where is it collecting, processing, and storing data?

Is the organization a private company, or a public company with **many shareholders** and subject to exchange oversight?

Will the organization be handling **personal information and/or personal health information**? If so, existing and evolving privacy protection laws will come into play.

Will the IT solution being contracted for be **B2B** or **B2C**?

Will the IT solution involve third party components such as **hosting or payment providers**?

Is the organization **storing its data** onsite, in a local data centre, or in the cloud?

components of the vendor's solution, and the vendor's capabilities and certifications, risk management practices, and financial wherewithal are all elements that should be explored (see sidebar).

Then, having established the organization's cybersecurity risk profile, and having completed thorough due diligence of the vendor, the legal team will now be in a position to tailor the various data incident prevention, response, mitigation, and remedy provisions of the proposed IT services agreement.

Some of the most important provisions in the agreement will pertain to risk allocation. The interplay of representations, warranties, indemnities and liability is generally hotly contested in the area of cybersecurity because jurisprudence is evolving. An organization may want to consult outside counsel with expertise in this area to determine how it wishes to effectively address these issues and to discuss the various avenues available.

IT Security, Malware and Monitoring

Critical to managing risk will be the organization's IT defences – are they adequate, up to date, and informed by identified threats? It will be important for an organization to subscribe to a comprehensive and legitimate threat assessment service (for instance, Canadian Cyber Incident Response Centre (CCIRC) Cybersecurity Bulletins and best practice documents).⁹ There are also industry and sector groups that are engaged in information sharing. For instance, the Committee on Payments and Market Infrastructures has published a report on the current cybersecurity practices of financial institutions.¹⁰

EXAMPLES OF VENDOR DUE DILIGENCE INQUIRIES



What is the state of the vendor's **security framework**? What policies and procedures does it have in place to maintain the integrity of the framework?

Will the vendor permit **penetration testing** and other exploration of vulnerabilities?

Are the vendor's facilities audited for industry-recognized internal controls? Does the vendor perform **internal audits**, and is it willing to share the results with the client?

Where are the vendor's service delivery centres? Where does it process and **store data**?

What cybersecurity risk insurance does the vendor carry, and has it made **any claims** in the last five years?

Is the vendor operating in accordance with industry-recognized **security standards** (including those related to cloud computing, if applicable?)

9 Canadian Cyber Incident Response Centre materials available at <<http://www.publicsafety.gc.ca/cnt/ntnl-scr/cbr-scr/ccirc-ccirc-eng.aspx>>

10 "Cyber resilience in financial market infrastructures", Committee on Payments and Market Infrastructures, November 2014, available at <<http://www.bis.org/cpmi/publ/d122.pdf>>

The Bank of Canada has adopted the general risk-management guidance issued by this committee as the standard for designated financial institutions, as well as calling for “[c]o-operative initiatives that facilitate information sharing enhance cyber security by creating a forum to exchange best practices, share threat-intelligence information and establish communities of trust between sectors.”¹¹

Industry-standard antivirus and malware protection should be installed, with updates continuously installed and documented. The organization’s networks should be protected from internal and external attacks, and wireless networks should be secured using industry-standard practices, and firewalls and malware detection should be routine. Penetration testing should be conducted regularly (ideally by an independent third party). There should be technical solutions in place that detect and block suspicious activities or access.

Social engineering attacks should also be considered, and organizations should consider training their employees on how to avoid falling victim to phishing attacks, evil twin routers (a rogue Wi-Fi access point that appears to be a legitimate one offered on the premises, but actually has been set up to eavesdrop on wireless communications; an attacker fools users into connecting a laptop or mobile phone to a tainted hotspot by posing as a legitimate provider), and USB keys that appear to have been lost but are deliberately-planted malware-infected devices.

PERSONAL INFORMATION



What is Covered

Canadian privacy laws apply only to “**personal information**”, defined broadly to mean information about an identifiable individual.

Information will be “about” an “**identifiable individual**” where there is a serious possibility that an individual could be identified through the use of that information, alone or in combination with other information. Note that “personal information” will be interpreted broadly and has been found to include such things such as an IP address, a voice recording, and location data.

Note that information may still be considered “personal information” even if it is **publicly available** within the meaning of the regulations.

What is Not Covered

Under **PIPEDA**, personal information “does not include the name, title or business address or telephone number of an employee of an organization”. Note that under the federal legislation, this exemption does not include a business email address, which is still considered personal information. Moreover, this exemption may not be available in provincial legislation (see, for instance, Québec’s provincial privacy law).

Note, too, that the PIPEDA applies only to those organizations which collect, use and disclose personal information “**in the course of commercial activities**”.

Private sector employees are also not covered by PIPEDA, but may be covered under other provincial privacy legislation.

11 “Cyber Security: Protecting the Resilience of Canada’s Financial System”, Bank of Canada, December 2014, available at <<http://www.bankofcanada.ca/wp-content/uploads/2014/12/fsr-december14-morrow.pdf>>

Cybersecurity Risk Insurance

As data incidents increase in number, scope, and impact, organizations are looking to transfer the risk associated with them. The most common way of transferring risk is by obtaining insurance policies: if the risk is insurable, the risk is transferable. Marsh Inc., a global insurance broker, said that the number of organizations that purchased cybersecurity risk insurance in the US increased by 33% from 2011 to 2012, and that cybersecurity risk insurance is currently the fastest growing area of commercial insurance in the world.¹²

Generally, cybersecurity risk insurance is divided into first party coverage (protecting the policyholder from direct loss) and third party coverage (protecting from third party claims).

FIRST PARTY POLICIES MAY COVER:

- The costs associated with determining the scope of the breach and taking steps to stop the breach
- The costs of providing notice to individuals whose identifying information was compromised
- Public relations services to counteract the negative publicity that can be associated with a data investigation
- The costs of responding to government investigations
- The costs of replacing damaged hardware or software
- The costs of responding to parties vandalizing the company's electronic data
- Business interruption costs

THIRD PARTY POLICIES MAY COVER LIABILITY FOR:

- Permitting access to identifying information of customers
- Transmitting a computer virus or malware to a third-party customer or business partner
- Failing to notify a third party of their rights under the relevant regulations in the event of a data incident

12 "Companies turn to cyber insurance after Ashley Madison and other high-profile hacks", CBC News, October 14, 2015, available online at <http://www.cbc.ca/news/canada/kitchener-waterloo/companies-turn-to-cyber-insurance-after-ashley-madison-and-other-high-profile-hacks-1.3270756>.

-
- Potential “advertising injury,” i.e., harms through the use of electronic media, such as unauthorized use or infringement of copyrighted material, as well as libel, slander, and defamation claims
-

Cybersecurity risk insurance can also cover specifically the crisis stage of a data incident. This could include any expenses related to the management of the incident, such as investigation, remedial steps, required notifications, call center set up and public relations management, credit checks for the subjects of the data, and any legal costs including fines or the costs of launching or defending a lawsuit.

All insurance policy coverage is dependent on the particular terms and conditions in the policy at issue. Organizations looking to obtain cybersecurity risk insurance should consider a number of questions, and have their policies reviewed by counsel.

EXAMPLES OF CYBERSECURITY RISK INSURANCE CONSIDERATIONS:

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- What security controls can you put into place that will reduce the premium?
-
- Will you have to undertake a security risk review of some sort?
-
- What is expected of you to reduce or limit the risks?
-
- Will you get a reduction for each year you do not claim?
-
- Could you claim if you were not able to detect an intrusion until several months or years have elapsed, so you are outside the period of the cover?
-
- Who makes the decision to pay/not pay ransom?
-

Cybersecurity Incident Response Plan

Until now, the discussion has focused largely on the proactive elements of a cybersecurity plan. The other major part to a cybersecurity program is the reactive cybersecurity incident response plan.

An effective incident response plan ultimately relies on executive sponsorship. The next key step to developing an effective incident response plan is to ensure the right team is involved. An incident response plan should be enterprise-wide, and draw on the experience of key personnel from key stakeholder areas within the organization. Typically, this will include senior representatives from legal, public relations/marketing, customer care, human resources, corporate security/risk management, and IT. Ideally, it will also include pre-screened and pre-selected external advisors.

The responsibilities of the team and further details of the response plan are set out in the next section, Part IV.

Once the incident response plan is drafted, it should not sit in a drawer. Organizations should train, practice, and run simulated data incidents to develop response “muscle memory.” The best-prepared organizations routinely conduct war games to stress-test their plans, increasing managers’ awareness and fine-tuning their response capabilities. Outside counsel, with sophisticated understanding as a result of having handled dozens of data incidents, will often be invited to run the simulation, and evaluate the organization’s response.

PART IV: EFFECTIVELY EXECUTING YOUR CYBERSECURITY RESPONSE PLAN

What to do in the first 72 hours

A cybersecurity response plan should be prepared in advance, be detailed, be tested, and be well understood by those within the organization. A response plan will help focus the efforts of a diverse group of people during a crisis, and help prevent well-meaning but uncoordinated communications (both internally and externally).

A response plan should be the result of input from stakeholders enterprise-wide. Each of these stakeholders will ultimately have to designate someone from their group to be their lead on the team to be: (a) the person accountable for executing their portion of the plan; and (b) reporting to management

Several well-recognized steps are involved in any response plan, and are below.

1. Contain the Incident

Not every data incident will involve sophisticated hackers compromising an organization's IT systems. Physical incidents (e.g. non-electronic breaches such as departing employees taking information with them, loss of records or devices, theft of laptops) are still common. Note that an organization's response plan should not only contemplate activation in the case of an electronic breach, but in the case of a critical non-electronic one as well.

IMMEDIATELY AFTER DISCOVERY



DISCOVERY

Record the **date, time, location and duration of the breach** (e.g. was it a one-time incursion, or has the malware been resident for months?). Document **who discovered** the breach and how.

BREACH

Document the **details of the breach** (e.g. point of entry, method of intrusion, systems affected, whether information was accessed, deleted/modified or taken).

DATA

Document the **details of the compromised data** (e.g. who are the individuals affected (e.g. customers versus employees)? Where are the **affected persons** located? What **type of information** was compromised (e.g. personal information or other data)? Was the information encrypted? **How many records** are affected?

Where appropriate, immediately begin marking all written reports and other information generated as being "Privileged and Confidential: prepared at the direction of counsel in anticipation of litigation".

Depending on the scope and nature of the physical data incident, it may or may not be appropriate to activate the response plan and convene the incident response team. Regardless, the first step will be to promptly investigate and take action to limit further data loss. This can be done by limiting employee and public access to the affected area and changing locks/access cards if necessary. Organizations should determine whether it is appropriate to notify law enforcement. If an internal or external investigation is being conducted, the organization will need to determine what assets have been lost/affected, obtain tracking information (if available), obtain video surveillance (if available) and, if the incident involved employee misconduct, consider HR implications of any such investigation.

If an electronic data incident has occurred (e.g. a hack or other compromise of IT infrastructure that has led to data loss or infiltration), containment is likely to be more challenging and it is more likely that an organization will need to implement its response plan and convene the incident response team. These decisions will largely turn on the size of the incident and the type of information affected.

2. Convene the Team

If appropriate, the various team members should be contacted and the team assembled and briefed. Communications may need to be by phone only (in some cases, new mobile phones) in order to prevent the use of a compromised email system and the risk of leaks. Secure communications, including secure phones, laptops, and networks, should also be made available to senior management and other critical employees.

Once the response plan is triggered, clear communications channels, reporting structures and accountabilities should fall into place. When deciding on these channels and structures, it will be critical to have already considered the most efficient ways to include internal and external counsel in order to preserve privilege (where appropriate).

The actual members of the team will vary depending upon the organization and the nature of the incident; however the responsibilities of team members will generally include the following areas:

LEGAL/COMPLIANCE

- will, along with outside counsel, implement a privilege protocol
- will determine how to notify affected individuals, the media, law enforcement, government regulators and other third parties (such as card issuers, banks, etc.)
- will have established relationships with outside counsel prior to an incident, and will manage outside counsel during an incident response
- will manage all statutory notifications in all jurisdictions and communications with privacy commissioners, regulators, and so on
- will ensure internal documents and reports are generated at counsel's direction
- will issue and monitor a litigation hold
- will control information and identify persons who are on the "need to know" list
- will review all outgoing communications, filings, reports, etc.

PUBLIC RELATIONS/MARKETING

- will be familiar with industry channels and players and will have identified key media strategies prior to an incident occurring
- will have an internal communication plan to emphasize confidentiality, appropriate employee actions if media contact them, and a response plan if information about the incident is leaked
- will track and analyse media coverage and have a plan to respond if necessary to negative coverage

CUSTOMER CARE

- will create a rationale for determining whether incident inquiries will be dealt with internally or whether a call centre will be activated
- will set up a call centre and consumer protection program (see below and "Call Centre Considerations" sidebar below for more information)
- will handle customer complaints

HUMAN RESOURCES

- will manage employees during the incident, including reallocation of employee resources as required
- will handle investigations, discipline and termination if incident is the result of employee wrongdoing

CORPORATE SECURITY/RISK MANAGEMENT

- will communicate with law enforcement (along with Legal), including RCMP, and possibly CSIS, CSE, the FBI and Secret Service if the incident is of sufficient magnitude
- will disseminate to the team any law enforcement directives, ensuring compliance
- will manage incident risks, isolation of affected areas, and physical access

IT

- will work alongside external IT forensics to identify and remove any malicious code or other artefacts of a data incident, if source of the incident is electronic
- will assist with evidence, management of litigation holds, and support of litigation efforts

3. Analyse the Breach

An organization should begin gathering information the moment the incident is identified. All information related to the data incident should be subject to a comprehensive litigation hold so that it can be preserved, collected and analysed at the direction of counsel (and provided to law enforcement if required/appropriate). A subsequent review by lawyers will determine what information is actually relevant to any litigation, but the first task will be identify and preserve any information that might be relevant.

As the cause of the data incident becomes apparent, and as affected individuals are identified, an organization will be in a position to predict how the compromised information might be used (e.g. Was it unencrypted personal financial information that was the subject of a malicious hack? Or was it the loss

of an encrypted USB key with names and addresses only? The former is much more likely to end up being sold on the internet's black markets and used for fraud or identify theft). An organization can then begin making decisions about risk mitigation, consumer protection, law enforcement and so on.

When a data incident occurs, an organization will only have a short window of time to gather critical evidence. While the internal IT team will act as first responder to a data incident, they are often untrained in data recovery and forensic analysis and can sometimes do more harm than good, damaging critical data or inadvertently mishandling important evidence. For this reason, an outside IT forensics firm is likely to be one of the first outside vendors retained and operating after a data incident, using forensic software and protocols to perform data collection and data preservation in the wake of a data incident.

COMPETENCIES OF AN IT FORENSICS FIRM

- be able to identify and neutralize the threat while at the same time preserving and handling evidence with proven, forensically sound methodology, using data recovery tools and processes that are supported by case law and prior litigation experience
- be able to work across operating systems, and across devices (not just computers, but laptops, handheld devices, GPS units, and in many cases, outdated technologies that are still in use)
- be able to manage these critical steps in a way that respects employee sensitivities and workplace culture, because the firm will be interviewing and at least temporarily accessing employees' workstations and devices, (and in some cases, personal devices)
- be able to assemble a team with demonstrated experience supporting inside and outside counsel in building a case
- have key people who can provide testimony and appear as confident witnesses in court
- have a sophisticated understanding of privilege issues and litigation holds, be able to manage these issues, and understand the role that any and all of its investigations and reports may subsequently play in regulatory and court proceedings

Organizations should have these relationships in place before an incident and, ideally, already have coordinated any anticipated response with their choice of external legal counsel in order to allow a seamless handoff of this critical phase during an actual incident response.

4. Assess and Manage the Legal Implications

At the same time as information is being collected and preserved, and as details of the nature and scope of the incident are just becoming clearer, the organization will also need to consider (even at this early stage of its response) the medium- and long-term litigation risks arising from the incident.

LITIGATION RISK - CLASS ACTIONS

It is almost certain that, in the aftermath of any significant data incident, an organization will face one, and perhaps two, kinds of class actions.

First, a consumer class action will almost certainly be brought on behalf of all customers potentially affected by exfiltration of personal information. Second, if an organization is a Canadian public issuer whose share price dropped immediately after the announcement of the incident, an organization may be sued by a person representing shareholders, with an allegation that the organization's continuous public disclosure as to the state of its cybersecurity systems was misleading.

At the time of writing, no securities class action has been commenced in Canada in the wake of a data incident, but several consumer class action actions have been. Those actions have not yet been fully considered by Canadian courts and as a result, questions regarding the legal validity of the causes of action that were advanced, and the scope of possible damage awards, remain largely open.¹³

13 For a class action commenced in a provincial court, the availability of common law and/or statutory causes of action will depend on the jurisdiction. In British Columbia, for example, that province's privacy act creates a statutory tort of invasion of privacy if a person, wilfully and without a claim of right, violates the privacy of another. This tort is actionable without proof of damage. As a consequence of this statutory right, it is well-established in British Columbia that there is no freestanding common law tort of breach of privacy. Accordingly, if raised, such common law claims can be struck. A similar exclusionary rule applies to Alberta. In the federal setting, the Federal Court has found that the sole avenue for a private-sector privacy complaint is through the process set out under PIPEDA, although a common-law breach of privacy cause of action was not struck out from a class action against the federal government. By contrast, in Ontario, the Court of Appeal confirmed in *Jones v. Tsige* that there is a common-law tort of breach of privacy that applies to general personal information. The case law continues to evolve in all respects.

In Canada, a consumer or shareholder class action will almost always be brought in provincial (as opposed to federal) courts. Only one class action can proceed in each province and plaintiff's firms generally operate on the assumption that if they are the first to issue a claim in a particular province, that discourages competing lawsuits in the same jurisdiction. Accordingly, a plaintiff's law firms will generally issue a lawsuit in response to a data incident as soon as it can identify a suitable plaintiff who may have been affected. The statement of claim will likely have only generic wording, simply inserting the name of the organization and some basic facts about the incident. No investigation of the merits of a case will likely be undertaken before the proposed class action is issued (usually with an accompanying press release).

Generally, an organisation can expect the first lawsuit within 7- 30 days. If two months pass without a lawsuit, the chances that a lawsuit will be initiated decline dramatically (unless there is subsequent significant disclosure about the incident, such as a dramatic change in the numbers of persons affected, the type of information compromised, or supported if plausible allegations of fraud tied to the incident are revealed).

It is possible in Canada for overlapping class action to be brought in multiple provinces; as a result, an organization may need to defend multiple parallel cases at the same time. Whether one case or many, class actions tend to unfold slowly (especially where the facts are still being discovered and the law as to liability and damages is, as here, uncertain). It may be 3 to 5 years before a class action reaches trial or settlement. It is for this reason that an organization should include an outside litigation specialist on the incident response team, an involve them as soon as possible; it will be outside counsel who has their eye on the longer term consequences (e.g. asserting privilege, reviewing public messaging, and so on) while the organization and its resources are focused on the immediate response.

REGULATORY RISK

An organization can also expect to be the focus of regulatory proceedings. This will principally mean an investigation by various Privacy Commissioners responding to complaints, or acting of their own accord and, depending upon the industry, could also include securities, financial institutions or public health regulators, and even law enforcement agencies.

Privacy Commissioners

The main regulators in this area will be the various provincial privacy commissioners, as well as the federal privacy commissioner. A chief concern for an organization which has suffered a data incident which includes personal information will be providing notification to the various privacy commissioners.

Organization may be required by law to notify regulators or affected persons. Currently, only Alberta and Manitoba have enacted legislation to require mandatory breach notification in the private (non-health) sector (Manitoba's legislation is not yet in force at the time of writing). Amendments made to PIPEDA by virtue of the Digital Privacy Act now make notification of both affected persons and the federal privacy commissioner mandatory, but the relevant sections are not yet in force pending the passage of implementing regulations. In the health sector, Alberta, Ontario, Newfoundland, and New Brunswick have all enacted laws that requires mandatory breach notification.

There may be penalties for failure to report a data incident. In Alberta, the private sector mandatory notification is triggered "where a reasonable person would consider that there exists a real risk of significant harm to an individual". Failure to notify the Alberta Privacy Commissioner of a breach that may pose a real risk of significant harm to individuals is an offence, subject to a fine of up to \$10 000 for an individual and up to \$100 000 for a corporation.

As a practical matter, an organization will generally want to notify all relevant privacy commissioners (regardless of whether it is mandatory), using an approach that ensures a coordinated notification process that ensures consistency of information. Organizations must be aware that while information provided to a privacy commissioner will generally be confidential, some of it may be subject to subsequent disclosure pursuant to requests made under access to information laws.

Complaints from individuals to a privacy commissioner will trigger discrete investigations aimed at resolving the matter in issue, but privacy commissioners may also initiate an investigation of their own accord into any issue within their jurisdiction. Such investigations are more likely where there are multiple individual complaints, the scope of the data incident is large or involves particularly sensitive information, where there is a larger public policy issue or need for guidance (e.g. a new type of service or business model) or where the privacy commissioner feels that consumer or public interests have not been adequately protected by the organization's response.

NEW MEASURES INTRODUCED INTO PIPEDA

The Digital Privacy Act (Bill S-4)

In June 2015, the Digital Privacy Act introduced new measures into PIPEDA. These measures and improvements are **now in force**, except for the data breach requirements discussed below, which await the passage of accompanying regulations.

Mandatory Breach Notification: Though not yet in force, these provisions oblige organizations to notify both affected individuals and the Office of the Privacy Commissioner (“the Commissioner”) following a data breach under certain conditions. Among these conditions, an organization must report to the Commissioner any breach of security safeguards involving personal information under its control if it is reasonable in the circumstances to believe that the breach creates a real risk of significant harm to an individual. In addition, the report must be made “as soon as feasible after the organization determines that the breach has occurred”.

The Act defines a “real risk of significant harm” expansively and includes, among other things, “bodily harm, humiliation, damage to reputation or relationships, loss of employment, business or professional opportunities, financial loss, identity theft, negative effects on the credit record and damage to or loss of property”. This expansive definition of harm, combined with the “as soon as feasible” requirement, raises new questions and new burdens on organizations.

Further, an organization encountering a breach will have additional reporting obligations to other organizations and government institutions if the breached organization believes the other organizations may be able to reduce their risk of harm as a result.

These expansive mandatory breach obligations make it imperative that an organization engage external counsel as soon as a breach is detected in order to comfortably meet the Act’s “as soon as feasible” requirement. Non-compliance may result in stiff penalties discussed below.

Penalties: The Act introduces liability for knowingly violating the notification requirements. An organization may be liable for fines up to CA\$100,000 per violation.

Confidentiality: The Act provides the Commissioner with the right to make public any information that comes to his or her knowledge in the performance or exercise of any of his or her duties or powers as well as information in security breach notifications to the Commissioner. This is over and beyond the power to “name and shame” wrongdoers the Commissioner already had under the previous PIPEDA regime.

Taken together, these provisions introduce more stringent privacy, consent and breach notification obligations on organizations. Organizations must continue to balance these new obligations with the need to minimize financial and reputational costs stemming from a data breach. The Act has made the balancing act more complicated, made non-compliance more costly and made a well-thought out incident response plan even more necessary.

PAYMENT CARDS AND PCI-DSS OBLIGATIONS

Data incidents involving payment cards and/or the loss or unauthorized access to cardholder information raise special considerations in respect of the complex web of players in the chain of payment processors and the various contractual interrelationships. While there is at this time no legislative or regulatory obligation in Canada to notify payment card providers or acquiring banks of a data incident, such obligations may well arise as a result of the various contractual relationships between (and among) the merchant organization and the various bank and payment card brands in respect of the use and issuance of payment cards.

There may be a requirement to comply with sector-specific standards.

The Payment Card Industry Security Standards Council was founded by leading payment card brands. Organizations accepting payment card transactions – including acquirers, service providers, and merchants – from any of these payment brands have to comply with the Payment Card Industry Data Security Standard (PCI-DSS) requirements. Although the Security Standards Council has exclusive authority to set requirements, it does not participate in compliance enforcement. The card brands themselves are responsible for enforcing compliance for all transactions conducted with their own cards. They accomplish this through policy enforcement with their member banks (acquirers). The member banks, in turn, enforce compliance with merchants. Consequently, if an organization wishes to process major credit cards, it must do so through members of the card brands, who mandate PCI-DSS compliance measures in their service contracts.

PCI-DSS requires documentation to be developed and maintained, preventive and detective security controls to be implemented, and processes to be in place in order to identify and contain any security breach attempts as soon as possible. A PCI-DSS Forensic Investigator (PFI), an IT forensics firm approved by the card brands, will conduct periodic reviews of an organization's compliance with the PCI-DSS standards and issue reports that will recommend or decline continued certification. Non-compliant organizations are exposed to higher transaction fees imposed by their acquirer banks, contractual "penalties" imposed by the payment card brands, higher liability if a data incident occurs, and could run the risk of losing the authorization to process payment card transactions.

Additional, multiple sector-specific notifications may be required. When a data incident occurs, the compromised organization will often be required (in accordance with applicable payment card industry rules and requirements of acquirers, issuers and/or participating payment card brands) to notify their acquiring banks and/or participating payment brands, and may be contractually required to engage an approved PFI to investigate the security issue, determine root cause, and report back to affected participating payment brands and others. The PFI investigation will often be conducted alongside the organization's own forensic IT investigation.

PCI-DSS does not provide specific guidelines on how to handle a security breach. Each payment card brand has its own policies and procedures; and they can differ among the individual brands. For example, some card brands require "immediate" notification upon confirmation of a data incident; others require notification within 24 hours of knowledge of such incident).

Some organizations may be tempted to defer or decline such reporting.

However, even if organizations do not notify the bank and/or card brand network, it is very likely that these entities will independently identify the organization as a source of cardholder data compromise. Both banks and payment card networks have implemented processes to identify the source of an incident as precisely as possible.

Legal counsel should be involved in all discussions with PFI investigators and related investigations. An organization may want to consult outside counsel with expertise in this area to determine how it wishes to manage not only the PFI investigation, but its interactions with card brands, the management of its own parallel IT forensics investigation, and the preservation of privilege. This is a complex, high stakes area and the strategic management of privilege issues will be of significant benefit to the organization.

PUBLIC COMPANY RISK DISCLOSURE

Reporting issuers are required to disclose risks in a number of disclosure documents mandated by securities laws, including in prospectuses and in continuous disclosure documents such as annual information forms. For instance, the instructions to Form 51-102F1 (Management's Discussion & Analysis) include a discussion of risks that have affected the financial statements or are reasonably likely to affect them in the future, and risks and uncertainties that the issuer believes will materially affect its future performance.

The CSA issued its 2016 Notice updating its previous notice on the same topic, CSA Staff Notice 11-326 Cyber Security (the “2013 Notice”) for reporting issuers, registrants and regulated entities. As the CSA acknowledges, since the 2013 Notice was published, the cybersecurity landscape has evolved considerably, as cyber attacks have become more frequent, complex and costly. Citing two recent studies, the CSA noted in its 2016 Notice that:

- **In 2015, 38% more cybersecurity incidents were detected than in 2014;**
- **The average total cost of a data incident for the companies participating in the studies stood at USD\$4 million.**

In the 2016 Notice, the CSA first provides a summary of its recent initiatives to monitor and address cyber security risks in order to improve overall resilience in our markets. For example, noting the failure of many issuers to fully disclose their exposure to cyber risks, the 2016 Notice states that CSA members intend to re-examine the disclosure of some of the larger issuers in the coming months and, where appropriate, will contact issuers to get a better understanding of their assessment of the materiality of cyber security risks and cyber attacks. The CSA also notes current initiatives on enhancing cross-border information sharing among regulators related to cybersecurity. **The 2016 Notice also provides links and references** to a number of particularly helpful cybersecurity resources that have been published by various financial services regulatory authorities and standard-setting bodies in an effort to improve the preparedness of market participants to deal with cyber incidents. Such resources include:

- **IIROC Cybersecurity Best Practices Guide¹⁴**
- **IIROC Cyber Incident Management Planning Guide¹⁵**
- **Securities and Exchange Commission (SEC) Division of Corporation Finance Disclosure Guidance¹⁶**
- **The National Institute for Standards and Technology (NIST) Cybersecurity Framework¹⁷**
- **The Office of the Superintendent of Financial Institutions (OSFI) Cyber Security Self-Assessment Guidance¹⁸**

14 Available at < http://www.iiroc.ca/industry/Documents/CybersecurityBestPracticesGuide_en.pdf >

15 Available at < http://www.iiroc.ca/industry/Documents/CyberIncidentManagementPlanningGuide_en.pdf >

16 “CF Disclosure Guidance: Topic No. 2 – Cybersecurity”, Division of Corporation Finance, Securities and Exchange Commission, October 13, 2011, at < <http://www.sec.gov/divisions/corpfin/guidance/cfguidancetopic2.htm> >

17 Available at < <http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214.pdf> >

18 Available at < <http://www.osfi-bsif.gc.ca/eng/fi-if/in-ai/pages/cbrsk.aspx> >

As noted above, the SEC has provided similar guidance related to cybersecurity risk disclosure. While risk factor disclosure is entity specific, in its CF Disclosure Guidance: Topic No. 2 – Cybersecurity, the SEC noted that, depending on an issuer’s specific facts and circumstances and the level of materiality, cybersecurity risk factor disclosure include the following: (i) aspects of the registrant’s business or operations that give rise to material cybersecurity risks and the potential costs and consequences; (ii) To the extent that functions that have material cybersecurity risks are outsourced, a description of those functions and how those risks are addressed by the issuer; (iii) a description of cyber incidents experienced by the issuer that are individually, or in the aggregate, material, including a description of the costs and other consequences; (iv) risks related to cyber incidents that may remain undetected for an extended period; and (v) any relevant insurance coverage.¹⁹ In its guidance, the SEC noted that while entity-specific disclosure should be provided, securities laws do not require disclosure that would result in compromising the issuer’s security. Rather, the aim is to provide sufficient disclosure to allow investors to appreciate the nature of the risks faced by the issuer without compromising its security.

In addition, issuers may need to disclose known or actual cyber incidents, to provide context and investors and costs and other consequences in order to allow investors to appreciate the nature of the risks. As well, if a cybersecurity incident constitutes a material change, a press release will need to be disseminated and filed and a material change report will need be filed.

INSURANCE COVERAGE

Does the organization have cybersecurity risk insurance? If so, is the incident covered and to what extent? Agreements and policies will need to be reviewed to make these determinations. As well, insurance agreements generally have a requirement that the insured promptly notify the insurer of a suspected incident – organizations will want to make sure they know when such an obligation is triggered, how long they have to report, and what information is required.

Once the above is complete, the insurer should be notified, but only once counsel has been involved and approved.

¹⁹ “CF Disclosure Guidance: Topic No. 2 – Cybersecurity”, Division of Corporation Finance, Securities and Exchange Commission, October 13, 2011, at < <http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm> >

INDEMNIFICATION AND/OR RESPONSIBILITY OF THIRD PARTIES OR EMPLOYEES

Where a third party (such as an IT service provider) is implicated in a loss of data, relevant agreements should be reviewed for indemnification clauses and any notification or informational requirements therein.

Once the above assessment is complete, the third party service provider should be notified if appropriate, but only once counsel has been involved and approved.

Employee liability and/or responsibility may also be in issue. A review should be conducted to determine if corporate policies were followed or if laws were violated. Appropriate actions should be taken. If the organization has a unionized environment, labour considerations may also be in play.

5. Law Enforcement

Law enforcement may become involved. Such involvement can occur in two ways, either by law enforcement approaching the organization with a request for information or by the organization itself approaching law enforcement with a request that law enforcement get involved.

Organizations should be aware of disclosure restrictions, especially regarding personal information. If approached by law enforcement, an organization should be aware that it is only entitled to disclose personal information to law enforcement without the consent of the affected individual where it is required to do so pursuant to a warrant or summons, or as otherwise authorized by law. Whether or when an organization may disclose personal information requested by law enforcement, but not required by law, is a complex and evolving area given Supreme Court jurisprudence in this area.

CRIMINAL CODE OFFENCES



Identity theft and identity fraud (ss. 402.2 and 403)

Identity theft is the possession and trafficking of information about **another person's identity** where the information will be used in certain listed crimes of deceit (forgery, fraud etc.). Identity fraud involves **impersonating another person** for the gain of the impersonator or to the detriment of the victim.

Unauthorized use of a computer (s. 342.1)

It is an offence to fraudulently access a computer or data storage system **belonging to someone else** to download information or intercept private communications (e.g. a disgruntled former employee hacking into an organization's IT system).

Mischief to data (s. 430(1.1))

This offence criminalizes the **unauthorized use of data that renders it less useful to its proper owner**. Note that *theft* of confidential information is not caught by this offence and is difficult to place under any other existing *Criminal Code* offence because the Supreme Court of Canada has held that confidential information was not "property".

Unlawful interception of private communication (s. 184)

Intercepting or accessing a private communication is unlawful where the individuals have a **reasonable expectation of privacy**.

Terrorism (ss. 83.01-83.21)

Large-scale hacking that is designed to endanger the lives and safety of the public, or to disrupt an essential service, for a political, religious or ideological purpose may fall under this provision. It is an offence to participate in, facilitate, or instruct others to carry out this hacking activity.

Law enforcement may also be involved because the organization has concluded it is the victim of a criminal offence (see sidebar).

Once law enforcement is involved, they may request that breach notifications and other disclosures be delayed in order to preserve the integrity of their investigation, or they may otherwise prohibit the release of certain information. This may conflict with the organization's existing statutory or contractual obligations and, accordingly, legal counsel should be involved in all discussions with law enforcement.

6. Consumer/Customer Response

One of the most significant stakeholder groups in a data incident is an organization's customers. Canadian consumers have high expectations that not only will they be promptly notified about a data incident but that organizations will take immediate, clear steps to protect consumers (or allow consumers to take steps to protect themselves). The gap between what organizations do, and what consumers expect them to do, creates an area of risk.

Among other things, organizations should consider establishing a call centre to address consumer concerns. In addition, consumers often expect organizations involved in significant data incidents involving payment cards or identifying information to offer credit monitoring and/or identity theft monitoring.

A well thought-out and robust customer response can, in addition to helping retain customers and preserve brand value, have a significant impact on potential class actions fees and damages.²⁰

20 See, for instance, *Lozanski v The Home Depot, Inc.*, 2016 ONSC 5447 (CanLII), <http://canlii.ca/t/gt65j>, where Perell J. observed that a Defendant's incident response may well be a key factor driving the consideration of the abandonment, discontinuance or settlement of a class action: "The case for Home Depot being culpable was speculative at the outset and ultimately the case was proven to be very weak... After the data breach was discovered, there was no cover up, and Home Depot responded as a good corporate citizen to remedy the data breach. There is no reason to think that it needed or was deserving of behaviour modification. Home Depot's voluntarily-offered package of benefits to its customers is superior to the package of benefits achieved in the class actions... By the time the actions against Home Depot came to be settled, there were no demonstrated or demonstrable losses by the Class Members and the Representative Plaintiffs were not even members of the settlement class. Unless one wishes to play pretend, Home Depot was the successful party in resisting a pleaded claim of \$500 million." (at paras. 100-101).

CALL CENTRES

In the case of most large data breaches, a decision will be made to activate a call centre (as opposed to dealing with customers using internal resources on an ad hoc basis). The sooner a call centre is up and running, the sooner an organization can begin managing the message, limiting reputational risk and litigation risk.

CALL CENTRE CONSIDERATIONS

- Can the service provider ensure the organization will be assigned a unique toll-free number for its customers?
- Will the number be truly toll-free and work in all affected jurisdictions?
- Can the service provider offer this service on a 24/7 basis?
- How long does the organization anticipate the call centre will remain active?
If that isn't known, can the activation period be open-ended?
- Is enrollment for protection products straightforward and easy to understand? Organizations will need to think about how to qualify callers for these products; in most cases, companies will want to have a low (or no) threshold to avoid further customer dissatisfaction.
- Does the service provider have sample scripts and FAQs that can be customized by an organization?
- Does the service provider have proficiency in both French and English?
Other languages?
- All materials should be reviewed by the legal department to ensure consistency of message and language. How quickly can the legal department review and approve these scripts and FAQs?
- Does the service provider have a straightforward process for customers to enroll for protection products?
- Does the organization have final say on all scripts? Or will the service provider insert its own language, and possibly use the opportunity to pitch to customers?
- Is there escalation to a fraud resolution specialist where appropriate?

-
- Can the service provider provide tracking and reporting services?
Organizations will need this information to monitor the progress of their data incident resolution efforts. Things like daily call volume, type of calls, speed of answer and other metrics should be considered.
-

PROTECTION PRODUCTS

There are typically two main types of protection products that are offered: credit protection and identity theft protection. Credit protection involves no-cost credit monitoring for customers and alerts customers if there is activity or something new on a customer's credit report. Identity theft protection involves monitoring driver's licence, social insurance number and other foundational identity documents and online activity to see if any personal information is being bought or sold online, and monitoring court records and other markers of possible identity fraud.

These protection products may not be required in all cases. An organization affected by a data incident will need to consider carefully what products it will offer and, if it decides not to offer certain products, understand that the decision will come under significant scrutiny, particularly if it later emerges that such protection may have been warranted. The provision of such services also assists in mitigating possible damage, which will be a factor in any subsequent litigation.

Note that there are significant differences in the protection products that are available in the United States versus Canada. Where a data incident affects both jurisdictions, companies should expect to receive inquiries as to why better/longer/more complete services are being offered in one jurisdiction as opposed to another. These inquiries can be reduced if the nature of the products being provided is not detailed in public statements, but rather such statements mention only the fact of such products being made available.

COMPENSATION

In some cases, fraud protection or identity theft monitoring may not be appropriate or feasible. In other cases, consumer goodwill may be at stake. In such circumstances, an organization may want to consider compensation. Ideally, this will have been explored well in advance of any data incident, and an organization will have a clear understanding of the form of such compensation, its distribution, the amount, and so on (e.g. \$10 gift cards to all consumers who present evidence of a purchase between qualifying dates).

ABOUT MCCARTHY TÉTRAULT'S CYBERSECURITY, PRIVACY AND DATA MANAGEMENT GROUP

Data incidents at major retailers, government departments and financial services organizations should serve as a clear warning to all organizations doing business in Canada that collect, use and/or disclose personal information. Consumers actively expect that these entities should take market-leading steps to protect personal and financial data.

Increasingly, good information management practices go beyond matters of privacy. Malicious hacks (from outside and from within) and ransomware demands have targeted intellectual property, trade secrets and other critical business information with noticeable impacts on share prices, director and Board longevity, and industry competitiveness. Clients need support from counsel who can marry legislative compliance and the application of industry codes of conduct and privacy policies in various jurisdictions with a practical knowledge of commercial and technology outcomes - all in a manner that will help a client preserve privilege.

Cybersecurity, protection of business information and data, and strategic management of the production and/or retention of information are all significant aspects of our practice. Our privacy and data management lawyers offer perspective on all aspects of information management, storage and transfer. Mitigating risk for clients is always our first priority and we have helped clients manage the entire lifecycle of data, including providing guidance to companies looking to prepare for and prevent a critical data incident. When crisis occurs, we draw from a team of leading class action litigators and subject matter specialists who have responded to some of the highest profile data incidents in North America and are involved in many of the key cybersecurity initiatives (both private and public) in Canada.

For more information please contact:



TORONTO

Kirsten Thompson
416-601-7797
kthompson@mccarthy.ca



Barry Sookman
416-601-7949
bsookman@mccarthy.ca



MONTRÉAL

Charles Morgan
514-397-4230
cmorgan@mccarthy.ca

