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Data Protection 'Big Data' Presents New Privacy Risks, Enforcement Challenges for Regulators

by Donald G. Aplin

MEXICO CITY—So-called “big data,” the large, and getting larger, data sets prized by researchers and marketers that reveal trends in the aggregate that would not appear from looking at single data entries, is here to stay, and data protection authorities must rise to its privacy challenges, panelists at the 33rd International Conference of Data Protection and Privacy Commissioners said Nov. 2.

Opening the plenary session, Kenneth Neil Cukier, Tokyo correspondent for *The Economist*, said that 2000 marked the true start of the electronic information age because that was the year digital information reached the acceptance threshold of 25 percent of all stored information.

Since then, the amount of digitized information has outstripped data stored in analog form and now accounts for some 75 percent of all stored information, and the total amount of stored information now doubles approximately every three years, he said.

Opening the conference, President Commissioner Jacqueline Peschard of the Mexican data protection authority also focused on the headlong rush of information technology to new formats and systems, like mobile devices and cloud computing, saying that “the spiral of innovation is unstoppable.”

Cukier said that attempting to enforce traditional data protection laws in the big data landscape is extremely difficult at best. Cukier even went as far as to say that “in a world of big data, privacy may be less important than ethics, propensity, and free will.”

But Richard Thomas of the Centre for Information Policy Leadership at Hunton & Williams LLP, and the former U.K. Information Commissioner, did not appear willing to cede too much ground, saying “DPAs are the policemen of big data.”

DPAs Suggest Changes to Address Big Data Privacy

As the session moderator, Thomas asked DPA officials on the panel what one thing they can do to try to gain some privacy control over big data.

New Zealand Privacy Commissioner Marie Shroff suggested that DPAs need to more fully move to a risk-based analysis of big data uses. Traditional privacy regulation focused too much on the negative and should probably move to a more positive approach when addressing big data, she added.

Joel Reidenberg, of the Center on Law and Information Policy at Fordham University School of Law, said that focusing on systemic risks makes sense when trying to regulate big data privacy issues.

Jacob Kohnstamm, chairman of the Dutch DPA and chairman of the European Union's Article 29 Working Party, took a harder line, saying that while big data may present new challenges of scale, aggregation of information, and speed, DPAs should not abandon the basic principles of data protection, such as the need for an independent privacy impact assessment before using personal data.

DPAs should focus on enforcement, he said. "DPAs should primarily use the stick, not the carrot and stick," when addressing big data.

Shroff agreed, saying that "we still have to have sharp teeth and claws" when it comes to big data.

German Federal Commissioner for Data Protection and Freedom of Information Peter Schaar said that while big data may require DPAs to change their focus to consider broader definitions of personal information that must be protected, they should not retreat from basic privacy principles.

Privacy-by-design and data collection minimization become even more important in the context of big data, he said.

David C. Vladeck, director of the Bureau of Consumer Protection of the Federal Trade Commission, said big data is not really a new concept, it has just become bigger. He added, however, that "increasingly the big data at issue is personal data that are hard to anonymize."

Vladeck noted the increasing importance of technologists to the compliance and enforcement efforts of privacy regulators, predicting that the profile of technologists will continue to rise as big data use expands.

User consent to the use of personal data and data minimization: possible in the age of big data? Gus Hosien, the policy director at advocacy group and think tank Privacy International, called big data a "ruse," arguing that companies would like nothing more than for DPAs to soften their approach to privacy compliance.

Stakeholders Weigh in on Big Data

Microsoft Corp. Chief Privacy Strategist Peter Cullen posited that user consent to the use of personal data and data minimization may no longer be realistically possible in the age of big data.

He added, however, that companies should be held accountable for “unacceptable uses” of personal data, whether traditional or big data.

Christian Pardieu, European privacy officer for GE, said that even companies have some fear that big data concepts are being launched in labs and put into use without the input of legal and policy staff.

Echoing Vladeck’s note on the rise in the importance to privacy regulators of technologists, Maria Carolina Pardo, a partner at Baker & McKenzie Colombia S.A., suggested that regulators invest in research into how big data actually works. DPAs cannot effectively regulate and enforce privacy in a big data environment unless they understand it, she said.

Pardo also said DPAs should invest heavily in public education efforts regarding big data. Consumers have a hard time understanding how their personal information is being used now and big data makes the problem much harder, she said.