ENFORCEMENT MODELS

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Defining Data Protection and Privacy

• Almost everyone uses the terms interchangeably
• There are broad and narrow privacy definitions
• European law defines them differently
  – Privacy is related to individual autonomy and protection of family life
  – Data protection is a broader fundamental right to assure data is not used in a manner that negatively impacts other fundamental rights
• The difference becomes meaningful when gets beyond uses where individual consent is fully effective
Data Policy Management Is Complicated

• Data protection is a fundamental right – not absolute
  – Needs to be balanced against other rights and interests

• Compliance is different from other compliance areas
  – More subjective
  – Few checklists
  – Requires organizations to be responsible and answerable
    • To whom?

• Organisations need to take guidance from the law and agencies, and

• Translate that guidance into policies, practices, and internal monitoring
What Does This Mean For Enforcement

• It must be subtle
• Consistent
• Forward looking
• Play different roles at different times
  – Teacher
  – Encourager
  – Enforcer
Those Roles Play Out In Different Legal Systems

• **Common law** – enforce based on what is not allowed by law
  – Generally one is allowed to collect and process data unless prohibited
  – Examples:
    • United States
    • British Commonwealth and former members

• **Civil law** – enforce based on what is permitted by law
  – Generally one is permitted to collect and process data where allowed
    • Germany
    • France
    • Spain
    • Latin America

• **Statutory law**
  – Inspired by both a civil and common law tradition
    • Canada is the example
    • Bridges the difference between U.S. and Europe
Enforcement Types

• Dedicated – agency only has data protection
  – France, Italy, Spain

• Information Commissioner – privacy and government transparency
  – United Kingdom, Mexico, British Columbia

• Consumer protection
  – United States

• Distributed to industry regulators
  – United States
  – Japan
Dedicated Agency

- Only enforces privacy law and norms
- May enforce against both public and private sector
- Independent of government
  - How independent?
Information Commissioner

• Two tasks
  – Assure government transparency
  – Protect privacy
  – British Columbia adds the third task of regulating lobbyists

• Structure
  – Two different teams each led by a senior staff person
  – Commissioner(s) spend time on both functions

• Two tasks tend to meld together with right leadership
Consumer Protection Agency

- Consumer protection is the agency mandate
  - Privacy is seen as an extension of consumer interests
- United States Federal Trade Commission best example
- Privacy enforced as an important interest
  - but not as a fundamental right
- Some sector specific privacy laws
  - Credit reporting
  - Financial services privacy
- Other enforcement tool is “unfair and deceptive practices”
Industry Regulators

• Two approaches:
  – Industry sector specific laws
    • United States
      – Credit reporting
      – Video rental
      – Telecommunications privacy
      – Department of Transportation has responsibility for privacy enforcement in the airline industry
  – Many agencies enforce one law
    • Japan best example
      – More than 30 agencies enforce one law
      – A company in more than one industry would see more than one regulatory approach
      – Japan revising its law creating a new privacy agency
Enforcement Tools and Powers

• Tools
  – Investigate complaints
    • Most investigate all complaints
    • May be selective
  – Investigate a company or agency without a complaint
  – Audit a company or industry
  – Research a topic
  – Suggest best practices

• Powers
  – Request a change in behavior
  – Embarrass a company or agency
  – File suit against a non-compliant company or agency
  – Levy a fine against a non-compliant company or agency based on statutory authority
Key Issues

- Focus – is privacy of paramount importance?
- Resources – does the agency have the money to oversee the entities under its jurisdiction?
- Knowledge – does the agency understand information technologies and risks to individuals from the processing of information technologies?
- Authority – is there the power to get industry attention
- Independence – particularly important if agency is a check on government misuse of information?