Legitimate Interests Project

Problem Statement

Today’s digital society is dependent on data pertaining to individuals being used beyond their understanding and/or reasonable expectations. There is also a growing agreement that consent is not fully effective in governing this data and data use. Many national laws include limited exemptions for processing when consent is unavailable, while others, notably European law, provide legal justification based on the legitimate interests of an organisation when they are not overridden by the interests of individuals. However, exemptions are both limited and dated, and legitimate interests require a balancing procedure that has yet to be developed. Moreover, neither exemptions nor legitimate interests as currently practiced fill the gap between the processing that is taking place and the processing that with legal certainty may take place.

IAF intends to convene research and collaboration to address this vacuum between what is needed and what is currently available and accepted; more specifically, IAF intends to undertake to define the balancing process that addresses the current gap. That assessment process to achieve balance must be developed in a fashion that honestly recognizes the full range of societal and personal issues that are at work when data is processed and must be demonstrable in a fashion that guards against paternalism.

Overview

The legitimate interests project includes four distinct subprojects plus an opportunistic communications plan that links to all four subprojects. Funders may support the project as a whole or one or more of the subprojects. The four subprojects are:

1. Developing a Canadian assessment process for data used beyond individuals’ expectations;
2. Developing and socializing a legal basis for legitimate interests in Colombia;
3. Creating and socializing a legitimate interests assessment process in Europe that meets the balancing test required by the GDPR and regulator expectations of what is legal, fair and just;
4. Establishing a connection between legitimate interests assessments and unfairness assessments for purposes of interoperability between the United States and Europe.
Subproject Descriptions

Canada
The IAF in partnership with AccessPrivacy will develop a Canadian specific assessment process for big data and other processing that is not fully governed by consent. The partners will work with an industry group to customize the IAF ethical big data assessment beginning in April 2016. The IAF has also applied to the Office of the Privacy Commissioner of Canada for funding for a multi-stakeholder evaluation process to be completed in 2016.

Colombia
Colombia’s data protection law requires consent for all processing of personal data with very limited exceptions. This legal provision has been an impediment to data driven innovation. The Colombian Superintendent of Industry and Commerce will urge the Colombian Congress to amend the law to reflect current concerns. Among the suggested provisions will be a section on legitimate interests. IAF will provide guidance to the policy discussion on legitimate interests and trustworthy assessments to assure processing pursuant to legitimate interests is legal fair and just. The Latin American partners of Baker McKenzie will provide logistical support and legal expertise to the subproject.

Europe
The EU GDPR will go into effect in Spring 2018. The regulation still requires the appropriate legal basis for any processing that is taking place. However, where it is not fully effective, consent no longer will be able to be stretched to governing processing, and legitimate interests as a basis for processing will now be valid in the entire European community. A model assessment process will be needed to inform the debate on how legitimate interests will be implemented. The balancing process used in the ethical big data assessment framework is the logical starting point for the development of the balancing process in the legitimate interests model assessment. This development will require European participation and European partners. The target will be an assessment process that may be socialized throughout 2017 and that may culminate in an event at the 2017 International Conference of Data Protection and Privacy Commissioners most likely to be held in Brussels with the EDPS as the host.

United States
Privacy in the United States is enforced most often based on the Federal Trade Commission Act which prohibits unfair and deceptive practices. The FTC has a test for determining whether a practice is unfair. The FTC has often required organisations under consent decrees to create accountable privacy programs that include an assessment of the risks to consumers created by data processing. The orders do not discuss how such assessments should be conducted. However, senior FTC staff has said that organizations should take note of how the FTC conducts an unfairness test. IAF
sees great similarity between an unfairness assessment and a legitimate interests assessment, and sees room for the similarities of the tests to facilitate interoperability. IAF will seek partners to explore this concept in the United States, beginning with the Conference Board Chief Privacy Officers Council.