

Automated Processing/Artificial Intelligence Disclosures

Quebec's Private Sector Privacy Law Amendments THE ACT

Section 12.1

Introduction

On September 22, 2021, Quebec passed [An Act to modernize legislative provisions as regards the protection of personal information](#) (2021, c. 25) ("the Act") updating public and private sector privacy laws. The provisions of the Act come into force over a period of 3 years.

This document was created by leading Canadian privacy experts working with national and regional industry associations. We believe a harmonized approach to privacy law across Canadian jurisdictions is important so that the rules are understandable for individuals and enterprises. Interpretations of privacy laws should be pragmatic, reasonable and focus on the privacy outcomes for individuals and practical implementation for enterprises. With this in mind, we have created what we think is appropriate guidance for interpreting some of the more challenging provisions of the Act.

This document can be shared and used by enterprises. This is not legal advice; it is suggested best practices for entities wishing to work pragmatically on their compliance with the Act before any additional guidance from the *Commission d'accès à l'information* (the "CAI") or regulations are made available. We encourage enterprises to monitor developments in CAI and government guidance on these and other topics related to the Act.

Automated Processing / Artificial Intelligence Disclosures

When an organization makes a decision based exclusively on the automated processing of personal information, there is a new disclosure obligation intended to promote transparency in the use of automated decision systems, such as artificial intelligence (AI) and machine learning. It is reasonable to focus on decisions that can have a **material, direct or significant impact** on an individual. This disclosure requirement does not grant the individual the right to object to being the subject of a decision made exclusively by automated processing.

Industry best practice

Organizations should consider providing additional information as part of their normal notice as **best practice** to improve overall transparency when using automated processing generally, and especially when it can have direct impacts on individuals.

This upfront notice should include:

- A clear explanation of the decision being made using automated processing

- E.g., In an automated loan application process, the consumer should be informed that they could be approved or denied a loan based on the use of automated processing of data used to determine loan eligibility.
- Categories of information or sources of data that are being used to make the decision
 - E.g., In the same loan application scenario, the individual should be advised that the machine learning-enabled platform may analyze bank statements, pay stubs, tax documents, mortgage forms, invoices, credit score, etc. to determine loan eligibility and the consumer's ability to pay back the loan being requested.
- How an individual can request additional information or submit observations
 - E.g., Clear instructions should be provided to the individual as to how they can contact the organization to ask questions or provide feedback into the automated process being used.

Below is a detailed breakdown of the new requirements along with recommended guidance:

a) Using automated processing to render a decision

The obligation to inform applies when a decision is based exclusively on the use of automated processing of personal information. Until further guidance is provided by the CAI, if you answer “yes” to each of the following questions, then you have an obligation to inform.

- Is the process automated?
 - while automated processing can be interpreted quite broadly, focus on more advanced technologies, such as artificial intelligence and machine learning
- Are you using personal information?
 - the disclosure obligation extends to the use of personal information in automated processing, but does not apply to the processing of anonymous, or aggregate information
- Is the decision made exclusively using automated processing?
 - by exclusively, there should be **no human intervention** before the automated processing is applied
 - focus on decisions that can have a **material, direct or significant impact** on an individual, e.g.
 - granting or refusing access to a product or service based on an assessment of an individual's financial or medical situation

- but not simply routing a call or marketing a new service

b) Basic obligation to inform:

Once you confirm that your decision affecting an individual is made exclusively using automated processing, there is a new obligation to inform the individual.

- How and what to inform
 - informing can take place through various means and organizations can take a multi-layered approach, as appropriate (e.g. general information in a privacy policy, terms and conditions, website, FAQs, and more specific information on forms or in other direct communications like a “just in time” notice or pop up)
 - organizations should be upfront and as transparent as possible using plain language
 - the more impactful the decision, the greater the need for explanations of automated processing to be direct and prominent to help the individual understand an automated process is used to render the decision
- When to inform
 - organizations have some flexibility of when to inform individuals, so long as they do so no later than when they inform the individual of the decision itself

c) Obligation to explain upon request

If an individual asks, an organization has an additional obligation to provide information about automated decision-making. Note that this legal obligation requires organizations to provide to requesters a broader scope of information than is required under the basic obligation to inform individuals affected by automated decision-making. Where requested, an organization should explain the following:

- the personal information used to render the decision
 - organizations will need to keep good records to meet this obligation
 - generally, organizations should provide the **types** of personal information used (e.g. health information, financial history, behavioural information, browsing habits)
 - they should also include information about the **nature** of the personal information used (e.g. whether it is personal information of the specific individual or belonging to many individuals to train their automated processing algorithms)

- the more impactful the decision, the more granular the response should be (e.g. credit information, health claim information or medical history, browsing habits from 3rd party sites, Stats Canada postal code information)
- the reasons, and principal factors that led to the decision
 - the explanation needs to be sufficient to allow the individual to understand how it was arrived at, and what were the main contributing factors to the decision
 - at times it may be straight forward, e.g.
 - *In a scenario where a marketer is using a contextual advertising solution based on supervised machine learning to classify content based on images, video, text, speech could result in bias. For example, a set of data that identifies violence might contain too many images of people of a certain race which could then lead to assumptions on the audience and impact the marketing message used.*
 - other times it will be more complicated, e.g.
 - *in a car lease scenario, AI that operates on applicant-provided information combined with a service provider's use of survey data and Stats Canada household income in a neighbourhood increases the down payment required predicting the applicant was in a lower income bracket and higher risk*
 - however, organizations are not required to disclose commercial proprietary information (i.e. trade secrets or “secret sauce”); in such cases, organizations will need to explain the principal factors or parameters.
- their right to correct the personal information used to render the decision, if necessary
 - the types of personal information or actual personal information used needs to be clear enough so the individual knows whether the personal information is accurate or not, and the impact it may have on the decision

d) Obligation to listen

Organizations must give individuals the opportunity to submit observations to a member of their personnel who is able to review the decision.

- submitting observations
 - organizations need to be open to hearing from individuals who have been impacted by their automated processing

- while an organization need not necessarily change their automated processing, they should consider documenting the feedback, and explain or justify the outcome of their review
- member of the organization who can review the decision
 - organizations can begin by relying on existing customer complaint procedures, including privacy complaints, as these processes typically include experienced personnel who can review decisions or escalate to others within the organization as needed