Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

October 10, 2007

The Honourable Stockwell Day
Minister of Public Safety
Care of Customer Name and Address Information Consultation
Public Safety Canada
16C, 269 Laurier Avenue West
Ottawa, Ontario
K1A OP8

Dear Minister:

RE: 2007 Lawful Access ("Customer Name and Address Information") Consultations

Further to your invitation for public comment, I welcome the opportunity to join other Canadian Information and Privacy Commissioners and Ombudsmen in making submissions regarding the customer name and address information ("CNA") consultations.

As you may be aware, our office was involved in the lawful access consultations that took place in 2002 and 2005. In our submissions of December 10, 2002, and April 21, 2005, we urged the Government of Canada to ensure that any new powers were justifiable, proportionate, and subject to strong oversight. While the lawful access proposal currently under discussion has a narrower focus than the earlier proposals, it is equally important that legislators not needlessly undermine the right to personal privacy, nor underestimate the sensitivity of much of the information involved. In this regard I applaud your widely reported September 13th commitment not to compel Internet Service Providers to provide the state with customer information in the absence of a warrant. However, this raises a critical question – why wouldn't all other individuals, such as telecommunications customers, enjoy equal protection under the law?

In this context, it is vital to recall that the core tenet of privacy is the ability of the individual to control the use and dissemination of their own personal information. We know that CNA information is personal information and that all individual customers have the legal right to insist that, subject to narrowly defined exceptions, their CNA information remain private and confidential. The fact that telephone customers often choose to participate in 411 listing services does not displace any other individual's right to choose privacy over accessibility, and to have that choice respected.

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To their credit, communications service providers generally strive to comply with their legal duty to protect the privacy of their customers' personal information and to exercise appropriate discretion in considering whether to disclose personal information to third parties, including law enforcement officials. Of course, service providers must also comply with warrants issued by the courts.

Having reviewed all the information provided by the Government of Canada to date, I am not convinced of the need for additional powers. The law currently provides for warrant procedures, expedited tele-warrants, and the special exercise of discretion to disclose personal information by organizations without an individual's consent, for example in exigent circumstances. Public Safety Canada has not provided any information to substantiate the claim that efforts to locate next-of-kin in emergency situations have been significantly or routinely frustrated. Nor has the department made a compelling case for a new power to *unilaterally* compel disclosure in the "early stages" of investigations. In any case, if there are gaps in the law, they ought to be addressed within the context of judicial warrant procedures. Granting law enforcement and intelligence officials the power to issue their own administrative "warrants" represents a substantial departure from the legal and constitutional framework in Canada, which is accompanied by the appropriate checks and balances. Such a departure would require extraordinary justification, and a substantial framework for accountability.

We acknowledge that the safeguards discussed in the consultation materials attempt to frame a discussion regarding transparency and accountability. Nonetheless, it is our strong view that this preliminary list of safeguards is inadequate to redeem an approach to CNA information that derogates from constitutional norms. Administrative "warrant" schemes that may be appropriate in the regulatory context are not appropriate for law enforcement and intelligence purposes.

If, at a later time, a case for additional powers is made out, it is our view that any new *judicial* warrant power should be confined to:

> Clearly defined statutory purposes rather than the expansive language of "duties and functions"; and
>
> Circumstances where the authorities can demonstrate to a judge that the particular information sought is relevant to a specific investigation of an offence or is relevant and necessary to the fulfillment of a specific duty.

It is also our view that any new power must be accompanied by a statutory duty to provide notice to the affected individual(s) within specific timeframes.

Within this context, we believe that there must be detailed, written, record-keeping requirements to provide the necessary accountability and support for the requisite audit and review functions.

.../3

In this regard, we continue to believe that it is critical that Parliament and the public learn of the ongoing and cumulative impact of personal electronic communication surveillance and access powers. We note, for example, that the current wiretap reporting practices of provincial and federal Attorneys General vary considerably despite longstanding reporting requirements mandated under the Criminal Code of Canada. Assessing the impact of surveillance or access powers on the privacy rights and civil liberties of the general population requires much more extensive public reporting. In the absence of a focused harmonizing and coordinating authority, privacy rights and civil liberties will continue to suffer from fragmented and inconsistent protections.

Accordingly, we renew our call for the creation of an independent, arm's-length Surveillance and Access Review Agency (SARA), mandated to supervise access to personal communication information and to report annually to Parliament on the use of surveillance and access powers. The Commissioner of such an agency should be an independent Officer of Parliament nominated by an all-party committee of the House of Commons and appointed by the Governor-in-Council, with sufficient security of tenure to ensure independence and sufficient powers and resources to carry out the mandate of the Office to ensure the desired transparency and accountability. For more information about the functions and duties of SARA, I attach our April 21, 2005 letter to the then Minister of Justice, Irwin Cotler.

Conclusion

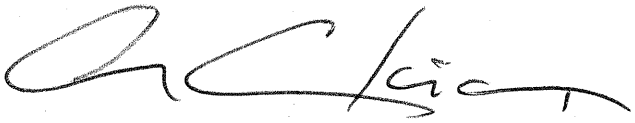
Lawful access powers designed for preventative and prosecutorial investigations raise special concerns requiring rigorous oversight and review. These concerns are multiplied in the context of police demands for new powers related to CNA information tied to digital communications. Linking the identity associated with digital devices, as well as IP addresses, to real people presents a number of complexities. Digital identities are often unstable, vulnerable to misuse by third parties, and can be associated with membership in a community rather than simply denote individual use. Risks associated with erroneous linkage by law enforcement and security officials are very significant for individual privacy, reputation and liberty. Due diligence, including that provided by judicial warrant procedures, is necessary to protect the legal rights and interests of all Canadians.

In my view, neither the current law, nor the latest proposals provide for sufficiently robust or dynamic privacy protections. New technologies continue to appear, surveillance and access capacities continue to grow, placing privacy rights increasingly at risk. Governments have a duty to be mindful that, in the absence of adequate safeguards today, the privacy rights of Canadians will be harmed by function creep tomorrow as new tools and new powers are put to new uses. Any proposal to significantly expand surveillance and access powers without providing for a corresponding increase in independent oversight has not and, in my view, cannot be justified. If there are gaps in the law, they ought to be addressed within the context of judicial warrant procedures and supplemented by the establishment of an independent, arm's-length Surveillance and Access Review Agency.

.../4

In closing, I thank you for your recent efforts to involve the public in stakeholder consultations. In order to advance the public debate around these critical issues, I will be posting this letter on our website. If I can be of any further assistance, please do not hesitate to contact my office.

Sincerely yours,



Ann Cavoukian, Ph.D.
Commissioner

Enclosure