



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

June 3, 2014

Mr. Mike Bernier, MLA
Chair, Special Committee to Review the
Personal Information Protection Act
Parliament Buildings
Victoria, BC V8V 1X4

Dear Chair:

I am writing as a follow-up to my presentation to the Special Committee to Review the *Personal Information Protection Act* (“PIPA”) on May 28, 2014, to provide responses to three questions posed by a member of the Committee.

1. Has my Office communicated with government with respect to implementation of the recommendations made by the last Special Committee in 2008?

I did not write specifically to government regarding the 2008 recommendations of the Committee. As you may recall, I was appointed as Information and Privacy Commissioner in July 2010. I did write to then Minister of Labour, Citizens’ Services and Open Government, Honourable Stephanie Cadieux, on June 7, 2011, in relation to the Committee’s recommendation regarding mandatory breach notification. I asked government to give very serious consideration to mandatory breach notification under PIPA. As you know, implementation of mandatory breach notification would require an amendment to PIPA that would require organizations to report privacy breaches and mitigate risk to British Columbians when there is a loss of, unauthorized access or disclosure of personal information where there is a real risk of significant harm.

In a joint resolution in October 2013, Commissioners and Ombudspersons responsible for access and privacy across Canada called on governments to modernize access and privacy laws, including establishing when and how individuals should be notified when their personal information has been lost, stolen or improperly accessed.

2. How does Bill S-4, the Digital Privacy Act (introduced in the Senate on April 8, 2013) interact with the *Personal Information Protection Act*?

Substantially similar status

Bill S-4 would amend the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”). This federal privacy law applies in provinces that do not have a private sector privacy law that has been declared substantially similar. It also applies to federal works, undertakings or businesses such as banks, telecommunication companies and airlines no matter where they operate.

PIPA has been declared substantially similar to the federal law and therefore PIPA applies to private sector organizations that collect, use and disclose the personal information of British Columbians.

Because PIPA must be substantially similar to PIPEDA in order to apply in BC, significant amendments made to PIPEDA must be made to PIPA. Bill S-4 would, among other things, implement mandatory breach notification. The need to preserve PIPA’s substantially similar status is an important consideration for the Committee.

Disclosure without consent for investigations

I would also note that Bill S-4, which is presently before the Senate Committee for Transport and Communications, contains language that would amend PIPEDA to add provisions permitting disclosures of personal information without knowledge or consent. The relevant proposal states that an organization may make such a disclosure to “another organization” for an investigation when it is:

reasonable for the purposes of investigating a breach of an agreement or a contravention of the laws of Canada or a province that has been, is being or is about to be committed and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation.

The similar provision in PIPA, section 18(1)(c), permits the disclosure of personal information without consent for investigations and proceedings if:

it is reasonable to expect that the disclosure with the consent of the individual would compromise an investigation or proceeding and the disclosure is reasonable for purposes related to an investigation or a proceeding

The proposal in Bill S-4 has been the focus of some concern and sheds light on privacy issues in relation to the analogous provision in PIPA. Given the extent

that personal information is available to some organizations in today's digital world, there may be unintended consequences in providing authorization for personal information-sharing between organizations under such broad conditions. Even the Canadian Bar Association – which recommended¹ this proposal in the last PIPEDA review – has appeared before the Senate Committee and said that the proposal is too broad.²

You may recall that I discussed section 18(1)(j) in PIPA in my submission to the Committee. It permits disclosure without consent to public bodies or a law enforcement agency in Canada for investigative purposes. Because of the need for transparency and accountability, I indicated that the breadth of section 18(1)(j) should be examined by the Committee and transparency should be built-in. The same principles apply to section s. 18(1)(c) – sections 18(1)(c) and 18(1)(j) are the only sections which permit disclosure without consent for the purposes of investigations and the same principles apply.

I will be making specific recommendations to the Committee in the Fall about narrowing both sections 18(1)(c) and (j) as well as adding transparency requirements.

3. How does Bill C-13, the Protecting Canadians from Online Crime Act (introduced in the House of Commons on November 20, 2013) interact with the *Personal Information Protection Act*?

The member also referenced Bill C-13, the *Protecting Canadians from Online Crime Act*. While Bill S-4 would amend PIPEDA, Bill C-13 would amend the *Criminal Code*. The proposed amendments in Bill C-13 are relevant to the above discussion because, among other things, they would create immunity for organizations who voluntarily – without a warrant or court order – preserve or disclose data or documents to a peace or public officer. This undermines the regulatory framework of PIPA and PIPEDA.

Together with my counterparts in Alberta and Ontario, I have written to the Standing Committee on Justice and Human Rights to express our concerns that no Privacy Commissioners have appeared before the Committee to speak to the privacy issues, including the immunity issues, raised by Bill C-13. Please find attached a copy of the letter for your reference.

I hope this response is helpful to the Committee. I commit to providing updates to the Committee regarding the status of Bills S-4 and C-13 as they proceed

¹ <http://www.cba.org/cba/submissions/pdf/08-06-eng.pdf>.

² <http://senparlvu.parl.gc.ca/Guide.aspx?viewmode=4&categoryid=-1&eventid=9523&Language=E>.

through Parliament. If I can be of further assistance, I would be pleased to provide the Committee with additional information regarding these or other matters as it moves forward with its review.

Sincerely,

ORIGINAL SIGNED BY

Elizabeth Denham
Information and Privacy Commissioner
for British Columbia

Encl. (1)



Office of the Information and
Privacy Commissioner of Alberta



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
for British Columbia

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June 2, 2014

Mike Wallace, MP
Chair, Standing Committee on Justice and Human Rights
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6

Dear Mr. Wallace,

We are writing to you as independent regulators and oversight agencies responsible for protecting the privacy rights of more than 20 million citizens in our respective jurisdictions. We are deeply concerned that Bill C-13, the cyberbullying and “lawful access” Bill, will pass Committee stage without hearing from the Privacy Commissioner of Canada, the Commissioner’s staff, or any other Privacy Commissioner in this country.

Bill C-13 will have far-reaching implications for all citizens in the years to come. It is imperative that the privacy risks it raises be articulated and thoroughly examined on behalf of all Canadians.

Some of our concerns about Bill C-13 relate to amendments to the *Criminal Code* that would increase the investigative powers of law enforcement, often on low suspicion-based thresholds, including:

- Data preservation and demand orders;
- New production orders to trace a specified communication;
- New warrants and production orders for transmission data and tracking;
- Enhancing efficiencies in relation to authorizations, warrants and orders.

We also believe that Bill C-13 will entrench and possibly encourage the expansion of warrantless disclosure of private sector data to law enforcement by providing broad immunity for such practices.

You may recall that similar provisions were proposed in 2012 in Bill C-30, the so-called lawful access legislation. Bill C-30 was vigorously opposed by many Canadians and civil society groups, and was also a cause of great concern to Privacy Commissioners across Canada. Ultimately, the Bill was withdrawn. The law enforcement provisions of Bill C-13 revive most of those in Bill C-30, again raising serious concern for many Canadians.

What we have seen time and time again from this government is the suggestion that surveillance powers need to be modernized. Unfortunately, what the government doesn't appreciate is that transparency and accountability must also be modernized, and featured prominently.

We are alarmed that these issues will not be articulated or presented to Parliamentarians for examination in the absence of a Privacy Commissioner of Canada. Representation from independent, expert privacy regulators is imperative for the Committee's study of this Bill, as is the participation of legal experts, academics, and civil society groups.

Given the heightened and pressing interest in Bill C-13, we urge the Committee to postpone hearings on Bill C-13 until such a time as the Privacy Commissioner of Canada can appear and speak to this Bill. If the Committee is of the view that such a delay is not practicable, we are prepared to give evidence in our capacity as provincial Commissioners in a manner and at a time convenient to the Committee.

In the interests of transparency, we will be making this letter a matter of public record.

Sincerely,



Dr. Ann Cavoukian
Information and Privacy Commissioner for Ontario



Jill Clayton
Information and Privacy Commissioner for Alberta



Elizabeth Denham
Information and Privacy Commissioner for British Columbia

pc. Members of the Standing Committee on Justice and Human Rights
pc. Jean-François Page, Committee Clerk