



AUG 07 2014

The Honourable Clyde K. Wells, QC  
Chair, ATIPPA Review Committee  
83 Thorburn Road, Suite C  
St. John's, NL A1B 3M2

Dear Mr. Wells:

First and foremost, I would like to congratulate you and your fellow committee members, Jennifer Stoddart and Doug Letto, on your appointment to the Independent Statutory Review Committee tasked with undertaking a comprehensive review of the *Access to Information and Protection of Privacy Act* (ATIPPA). I am pleased to take part in the public consultation process and bring forth some of my observations on current privacy challenges.

My colleague, Ed Ring, the Information and Privacy Commissioner for Newfoundland and Labrador, has shared his expertise with you in his detailed submission. He and his office have the in-depth knowledge that comes from many years of working closely with the ATIPPA, and provided you with relevant feedback and specific suggestions on both privacy and access issues. I will therefore keep my comments to a more general nature on the need to ensure that privacy rights are respected in the face of the significant technological and operational changes that we now confront.

Advances in computing power and storage, the massive expansion in the scale and availability of personal information, the streamlining of government services and the growth of government information sharing networks have a major impact on how governments and economies around the world function. While these changes present great potential benefits for society, they also carry increased risks to individuals' personal information.

Canada's privacy legislation, whether at the federal or provincial/territorial levels, owes much to the Organisation for Economic Co-operation and Development's (OECD) Guidelines Governing the Protection of Privacy and Transborder Flows of Data (Guidelines). These Guidelines, which came into force in 1980, were the first internationally agreed-upon set of core privacy principles. The Guidelines were a response to the two interrelated trends mentioned above: a recognition of the importance of information in the global economy; and emerging concerns about the possible impact on the rights of individuals resulting from the automated processing of personal information made possible by computing technology.

.../2

The Guidelines clearly enunciated some key principles, namely, purpose specification, and collection and use limitation. Now, as before, these principles are crucial in guiding policy and legislative work. However, in and of themselves, they may not be enough to adequately protect privacy in the 21<sup>st</sup> century.

The OECD completed a review of its Privacy Guidelines in 2013 and, among other things, expanded on the concept of accountability in privacy protection, emphasizing the need for organizations to have mature, functioning privacy programs in place. They also counsel member countries to implement mandatory breach notification. The revised Guidelines are in my view a step forward in privacy protection. They are also indicative of the need for stronger legal privacy frameworks.

This need for reform was echoed by my predecessor, along with her provincial and territorial counterparts, when they issued a resolution in October 2013, calling on Canadian governments to modernize access and privacy laws for the 21<sup>st</sup> century. The Commissioners made a number of suggestions designed to strengthen these laws, noting that Canada needs to re-establish its position as a leader in both the access and privacy fields. A copy of this resolution is attached for reference.

It is therefore in this context that I would like to extend my support to the recommendations made by my colleague Ed Ring in his submission, notably with respect to providing the Commissioner with the explicit power to investigate a privacy complaint and issue a report of findings and recommendations, as well as with providing the Commissioner with the power to conduct audits of public bodies' performance in relation to complying with ATIPPA. Members of the public, whether at the federal, provincial or territorial levels, need privacy commissioners with oversight powers sufficiently robust to ensure compliance with privacy rights and obligations.

Also, and consistent with my Office's historical position regarding the broadening of grounds for which an application for Court review may be made under section 41 of the *Privacy Act*, I am supportive of the recommendation that the Commissioner be able to appeal to the Trial Division public bodies' decisions or failures to implement the Commissioner's recommendations respecting compliance with the privacy provisions in Part IV of ATIPPA. This would provide courts with the jurisdiction to issue compliance orders and therefore create a more solid privacy enforcement model.

.../3

-3-

Equally consistent with the current practice at the federal level is the recommendation to require public bodies to complete a privacy impact assessment for ministerial approval prior to implementing a new program or policy. The experience of my Office in this respect shows that privacy impact assessments are a valuable tool in fostering a greater institutional privacy culture and in consolidating internal accountability frameworks.

Furthermore, in our data hungry environment, privacy breaches are a frequent occurrence – with potentially devastating consequences for affected individuals. Many jurisdictions already have mandatory breach notification provisions. This year, the federal government issued policy guidance requiring federal government departments to notify my Office (and the Treasury Board Secretariat) of material breaches (as well as affected individuals in certain cases). A similar requirement would, in my view, benefit the citizens of Newfoundland and Labrador by enhancing accountability and transparency, and helping to mitigate the fallout of a privacy breach.

As a final thought, I would like to draw your attention to the fact that, in the context of expanding demands and fewer resources, governments are exploring new information sharing networks as a way to increase efficiencies. In this respect, any move towards increased information sharing within and across governments would, at a minimum, require that stronger controls are in place or implemented to prevent data breaches and that all governmental departments and agencies implement effective privacy management frameworks to address the risks arising from such sharing.

Thank you for the opportunity to present my views on some ways to better address current privacy challenges, and I look forward to reading your final report and recommendations.

Sincerely,



Section 30

Daniel Therrien  
Privacy Commissioner of Canada

Encl.

c.c.: Mr. Edward P. Ring, Information and Privacy Commissioner of Newfoundland and Labrador

## Office of the Privacy Commissioner of Canada

---

### News

## Modernizing Access and Privacy Laws for the 21<sup>st</sup> Century

### Resolution of Canada's Information and Privacy Commissioners and Ombudspersons

October 9, 2013

#### CONTEXT

Canadians have come to expect greater accountability and transparency on the part of both governments and private-sector organizations with respect to how they gather, create, share, disclose and manage information, including personal information.

There have been many changes in technology, changes to government practices (such as public-private partnerships, outsourcing or shared services models), and Canadians' expectations over the years. Recent revelations about government surveillance programs have heightened Canadians' concerns about the erosion of their privacy rights and have prompted calls for increased transparency and greater oversight of national security initiatives.

Most Canadian access and privacy laws have not been fundamentally changed to keep up with these changes and to improve protections and rights since their passage, some more than 20 years ago. Only a few Canadian laws have recently been passed or updated to address modern challenges and to ensure continued protection of individuals' rights to access and privacy.

At the same time, other laws have been amended or passed that have had the result of undermining or eroding access and privacy rights – the very rights access and privacy laws were intended to protect and guarantee.

Elsewhere in the world, privacy and access laws are being strengthened to meet the realities of the 21st Century – more powerful information and communication technologies, the challenge of managing electronic information and the social and political demands of engaged citizens. Canada's laws need to do the same.

#### WHEREAS

Information is one of Canada's most important national resources.

Robust protection of privacy and access to information are defining values for Canadians and underpin our democratic rights and freedoms.

Canadians need to be able to hold public institutions and private organizations to account for their privacy practices, their access decisions and their information management.

Canada must re-establish its position as a leader in both the access and privacy fields.

#### THEREFORE

1) Canada's Information and Privacy Commissioners and Ombudspersons call on our respective governments to recommit to the fundamental democratic values underpinning access and personal privacy legislation by:

- Consulting with the public, civil society and Information and Privacy Commissioners and Ombudspersons on how best to modernize access and privacy legislation in light of modern information technologies, evolving government practices and citizens' expectations.
- Modernizing and strengthening these laws in keeping with more current and progressive legislation in parts of Canada and around the world, including some or all of the following:

**In terms of access to information:**

- a. Providing strong monitoring and enforcement powers such as the ability to issue binding orders for disclosure, and penalties for non-compliance;
- b. Broadening and clarifying which public entities are covered by access laws;
- c. Creating a legislated duty requiring all public entities to document matters related to deliberations, actions and decisions;
- d. Legislating strict and enforceable timelines for public entities to respond to access requests in a timely fashion;
- e. For exemptions where the expectation of harm is in issue, limiting which records are exempt from the general right of access by requiring public entities to prove there is a real and significant harm in their disclosure;
- f. Requiring all records, including exempt records, be disclosed if it is clearly in the public interest to do so;
- g. Establishing minimum standards for proactive disclosure, including identifying classes or categories of records that public entities must proactively make available to the public and, in keeping with the goals of Open Data, make them available in a usable format;
- h. Requiring that any exemptions and exclusions to access that are to be included in laws other than access to information laws be demonstrably necessary and that government consult with Information and Privacy Commissioners and Ombudspersons; and
- i. Establishing a requirement that for any new systems that are created, public entities create them with access in mind, thus making exporting data possible and easier.

**In terms of privacy:**

- a. Providing strong monitoring and enforcement powers and penalties for non-compliance;
- b. Broadening and clarifying which public entities are covered by privacy laws;
- c. Establishing legislative requirements for notifying affected individuals when their personal information has been lost, stolen, destroyed, or improperly accessed, used or disclosed (mandatory breach notification);
- d. Requiring public and private entities to improve the information they provide about their personal information policies and practices;
- e. Legislating a "necessity test" requiring public and private entities to demonstrate the need for the personal information they collect;
- f. Providing individuals with effective means to assert their privacy rights and to challenge entities' compliance with their legislated obligations;
- g. Strengthening reporting requirements to the public with respect to the disclosure of personal information between private and public entities;
- h. Legislating a requirement that public and private entities implement privacy management programs to ensure the protection of personal information; and
- i. Establishing a requirement that for any new legislation, service, program or policy, public entities consider and plan for privacy implications at the outset (for example, privacy impact assessments, privacy by design).

2) Canada's Information and Privacy Commissioners and Ombudspersons commit to

- Engaging and following up with government, Legislature and Parliament on the issues set out above;
- Continuing to study and make public how access and privacy laws impact all Canadians; and
- Making recommendations to government, Legislature and Parliament based on our areas of expertise.

## List of signatories

Jennifer Stoddart,  
Privacy Commissioner of Canada

Suzanne Legault,  
Information Commissioner of Canada

Elizabeth Denham,  
Information and Privacy Commissioner for British Columbia

Jill Clayton,  
Information and Privacy Commissioner of Alberta

Mel Holley,  
Acting Ombudsman for Manitoba

Anne E. Bertrand,  
Access to Information and Privacy Commissioner of New Brunswick

Ed Ring,  
Information and Privacy Commissioner for Newfoundland and Labrador

Elaine Keenan Bengts,  
Information and Privacy Commissioner for the Northwest Territories and  
Information and Privacy Commissioner for Nunavut

Dulcie McCallum,  
Freedom of Information and Protection of Privacy Review Officer (Commissioner) for the Province of Nova  
Scotia

Ann Cavoukian,  
Information and Privacy Commissioner of Ontario

Maria C. MacDonald,  
Information and Privacy Commissioner of Prince Edward Island

Me Jean Chartier,  
President, Commission d'accès à l'information du Québec

R. Gary Dickson,  
Information and Privacy Commissioner of Saskatchewan

Diane McLeod-McKay,  
Ombudsman and Information and Privacy Commissioner of Yukon

---

Date Modified: 2013-10-09