

April 15, 2011

George VanderBurg, MLA
#127 Legislature Building
10800 97 Avenue NW
Edmonton, AB T5K 2B6

Re: Bill 8: The Missing Persons Act

Dear Mr. VanderBurg:

The Canadian Wireless Telecommunications Association (CWTA) is the authority on wireless issues, developments and trends in Canada. It represents wireless service providers, as well as companies that develop and produce products and services for the industry.

CWTA appreciates the opportunity to provide comments on Bill 8 - the Missing Persons Act, now before the Alberta legislature. While CWTA remains supportive of safety and security investigations by law enforcement agencies, CWTA would like to register several comments with respect to Bill 8.

This submission only offers CWTA's general comments on Bill 8, and should not be construed as CWTA's recognition of the Government of Alberta's jurisdiction to regulate in the sphere of telecommunications services, which CWTA respectfully maintains is solely under federal jurisdiction.

Justification

In bringing forward this legislation, CWTA notes that the Province has not brought forward any evidence of cases where the types of personal data that wireless carriers would be required to provide under the Bill, was not available. To this end, CWTA notes that existing statutes, and existing corporate practices, already ensure that such data is made available to law enforcement agencies in cases of missing persons. For example, in cases of imminent danger to life, Alberta's private sector privacy legislation, *the Personal Information Protection Act* (PIPA) already allows for voluntary disclosure without consent where a reasonable person would consider that the disclosure is clearly in the interests of the individual, and consent cannot be obtained in a timely way (s. 20(a) of PIPA). Similar provisions exist in the federal private sector privacy legislation, the *Protection of Personal Information and Electronic Documents Act* (PIPEDA).

Moreover, PIPA also contains an exception that allows disclosure without consent where necessary to respond to an emergency that threatens the life, health or security of an individual or the public. (s. 20(g)).

In summary, CWTA respectfully submits that the Province has not sufficiently made the case that incremental powers to compel production of records are required, or that consequently seeking new powers in Bill 8 is demonstrably necessary.

Test for Access

CWTA considers the tests for access to subscriber records in Bill 8 is overly open-ended. In order to obtain an order from a justice of the peace for records (s. 3), the justice of the peace (JP) need only be satisfied that the information is required to investigate the whereabouts of a missing person. There is no "reasonable grounds" test, which is more typical for warrants and orders. All that is required is a belief that the Telecommunication Service Provider (TSP) may have information relevant to a missing persons case.

In other words, if an officer surmises that the missing person might have a wireless phone, that would be sufficient to obtain the order in question. CWTA respectfully submits that absent a more rigorous test for access, Bill 8 could generate indiscriminate "fishing expeditions" on the part of law enforcement agencies, which could place a heavy financial and resource burden on telecommunications service providers (TSPs), as it is likely that orders for access to wireless records would become a standard part of the investigative procedure for any case where missing persons were not immediately locatable by law enforcement.

Accordingly CWTA recommends that Bill 8 be amended to include a specific exclusion for any cases not classified solely as "missing persons cases" at the time the order is issued. Absent such an exclusion, Bill 8 would effectively lower the bar for obtaining access to suspect records in any or all investigations, criminal or otherwise.

CWTA notes that there is a 'reasonable grounds' test for a warrantless demand for data in s. 4, relating to imminent bodily harm or death. However, if the demand is not complied with, a JP can order such production - based only on the lower threshold test of the officer requiring the order in aid of investigating the whereabouts of a missing person (see s. 5(2)). At a minimum, CWTA submits that the test for the justice of the peace should be the same as for the officer in the first instance.

As noted, absent a 'reasonable grounds' test, TSPs could be compelled to divulge personal information for anyone being sought by police, for any reason, with or without a warrant.

Safeguards

CWTA is also concerned that there are no safeguards in Bill 8 to help ensure that the subscriber information production requirements will be used appropriately – i.e., only in cases where a person is reported missing by a family member or other acquaintance.

In this regard, CWTA respectfully submits that Alberta should consider including in Bill 8 some of the safeguards contained in proposed federal legislation Bill C-52, dealing with lawful access (as introduced in the House of Commons on November 1, 2010). For example, in C-52 the following is required:

1. The requesting officer must provide identifying information (badge number, agency, etc) and state that the request is being made in exceptional circumstances;
2. The officer must have reasonable grounds to believe that the info requested must be immediately necessary to prevent an unlawful act/serious injury etc;

3. The officer must report the request to a designated official in the force, establishing the basis for the request, and the designated person must confirm with the TSP in writing that the request was made in exceptional circumstances;
4. A record must be kept of the request and the grounds for it;
5. Internal audits of police and national security agencies are required to ensure compliance with the subscriber information sections of the bill; with non-compliance being escalated to the Minister;
6. The Privacy Commissioner may also conduct such audits.

CWTA considers these to be minimal safeguards necessary to ensure that the application of the statute remains consistent with its intent.

With respect to the last criteria concerning audits, CWTA notes that the Privacy Commissioner of Canada has noted that after-the-fact audits and checks are poor substitutes for *ex ante* controls that prevent improper collection and use of personal information in the first place. CWTA submits that audits are an important part of privacy safeguards around lawful access issues, but should not be the sole safeguard.

Privacy

CWTA has significant concerns about the scope and depth of the information that may be ordered disclosed by TSPs under Bill 8. This list of data sought goes beyond similar legislation contemplated under the federal Bill C-52 referenced above, including both tower and GPS location data. As noted the Bill sets a very low bar for access to these types of sensitive information. To this end, the proposed legislation constitutes the first time that Canadian TSPs would be compelled to surrender their customers' personal information where no evidence of a crime exists. One can imagine a situation where a TSP, under the proposed Alberta legislation, would be compelled to disclose information that allowed an abusive spouse to track down their partner who has voluntarily gone "missing" to protect him/herself from harm.

Compensation

Under proposed federal Bill C-52, as per previous iterations of federal lawful access legislation, TSPs would be compensated for providing subscriber information - whether the information is produced pursuant to a warrant or an "emergency" request. CWTA submits that there is a strong likelihood of numerous "missing person" cases that do not result in harm or death pursued by Alberta law enforcement agencies (LEAs) upon enactment of Bill 8. Canadian TSPs already respond to over one million requests annually from Canadian LEAs for information to assist in investigations. Accordingly, CWTA is seeking assurances within Bill 8 that TSPs will be appropriately compensated for assistance they provide to LEAs, especially considering that in many of the instances contemplated in the legislation, there may in fact be no crime involved, or no persons that have truly gone missing, whatsoever.

Technical and Reporting Standards

Telecommunications equipment manufacturers rarely (for reasons of scale) design network equipment specifically for the Canadian market – let alone a provincial market. Therefore the proposed legislation should only require TSPs to provide information to LEAs that they already collect for business purposes, and that they are able to provide using their existing technological infrastructure.

CWTA notes that different TSPs have different practices with respect to what types of data are archived, and for how long. Moreover, numerous variables beyond the control of the TSP will have an impact on whether certain types of data – such as GPS coordinates—are available at all. For example, someone with a non-GPS equipped handset, or someone out of line-of-sight of GPS satellites, will obviously not be locatable via GPS data.

Furthermore, the level of detail in the information that TSPs would be compelled to provide should not exceed the level of detail required under current (and/or pending) federal ‘lawful access’ statutes.

Finally, CWTA submits that TSPs should not be required to provide the same types of information to different LEAs, in different formats. If carriers were required to provide, for example, customer name and address information to the Calgary Police in a different format than the Edmonton Police, this would greatly add to the complexity and cost of compliance.

Conclusion

CWTA is concerned about the general privacy implications to Canadian wireless subscribers, given the low threshold for obtaining an order for production of data under Bill 8, as well as the lack of safeguards to ensure that this power is not misused or used indiscriminately by Alberta law enforcement agencies.

Moreover CWTA notes that Bill 8 offers no compensation for TSPs for complying with potential numerous orders – particularly in cases where the person in question turns out not to be missing, and/or in cases where no crime has been or was about to be committed. It is essential that the potential costs to TSP’s be minimized by limiting the use of the order power in the first instance. CWTA is equally concerned about the technical and reporting standards that would result from complying with this legislation.

CWTA appreciates the opportunity to provide this submission further to the legislature’s consideration of Bill 8.

We would be pleased to engage in further dialogue with you, your colleagues in the legislature, and officials at Alberta Justice as this process moves forward.

Sincerely,



Bernard Lord
President & CEO

c.c:

Hugh MacDonald, MLA (Lib – Edmonton - Gold Bar) Official Opposition Critic

Rob Anderson, MLA (WA – Airdrie – Chestermere), Wild Rose Alliance Critic

Franklin J. Work, Commissioner, Office of the Information and Privacy Commissioner of Alberta

Rick Hanson, President, Alberta Association of Chiefs of Police

Kelly Hillier, Director, Legislative Initiatives, Alberta Justice