



January 15, 2007

Richard Simpson
Director General, Industry Canada, Electronic Commerce Branch
Industry Canada
300 Slater Street
Ottawa, Ontario
K1A 0C8

Dear Mr. Simpson

Please find attached our submission in response to the Consultation on the implementation of the Government response to the Fourth Report of the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI), Statutory Review of PIPEDA as published in the Canada Gazette (Vol. 141, No. 43 — October 27, 2007).

Sincerely,

A handwritten signature in black ink, appearing to read 'J. D. Farnes', written in a cursive style.

J. David Farnes
Vice President
Industry and Regulatory Affairs

The CWTA is pleased to provide comments in response to the consultation on the implementation of the Government response to the Fourth Report (herein “the Report”) of the House of Commons Standing Committee on Access to Information, Privacy and Ethics (ETHI), Statutory review of the *Personal Information and Protection of Electronic Documents Act (PIPEDA)*.

The CWTA agrees with the Government and with many of the other submissions that PIPEDA is working well for Canadians and Canadian businesses, and that no major changes are required to the legislation at this time. However, we would like to use this opportunity to focus on a few areas. Specifically:

- The CWTA supports the government’s proposals to define business contact information, and the measures to address consent;
- The CWTA does not support a legislative amendment to introduce a mandatory data breach notification obligation at this time. If however, legislation is needed, the CWTA encourages a short and succinct amendment that incorporates the Privacy Commissioner’s data breach guidelines
- The CWTA recommends the Government ensure any proposed changes are not at odds with the progress made in consultations on Canada’s lawful access regime.

This response focuses only on those recommendations of the Report of relevance to the wireless industry. Lack of comment on other recommendations should not necessarily be interpreted to mean agreement.

Business Contact Information (Recommendation 1)

The CWTA supports the recommendation to define business contact information to include fax and email coordinates. Current interpretations by the Office of the Privacy Commissioner (OPC) have deemed some business contact information (specifically business email addresses) to be personal information. This seems an overly restrictive interpretation when an employee’s name, title, business address, and business phone number are not considered to be personal information, and when many first business contacts take place using email.

The CWTA further supports the proposal that the definition of business information in PIPEDA be aligned with that used in other provincial legislation, such as Alberta’s *Personal Information Protection Act (PIPA)*. Many of our members operate nationally and legislative harmonisation would provide increased business certainty and ease of operations.

Consent: General Principles (Recommendation 4)

The CWTA agrees with the Government of Canada that the flexible approach in PIPEDA which allows firms to decide on the appropriate form of consent it needs given the circumstances. In addition, the Privacy Commissioner has already released a large body of interpretative material and formal findings that enable businesses to make informed decisions about what type of consent is needed for different types of transactions.

Designation of Investigative Bodies (Recommendation 6)

The CWTA shares the concern of other stakeholders that the current process for designating investigative bodies under PIPEDA requires costly registration arrangements for independent investigative bodies. The majority of firms in the wireless telecommunications industry are small and medium sized enterprises – for example independent dealers. The current lengthy designation process makes it very difficult – if not impossible - for smaller organisations to share investigative information. This significantly hampers the prevention and detection of fraud, including identity fraud.

The CWTA is pleased to see the government is willing to examine how best to streamline and harmonise investigate body designation, and urges the government to consider moving to a arrangement similar to that found in the BC PIPA and Alberta PIPA. This would remove the unnecessary bureaucracy associated with the establishment and monitoring of investigative bodies, and enable Canadian organisations to appropriately address fraud and other illegal activities by allowing organizations to collect, use and disclose personal information without consent for such purposes.

Public Interest Exemptions (Recommendation 11)

The CWTA appreciates the government's intent to clarify exemptions to PIPEDA's consent provisions in the specific cases of individual, family or public interest and simply wishes to caution the government to ensure that efforts to implement recommendation 11 are not at odds with the ongoing consultations to amend Canada's lawful access regime.

The CWTA and our members have for several years participated in consultations with Public Safety Canada over proposed changes to Canada's lawful access regime. As we noted recently in our response to the *Consultation on Customer Name and Address Information*, our strong preference is to have mandatory disclosure of customer name and address information only under warrant, except in very limited exigent circumstances. Indeed, this was the public position taken by this government in statements made by the Minister of Public Safety, the

Honourable Stockwell Day,¹ that he would seek mandatory disclosure of Canadians' personal information without a warrant. As such, we agree with the Government that any contemplated amendments should be very specific so that businesses and law enforcement agencies alike are clear on what information can be disclosed without the consent of their customers. This will also assist carriers in managing the significant costs of a potential increase in the scope and number of requests.

Law enforcement/ National Security (Recommendation 12)

The CWTA's reading of this section of PIPEDA is that Section 7(3)(c. 1) "permits" disclosure, without consent, of personal information to any government institution or part thereof that identifies its "lawful authority" to receive the information, for the purposes of: national security, international affairs, defence of Canada, enforcement or investigation of any law, and intelligence gathering or administration of any law, whether provincial or federal. While this provision is very broad, it is clearly discretionary and should remain that way.

The CWTA believes that to the extent additional clarification is required regarding what is meant by "lawful authority" in section 7(3) (c.1), guidelines issued by the OPC that meet the needs of law enforcement agencies and the private sector would be the most appropriate way to better define how organizations can exercise their discretion.

The CWTA also suggests that the lawful authority of the government to obtain confidential information should be harmonized across the legislation providing the Government these rights. In particular, PIPEDA and the CRTC's rules on confidentiality (Telecom Decision CRTC 2003-33) should provide for consistent rules regarding lawful authority.

Data Breach Notification (Recommendation 23, 24 and 25)

The CWTA suggests that rather than introducing mandatory data breach notification provisions, the government study the progress of the data breach guidelines developed by the Privacy Commissioner of Canada. The guidelines were developed through a consultation process with various stakeholders and result in a workable solution to this complex issue. They have already been adopted by many Canadian firms, and endorsed by the New Zealand Privacy Commissioner as a good model for breach notification, and as such serve as an industry-wide standard – such as the government recommends is needed in recommendation 25.

While we understand that the Privacy Commissioner has publicly stated that the guidelines are an "interim" measure, we believe that taking the time to assess

¹ National Post, October 25, 2007.

their impact and collect evidence on their use would greatly assist in building a body of knowledge on how best to handle breaches; knowledge that could greatly inform and improve any future legislation the government deems necessary.

We agree with the government that the individual organisation, not the OPC, is best positioned to determine the level of notification needed in the event of a data breach. However, the OPC could play a valuable role in gathering information on breaches. CWTA agrees with the recommendation, made by the Canadian Chamber of Commerce, that the Privacy Commissioner establish a database of data breach circumstances and gather evidence on how well firms report major breaches before embarking on legislation.

If however the government does decide to proceed with legislation at this time, the CWTA believes a short, clear and succinct legislative provision that requires organizations to promptly notify affected persons where a “a high risk of significant harm to individuals or organizations” exists would be most effective. The CWTA understands that there are many details that would need to be clarified to ensure individuals are properly notified. As raised by Industry Canada in its presentation entitled “Data Breach Notification Model for PIPEDA” CWTA believes details like timing of responses, reporting forms and formats, and definitions of risk should be addressed in the guidelines issued by the Privacy Commissioner.

Given the complexity of data breaches, a high-level legislative provision would effectively achieve the government’s goal of ensuring firms notify affected person, while staying in keeping with PIPEDA, which is not a prescriptive statute, and which relies on guidelines and guidance from the Privacy Commissioner. The use of guidelines is also often preferred by small businesses and SMEs, as these are easier to understand, and to find, than legislation or regulation.

Other Issues– Increased flexibility for the Privacy Commissioner

PIPEDA requires the Privacy Commissioner to investigate every complaint regardless of the circumstances, including when the Commissioner can tell from the outset that the complaint is not a serious one. As such, the CWTA believes, the OPC should be given the discretionary authority not to investigate a complaint that is not in the public interest.

The CWTA notes that, in keeping with the Government’s goal to assist in harmonising privacy legislation across Canada, the Alberta PIPA and BC PIPA and the Quebec privacy law have various provisions that allow their Privacy Commissioners certain discretion not to investigate requests that they deem to be frivolous, or an abuse of the law, or to be outside the object of the law.

Such discretion would allow the OPC to focus its time and resources on the many pressing privacy issues that affect Canadians, meaning greater emphasis could be placed on resolving simple complaints faster.

Conclusion

The CWTA believes that PIPEDA is working well and no major legislative changes are needed. The CWTA supports the government's proposals to define business contact information and to keep a flexible regime for consent within PIPEDA. However, the CWTA is concerned with the proposal to legislate data breach notification without enough evidence whether Canadian organizations are in fact failing in their obligations to safeguard personal information and their duty to notify, and before additional efforts are made to further promote the voluntary breach guidelines and their implementation. The CWTA is also concerned that the proposed changes to recommendations 11 and 12 adequately consider the ongoing lawful access consultations. Businesses need sufficient clarity in what information may be disclosed to law enforcement without consent of their customers, and any definitional changes should be narrow enough to achieve such clarity.