



Office of the Information
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Lawful Access Consultation
Criminal Law Policy Section
5th Floor, 284 Wellington Street
Ottawa, Ontario
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Attention: Justice Minister Martin Cauchon

Dear Minister Cauchon:

Re: Lawful Access Consultation

The Department of Justice, with the Portfolio of the Solicitor General of Canada and Industry Canada, has invited comments on proposals to amend the *Criminal Code* and other federal Acts that regulate access to telecommunications for law enforcement purposes. These proposals are designed partly to allow Canada to ratify the European Convention on Cybercrime (the “Convention”).

I agree in principle that law enforcement organizations must get effective access capabilities to new communication technologies, for both domestic and international law enforcement. Canadian-based Internet service providers (ISPs) should be required to have the technical capability to afford lawful intercept capability to an internet-based communication.

I have these comments on privacy for your consideration.

Buried Privacy Issues

The proposals in the consultation paper are like loose threads, that, if tugged on, unravel and reveal many underlying questions about privacy that are buried in the larger issues. For instance: should it be lawful to open an e-mail account in Canada without a client providing basic customer information for each e-mail address? What are the appropriate kinds of personal information that could be collected by Canadian ISPs? What degree of anonymity on-line would be permissible under the proposed amendments? Would anonymous re-mailing of e-mail within Canada remain lawful? Would encrypted e-mail be permitted within Canadian borders, and if so, on what terms?

I encourage you to make sure that these basic and critical questions are put to Canadians directly within the consultation process.

General vs. Specific Measures

The Convention states that the parties to it must ensure that they implement the Convention in a manner that respects domestic human rights and liberties.

The consultation paper presents both general and specific measures to create lawful access to Internet communications. Interceptions and seizures of Internet communications, both content and traffic data, should be as narrow and specific as possible. Routine and exploratory electronic surveillance on a large scale must not be allowed. Overbroad measures would impair privacy rights and run afoul of section 1 of the *Charter of Rights and Freedoms*.

Treat Internet e-mail as a communication in which senders and receivers have a reasonable expectation of privacy under the *Canadian Charter of Rights and Freedoms*

The consultation paper raises the key issue of whether an e-mail should be considered a private communication under the *Criminal Code*. In 1993, the Supreme Court of Canada in *R. v. Plant* unanimously held:

...section 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choice of the individual [at para 20]

An e-mail, which can contain text, sound and graphics files, is a rich source of intimate personal information about the sender, and, potentially, the recipient. The Alberta courts have affirmed that the recipient of the content of an internet e-mail enjoys a Charter-based reasonable expectation of privacy in that communication: *R. v. Weir*, [1998] A.J. No. 155, affirmed [2001] A.J. No. 869 (Ab.C.A.). In *Weir*, the header of an e-mail was likened to address information on the outside of a mailed envelope, and was held to carry a lower expectation of privacy than the information inside. In *R. v. Weir*, the issue of how much lower the expectation of privacy is in an e-mail header was left unanswered.

Data Retention and Preservation

Many people have multiple e-mail accounts, both at home and at work. It is not uncommon for people to terminate e-mail accounts and create new ones with new ISPs that offer a better deal. Having considered the logistics of a creating and maintaining a comprehensive national database of current e-mail customer

account information, I think it is an unworkable idea that would drain resources better used elsewhere.

I urge you not to draft provisions that would require ISPs to retain all traffic data and content for a specific period solely the purposes of a hypothetical law enforcement action. Such measures would be overbroad and could seriously harm Canadian privacy, and the business of Canadian-based ISPs. Canadians could flee to ISPs based outside of Canada to preserve their privacy, and seriously damage the industry that underpins domestic electronic commerce.

Yours truly,

Frank J. Work, Q.C.
Information and Privacy Commissioner