Customer Name and Address Consultation
Public Safety Canada
16C, 269 Laurier Avenue West
Ottawa, ON, Canada K1A 0P8

October 19, 2007

Dear Sir/Madam,

Re: CUSTOMER NAME AND ADDRESS CONSULTATION

1. In response to your invitation for comments on “updating Canada’s lawful access provisions as they relate to law enforcement and national security officials’ need to gain access to CNA [Customer Name and Address] information in the course of their duties”, please accept these comments and the attached article as our submission.

2. The government’s Consultation Document on CNA proposes a number of law reform initiatives similar to those embodied in the 2005 Bill C-74, The Modernization of Investigative Techniques Act. It was in light of Bill C-74 that the attached article, entitled The Medium and the Message: Personal Privacy and the Forced Marriage of Police and Telecommunications Providers, was written. In the article, we describe the changing role of telecommunications service providers (TSPs) from trusted gatekeepers of clients’ privacy to active partners in the fight against cybercrime. We argue that the legislative approach proposed in Bill C-74 will lower the threshold of privacy protection and significantly alter the relationship between TSPs and the individuals who have come to depend on them to manage their personal information and private communications. We believe this article is pertinent to the current consultations on CNA information, and have attached it here for your consideration.

3. We must begin by expressing concern about the course that the current round of consultations on access to CNA has taken. The closed-door consultation initially commenced by Public Safety Canada, along with Industry Canada, excluded many interested stakeholders that the government needs to hear from if the consultation process

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2 Bill C-74 died with the dissolution of the Liberal government. An identical bill was later introduced by Liberal M.P. Marlene Jennings as a private member’s bill (Bill C-416), but this bill also died on the order paper when Parliament was prorogued.
3 This piece was published in (2007) Criminal Law Quarterly, vol. 51(4) 469.
is to be participatory and truly representative of public interests. We are hopeful that in future consultations Public Safety Canada will ensure that the discussion is open and accessible from the outset, and not made public merely as the result of political necessity.

The Goal: Balancing Interests

4. The Consultation Document broadly identifies the objective of the proposed lawful access regime regarding CNA information as "...to maintain lawful access for law enforcement and national security agencies in the face of new technologies while preserving and protecting the privacy and other rights and freedoms of all people in Canada," and ensuring "that the solutions adopted do not place an unreasonable burden on the Canadian public."\(^4\) The proposed solution provides for legislation under which law enforcement and national security officials could access CNA information from TSPs without a warrant, court order or other judicial authorization, and without reasonable grounds to suspect criminal activity.

5. It is our submission that while the Consultation Document correctly recognizes the need to carefully weigh the interests of law enforcement and national security with individual civil liberties, the access to CNA scheme under consideration does not strike an appropriate balance. Legislating 'on-demand' access to CNA information without judicial authorization poses serious risks to the privacy interests of Canadians.

6. In light of our concerns regarding the privacy implications of the proposed scheme on lawful access to CNA information, we are pleased to support the recent statements of Public Safety Minister Stockwell Day on September 13, 2007, confirming that the government will not introduce legislation compelling the disclosure of CNA information without a court order:

   We have not and we will not be proposing legislation to grant police the power to get information from Internet companies without a warrant. That's never been a proposal. It may make some investigations more difficult, but our expectation is rights to our privacy are such that we do not plan, nor will we have in place, something that would allow the police to get that information.\(^5\)

7. We agree with Minister Day for the following reasons.

CNA Information

8. The Consultation Document indicates that the CNA information collected by law enforcement could include a range of basic identifiers associated with a particular TSP subscriber, including: name, address(es), telephone numbers (wireline and wireless), cell

\(^4\) Consultation Document, supra note 1.
phone identifiers, email address(es), IP address(es) and/or local service provider identifier information.

9. The proposal for warrantless access to CNA information is based on the mistaken premise that this information is the least revealing form of personal data, in which individuals have the lowest expectation of privacy. This assumption does not hold true, particularly in the context of electronic communications. CNA information, like name and address, are keys to acquiring other personal information, including highly sensitive data such as health or financial records.6

10. Intensifying our concerns about unfettered access to CNA information are the realities of data mining. Information collected and stored for one purpose can be combined with information collected and stored for a completely different purpose through data mining, and two pieces of seemingly innocuous information can prove damming in combination. While CNA data may appear less revealing, and is therefore deemed less worthy of strong privacy protections, in combination it can be just as, or even more revealing as other kinds of sensitive data in which individuals may have a greater expectation of privacy.

11. The creation of expedited, warrantless procedures for accessing CNA information is based on the false assumption that CNA data is somehow a lesser form of investigatory information. The possibility of legislating unrestricted access to this kind of information poses a serious threat to the individual privacy of Canadians. By erecting false distinctions between different kinds of data, and treating these categories of information differently, the government is in fact seeking enhanced search powers through expedited processes and lower standards, thereby slashing privacy safeguards and expectations.

12. The Consultation Document assures that the scope of CNA information subject to ‘on-demand’ disclosure “…would not, in any formulation, include the content of communications or the Web sites an individual visited while online.”7 The potentially revealing nature of CNA information when in combination with other data make it impossible to guarantee that online activities and communications will not be captured, inadvertently or otherwise, within the proposed scheme. The point cannot be sufficiently underscored: typical subscriber information of the sort made available under the proposed legislative scheme will become the means by which a biographical core of personal information is assembled.

**Proposed Safeguards**

13. Empowering law enforcement officials to obtain CNA information in an expeditious manner simply by asking for it represents a significant alteration in the procedural safeguards against excessive ‘fishing’ expeditions by law enforcement agencies. Under

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6 The Ontario Court of Justice recently acknowledged this reality, stating, “[i]nformation about name and date of birth is information which can be a key in unlocking other database information about an individual of an intimately personal nature.” See *R. v. M.E.*, [2006] ONCJ 146 at 32.

the existing system, the primary safeguard against police abuse of investigative powers is the requirement for judicial pre-authorization, based on a “reasonable grounds” standard to suspect criminal activity, before police can conduct a search or surveillance activity. The proposed access scheme will eliminate this safeguard in respect of CNA information. For this reason, we cannot support the proposal.

14. Allowing law enforcement officials to obtain unlimited amounts of CNA information simply by asking for it, with no accountability apparatus in place represents an infringement of the privacy rights and expectations of Canadians. Law enforcement should be made to justify requests for access to information at a high standard before judicial authorization is granted. These orders should not be available for suspicions or anticipated crimes, for example, but only when authorities believe that an offence has been committed. Law enforcement should be required to demonstrate that there are reasonable grounds for requesting data, and the scope of authorization should be construed as narrowly as possible, on a standard of necessity, not relevance to the investigation.

15. We have considered the ‘alternative’ safeguards proposed in the Consultation Document, including:

- requiring the designated officials to record their status as such when making a request, as well as the duty or function for which a particular request is made;
- limiting the use of any information obtained to the agency that obtained it for the purpose for which the information was obtained, or for a use consistent with the purpose, unless permission is granted by the individual to whom it relates; and
- requiring regular internal audits by agency head to ensure that any requests for CNA information are being made in accordance with the protocols and safeguards in place.\(^8\)

16. We are unable to conclude that these safeguards go far enough in protecting privacy interests when weighed against the fact that police would have ‘on-demand’ access to CNA information under the proposed scheme. Permitting warrantless access to CNA information “...for the purpose of performing an official duty or function”\(^9\) remains, in our submission, an overbroad proposal. Without judicial oversight, the purposes for which law enforcement may demand CNA information must be narrowly and precisely circumscribed.

**Constitutionality**

17. The Consultation Document explicitly states, “[t]he principles and powers of lawful access must be exercised in a manner consistent with the rights and freedoms guaranteed in the Canadian Charter of Rights and Freedoms...”\(^10\) We could not agree more, and it is with Charter principles in mind that we ask you to consider the constitutionality of

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\(^8\) Consultation Document, *supra* note 1.

\(^9\) Ibid.

\(^10\) Ibid.
allowing warrantless access to CNA and related information. In our view, the proposed access proposal would not survive Charter scrutiny in a Canadian court of law.

18. Section 8 of the Charter protects Canadians against unreasonable search and seizure, and the Supreme Court of Canada has equated this guarantee with the existence of a reasonable expectation of privacy. The information within which one has a reasonable expectation of privacy has been found to include a “biographical core of information”, or information that tends to reveal intimate details about the individual. Legislation authorizing unwarranted access to CNA information could be challenged under section 8 on the grounds that it amounts to an unreasonable search and seizure because the potentially revealing nature of CNA information invades the “biographical core” of information within which individuals have an expectation of privacy. As stated above, CNA information can be linked with online activities and communications as well as other sensitive documentation that may reveal intimate details of an individual’s life.

19. Only if a Charter breach cannot be “demonstrably justified in a free and democratic society” will the law be declared unconstitutional. This analysis takes place under section 1 of the Charter in accordance with the test set out by the Supreme Court of Canada in R. v. Oakes. In assessing the proposed lawful access regime for CNA information, the appropriate constitutional question under section 1 is whether the pressing and substantial objectives of the legislation are proportional in terms of being a) rationally connected to the objective; b) minimally impairing of rights; and c) proportional to its potentially harmful effects. We say that they are not.

   a. The relevant question with respect to the rational connection between the proposed means and the objective of warrantless access legislation is whether the breadth of expansion in investigatory powers, the reduction of procedural safeguards, and the expedited means by which law enforcement agencies could access personal information about citizens without oversight, as set out in the Consultation Document, is proportional to the objectives it seeks to fulfill. In our view, the current proposal is an excessive and over-inclusive response. Canadian law enforcement and national security have demonstrated an ability to investigate and prosecute cybercrime and has even garnered international success in online investigations, and has done so without warrantless access to CNA information.

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15 Ibid.
b. ‘On-demand’ access to CNA information invites law enforcement officials to an all-you-can-eat ‘investigatory smorgasbord’ with no say on the part of the citizens concerned about the collection, use, or disclosure of their personal information. In absence of judicial pre-authorization, the safeguards proposed in the Consultation Document provide only minimal restrictions on who can access subscriber information and under what circumstances, and offer no real oversight mechanism to monitor the process. The excessive range of personal information available, in conjunction with the lack of accountability measures in place to monitor expedited access does not impair Charter rights as minimally as possible.

c. Without sufficient safeguards, it is impossible to ensure that legislation imparting unfettered access to subscriber information will not be misused by law enforcement for excessive information gathering or for other purposes unrelated to cybercrime activity. The potential for disproportionately deleterious effects is therefore unreasonably high. In light of the case with which CNA information can be combined to reveal intimate aspects of one’s life, it is not difficult to imagine the damaging consequences that could result if one’s health, financial or other personal information was improperly collected, used or disclosed. In fact, the courts have recognized this possibility and noted that it “is capable of creating substantial hardship.”

20. It is our submission that unwarranted access to CNA information amounts to an unreasonable search and seizure, and that legislation permitting such searches in the absence of sufficient oversight mechanisms would violate the Charter. A society which lays bare our personal information with insufficient democratic safeguards may be perfectly suited to fight cybercrime, but, as the Supreme Court of Canada has noted, also “has the potential, if left unregulated, to annihilate any expectation that our communications will remain private.”

Conclusions

21. While the proposed legislation may make it easier and more convenient for law enforcement officials to undertake cybercrime investigations, ease and convenience are not sufficient justifications for violating the privacy rights of Canadian citizens. The possibility of opening up CNA information to law enforcement official is an excessive and over-inclusive response by the government that undermines citizens’ fundamental privacy rights in a manner that cannot be justified in a free and democratic society.

Sincerely,

Ian R. Kerr  Jena McGill  Daphne Gilbert

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17 Plant, supra note 13.