

Embassy

Observers decry Canada-US plan to allow personal info to be sent abroad

Toews' office defends plan as stronger than existing agreements amid concerns over Charter standards, Arar commission advice.

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A chorus of criticism is building against Canada over its deal with the United States to permit the sharing of personal information gathered at the border with third countries—in some cases without informing the other government until after the fact.

In a bilateral pact announced on June 28, Canada and the US released the long-awaited Joint Statement of Privacy Principles under their perimeter security plan.

The following day, Chantal Bernier, Canada's assistant privacy commissioner, blasted the government in comments to the Canadian Press for crafting a document that could allow personal details of Canadians to be sent to countries with bad human rights records.

Now, Kent Roach, who served on the research advisory committee for the Maher Arar commission, has expressed similar concerns with what the privacy pact permits in comments to *Embassy*.

As well, the Canadian Civil Liberties Association, and the Council of Canadians, have both announced their own concerns with the pact.

The Harper government, however, considers the effort to be a success, and is sticking with its support of the principles.

Julie Carmichael, a spokesperson for Public Safety Minister Vic Toews, wrote in an email that the principles "contain stronger privacy protections than any existing international agreements."

Three's a crowd

At issue is the pact's principle governing the transfer of information to third countries.

The carefully worded statement says information may be passed on "only if consistent with the domestic law of the receiving country, and in accordance with existing applicable international agreements and arrangements."

However, if there are no such agreements or arrangements, the pact goes on to say Canada or the US may still transfer that information, as long as they inform the other country "as soon as reasonably possible after the transfer in the case of exigent circumstances."

That wording means the document doesn't meet all the standards laid out by the Arar commission, argued Mr. Roach, who is now chair of law and public policy at the University of Toronto law faculty.

The commission concluded that Mr. Arar, who was picked up by American authorities in 2002 on suspicion of being a member of al-Qaeda, and then deported to his country of birth and tortured, was a victim of bad Canadian intelligence that was passed to the Americans.

The new pact "seems to have perhaps muddied the waters" in terms of how that transfer of information plays out, said Mr. Roach.

"The Arar commission stressed that once the information goes to a third party, then you lose control of that information, and that that third party, especially if it employs methods that violate human rights, you may be in a situation where you really will never know what use that information was taken," he said.

The reason behind the muddying, he suggested, was a need to reconcile legal sensitivities with the time-sensitive imperative demanded by government security agencies needing to act on information before events occur.

He stressed that in general, "the principles do reflect some of the recommendations of the Arar commission in terms of specifying the purpose and relevance, necessity, [and] proportionality"—but that the transfer principle is "confusing" and departs from this trend.

He said the Arar commission concluded the relationship between the receiving and the sending country can still work, and can accommodate these so-called security imperatives, but "you always go back to the sending country, even if there are situations of urgency," and request permission.

Oversight or self-policing?

He also took issue with another principle on oversight. The pact says "a public supervisory authority or authorities with effective powers of intervention and enforcement" should supervise personal information. That suggests self-policing, said Mr. Roach.

"That's obviously important, and that is part of the puzzle, but from the consumer's perspective, or the people that are affected...I'm really not sure that people are going to have confidence unless there is independent review."

On June 29, the CCLA posted a commentary on its website that the privacy pact does incorporate some, but not all, of the safeguards the organization had expected.

"We are pleased to see that the government did include principles outlined in CCLA's submissions, but remain concerned about omissions in the statement," reads the commentary.

"CCLA had suggested that protection for Canadians required that Canadian law apply to the treatment of Canadians, and their personal information, and that the highest standard of privacy protection be afforded to both Canadians and Americans.

"This requirement has been omitted and the general reference to compliance with 'domestic laws' may permit the lowest standard between the two countries to prevail."

The commentary also notes that while the "CCLA has long understood the need for North American and overseas information sharing...we have argued it must be done in compliance with the safeguards contained in the Canadian Charter of Rights and Freedoms.

"CCLA remains concerned that these standards may fall short of the safeguards contained in our Charter, in particular that they may be shared with countries that practice torture."

Stuart Trew, the trade campaigner for the Council of Canadians, said the Canadian government seems to be waving a white flag on privacy protection.

"The government seems to be saying, 'We give up on trying to protect privacy in these perimeter talks. We're just going to let whatever existing norms or laws are in effect in any of these countries, whether it's the United States or Canada,'" he said.

"These are a series of pretty wishy-washy aspirations."

Government pushing ahead

The government, however, sees its efforts as standing up for Canadians' privacy.

Responding to questions about the sharing and oversight principles, Ms. Carmichael pointed out that the pact states "very clearly that Canada is to be notified anytime information is shared."

"The principles also require that citizens have the ability to rectify or expunge their personal records. Information will only be shared in a manner [that] is consistent with Canadian laws," she added.

Mr. Toews also gave a speech at the Pacific Northwest Economic Region Summit in Saskatoon, Sask. on July 16 that addressed privacy.

"Promotion of the principles of human rights, privacy and civil liberty by both countries is essential to the rule of law and effective management of our perimeter," said Mr. Toews, according to speaking notes.

The privacy principles are a main aspect of the perimeter security plan launched in December 2011 by Prime Minister Stephen Harper and US President Barack Obama, as a way to boost trade by changing how the border is monitored and regulated.

The plan aims to enhance the ability of law enforcement on both sides of the 49th parallel to share intelligence and evidence, improve border surveillance, and pursue suspects into each other's territory.

The privacy statement was originally promised by both countries to be released by May 30.

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