



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
for British Columbia

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October 18, 2013

Normand Wong
Federal Co-Chairperson
Sub-group on Cyberbullying
FPT Working Group on Cybercrime
nwong@justice.gc.ca

Dear Mr. Wong:

Re: *FPT Report on Cyberbullying and the Non-consensual Distribution of Intimate Images*

Thank you for the opportunity to comment on the Working Group's Cyberbullying report. My office has an ongoing interest in issues regarding internet safety and digital literacy, as well as the need to provide law enforcement with the appropriate tools to keep pace with changing technologies. We have provided comments on similar federal government initiatives in the past, such as Bills C-50, C-51, C-52, C-22, C-29 and most recently, Bill C-30, the *Protecting Children from Internet Predators Act*, proposed in 2012. Many of my past concerns are applicable to the recommendations contained in the Working Group report.

As the report notes, cyberbullying and the non-consensual distribution of intimate images are growing concerns. The increased prevalence is worrying and there is a great need for a multi-sector and multi-pronged approach to addressing these devastating phenomena.

I commend the Working Group for their efforts in tackling these complex issues. I am supportive of many of the recommendations in the report, particularly the need for a multi-sectoral educational approach and for engagement with the provinces and territories should the federal government decide to legislate in this area.

However, I have concerns with other aspects of the report, specifically, that section which addressed "Investigative Powers in the Internet Context". This calls for amendments to the *Criminal Code* that increase the investigative powers of law enforcement and specifically recommends:

- Data preservation and demand orders.
- New production orders to trace a specified communication.

- New warrants and production orders for transmission data and tracking.
- Improving judicial oversight while enhancing efficiencies in relation to authorizations, warrants and orders.
- Other amendments to existing offences and investigative powers that will assist in the investigation of cyberbullying and other crimes that implicate electronic evidence.

As the report notes, these recommended amendments are similar to proposals previously introduced by the federal government, most recently in Bill C-30 which was not passed. I expressed concerns in response to Bill C-30 in a 2012 letter to the Standing Committee on Public Safety and National Security¹. I also joined my colleagues across Canada in signing a joint 2011 letter to Public Safety Canada in response to the federal government's lawful access initiative².

I reiterate my belief that any proposals which aim to increase law enforcement powers must be critically examined to ensure that:

- government is transparent with the public regarding such proposals;
- there is informed public debate of the issues involved;
- there is rigorous and independent oversight of any new powers;
- the new powers are proportionate to the problems they are trying to address;
- the new powers intrude on individual right to privacy to the least extent possible;
- the new powers are demonstrably necessary; and
- the new powers are framed as narrowly as possible to avoid over reach or unintended precedents.

While the Working Group's proposed amendments in this area purport to allow law enforcement to keep pace with technology, specifically cyberbullying, they have the inescapable consequence of expanding these powers much more broadly. The proposals would apply to "other crimes that implicate electronic evidence". In the 21st century, it is difficult to conceive of a crime that would not implicate some degree of electronic evidence. This broad expansion of law enforcement authority is a source of concern for many Canadians.

¹ Available on line at <http://www.oipc.bc.ca/public-comments/1146>.

² Available on the Office of the Privacy Commissioner of Canada website at http://www.priv.gc.ca/media/nr-c/2011/let_110309_e.asp.

An example of these broadened powers was contained in Bill C-30 which included data preservation and demand orders based on a standard of reasonable grounds of *suspicion* as opposed to reasonable and probable grounds of wrong doing.

The report states that provisions relating to sharing of basic subscriber information and the requirement that service providers establish frameworks to aid in the interception of communications, as we saw in Bill C-30, do not form part of the Working Group's recommendations. I appreciate that the Working Group does not support this level of state intrusion; however, I want to stress again the importance that these types of provisions not make their way into future proposals.

I believe that effective law enforcement and the protection of individuals' right to privacy are not mutually exclusive. Privacy rights are not absolute; however, any state intrusion must be done exercising proportionality, only when necessary and to the least extent possible.

I strongly encourage that proportionality, justification that rises above mere suspicion and robust oversight are at the heart of any proposed legislation that seeks to expand law enforcement powers. My office is available to participate in any further consultation on these complex and critical issues.

Sincerely,



Elizabeth Denham
Information and Privacy Commissioner
for British Columbia