



MAY 01 2017

Mr. Richard Elliot
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Toronto, Ontario
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Mr. Ryan Peck
Executive Director, HIV & AIDS Legal
Clinic Ontario
55 University Street, Suite 1400
Toronto, Ontario
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Dear Mr. Elliot and Mr. Peck:

Thank you for your letter regarding the Executive Order, “*Enhancing Public Safety in the Interior of the United States*” signed by the U.S. President on January 25, 2017.

Of particular relevance to the above-mentioned Executive Order is the *Judicial Redress Act* that Congress passed in 2016. This legislation broke new legal ground in the U.S. system as it extended a subset of the protections of the US *Privacy Act* to certain non-citizens, and provided an avenue of recourse to certain countries specifically designated as “covered” by U.S. authorities.

Unfortunately, at this time, Canada is not one of these designated countries. While the Executive Order does not address either aspect (the protection of the *Judicial Redress Act* or Canada’s omission from its coverage), this clearly highlights a significant gap in the protection of Canadians’ personal information. To that end, I have written to the responsible Ministers (copy attached) to urge them to address the question with their U.S. counterparts.

Further to the adoption by President Trump of Executive Order 13768 of January 25, 2017, I have written Ministers to ask for confirmation that administrative agreements previously reached between Canada and the United States will continue to offer privacy protection to Canadians in the United States. Upon receipt of the government’s response, which I expect shortly, I will inform Canadians of my conclusions.

Thank you for your letter and directing your privacy concerns to my attention.

Sincerely,

Daniel Therrien
Commissioner

Encl.



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(/en/for-
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businesses
(/en/for-
businesses/)

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institutions
(/en/for-
federal-
institutions/)

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concern
(/en/report-a-
concern/)

OPC actions
and decisions
(/en/opc-
actions-and-
decisions/)

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OPC
(/en/about-
the-opc/)

[Home](#) → [OPC News](#) → [News and announcements](#)

→ [Commissioner's letter to the ministers of Justice, Public Safety and Defence calling for greater protectio...](#)

Commissioner's letter to the ministers of Justice, Public Safety and Defence calling for greater protection of Canadians' privacy rights in the U.S.

The Privacy Commissioner of Canada has been asked by concerned Canadians to consider the implications of President Donald Trump's Executive Order excluding non U.S. citizens and lawful permanent residents from the protections of the U.S. Privacy Act regarding personally identifiable information.

Commissioner Daniel Therrien concluded that Canadians have some privacy protection in the United States, but that protection is fragile because it relies primarily on administrative agreements that do not have the force of law. Therefore, the Commissioner has called on Canadian government officials to ask their U.S. counterparts to strengthen privacy protections for Canadians.

In the following letter, the Commissioner urged the Canadian federal government to ask the United States for Canada to be added to a list of designated countries under the Judicial Redress Act, which would extend certain judicial recourse rights established under the U.S. Privacy Act to Canadians.

March 8, 2017

Honourable Ralph Goodale P.C., M.P.
Minister of Public Safety and Emergency Preparedness
Public Safety Canada
269 Laurier Avenue West
Ottawa, Ontario K1A 0P8

Honourable Harjit S. Sajjan P.C., M.P.
Minister of National Defence
Department of National Defence
101 Colonel By Drive
Ottawa, Ontario K1A 0K2

Honourable Jody Wilson-Raybould P.C., M.P.
Minister of Justice and Attorney General of Canada
Justice Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8

Dear Ministers:

Over the past few weeks, several Canadians have contacted my office and raised serious concerns about their privacy rights as a result of the issuance of the recent US Executive Order 13,768, entitled, "Enhancing Public Safety in the Interior of the United States."

The relevant section of the Executive Order states the following:

Sec. 14. Privacy Act. Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

Until 2015, the US *Privacy Act* of 1974 did not afford non-U.S. persons any protection given that its definition of "individual" only covers US citizens and legal aliens. The *Judicial Redress Act* of 2015 expanded the protections of the US *Privacy Act* to citizens of certain countries designated as "covered countries" by the US Attorney General. Canada however is not one of these designated countries. Therefore, the US *Privacy Act* still provides no privacy protections or redress to Canadians.

While the Executive Order in question does not alter this reality, it does shed light on a significant gap in protection of Canadians' personal information south of the border. This gap could be meaningfully addressed if the United States were to add Canada to the list of designated countries under the *Judicial Redress Act*. I would therefore strongly urge the Government of Canada to ask the United States to add Canada to this list.

If this were done, my understanding is that the Executive Order would no longer apply to Canadians, as the Order applies "to the extent consistent with applicable law". As a long-time ally and close trading partner, I believe that Canada should ask to be given the same level of protection as that granted to the various European countries designated as "covered countries" on January 17, 2017.

In my analysis of the concerns raised by Canadians, I believe it is relevant to note that there are instruments applicable to the US government, other than the US *Privacy Act*, that may protect Canadians' personal information. For instance, classified arrangements under the *British-U.S. Communication Intelligence Agreement* of 1946 (the "5-Eyes Agreement") include commitments by Five Eyes partners to carry out their operations while respecting the privacy of one another's citizens. In his 2014/15 annual report, the Honourable Jean-Pierre Plouffe, Commissioner of the Communications Security Establishment, referred to these commitments as pledges "not to target one another's communications." I do not see the Executive Order as affecting these commitments but, as I wrote in my 2015/16 annual report to Parliament, they do not have the force of law and are not absolute guarantees.

I would also mention another significant instrument adopted in 2014 by the previous US administration in the form of *Presidential Policy Directive 28 (PPD-28) Signals Intelligence Activities*. This instrument extended the identification, suppression and minimization procedures applied for US citizens in foreign intelligence to all individuals, regardless of nationality.

The Canada-US *Beyond the Border Action Plan* includes a *Joint Statement of Privacy Principles* and several sub-agreements which also offer some level of assurance around the use of Canadians' personal information. Some of these protections (for instance, individual access and rectification, redress) are similar to those offered by the US *Privacy Act* and may depend on the application of that Act to Canadians in order to be truly effective. In my opinion, this is another reason why asking the US government to add Canada to its list of designated countries under the *Judicial Redress Act* would bring significant benefits to Canadians.

While I have mentioned a number of relevant instruments, there are also, I am sure, numerous other information-sharing agreements between the two countries governing agency-to-agency sharing, the full scope of which I do not know. In order to properly assess the concerns of Canadians on the impact of the Executive Order, I would ask that you provide my Office with copies of at least the most significant information-sharing agreements that the Government of Canada has in place with the Government of the United States that would touch on these issues, and that you consult my Office on their content so that we may ensure Canadians' personal information is being appropriately protected.

I would also ask that you remain vigilant in monitoring any changes to how information-sharing activities with the US are being operationalized, and that you advise my Office of any changes in the implementation of the agreements that would adversely impact the privacy of Canadians. For instance, I think Canadians would want and deserve to know if the United States, despite the Executive Order, continues to honour their commitments under the 5-Eyes Agreement.

Thank you for your consideration.

Sincerely,

Original signed by

Daniel Therrien
Commissioner

Date modified:

2017-03-10



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