Commissariat à la protection de la vie privée du Canada
Office of the Privacy Commissioner of Canada

AVR APR 30 2018

Lisa Pezzack
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Dear Ms. Pezzack:

Thank you for the opportunity to provide comments to Finance Canada's consultation on Canada's Anti-Money Laundering and Anti-Terrorist Financing regime.

The Office of the Privacy Commissioner of Canada (OPC) makes this submission as an interested party to the consultation, pursuant to its legislative mandate[1] to protect the privacy rights of individuals and promote the privacy protections available to Canadians.

Privacy and Anti-Money Laundering and Anti-Terrorist Financing (AML/ATF)

Our Office has previously provided comments related to the interplay between privacy and money laundering/terrorist financing (ML/TF). In those submissions, we have noted an expansion in the number of reporting agencies that must report to the Financial Transactions and Reports Analysis Center of Canada (FINTRAC).

This trend has led to a vast increase in the number of reports that are generated - including mandatory and voluntary reports - under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA).

While our Office supports efforts to combat ML/TF, the scale and scope of information involved in the regime, and the potential consequences for those who are the subject of reports, highlights the need to ensure there is a balance between ML/TF objectives and balancing the privacy rights of everyday ordinary Canadians.

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[1] Office of the Privacy Commissioner of Canada, Mandate and Mission of the OPC.

The most apparent privacy implication with this regime is that it casts a wide net capturing a great deal of information about law-abiding Canadians conducting financial transactions, with a view to uncovering threats to national security or incidents of money laundering. This is of particular of concern given that our reviews of FINTRAC found indications that the vast majority of the reports received by the Centre may never be used.

In our previous Parliamentary briefs on Bills C-51[2] and C-59[3], we signaled concerns around information collection and sharing regimes in the context of national security.

Specifically, we have highlighted the need for rigorous legal standards around the collection and sharing of personal information, effective oversight, and minimization of risks to the privacy of law-abiding Canadians, in part through prudent retention and destruction practices.

Results of our reviews of FINTRAC

As you are aware, subsection 72(2) of the PCMLTFA provides our Office with a mandate to conduct biennial reviews of how FINTRAC protects information it receives or collects under this Act. We can also conduct reviews under section 37 of the *Privacy Act*.

All of our audits have identified issues with FINTRAC receiving and retaining reports which do not meet legislative thresholds for reporting.

In 2014, the PCMLTFA was amended by Bill C-31 to add subsection 54(2), which requires that FINTRAC destroy information in its holdings which was either not required to be reported, or any information voluntarily provided to it by the public that it determines is not about suspicions of money laundering, or the financing of terrorist activities.

Although FINTRAC has implemented measures to validate incoming reports, resulting in the rejection of thousands of them, we continue to identify information in FINTRAC databases that do not meet thresholds and should not be retained.

We have recommended improvements, and FINTRAC responded that it will continue its work in implementing front-end screening measures to minimize the receipt of unnecessary personal information.

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[2] Office of the Privacy Commissioner of Canada, Submission to the Standing Committee on Public Safety and National Security of the House of Commons on Bill C-51, the Anti-Terrorism Act, 2015

[3] Office of the Privacy Commissioner of Canada, Submission to the Standing Committee on Public Safety and National Security regarding the review of Bill C-59, An Act Respecting National Security Matters

Also, we have generally found FINTRAC to have a comprehensive approach to security, including controls to safeguard personal information. Our most recent audit did identify governance issues between FINTRAC and Shared Services Canada, which FINTRAC has committed to addressing.

Proportionality

Beyond these issues which we are mandated to review under the PCMLTFA, our principal concern, based on our experience reviewing FINTRAC over the past 10 years, relates to the lack of proportionality of the regime. Disclosures to law enforcement and other investigative agencies made in a given fiscal year represent a very small number when compared to the information received during that same timeframe. Information received is also retained for long periods.

According to their latest annual report, FINTRAC reported that out of 24.7 million records received during the last fiscal year there were only 2,015 actionable disclosures, which represents less than 1 in 10,000.[4]

FINTRAC's retention of undisclosed reports increased from 5 to 10 years in 2007.

Even if one accepts that sharing financial transaction data related to law-abiding citizens may lead to the identification of threats of money laundering or terrorist financing activities, once that information is analyzed and leads to the conclusion that someone is not a threat, it should no longer be retained.

Along the lines of proportionality, we note an issue with how the Politically Exposed Person (PEP) regime is implemented in Canada. FINTRAC guidance on domestic PEPs is silent regarding the application of enhanced measures in cases of low-risk determinations for domestic PEPs or their family members or close associates. As such, there is a risk that prescribed reporting entities may apply such measures regardless of client risk category. This could result in the over collection of personal information for implicated individuals, beyond requirements of domestic law and international standards. Our Office has written to FINTRAC and noted that as it modernizes its entire guidance, the agency could take the opportunity to update existing guidance on this matter.

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[4] FINTRAC 2017 Annual Report

More broadly though, we have noted a trend to broaden the regime, and we note Finance Canada's vision of moving towards a holistic information collection scheme which would create an environment supporting increased analytics and information sharing. We have already seen discussion about lowering existing thresholds for reporting, which could be made through Regulations. In the consultation paper, Finance also suggests increasing the number of reporting agencies and a new model for engagement of the private sector.

Enhancing proportionality in collection and retention: a risk based approach

While we appreciate that a holistic approach to the collection and sharing of information might be useful to identify threats, what is proposed, unless appropriate privacy safeguards are adopted, would further exacerbate our concerns with proportionality. Instead, I would suggest that a risk-based approach be adopted in order to minimize the risk of over-collecting and retaining the financial and personal information of law-abiding individuals.

Under such an approach, FINTRAC, based on a thorough risk based analysis of its data, would develop criteria to limit collection, sharing and retention to only situations likely to represent potential manifestations of terrorist financing or money laundering. We realize this may be challenging, but as privacy experts, we at the OPC believe we can play a role in the assessment of these factors.

Currently, our review mandate under the PCMLTFA and the *Privacy Act* is limited to ensuring that these statutes and regulations as enacted, including monetary thresholds for collection, are respected. We think a more useful contribution would be to provide advice, after review, on amendments that could be made, either to the statutes, regulations or practices of FINTRAC, to ensure greater proportionality, including the assessment of risk factors which might govern information collection, sharing and retention.

The government is recommending that the PCMLTFA be amended to provide that the reviews we currently undertake every two years under section 72, occur every four years. We agree in part and would recommend that:

(i) the purpose of our reviews under the PCMLTFA be modified to include advice or recommendations on proportionality, as just mentioned; and

(ii) that they begin at least one year before every anticipated 5-year review that Parliament must undertake.

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The OPC would continue to conduct compliance reviews under section 37 of the Privacy Act.

As it relates to proportionality, the Committee may wish to consider Part 4 of Bill C-59, concerning CSIS datasets and their retention, which might be instructive. Under that model, CSIS must screen data promptly (within 90 days), and can only retain Canadian datasets if the Federal Court is satisfied it is likely to assist in the performance of CSIS's mandate, including the detection of threats to the national security of Canada.

In addition, with respect to any contemplated changes to reduce existing thresholds through Regulations, which would also affect proportionality, I would reiterate our recommendation in the context of *Privacy Act* reform that government institutions should be legally be required to consult with my office on draft legislation and regulations with privacy implications before they are tabled.

Addressing gaps in oversight

In terms of review and oversight of this regime, there are some review mechanisms in place and others proposed in Bill C-59, but I would argue that there are still some gaps in terms of comprehensive oversight.

While some decisions are subject to statutory or judicial review by the Federal Courts, a decision by FINTRAC to disclose information is more likely to be challenged in the context of a proceeding involving a disclosure to an investigative body, such as a law enforcement agency. In many cases, however, an individual whose information is disclosed by FINTRAC may never know the disclosure took place.

C-59, if passed, would create a new expert review body, the National Security Intelligence Review Agency (NSIRA), with broad jurisdiction to examine the activities of all departments and agencies involved in national security, which will include FINTRAC. The new National Security and Intelligence Committee of Parliamentarians will also have a role to produce well informed and comprehensive reviews of the work of these agencies.

However, NSIRA will not review all of FINTRAC's activities, given the latter's mandate to identify criminality related to money laundering. Its national security review may also be limited given that not all of FINTRAC's disclosures are within the federal family.

The OPC has an important mandated role, as already explained, and insight on the privacy aspects, including ten years of audit experience in this area. However, we currently do

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not have the legal authority to work with other national security review bodies, such as NSIRA, to cooperate and provide effective oversight in this area. This is point we raised in the context of C-59.

PIPEDA

With respect to PIPEDA, the Finance Canada consultation paper specifically states[5]:

> *"Circumstances and protocols surrounding the effective and appropriate exchange of information not only with government institutions but also between private sector organizations should be examined with a view to ensure clarity for all stakeholders and to protect from criminal/civil liability."*

Our Office is unclear of the intent behind the reference *"to protect from criminal/civil liability"*. Further context with respect to this statement would be appreciated, as well as clarification of the purpose of this statement.

We would like to bring to your attention that PIPEDA was amended to provide for the ability of organizations to share information with other organizations under certain circumstances. These amendments are under Paragraphs 7(3)(d.1) and 7(3)(d.2) of the Act. These amendments allow for disclosures amongst organizations without consent – in certain cases of fraud or in relation to an investigation.

Specifically, Paragraph 7(3)(d.1) enables organizations to disclose personal information to another organization if it is reasonable for the purposes of investigating a breach of an agreement or a contravention of the laws of Canada or a province that has been, is being or is about to be committed and it is reasonable to expect that disclosure with the knowledge or consent of the individual would compromise the investigation.

As well, Paragraph 7(3)(d.2) allows an organization to share information with another organization if it is reasonable for the purposes of detecting or suppressing fraud or preventing fraud that is likely to be committed and it is reasonable to expect that the disclosure with the knowledge or consent of the individual would compromise the ability to prevent, detect or suppress the fraud.

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[5] Finance Canada, Reviewing Canada's Anti-Money Laundering and Anti-Terrorist Financing Regime

Our Office has developed guidance on Paragraphs 7(3)(d.1) and 7(3)(d.2), which notes how these exceptions can be applied and stresses the importance of being able to demonstrate due diligence.[6]

As these amendments were being contemplated, our Office advised Parliament that they were overly broad and cautioned that it "*...may open the door to widespread disclosures and routine sharing of personal information among organizations based on a hypothetical risk of fraud.*"[7]

We continue to advocate on behalf of everyday Canadians against overly broad disclosures, and caution against any further broadening of these exceptions.

Mutual Legal Assistance

The Finance Canada consultation paper suggests that the Financial Action Task Force (FATF) had concerns about Canada's effectiveness with respect to its mutual legal assistance framework. In particular the paper cites that advances in technology require changes so Canada can provide assistance to ML/TF proceedings "without undue delay".

We understand though, that while the FATF did suggest there were some instances where delays were noted, the mutual legal assistance framework in Canada received positive feedback:

> "...mutual legal assistance (MLA) provided by Canada is generally broad, and countries provided - through the FATF - largely positive feedback regarding the responsiveness and quality of the assistance provided."[8]

The Finance Canada consultation paper does not highlight the positive observations from the FATF's latest review of Canada, and suggests that there are perhaps more gaps than actual effective efficiencies.

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[6] Office of the Privacy Commissioner of Canada, Applying paragraphs 7(3)(d.1) and 7(3)(d.2) of PIPEDA

[7] Office of the Privacy Commissioner of Canada, "Submission to the Standing Committee on Industry, Science and Technology - Bill S-4, An Act to amend the Personal Information Protection and Electronic Documents Act and to make a consequential amendment to another Act (the Digital Privacy Act)"

[8] Financial Action Task Force, 2016 Mutual Evaluation Report of Canada; pgs 8-9

We would be open to engage with the Government on potential changes to Canada's mutual legal assistance framework or the *Mutual Legal Assistance in Criminal Matters Act* to balance effective risk and proportionality for any future potential amendments, as we understand that these are issues that have been identified as areas of interest in Budget 2018.[9]

Beneficial Ownership

Canada's recent international commitments to address tax evasion, base erosion and profit shifting are consistent with global efforts for greater transparency to strengthen both tax and ML/TF frameworks.

Part of the beneficial ownership transparency dialogue taking place touches upon whether such a registry should be made public.

It is unclear to us what information would be contained in such a registry, who would be responsible for such a registry, how the registry would be populated, how the registry would be maintained, nor what the technical, administrative, or governance framework would look like for its ongoing operation. Undertaking a risk analysis of the potential technical and privacy implications would be a useful start.

While we understand that the European Union's AML Directive may be moving towards a public database, we would recommend that any decision made in Canada consider whether there are public policy objectives that are evaluated against the risks of the degree this information is being made available.

Our Office is open to engage in these discussions with Finance Canada in order to consider the potential implications and how to evaluate any associated risks.

Conclusion and Recommendations

To summarize then, we would recommend that:

(i) the purpose of our reviews under the PCMLTFA be modified to include advice or recommendations on proportionality;

(ii) that they begin at least one year before every anticipated 5-year review that Parliament must undertake;

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[9] Government of Canada, Budget 2018 - Tax Measures: Supplementary Information; pgs 37-38

(iii) That guidance related to domestic PEPs be updated regarding the application of enhanced measures in cases of low-risk determinations for domestic PEPs;

(iv) Our Office be consulted on matters related to changes to mutual legal assistance and beneficial ownership transparency; and

(v) with respect to any contemplated changes to the Regulations, Finance Canada should be legally required to consult with my office on draft legislation and regulations with privacy implications before they are tabled.

Thank you for the opportunity to provide comments to this consultation, and we look forward to future discussions on any of the matters raised in this submission.

Sincerely,

B Bucknell

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