

Privacy and Information Protection Bulletin

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CRTC Imposes Super-PIPEDA Privacy Protections for Personal Information Collected by ISPs

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In Canada's landmark 'net neutrality' policy released on October 21, 2009, the Canadian Radio and Telecommunications Commission (CRTC) imposed "a higher standard than that available under the Personal Information Protection and Electronic Documents Act (PIPEDA) in order to provide a higher degree of privacy protection for customers of telecommunications services."¹ This bulletin briefly reviews the privacy issues addressed in the CRTC policy. For a review of the other issues addressed in the policy, please see the following Fasken Martineau bulletin: [CRTC Issues Internet Traffic Management Policy](#).

[CRTC Policy 2009-657](#) principally addresses the use of Internet Traffic Management Practices (ITMPs) by Internet Service Providers (ISPs). The CRTC described its objective in the policy as one of balancing "the freedom of Canadians to use the Internet for various purposes with the legitimate interests of ISPs to manage the traffic thus

generated on their networks, consistent with legislation, including privacy legislation."²

The CRTC policy allows ISPs to manage internet traffic, even if that management means discriminating between the types of applications being used by an internet user. For example, an ISP might decide to discriminate against (i.e. 'throttle', or slow down) internet traffic involving the use of peer-to-peer file sharing software. The new framework requires that ISPs give preference to ITMPs based on economic measures, disclose their use to customers in advance, and ensure that they are discriminating "as little as reasonably possible."³ The policy stands in contrast to rules being contemplated by the U.S. Federal Communications Commission (FCC), that would require that ISPs treat applications in a nondiscriminatory manner.

In CRTC Policy 2009-657, the CRTC acknowledged that certain ITMPs can have privacy implications: "certain technologies have the capacity to collect and use personal information as

¹ Canadian Radio and Telecommunications Commission (CRTC) *Review of the Internet Traffic Management Practices of Internet Service Providers*, Telecom Public Notice 2008-19, October 21, 2009 at para. 102

² *Ibid* at para. 7

³ *Ibid* at para. 43

part of an ITMP and that information obtained in this manner can be derived from the flow of network traffic, without the knowledge or consent of the consumer.”⁴ Privacy was among the issues raised in the roughly 15,000 submissions received by the CRTC during an extensive public consultation process that preceded the decision. The Office of the Privacy Commissioner of Canada [made a submission](#) that touched specifically on privacy concerns.

In response to the privacy concerns raised, the CRTC directed “all primary ISPs, as a condition of providing retail Internet services, not to use for other purposes personal information collected for the purposes of traffic management and not to disclose such information.”⁵ Under the policy, primary ISPs are also required “to include, in their service contracts or other arrangements with secondary ISPs, the requirement that the latter not use for other purposes personal information collected for the purposes of traffic management and not disclose such information.”⁶

Since the current stated practice of ISPs is to use aggregate (i.e. non-personal) information for ITMP, the privacy protection in the policy may not impact ISPs’ current practices. Under the policy, ISPs’ may continue to use aggregate information to manage traffic on their networks.

The CRTC policy may close the door, at least for the time being, on ‘behavioural advertising’ practices that rely upon the use and disclosure of personal information collected by ISPs for ITMP purposes. Nevertheless, it is arguable that the decision may leave open the use and disclosure of personal information for ‘behavioural advertising’ purposes

where personal information is not collected solely or primarily for the purpose of traffic management.

The blanket prohibitions against certain uses and disclosures of personal information by ISPs in the CRTC policy are stronger than the privacy protections found in PIPEDA. Under PIPEDA, such uses and disclosures would be permitted with consent, or pursuant to any number of exceptions to the consent requirement (e.g. court orders, disclosures that are required by law). This difference between the CRTC policy and PIPEDA may generate questions about whether the CRTC policy may adversely interfere with, for example, the ability of civil litigants and law enforcement to obtain disclosure of information from ISPs in some cases (e.g. gathering evidence regarding defamation or suspected criminal activity). Such questions would likely arise, however, only if ISPs collect personal information for ITMP, as opposed to their current stated practice of relying upon aggregate information. It is also often the case that all a litigant or law enforcement requires from an ISP is the identity of the subscriber assigned a particular IP address at a particular time.

[CRTC Policy 2009-657](#) is significant in its recognition of privacy interests and in its super-PIPEDA protection of such interests. Although the policy applies to a relatively narrow category of organization, ISPs, it may have broader privacy- and business-related implications as discussed in this bulletin. The policy raises a number of privacy issues that remain to be determined in practice.

For more information on the subject of this bulletin, you may also contact the author:

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⁴ *Ibid* at para. 100

⁵ *Ibid* at para. 103

⁶ *Ibid* at para. 104

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