



BY FAX AND MAIL

July 27, 2006

Privacy Commissioner of Canada
112 Kent Street
Ottawa, Ontario
K1A 1H3

Dear Commissioner Stoddart:

Re: s.11 PIPEDA Complaint against "Big Six" Canadian banks re: failure to protect customer information from inappropriate disclosures via SWIFT

This is a complaint, filed under s.11 of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), against the six largest Canadian banks: Royal Bank of Canada (RBC Financial Group), Toronto-Dominion Bank (TD Bank Financial Group), Bank of Nova Scotia (Scotiabank), Canadian Imperial Bank of Commerce (CIBC), Bank of Montreal (BMO Financial Group), and National Bank of Canada.

It is our understanding, based on recent news reports regarding international banking clearinghouse SWIFT, SWIFT's response to these reports (www.swift.com), and documentation made public by Privacy International (www.privacyinternational.org), that SWIFT has been disclosing personal banking data associated with thousands of individuals, in bulk, to the U.S. government. While it has not been confirmed whether personal information about Canadians or provided by Canadian banks has been part of this data sweep, neither SWIFT nor the U.S. government has suggested that the data gathered is limited to U.S. citizens or to that provided by U.S. financial institutions. It does seem clear that the data transfers are bulk in nature and not based on any individualized suspicion, and that the data originates from many of the over 200 countries served by SWIFT.

SWIFT describes itself as "the financial industry-owned co-operative supplying secure, standardised messaging services and interface software to 7,800 financial institutions in more than 200 countries. SWIFT's worldwide community includes banks, broker/dealers and investment managers, as well as their market infrastructures in payments, securities, treasury and trade."¹ SWIFT's headquarters are in Belgium, but the organization has offices in the U.S. and other countries as well. It is not clear from which jurisdiction the data transfers in question have been and are being made, but SWIFT reports that it maintains, at least, two identical sets of such data with one database housed in the Netherlands.

Nor is it clear what form the U.S. government requests for data from SWIFT have taken. According to SWIFT's "Statement on Compliance" posted in response to publicity about this

¹ <www.swift.com>, "About SWIFT"

issue,² it "responded to compulsory subpoenas for limited sets of data from the Office of Foreign Assets Control of the United States Department of the Treasury". However, this claim has not been independently confirmed. Moreover, the validity of the U.S. government requests, even if they are properly issued subpoenas, has been questioned, especially insofar as the requests appear to be overbroad and not based on any individualized suspicion.

It is our understanding that financial institutions operating in Canada, including the "Big Six" banks against whom this complaint is being made, all use SWIFT in order to process international monetary transfers. Under Principle 4.1.3 of Schedule 1 of PIPEDA, the banks remain responsible for personal information that has been transferred to SWIFT for such processing. Disclosure of personal banking data about Canadians to the U.S. government outside the approved processes for such data transfers (i.e., with judicial authorization, via FINTRAC, or via a Mutual Legal Assistance Treaty ("MLAT")) is inappropriate and, in our submission, violates PIPEDA. That SWIFT is making such disclosures does not relieve the banks of liability under PIPEDA. It is their responsibility, in the words of PIPEDA, to "use contractual or other means to provide a comparable level of protection while the information is being processed by [SWIFT]".

Under subsection 5(3) of PIPEDA, regardless of customer consent, banks:

may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances.

The direct disclosure of "sets of data"³ to the U.S. government for counter-terrorism purposes, despite the existence of legal channels such as FINTRAC for precisely these purposes and without any kind of judicial authorization, is clearly inappropriate. The Canadian government has designed processes for the international sharing of banking data, which processes are meant to ensure that no unnecessary or inappropriate disclosures occur. The wholesale transfers of personal banking data to the US government, to which SWIFT admits, clearly circumvent such processes and thus violate PIPEDA's requirement for "appropriate purposes".

The banks may argue that they are permitted, under PIPEDA, to disclose customer information to foreign governments without the knowledge or consent of individuals, under subsections 7(3)(c) and/or 7(3)(c.1).

Subsection 7(3)(c) of PIPEDA allows banks to disclose personal information without the consent of the individual, where:

required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

We submit that the U.S. government agency issuing subpoenas or other requests to SWIFT does not have jurisdiction to compel the production of this personal data from SWIFT, to the extent

² <www.swift.com>

³ See SWIFT statement on compliance policy, <www.swift.com>

that the data is held in a country other than the U.S. Even if the data is being disclosed from a U.S.-based facility, we submit that the subpoenas or requests in question are overbroad and therefore invalid.

Subsection 7(3)(c.1) of PIPEDA allows banks to disclose personal information without consent:

...to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that

(i) it suspects that the information relates to national security, the defence of Canada or the conduct of international affairs,

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law, or

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province;

PIPEDA does not define "a government institution", nor has the Governor-in-Council exercised its power to make regulations specifying what is "a government institution". However, it is clear from the Act's stated purpose, the context of the provision in question, and Parliament's clear intention in enacting this legislation as well as other statutes regulating transfers of banking information, that "a government institution" means "a *federal or provincial Canadian* government institution" and does not include foreign government institutions. In particular,

- The stated purpose of PIPEDA is "to establish, in an era in which technology increasingly facilitates the circulation and exchange of information, rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances". As noted above, a reasonable person would not consider it appropriate for banks or their agents to be disclosing sets of customer financial data directly to foreign governments, outside the Canadian approved, regulated avenues for such transfers, and without individualized grounds for suspicion, let alone judicial authorization. This is especially true where the foreign government in question is notorious for failing to respect fundamental aspects of due process in its zeal to identify and detain terrorist suspects.
- Parliament has enacted laws such as the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the *Mutual Legal Assistance in Criminal Matters Act* precisely to facilitate appropriate sharing of data related to crimes and terrorism with foreign governments. For PIPEDA to permit an "end run" around the processes set out in these other statutes would be perverse.
- If "a government institution" in subs.7(3)(c.1) were to include foreign government institutions, it would necessarily include tyrannical and non-democratic governments that do not respect fundamental human rights and civil liberties and that have no effective safeguards

against state abuse of personal data. This could not be the intent of Parliament, given that it would violate the fundamental precepts and democratic principles embraced by Canadian law generally and enshrined in the *Canadian Charter of Rights and Freedoms*.

Last fall, you issued a finding (#313)⁴ on complaints that Canadian banks were improperly disclosing Canadians' data to the U.S. government via U.S.-based processing companies. The SWIFT disclosures are different from the *PATRIOT ACT* disclosures that were the subject of that complaint, in two key respects: (1) the personal data in question here is being provided to U.S. authorities by an organization based in Belgium, not in the U.S., and (2) the subpoenas or other requests made by the U.S. government may not be valid under U.S. law. In particular, it appears that the disclosures in question were made with even less due process or legal authority than the FISA court orders on which the *PATRIOT ACT* complaints were based.

For all these reasons, we submit that Canadian bank disclosures of customer data via SWIFT to the U.S. government constitutes a violation of PIPEDA, insofar as are made (a) in response to administrative subpoenas or other requests of questionable validity, and (b) entirely outside the legal processes established by Canada, the U.S., and other countries for the international sharing of such data.

Sincerely,

Philippa Lawson
Executive Director and General Counsel, CIPPIC

Ian Hosein
Senior Fellow, Privacy International

cc:

Royal Bank of Canada (Ombudsman)
Toronto-Dominion Bank (Ombudsman)
Bank of Nova Scotia (Ombudsman)
Canadian Imperial Bank of Commerce (Ombudsman)
Bank of Montreal (Ombudsman)
National Bank of Canada (Ombudsman)

⁴ <http://www.privcom.gc.ca/cf-dc/2005/313_20051019_e.asp>