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**Comments on the Government's Response  
to the *Fourth Report of the Standing  
Committee on Access to Information,  
Privacy and Ethics on the Personal  
Information Protection and Electronic  
Documents Act***

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**A joint submission of  
BC Freedom of Information and Privacy Association  
and  
BC Civil Liberties Association**

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**BC Freedom of Information  
and Privacy Association**  
103 - 1093 West Broadway  
Vancouver, BC V6H 1E2  
Ph: 604-739-9788 • Fax: 604-739-9148  
Email: [info@fipa.bc.ca](mailto:info@fipa.bc.ca)  
Web: [www.fipa.bc.ca](http://www.fipa.bc.ca)

**BC Civil Liberties Association**  
550 – 1188 West Georgia Street  
Vancouver, BC V6E 4A2  
Ph: 604-687-2919 • Fax: 604-687-3045  
Email: [info@bccla.org](mailto:info@bccla.org)  
Web: [www.bccla.org](http://www.bccla.org)

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# Introduction

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This document is submitted by Richard S. Rosenberg on behalf of the British Columbia Freedom of Information and Privacy Association ("FIPA") and the British Columbia Civil Liberties Association (BCCLA)

Let me state at the outset that FIPA and BCCLA remain committed to the nine recommendations we submitted to the Parliamentary Committee on November 22, 2006.

A summary of our recommendations submitted to the *Standing Committee* consisted of the following nine items:

1. The Office of the Privacy Commissioner (OPC) should publicize the complaints it deals with.
2. The OPC should undertake an ongoing program to publicize its activities as a means of educating the Canadian public about its privacy rights and protections.
3. Companies and agencies should be required to inform their clients about security breaches that threaten their personal privacy.
4. The Federal Government must explore ways to provide protection for the personal information of Canadians which may reside outside of Canada.
5. PIPEDA must be amended to provide more workplace privacy protection for those workers under federal privacy jurisdiction.
6. Personal medical information as captured in the Electronic Medical Record must be given greater protection, with individuals having a final right of consent for disclosure of particularly sensitive information.
7. The challenges of emerging privacy-threatening technologies must be confronted as soon as possible
8. Some of the sections of PIPEDA dealing with consent must be reviewed as increasingly the rights of citizens are abrogated by external needs such as the Anti-terrorism Act and the Public Safety Act.
9. Given the experience with the current Ombudsman model in the OPC, it is recommended that the Commissioner be given order-making powers such as those available to the Commissioners in BC, Alberta, and Quebec.

In this submission, we are concerned with addressing the following issues:

- Overview of the Status of the Recommendations of FIPA and BCCLA to the Parliamentary Committee and the Government Response.
- What is the Status of the Remaining Recommendations Made by the Parliamentary Committee and the Federal Government's Response?

## **Overview of the Status of the Recommendations of FIPA and BCCLA to the Parliamentary Committee and the Government Response**

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The Committee notes that, "This report does not advocate dramatic changes to PIPEDA at this time." Also, "Given that the full implementation of the Act did not come about until January 2004 ... the Committee is cognizant of the fact that not every aspect of its implementation has yet been fully realized." Furthermore, the Committee emphasizes that,

The recommendations in this report essentially seek to provide some fine-tuning, much of which is premised on the need for greater harmonization between PIPEDA and the provinces of Quebec, Alberta and British Columbia, all of which have substantially similar private sector data protection laws. Indeed, we heard from privacy advocates, academics, business and industry organizations, as well as from the Federal Privacy Commissioner, that reference should be made to these provincial laws when making changes to PIPEDA.

We submit that the justification of "harmonization" cannot be used to water-down more effective privacy protections in favour of lesser protections. Where uniformity is desirable, lesser protections must always be harmonized upwards.

The following table compares the relevant responses of the Parliamentary Committee and the Government to the specific recommendations made by FIPA and BCCLA. Of course, neither the Committee nor the Government responded explicitly to these recommendations. The overall recommendations of the Committee and the Government's responses to these have been matched against our nine specific recommendations.

<b>FIPA and BCCLA Recommendations</b>	<b>Parliamentary Committee's Relevant Responses</b>	<b>Government's Relevant Responses</b>
<p>1. The OPC should publicize the complaints it deals with.</p>	<p>Recommendation 19: The Committee recommends that no amendment be made to section 20(2) of PIPEDA with respect to the Privacy Commissioner's discretionary power to publicly name organizations in the public interest.</p>	<p>The government agrees with the Committee's recommendation that no legislative change is required in this regard. The Privacy Commissioner currently possesses the ability under PIPEDA to publicly name organizations that are subject to complaints, and should retain the discretion to determine when it is in the public interest to use this power.</p>
<p>2. The OPC should undertake an ongoing program to publicize its activities as a means of educating the Canadian public about its privacy rights and protections.</p>	<p>No recommendation was made but the Committee notes that:          "We recognize that there is a need to devote more resources to the education of both individuals and organizations about their respective rights and responsibilities under PIPEDA. We heard evidence that most Canadians are unaware of their privacy rights in general, let alone those with respect to PIPEDA. We also heard that one of the biggest challenges for most small and medium businesses is to understand their obligations under the law. In our view, the success of any amendments we propose to PIPEDA, and ultimately of PIPEDA itself, will depend on individuals being able to make informed choices about their personal information and organizations being fully aware of their obligations under the Act. Given that the Office of the Privacy Commissioner has a clear mandate to foster public awareness and encourage compliance amongst organizations subject to the legislation, we hope that more work will continue to be done in this area and that the government, for its part, will also work with both organizations and the Privacy Commissioner to this end."</p>	<p>The Government notes that, "Of equal importance however, the Committee has highlighted the need for greater education and awareness of privacy protection among both individuals and businesses."</p>

<p>3. Companies and agencies should be required to inform their clients about security breaches that threaten their personal privacy.</p>	<p>Recommendations 23, 24, and 25 (Data Breach Notification):</p> <p>23. The Committee recommends that PIPEDA be amended to include a breach notification provision requiring organizations to report certain defined breaches of their personal information holdings to the Privacy Commissioner.</p> <p>24. The Committee recommends that upon being notified of a breach of an organization’s personal information holdings, the Privacy Commissioner shall make a determination as to whether or not affected individuals and others should be notified and if so, in what manner.</p> <p>25. The Committee recommends that in determining the specifics of an appropriate notification model, consideration should be given to questions of timing, manner of notification, penalties for failure to notify, and the need for a ‘without consent’ power to notify credit bureaus in order to help protect consumers from identity theft and fraud.</p>	<p>23. . . . the government agrees with the Committee that a legislative requirement for notification of data breaches would establish a consistent approach across the marketplace and encourage all organizations to take the security of personal information seriously.</p> <p>24. Assuming appropriate oversight by the Privacy Commissioner of Canada, the organization experiencing the breach is well positioned to understand and assess the risks involved and to make a prompt determination regarding whether and how to proceed with notification of their customers, business partners, and/or the general public. Assigning the Privacy Commissioner the responsibility to decide on notification, as proposed by the Committee, would be a less effective alternative, as well as more burdensome for that Office from a resource perspective.</p> <p>25. The government recognizes that the determination of the specifics of the model, including “triggers” and “thresholds” for notification (to both the Privacy Commissioner and affected individuals) will be a critical element in the breach notification provision. Research, analysis and consultation will be required to arrive at the best model for Canada.</p>
<p>4. The Federal Government must explore ways to provide protection for the personal information of Canadians which may reside outside of Canada.</p>	<p>Recommendation 16 The Committee recommends that no amendments be made to PIPEDA with respect to transborder flows of personal information.</p> <p>The Committee agrees with the Privacy Commissioner that there is no need to amend PIPEDA with respect to transborder flows of personal information. In our view, the Act already contains sufficient accountability and allows for the</p>	<p>While the government agrees with the Committee’s recommendation that legislative amendments are not necessary, it is also important to recognize the privacy concerns raised by transborder data flows and the importance of addressing these challenges through international cooperation.</p>

	necessary flexibility for businesses to ensure that personal information is privacy protected when it crosses our borders. We do, however, encourage the Commissioner to continue to work with organizations, as well as the federal government, to ensure appropriate guidance in this respect.	
5. PIPEDA must be amended to provide more workplace privacy protection for those workers under federal privacy jurisdiction.	<p>Recommendations 4 and 5.</p> <p>Recommendation 4. The Committee recommends that PIPEDA be amended to clarify the form and adequacy of consent required by it, distinguishing between express, implied and deemed/opt-out consent. Reference should be made in this regard to the Alberta and British Columbia Personal Information Protection Acts.</p> <p>Recommendation 5. The Committee recommends that the Quebec, Alberta and British Columbia private sector data protection legislation be considered for the purposes of developing and incorporating into PIPEDA an amendment to address the unique context experienced by federally regulated employers and employees.</p>	<p>4. The Government of Canada fully acknowledges the importance of meaningful consent to effective privacy protection. To this end, PIPEDA establishes a flexible legislative approach that takes into account the divergent needs and practices of the many organizations it captures.</p> <p>5. The government agrees with the Committee's recommendation and with a number of stakeholders, including the Privacy Commissioner of Canada, regarding the need to better account for the unique circumstances regarding consent in employee/employer relationships.</p>
6. Personal medical information as captured in the Electronic Medical Record must be given greater protection, with individuals having a final right of consent for disclosure of particularly sensitive information.	Recommendation 17. The Committee recommends that the government consult with members of the health care sector, as well as the Privacy Commissioner of Canada, to determine the extent to which elements contained in the PIPEDA Awareness Raising Tools document may be set out in legislative form.	The government welcomes the support expressed by the health care community and other stakeholders for the PIPEDA Awareness Raising Tools (PARTs) document. In concurrence with the Committee's recommendation, Industry Canada will work with Health Canada, the Privacy Commissioner of Canada, the health care community, as well as provincial and territorial governments to discuss the possible options for according the PARTs document more formal status.
7. The challenges of emerging privacy-threatening technologies must be confronted as soon as possible	Not addressed	Not addressed



<p>8. Some of the sections of PIPEDA dealing with consent must be reviewed as increasingly the rights of citizens are abrogated by external needs such as the Anti-terrorism Act and the Public Safety Act.</p>	<p>See Recommendations 6, 9, 12, and 14.</p> <p>6. The Committee recommends that PIPEDA be amended to replace the “investigative bodies” designation process with a definition of “investigation” similar to that found in the Alberta and British Columbia Personal Information Protection Acts thereby allowing for the collection, use and disclosure of personal information without consent for that purpose.</p> <p>9. The Committee recommends that PIPEDA be amended to create an exception to the consent requirement for information legally available to a party to a legal proceeding, in a manner similar to the provisions of the Alberta and British Columbia Personal Information Protection Acts.</p> <p>12. The Committee recommends that consideration be given to clarifying what is meant by “lawful authority” in section 7(3)(c.1) of PIPEDA and that the opening paragraph of section 7(3) be amended to read as follows: “For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization shall disclose personal information without the knowledge or consent of the individual but only if the disclosure is [...]”</p> <p>14. The Committee recommends the removal of section 7(1)(e) from PIPEDA.</p> <p>The following is taken from Murray Long:</p> <p>This is the section that was added under the <i>Public Safety Act, 2002</i> and which permitted organizations to collect any personal information for a disclosure required by law without knowledge or consent and to engage in surreptitious collection of new personal information about individuals for national security</p>	<p>6. In addition to making the process more efficient, and in accordance with the Government of Canada’s Paperwork Burden Reduction Initiative, this approach would allow greater harmonization with the provinces. Therefore, the government will give further consideration the issue of how best to streamline the Act’s provisions in respect of private sector investigative activity.</p> <p>9. The government notes the Committee’s recommendation and acknowledges that it was made in response to concerns expressed by certain stakeholders regarding the need to ensure that PIPEDA does not impede litigation procedures. However, the government does not share the Committee’s view that such an amendment is necessary at this time.</p> <p>12. As noted above, a clearer definition and understanding of what constitutes “lawful authority” would address the current ambiguity regarding organizations’ right under PIPEDA to disclose personal information for the purpose of law enforcement or national security. The proposal to include in PIPEDA a further provision designed to require organizations to disclose personal information would be difficult to implement, given that the purpose of PIPEDA is not well-suited to such a requirement. For this reason, the government does not propose to implement this aspect of the Committee’s recommendation.</p> <p>14. The Government of Canada notes the recommendation of PIPEDA arising from the <i>Public Safety Act, 2002</i> (s.7(1e)), and acknowledges the concerns expressed by the Privacy Commissioner and others respecting the potential impact of this provision on the privacy of Canadians. However, given the</p>
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	purposes, either on their own or at the request of a government body.	important public safety interests it is designed to address, the government is not prepared to remove s. 7(1)(e) from PIPEDA at this time.
9. Given the experience with the current Ombudsman model in the OPC, it is recommended that the Commissioner be given order-making powers such as those available to the Commissioners in BC, Alberta, and Quebec.	Recommendation 18. The Committee recommends that the Federal Privacy Commissioner not be granted order-making powers at this time.	The government agrees that the Privacy Commissioner should not be granted order-making powers at this time. This position is supported by the general view expressed throughout oral and written submissions to the Committee that PIPEDA is working quite well. In addition, the relatively short time for which the Act has been in existence warrants a cautionary approach to making significant amendments to the enforcement powers of the Privacy Commissioner. Rather, the Commissioner should be given additional time to make full use of the enforcement powers that are currently at her disposal.

In summary, the Parliamentary Committee made no specific reference to our recommendations 2 or 7, other than to refer to the importance of educating the public about its privacy rights (2). Our recommendations 1, 4, and 9 were explicitly rejected and this position was upheld by the Federal Government's response.

Our recommendation 3, pertaining to public disclosure of privacy breaches, was generally supported by the Committee in its recommendations 23, 24, and 25 and generally supported, as well, by the Federal Government. Indeed, Industry Canada is presently involved in a program to determine a detailed approach.

Our recommendation 5 pertaining to workplace privacy received some support in the Committee's own recommendations 4 and 5, with the Federal Government's support. But there were a number of expressions attempting to characterize the notion of "consent" which do need seem promising.

Our recommendation 6 pertaining to personal medical information, while not directly supported, did receive recognition in so far as more study of the issues with relevant parties was recommended. The Federal Government also supported more study. We support broad-based consultation on this matter. However, our position is that any consultation on electronic medical records will not be legitimate unless patient

organizations are included. We continue to be deeply concerned by the sidelining of patients and patient advocates in this critical discussion.

Our recommendation 8 deals with potential assaults on privacy due to the sharing of personal information without consent for perceived security imperatives and the emerging needs of law enforcement ("lawful authority"). These concerns have resulted in recommendations 6, 9, 11, and 14 by the Parliamentary Committee, and a mixed response in part by the Government.

Recommendations 6 and 9 are predicated on reference to existing legislation in Alberta and British Columbia as a model. We strongly disagree with the premise that this provincial legislation is a suitable model.

The federal Government agrees with the Committee's recommendation 6 but does believe that additional legislation is necessary to deal with Recommendation 9. With respect to Recommendation 14, the Government is adamant about not removing section 7(1)(e). Its perceived relationship with the U.S. is probably a factor here.

The Committee's recommendation 12 deals with the disclosure of personal information without knowledge and consent for the purposes of law enforcement or national security. The committee recommends this section of PIPEDA be changed from permissive to mandatory – a proposal that we disagree with in the strongest terms. The Federal Government states that this might require additional legislation, which they do not support – a position that we applaud. But the government does agree that more must be done to define and clarify the concept of "Lawful Authority."

It should be recalled that considerable effort has already been exerted in defining the similar notion of "Lawful Access" in legislation introduced by the previous Liberal Government, which died on the order paper after that Government was defeated. FIPA and BCCLA are on the record as opposing the increased access for law enforcement that was proposed during those extensive consultations.

## **What is the Status of the Remaining Recommendations Made by the Parliamentary Committee and the Federal Government's Response?**

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Many of the recommendations made by the Committee and endorsed by the Government are based on existing sections of relevant legislation in British Columbia (BC) and Alberta. As such, the goal seems to be to make the federal privacy legislation more consistent with its existing provincial counterparts. In addition, certain details are omitted from the overall discussion as reference is regularly made to the provincial legislation. In the following table, we consider the remaining recommendations.

<b>Parliamentary Committee's Remaining Recommendations</b>	<b>Federal Government's Position</b>	<b>FIPA and BCCLA Concerns</b>
1 and 2 refer to Alberta, BC, and Quebec legislation, in which such terms as "business contact information" and "work product" are defined.	The Government agrees with 1. but suggests more consultation is necessary for 2.	The addition of definitions of these terms to PIPEDA seems reasonable but more study must be paid to the definition and use of "work product."
3. Recommends a definition for "destruction" be added to PIPEDA.	The Federal Government recommends non-legislative guidance.	We agree as long as sufficient consultation takes place.
7. The Committee recommends that PIPEDA be amended to include a provision permitting organizations to collect, use and disclose personal information without consent, for the purposes of a business transaction. This amendment should be modeled on the Alberta Personal Information Protection Act in conjunction with enhancements recommended by the Privacy Commissioner of Canada.	The Government agrees with the recommendation.	We are concerned about this recommendation. Any time information can be gathered without consent, strict rules must be in place. Given that Alberta and the office of the Privacy Commissioner of Canada have been involved in this issue does relieve some of our concern. Indeed BC has provisions in this area that should be emulated.
8. The Committee recommends that an amendment to PIPEDA be considered to address the issue of principal-agent relationships. Reference to section 12(2) of the British Columbia Personal Information	... the government proposes education and guidance as an alternative to legislative amendments. Therefore, the government will work with the Privacy Commissioner and other stakeholders to develop	As Murray Long notes, "There are likely to continue to be problems with the current Act within the insurance industry and elsewhere in cases where an agent has collected the information and an individual

<p>Protection Act should be made with respect to such an amendment.</p>	<p>tools to provide further clarity on this matter.</p>	<p>refuses to permit the agent to pass on the information to the principal organization.” We understand that principal-agent relationships have been cited as problematic under the Act. We have had insufficient time to develop a position on this matter.</p>
<p>10. The Committee recommends that the government consult with the Privacy Commissioner of Canada with respect to determining whether there is a need for further amendments to PIPEDA to address the issue of witness statements and the rights of persons whose personal information is contained therein.</p>	<p>The government agrees with the Committee’s recommendation to consult with the Privacy Commissioner, the legal community, as well as other relevant stakeholders, to determine whether an amendment to PIPEDA is needed to address issues of witness statements.</p>	<p>Further exploration of this issue is certainly warranted, especially with respect to the legal issues underlying witness statements.</p>
<p>11. The Committee recommends that PIPEDA be amended to add other individual, family or public interest exemptions in order to harmonize its approach with that taken by the Quebec, Alberta and British Columbia private sector data protection Acts.</p>	<p>The government agrees with the Committee’s view that certain limited exceptions to PIPEDA’s consent requirements may be warranted in order to address the concerns expressed by stakeholders regarding the disclosure of personal information in cases of natural disasters, elder abuse and other similar circumstances.</p>	<p>The Government endorses a study of the approaches taken in other relevant Canadian jurisdictions on this issue with the result possibly being a narrowly defined amendment to PIPEDA. We agree.</p>
<p>13. The Committee recommends that the term “government institution” in sections 7(3)(c.1) and (d) be clarified in PIPEDA to specify whether it is intended to encompass municipal, provincial, territorial, federal and non-Canadian entities.</p>	<p>The government recognizes the benefits of providing clarity on the term “government institutions” and notes that a provision already exists in PIPEDA to grant the Governor-in-Council the power to make regulations in relation to such matters. As such, it would be possible to define “government institution” in the Act through regulation.</p>	<p>We endorse this recommendation and note Murray Long’s informative comment, as follows: The Act is currently unclear as to whether “government institution” includes institutions outside of Canada, for example the U.S. Internal Revenue Service, U.S. or international law enforcement agencies, etc. Every bit of added clarity in this regard helps. The Alberta and B.C. laws are clear that such institutions must be Canadian.</p>
<p>15. The Committee recommends that the government examine</p>	<p>The government recognizes that the privacy of minors can</p>	<p>An amendment to protect the privacy of children is necessary,</p>

<p>the issue of consent by minors with respect to the collection, use and disclosure of their personal information in a commercial context with a view to amendments to PIPEDA in this regard.</p>	<p>be vulnerable, particularly in an online environment. In support of the Committee's recommendation, the government will consult with relevant stakeholders to examine the issue of consent by minors, and to consider the necessity and feasibility of amending PIPEDA in this respect.</p>	<p>especially given the widespread assault on their privacy on the Internet. Even the U.S, passed legislation to protect the privacy of children with the Children's Online Privacy Protection Act of 1998.</p>
<p>20. The Committee recommends that the Federal Privacy Commissioner be granted the authority under PIPEDA to share personal information and cooperate in investigations of mutual interest with provincial counterparts that do not have substantially similar private sector legislation, as well as international data protection authorities.</p> <p>21. The Committee recommends that any extra-jurisdictional information sharing, particularly to the United States, be adequately protected from disclosure to a foreign court or other government authority for purposes other than those for which it was shared.</p>	<p>20 and 21. The government agrees with the need for the Privacy Commissioner to cooperate in multijurisdictional investigations. The global nature of the modern economy requires that the Privacy Commissioner be able to work with other authorities responsible for the protection of personal information, both in Canada and abroad, in order to fulfill her mandate under PIPEDA.</p> <p>It further agrees that the Privacy Commissioner's current power to share information with her counterparts is too limited and therefore constrains her ability to work effectively in this manner. However, any agreements to share information with foreign authorities should include appropriate constraints to stipulate that information only be used in fulfillment of the purposes for which it is shared.</p>	<p>This issue is related to the more general issue of information about Canadians being sent into, or held in, other countries, particularly the U.S. FIPA and BCCLA recommendation 3 refers to this situation. So we support these recommendations but believe that they do not go far enough.</p> <p>Given that the U.S. does not have privacy legislation for the private sector and weak legislation for the public sector, it is difficult to believe that adequate safeguards can be negotiated. Nevertheless given the realities of the world, it is necessary for the Government of Canada and the OIPC to negotiate agreements in this area with individual countries as well as such political and economic blocs mentioned by the Federal Government.</p>
<p>22. The Committee recommends that PIPEDA be amended to permit the Privacy Commissioner to apply to the Federal Court for an expedited review of a claim of solicitor-client privilege in respect of the denial of access to personal information (section 9(3)(a)) where the Commissioner has sought, and been denied, production of the information in</p>	<p>The government acknowledges the Committee's recommendation in respect of the ability of the Privacy Commissioner of Canada to verify claims of solicitor-client privilege. The government also notes that in October 2006, the Federal Court of Appeal ruled on this matter in <i>Blood Tribe Department of Health v. the Privacy Commissioner of</i></p>	<p>We support the amendment recommended by the Parliamentary Committee in 25 but waiting for the relevant Supreme Court decision does makes sense.</p>

the course of an investigation..	<i>Canada.</i> Given that in March 2007, the Privacy Commissioner was granted leave to appeal before the Supreme Court of Canada, the government would submit that any legislative action to address the issue of solicitor-client privilege would be inappropriate at this time and that it will await the decision of the Supreme Court on the matter.	
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## Conclusions

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It should not be surprising that FIPA and BCCLA continue to support the nine recommendations we made in our November 2006 submission, even though some were directly opposed by the Parliamentary Committee and the Government.

In the body of this document several proposals by the Committee have also been supported. These include recommendations 2, 3, 10, 11, 13, 15, 20, 21, and 22. Specific comments can be found in the relevant sections of this submission.

The struggle to protect the privacy of Canadians has been pushed into hyperdrive by the relentless imperatives of technology, social evolution and politics. But where are we being pushed? Will our destination be one of conscious choice, or a dystopia we are unwilling to contemplate?

As Thomas Jefferson wrote, "The price of liberty is eternal vigilance." In the future world, liberty will be impossible if we fail to demand our right to privacy.

Dr. Richard S. Rosenberg  
 President, BC Freedom of Information and Privacy Association  
 Board of Directors, BC Civil Liberties Association  
 Professor Emeritus  
 Department of Computer Science  
 University of British Columbia  
 2366 Main Mall  
 Vancouver, BC V6T 1Z4  
[rosen@cs.ubc.ca](mailto:rosen@cs.ubc.ca)

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