

Excerpt from ACLU Memo To British Columbia Privacy Commissioner David Loukidelis Regarding US Government Access to Canadian Personally Identified Information.

To: Commissioner David Loukidelis
Information and Privacy Commissioner for British Columbia

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Main Question

How secure is the personal information of Canadian citizens in light of the USA PATRIOT Act and the limited privacy protections of the United States?

III. American Access to Canadian Personal Data

i. What U.S. law applies to the holders of Canadian personal information when the information is held in the U.S.?

We now turn to the core question of interest to Canadian citizens – how great an impact will these laws have on the United States government’s ability to access their personal information. There is no case law on this issue in the context of the USA Patriot Act. However, there is an extensive body of law discussing the general legal doctrine involved in seeking records held in foreign countries as part of U.S. disputes and investigations.

There is no doubt that records held in the United States are in all cases subject to U.S. law and hence completely accessible to U.S. law enforcement – regardless of the nationality of the individuals described in the underlying records. Law enforcement access to records is at least as broad under the Patriot Act as it would be under the provisions of the Right to Financial Privacy Act (discussed above). In that context it is clear that records held in the United States are subject to lawful government requests.¹ For instance in *Botero-Zea* the defendant is a Columbian national contesting the validity of an administrative subpoena of his U.S.-held bank records by the Drug Enforcement Agency. It is assumed by both the government and the defendant in this case that the defendant’s nationality is irrelevant. Neither side raises it as a reason for not disclosing the requested records. Further, the language of both the Right to Financial Privacy Act and the Patriot Act refer to records in sweeping terms.²

¹ *Botero-Zea v. U.S.*, 915 F.Supp. 614 (S.D.N.Y.1996).

Any record held in the United States, including records outsourced to U.S. companies from Canada, would be subject to the medical, financial and law enforcement disclosure provisions discussed in this memo. In sum, if information is outsourced to the United States, it will likely be widely available, not only to law enforcement, but to other private entities as well. Canada and its citizens will likely have very little say over how this information is disseminated.

ii. What U.S. law applies to the holders of Canadian personal information when the information is held in Canada but may be accessible to an entity in the U.S.?

Before discussing the substantive law regarding the subpoenaing of records held in foreign countries, a brief discussion of the question jurisdiction is necessary. Records held in a foreign country are obviously outside of the direct reach of a U.S. court or investigative agency. In order for the United States government to subpoena foreign records, it must establish jurisdiction over some entity within the U.S. giving it the power to enforce any action. In cases involving records relevant to a U.S. action but held in a foreign country, courts and administrative authorities have enforced their judgments in a variety of ways including by acting against U.S. affiliates or agents of the foreign actor,³ by subpoenaing an employee of the foreign country while he was in the U.S.⁴ and by relying on explicit statutory authority⁵ (these cases are discussed in more detail in the next section). The general test of jurisdiction is whether a corporation has a certain minimum level of corporate contact in the U.S.⁶ If the investigation is being conducted by the Federal Bureau of Investigation once jurisdiction is established anywhere in the U.S., the broad reach of the Patriot Act assures the Act's record gathering authority will apply.

2 The Right to Financial Privacy Act defines "financial record" as "an original of, a copy of, or information known to have been derived from, any record held by a financial institution pertaining to a customer's relationship with the financial institution." Similarly Section 215 of the Patriot Act requires the production of "any tangible things".

3 *Securities and Exchange Commission v. Banca Della Svizzera Italiana*, 92 F.R.D. 111.

4 *United States v. Field*, 532 F.2d 404 (5th Cir.).

5 *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C.Cir.1961) (shipping company transacted significant business in the United States and hence was amendable to jurisdiction).

6 *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310 (due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice).

Investigators would also likely rely on claims of extraterritorial jurisdiction: governments have the power to investigate conduct that produces harmful effects within their territory.⁷ This type of jurisdiction is widely used in anti-trust cases where the anti-trust activities take place outside of the U.S., but cause harm within the country.⁸ The harm in this case would likely be cited as a terrorist act or possible terrorist attack within the United States. Finally, the question of jurisdiction over cross-jurisdictional searches is unsettled.⁹ From a practical point of view, there is little preventing a law enforcement officer who has gained a search warrant for a corporation's records from searching records that are not held within the United States.

Turning to the main question, records held in a foreign country are not automatically shielded from access by a U.S. court or U.S. law enforcement.¹⁰ Nor is access barred by the fact that the disclosure of the records in question would be illegal in the country where they are held.¹¹ Instead the court will consider the request for information in two basic factual contexts. The first context (dealt with in this section) is when the records sought are held in a foreign country but may be accessible by an entity in the United States. The second context (next section) is when the records are not accessible to a party in the U.S.

Cases where foreign records may be accessible to a U.S. entity typically occur in the context of corporations with foreign affiliates. In order to determine whether documents can be compelled, the court will consider the relationship between the corporate parent and affiliate, and whether the U.S. affiliate has custody or control over the records.¹² Specifically, the documents and records that a corporation requires in the normal course of its business are presumed to be in its control unless the corporation

7 *Strassheim v. Daily*, 221 US 280 (1911) (“Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect”).

8 See *In re Investigations of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.D 280 (D.D.C. 1952)

9 Patricia L. Bellia, CHASING BITS ACROSS BORDERS, 2001 U. Chi. Legal F. 35.

10 *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y.1984).

11 *Banca Della Svizzera Italiana*, at 115.

12 *Cooper Indus., Inc.*, 102 F.R.D 918 at 920; *Hunter Douglas, Inc. v. Comfortex Corp.*, 1999 WL 14007 (S.D.N.Y. 1999).

proves otherwise.¹³ Any other rule would allow corporations to improperly evade discovery.¹⁴

In *Cooper Indus. Inc.* the defendant sold and serviced planes manufactured by the parent company and the court concluded that the American affiliate would have to regularly use the records in question (flight manuals and blueprints) as part of its daily work. A similar test would likely be applied for personal record information. Would the American affiliate have access to the records or could they receive them upon request? Would the affiliate be part of the processing of the records including oversight for quality control or management? If the answer to any of these questions were yes, then these records would be accessible to American law enforcement under a subpoena type power like a National Security Letter or a warrant under Section 215. In a worst-case scenario, any data that the American affiliate had access to, even data on servers in Canada with no connection to the United States, could be released to law enforcement because of a desire on behalf of the affiliate to fully comply with the government request.

iii. What U.S. law applies to the holders of Canadian personal information when the information is held in Canada and not accessible by an entity in the U.S.?

Having discussed the legal test for situations when a U.S. actor has access to the requested records, the next logical question is: what is the test for situations when no U.S. actor has such access but a U.S. court or agency may still have jurisdiction? This situation usually arises because the records are in a foreign country and a U.S. actor either does not have access to them or is barred from disclosing the records under the laws of another jurisdiction. These types of cases frequently arise as part of a civil or criminal investigation when U.S. courts or investigators seek access to bank records held in a foreign country and those records are subject to those country's bank secrecy laws. For example both the 5th and 11th Circuits have ordered the release of bank records held in the Cayman Islands and the Bahamas as part of a criminal grand jury investigation.¹⁵

As noted in the previous section, U.S. courts and other entities can secure this disclosure even against entities that are not within the U.S. For example in *Banco Della Svizzera Italiana* the Securities and Exchange Commission gained jurisdiction to pursue an insider trading investigation against a plaintiff through a subsidiary operating in the U.S., even though the records in question were in Switzerland.¹⁶ In another instance an

¹³ *Cooper Indus., Inc.*, 102 F.R.D 918 at 920.

¹⁴ *Id.*

¹⁵ See *Field* at 404; *United States v. Bank of Nova Scotia I*, 691 F.2d 1384 (11th Cir.1982).

¹⁶ *Banca Della Svizzera Italiana* at 112.

employee of a foreign bank was subpoenaed by a grand jury as part of a tax investigation while he was in the U.S.¹⁷ The employee was forced to testify in spite of the fact that his testimony exposed him to criminal liability in the Cayman Islands. Finally, the D.C. Court of Appeals gained jurisdiction over the foreign actions of a shipping company because the company conducted significant business in the United States and the court had a specific grant of jurisdiction under the Shipping Act of 1916.¹⁸ This type of extra-territorial jurisdiction gives U.S. courts the authority to act against entities that are not in the U.S. as long as they are engaging in behavior that has an impact within the United States. In sum, the power of U.S. courts and law enforcement agencies does not stop at the territorial borders of the United States.

When a court or agency is confronted with a statute that blocks access to records, or when the records in question are otherwise inaccessible to any entity in the U.S., the seeking entity will employ the following balancing test:

[A] court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; the availability of alternative means of securing the information; and the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state [or country] where the information is located.¹⁹

This balancing test is constructed to allow the court (or agency if it is seeking information under an administrative subpoena) to balance its own need for the information with the needs and values of the country protecting the information. While it is difficult to make conclusive judgments on how the court would treat a records request absent specific facts, the language of this standard and court decisions give some general guidance.²⁰

¹⁷ *Field* at 405.

¹⁸ *Montship Lines, Ltd* at 147.

¹⁹ *Volkswagen, A.G. v. Valdez*, 909 S.W.2d 900, 901, 902 (Citing The Restatement (Third) of Foreign Relations Law §442(c)1)

²⁰ The law on blocking statutes encompasses cases involving both private litigation and actions by the government.

The most important portion of the balancing test is the weighing of the interests of the two states involved.²¹ Courts have tended to be extremely deferential in cases where the state interest is a criminal prosecution.²² Because requests involving the Patriot Act apply not only to criminal acts but to terrorism (a crime that all nations have an important interest in resolving and that tends to be international in scope), it is likely that a U.S. court would give significant weight to this interest. Courts have also recognized that the other nations have a legitimate and important privacy interest in their citizens' personal information,²³ but have tended to be skeptical of secrecy laws (general in the context of bank records) when they interfere with criminal investigations or strong state interests.²⁴

Another relevant factor is the requirement that records requests be specific. While several of the Patriot Act provisions allow for broad records requests, the dictates of this test would tend to argue against granting such requests. Courts have struck down sweeping demands for information that could not meet the test of being "reasonably relevant" to an actual, authorized investigation.²⁵ Similarly the courts have denied requests when the information in question seemed to be of minimal importance to the investigation, available elsewhere or of non-U.S. origin.²⁶

As a practical matter, cases brought by the government (especially those involving violations of criminal law) have tended to favor the disclosure of records because courts accord them great weight under the "significant government interest" prong of the test. While it is difficult to predict the access that U.S. courts will grant to foreign records, it is likely that if the U.S. government claims that its interest lies in preventing terrorist activity and it attempts to limit the amount of the request, a court will find that it has satisfied the prongs of the balancing test and should be granted the records it seeks.

iv. What U.S. law applies to the holders of Canadian personal information when the information is held by a company or entity without contacts in the U.S.?

²¹ *Field* at 407.

²² *Field* at 404; *Bank of Nova Scotia I* at 1384.

²³ *Volkswagen*, at 900 (information request violated German data privacy law)

²⁴ *United States v. Vetco Inc.*, 691 F.2d 1281 (9th Cir.) (collecting taxes and prosecuting tax fraud outweighs Switzerland's interest in preserving business secrets).

²⁵ See *Montship Lines* at 154- 55.

²⁶ See *Volkswagen* at 900.

When foreign records are sought from a company or entity that has no contacts in the United States, a U.S. court clearly has no jurisdiction and no enforcement power stemming from that jurisdiction. This situation precludes a U.S. court from ordering the disclosure of the records. However, it should be noted that government actors have powers beyond those conferred by the judiciary. Non-judicial enforcement measures can include prohibitions on asset transfer, suspension or denial of a permit to engage in a particular business activity, and removal from a list of entities eligible to bid on government contracts. U.S. actors could also gain access through more informal means such as information sharing agreements between law enforcement. Presumably the U.S. government could employ measures of this type if they were deemed necessary.