

30 July 2015

Hon Kanwaljit Singh Bakshi, MP
Chairperson
Law and Order Committee
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Dear Law and Order Committee

Electronic Monitoring of Offenders Legislation Bill

I am pleased to provide a submission on this Bill.

Electronic monitoring uses global positioning to help authorities verify compliance with, and provide evidence of non-compliance with release conditions relating to a sentenced offenders' whereabouts.

The Bill aims to remove some of the current prohibitions in the Sentencing Act 2002, to extend the ability for courts to impose electronic monitoring to cover offenders released from a sentence of imprisonment of 2 years or less; and offenders sentenced to intensive supervision.

I recognise the value of electronic monitoring as a means to help authorities ensure the public is protected from certain higher risk offenders who may commit further offences while subject to non-custodial oversight by the Department of Corrections. However, electronic monitoring is, as described in the Act, a "high-impact" condition that significantly impacts on the privacy and freedom of movement of the individuals subject to such a control. As such, it is important that the legislation ensure clearly justified use and robust governance.

My Office was consulted during the development of the policy to extend the scope of electronic monitoring. We initially expressed concern that the statutory safeguards limiting the use of information collected through electronic monitoring might be weakened if the scope of application was expanded without ensuring the legislation included sufficient controls on use and a requirement to show that the increased use of such an intrusive control was proportionate to identified risk.

Positive engagement by Department of Corrections officials during the development of the proposed changes has addressed the concerns we raised during consultation, and I consider the current draft Bill is appropriately balanced.

The provisions included in the Bill address an identified risk to public safety by providing for efficient monitoring of controls on offenders serving sentences that entail restrictions on their whereabouts.

However, the use of electronic monitoring must have robust oversight to ensure evidence can be provided that any expanded use is justified as necessary, effective and appropriately restrained. I recommend that further specific provisions are included to strengthen the governance arrangements for electronic monitoring by the Department of Corrections, to define the expectations for data retention and to ensure appropriate monitoring of use and access to information collected from use of these devices.

The Bill contains a number of safeguards that should be retained

The Bill contains a number of provisions that will help to ensure electronic monitoring continues to be applied with appropriate restraint given the expanded context. Safeguards that should be retained and/or made explicit in the revised legislation include:

- (i) A clear purpose statement defining the purposes for which information can be collected and used.
- (ii) Restrictions on that use specifying that electronic monitoring can be used to assure compliance with conditions relating to an offender's whereabouts, to detect non-compliance with any such conditions and the commission of offences, and to verify the effective and accurate operation of the electronic monitoring equipment.
- (iii) The requirement that electronic monitoring can only be imposed by the Court at sentencing, with judicial discretion informed by advice from the Department of Corrections confirming that electronic monitoring would likely facilitate or reduce risk of offending or increase chance of the offender's rehabilitation or reintegration.
- (iv) Restricting the extension on use of electronic monitoring to offenders released from custodial sentences and on intensive supervision.
- (v) Retaining the prohibition on use for non-intensive supervision, or as a means to monitor the movements of individuals subject to residential restrictions or release from home detention.
- (vi) Continued application of the relevant controls in the Parole Act 2002 that ensure the use of electronic monitoring is reviewed on a regular basis, including an assessment of whether the condition as imposed on any offender is still appropriate and, if not, whether the condition should be discharged or varied and, if it should be varied, how.
- (vii) Continued application of the Parole Act's current requirement for the Department of Corrections to report on its use of electronic monitoring in its annual report, including a description of processes and systems relating to electronic monitoring that were in place during the year reported on.

Retention of information collected during electronic monitoring

As an additional safeguard against the potential for misuse of information collected through electronic monitoring, consideration should be given to including in the legislation a defined retention period.

Privacy principle 9 of the Privacy Act requires that an agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used.

Once the objective of the control has been achieved and the control is no longer required (that is, where the condition has been discharged or the sentence has been served), for the most part, I see no need for the Department of Corrections to retain the information collected.

I can foresee situations where it would be appropriate that electronic monitoring data be retained after the completion of an individual offender's sentence. For example, where the Department believes that retention is necessary to avoid prejudice to the maintenance of the law or for the conduct of proceedings that have been commenced or are reasonably in contemplation (e.g. should monitoring indicate that the person subject to monitoring may have committed further offences while on monitored release). However, I consider there would be value in clarifying in the legislation that where there is no over-riding need for information sourced through electronic monitoring to be retained, such information should be deleted.

Operational impact on the Department of Corrections

Any information collected through the use of electronic monitoring will constitute personal information about the individual concerned and will therefore fall under the scope of the Privacy Act. Information privacy principle 6 of the Privacy Act provides that where an agency holds personal information in such a way that it can readily be retrieved, the individual concerned shall be entitled to obtain from the agency confirmation of whether or not the agency holds such personal information; and to have access to that information.

Should the Department provide for increased collection of personal information through the use of electronic monitoring, it will need to ensure that any information collected in this way and held by the Department can be retrieved readily so that it remains accessible to the individuals concerned.

Section 15A(2)(d) of the Parole Act currently provides that, for the purposes of the Privacy Act 1993, information about an offender that is obtained through electronic monitoring may be used to verify that the offender has not tampered or otherwise interfered with the ability of the electronic monitoring equipment to operate effectively and accurately.

Section 15A(4) requires that the Department include in its annual report details including the average number of offenders who were subject to an electronic monitoring condition and a description of the relevant processes and systems in place. However, there is currently no requirement for the Department to report on the implementation of any such processes, for example, the number and outcome of any personal information access requests, or the results of any internal audit of departmental access to or use of electronic monitoring information, to ensure electronic monitoring is not carried out inappropriately but with appropriately transparent and robust oversight.

Recommendations

As well as retaining the safeguards discussed above that are included in the current Bill, I recommend that additional clauses be added to the Bill to require the Department of Corrections to:

- i. include in its annual reports, for all classes of sentence subject to electronic monitoring, an account of its implementation of relevant processes and systems, including any access to or use of information by staff, or the individuals concerned.

- ii. delete any information sourced through electronic monitoring on completion of the requirement for the control, unless there is an over-riding need for retention of information pertaining to a specific individual to avoid prejudice to the maintenance of the law.

I would be pleased to appear to speak to this submission if that would assist the Committee.

Yours sincerely

A handwritten signature in blue ink, consisting of a large, stylized initial 'J' followed by a long, sweeping horizontal stroke that ends in a small upward curve.

John Edwards

Privacy Commissioner