

January 10, 2007

VIA E-MAIL / COURIER

The Honourable Lawrence Cannon
Minister of Transport, Infrastructure and Communities
Care of Regulatory Affairs – Security
Transport Canada
Place de Ville
Tower C, 13th Floor
330 Sparks Street
Ottawa, Ontario
K1A 0N5

Dear Minister:

Re: Proposed *Identity Screening Regulations* and the Interrelated *Passenger Protect Program*

I am writing to you on behalf of the Information and Privacy Commissioner of Ontario, Dr. Ann Cavoukian. Further to your invitation for public comment, we welcome the opportunity to join other Canadian Information and Privacy Commissioners and Ombudsmen in making submissions regarding the proposed *Identity Screening Regulations* (“the *Regulations*”) and the interrelated *Passenger Protect Program* (“the *Program*”) discussed in the *Regulatory Impact Analysis Statement (RIAS)* published in the *Canada Gazette*, Part I, on October 28, 2006.

Our comments and recommendations with respect to the *Regulation* and the *Program* are tied to three themes derived from fair information principles and practices (FIPs). These principles and practices underpin the [Global Privacy Standard](#) which was accepted at the 28th International Data Protection Commissioners’ Conference in the United Kingdom on November 3, 2006 (a copy is attached for your convenience). The three themes are: 1) the need for an adequate legal framework based on the rule of law (openness and transparency), 2) the need for legally enforceable rules and constraints (the security of personal information and the protection of privacy), and 3) the need for adequate remedies and effective oversight (access, complaint, and redress mechanisms).

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THE PROPOSED PROGRAM

The *Passenger Protect Program*, which is being developed on the basis of four sections of the *Aeronautics Act* (the “*Act*”) and the ten provisions found in the proposed *Regulations*, is described at some length in the *RIAS*. The latter includes proposals and details not found in the *Regulations* or the *Act*.

The *Program* will involve the screening of passenger information, passengers, and their identification and allow for individuals being detained and subject to scrutiny and delay at the airport as well as being denied the right to board a booked flight. By its very nature, the *Program* is bound to have an impact on the privacy rights of innocent travelers misidentified as individuals who pose a security threat. Media reports have already alerted Canadians to the fact that, under related aviation security programs, travelers are experiencing discomfort, delay and indignities, with little notice and in the apparent absence of effective redress. It is therefore critical that practical and rigorous rights protections are built in to the *Passenger Protect Program* from the outset, backed up by the requisite resources including the provision of a misidentification remedy desk at each airport.

Under the proposed *Passenger Protect Program*, air carriers and aviation reservation system operators (“ARS operators”) will be required to provide the Royal Canadian Mounted Police (RCMP) and the Canadian Security Intelligence Service (CSIS) with *ongoing* electronic access to the passenger data of all domestic and international air travelers. This requirement will come into force in advance of the registration of the proposed *Identity Screening Regulations* with the proclamation of section 4.82 of the *Act*. Section 4.82 has been controversial since the time of its introduction before Parliament. Nevertheless, the Ministry of Transportation, Infrastructure and Communities continues to indicate an intention to implement this complex Canada-wide surveillance program.

The *Regulations* will require air carriers to examine the government issued identification of all travelers against Transport Canada “specified persons lists” (“watch lists”) before allowing any traveler to board an airplane. As of this date, the nature of the identification has not been specified. For these purposes, we understand that air carriers will have access to Transport Canada’s watch lists through an on-line system which Transport Canada asserts will be secure. Air carrier staff will be required to alert Transport Canada of any apparent matches of a traveler’s name with a name on the watch list and to deny boarding pending Transport Canada’s verification of a match. Transport Canada will take unspecified “further steps” before issuing an “emergency direction” barring a person from flying or a written confirmation that no such direction will be issued. In the meantime, travelers may or may not be informed of what is transpiring, how long it will take, or whether they can expect to make their flight.

Prior to arriving at a gate, some travelers will experience the additional frustration of being unable to obtain their boarding passes at an electronic kiosk, over the phone, or on the Internet because their name resembles a name on a watch list. These travelers will be required to present themselves with their identification in person before obtaining a boarding pass. Behind the scenes, information about all airline travelers will be collected by Transport Canada, CSIS, and the RCMP, linked to other information accumulated by government, evaluated in secret, and used to form the basis of unilateral Ministerial decisions that could have a serious impact on the travel plans, reputation, and finances of many Canadians citizens, permanent residents, and individuals. For example, innocent individuals may be treated as potential terrorists in front of fellow travelers, then denied the right to board an intended flight, and end up finding themselves out of pocket for travel-related expenses including the costs associated with rebooking.

THE ISSUES

I The Need for an Adequate Legal Framework

In order to protect privacy, programs intruding on privacy should be governed by clear and appropriate statutory language. Where statutes grant government power to intrude on privacy and other rights, the grant of power should be no greater than is necessary to accomplish the purposes behind the program. Minimal collection, use, and disclosure of personal information must be employed. An intention that the power will be exercised with restraint should be plain on the face of the statute. Such openness and transparency ensures that citizens and officials understand and respect legal duties and basic rights.

Over Breadth of Current Statutory Provisions

By way of an associated schedule, section 4.81 of the *Act* provides the Minister with the power to obtain “any information” from air carriers and ARS operators regarding all travelers flying in to, departing from and traveling within Canada. At present 34 data elements are listed under the Schedule. This extensive collection of personal information will include every passenger’s address and telephone number, a full and detailed travel itinerary, class of seat, number of checked bags, and manner of payment. The resulting privacy invasion is excessive. By way of contrast, the advanced passenger information agreement with the European Union involves 19 data elements.

Section 4.76 of the *Act* allows the Minister to issue “emergency directions” requiring “any person to do... anything that in the opinion of the Minister is necessary” to respond to “an immediate threat to aviation security.” We are concerned that this provision creates an overbroad discretion with resultant risks to privacy and other fundamental freedoms, yet no concomitant safeguards are provided.

Recommendations:

- 1. Section 4.81 of the *Act* should be amended so as to minimize the data required for collection to that which is absolutely necessary for aviation security.**
- 2. Section 4.76 of the *Act* should be amended to provide an objective standard - anything required under an “emergency direction” must be “reasonably necessary and consistent with the Canadian Charter of Rights and Freedoms.”**

Secret Rules and the Rule of Law

Measures that impact on rights should be publicly known and defensible. Under section 4.72 of the *Act*, a wide range of *Passenger Protect* procedures affecting travelers may be promulgated in secret by the Minister of Transport as “security measures.” The power to develop secret rules extends to matters including safety, restricted access, the screening of passengers and other persons, and the prevention of and response to “unlawful interference with civil aviation” that “occurs or is likely to occur.” In light of the Minister’s existing broad power to issue “emergency directions”, the justification for such further emergency-like powers is not evident. Whatever reason there may be for the issuance of a particular narrow, local, or technical “security measure”, secret rules that derogate from basic rights of individuals do not and cannot comport with the rule of law.

Recommendation:

- 3. Section 4.72 of the *Act* should be amended to preclude the making of secret “security measures” that impact on civil liberties and human rights including the right to privacy.**

The Absence of Criteria and Defining Elements Governing Listing Decisions

The ostensible purpose at the heart of the *Passenger Protect Program* is the protection of travelers and other members of the public from traveler-based terrorism. In order to accomplish that purpose while safeguarding fundamental rights, the *Program*’s handling of personal information must be disciplined by appropriate, objective, and clear statutory language providing criteria and elements which will define and limit the discretion to list an individual on a Transport Canada watch list.

Since the *Program* will have a significant impact on the personal privacy of individuals, legislation must be enacted to provide appropriate and objective criteria governing the underlying listing decisions. To date, this has not been provided.

While the *RIAS* provides background on the *Program*, this background material does not have the requisite force of law. Moreover, statements made in the *RIAS* appear at odds with *Passenger Protect* materials posted on Transport Canada's website. For example, at several points, the *RIAS* refers to barring individuals from flying who "pose an immediate threat" and alludes to an "assessment ... [that] would *include* an evaluation of whether there is a reasonable expectation that the person would commit an act of unlawful interference in civil aviation should they be permitted to board an aircraft" (emphasis added). At the same time, Transport Canada's website refers to a number of non-exhaustive indicators such as those associated with *past* convictions as part of an unpublished set of "guidelines" that would allow a person to be added to the list "if the person's actions lead to a determination that the individual may, should they be permitted to board, pose a threat to aviation security."

Both of the approaches taken fall short of providing objective and defined elements. Instead, the proposed *Program* will rely on various *indicators* that would shape but not confine an effectively open-ended discretion to the list. The overall approach is also deficient because it is not clear which of these "standards" will apply. What is required is a focused and exhaustive set of defining elements tied to the purpose of the *Program* that must be satisfied in order to justify a decision to list a person as a threat.

Recommendation:

4. The *Act* should be amended to provide that a decision to list or bar an individual is based on reasonable grounds to believe that the individual will cause or is involved in the planning of violence associated with travel-related terrorism. Such criteria would help to ensure that from the outset, the intrusive powers associated with the *Program* are focused on the prevention of serious travel-related threats.

II The Need for Other Legal Constraints

The protection of privacy requires that the Program be governed by legally enforceable rules and constraints based on the fair information principles and practices. A privacy-protective approach requires that less intrusive alternatives be considered first, that there be a rational connection between the Program and its objectives, that any privacy intrusions be limited to no more than is necessary, and that the security gained must be real and not illusory. This approach is consistent with the protection of privacy provided for in the Charter of Rights and Freedoms.

Purposes of Disclosure

Having a clear and defined purpose at the heart of the *Program* is essential for compliance with the *FIPs*. As indicated at the outset, these principles and practices are at the foundation of modern privacy laws and policies, including those in force across Canada. These *FIPs* include:

- Identifying Purposes – the purpose for which personal information is collected shall be identified by the organization at or before the time of collection; specified purposes should be clear, limited and relevant to the circumstances;
- Limiting Collection – the collection of personal information shall be limited to that which is necessary for the purposes identified, and collected by fair and lawful means; and
- Limiting Use, Disclosure, and Retention – personal information shall not be used or disclosed for purposes other than those for which it was collected, and shall be retained only as long as necessary for the fulfillment of those purposes.

Allowing the RCMP to access, use, and disclose personal information for the purpose of identifying individuals wanted on a wide variety of warrants unrelated to the purpose of the *Program* violates the FIPs, particularly the purpose limitation principle, and may have the effect of detracting from the *Program's* capacity to focus on aviation security. Under subsection 4.82(12), CSIS' discretion to use and disclose personal information for the purpose of assisting with an investigation of a threat to the security of Canada is restricted to those threats involving "activities ... directed toward or in support of the threat or use of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective ..." as set out in paragraph c) of the definition of "threats to the security of Canada" in section 2 of the *CSIS Act*. The RCMP should not be granted any greater latitude in regard to this *Program* and should be bound by similar restrictions as CSIS on the use and disclosure of the personal information collected under the *Program*.

While the RCMP has a general duty to assist with the apprehension of those who are subject to outstanding warrants regarding extradition or immigration matters or drug trafficking offences, it is inappropriate to expand RCMP powers with respect to such duties under the guise of a counter-terrorism measure. Moreover, in the absence of appropriate statutory constraints limiting the purposes of this *Program*, the risk of "function creep" is too great: what was conceived as an extraordinary measure designed to counter terrorism associated with travel may too easily transform into a more general surveillance program if the regulation-based list of applicable warrants is permitted to grow under subsections 4.82(1) and (20) of the *Act*.

Recommendations:

5. RCMP discretion to use and disclose the *Program* passenger data should be confined to circumstances where the RCMP is performing terrorism-related transportation security functions.

6. Subsection 4.82 (11) of the *Act* should be repealed. In the alternative, section 4.82 should be amended to ensure that personal information is only disclosed in relation to a person sought under warrant where that person presents a serious threat to transportation security or the safety of the public.

Public Privacy Impact Assessments and Information Handling MOUs

Public notice of the rules and procedures governing the handling of personal information is essential for accountability with respect to the use and disclosure of personal information. In this regard, the *RIAS* mentions memoranda of understanding (“MOU”) between the RCMP, CSIS, and other bodies regarding the sharing of personal information without the necessary detail as to content and without any provision for “privacy protection” protocols limiting the subsequent retention, use, and disclosure of personal information. The *Act* and the proposed *Regulations* are silent on the subject of MOU’s. In the absence of transparent rules and procedures both privacy and security suffer. As a general rule such protocols should be made public and subject to scrutiny and comment. Such scrutiny and evaluation protects privacy and promotes public confidence while ensuring that relevant security elements are also scrutinized and improved.

Recommendation:

7. Information handling rules and procedures, including those governing the disclosure of personal information, should be publicly scrutinized using a privacy impact assessment model.

Accuracy, Data Quality and the Duty to Validate Information and Intelligence

Ensuring that personal information is accurate, complete, and up-to-date is critical to protecting privacy and human rights. And since personal information is at the heart of the *Program*, the relevance and accuracy of that information is critical to fairness and a defensible program.

Under the proposed *Program*, the personal information of travelers will flow between air carriers, ARS operators, the RCMP, CSIS, as well as other Canadian and foreign law enforcement and intelligence agencies. At critical junctures, this information and intelligence will be pooled, considered, and acted on by Transport Canada. In exercising decision-making authority under the *Program*, the Minister of Transport will not be subject to sufficiently rigorous and legally enforceable obligations with respect to the validation of personal information and intelligence. A program such as this one calls for obligations in addition to those prescribed in subsection 6(2) of the *Privacy Act* and that arise well ahead and independent of any appeal or complaint.

In addition, the Minister's decision-making process would be significantly improved if it provided for a critical insider voice – possibly a senior legal official from the Department of Justice – who would be tasked with probing and testing the evidence and analysis during the internal validation process.

As Justice O'Connor's three-volume report on the events related to Maher Arar indicates, agencies that rely on inaccurate or mischaracterized information can have a profound impact on the rights of affected individuals. The following recommendations are designed specifically to minimize the risks to privacy and human rights.

Recommendations:

8. Individual cases being considered for listing must first be subject to a rigorous internal validation process. Even in urgent cases justifying an interim decision to list or bar an individual, the decision maker must be legally bound to complete this validation process within a defined period. In all cases, the decision maker should be required to document the basis for a reasonable decision to list or required to remove a person's name from the list. The duty to follow these steps should be set out in statute although the particulars might be provided for by regulation.

9. The documentary record supporting a listing decision must be made available for purposes of access, correction, transparency, and review.

10. All listing materials and files associated with an unsupportable listing decision should be destroyed one year after a de-listing decision. Accordingly, Transport Canada must be legally responsible for ensuring that where such materials are disclosed, the disclosure is subject to appropriate and enforceable use, retention, disclosure, and destruction policies and procedures.

11. A rigorous validation process should also formalize the role of a critical insider voice – possibly a senior legal official from the Department of Justice – who would be tasked with probing and testing the evidence and analysis during the internal validation process.

A Single Accountable Authority

I note that it appears that there will be only one authority (the Minister of Transport) with responsibility for making listing decisions under Canada's air travel watch list. Having a single authority is crucial to the integrity and fairness of the *Program*, which in turn supports privacy. Affected individuals and the Canadian public need to be certain that a single Canadian authority will be held accountable for all misidentification problems. Otherwise, Canadians would experience the additional frustration, expense, and injury associated with being bounced back and forth between several Canadian agencies, each disclaiming responsibility.

The frustrations and injuries associated with misidentification and wrongful listing decisions are likely to be compounded if the watch list is a foreign list. News reports have indicated that air carriers operating between certain Canadian cities or between Canadian and non-U.S. foreign destinations may be using U.S. watch lists. The origins and criteria of foreign watch lists are likely to be unknown to the Canadian public, affected Canadians may not have access to redress, and, in any case, the originating authorities may not be accountable or responsible for reasonable redress mechanisms.

Recommendation:

12. The Act should be amended to provide that air carriers operating from Canadian airports must only apply the Minister's list and not other Canadian or foreign lists.

III The Need for Adequate Remedies and Effective Oversight

Privacy, the presumption of innocence, and due process rights are fundamental rights at the heart of a modern citizen-based democracy. A watch list program created for the purpose of allowing the state to take immediate and decisive action impacting on these rights must recognize and protect them. The protection of privacy requires that fair and effective access, complaint, and redress mechanisms be provided to individuals whose personal information may have been collected, used, or disclosed.

Overview of the Inadequacy of the Proposed Remedial Machinery

Neither the proposed *Regulations* nor the *Act* provides for a right to a legally enforceable and effective right to appeal a wrongful listing decision. The *Regulations* merely provide that affected individuals have a right to receive the contact information for the “Office of Reconsideration” (“OOR”). Additional information in the *RIAS* and Transport Canada’s website provides some indication of how that Office might function alongside a centralized Department of Transport office tasked with being available to evaluate air carrier match alerts.

In our view, the remedial machinery discussed in the *RIAS* – consisting of a false positive notation process (whereby innocent travelers misidentified as individuals properly listed as threats are distinguished from those individuals and “cleared” for travel) and a reconsideration office process (whereby wrongly listed individuals names are removed from the watch list) – are insufficient for the following reasons:

- They have no legal status – The proposed functions, powers, and responsibilities of the OOR and the associated remedial machinery do not appear in the *Act*, the proposed *Regulations* or any other legal instruments;

- Affected individuals have no legally enforceable right to appeal a listing decision and the proposed remedies may not be enforceable – The proposed remedies will operate at the discretion of the Department of Transport and, as discussed below, the other avenues, while founded in law, are inadequate;
- The proposed “Office of Reconsideration” lacks independence – It will be an office within the Department of Transport; the same Department responsible for making listing decisions and the issuing “emergency directions;”
- There is no provision for disclosure of information to allow an affected individual to challenge the state’s basis for a decision to list or bar – The information and intelligence founding a listing decision or an emergency direction will be considered and reviewed by the Minister, Transport Canada and the “independent external advisor” hired by Transport Canada. At best this amounts to an *in camera ex parte* review of the evidence without any meaningful provision for disclosure, cross-examination, or other challenge. To be properly fair at law, the process must ensure that affected individuals know the case to meet;
- If a discretionary review is granted, there is no provision for an oral hearing – The reconsideration or wrongful listing process discussed in the *RIAS* appears to contemplate a process conducted primarily, if not entirely, by correspondence.
- There is no provision for written reasons justifying a decision to list or bar – The *RIAS* indicates that the affected individual will simply receive a “letter” from Transport Canada “advising of the decision.”;
- There are no timelines provided to ensure that innocent individuals will be able to make their flights – the *RIAS* merely indicates that “the Department will work with the individual and the air carrier to solve the problem as soon as possible.”;
- There is no provision for compensating innocent individuals who miss flights or suffer other out of pocket losses or injuries.

Each of these significant shortcomings should be appropriately remedied and the process protections should be given force of law by way of statutory enactments. Before elaborating on the appeal rights and procedures recommended by our Office, three other matters warrant comment and recommendation: reducing inconvenience, embarrassment, and injury at the airport; the false positive notation process; and the inadequacies of existing complaint and review machinery.

Reducing Inconvenience, Embarrassment, and Injury at the Airport

The *RIAS* discusses the establishment of a single central office operating around the clock to receive and respond to calls from air carriers and presumably affected individuals. Even a well-staffed traveler oriented service office will not be in a position to adequately resolve the concerns of an as yet unknown number of innocent travelers booked to board flights about to depart from airports across the country. In our view, meaningful assistance with misidentifications will either succeed or fail on the ground at the busiest airports. In the absence of dedicated resources and appropriate protocols requiring timely action, misidentified travelers will miss flights and experience other frustrations and injuries.

Recommendations:

13. Transport Canada must establish misidentification remedy desks staffed by designated Transport officers at all airports at all times with adequate powers to remedy errors and assist travelers in clearing up misidentifications before they are needlessly inconvenienced, embarrassed, or detained.

14. Protocols should be established to ensure that affected innocent individuals are able to make their flights.

15. At each point where a traveler encounters a *Program* related barrier to travel, s/he must be provided with as much information as possible regarding what is happening, why it is happening and what practical steps s/he can take immediately to facilitate continuation of uninterrupted travel. In addition, general information should be provided in writing in plain language and the materials should include a description of the *Passenger Protect Program*, the types of decisions made under the *Program*, the corresponding redress and appeal mechanisms, and the title and contact information for the office ultimately accountable for passenger delay.

16. Affected individuals must be directed to the designated Transport Canada misidentification remedy desk quickly and efficiently so as to increase the odds that innocent travelers will be freed to board on time and as scheduled.

The False Positive Notation Process

The *RIAS* discusses Transport Canada's establishment of a false positive notation process designed to limit the impact of certain varieties of misidentification. This process leaves responsibility for the notation decision in the hands of the Minister. As indicated above, the *RIAS* provides that "the Department will work with the individual and the air carrier to solve the problem as soon as possible."

Based on the U.S experience, such a "cleared list" procedure will require that affected individuals surrender additional personal information in hope of receiving a "cleared" notation from Transport Canada that distinguishes them from another individual on the list sharing a similar name and birth date. Thereafter, "cleared" individuals will be required to surrender the additional information to confirm their "cleared" status with each air carrier prior to attempting to board all subsequent flights. Despite the additional privacy intrusions involved, we agree that timely false positive notation procedures may be able to provide some assistance in cases of obvious misidentifications. The additional personal information required should be limited to only that which is necessary to establish an individual's "cleared" status.

Recommendations:

17. A process to correct misidentifications should be provided in a manner that intrudes on privacy no more than is necessary and such a false positive notation process should be given legal status under the *Act*. There should be no fees or charges associated with such a process.

18. Transport Canada should be required to issue a notation decision within a reasonable timeframe as established under the *Act*.

19. Independence and fairness should be built into the correction process. This could be accomplished by, for example, ensuring that the notation decision-making process would be staffed by individuals from outside the decision-making Department – the Department of Transport.

The Inadequacies of the Proposed OOR and Existing Machinery Discussed in the RIAS

As indicated, the OOR has no legal status, fails to come with a legal right to appeal for affected individuals, lacks independence, does not provide for disclosure of information to allow an affected individual to challenge the state's basis for a decision to list or bar, does not provide for a right to an oral hearing, does not provide for written reasons justifying a decision to list or bar, is not likely to ensure fair or timely results, and simply makes no provision for compensating innocent individuals who miss flights or suffer other out of pocket losses or injuries.

The *RIAS* indicates that existing complaint mechanisms operating in the form of the Commission for Public Complaints against the RCMP (the CPC), SIRC, the Canadian Human Rights Commission (CHRC), or the availability of judicial review will be able to provide fair and effective remedies. In our view, this assessment is overly optimistic. As Justice O'Connor noted in his initial Report, the current complaint mechanisms "may leave the complaints unaddressed." (Arar Commission Report, Vol. 1, page 277)

With a qualified exception in respect of the Canadian Human Rights Commission, none of the current complaint mechanisms discussed in the *RIAS* has jurisdiction over the relevant decision maker – the Minister of Transport – or the power to order correction of erroneous decisions. SIRC and the CPC are confined to making recommendations about matters within their important but limited mandates. The CPC suffers from an additional deficiency – it may not be in a position to access the information and evidence needed to assess the merits or propriety of RCMP activities. As for the CHRC and any tribunal appointed under the *Canadian Human Rights Act* (the *CHRA*), they are both limited to tackling wrongs associated with statutory grounds of discrimination. While Canadians are properly concerned about the possibility that racial, ethnic, and religious minorities will be disproportionately impacted under a watch list program, listing decisions may be wrong without running afoul of the *CHRA*.

Neither is judicial review before the Federal Court an avenue capable of providing a just remedy for most individuals. The Court's power to grant relief is confined to narrow grounds, evidence is likely to be kept secret from the affected individual, it is an expensive process for litigants in seeking the relief available, and a busy court will not be in a position to provide relief quickly.

Regarding A Statutory Right of Appeal

Modern democracies committed to accountability and the rule of law protect privacy and other fundamental rights by ensuring that individuals have a right to independent adjudication and review of their legal claims including their rights to access, correction and redress with respect to the collection, use, and disclosure of personal information.

As indicated above, the proposed *Program* has not addressed these fundamental protections. Affected individuals must have a legal right capable of providing a full and timely remedy.

Recommendations:

20. Pursuant to the enactment of enabling legislation, an independent appeal body should be vested with the authority and resources to provide a full, fair, effective, and timely remedy in respect of any decision to list or bar a traveler from flying into or out of any Canadian airport. Individuals should have a statutory right to appeal to an independent adjudicator who is empowered to assess the reasonableness of a listing decision against clear, objective, legal, appropriate, and public criteria.

21. The appeal body must be in a position to consider all relevant factors and information irrespective of which agencies were involved in the provision or assessment of intelligence and information.

22. The appeal process must ensure that affected individuals are able to respond to the case against them. Secret evidence should be the exception and kept to an absolute minimum. As was demonstrated effectively before the Arar Inquiry, special security cleared counsel can and should be provided to challenge the status and weight given to evidence the authorities seek to both use and keep secret.

23. The adjudicator must have the authority to remove innocent individuals' names from the Minister's list and to order compensation for injuries including missed flights or other out of pocket expenses.

24. Decisions should be issued in writing with reasons.

Independent Review and Oversight with Respect to Information Handling

In order to ensure that derogations of privacy and other fundamental rights and liberties remain limited and proportional, democracies today must provide for fair, effective, and independent oversight of the national security activities of law enforcement and intelligence agencies. Machinery dependent on receipt of complaints from individuals cannot, on their own, ensure that the public and individual interest in the protection of rights and liberties will be adequately served.

In his most recent report regarding a new review mechanism for the RCMP's national security activities, Justice O'Connor has recommended that an independent oversight body, the Independent Complaints and National Security Review Agency, be created to oversee all of the RCMP's activities including those related to national security. We support Justice O'Connor's recommendation, as well as his recommendations with respect to an expanded oversight role for the Security Intelligence Review Committee (SIRC) over Transport Canada and other agencies involved in national security related programs. This is consistent with [Commissioner Cavoukian's submissions regarding oversight in relation to the *Anti-Terrorism Act Review*](#), a copy of which is attached for your convenience.

Recommendations:

25. For systemic oversight of this Program, the Information and Privacy Commissioner of Ontario supports Justice O'Connor's recommendations found in his review.

26. Enabling legislation for systemic oversight requires a dedicated annual and independent review of the entire *Passenger Protect Program* including:

a) Transport Canada listing decisions, "emergency directions", "security measures"; and

b) Retention and disclosure decisions made under the *Program*; and

c) *Activities involving or that should involve* policies and caveats limiting the subsequent use and retention of personal information obtained or generated under the *Program*.

27. The review body for systemic oversight should be required to report to the public through Parliament on all aspects of the *Passenger Protect Program* including but not limited to:

a) The number of listing decisions,

b) The number and nature of "emergency directions" and "security measures",

- c) **The number and nature of retention and disclosure decisions,**
- d) **The number and nature of *activities involving or that should involve* policies and caveats limiting the subsequent use and retention of personal information obtained or generated under the *Program*, and**
- e) **The number and nature of the recommendations provided to government, the nature of government response, and the nature of any outstanding concerns.**

CONCLUSION

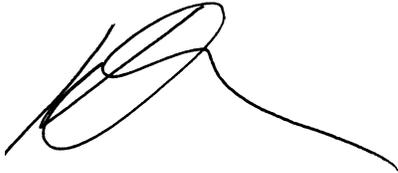
As proposed, Canada's "No-Fly" Program - *Passenger Protect* - does not have an adequate legal framework to provide for transparency, accountability, or redress. The result is a security program that will have a disproportionate impact on privacy relative to the security results that may be obtained. Neither the proposed *Regulations* nor the *Act* set out critical limits, rights, or remedies regarding the Minister of Transport's power to list individuals as threats and bar them from flying. The RCMP's discretion to use and disclose *Passenger Protect* passenger data is for purposes other than terrorism-related aviation security and is too broad. Innocent people affected and injured under the *Program* have not been provided with practical, as well as legal rights to correction, redress, and compensation.

Canadians expect and are entitled to security solutions that comport with the rule of law and the protection of privacy. Justice O'Connor's recent reports on the events related to Maher Arar make evident that poorly managed watch list systems and protocols can have a profound and disproportionate impact on individual rights and especially those in minority communities. Where inaccurate personal information is collected and used by the public authorities, without verification as to accuracy and without correction, the consequences to the individual can be severe. The lack of an effective, timely and legally enforceable remedy for citizens is a serious issue, with serious consequences for those caught in situations not of their own making, through official use of inaccurate information.

Accordingly, we recommend appropriate legislation to ensure that the rights of Canadians are protected by appropriate legal constraints, statutory safeguards and remedies, and adequate and effective oversight.

I attach a list of all of our [recommendations](#). If we can be of any further assistance, please do not hesitate to contact our office.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Ken Anderson', with a long horizontal stroke extending to the right.

Ken Anderson
Assistant Commissioner (Privacy)

cc: Mark D'Amore, Clerk, House of Commons Standing Committee on Transport,
Infrastructure and Communities
Robert Marleau, Information Commissioner of Canada
Jennifer Stoddart, Privacy Commissioner of Canada

Enclosures