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June 6, 2012

BY E-MAIL

Mr. Warren (Smokey) Thomas
President of the Ontario Public Service
Employees Union
Ontario Public Service Employees' Union
100 Lesmill Road
North York, ON M3B 3P8

Dear Mr. Thomas:

Re: Schedule 28 of Bill 55: *Government Services and Service Providers Act, 2012*

You have asked for an assessment of any privacy concerns relating to *The Government Services and Service Providers Act, 2012* that arise from the United States *Patriot Act*. For the reasons set out below, the *Patriot Act* poses serious privacy concerns if ServiceOntario is contracted out to either a US corporation or a Canadian subsidiary of US corporation. Ontarians' personal information would be at risk of disclosure to US national security authorities under the *Patriot Act* if this occurred. There are no legal guarantees that personal information held by a corporation with US ties would be safe from disclosure to US authorities under compulsion of the *Patriot Act*.

The Government Services and Service Providers Act, 2012 ("GSSPA")

The *GSSPA* provides the provincial Cabinet with very broad powers to contract out or privatize the delivery of Ontario government services, such as the services provided by ServiceOntario. Nothing in the *GSSPA* prevents the government from contracting out services to either US corporations or Canadian subsidiaries of US corporations.

US Patriot Act

The US Congress passed the *Patriot Act* in October 2011 in the wake of the 9/11 attacks. The Act provides sweeping powers to US authorities to monitor personal records. Among other things, the *Patriot Act* amended the US *Foreign Intelligence Surveillance Act (FISA)* which provides US authorities with the power to gather intelligence in the US and abroad.

{C0541061.1}

Under *FISA*, a Foreign Intelligence Surveillance Court (FIS Court) may issue secret orders allowing US authorities to gather personal information about individuals. Failure to comply with a FISA order, and to keep its existence secret, is an offence in the US.

Privacy Concerns Relating to Privatization of ServiceOntario

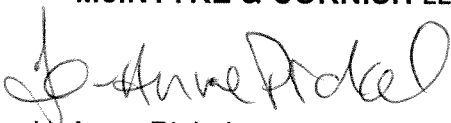
The possible privatization of ServiceOntario under the *GSSPA* raises the following serious privacy concerns:

- There is a significant risk that a US corporation or a Canadian subsidiary of a US corporation carrying out ServiceOntario services under the *GSSPA* could be required by court order under the *Patriot Act* to produce personal records that are in their possession or control, whether those were held in the US or in Canada.¹
- A corporation would be legally required to produce this information regardless of any contractual or practical service agreement they may have entered into with the Ontario Government.²
- Court orders under the *Patriot Act* are issued in secret, meaning no notification likely would be provided to the Ontario government about the disclosure of the information to US authorities. In fact, a corporation likely would be found in violation of the law if it failed to keep the FISA order secret.
- Finally, an FIS Court would not be bound by any privacy protections in Canadian legislation such as the *GSSPA* or the *Freedom of Information and Protection of Privacy Act*. Although an FIS Court might take these privacy protections into consideration, there are no guarantees that a court would refrain from issuing a disclosure order because of them, especially if vital US interests are seen to be at stake.

For all these reasons, serious privacy concerns arise from the proposed privatization of ServiceOntario services. As detailed above, a contracting out of these services to a corporation with US ties would place Ontarians' personal information at risk of disclosure to US national security authorities under compulsion of the US *Patriot Act*.

Yours very truly,

CAVALLUZZO HAYES SHILTON
McINTYRE & CORNISH LLP



Jo-Anne Pickel
JP/an

¹ See "Privacy and the USA Patriot Act: Implications for British Columbia Public Sector Outsourcing (Information and Privacy Commissioner for British Columbia, 2004)

² Section 16(1) 3. of the *GSSPA* authorizes disclosure of personal information "in order to comply with a subpoena or warrant issued, or order made, by a court... with jurisdiction to compel the production of the information." This exception could be interpreted to permit a person or entity to disclose personal information to a US court with jurisdiction to compel the information.