Surveillance and Privacy Law: FAQs

In this appendix, we answer common questions about government, business, and individual surveillance, with reference to some of the laws that protect privacy rights. Laws can be very complex, can vary across provinces and territories, and can change over time. As a result, this discussion can only serve as a general and preliminary guide.

**How is the personal information I give out to businesses protected?**

When a business collects and uses your personal information, you are entitled by law to ask why it needs that information: a business is allowed to collect only information that is essential to its basic purposes. You have the right to see the information that a company holds about you in order to ensure that it is correct, and you may also withdraw your consent. As a general rule, before a business collects sensitive personal information from you (for example, health or financial information), it must explicitly request and receive your consent to do so. Businesses must also keep that information secure. In addition, they must appoint an individual to be accountable for information-collection practices and must provide his or her contact information. For more about your rights under the main federal law that governs business information collection practices, the Personal Information...
Protection and Electronic Documents Act, see the guide to PIPEDA at http://www.priv.gc.ca/information/02_05_d_08_e.asp.

If you feel that your personal information has been mishandled by a business, you can file a complaint with the Privacy Commissioner of Canada: http://www.priv.gc.ca/complaint-plainte/pipeda_e.asp.

In British Columbia, Alberta, and Québec, the provincial privacy commissioners also have jurisdiction to investigate complaints about businesses under provincial private sector privacy statutes:

- Office of the Information and Privacy Commissioner for British Columbia
  http://www.oipc.bc.ca/
- Office of the Information and Privacy Commissioner of Alberta
  http://www.oipc.ab.ca/pages/home/default.aspx
- Information and Privacy Commissioner, Québec / Commission d’accès à l’information du Québec
  http://www.cai.gouv.qc.ca/

In the other provinces, PIPEDA applies, and so you would need to address your complaint to the Federal Privacy Commissioner.

**How is the personal information that I give out to governments protected?**

Both Canadian and all provincial and territorial governments restrict how your personal information can be collected and shared by all levels of government, and some provinces, such as Ontario, have specific protection for health-related information. (See Information and Privacy Commissioner, Ontario, at http://www.ipc.on.ca.)

These laws generally require government agencies to have accessible and understandable policies related to the collection and use of personal information and to collect only information necessary for the provision of services as authorized by law. Privacy legislation restricts the extent to which these agencies can share information. Laws that protect privacy typically allow a person to inquire about what information an organization has
collected and stored about him or her, to review it, and to request changes when the information is not accurate.

If you feel that your personal information has been collected, stored, or shared improperly by a provincial government agency, each province has a privacy commissioner or ombudsperson who receives complaints and can act to resolve your complaint. For a list of these individuals and provincial government agencies responsible for privacy, see http://www.priv.gc.ca/resource/prov/index_e.asp.

If you feel that a federal government agency has mishandled your personal information, you can file a complaint with the Privacy Commissioner of Canada. For instructions and related forms, see http://www.priv.gc.ca/complaint-plainte/pa_e.asp.

Can I sue if another individual violates my privacy?

Four provinces (British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador) have laws that make invasion of privacy a tort—that is, a wrongful act that can give rise to a civil lawsuit. The tort typically consists of a lawsuit brought by an individual who has been subjected to audio or video surveillance or impersonation, or whose personal documents have been read or used.

In Jones v. Tsige (2012 ONCA 32), the Ontario Court of Appeal also affirmed the existence of a common-law (i.e., judge-made law) tort of invasion of privacy; as a result, individuals in Ontario can also bring a lawsuit if they feel that their privacy has been unlawfully intruded upon. The cause of action for intrusion upon seclusion must have three key elements:

- the defendant’s conduct must have been intentional (this includes reckless conduct);
- the invasion of privacy must have occurred without lawful jurisdiction
- a reasonable person would regard the invasion as highly offensive and as causing distress, humiliation, or anguish

* The legislation in British Columbia is the Privacy Act, RSBC 1996, c. 373; in Saskatchewan, it is the Privacy Act, RSS 1978, c. P-24; in Manitoba, it is the Privacy Act, CCSM c. P125; and in Newfoundland and Labrador, it is the Privacy Act, RSNL 1990, c. P-22.
Am I required to identify myself to the police?

In general, while it is perfectly acceptable for police officers to engage you in conversation and to ask questions of you, you are under no general obligation to provide them with information. There are, however, specific times when you must identify yourself to police. In Moore v. R. ([1979] 1 SCR 195), the Supreme Court upheld a conviction, holding that a refusal to identify oneself to a police officer who was trying to issue a ticket for a traffic offence was obstruction. When a police officer suspects you of a specific offence, in all likelihood you have an obligation to provide your name and identifying details.

How much information do I have to provide to police?

If you are a suspect, are detained for questioning, or are put under arrest, several common-law (i.e., judge-made law) and constitutional law (i.e., the Charter of Rights and Freedoms) protections are available to you. You are not required to answer any questions, and as soon as you are detained, you must be informed of your right to consult a lawyer. Everyone has the right to remain silent and cannot be compelled to speak to police during an investigation. However, the police are allowed to question an individual after he or she has consulted a lawyer, even when the person asserts his or her right to silence. In addition, the police may observe a person under arrest or detention and may use statements made to cellmates.

When can I be searched by police?

Under section 8 of the Canadian Charter of Rights and Freedoms, “Everyone has the right to be secure against unreasonable search or seizure.” Typically, it is assumed that the police need to get a warrant to search you or your property. Any time you have a reasonable expectation of privacy, the police are required to get judicial authorization from an independent judge or justice of the peace to be permitted to violate your privacy. This means that the police must present reasonable and probable grounds to an impartial decision maker to get permission to search you, your possessions, or your home. Reasonable and probable grounds amounts to a reasonable belief that an
offence has been committed and that some relevant evidence will be found through the search. It is not enough for the police to merely have a suspicion, as determined in Hunter et al. v. Southam Inc. ([1984] 2 S.C.R. 145).

Can I be searched when I am arrested or detained?

Police officers are allowed to search a person immediately after arrest. The logic behind this is that the police need to ensure that the arrested person does not possess any weapons or other dangerous materials. As well, the police have an opportunity to collect evidence that might be destroyed if they take time to get a warrant.

In R. v. Caslake ([1998] 1 S.C.R. 51), the right to search after arrest was limited to searches that were directly related to the incident leading to the arrest. Searches that were simply an administrative formality and not related to the actual circumstances of arrest were ruled to be in violation of section 8. In R. v. Stillman (1997 SCC 32), the Supreme Court determined that the power to conduct a search “incident to arrest” did not include the collection of samples of bodily evidence from an arrested person.

If a person is simply detained rather than arrested, the police’s powers to search are much more limited. In R. v. Mann (2004 SCC 52), the Supreme Court ruled that when the police have reasonable grounds that connect a person to a particular crime, they can detain the individual and, as part of that detention, can subject the person to a simple pat-down search to ensure the safety of the police officers, and not for any other reason.

Can I be strip searched?

The police do have the power to conduct strip searches. In R. v. Golden (2001 SCC 83), the Supreme Court ruled that in addition to the reasonable and probable grounds for making an arrest, the police need reasonable and probable grounds to conclude that, as part of a search incident to arrest, a strip search is necessary.

Strip searches are considered to be the most invasive form of search. As such, they should always be conducted in a private location such as a police station. Only in true emergency circumstances should a strip search be carried out at the scene of arrest.
When can my home be searched?

A home is considered to be a place where you enjoy the highest degree of privacy. Police cannot normally enter, let alone search, a home without a warrant. They are, however, allowed to enter a home without a warrant in certain limited circumstances. In emergency circumstances, police can enter a home to arrest a suspect if waiting for a warrant would risk the destruction of evidence or the safety of people involved in the situation. If a 911 call is made from a location, the police are allowed to make searches related to the 911 call only and may enter without a warrant to do so.

When can the police search my car?

In *R. v. Caslake* ([1998] 1 S.C.R. 51), the police determined that individuals in cars enjoy a lower expectation of privacy than they would in their homes. As a result, cars can be searched incident to a person’s arrest (assuming the person was in or near the car at the time of the arrest). When the police stop a person for a driving-related reason, the search of the vehicle must be related to the traffic stop, as determined in *R. v. Mellenthin* ([1992] 3 S.C.R. 615).

In *Dedman v. The Queen* ([1985] 2 S.C.R. 2), the Supreme Court affirmed that the police have a duty to ensure the safety of those travelling on public roads and therefore have the power to make random traffic stops to determine whether a driver has been drinking or is otherwise in violation of the law. This means that the police need very little reason to pull over a driver and initiate a search in order to detect possible traffic-related offences.

Can my phone or computer be searched?

In *R. v. Fearon* (2013 ONCA 106), the Ontario Court of Appeal ruled that it is acceptable for police to make a cursory search of a cellphone incident to arrest, providing that it is not locked or otherwise password protected. Beyond a cursory search, or in cases where the phone is locked, a warrant is required.

With regard to search warrants, a laptop or smartphone is considered to be a separate place, distinct from the place where it is located. Therefore, if a warrant is issued for a home or car, and a computer or smartphone is discovered, the contents of the electronic device are not searchable without a separate warrant.
Can the police search through my garbage?

In *R. v. Patrick* (2009 SCC 17), the Supreme Court allowed the police to use evidence obtained through the search of garbage placed near the edge of the defendant’s property for disposal through the city’s garbage collection. The court ruled that an individual has little expectation for privacy with respect to the garbage placed out for collection.

When are the police allowed to use sniffer dogs?

In *R. v. Kang-Brown* (2008 SCC 18), the Supreme Court allowed the use of sniffer dogs in a bus terminal for random searches where there was a reasonable suspicion of illegal activity. This is a lower standard than is required to obtain a search warrant from a judge. There is a higher expectation of privacy for children in a school, however, and random searches are not acceptable there, as determined in *R. v. A.M.* (2008 SCC 19).

When can police take DNA evidence, and how long can they keep it?

DNA evidence can be collected by the police for use during an investigation, but the police must obtain a warrant to do so.* Additionally, there is a long and growing list of offences where DNA evidence is required to be collected or can be collected after conviction at the discretion of the judge.

In some cases, stored DNA evidence must be destroyed, and, in other cases, it may be destroyed at the discretion of the commissioner of the RCMP. Evidence must be destroyed immediately if the order that allowed for its collection is set aside or if the person from whom it was collected is acquitted of all the charges for which the order to collect the evidence was granted. DNA evidence must be destroyed within one year if the person from whom it was collected is discharged absolutely and within three years if the person from whom it was collected is discharged conditionally, unless there is another

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order that allows for the collection or retention of DNA evidence from that person.* A refusal to destroy stored DNA evidence can be reviewed by a judge.