



July 9, 2007

Dear San Francisco Supervisor:

The ACLU of Northern California (ACLU-NC) and the Electronic Frontier Foundation (EFF) write to respond to a letter, sent by the Department of Telecommunications and Information Services (DTIS) on May 31, 2007, which purports to address concerns raised about insufficient privacy and free speech protections in the Earthlink/Google contract for municipal wireless Internet access in San Francisco.

DTIS's response only confirmed that the Earthlink (fee service) and Google (no fee service) contract provisions lack adequate protections for privacy and free speech. Both the ACLU-NC and EFF have spent considerable time analyzing the current contract, carefully differentiating between concerns with the Earthlink portion of the Agreement and the Google portion of the Agreement, and making concrete recommendations about how to modify the contract. These recommendations take account of the realities of providing municipal wireless service, while ensuring some basic protections for privacy and free speech.

We were very disheartened that after DTIS claimed in the first page of the letter that "protection of an individuals' personal privacy is of paramount importance," its response did not adequately address many of our concerns, and clouded the issues by touting restrictions that apply only to the Earthlink service, while concerns about the Google service were left entirely unresolved.

The Board of Supervisors should insist on the relatively modest, but important, contract modifications delineated in the following pages in order to ensure basic privacy and free speech protections for the people of San Francisco. Shouldn't San Franciscans have at least the same level of protection for their private information as do community members in Philadelphia and Portland?¹

Earthlink and Google stand to make a substantial profit by providing wireless service to San Francisco. Municipal wireless is expected to be a \$1.2 billion industry by 2010 and according to internal Earthlink research,, the company expects a return on its Philadelphia investment in two years and greater profits in the years to come. San Francisco community members should not be forced to subsidize company profits with their privacy and free speech rights. It is now up to the Supervisors to ensure that San Francisco is getting a fair deal.

The following pages reiterate the privacy and free speech concerns and concrete recommendations for contract language modification that were articulated in the ACLU-NC's May 14, 2007 letter. Following each of the recommended changes to the contract, we have included portions of DTIS's letter with explanations detailing why the response does not adequately address our concerns.

¹ The Philadelphia wireless contract provides subscribers with the opportunity to opt-out of data collection as well as receiving marketing information. Neither can personal information be sold, rented, or given away to third parties. Portland's agreement stipulates that service providers may not collect more "personally identifiable information beyond what is required to operate Services and will only share information for purposes necessary to operate Services, except as required by law or authorized by this Agreement." The San Francisco contract does not contain either of these safeguards.

Necessary Modifications to Earthlink/Google Contract

1. Currently No Limitations on Tracking Who We Are:

Now: There are currently NO LIMITATIONS in the contract to control what type of personal information can be collected by Earthlink and only a nebulous limitation on Google. Google can collect “minimal information.” But, what is “minimal” to Google may be extremely different than what is “minimal” to many San Franciscans.

Recommended Changes:

- **Anonymous and pseudonymous access should be available.**
- **At a minimum, the contract must define and limit the amount and type of personal information that can be collected by Earthlink and Google. Earthlink and Google should not be allowed to require multiple types of personal information in order to use the municipal wireless system.**

DTIS responses, numbered below, do not adequately address concerns about the *type* of personal information that is collected. Our explanations are included in the [blue](#) bulleted sections below.

1. “For the no fee [Google] service, the Agreement provides that only minimal information will be collected for login. . . . Therefore, little, if any, personal information will be collected.”
 - The Agreement does not define “minimal information.” What is “minimal” to Google may be extremely different than what is “minimal” to many San Franciscans. DTIS’s conclusion that the term, “minimal information,” without definition, will ensure that “little, if any, personal information will be collected,” is insufficient. The contract must define and limit the amount and type of personal information that can be collected by both Google and Earthlink. Defining the term “minimal” will help make the privacy practices transparent, and give the San Francisco users confidence that they know what will be collected and stored when they use the system.
2. In response to our concerns that there is no limitation on the type of personal information that can be collected by Earthlink, DTIS points to other provisions in the contract that do not address limitations on the *type and amount* of information collected, but only address *what can be done* with information once it has been collected.
 - DTIS’s response does not address the problem raised. The contract should limit *the type and amount* of information that Earthlink can collect, in addition to limiting *what can be done* with this information once it is collected. The DTIS response only attempts to address the latter issue, and therefore leaves our concerns about limiting the information initially collected entirely unresolved. There are currently no limitations in the contract to control what personal information Earthlink can collect. The Philadelphia contract addresses both what can be collected and to whom it can be disclosed, and the Portland contract precludes providers from collecting any more personally identifiable information than is required to operate the services.

	Recommended Changes	Earthlink (monthly charge)	Google (no fee)
What personal information is collected about users?	<p>Anonymous and pseudonymous access should be available.</p> <p>At a minimum, define and limit the amount and type of personal information that can be collected by Earthlink and Google.</p> <p>Multiple types of personal information should not be required.</p>	<p>No limitation in contract regarding the type of information that Earthlink can or will collect.</p> <p>Contract defines two types of information, “Protected Personal Information” (PPI) and “unique information.”</p> <p>PPI: “personally identifies the person to which such information pertains.” Includes, but is not limited to, name, address, phone number, social security number, medical profiles, and credit card information.</p> <p>“Unique information,” includes, but is not limited to, “a unique identifier, email address, biometric information, Location Information, IP address or MAC address.</p>	<p>Only limitation in contract regarding the type of information that Basic Service Provider can or will collect is that “[U]sers shall be presented with options to register or login that require ‘minimal’ information from the user.” (10.4.2)</p> <p>No definition of “minimal.”</p>

2. *Currently No Limitations on Tracking What We Are Looking At:*

Now: There are currently NO LIMITATIONS in the contract to limit Earthlink and Google from collecting and storing information about the activities of users.

Recommended Change:

- **The contract should require that Earthlink and Google ask users for permission (opt-in) before any records are kept about their activities online.**

DTIS responses, numbered below, do not adequately address concerns about tracking the Internet activities of users. Our explanations are included in the [blue](#) bulleted sections below.

1. “[W]ith respect to Earthlink’s fee service, the Agreement defines PPI to include any ‘Unique Information,’ if that information is associated with PPI (and thus identified as the activities of an

individual user). Thus, if any activity usage logs are associated with PPI, all of the privacy protections applicable to PPI . . . also apply to these usage logs.”

- DTIS completely fails to address the lack of limitations on Google’s recording of users’ activities online, only discussing limitations in place for Earthlink’s fee service.
 - Regarding Earthlink, DTIS also fails to properly respond to the concerns about tracking what individuals are looking at online. Activity usage logs (what people are looking at online) are not included in the definition of “unique information.” DTIS’s response that what people do online will actually be protected when it is linked to other personal information does not solve the problem. As was evidenced by the large AOL privacy breach earlier this year, people can be identified through their searches, even if these searches are not linked to other personal information. There is no good reason why the contract provisions, with both Earthlink and Google, should not directly include protections that stop improper tracking of Internet activities.
2. “The services provided pursuant to this agreement will enable users to access a vast number of third-party services that may collect PII. It is unreasonable to expect this Agreement to regulate PII practices of such unaffiliated services.”
- The change recommended does not presume that this Agreement could regulate third-party practices, and does not ask that it do so. As controllers of networks that provide wireless internet access, Earthlink and Google will have the technical ability to record users’ online activities, independently of any activity logging in which third parties may or may not engage. It is Earthlink and Google’s recording of online activities that the contract can, and should, limit.

	Recommended Change	Earthlink (monthly charge)	Google (no fee)
Are mechanisms available to allow users to opt-in or opt-out of any service that collects, stores, or profiles information on the searches performed, websites visited, emails sent, or any other use of the Network?	The contract should require Earthlink and Google to get user permission (opt-in) before any records are kept about their activities online.	No provisions in the contract for users to opt-in or opt-out of any service that collects, stores, or profiles information on the searches performed, websites visited, emails sent, or any other uses of the Network.	No provisions in the contract for users to opt-in or opt-out of any service that collects, stores, or profiles information on the searches performed, websites visited, emails sent, or any other user of the Network.

3. *Currently No Limitation on Google Tracking Where We Are/Inadequate Earthlink Limitations:*

Now: There is currently NO LIMITATION on Google tracking and recording your location when you use the wireless network.

The contract does require Earthlink to give users the option to opt-out of their location information being recorded and tracked for non-network purposes.

Recommended Changes:

- **The contract should require that Earthlink and Google ask the permission (opt-in) of users before tracking their location.**
- **At the very minimum, people using the Google (no fee) service should have the same ability to opt-out as those using the Earthlink (paid service). People should not have to pay for the Google service by allowing the company, and potentially the government, to know their physical whereabouts.**

DTIS responses, numbered below, do not adequately address concerns about location tracking. Our explanations are included in the [blue](#) bulleted sections below:

- 1 “The Network Agreement includes ground-breaking provisions limiting the uses of Location Information. This is provision [sic] specifically limits the length of time such information resides on the system to 60 days and allows users to opt out of any use of the information.”
 - The opt-out provision cited here (as well as the 60-day limit on data retention) only applies to the Earthlink service. The free Google service does not provide users any option to opt in or opt out having their locations tracked, and DTIS’s response completely ignores this concern. Users who cannot afford the fee service should not be required to sacrifice an important privacy protection in order to obtain the no fee service. Additionally, we recommended that the Earthlink provision, which should be applied equally to Google, be structured as an *opt-in* scheme. An opt-in scheme protects user location information be default, instead of the contract’s current *opt-out* scheme, which requires that affirmative steps be taken by users to protect their privacy and safety.

	Recommended Changes	Earthlink (monthly charge)	Google (no fee)
Are mechanisms available to allow users to opt-in or opt-out of any service that tracks information about the user’s physical location?	The contract should require that Earthlink and Google ask the permission (opt-in) of users before tracking their locations. At a very minimum, people using the Google (no fee) service should have the same ability to opt-out as those using the paid service.	Opt-out option for Location Information. However, opt-out does not preclude Earthlink from using Location Information to: (i) enable a device to connect to the Network; (ii) provide other services which use Location Information from which the user has not opted-out; (iii) comply with legal requests; or (iv) to protect Earthlink or its customers from a	No provisions in the contract regarding any mechanisms available to allow users to opt-in or opt-out of any service that tracks information about the user’s physical location.

		crime, fraud or network security breaches of a material nature.	
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4. Currently Little Limitation on How Long Our Personal Information is Kept:

Now: There is currently NO LIMITATION on how long Google can store any information.

Earthlink can store personal information for as long as it wants—it is only required to purge location information after 60 days.

Recommended Change:

- **The contract should require that our personal data—who we are, what we are looking at, and where we were located—be kept only as long as it is needed to operate the network, and never longer than a few weeks.²**

DTIS responses, numbered below, do not adequately address concerns about data retention. Our explanations are included in the [blue](#) bulleted sections below:

1. “Earthlink must delete Location Information after 60 days.”
 - As discussed in our original recommendation above, this limit applies only to Earthlink and only to location information. There are no other limitations on Earthlink to control how long personal information is retained, and Google may retain any information for as long as it wants, including location information.
2. Regarding PPI: “[D]ifferent types of personal information may need to be kept for different time periods, depending on operational needs of the service. For example, certain billing and collections information must be retained for as long as the user remains a subscriber of the system. . . . Rather than negotiate complicated schedules for data retention, we allow EarthLink the discretion to craft data retention schedules to meet its own operational needs.”
 - Here again, DTIS only discusses Earthlink and disregards the concerns associated with Google. While Earthlink may need to retain some data for billing purposes, DTIS fails to address why the contract has no limitations on how long Google (no fee, no billing records) can retain information.
 - DTIS’s response regarding Earthlink is also inadequate. It is not appropriate for DTIS to give Earthlink the discretion, based on “its own operational needs,” to determine how long to keep detailed records about San Franciscans and what they are looking at while using the municipal wireless system. Just like the contract set a 60-day limit on how long Earthlink could maintain location information, there must also be a time-frame for the retention of other information for both Earthlink and Google.
3. DTIS also cites EFF’s “Best Data Practices” to support its argument that it is proper not to include any limitations in the contract about how long particular data is stored.

² The Earthlink paid service may require user information to be retained until billing and collection have been completed.

- We do not understand why DTIS is confused by the recommendation that data should not be retained for more than a few weeks. While DTIS cites to EFF's Best Practices paper, the white paper clearly explains that "PII about users should be kept only so long as it is operationally necessary, *and in no event for more than a few weeks.*" (emphasis added). Specifically, it recommends that service providers "do not retain any logs of user information on their networks for more than a few weeks." EFF's Best Practices paper address municipal wireless by noting that no-fee services can delete information logs immediately after users log out, while paid services should only keep logs until billing and collection have been completed.³
- As the contract is currently written, Earthlink and Google could even retain personal information long after an individual has stopped subscribing to a service. This is not appropriate. Both for Earthlink and Google, no data should be retained longer than it is necessary to provide the user service, and never longer than a few weeks. The longer such information is maintained, the higher the likelihood of its being accessed by others—the government, third parties, and bad actors hacking into systems and taking advantage of data breaches.

	Recommended Change	Earthlink (monthly charge)	Google (no fee)
How long is this information stored?	The contract should require that data be kept only as long as it is needed to operate the network, and never longer than a few weeks.	<p>No limitation in contract regarding how long EarthLink can store PPI.</p> <p>Earthlink shall retain Location Information for no longer than sixty (60) days.</p> <p>However, this limitation does not apply to Aggregated Location Information or as required by: (i) Applicable Law; (ii) an order of an governmental authority evidenced by court-supported documentation; or (iii) a pending internal investigation to determine if a fraud, crime, or network security breach of a material nature has occurred. (10.3.1.4.b)</p>	No limitation in contract regarding how long the Basic Service Provider can store any information.

³ See EFF OSP Best Practices at www.eff.org/osp/20040819_OSPBestPractices.pdf.

It is not too late to ensure that San Francisco has a municipal wireless system that is truly accessible to all—one that is safe, affordable, and protects the fundamental rights of community members.

For more information, including a more detailed analysis of the Earthlink and Google contract, please visit <http://www.aclunc.org/tech/> or <http://www.eff.org/osp/>, or contact Nicole Ozer at nozer@aclunc.org; 415.621.2493 x306 or Kurt Opsahl at kurt@eff.org.

Sincerely,

Nicole A. Ozer
Technology and Civil Liberties Policy Director
ACLU of Northern California

Kurt Opsahl
Senior Staff Attorney
Electronic Frontier Foundation