

Personal Data Protection in Decisions

**Guidelines intended to courts and tribunals
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Contents

Introduction.....	3
1 Personal Data Identifiers	4
2 Legal Restrictions on Identity Disclosure	6
3 Anonymization Standards.....	7
4 Redaction Method	10

Summary

Personal Data Protection in Decisions

Minimization of personal data disclosure in public documents such as decisions rendered by courts and tribunals can both foster the accountability of the decision-making process and ensure a minimum threshold of personal data protection. It is possible to better manage and protect some of the most sensitive personally identifiable data in accordance with widely accepted fair information practices, without necessarily hiding anyone's identity. When law mandates anonymization, identifying information must be omitted according to a consistent set of standards or redacted with a method that allows for the preservation of good readability and meaningfulness of the reasons for decision.

Résumé

La protection des renseignements personnels dans les décisions

La minimisation de la divulgation de renseignements personnels dans les documents publics tels les décisions des tribunaux permet à la fois de favoriser l'obligation de reddition de comptes dans les processus décisionnels et d'assurer un seuil minimal de protection des renseignements personnels. Il est possible de mieux gérer et protéger certains des renseignements personnels nominatifs les plus sensibles en suivant des codes de bonne conduite en matière de renseignements, sans nécessairement garder secrètes l'identité des personnes. Lorsque la loi requiert l'anonymat, les renseignements identifiants doivent être omis en respectant des normes cohérentes ou caviardés suivant une méthode qui permet de préserver la lisibilité et la pleine intelligibilité du sens des motifs de la décision.

Introduction

[1] Over the past decade, documents prepared and stored by public institutions have become more and more available and accessible to the public. Government bodies now have a means to be more transparent and accountable by electronically posting all their documents on the Internet. Documents that in the past had to be carefully selected and edited before being officially published are now being publicly released within hours after they have been filed.

[2] Members of the public have come to expect such a timely and complete publication of court and tribunal decisions. However, these documents may contain personal data and other sensitive information that were in the past hidden by the “practical obscurity” entailed by the paper format.

[3] In an online and digital context, this personal data have become highly searchable and persistently available on the Internet, thus increasing risks of misuse, ranging from unsolicited marketing to identity theft. Also, when a statutory or court-ordered restriction on publication prohibits identity disclosure of a person named in a decision, it may become difficult to ascertain which identifying information should be omitted or removed from the decision in order to comply with the restriction, without jeopardizing the readability of the reasons.

[4] The following guidelines provide adjudicators from courts, tribunals and other decision-making public bodies with a simple set of guidelines on how to properly and timely release their decisions to the public, while reaching a proper balance between openness and personal data protection¹ and in conformity with any and all applicable publication restriction. These guidelines should be implemented whenever possible at the decision drafting stage, but in some organizations or specific situations the original version of the decision may have to be redacted, *i.e.* edited before public dissemination.

¹ This document is largely inspired by the Canadian Judicial Council's document entitled *Use of Personal Information in Judgments and Recommended Protocol*, available online at: http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_UseProtocol_2005_en.pdf.

1 Personal Data Identifiers

[5] Besides applicable law and legal analysis, reasons for decision usually contain factual information so that the parties and the public can understand the meaning and scope of the disposition. This may include sensitive details about the personal lives of individuals involved, most of which are required for a full understanding of the case background. These details may be embarrassing and even humiliating to the persons named, but it is admitted in Canada that the adverse impacts with respect to individual privacy are generally outweighed by the benefits of fostering a system that is open to public scrutiny².

[6] That the privacy of individuals should not be protected in decisions does not mean that all their personal data should be exposed for all to see on the Internet. It goes without saying that it is entirely up to the author of the decision to determine what facts and information should be included in the reasons for decision, but several personal data identifiers are generally considered to be of little or no interest for a better understanding of the reasons for decision, while constituting a high source of risk for the security of individuals.

[7] Personal data identifiers is information that is unique to a person and that allows direct contact with this person, especially when combined together or with other publicly available data. Except when this person's anonymity is required (see Section 3, below), this does not include the person's name. Personal data identifiers include a person's:

- Day and month of birth (not the age or year of birth);
- Place of birth: city or local community smaller than a province or territory;
- Contact information: home or residence address, postal code, phone, fax, e-mail;
- Unique identifiers: any number, code or image used for social security, health insurance, medical record, birth registration, passport, bank or credit card accounts; and

² "As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.", (*AG (Nova Scotia) v. MacIntyre*, [1982] 1 SCR 175, 185).

- Personal possession identifiers: licence or serial number, land registration, corporate or business name.

[8] These personal data identifiers should be omitted from all decisions except in rare situations where such information is an issue in the case.

[9] For example, where the age of a child is relevant, an effort should be made to avoid mentioning his or her full birth date where a mention of his or her age would suffice.

2 Legal Restrictions on Identity Disclosure

[10] The facts of a case may be subject to a restriction on publication of identifying information about an individual. It is out of the scope of the present guidelines to describe all these restrictions, but the most common and systematically applied prohibitions on identity disclosure in Canada pertain to the following categories of persons:

- Young persons having been dealt with under young offenders legislation³, as well as young victims or witnesses appearing in such proceedings;
- Complainants and minor witnesses when the accused is charged with a criminal sexual offence⁴;
- Parties and/or children in family, child protection or adoption proceedings;
- Applicants in health and social assistance proceedings; and
- Clients of professionals in discipline hearings⁵.

[11] Before releasing any decision to the public, compliance to these restrictions must be ascertained. Special attention should be paid to unlawful identity disclosures that could accidentally occur in reasons for decisions drafted in proceedings that are not routinely and immediately subject to these bans. This occurs most frequently with young persons identified as having a criminal record, victims of sexual crimes and children involved in family disputes or child protection proceedings.

[12] For example, a decision made in the context of a labour dispute containing a statement to the effect that an individual had a criminal record as a young person may trigger the application of the prohibition on identification of this person under the *Youth Criminal Justice Act*. Whenever possible, such an allegation should be avoided unless deemed required by the author of the reasons, in which case the person to whom these allegations relate will have to be anonymized.

³ See the *Youth Criminal Justice Act*, SC 2002, c. 1, s. 110(1) and 111(1) or the former *Young Offenders Act*, SC 1980-81-82-83, c. 110, s. 38. Provincial or territorial legislation may also apply for regulatory offences.

⁴ See the *Criminal Code*, RSC, 1985, c. C-46, s. 486.4(1), formerly 486(3).

⁵ With respect to the last 3 categories, applicable law vary significantly among jurisdictions.

3 Anonymization Standards

[13] In situations where a statutory or court-ordered publication restriction prohibits the disclosure of information that could lead to the identification of a specific individual referred to in a decision, this individual must be anonymized.

[14] The challenge to meet when anonymizing a person referred to in a decision is to be able to omit identifying information while providing parties and the public with meaningful and complete reasons for decision. Indeed, anonymization means more than simply omitting a person's name and personal data identifiers, since all sorts of facts may, combined together or with other sets of publicly available data, allow members of the public to single out a person.

[15] The following anonymization standards strive to strike the right balance between several objectives:

- Ensuring compliance with a legal prohibition on identification;
- Fostering openness and accountability of the decision-making body;
- Maintaining good readability of the reasons for decision;
- Limiting delays in the public release of decisions.

[16] It must be noted that there always remain a possibility that someone, somewhere, will be able to “re-identify” a person that has been anonymized. These standards aim at reaching a *reasonable* level of obscurity with regard to a person's identity, with the assumption that the benefit of fostering openness and providing the public with a meaningful decision generally outweighs the mere risk that someone might be able, with some effort, to put facts together from various sources to identify a person.

[17] In order to properly anonymize a person (the “protected person”), information that leads to this person's identification must be omitted in a consistent manner. Certain types of information should be systematically omitted, whereas other types of information should be omitted only where doing otherwise would pose a high risk of re-identification.

[18] **Personal data identifiers** and the protected person's names, aliases or nicknames should always be omitted. As a reminder, personal data identifiers include a person's:

- Day and month of birth (not the age or year of birth);
- Place of birth: city or local community smaller than a province or territory;
- Contact information: home or residence address, postal code, phone, fax, e-mail;
- Unique identifiers: any number, code or image used for social security, health insurance, medical record, birth registration, passport, bank or credit card accounts; and
- Personal possession identifiers: licence or serial number, land registration, corporate or business name.

[19] **Personal acquaintances information** should generally be omitted. Personal acquaintances information is personal data of closely related persons with whom the protected person is directly involved, such as:

- Family members: parents, children, brothers and sisters, grandparents, cousins, spouses, in-laws;
- Foster family members, tutors, guardians, teachers, babysitters;
- Friends, co-habiting persons, lessors, tenants, neighbours;
- Employers, employees, co-workers, business associates; and
- Organizations or institutions in which the person is involved such as businesses, schools, sports teams.

[20] **Specific factual information** about the protected person does not need to be omitted, provided that the above-mentioned personal data identifiers and acquaintances information is not disclosed. However, in rare cases where this specific factual information is still likely, on a balance of probabilities, to allow for the protected person's identification, it should be omitted. Such specific factual information includes:

- Names of communities or other geographical locations smaller than the judicial district;
- Names of accused or co-accused persons;
- Names of persons acting in an official capacity in a small community such as an expert witness, a social worker, a police investigator;

- Names of small local businesses such as a store, bar or hotel in which the facts have taken place;
- Atypical facts such as:
 - Names of very small communities or organizations such as certain aboriginal communities or small religious groups;
 - Public or notorious professional status such as a politician, a social or economic leader, a famous athlete or artist;
 - Grants or awards for which the person is a known recipient; and
 - Unusually large number of children in a family.

[21] Provided that all the above-mentioned identifying information has been omitted from the decision, **other factual information** about the case or the protected person's character is usually relevant for the readability of the decision and should be preserved. This may include:

- Docket information: file number, registry location, hearing dates;
- Judicial district or larger geographical denomination where the events have taken place or where the case is filed;
- Dates of events;
- Nature of an offence;
- Nature of the relation between the persons involved in the case;
- Year of birth or age;
- Province, territory or country of birth;
- Residence location larger than a judicial district;
- Professional status and occupation;
- Marital and family status;
- Gender, sexual orientation, race, ethnic or national origin; and
- Religious beliefs and political affiliations.

4 Redaction Method

[22] When personal data identifiers or other identifying information can't be omitted at the drafting stage for any reason, the decision should be redacted, i.e. the data should be obscured or blocked out before releasing a public version.

[23] Redaction must be achieved in a consistent manner that does not distort the meaning of the reasons for decision. The information should be replaced either with initials as further described below, or with omission marks between square brackets. In order to maintain good readability of the reasons, the nature of the omitted information should remain clear, as shown in the following example.

L.M.I., who was born on [...], 1989, did on the 16th of January, 2002 assault his father by stabbing him in the hand with a letter-opener in an argument over school grades.

Prior to these events, L.M.I. lived in the town of S[...] with his two parents, which are now divorced. In 2000, L.M.I. moved to Toronto with his mother and two older sisters. L.M.I.'s father, K.I., who is aboriginal, returned to live in the G[...] reserve after he won the silver medal in the men's [...] competition at the [...] Olympic Games. In September 2001, L.M.I. moved again to live with his father.

L.M.I. went to P[...] high school, in S[...]. Mr. M.D., the school principal testified that to his knowledge, L.M.I. was a handsome young man and very talented quarter-back for the N[...], P[...]'s football team.

[24] Special precaution should be taken to remove identifying information found in all parts of the document, including the cover pages, headnotes and footnotes, as well as information that could be revealed by the case name, the filename and any hidden data (also called "metadata") that might be embedded within the file⁶.

[25] The name of an individual should be replaced by initials⁷, or by a pseudonym in rare situations where initials, combined with the facts that have to

⁶ The best way to avoid problems with hidden information is to use the most current version of the word-processing application, and set the security settings to avoid disclosure of revision marks, prior versions or comments when printing, distributing or saving the document.

⁷ Replacing names with initials is a traditional technique used by most case law publishers in Canada, but a few courts or tribunals prefer using letters: the letter "X" replaces the name of the

be preserved in the decision, would still be likely to reveal the identity of the protected person (e.g. for publicly-known persons).

[26] Even if variations occur in the way an individual or organization is named in the decision, the same initials should be used throughout the document to replace each occurrence of the name, except where variations in the name are in and of themselves relevant in order to preserve the decision's readability.

[27] Only one initial for each forename and one for the surname is used, without spaces. Only one initial is used for a compound name.

Examples

Names	Replaced by
Mary Jane O'Neil	M.J.O.
Linda St-James	L.S.
Kate van de Wiel	K.V.
Marie-Claude Desbien-Marcotte	M.D.
Simon B. de Grandpré	S.B.D.

[28] The name of a family is replaced by only one initial.

Examples

Names	Replaced by
The Smiths, Kevin's foster family, [...]	The S.s, K.R.'s foster family, [...]
The Grahams' house was sold to [...]	The G.s' house was sold to [...]

[29] In order to avoid confusion between many individuals that would be referred to by the same initials, a number is added immediately after the set of initials of each of the other persons named having the same initials. This number is "1" for the first individual named in the decision, "2" for the second, and so on.

Examples

Names	Replaced by
John McKeown and James Morgan	J.M.1 and J.M.2
Mary, Mark and Mario Davis	M.D.1, M.D.2 and M.D.3

[30] When the name of an organization must be replaced (e.g. for a person's employer, business, school or community), only its first initial is used, followed by

first protected person, the letter "Y" is used for the second, "Z" for the third, "A" for the fourth, "B" for the fifth and so on. Using initials is merely a generalization of the name and could entail a higher risk of identification, but besides tradition, a good reason for maintaining this practice is that it allows for the creation of a wider variety of case names (e.g. "*M.L. v. D.L.*") than when using only letters (e.g. "*X v. Y*").

omission marks between square brackets. Whenever possible, the common terms found in the name of the organization are not replaced, in order to better preserve the meaning of the omitted information.

Examples

Names	Replaced by
Air Canada	A[...]
Dave McCain Auto Parts Inc.	D[...] Inc.
John MacDonald High School	J[...] High School
Municipality of Truro	Municipality of T[...]

[31] To avoid confusion between organizations that would be referred to by the same initial, numbers are added in the same way as with names of individuals.

Example

Names	Replaced by
Air Canada, Alimport and Alcan	A1[...], A2[...] and A3[...]