

The adjudicative process in the Internet age: A new equation for privacy and openness

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Introduction

This document intends to provide an overview, a framework, of the approach of the Office of the Privacy Commissioner to address the issue at hand: how can the fundamental right to privacy be protected and the fundamental principle of open court be fulfilled in the age of unlimited access through electronic media? This analysis is focused on federal administrative tribunals, but addresses some of the underlying issues in balancing the individual right to privacy with the collective right to open justice, namely:

- What is the essence of the open court principle?
- What is the essence of privacy?
- What is the relevant impact of technology?
- How can privacy and openness be furthered in the new context of information technology?

The open court principle applies to the courts completely, and even they have established guidelines in light of the potentially invasive effect of technology. The OPC's jurisdiction extends only to federal administrative tribunals under the *Privacy Act*. While there may be strong arguments in favour of transparency of administrative tribunals, they are not identical to courts. We have therefore recommended that they adopt practices to ensure an appropriate balance between openness and protection of sensitive personal information.

The Heads of Federal Administrative Tribunals Forum have acknowledged the need to consider privacy in the use of personal information in decisions and their posting online, and issued a statement to that effect. The OPC, in collaboration with provincial and territorial regulators, issued a guidance document, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*, attached, to give general assistance to adjudicative bodies across Canada wrestling with these issues.

1. The essence of the open court principle

The notion of the open court principle has inspired some of the most eloquent, almost lyrical, legal statements. From Jeremy Bentham, the English philosopher and jurist in the late 18th century:

“In the darkness of secrecy, sinister interest and evil in every shape have full swing... Publicity is the very soul of justice...It keeps the judge himself, while trying, under trial.”¹

To Irish bencher and British law Lord John Atkinson at the turn of the last century:

[I]n public trial is to found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means of winning for it confidence and respect.”²

to our own Supreme Court’s Justice Morris Fish,

“The administration of justice thrives on exposure to light and withers under a cloud of secrecy.”³

Two main points emerge from these quotes as the essence of the open court principle:

- The open court principle places secrecy and transparency in opposition, not privacy and transparency
- The open court principle pursues three objectives that may be reconciled with the protection of privacy:
 - Accountability of the tribunal,
 - Legitimacy of the process.
 - Public confidence in the justice system.

¹ 'Constitutional Code, Book II, ch. XII, sect. XIV.' *The Works of Jeremy Bentham, published under the superintendence of ... John Bowring*, 11 vols., (Edinburgh: Tait, 1843) vol. ix, p. 493. Source: <http://www.ucl.ac.uk/Bentham-Project/Faqs/fquote.htm>

² *Scott v. Scott*, [1913] AC 417, 463

³ *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, 2005 SCC 41, online: Supreme Court of Canada, <http://scc.lexum.umontreal.ca/en/2005/2005scc41/2005scc41.html>

2. The essence of privacy

Over the years, Canadian case law has drawn parameters around the right to privacy that may be summarized as follows for the purpose of our discussion:

- Privacy is a constitutionally protected, fundamental right;
- Privacy is the individual right to the protection of personal information;
- It is both inherent, to protect personal integrity, and instrumental, to protect against harm ;
- It may be overridden by public interest only as,
 - Necessary and justified in a free and democratic society;
 - Proportionately to that need;
 - Effectively in relation to that need and,
 - In the absence of less privacy-invasive alternatives.

3. The impact of technology : a new equation between openness and privacy

Arching back to Jeremy Bentham, Chief Justice Beverley McLachlin puts to us the challenge of furthering the open court principle in the era of the Internet:

“ The open courtroom remains as essential today as it was in Bentham’s time. Yet, the omnipresent and immediate reach of modern dissemination networks makes it increasingly apparent that openness may exact costs – costs that require the judges and the media to reassess the means by which they further the principle of open justice.”

And,

“ The first cost of the open court principle is to privacy....In Bentham’s day, the open court principle meant limited loss of privacy.”⁴

Herein lies the crucial change in the equation between privacy and openness: the Internet has brought unlimited loss of privacy. In particular, information technology distorts the application of the open court principle with three broad impacts:

⁴ B. McLachlin, “Courts, Transparency and Public Confidence – To the Better Administration of Justice (2003) 8(1) DeakinLawRw. 1. Online: AustLII <http://www.austlii.edu.au/au/journals/DeakinLRev/2003/1.html>

- Breadth of access:
 - The harm to parties well exceeds mere embarrassment or the traditional expectations of loss of privacy inherent to the adjudicative process;
 - Factual anonymity that came from the practical hurdles of access are removed;
 - The notion of openness to the “public” has gone from a few to all;
- Permanence of record:
 - Written records are created where formerly a mere oral account would have taken place;
 - Electronic records are saved even beyond the control of the author;
- Inefficiency of traditional protections:
 - Dissemination goes beyond the territorial application of publication bans;
 - Electronic media challenge traditional definitions of publication.

Beyond the loss of privacy, the spread of information technology to tribunals has also brought the loss of a principled approach:

- While the open court principle was directed towards accountability of the court, the spread of information through the Internet often focuses on the personal information of the parties;
- Coverage of the adjudicative process may go from the vested interest in the case, or in the administration of justice, to voyeurism;
- Interest is not only moved by ensuring justice but too often by mere curiosity;
- Access goes from a controlled, principled approach to loss of control.

In short, to preserve the essence of the open court principle, we must review its modalities in relation to fundamental rights, including the right to privacy. Chief Justice Beverley McLachlin would say that we must move from a “hierarchical approach” that places the principle of open court in opposition to the right to privacy, and declares its general predominance to a “contextual balancing” that assesses competing values on a case-by-case basis. We would put forward that it also entails that we move from a static notion of personal information to a dynamic notion of “impactful information.”

4. Furthering open justice and privacy in the Internet age

The attached guidance document represents the OPC’s position on the meaning of the open court principle in light of the fundamental right to privacy in the age of the Internet, in the context of federal administrative tribunals. It rests on Canadian case law on the right to privacy in relation to its definition and its limits. Mainly, we advise administrative tribunals to,

- Issue information management policies that reflect the impact of the Internet and the publication of decisions on-line;
- Notify parties of these policies;
- Balance the public interest to know with the individual right to privacy by
 - Anonymizing decisions where there is no public interest in disclosing identities of the parties ;
 - Eliminate from decisions personal information that is unnecessary and could lead to identification;
 - Encourage parties to withhold immaterial, identifying, personal information;
 - Assess public interest for disclosure of identity according to
 - Sensitivity of the information
 - Mandate of the tribunal
 - Expectations of affected individuals
 - Gravity of harm of publication
 - Public interest in knowing the proceedings and the outcome
 - Finality of the decision
- Adopt technology to protect privacy.

Conclusion

Openness and privacy pose a new challenge in the age of the Internet, one that does not put in question the principles at hand but rather the modalities for their fulfillment. To guide us in preserving the essence of openness and privacy, we put forward the following guidelines:

- The open court principle entails the full disclosure of the adjudicative process.
- The protection of privacy entails the protection of personal information.
- Disclosure of the adjudicative process does not necessarily entail full disclosure of personal information.
- Personal information may be disclosed only where
 - It is necessary for the fulfillment of the open court principle
 - It is proportionate to that fulfillment
 - It is effective in relation to the objectives of the open court principle
 - There is no less privacy invasive alternative to fulfill the objectives of the open court principle

Office of the Privacy Commissioner of Canada

Guidance Document

Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals: What should administrative tribunals consider when contemplating Internet publication of their decisions?

Federal administrative and quasi-judicial tribunals consider issues such as the denial of pension and employment insurance benefits, compliance with employment and other professional standards, allegations of regulatory violations, and challenges to federal public service hiring processes. These bodies, which are governed by the Privacy Act, commonly publish their decisions on the Internet, even though the decisions often contain personal details that not many people would be comfortable sharing widely -- salaries, physical and mental health problems, detailed descriptions of disputes with employers, and alleged wrongdoing in the workplace. Other information of questionable relevance is also sometimes included in the published decisions, such as the names of children, home addresses, places and dates of birth, and descriptions of criminal convictions for which a pardon has been granted.

Our Office has long shared the concerns of individuals who fear that participating in a tribunal proceeding could violate their privacy when the decision is ultimately posted online. Our Office, in consultation with our provincial and territorial counterparts, has therefore developed the following guidelines, aimed at maintaining the transparency of administrative justice, while also protecting the privacy of individuals.

Introduction

Administrative and quasi-judicial bodies ("tribunals") widely utilize the Internet as an efficient, inexpensive and effective tool to communicate their decisions to the public. The benefits are many. By electronically disseminating their decisions, tribunals can better educate the public about their mandates, make precedent-setting decisions readily accessible, promote transparency and demonstrate accountability.

However, tribunal decisions may contain significant amounts of personal information. Some of this may be sensitive information, such as information about medical conditions, financial circumstances or mental health issues.

Often, the format of tribunal decisions published on the Internet and the personal information they contain has not changed to reflect the reality that the Internet provides unlimited access to tribunals' decisions to unlimited persons for unlimited uses.

Canada's information and privacy oversight agencies wish to highlight the challenges posed by Internet publication of personal information in tribunal decisions. When personal information is made available on the Internet, individuals are at greater risk of identity theft, stalkers, data profilers, data miners and discriminatory practices; personal information can be taken out of context and used in illegitimate ways; and individuals lose control over personal information they may well have legitimately expected would be used for only limited purposes.

In drawing attention to the privacy challenges posed by Internet publication of tribunal decisions, Canada's information and privacy oversight agencies do not intend to suggest steps that would limit access to personal information the publication of which is demonstrably necessary to achieve the legitimate goals of openness, accountability and transparency.

The courts are increasingly grappling with these difficult issues and many have developed policies to limit the disclosure of personal information through Internet publication of decisions. The purpose of this document is to help tribunals appropriately balance openness and personal privacy when publishing their decisions online by suggesting answers to a few key questions.

Given the diversity of tribunals, their enabling legislation and the mandates they discharge, a 'one-size-fits-all' approach to the disclosure of personal information on the Internet is not possible. This document offers general guidance for tribunals to adapt and apply to their individual circumstances as they attempt to achieve an appropriate balance between privacy and openness in the publication of their decisions on the Internet. The suggestions set out in this document are, for clarity, restricted to the publication of tribunal decisions on the Internet.

How can a tribunal be transparent about the disclosure of personal information?

Transparency will lessen the risk of privacy-related conflicts by providing important information to the parties and witnesses in advance, helping to manage the parties' expectations and enabling them to make informed choices. To make your tribunal's practices transparent:

- Advise the parties of the specific policies, statutes and regulations that govern your tribunal's information-handling rules.
- Give the parties notice of preliminary processes through which personal information may be identified and protected from disclosure prior to a public hearing.
- Publish a written notice that describes your tribunal's practices regarding the publication of personal information online and in reasons for decision. This notice should identify:
 - the type of information that is generally made available to the public via the Internet;
 - how decisions are published electronically;

- whether and when personal identifiers are included in decisions published on the Internet; and
- what procedures are available for parties and witnesses to make submissions about the electronic disclosure of personal information of particular concern.
 - Develop a policy to guide your tribunal's exercise of discretion concerning the disclosure of personal information in decisions posted on the Internet and maintain a clear record of all decisions made pursuant to this policy.

What should a tribunal consider when seeking to balance privacy and openness?

The open court principle promotes public and media access to many tribunal proceedings. It exists to ensure the effectiveness of the evidentiary process, encourage fair and transparent decision-making, promote the integrity of the justice system and inform the public about its operation. However, this principle does not necessitate the limitless disclosure of personal information consistent with the full capacity of all available technologies.

The legislated provisions applicable to tribunals must also be considered. A tribunal's own enabling legislation may specifically regulate what personal information may or must be included in its decisions. And many tribunals are subject to privacy legislation that creates a statutory entitlement to the protection of personal information and sets out the circumstances in which this right can yield to other interests and policy objectives. As a best practice, every tribunal should consider whether it is appropriate to disclose personal information absent a clearly identified public interest in disclosure, whether it is subject to privacy legislation or not.

When seeking to strike an appropriate balance between privacy and openness, tribunals are encouraged to:

- Assess the extent to which your tribunal's enabling legislation indicates decisions should be made available to the public at large.
- Determine whether your tribunal is subject to any legislation that would prohibit or limit the public disclosure of parties and witnesses' personal information and/or reasons for decision.
- If the disclosure of personal information in decisions is permitted, assess whether the disclosure of personal information under consideration is necessary or appropriate.
 - Consider and specifically identify the public interest in the electronic disclosure of the identities of parties or witnesses in each case.
 - For example, a public interest in the disclosure of identifying information may include protecting the public from fraud, physical harm or professional misconduct or promoting deterrence.

- If there is a clearly identified public interest in the electronic disclosure of the identities of parties or witnesses in a particular case, weigh other relevant factors, including:
 - the sensitivity, accuracy and level of detail of the personal information;
 - the context in which the personal information was collected;
 - the specific public policy objectives and mandate of your tribunal;
 - the expectations of any individual who may be affected;
 - the possibility that an individual to whom the information relates may be unfairly exposed to monetary, reputational or other harm as a result of a disclosure;
 - the gravity of any harm that could come to an individual affected as a result of the disclosure of personal information;
 - the public interest in the proceedings and their outcome;
 - the finality of your tribunal's decision and the availability of a right of appeal or review; and
 - any special circumstances or privacy interests specific to individual cases.
- After weighing the relevant factors, determine whether disclosure of the identity of each party or witness is actually necessary to satisfy the public interest in disclosure.
- Where a tribunal determines that the public interest requires disclosure of a party's or witness' personal information, provide appropriate notice of decisions respecting the disclosure of personal information to the parties affected and to anybody to whom notice must be provided under statute.

How can a tribunal limit disclosure to that which is necessary?

In many cases, a tribunal can comply with privacy legislation and accomplish its goals with respect to openness, accountability and transparency through the publication of de-identified reasons for decision – reasons that do not include the names of parties or witnesses or other personally identifying information.

- Decisions should generally be written in a de-identified manner to the greatest extent possible.
 - Mask identities in decisions through the use of initials or pseudonyms.
 - Encourage decision-makers to draft all decisions with a view to eliminating the inclusion of unnecessary and sensitive personal information that is not essential to an understanding of the decision or the decision-making process.

- To assist decisions-makers, encourage parties to consider withholding clearly immaterial personal information from their submissions, which would include specific identifiers like social insurance numbers not relevant to matters in issue
- If personal identifiers including names are included in a tribunal's reasons, edit decisions made available to the public to remove those identifiers that are not relevant to the decision rendered, which will normally include data elements such as: addresses, dates of birth, names of a party's family members, identification document numbers and workplace names and locations.

How can a tribunal utilize the benefits of technology while minimizing the privacy risks?

Just as technology can augment risks to privacy, it can also assist to lessen or control the privacy risks inherent in the electronic disclosure of personal information.

- Employ technological means of protecting privacy on your website. Consider using web robot exclusion protocols and eliminating the option of public search queries by name, to lessen the risk of unintended and negative consequences for individuals who may be personally identified in decisions posted on the Internet.