PRIVACY DURING A HEARING:
ACCESS TO TRIBUNAL DOCUMENTS

by

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Introduction - Open Courts/Freedom of the Press and Privacy

The issue of access to tribunal documents during a hearing engages the constitutional principle of “open courts” and the freedom of the press protected by Section 2(b) of the Canadian Charter of Rights and Freedoms (the “Charter”), which states as follows:

2. Everyone has the following fundamental freedoms:
   …
   (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   …

Without open courts and media access to court proceedings and to the key underlying case documents, freedom of the press would be significantly curtailed and the public’s right to a transparent justice system would be negatively affected.

We all know that administrative tribunals and regulatory bodies have, over time, become a very significant component of our system of justice. Accordingly, the issue of access to tribunal documents during a hearing has important implications for the transparency and legitimacy of our system of justice in Canada.

At the same time, many tribunals deal with matters involving sensitive personal information and the privacy rights of individuals engaging with tribunals therefore must also be given due consideration.

Courts and Administrative Tribunals

The issues of open courts and competing individual privacy rights were discussed and examined at length in Vancouver Sun (Re), 2004 SCC 43, which involved an application by a newspaper reporter for all materials filed in relation to an in camera examination of a potential Crown witness in the Air India trial. The Court was asked to consider the validity of a lower court order allowing an ex parte in camera judicial investigative hearing to occur under s. 83.28 of the

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1 I wish to acknowledge the invaluable research assistance of Deanna Brummitt, Articled Student, Davis LLP, in preparing this paper. I also wish to acknowledge the significant contributions of Frank Work, Information and Privacy Commissioner for Alberta, to an earlier joint presentation on this topic, which presentation formed the basis for this paper.
Criminal Code. This Code provision allowed for a peace officer, with the prior approval of the Attorney General, to apply for an order allowing for the gathering of information in camera, in relation to an alleged terrorism offense.

The Court found that the proper balance between investigative imperatives and the value of openness would be best achieved through a discretion granted to judges to impose terms and conditions on the conduct of a hearing under s. 83.28(5)(e) of the Criminal Code. The Court found that the level of secrecy which had occurred in this particular instance was unnecessary and, although it was appropriate for part of the hearing to occur in camera, there was no reason to keep secret the existence of the order or its subject matter. The Court found that as much information about the nature of the order as could be revealed without jeopardizing the investigation should have been made known to all parties, subject, if need be, to a total or partial publication ban.

In Vancouver Sun (Re), the Court noted that the test which had previously been set out by the Court in Dagenais/Mentuck\(^2\) was applicable not just to publication bans but also to all discretionary judicial decisions or orders that limit the freedom of the press.

It follows from this that any decision (or rule) of a tribunal which limits access to tribunal documents can potentially give rise to a challenge based on the “open courts” principle and s. 2(b) of the Charter. Similarly, determinations to hold tribunal proceedings (or parts of tribunal proceedings) in private may also engage constitutional rights.

The Court held in Vancouver Sun (Re) that any order limiting freedom of the press must be “necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk”; and that the “salutary effects of the publication ban or order must outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial and the efficacy of the administration of justice”\(^3\).

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\(^3\) Vancouver Sun (Re), 2004 SCC 43 at para. 29 (this is the Dagenais/Mentuck test).
The Court stated:

“This court has emphasized on many occasions that the ‘open court principle’ is a hallmark of a democratic society and applies to all judicial proceedings.”

…

“The open court principle has long been recognized as a cornerstone of the common law… the right of public access to the courts is ‘one of principle’… turning, not on convenience, but on necessity.”

…

“Publicity is the very sole of justice. It is the keenest spur to exertion, and the surest of all guards against improbity.”

…

“Public access to the courts guarantees the integrity of judicial processes by demonstrating that ‘justice is administered in a non-arbitrary manner, according to the rule of law.”

…

“Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and public’s understanding of the administration of justice. Moreover, openness is a principle component of the legitimacy of the judicial process and why the public at large abide by the decisions of the courts.”

While Vancouver Sun (Re) related to court rulings which had the effect of limiting freedom of the press, challenges have also been made to orders and rulings of administrative tribunals and regulatory bodies which have the effect of limiting freedom of the press and/or the public transparency of the tribunal or regulatory process.

Arguably, restrictions on access to tribunal documents engages similar concerns about the “open courts” constitutional principle and freedom of the press.

Some jurisprudence, however, has indicated that administrative tribunals and regulatory bodies are not necessarily subject to the same required degree of openness as a court. In Robertson v. Edmonton (City) Police Service, 2004 ABQB 519; appeal dismissed 2006 ABCA 302, a

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4 Vancouver Sun (Re): at pages 345 - 346
challenge was made to a regulation under the Police Act which allowed the Chief of the Edmonton Police Force to order that a police disciplinary proceeding be held in private. The Court found that the regulation was valid under the Charter in the circumstances and that there was nothing “automatically objectionable” about a regulation that provides for closed hearings in some cases. The Court stated “it cannot be assumed that an administrative tribunal is subject to a constitutional requirement to have the same degree of openness as a court”.5

This approach is somewhat in contrast with the earlier decision of the Federal Court of Appeal in Pacific Press Ltd. v. Canada (Minister of Employment and Immigration) [1991] 2 FC 327 (C.A.), in which it was held that a provision of the Immigration Act, providing that inquiries should be held in camera unless an adjudicator was satisfied that opening the inquiry would not impede the inquiry or adversely affect a claimant, offended the Charter because the discretion given to the adjudicator to open the hearing was too narrow.6

**Protecting Privacy in Administrative Proceedings**

While the principle of “open courts”, general transparency and freedom of the press are obviously very important, it also must be considered, as noted above, that some administrative tribunals and regulatory bodies deal with very sensitive personal information of the individuals involved. For example, review panels under various provincial mental health statutes deal with very sensitive personal information and these hearings are often deemed presumptively private.7 Similarly, hearings conducted by child and family services authorities often include very sensitive personal information, including information about minors. By way of further example, professional regulatory bodies often deal with personal information relating to a professional’s reputation and a third party’s privacy (for example a patient’s information in a professional regulatory hearing by the College of Physicians and Surgeons regarding a medical practitioner).

In January 2005, the Canadian Judicial Council published the Austin-Pelletier synthesis of the Judges Technology Advisory Committee Discussion Paper and Comments – this document

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5 At para. 207.
6 The provision in question has since been replaced with a more extensive provision providing greater flexibility and a presumption for certain proceedings to be public (see Section 166 of Immigration and Refugee Protection Act).
7 See for example Section 25(2.15) of the British Columbia Mental Health Act, Section 37(2) of the Alberta Mental Health Act, and Section 53(5) of the Manitoba Mental Health Act.
provides useful analysis regarding access to court records and competing privacy interests and provides a suggested framework for a Model Access Policy. Much of the Austin-Pelletier analysis is also applicable and helpful in the context of administrative tribunals. We will return to this analysis at the conclusion of this paper and address this point in more detail.

**The Effect of Access to Information/Protection of Privacy Legislation**

It should also be considered that, unlike superior courts, administrative tribunals and regulatory bodies are creatures of statute and many have been designated as “public bodies” or “government institutions” under access to information and privacy legislation. Many administrative tribunals and regulatory bodies are therefore subject to positive statutory obligations to protect personal information by, for example, only disclosing personal information as authorized and by making reasonable security arrangements against such risks such as unauthorized access, collection, use, disclosure or destruction.  

The applicability of access to information legislation also means that many tribunals and regulatory bodies are subject to access requests from the public or media relating to records which are in their custody or control. Interestingly, many access to information statutes expressly do not apply to “information in a court file”. There is not, however, an express parallel protection for information in an administrative tribunal file.  

Access to information legislation, however, contains various exceptions to the right of access. For example, there are exceptions which would cover advice from officials to the tribunal, sensitive business information of third parties, information the disclosure of which would be harmful to law enforcement or to a third party’s personal privacy (unless a statute authorizes or requires disclosure), and various forms of privilege including solicitor-client privilege.

Interestingly, in some provinces, certain regulatory bodies (such as professional colleges or safety authorities) are subject to public sector freedom of information or access to information legislation whereas, in other provinces, such entities are subject to the private sector privacy

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9 Having said that, s. 3(1)(b) of B.C. *FOIPPA* does protect personal notes or drafts of a person acting in a quasi-judicial capacity. See also Ontario’s *Freedom of Information and Protection of Privacy Act*, Section 65.
legislation. For example, in British Columbia the Law Society of British Columbia is subject to the B.C. *Freedom of Information and Protection of Privacy Act*. In Alberta, the Law Society of Alberta is governed by the *Personal Information Protection Act* (the same statute that is applicable to most Alberta private commercial corporations).

This means, for example, that in British Columbia a complainant could make an access request under British Columbia *FOIPPA* to a professional college for all records relating to their complaint made to the College. In Alberta, however, the complainant would be required to frame their request as a request for their own personal information and would not be entitled to access records that did not constitute their own personal information.10

In Law Society of Alberta OIPC Order No. P2006-004, a complainant’s request for personal information pertaining to complaints he had made to the Law Society of Alberta were found not to constitute requests for his own “personal information”. The Commissioner found that Alberta *PIPA* did not govern what information a law society was required to provide to an applicant under the Law Society’s own processes pursuant to the *Legal Profession Act*. The complainant’s complaint to the Commissioner was thus dismissed and the Commissioner found the Law Society had properly used and disclosed the applicant’s information to process his complaint to the Society and had complied with the duty to establish policies under *PIPA*.

There have been a number of cases in British Columbia where members of the media or other interested parties have made access requests under B.C. *FOIPPA* for records held by various professional regulatory bodies.

The results in these cases have been mixed. In an early Order involving the BC Police Commission, BC OIPC Order No. 13-1994, an access request was made by a member of the media to the BC Police Commission for complaint file information regarding identifiable police constables. The Commissioner allowed access to some of the records but found that other records were protected in light of the privacy interests of the police constables involved:

> “… I do not believe that the name of a complainant or the name of an officer complained about should normally be disclosed. The desire to avoid unjust

10 This would also appear to be the case in Ontario, as professional regulatory bodies do not appear to be “institutions” under the Ontario *FOIPPA*.
stigmatization of police officers is an important consideration. However, if a complaint is found to be substantiated after a legal process has taken place (such as would occur in any event during a public inquiry), I think the presumption should be in favour of disclosure of police officers’ names”.

…

“Until an allegation has been proven, the factor described in Section 22(2)(a) (disclosure is desirable for the purpose of subjecting the activities of a public body to public scrutiny) does not outweigh the privacy interests described above. Accordingly, all information which would identify the policy officer should be severed if any unresolved complaint records are disclosed.

Where complaints have been resolved informally, similar factors apply, since the police officer has not been through a formal legal process”.

Similarly, in BC OIPC Investigation Report P99-013, regarding the British Columbia College of Teachers, the Commissioner confirmed that the College had taken an appropriate approach in not publicly disclosing hearing reports but in publishing, pursuant to the College’s Bylaws, case summaries of decisions reached by the Discipline Hearing Subcommittee11.

In BC OIPC Order F05-03, the Commissioner found the British Columbia Veterinarian Medical Association (“BCVMA”) had properly refused to disclose to a complainant copies of correspondence between the BCVMA and the member regarding the complaint.

More recently, however, in BC OIPC Order F07-22, the response to a complaint provided by a chiropractor to the College of Chiropractors was found disclosable in the particular circumstances of that case. The Adjudicator noted in that case that the College of Chiropractors had not provided much of an explanation to the complainant as to why the complaint had not resulted in a disciplinary proceeding against the chiropractor. In light of the lack of pro-active transparency, the Adjudicator found that the chiropractor’s response to the complaint was disclosable to the complainant under FOIPPA.

The British Columbia Court of Appeal has also considered the reputation of a professional involved in a regulatory proceeding to be worthy of protection. In Dr. Q v. College of Physicians and Surgeons of British Columbia, 1999 62 B.C.L.R. (3d) 375 BCCA, the Court

11 Notwithstanding this, the Law Society of B.C. has passed a rule which allows for publication of a Citation against a member prior to a hearing.
granted an injunction to allow anonymity for Dr. Q during a Supreme Court Appeal from a disciplinary decision of the College of Physicians and Surgeons and prevented the College from releasing a summary of the case to the media until the appeal was determined. The Court stated:

“While it may be said that the primary goal of the confidentiality is to protect complainants, I think it is also true to say that doctors are intended to be protected. There is a public interest in not damaging professional reputations unnecessarily”. (at para. 24)12

In Alberta OIPC Order No. 96-003, involving the Law Enforcement Review Board, the Commissioner found that some severing of information from records was required prior to the disclosure of an internal bulletin and a “final report” from Internal Affairs to the Chief of Police regarding the applicant’s complaint about a municipal police force. For example, the names and other identifying information of third parties who had provided information about the applicant were required to be severed from the records. The Commissioner stated:

“In the initial stages [of a complaint investigation]… the personal privacy of both officers and complainants is a major consideration”.13

There have also been instances where individuals or members of the media have made access requests for copies of settlement agreements reached by parties to a tribunal process. For example, in Grimard v. Canada (Canadian Human Rights Commission) [1994], FCJ No. 1743; affd [1998] FCJ No. 685, the Court found that the Canadian Human Rights Commission had properly refused, under the Access to Information Act, to release a copy of a settlement agreement reached between an employee and an employer. The settlement agreement in question had been approved by the Canadian Human Rights Commission and contained a non-disclosure clause. The Court found that while there would be a public interest in the topic of the settlement agreement, disclosure would constitute an invasion of privacy for the parties to the settlement agreement.14

12 See also Hirt v. College of Physicians and Surgeons of British Columbia (1985) 17 D.L.R. (4th) 472 - where the Court of Appeal limited public access to the transcript of an in camera discipline proceeding before the College where the outcome of the proceeding had been appealed to the Courts by Dr. Hirt (this Order was intended to protect the identify of complainants and other witnesses as the case involved allegations of sexual misconduct by the doctor.)
13 At page 11.
14 See also Liquor Control Board of Ontario v. Magnotta Winery Corporation, 2010 ONCA 681 (CanLII)
In some instances, access requests are made for copies of evidentiary records considered by a tribunal or regulatory body. For example, in Canada (Information Commissioner) v. Canada (Transportation Accident Investigation and Safety Board), 2006 FCA 157; leave to appeal to SCC denied [2006] SCCA No. 259, the Court found that the Transportation Investigation and Safety Board had wrongly refused under the Access to Information Act to disclose to journalists tapes of air traffic control communication between pilots and air traffic control staff in relation to four airplane collisions or incidents which were investigated by the Board.\(^{15}\)

The Court found that the information at issue was not “about” the pilots or the air traffic control staff as individuals. Rather, the information at issue was of a professional and non-personal nature and was transmitted by the individuals in job-related circumstances and disclosure would not infringe the personal privacy of the pilots or the air traffic control staff.

The Court effectively found that the records in question did not constitute “personal information”; rather, the records constituted “work product”.

**Deliberative Secrecy**

In other instances, individuals have requested copies of the notes made by Board members during tribunal hearings. For example, in Canada (Privacy Commissioner) v. Canada (Labour Relations Board), [1996] 3 F.C. 609, aff’d 2000 CanLII 15487 (F.C.A.), the Court found that the Canada Labour Relations Board had properly refused to disclose to the applicant (who had been a complainant at a CLRB hearing) notes of the Board members made during the hearing.

The Court found that the Board members’ notes were an *aide mémoire* of a quasi-judicial tribunal and were not under the “control” of the Canada Labour Relations Board\(^{16}\). Moreover, the release of such notes would be harmful to a “law enforcement matter” because deliberative secrecy was essential to the performance of the Board members’ duties and disclosure of the notes would compromise the operations of the Canada Labour Relations Board.

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\(^{15}\) This decision was followed in Otis Canada Inc. v. International Union of Elevator Constructors, Local 1 (Telematics Device Grievance), [2010] B.C.C.A.A. No. 121 (Arbitrator: John Steeves).

\(^{16}\) Records that are not in the custody or under the control of a government institution are not responsive records to an ATIPP request.
Similarly, in BC OIPC Order No. 00-16, regarding the BC Labour Relations Board, the Commissioner found that draft decisions, notes, copies of emails and memorandum sent between Panel members regarding various issues raised by an application before the Board are excluded from disclosure under Section 3(1)(b) of the British Columbia Freedom of Information and Protection of Privacy Act as they are “personal note[s], communication[s] or draft decisions of a person acting in a judicial or quasi-judicial capacity”.17

The Ontario Information and Privacy Commissioner came to a similar conclusion regarding records of Board members of the Rent Review Hearings Board in Order No. P-396 and in Order No. P0-2648 regarding the Health Professions Appeal and Review Board.

While the internal records of tribunal members regarding a case have been found not to be disclosable, this is not the case with respect to statistical information regarding the outcomes of various cases heard by identified tribunal members.

In 2005 to 2006, the Federal Information Commissioner dealt with a complaint from a journalist who had requested statistics about the outcomes of refugee claims cases heard by a particular member of the Immigration Refugee Board. The Federal Commissioner found that the Immigration Refugee Board had wrongly refused the journalist’s request for the statistics relating to the decisions of the named Board member. The Commissioner concluded that the outcome of quasi-judicial decision-making is not information about the decider; it is, rather, the decider’s “work product”. The Commissioner stated that the public interest in the accountability of the Immigration Refugee Board also outweighed any potential negative effects of disclosure, especially when it was open to the Immigration Refugee Board to disclose any needed contextual information to aid in the interpretation of the statistics. In this case, the Immigration Refugee Board agreed to disclose the requested information after having received the Information Commissioner’s views on the matter.18

Access to information legislation has also had an impact on the openness of hearings. In Canada (Information Commissioner) v. Canada (Immigration Appeal Board) [1988] F.C.J. No. 324

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17 See also BCOIPC Order No. 02-12 regarding the Workers’ Compensation Review Board
18 See 2005-2006 Annual Report of the Federal Information Commissioner at www.infocom.gc.ca/reports. The federal Commissioner does not have order-making power and can only issue recommendations (or proceed to Federal Court if the recommendations are rejected by the government institution).
(T.D.), the media challenged an order of the Immigration Appeal Board that a particular immigration proceeding be heard in camera and that the record be sealed. The Court found in favour of the media outlet on the basis that the Access to Information Act provided a general right of access and the provisions of the Immigration Act that allowed for in camera hearings were not referenced in Schedule 2 of the Access to Information Act and thus did not override the general right of access provided by ATIPP.

**A Tribunal’s Right to Obtain Confidential Advice**

Information and Privacy Commissioners have also had to deal with situations where the public’s right to transparency must be balanced against the right of the tribunal or regulatory body to receive confidential advice related to their tribunal duties and responsibilities.

In Alberta OIPC Order 2001-013, an applicant had made a complaint against certain police officers and the Law Enforcement Review Board had obtained a Calgary Police Service Final Report as part of its review. The Alberta Commissioner found that the Law Enforcement Review Board had properly severed from the Final Report several recommendations made to the Chief of Police by the Calgary Police Service Officials, before releasing the remainder of the document to the applicant. The Commissioner found that the recommendations constituted advice and were excepted from disclosure under the freedom of information legislation. The decision to sever only the portions constituting advice and to leave in the portions detailing the conduct of the investigation was found to strike a good and accountable balance between access and the ability of the Chief of Police to receive confidential advice from Calgary Police Service officials.

In this regard, the Court of Appeal in British Columbia has found that the “advice exception” in the BC FOIPPA is not limited to a communication or recommendation about a future action and would include advice or an opinion about an existing set of facts or circumstances and what those facts do or do not amount to. In *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665, the Court found that written opinions of experts provided to the College and memoranda prepared by the College’s lawyers
summarizing oral opinions of experts were excepted from disclosure under FOIPPA as constituting “advice provided by or for a public body”. The Court stated:

“In my view, Section 13 of the Act recognizes that some degree of deliberative secrecy fosters the decision-making process, by keeping investigations and deliberations focused on the substantive issues, free of disruption from extensive and routine enquiries. The confidentiality claimed by the College has a similar objective: to allow it to thoroughly investigate a complaint with the open and frank assistance of those experts who have the knowledge and expertise to help in assessing a complaint and deciding how to proceed. …”

“… The deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action”. …

“[Advice] should be interpreted to include an opinion that involves exercising judgement and skill to weigh the significance of matters of fact”.20

Public Access to Tribunal Documents

Many tribunals and regulatory bodies wish to provide some degree of pro-active routine disclosure of tribunal/regulatory documents, but struggle with finding the right balance between transparency and protection of personal privacy.

With respect to court documents, the Austin/Pelletier synthesis notes the following:

- unrestricted electronic access to court information facilitates uses, such as bulk searches and downloads and commercial data–mining practices, which have a weak connection to the open courts principle but have serious effects on individual rights to privacy and to the proper administration of justice;

- unrestricted electronic access could raise a number of privacy concerns, including identity theft and the possibility of harassment;

- there is a general consensus that remote public access to the contents of all court records is not desirable;

19 See also B.C. Freedom of Information and Privacy Association v. British Columbia (Information and Privacy Commissioner) 2010 BCSC 1162 which confirmed that the advice exception also applies where advice to the public body is provided by stakeholders.

20 At paras. 105 to 113.
• there is a general consensus that remote public access should be provided to judgements, with privacy concerns dealt with through de-identification protocols for which courts would be responsible; and

• suggestions to deal with privacy concerns regarding docket information and other court records include: implementing de-identification protocols, publishing the fact that a document exists without providing details regarding its contents, charging fees for remote access, providing remote access only to specific categories of users, and/or exempting “sensitive” records (e.g. family court records) from remote electronic access entirely.

The best practice, of course, is for an administrative tribunal’s or regulatory body’s governing statute (or rules/regulations made pursuant to that statute) to expressly address how tribunal information and records will be disclosed and/or published in various circumstances.

For example, Rule 6 of the B.C. Human Rights Tribunal Rules of Practice and Procedures provides that personal information held in a complaint file will be disclosed to the public at hearings and in decisions issued by the Tribunal. Information in certain records (e.g. the Complaint and Response) will also be made publicly available three months prior to a hearing. However, on application, the Tribunal can make an order limiting public disclosure of personal information if a participant’s privacy interests outweigh the public interest in access to the Tribunal’s proceedings.

**Immunity for Tribunals**

What happens if Tribunals “get it wrong”? It should be noted that many tribunals and regulatory bodies are protected by statutory immunity provisions for disclosures of information and records made in good faith. For example, section 74 of the federal *Privacy Act*, section 73 of B.C.

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21 other than a participant’s address and telephone and fax numbers.

22 See also Section 3 of the Alberta Human Rights and Citizenship Commission Procedural Manual for Panel Hearings which provides that a hearing before the Human Rights Panel will be public unless the Panel determines it would be advisable for the hearing to be private because of the confidential nature of the matter to be heard or because of a potential adverse effect on a complainant.
FOIPPA and section 90 of Alberta FOIPPA all provide immunity for disclosures made in good faith by public bodies.\(^{23}\)

However, it is important to be aware of cases such as *Harrison v. British Columbia (Information and Privacy Commissioner)* 2008 BCSC 411; overturned 2009 BCCA 203; leave to appeal to SCC dismissed, January 14, 2010, Docket 33250.

In *Harrison*, Mr. Harrison challenged a decision of the British Columbia OIPC which had found that information about him in the files of the Ministry of Children and Family Development had been properly released to a potential employer. Mr. Harrison had formerly worked as a caregiver in his wife’s licensed family childcare facility. A person (apparently somehow connected with the childcare facility) had telephoned the Ministry of Social Services (the predecessor to the Ministry of Children and Family Development) and had alleged that, many years previous, Mr. Harrison “may have abused” his own daughter. This caused the Ministry’s intake worker to open an “assessment only” file. No further action was taken on the allegation by the Ministry. In fact, Mr. Harrison found out about the allegation a short time later and was verbally reassured by a staff member that it had raised no concern for the Ministry. Many years later, Mr. Harrison submitted an application for employment at a home for troubled youth known as “Access House”. As a condition of employment, Mr. Harrison signed a Consent to Disclosure form which allowed Access House to obtain background information from the Ministry.

Ms. Bischoff, a Ministry social worker, responded to the request for information and advised the Program Director of Access House that a file concerning Mr. Harrison existed in the Ministry’s records but she could not provide further information without a more specific consent. Mr. Harrison provided a more specific consent and Ms. Bischoff then disclosed to Access House the nature of the allegation contained in the “assessment only” file and expressed her opinion that the allegation had not been properly investigated at the time and recommended Mr. Harrison be supervised in working with youth until further investigation could occur. Since the intended work involved one-to-one work with troubled youth, Mr. Harrison’s contract was terminated.\(^{24}\)

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\(^{23}\) See also Section 62(2) of Ontario FOIPPA and Section 84 of Manitoba FIPPA.

\(^{24}\) Subsequent to that, Ms. Bischoff advised Access House following further investigation that the situation should not preclude Mr. Harrison from working with youth on an unsupervised basis, but it was too late for this information to assist Mr. Harrison, as he had been terminated.
The Trial Judge found that Mr. Harrison’s complaint to the OIPC had not been properly considered and he remitted the complaint for reconsideration by the OIPC, noting that it appeared Ms. Bischoff had breached her duties under s. 28 of FOIPPA because the personal information in the custody or control of the Ministry was used to make a decision directly affecting Mr. Harrison and Ms. Bischoff had not made “every reasonable effort to ensure that the personal information [was] accurate and complete”. In essence, the Trial Judge was of the view that Ms. Bischoff ought not to have stated an opinion about whether Mr. Harrison should work on an unsupervised basis with youth without undertaking further investigation and analysis of the information in the Ministry file. The Trial Judge also noted that judicial review may not provide a meaningful remedy to Mr. Harrison and that he may be compelled to attempt to derive a remedy by way of an action seeking damages for defamation or negligence. The Trial Judge stated: “the immunity provision contained in s. 73 of FIPPA would not appear to have application in the event such an action proceeds”.

The Trial Judge’s decision was overturned by the Court of Appeal on the basis that the Trial Judge had made certain orders against the Commissioner that the Commissioner did not have jurisdiction to implement. The Court of Appeal also noted other errors of the Trial Judge, but made no comment regarding the immunity provision. In the result, the Court of Appeal ordered that the OIPC reconsider its evaluation of Mr. Harrison’s complaint, given that there may have been a breach of s. 28 of FOIPPA which had not previously been considered or addressed by the OIPC.

The OIPC subsequently issued an Order, on September 7, 2010, finding that the Ministry had breached its duty under s. 28 of FOIPPA to make every reasonable effort to ensure that Mr. Harrison’s personal information in its custody and control was accurate and complete before using the information to make a decision that directly affected him.25

The OIPC made no comment regarding whether the immunity provision in FOIPPA would apply so as to protect the Ministry and Ms. Bischoff if Mr. Harrison were to bring a claim for damages for breach of privacy, negligence or defamation. This remains to be seen.

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25 See Order F10-31 at para.80.
**Pro-Active Disclosure of Tribunal Records**

Tribunals and regulatory bodies which are considering pro-active disclosure of documents should have regard to the following factors and considerations for deciding what disclosure should incur on a routine basis:

- Remote electronic access versus on-site/hard copy access;
- Disclosure of final decisions or determinations versus disclosure of other information (allegations, investigations, consensual resolutions);
- Disclosure of information only after a final determination versus earlier disclosure of information;
- Disclosure of detailed identifiable information versus disclosure of a summary with identifiers removed;
- Disclosure of a full decision, including identifiers, versus disclosure of a full decision which has been severed to remove some identifiers or which has been written so as to minimize identifiers and unnecessary personal details;
- Tribunals need to know their jurisdiction and be aware of how access and privacy laws apply to them;
- Having a written policy or rules (with some built-in inflexibility) respecting the collection, use and disclosure of documents and information is useful. If participants know the extent of their exposure, they can flag sensitive information for the tribunal’s more focused consideration;
- It is important to balance the need for transparency, accountability, and the appearance of justice with a due regard for individual privacy;
- Tribunals must have regard to maintaining appropriate security measures and for maintaining appropriate records management with a well considered retention and destruction policy.
Conclusion

The disclosure of documents before, during or after a tribunal or regulatory proceeding involves difficult and complex issues of transparency, access to justice and the protection of personal information of individuals. Tribunals must have regard to the provisions of their underlying statute (and any rules, regulations or bylaws passed thereunder), the provisions of general administrative law legislation such as the BC Administrative Tribunals Act or the Ontario Statutory Powers Procedure Act, the provisions of access to information and privacy legislation which may be applicable and the constitutional principles of “open courts” and freedom of the press.

As the demand for routine, pro-active electronic disclosure of tribunal records inevitably increases, due consideration must be given as to how and when such disclosure will occur in order to achieve the best possible balance between transparency and the protection of individual privacy.

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