FASKEN MARTINEAU

THE CANADIAN BAR ASSOCIATION

THE 2010 ADMINISTRATIVE/LABOUR & EMPLOYMENT/PRIVACY & ACCESS LAW CONFERENCE
NOVEMBER 26-27, 2010

ADMINISTRATIVE TRIBUNAL DECISIONS ONLINE: A BALANCING ACT

By Jeffrey A. Kaufman

© November 1, 2010

Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, Ontario Canada M5H 2T6

ADMINISTRATIVE TRIBUNAL DECISIONS ONLINE: A BALANCING ACT

BY: JEFFREY A. KAUFMAN
FASKEN MARTINEAU DUMOULIN LLP

Introduction

We live in an information technology world which was the impetus for the growing need for privacy. The internet, powerful search engines, social networking sites and most recently, cloud computing, have dramatically increased the availability of information and have radically altered the divide between public and private life. This shift to digital access to information has also impacted the balance between two crucially important legal and fundamental values: transparency of administrative justice and privacy protection.

Over the past decade, there has been an increasing trend to make court and administrative tribunal decisions more widely available over the internet. This online access to decision records has increased transparency by removing the practical barriers of access to paper decisions. This, in turn, has enhanced the fulfilment of the open courts principle by providing the public with a more efficient opportunity to examine the administration of justice.

However, the online dissemination of judicial, quasi-judicial and tribunal decisions online raises important questions about privacy protections. Reported decisions often deal with personal details that many people consider private – salaries, employment wrongdoings, health issues, family squabbles, identification of children's names, and pardoned convictions, to name a few. The creation of an online database of decisions, together with powerful search tools, has

Jeffrey Kaufman is a litigation partner in the Toronto office of Fasken Martineau DuMoulin LLP, where he also serves as National Chair of Fasken's Privacy and Information Protection Practice Group. Jeff is a past Chair of the OBA Privacy Law Section and co-author of the Privacy Law in the Private Sector: An Annotation of the Legislation in Canada , published by Canada Law Book.
With special thanks to Nicole Park, a Student at law, who greatly assisted with the research and writing of this article.

facilitated the possibility of using this access to personal information for misuse and improper purposes.

Many legal experts, judges and privacy commissioners have begun to question whether such sensitive material needs to be posted online to satisfy the open courts principle. The Courts have addressed this concern in a number of Canadian Judicial Council ("CJC") publications and discussions that led to the Supreme Court of Canada ("SCC") releasing an official policy for access to their court records in 2009. However, these discussions and the SCC's policies do not apply to administrative tribunals. The Office of the Privacy Commissioner of Canada has released some general guidelines addressing this issue, but no official policy has been released. The central question therefore remains on how administrative tribunals should strike a balance between the values of transparency and privacy. Should administrative tribunals adopt the Courts' approach to access to information despite their differences? Does the open courts principle apply equally to tribunals? Administrative tribunals have a very trying task ahead of them. Such bodies are legislatively mandated and, unlike the Courts, are governed by the *Privacy Act* and *Freedom of Information* legislation in various provinces. Therefore, administrative tribunals are required to determine the right balance between openness and privacy while being mindful of their often unique legislative obligations.

This paper proposes to look at the central problem relating to the publication of online decisions, the open courts principle in more detail and its possible application to administrative tribunals, and the privacy interests at stake. This paper then will discuss the legislative framework and recent developments surrounding the issue of access to administrative tribunal decisions. Lastly,

we propose to address the challenges and considerations in striking the right balance between transparency and privacy protection in the administrative law context.

Tipping the Scale: Providing Access to Administrative Decisions Online

The administration of justice in a transparent, fair and open manner is at the core of our legal system and it forms the basis for the open courts principle. This concept of open justice explains why proceedings are generally open to the public and why they should become a public record. These public records of proceedings and decisions have long been available to the public through court and tribunal registries, law reports and law libraries. However, the open access to these records was practically limited by the inconvenience of attaining a copy. Although records of proceedings were fully available to the public, in practice, access to them was difficult, costly and time-consuming. This practical barrier to access is often referred to the "practical obscurity" of paper records.

An increasing number of administrative tribunals are using the internet to create greater transparency and accessibility by posting their decisions in online databases, free of charge. This online access removed the limitations caused by the "practical obscurity" of the paper record by making it easier than ever for the public to gain a fuller understanding of our justice system and its processes. Additionally, online access has made legal research much more user-friendly by making it possible to gather decisions on a topic in aggregate form or linking decisions to related public information and commentary.

Although the electronic availability of administrative decisions has many benefits, it does come with its share of serious risks as contemplated in *Privacy Law in the Private Sector, An Annotation of the Legislation in Canada*:

> Equally contentious is the access given to the decisions of courts and tribunals. Often these decisions are published in legal journals, but with the advent of internet such decisions are also widely available without cost, or need to subscribe, 24 hours a day, seven days a week. Most superior courts, including the Supreme Court of Canada, have their own web sites that post decisions. Moreover, other sites such as www.canlii.org contain many decisions of courts and tribunals from across Canada in one place. Such widespread access to sensitive personal information contained in judgments, together with powerful search engines, eliminates the practical obscurity that exists when publication is in paper form or through subscription to legal journals. Ought Social Insurance Numbers, bank account numbers and other sensitive identifying information to be in judgments? What of the names of children and the detailed financial information of their parents?...employment history and medical information are frequently outlined in employment decisions. Ought judgments to be written differently based on their widespread availability on the internet? In light of the impact on reputations, will those who are knowledgeable and able to afford alternatives resort to private courts or arbitration, leaving the public courts to the poor and uninformed? With the proliferation of identity theft, will electronic access to judgments provide fertile ground for this burgeoning crime?[1]

Therefore, providing online access to tribunal decisions increases transparency while simultaneously increasing privacy concerns; this shifts the balance in favour of greater fulfillment of the open courts principle with the high cost of lost privacy rights.

As articulated in the CJC's Discussion Paper on *Open Courts, Electronic Access to Court Records* ("*Open Courts*"), "[a]t the heart of the matter is the relationship between two fundamental values: the right of the public to transparency in the administration of justice and

[1] Kaufman, Jeffrey A. et al., Privacy Law in the Private Sector: An Annotation of the Legislation in Canada, looseleaf (Canada: Canada Law Book, 2007)

the right of an individual to privacy".[2] This is no less true for administrative tribunals. Administrative tribunals have an important responsibility to attain the correct balance between transparency and privacy, while still complying with their legislative obligations.

Open Courts Principle: All or Nothing?

The open courts principle is firmly entrenched in our justice system. It stands for openness, accessibility and fairness, and is deemed to be of critical importance to judicial accountability by making possible the public's ability to scrutinize and criticize judicial processes[3]. The SCC has on a number of occasions called great attention to the importance of the concepts underlying the open courts principle.[4] In addition, the SCC outlined a two-part test in Dagenais/Mentuck in the context of publication bans, which again highlighted the foundational principle of open court access:

> (a) Is the ban necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the ban outweigh the deleterious effects of the free expression of those affected by the ban.[5]

The CJC Open Courts Synthesis Paper confirmed that the Dagenais/Mentuck test is the appropriate assessment for striking the balance between openness and privacy interests.[6]

[2] May 2003, <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_OpenCourts_20030904_en.pdf.>, p. 8

[3] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326

[4] For example see *Named Person v. Vancouver Sun*, [2007] S.C.C. 43

[5] *Dagenais v. Canadian Broadcasting Corp*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 SCR 442. See more recently, *Toronto Star Newspapers Ltd. V. Canada*, [2010] 1 S.C.R. 721; *Globe and Mail v. Canada (Attorney General)*, 2010 S.C.C. 41

[6] Lisa M. Austin and Frederic Pelletier, *Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy*, January 2005; p.1

Granting free access to online decisions facilitates the underlying values of the open courts principle. It allows for better understanding of our justice system, easier and more affordable legal research and greater public scrutiny of proceedings. Such benefits are consistent with our society's democratic values and ideals.

This discussion begs the question: does the open courts principle even apply to administrative tribunals? In answering this query, it is crucial that one consider the very significant differences between the administrative tribunal process and the court system in Canada. Administrative tribunals are legislatively created making them accountable to legislative mandates. These mandates generally grant administrative tribunals a narrow jurisdictional scope, which rarely includes powers to grant serious penal consequences or deal with issues where an individual's liberty may be at risk. Additionally, each tribunal reflects a different purpose and role, and thus may have very distinct procedural practices. Likewise, tribunals are subject to federal and provincial privacy laws for public and governmental bodies due to the fact that they are creatures of the legislature. Members of tribunals are often selected by the government and sometimes include people without a legal background.[7] It is also common for self-represented litigants to appear before administrative tribunals, who may not know how to properly protect their privacy interests. Lastly, the decisions made by tribunals can be judicially reviewed, sometimes even when there is a privative clause in place.

---

[7] The Saskatchewan Information and Privacy Commissioner , *Administrative Tribunals, Privacy and the Net*, (2009)online: The office of the Saskatchewan Information and Privacy Commissioner, <http://www.oipc.sk.ca/Resources/Administrative%20Tribunals.pdf> p.27

In contrast, courts do not exhibit the above qualities. Courts are independent bodies that are not accountable to legislatures and are excluded from the privacy acts. Likewise, judges are seasoned legal experts who are selected in a process that exhibits independence. Courts generally have a much larger jurisdictional scope and can deal with issues where severe penal consequences and loss of liberty are more common possibilities, making it usual for litigants before the court to be represented by counsel. Further, courts are guided by *stare decisis* in a more rigid manner.

Therefore, administrative tribunals exhibit important differences from the courts. These differences suggest that the open courts principle may not be as applicable to administrative tribunals as it is to the courts. However, even if the open courts principle does apply fully to administrative tribunals, it does not mean that there are no limits to openness. Even the courts have questioned the necessity of publishing their decisions online indiscriminately, despite their adherence to the open courts principle. Administrative tribunals, whose adherence to the open courts principle is questionable, should at least be equally cognizant as the courts are of the important privacy interests at play in providing free online access to their decisions.

The Right to Privacy

Every individual in Canada has a right to privacy that is premised on sections 7 and 8 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*")[8], which state:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.

---

[8] *R v. O'Connor,* [1995] 4 S.C.R. 411 (S.C.C.)

Therefore, privacy is a value premised in the Charter which must be acknowledged and respected.

Privacy rights have been deeply impacted by the digitization of information, the internet and powerful search engines. In *Delete: The Virtue of Forgetting in the Digital Age*, Victor Mayer-Schonberger indicates the four processes that have fundamentally affected privacy rights: digitization of information, cheap storage, easy retrieval and global access.[9] Christopher Berzins, in his paper *Administrative Transparency and Protection of Privacy*, recognizes the privacy concern that has developed from the digitization of information by noting that:

> it is now possible to share vast amounts of sensitive personal information almost instantaneously with numerous individuals around the world. When improper disclosure occurs in this setting, even if it is inadvertent rather than malicious, it will be virtually impossible to contain and retrieve the information that has been disclosed.[10]

Mayer-Schonberger points out that digital information is very cheap to store, creating an incentive to keep information around even if it has no foreseeable future use. He also notes that the effort it would take to manage the digital information creates further incentives for holding on to it longer than necessary.[11] As Berzins recognizes, this "directly runs counter to the fair information principle that provides that personal information should only be kept as long as necessary to meet the original purpose for collection".[12]

---

[9] Victor Mayer-Schonberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009)

[10] Christopher Berzins, *Administrative Transparency and the Protection of Privacy in a Digital Era*, The Advocates' Quarterly, (2010) 37, 1, pp. 5 – 6

[11] *Supra* at note 9, p. 68.

[12] *Supra* at note 10, p. 6

The easy retrieval of digital information has also impacted privacy rights. As Jennifer Stoddart, the Privacy Commissioner of Canada, acknowledged, "[w]ith online access, you can be both a very intrusive snoop and a very lazy couch potato".[13] The removal of the "practical obscurity" of paper has created new incentives and opportunities for people to look up and research information. One can now access an unlimited number of public and private documents from around the world from the privacy and anonymity of their home. This global access to information has altered privacy in dramatic ways. The removal of geographic barriers makes it possible for an improper disclosure to travel the entire world, making damage control an improbable task. Although the easy retrieval and global access to information creates great benefits by facilitating a more informed public, it is a double-edged sword. People will likely be more motivated to search out information for improper purposes now that there is a much more convenient and efficient way to do so.

The possible negative consequences of indiscriminately publishing tribunal decisions online are countless. Tribunal decisions can contain a great deal of personal information including, among other things: full names, salaries, Social Insurance Numbers, children's names and schools, property values, health problems, financial information and pardoned convictions. The disclosure of such information to these administrative bodies can be mandatory, while the disclosure of the

---

[13] Jennifer Stoddart, *The Open Court Principle in the Age of Google* (Speech). Office of the Privacy Commissioner of Canada, June 2, 2009, <http://www.priv.gc.ca/speech/2009/sp-d_20090602_e.cfm>, June 9, 2010

information in online decisions is often done without prior notice. The indiscriminate online publication of decisions easily conjures up a range of potential negative consequences[14]:

- Data-mining by commercial entities
- Identity theft
- Harassment
- Stalking
- Damaged reputations
- Embarrassment
- Discrimination from the availability of prejudicial information in terms of employment and access to life insurance
- Less access to justice; People may become less inclined to assert their rights due to the risk of having personal details exposed publicly, creating a chilling effect. This effect would be disproportionately higher on the poor due to the fact that private judicial proceedings can be attained by those who can afford it.

These risks are very real. For example, there was reportedly an identity theft ring in Ohio that collected personal information of residents from court documents on the County website to commit their crimes.[15] These privacy concerns were not present to the same degree before the digitalization of records and the internet and therefore, administrative bodies need to attune their disclosure polices to address these *bona fide* risks.

---

[14] *Alberta (Attorney General) v. Krushnell*, [2003] A.B.Q.B. 252, the Alberta Queens Bench dealt with the possible mischief inherent in a data miner obtaining lists on accused names in the criminal court docket between 1990-2005.

[15] *Feds say identity thieves used Hamilton County Web site*, wkyc.com, March 3, 2006, <http://www.wkyc.com/news/news_articl.aspx?storyid=48724.. June 8, 2010.

Privacy Protection: Legislatively Required

As discussed above, administrative tribunals are government institutions that are subject to the *Privacy Act*, R.S.C. 1985, c. P-21, if they are a federally legislated body, or freedom of information legislation, such as the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 (the "*FOIPPA*"), if they are a provincially legislated bodies. The purposes of these acts are to "protect the privacy of individuals with respect to personal information about themselves held by a government institution and ...provide individuals with a right of access to that information."[16] These laws impose rules on how government institutions, like administrative tribunals, can collect, use and disclose personal information. Set out below are the relevant rules applicable to federal and Ontario administrative tribunals publishing decisions online:

> Privacy Act
>
> Section 8(2)(a) states that "[s]ubject to any other Act of Parliament, personal information under the control of a government institution may be disclosed for the purpose for which it was obtained or compiled or for a use consistent with that purpose".
>
> Section 8(2)(m) states that a government institution may disclose personal information "for any purpose where, in the opinion of the head of the institution, (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or (ii) disclosure would clearly benefit the individual to whom the information relates.
>
> FOIPPA
>
> Section 37 states that the Protection of Personal Information section of the Act, which deals with disclosure permissions, "does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public".

---

[16] *Privacy Act*, s.2; *FOIPPA*, s. 1 – For convenience, we will use *FOIPPA* as the example for provincial freedom of information legislation.

> Section 42(1)(c) states that disclosure is permitted for the purpose for which it was obtained or compiled or for a consistent purpose;

Although these sections apply to administrative tribunals, the language is very general to make it universally applicable to all government institutions. This generality makes it difficult for one to determine the limits on administrative tribunal disclosure of personal information. Berzins also recognizes this problem, commenting that "the *FOIPPA* makes little specific reference to administrative agencies with the result that no guidance is provided in term of how adjudicative processes should mesh with the rules concerning the collection, use and disclosure of personal information".[17] Berzins is right on point here, specifically in terms of *FOIPPA*. Administrative tribunals do not have a statutorily authorized purpose of collecting personal information for disclosure in an online public record.[18] Therefore, in order to be in compliance with the *FOIPPA*, the online publication of personal information in tribunal decisions would have to be considered a "consistent purpose", which would be a contentious conviction. Alternatively, one could argue that the public record exclusion contained in s.37 applies to provincial administrative tribunal decisions published online. This reasoning raises the question of whether the s.37 exception applies to online records at all or whether it is a more limiting exclusion. In contrast, federal administrative tribunals could more reasonably rely on s.8(2)(m) of the act, arguing that the disclosure of tribunal decisions is in the public's interest and that such interest outweighs the potential invasion of privacy. As the above discussion indicates, the privacy legislation does not

---

[17] *Supra* at note 10, p. 3

[18] There is one noted exception. Quebec mandates the official website disclosure of tribunal decisions in November 2009: *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*

provide a clear picture of the disclosure rights and limitations in terms of online publications of administrative tribunal decisions.

Disclosure of Personal Information in Online Decisions: Developments

Courts

It is helpful to look at the developments made in terms of court records, to provide guidance for administrative tribunals on the considerations required to address the relevant privacy concerns surrounding online publication of adjudicative decisions.

In 2003, the CJC released the *Open Courts* discussion paper, and in 2005 a synthesis of that document was released which summarized the conclusions formed on the topic of online publication of court decisions.[19] The synthesis paper held that the Dagenais/Mentuck test, discussed above, was the appropriate test for determining how to strike the right balance between the values of the open courts principle and privacy protection.[20] The discussion paper provided further clarification on its view of the balance between these values, holding that "the right to open courts generally outweighs the right to privacy".[21] However, the discussion paper recognizes the need in certain circumstances to deny access to certain information where the "ends of justice would be subverted by disclosure or the judicial documents might be used for an

[19] *Supra* at note 6
[20] *Supra* at note 6
[21] *Supra* at note 6

improper purpose".[22] The discussion paper uses family law and Young Offenders proceedings as illustration of the circumstances where disclosure would not be justified.[23]

In 2005, the CJC released *Model Policy for Access to Court Records in Canada* which provided the following guiding principles for creating an access policy:

> (a) the open courts principle is a fundamental constitutional principle and should be enabled through the use of new information technologies.
>
> (b) Restrictions on access to court records can only be justified where:
>
> > i. Such restrictions are needed to address serious risks to individual privacy and security rights, or other important interests such as the proper administration of justice;
> >
> > ii. Such restrictions are carefully tailored so that the impact on the open courts principle is as minimal as possible; and
> >
> > iii. The benefits of the restrictions outweigh their negative effects on the open courts principle, taking into account the availability of this information through other means, the desirability of facilitating access for purposes strongly connected to the open courts principle, and the need to avoid facilitating access for purposes that are not connected to the open courts principle.[24]

Most recently, the SCC released *Policy for Access to Supreme Court of Canada Court Records* in 2009 that addressed many of the privacy concerns related to online publications of court records.[25] For example, section 5.1 states that "[p]ersonal information, including personal data identifiers, shall not be included in a court record unless it is required for the disposition of the case". Section 5.2 places a responsibility on the parties preparing documents for the court to limit disclosure of personal information to what is necessary and advise the courts of publication bans

---

[22] *Supra* at note 6, p. 12

[23] *Supra* at note 6., p.12

[24] *Model Policy for Access to Court Records in Canada*, JTAC for the CJC, September 2005, p. iii.

[25] http://www.scc-csc.gc.ca/case-dossier/rec-doc/pol-eng.asp

and any included personal data that, if combined with the individual's name and made public, could pose a serious threat to the individual's safety. These privacy protection policies help provide the necessary clarity on what the limits on court records are. Hopefully similar clarity and progress can be made in the context of administrative tribunals.

Administrative Tribunals and Privacy Commissioners

Developments in the online decision debate have occurred outside the court regime as well. In general, the Office of the Privacy Commissioner, both in Canada and in other jurisdictions, has been vocal about diverging from the Courts' position on this contentious issue. For example, Raymond D'Aoust, Assistant Privacy Commissioner of Canada, responded to the *Open Courts* discussion paper (mentioned above), stating that:

> the crux of the matter is not simply one where the merits of new communication technologies are at issue. The crux of the matter – to be colloquial – is who needs to know what, and why...With respect, the OPC believes that the right to open courts does not outweigh the right to privacy. Rather, both rights should exist in equilibrium relative to one another. Such equilibrium can best ensure both the continued efficiency and fairness of our system of law, and the protection of the fundamental right to privacy.[26]

The Assistant Commissioner's comment illustrates the tension in striking the correct balance between these two very important values.

The *Open Courts* discussion paper has not been the only opportunity for privacy commissioners to speak their mind regarding this controversial issue. Complaints opposing the practice of posting tribunal decisions online have come before privacy commissioners in a number of instances. In 2005, a complaint was initiated against the Automobile Injury Appeal Commission

---

[26] *Supra* at note 16, p. 10

(the "AIAC") regarding the posting of their decisions online without the removal of sensitive personal information, such as health and financial information.[27] Commissioner Gary Dickson, Saskatchewan's Information and Privacy Commissioner, concluded that the AIAC's posting of these decisions online failed to meet the requirements of *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 (the "FOIP") and of *The Health Information Protection Act*, S.S. 1999, c. H-0.021 (the "HIPA"). The Commissioner dismissed the AIAC's argument that their practice fulfilled the open courts principle, by differentiating administrative bodies from courts. He held that the AIAC is not a court, but rather a government body that is accountable to privacy acts like *FOIP*. The Commissioner also rejected the AIAC's claim that their practice of publishing decisions online was captured by the public records exception in the *FOIP*.[28] He held that a commission decision is not a public record, and alternatively that online publication of full decisions, as done by the AIAC, "is qualitatively a different matter than permitting an interested member of the public access to paper records in the office of the Commission".[29] Berzins insightfully noted that this is significant for Ontario as the "Saskatchewan's legislation appears broader than s.37 [the equivalent public record exception] in Ontario's *FOIPPA*".[30]

Assistant Privacy Commissioner D'Aoust took the opportunity again to clarify the issue in the context of administrative bodies when a complaint against Service Canada (Office of the

---

[27] *2005 CanLII 39917* (SK. I.P.C.)
[28] Commissioner Dickson is referring to the exception in *FOIP*, s. 3(1)
[29] *Supra* at note 6, p. 26
[30] *Supra* at note 10, p. 9

Umpire) came before him.[31] This complaint raised a concern with Canadian Umpire Benefit ("CUB") decisions being posted online containing personal information. Service Canada, like the AIAC, argued that the open courts principle justified the posting of decisions in full online. The Assistant Commissioner, like Commissioner Dickson, rejected the argument saying:

> I am of the opinion that the open court principle does not require or justify the electronic publication of the personal information in CUB decisions on the Internet.
>
> The open court principle can co-exist effectively with Service Canada's statutory obligations under the *Privacy Act* through reasonable efforts to depersonalize any CUB decisions posted online by replacing names with random initials. Where there is a compelling public interest in disclosure of identifying information that clearly outweighs the resultant invasion of privacy, Service Canada may exercise its discretion under subparagraph 8(2)(m)(i) to disclose personal information in identifiable form in CUB decisions. Thus, there is no intractable conflict between the rights and interests protected by the open court principle and compliance with the *Privacy Act*.[32]

The Assistant Commissioner further indicated that s.8(2)(a) of the *Privacy Act* does not authorize the online publication of tribunal decisions in "identifiable form" and that generally online disclosure of personal information in a decision is not reasonably necessary for fulfillment of their mandates.[33] Additionally, he explained that it requires a very high threshold to invoke s.8(2)(m)(i) of the *Privacy Act*. He outlined, in detail, the appropriate use and process that should be used by government institutions when attempting to use and rely on s.8(2)(m)(i). These guidelines indicated that s.8(2)(m)(i) required a government body to have a *bona fide* public interest that outweighs the invasion of privacy (after considering all relevant factors). Once that

---

[31] Office of the Privacy Commissioner of Canada. File #7100-03808, July 08 2008, <http://www.cippic.ca/index.php?page+privacy-act-complaints>

[32] *Ibid.*

[33] *Ibid.*

is satisfied, the body must only disclose the personal information that is reasonably necessary to satisfy the public interest.[34]

Earlier this year, the Office of the Privacy Commissioner of Canada released *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals*.[35] This document provides much needed guidance to administrative tribunals on how they should strike an appropriate balance between transparency and privacy protection. The document emphasizes that it is meant only to offer general guidance rather than a mandatory policy or approach.[36] The document stresses the types of factors a tribunal should consider in striking a balance between these two values, such as legislative requirements and the necessity of the disclosure of personal information, and provides tips on how to limit disclosure to that which is necessary, such as masking identities with initials or pseudonyms.[37]

Striking the Right Balance: Who is Responsible?

Administrative tribunals face a number of challenges in determining the 'right balance'. One such problem is the fact that administrative tribunals are very diverse. Each tribunal has its own unique enabling legislation and procedural practices. To compound the problem, administrative tribunals also must comply with relevant privacy legislation for their jurisdiction. This diversity makes the possibility of a uniform policy for all administrative tribunals quite impossible. Perhaps the best and only approach is the creation of a flexible guideline for each jurisdiction, as

---

[34] *Ibid.*

[35] OPC Guidance Documents, *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals* (2010), online: Office of the Privacy Commissioner of Canada, <http://www.priv.gc.ca/information/pub/gd_trib_201002_e.cfm

[36] *Ibid.*

[37] *Ibid.*

was done by the Office of the Privacy Commissioner of Canada. Unfortunately, such guidelines have yet to be adopted by the Treasury Board.

A more practical challenge tribunals must face is the question of who should be responsible for the content of published decisions. One possibility is to place the burden on the parties to indicate what information is inappropriate for online publication. However, this possibility raises a number of difficulties. This would create inconsistencies amongst different published records, inequalities in protection depending on the diligence and knowledge of the parties and counsel (if any), would overburden lawyers and/or litigants (especially self-represented litigants), and would require the development of a dispute mechanism. Equally challenging, who would look after the privacy interests of non-parties and witnesses who are not acting in a professional or other commercial capacity?

Another possibility is to place the responsibility on the website publishers. The difficulty with this approach is that the publisher is often not in the best position to know what should and should not be published for a specific party. Additionally, placing the responsibility on website publishers would permit inconsistencies between different published copies of the same decision.

The last possibility, and what appears to be the most appropriate, is placing the responsibility for decision content on the decision-makers. Although adjudicators may be able to focus better on making the most well thought-out decision without the additional burden of redacting, they are in the best position to know what information is sensitive in the particular context. Furthermore, editing during the drafting process would ensure consistency upon publication. Lastly, it would

be the least burdensome to educate decision-makers, rather than the parties, on what types of information may be considered inappropriate for wide disclosure on the internet.

Conclusion

Despite the attention spent on this issue federally and provincially elsewhere, Ontario and other provinces have yet to make any official word on this highly contentious issue.[38] This leaves administrative tribunals in Ontario to use their own discretion in determining their correct balance between transparency and privacy protection. One such tribunal which has risen to the challenge is the License Appeal Tribunal which has developed guidelines and accompanying chart for the deletion of personal information.[39]

Although each administrative tribunal has its own unique mandate, there are a number of factors that each should consider upon developing an online publication policy that strikes the right balance between transparency and privacy protection. The following should be considered by tribunals when attempting to strike the right balance when publishing decisions online:

- the enabling legislation and relevant privacy legislation to ensure compliance
- does the tribunal have a compelling public interest to disclose the personal information in its reasons
- replace names with initials or use standardized litigation terms, unless the adequacy of the reasons require fuller disclosure

---

[38] The Ministry of Attorney General of British Columbia and OIPC did provide a useful guide however for tribunals on access and privacy issues: Office of the Information and Privacy Commissioner for British Columbia, *Access and Privacy Issues: A Guide for Tribunals*, online: The Government of British Columbia, <http://www.ag.gov.bc.ca/ajo/down/privacy_guide.pdf>

[39] Ontario License Appeals Tribunal, Introduction to License Appeal Tribunal privacy guidelines, 2008, online: http://hdl.handle.net/1873/10571

- notice to parties (and possibly witnesses or other third parties)
- sensitive information that should rarely or never be disclosed online
    - Generally tribunals should avoid personal data (i.e. full names, birth date, Social Insurance Number), personal acquaintances' information (i.e. children's names, neighbours, employers), and specific factual information (i.e. communities, physicians, celebrity)[40]
- the necessity of the disclosure
- the public interest in disclosure and weigh it against the privacy risk
- gravity of harm of the disclosure to the individual
- the expectations of individuals and provide sufficient notice in respect of personal information disclosures

In addition to the above considerations, tribunals should publish and advise parties of their disclosure policies, which should include a mechanism for permitting individuals to request anonymity or redaction. Another alternative would be to publish a summary on website to satisfy the public's need to know and if necessary, publish the personal identifiers in a separate appendix for the parties and tribunal (for review or appeal purposes).[41] All in all, there are dozens of simple and easy methods for removing personal information deemed unnecessary - from using initials to web robot exclusion protocols - leaving tribunals with little excuse for posting decisions in full with sensitive information.

---

[40] *Use of Personal Information in Judgments and Recommended Protocol*, CJC and JTAC, March 2005

[41] Supra at note 38, at p.18