

**ELECTRONIC DISCLOSURE OF PERSONAL INFORMATION IN THE  
DECISIONS OF ADMINISTRATIVE TRIBUNALS**

**Privacy Commissioners of Canada and Saskatchewan**

<http://www.oipc.sk.ca/Resources/FAQs%20regarding%20Administrative%20Tribunals%20and%20the%20Internet%20publication%20of%20decisions.pdf>

# **ELECTRONIC DISCLOSURE OF PERSONAL INFORMATION IN THE DECISIONS OF ADMINISTRATIVE TRIBUNALS**

## **What should administrative tribunals consider when contemplating Internet publication of their decisions?**

### **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 any body 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.

***ACCESS AND PRIVACY ISSUES:  
A GUIDE FOR TRIBUNALS***

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## Executive Summary

This Guide has been jointly prepared by the Office of the Information and Privacy Commissioner (OIPC) for British Columbia and the BC Ministry of Attorney General's Administrative Justice Office (AJO) to address tribunal access and privacy issues and is intended to be a draft paper, for comments.

### *Why the Guide*

Access issues engage a fundamental element of our democratic system – openness and transparency of court and administrative proceedings – that has been increasingly met by tribunals posting decisions and other documents on their websites. But privacy concerns have been identified about the potential for data-mining, identity theft, stalking, and other misuses by powerful search tools that can access and extract personal information from those decisions and documents. The Guide discusses how to address these difficult issues in the context of the applicable legislation<sup>1</sup> and how to comply with that legislation when collecting information, providing access to records, and publishing reasons for decisions.

### *How to Balance the Interests to Achieve Compliance and Meet Needs*

A continuum of access and privacy measures can achieve compliance with the legislation, and tribunals may adopt practices from this continuum. The various factors that a tribunal may need to consider when determining the types of access and privacy measures to adopt are set out.

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<sup>1</sup> The *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c.145, sets a framework for access and to protect privacy; the *Administrative Tribunals Act*, SBC 2004 c.45 addresses the application of that Act to certain tribunals. Both are discussed in more detail in the Guide.

## Introduction

The purpose of this Guide is to assist administrative tribunals in developing access and privacy policies and procedures:

- that promote openness in their proceedings and decision-making processes while taking into account the privacy interests of the parties involved, including the interests of third parties; and
- that are tailored to and reflect the tribunal's unique jurisdiction and statutory powers and obligations.

It may also be of interest to tribunal users and the public in understanding why tribunals have access and privacy policies and procedures.

This Guide identifies what the principles of openness are, why they exist and how they relate to privacy interests, and the difference between courts and tribunals. The importance of considering privacy interests at all stages of a tribunal's work is discussed, specifically:

- collecting information;
- providing access to records; and
- publishing reasons for decisions.

The factors and criteria that may apply are set out, to assist administrative tribunals in achieving an appropriate balance between the privacy of parties and openness of their proceedings, ideally in advance of a specific issue arising.

The need for this Guide has been prompted by the recent level of discussion about access to tribunal records and privacy rights, and the issues arising from the increasing practice of tribunals to post their decisions and other information on their websites. Making information available on the internet can enhance the openness of tribunal proceedings and decision-making processes as users can retrieve more information about the tribunal and be better prepared to participate in its processes. Additionally, the public can be better informed about how tribunals operate and why they make the decisions they do. However, new technologies can also allow for potential misuse of some of this information.

Powerful search tools can be used to access information that may be available on the internet about persons who use the tribunal to settle disputes or establish rights. That information sometimes includes personal identifiers.<sup>2</sup> Data-mining,<sup>3</sup> identity theft, stalking, harassment and discrimination are just some examples of the potential for misuse. Individuals who fear their personal information might be accessed from a tribunal's records and possibly misused may conclude that possibility is too high a price to pay, and may decline to use the tribunal to resolve their disputes or establish their rights. This fear might be allayed by tribunals designing and implementing privacy and access policies and protocols.

## Openness and Privacy – a Delicate Balance

The “open court principle” recognizes the rights of members of the public to

- attend court proceedings; and
- have access to records in the court file, including the reasons for decision.

The “open court principle” ensures that the public can know what is happening in the courts, which is an important element of our democratic system. However, individuals who are parties to court proceedings may have a right, or at least an expectation, of privacy about personal information that may be disclosed as part of the court process.

In balancing the right to an open court with parties' rights to privacy, the courts have concluded that:

- the right to an open court is an important constitutional rule;

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<sup>2</sup> A personal identifier is personal information that when combined with other information, or with the person's name, enables direct identification of an individual so as to pose a serious threat to the individual's personal security. Personal identifiers include day and month of birth; civic, postal or e-mail address; unique numbers such as phone numbers, SIN numbers, financial account numbers and biometrical information. This information can be used to perpetrate identity theft as institutions may use some of this information for the purpose of authentication.

<sup>3</sup> Data mining is the process of sorting through large amounts of data and picking out relevant information.

- the right to privacy is a fundamental value; and
- the right to an open court outweighs the right to privacy, except in certain circumstances.<sup>4</sup>

However, because administrative tribunals are not courts, the court's conclusions do not directly apply to tribunals. As such, the public's right to attend a tribunal hearing or to access records in the tribunal's files does not automatically "trump" an individual's right to privacy about personal information held by the tribunal. For this reason, administrative tribunals are obliged to engage in a finer balancing of these competing interests. This balanced consideration should be done in advance, by developing and implementing policies that appropriately address privacy concerns both when conducting hearings and in providing access to tribunal records.

- ***The Freedom of Information and Protection of Privacy Act***

The *Freedom of Information and Protection of Privacy Act* (FIPPA) carefully balances the two purposes: providing access and protecting privacy. It holds public bodies accountable by:

- giving the public a right of access to records;<sup>5</sup>
- giving individuals a right of access to, and a right to request correction of, personal information about themselves; and
- specifying limited exceptions to the rights of access.

FIPPA also makes those bodies accountable to protect personal privacy, by preventing the unauthorized collection, use or disclosure of personal information.

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<sup>4</sup> However, the courts are very mindful of the need to protect privacy and have developed a model document to support that. See the Canadian Judicial Council "Model Policy for Access to Court Records in Canada", at:

[www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_techissues\\_AccessPolicy\\_2005\\_en.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf) Also see the Supreme Court of Canada "Policy for Access to Supreme Court of Canada Court Records" (2009) at: [www.scc-csc.gc.ca/court-cour/rec-doc/pol-eng.asp#s1](http://www.scc-csc.gc.ca/court-cour/rec-doc/pol-eng.asp#s1).

<sup>5</sup> A "record" is defined in Schedule 1 of FIPPA as including "books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records".

FIPPA establishes the Office of the Information and Privacy Commissioner (OIPC), which is independent from government. The OIPC monitors compliance with FIPPA.

- ***Tribunals and FIPPA***

Like courts, openness and privacy are important rights in tribunal proceedings. However, while court records are expressly excluded from the scope of FIPPA,<sup>6</sup> tribunal records *are* covered by FIPPA, unless the record is specifically excluded.

Exclusions from FIPPA that may apply include:

- section 3(1)(b) of FIPPA, which excludes “a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity“;
- Section 61 of the *Administrative Tribunals Act* (ATA),<sup>7</sup> which applies only if adopted in the tribunal’s own enabling legislation;<sup>8</sup> or
- express provisions in a tribunal’s own enabling legislation.

As such, while openness is an important principle that applies to tribunals, it does not automatically override privacy rights. While openness should be promoted, it should be done in a way that the tribunal can also fulfil its obligations to protect personal privacy under FIPPA.

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<sup>6</sup> See section 3(1)(a) (as noted above, the courts have found that the right to an open court outweighs the right to privacy, except in certain circumstances)

<sup>7</sup> Section 61 (2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3), does not apply to any of the following:

- (a) a personal note, communication or draft decision of a decision maker;
- (b) notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application;
- (c) any information received by the tribunal in a hearing or part of a hearing from which the public, a party or an intervener was excluded;
- (d) a transcription or tape recording of a tribunal proceeding;
- (e) a document submitted in a hearing for which public access is provided by the tribunal;
- (f) a decision of the tribunal for which public access is provided by the tribunal.

(3) Subsection (2) does not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act* that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

<sup>8</sup> To see if section 61 ATA applies to a tribunal, see:

[http://www.gov.bc.ca/ajo/down/application\\_of\\_ata\\_to\\_individual\\_tribunals.pdf](http://www.gov.bc.ca/ajo/down/application_of_ata_to_individual_tribunals.pdf)

Section 61 of the ATA recognizes the importance of maintaining a transparent and accessible administrative justice system, while taking into account the special nature of the quasi-judicial decision-making process and the specific fairness responsibilities that tribunals have.

- ***Complying with FIPPA and the ATA***

A continuum of access and privacy measures can be used to achieve compliance with the spirit and intent of FIPPA and tribunals may adopt privacy practices from this continuum (unless openness, confidentiality and/or access to their records or decisions is specifically addressed and set in their own legislation). The continuum reflects the fact that administrative tribunals are unique and deal with a range of issues and subjects of varying degrees of personal sensitivity.

The extent and degree to which a tribunal adopts access and privacy measures will depend on where the tribunal falls on the “privacy continuum”. To determine that, and the types of access and privacy measures a tribunal may need to adopt as result, the following factors can be of assistance:

- How sensitive is the personal information being considered by the tribunal? For example, does the tribunal deal with personal health, educational, financial or employment information?
- Is there a public interest element to the tribunal’s proceedings, such as enforcement or disciplinary hearings, or do the proceedings only involve a private dispute the outcome of which primarily concerns the parties involved?
- Does the tribunal’s enabling legislation provide that the tribunal:
  - has the power to make rules governing its own procedure;
  - hearings must be open to the public or may be held in private;
  - has authority to exclude the public from its hearings;
  - is governed by a confidentiality provision;
  - must make its decisions accessible to the public;
  - may publish its decisions; or

- has an obligation to remove personal information or personal identifiers from its decisions?
- Does the tribunal's enabling legislation contain exemptions from any of the provisions of FIPPA?
- What provisions of the ATA apply to the tribunal's proceedings?

Once these factors have been considered, the tribunal will want to consider developing privacy and access policies to govern the collection of and access to personal information.

## Collecting Personal Information

From a privacy perspective, administrative tribunals should collect only the personal information that is necessary to carry out their administrative and adjudicative functions. Sometimes a practise or policy, especially if adopted prior to the now widespread use of the internet, may inadvertently require or permit collection of personal information that is unnecessary for the task at hand. To ensure that the tribunal collects only that personal information that is necessary to carry out its functions, tribunals should consider and/or review:

- its standard forms or policies for creating internal "administrative" files; and
- its policies or rules that apply to a party's own documents that may be submitted to the tribunal.

- **Standard Forms**

Many tribunals request users complete standard form documents in order for the tribunal to open a file, so the tribunal can manage the file administratively. These forms are typically intended to assist the users to provide the information required and to ensure that the tribunal has the information it needs. However, FIPPA applies to protect personal information contained in these documents, so tribunals will be under an obligation to limit and protect any personal information it collects.

When designing or reviewing standard forms, tribunals may wish to consider the following:

- Do any standard forms request parties to provide any personal information or personal identifiers that may not be necessary for the tribunal, either to process the matter or to adjudicate on it?
- If personal information or personal identifiers are necessary for either of those purposes, can that information, or some of it, be provided at a later stage in the process? For example, requiring specific details about a claim or dispute may not be necessary at the very initial stage if that information is already in the other party's possession (for example, a government benefits office). Later filing of the information may also permit settlement or other resolution to occur, without the risk or need for any further disclosure of the personal information.
- If the standard forms can be filed with the tribunal electronically, is the tribunal's website sufficiently secure? A variety of security measures are now available and all tribunals should have some form of website security in place. Information and Technology experts located within the Ministry responsible for the tribunal may be able to assist.

- ***Records Obtained at a Hearing***

In many tribunals, parties will want to file or present documents to the tribunal to support their case. Those documents may contain personal information about the party, or even someone else. FIPPA applies to protect any personal information contained in these documents, so tribunals will be under an obligation to protect any personal information those documents may contain.

When designing or reviewing its practices and procedures for hearings, including rules of practice, a tribunal may wish to consider the following:

- Giving the person conducting the hearing the express authority to refuse to accept a document into evidence, if in his or her opinion the document has or will have little or no probative value. The ability to make this kind of

ruling can help minimise the risk of accepting, as part of the tribunal’s case file, documents that might contain sensitive personal information but which have little or no value in assisting the decision-maker to make a finding of fact about an issue in dispute.

- Allowing a party’s request that personal information be deleted or “severed” from documents submitted as evidence, if the personal information does not relate to the matter or dispute.
- Restricting or prohibiting any private recording of tribunal proceedings.<sup>9</sup>
- Clarifying how or when an official transcription or recording of tribunal proceedings may be made.<sup>10</sup>
- If sensitive personal information is to be presented in evidence, providing parties the opportunity to ask the hearing panel to exclude the public from the hearing and/or to keep the information confidential.<sup>11</sup>

In addition, the tribunal may also want to consider adopting a policy asking the parties to expressly commit to only using any personal information received during the course of a proceeding for the purpose of that proceeding and not for any other purpose.

## Providing Access to Documents and Protecting Privacy

Under FIPPA, the right of access applies to *all* records in the custody or under the control of a tribunal, *except* those records explicitly excluded by section 3(1)(b), section 61 of the ATA, or a provision contained in the tribunal’s enabling legislation. However, privacy rights may still apply to personal information that

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<sup>9</sup> Private recording is generally considered to serve little purpose in making a proceeding more transparent. See paragraph 4.4.3 of the Environmental Appeal Board’s Procedural Manual for an example of restricting the private recording of proceedings:

[http://www.eab.gov.bc.ca/fileappeal/EAB\\_Proc\\_Manual\\_2009.pdf](http://www.eab.gov.bc.ca/fileappeal/EAB_Proc_Manual_2009.pdf)

<sup>10</sup> Recordings and transcripts should only be available to parties, and generally only for appeal and judicial review purposes.

<sup>11</sup> The tribunal will have to have authority to do this, and if it may be done, the tribunal should establish internal policies for “sealing” files, so that only authorized persons may access the file documents.

may be contained in many records to which access must be given. This can mean that, where access to a record must be given, a tribunal will be required to sever (delete) personal information from the document before providing access. For this reason, tribunals may find it useful to develop a protocol or “roadmap” so that personal information is properly and consistently protected, whether or not the record is to be accessible. A clear “road map” can be helpful to tribunal staff, the parties and the public, to know what to do and what to expect.

- ***Section 61 of the ATA Limits Severance Requirements***

Section 61 of the ATA clarifies that administrative tribunals are not required to sever personal information from transcripts or recordings of public hearings or from documents submitted at public hearings.<sup>12</sup>

Providing access to most tribunal documents is consistent with most tribunals’ statutory requirements or policies that permit the public to attend its hearings. However, requiring tribunals to sever personal information from records that were already public (as the public already had access to the information during the hearing) created very real practical difficulties in many cases. With hearings that are often lengthy and sometimes involve thousands of pages of documents, reviewing them to sever personal information could be extremely time-consuming and costly.

Subsections 61(2)(d) and (e) clarify that the severance requirements in FIPPA do not apply to tape recordings or transcripts of the hearing or to documents submitted during the hearing, where public access to the hearing was provided.

- ***Practical considerations***

When developing policies to guide the tribunal with respect to access and privacy issues, and to promote consistency with respect to these practices, tribunals may wish to:

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<sup>12</sup> For more information on this, see the Information Bulletin “Application of the *Freedom of Information and Protection of Privacy Act* to Administrative Tribunals (Section 61 of the *Administrative Tribunals Act*)” at: [http://www.gov.bc.ca/ajo/popt/app\\_of\\_foi\\_admin\\_tribunals.htm](http://www.gov.bc.ca/ajo/popt/app_of_foi_admin_tribunals.htm)

- clearly articulate which records are excluded from the application of FIPPA access requirements, and if access will be permitted to any of those records or any parts of them even though FIPPA does not require it;
- set out in writing the conditions under which a tribunal will give access to records and the measures a tribunal will take to protect privacy; and
- inform the parties and the public about the tribunal's access and privacy practices.

- ***Notice to Parties***

A tribunal should make parties aware of the purpose their personal information may be required for, by including a general notice in all standard tribunal filing forms.<sup>13</sup> However, even with this kind of notice, many parties will remain completely unaware of the potential that their personal information could ultimately become publicly available as a result of the posting of the tribunal's decision on the tribunal's website. For this reason, it is important tribunals bring to the attention of and clearly communicate to parties the tribunal's policy on what information will be posted on its website and thus accessible through the internet.

A tribunal may wish to:

- publish its access and privacy policy on its website, so parties can know about that policy, in advance of starting any process;
- prepare an access and privacy brochure and make copies widely available, including when proceedings are started;
- inform parties about the parties' own responsibilities to include in any documents to be filed only that personal information (about themselves or another person) that is necessary to inform the tribunal about the nature of the claim or dispute and to establish or challenge the claim or dispute; and

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<sup>13</sup> See FIPPA section 27(2) A public body must ensure that an individual from whom it collects personal information or causes personal information to be collected is told

(a) the purpose for collecting it,  
 (b) the legal authority for collecting it, and  
 (c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.

- require the parties to expressly acknowledge having read and understood the tribunal's access and privacy policy (including policies for the posting decisions on its website if this is the case), when filing initiating documents, including any e-filed forms.

- ***Providing Routine Access vs. Access by Statute***

Openness is enhanced when tribunals simply make as many of their records as possible accessible to the public, (being mindful of course of any privacy interests). This means that, as much as possible, members of the public are able to access routine documents without having to resort to statutory access procedures.

Tribunals may wish to consider what types or classes of records they could make accessible routinely, without any privacy concerns. This may include:

- records that document information that the tribunal routinely releases to the public such as information sheets, pamphlets and guidelines;
- information that may not be routinely released to the public, but in which there is no privacy interest, such as hearing statistics and office policies; and
- decisions, and reasons for the decisions, that the tribunal makes accessible to the public (see more on this below).

In addition, the tribunal may want to have in place policies to provide "routine" access to the tribunal case file, if requested by a party or their authorised representative. However, that policy should include a means to ensure that the person requesting access is, in fact, a party. For example, the policy might provide that in-person access to tribunal case files require proof of identification, and that for other access, copies should only be sent to the address on record in the tribunal file.

Requests by third parties for access to a tribunal case file should be handled under the formal statutory access request, to ensure full consideration of all privacy and other issues. This will especially apply to documents filed in anticipation of a hearing that then gets cancelled and may not ever proceed (for example, if the matter is resolved.)

- ***E-Access to Records***

Many of the privacy concerns have arisen because of the increasing use of the internet to provide access to tribunal records, in particular, the posting of decisions and the reasons for those decisions. While the posting of reasons for decision on the internet has a very good rationale – increased public knowledge of how and what a tribunal is doing (and search tools on a website can enhance that public access) – many of these decisions can contain a significant amount of personal information.

Previously, when most tribunal documents were simply paper records filed in the tribunal office, the physical impediments to accessing the information contained in the records provided what the courts have called “practical obscurity”.<sup>14</sup> This meant that the requirement of having to go to a tribunal office and sift through what might be significant amounts of information meant most personal information remained private. However, the increasingly widespread use of the internet and growing practise of making documents accessible on the internet, when combined with powerful search engines, means a considerable amount of personal information about individuals can now be located, with relative ease and at very little or no cost to the person searching.

In making policies about electronic access to documents, tribunals will want to consider the nature of the record and the sensitivity of the information in it, including:

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<sup>14</sup> United States Department of Justice et al. v. Reporters Committee for Freedom of the Press et al. (1989) 489 U.S. 749.

- the type of records the tribunal will make widely available to the public, including posting on its website;
- whether the public should have any access to certain types of records, or if access should be limited to only parties;
- if the records are to be accessible electronically by the parties, how will the parties' right to access the documents ("authentication") be established electronically;
- whether access to a particular type of document should be limited to "in-person" only, to continue to provide "practical obscurity";
- whether the search tools that are made available on the tribunal's website, should be designed to limit the possibility of "aggregating" information for secondary uses that are unrelated to the public interest in transparency;
- whether only a single search should be allowed or if multiple searches will be permitted;
- if multiple searches are allowed, will the searches be tracked to ensure the searches are being conducted for proper purposes; and
- whether to be permitted to complete multiple searches a user should have to enter into an agreement with the tribunal regarding how the information will be used.

- ***Exhibits***

Exhibits are the documents filed by a party to support their case, or to challenge the case of another party. While section 61 of the ATA expressly exempts exhibits filed at a public hearing from the scope of FIPPA, a tribunal may still want to develop policies on how it will treat requests for access to these records.

Many parties to tribunal proceedings submit documentary evidence or other types of evidence to substantiate their claims. This may include bank statements, business contracts or medical reports, all of which contain highly sensitive personal information. In submitting these types of records, parties generally do

not expect them to be widely disseminated to the public. In developing access and privacy policies with respect to exhibits, things to consider include:

- whether to prohibit or otherwise limit public access to exhibits, or to treat those requests as a formal statutory access request, to ensure full consideration of all privacy and other issues;
- whether access should be limited to only those exhibits relied on and referred to in the tribunal's decision;
- whether personal information contained in the exhibit, particularly where it is extraneous to the tribunal's decision, can be easily discerned and severed; and
- whether a party must be given notice of and the opportunity to respond to a request for access to that party's documents that are exhibits.

- ***Tape Recordings and Transcripts***

Section 61 of the ATA exempts tape recordings and transcripts of tribunal proceedings from the scope of FIPPA. Many tribunals no longer record hearings due to the high costs of doing so, and the even higher costs of obtaining a transcript. However recordings and transcripts, if available, are generally made accessible to the parties for appeal or judicial review purposes, although a policy to ensure the security of access to a recording and/or the payment of the costs of providing a copy may be desirable. Some tribunals also require the party to provide the tribunal with a copy of any transcript the party has made.

With respect to other persons who are not parties to the dispute or claim, transparency is generally served by providing public access to hearings.

Allowing access to tape recordings and transcripts may not serve any additional purpose. However, if a tribunal is considering releasing tape recordings or transcripts to the persons who are not parties, policy considerations around that release may include:

- the nature of the personal information and personal identifiers that may be contained in the recording or transcript, and the costs associated with severing it; and
- whether to consider release only on a case-by-case basis, requiring the person to apply to the tribunal and justify the need for access in consideration of the competing interests of transparency and privacy, with prior notice to the persons whose privacy interests may be affected.

- ***Dispute Resolution Records***

Section 61 of the ATA exempts records from a dispute resolution process from the scope of FIPPA. In addition, the enabling statutes or regulations or the rules of procedure of most tribunals designate these records as confidential and participants are typically required to give an undertaking to maintain confidentiality. The reason dispute resolution records are confidential (and generally inadmissible in tribunal proceedings) is to promote the full discussion that may be necessary to achieve resolution without a hearing. Making these records available to others could defeat the purpose of the dispute resolution process and no public purpose would be served.

To prevent inadvertent disclosure of dispute resolution records, tribunals should ensure that these records are either kept in separate files or sealed and separated from other records in the tribunal case file. Protocols about accessing these records should be made clear to staff.

## **Publishing Tribunal Decisions**

Publication of tribunal decisions can be an important aspect of transparency. Publishing tribunal decisions can provide the public with useful information about tribunal practices and proceedings, how the tribunal applies its enabling legislation, and how the tribunal has decided prior cases and why.

- ***Accessibility***

Most tribunals make their decisions accessible to the public, either on their website or in paper form. If section 50 of the ATA has been adopted, the tribunal will be required to make their decisions accessible to the public. Other tribunals are permitted or may be required to publish their decisions by their enabling legislation. Yet others may be permitted to publish their decisions only if they take steps to remove the parties' personal identifiers.

- ***Privacy Issues***

Section 61 of the ATA exempts most tribunals from the FIPPA requirement to sever personal information from decisions, if the public has access to those decisions.<sup>15</sup> This means tribunals can publish decisions that contain personal identifiers. However, while publication of tribunal decisions is an important way to provide information and make tribunal operations more transparent, publication of sensitive personal information, especially on a website, may present the potential for misuse of that information.

In addition, it would seem contrary to the intent of protecting privacy rights under FIPPA if personal information contained in a tribunal record - which may be protected from disclosure by FIPPA - is then released to the public by setting out that information in a tribunal decision, unless the information is critical to the decision being made and the parties' and public understanding of why the decision is being made. A key consideration may be whether the information is necessary should the court or other oversight body be asked to review or reconsider the tribunal's decision.

Sensitive personal information includes:

- health information;
- information about sexual orientation, sexual history, or sexual abuse;
- the personal identifiers of children and other family members;

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<sup>15</sup> See AJO Information Bulletin on this topic at note 12.

- other specific factual information that could identify a party, like names of small towns where persons reside.

Generally, it should not be necessary to include personal identifiers such as birthdates, SIN numbers, credit card numbers, and financial account numbers in tribunal decisions.

To limit the potential for disclosure of personal information in its decisions, tribunals may consider adopting policies that:

- remove personal information that may identify parties or witnesses; and
- if the personal information is important to support the decision for the parties and any possible review rights, whether it can be anonymised so the persons affected cannot be identified.

Other considerations may include:

- whether publication of a party's name in the tribunal decision serves a public policy purpose, such as deterrence;
- whether personal information can be separated from the body of the decision and placed instead in appendices, which are provided only to the parties (and the court, if necessary on a review or appeal);
- whether all of the tribunal's decisions need to be published on its website or only the leading cases;
- whether publishing decision summaries on the website, instead of full-text decisions is sufficient to satisfy the public information needs; and
- whether tribunal decisions that must contain sensitive personal information should not be published on the website, at all.

## Conclusion

While it is important for administrative tribunals to conduct their proceedings and provide access to their records in an open and transparent manner, it is also

important to protect the privacy of the parties involved in their proceedings. This is particularly important where the personal information is sensitive and decisions are made available online.

Tribunals are encouraged to consider and adopt policies and procedures that take into consideration privacy principles when collecting, using and disclosing personal information. These policies and procedures should reflect where the administrative tribunal falls on the privacy continuum and, to the extent possible, cover all aspects of the tribunals' activities related to the handling of personal information.

This Guide has been jointly prepared by the OIPC for British Columbia and the BC Ministry of Attorney General's AJO and is intended to be a draft paper, for comments. Comments may be sent to:

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## Resources

Canadian Judicial Council, “Model Policy for Access to Court Records in Canada” (2003), [www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_techissues\\_AccessPolicy2005\\_en.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy2005_en.pdf).

Loukidelis, David, “Privacy and Openness in Administrative Tribunal Decisions”, CJALP, Vol. 22 No. 1 February 2009, p. 75.

Supreme Court of Canada “Policy for Access to Supreme Court of Canada Court Records” (2009), [www.scc-csc.gc.ca/court-cour/rec-doc/pol-eng.asp#s1](http://www.scc-csc.gc.ca/court-cour/rec-doc/pol-eng.asp#s1).

Privacy and Confidentiality in Tribunal Proceedings  
Foundation of Administrative Justice, April 2011

## **Additional Resources**

Bernier, Chantal (Asst. Privacy Commissioner of Canada), “The adjudicative process in the Internet age: A new equation for privacy and openness”, Canadian Institute for the Administration of Justice National Roundtable, May 28, 2010, [http://www.priv.gc.ca/speech/2010/sp-d\\_20100528\\_cb\\_e.cfm](http://www.priv.gc.ca/speech/2010/sp-d_20100528_cb_e.cfm)

Canadian Judicial Council, “Model Policy for Access to Court Records in Canada” (2005), [http://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_techissues\\_AccessPolicy\\_2005\\_en.pdf](http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_AccessPolicy_2005_en.pdf)

Canadian Judicial Council (Judges' Technology Advisory Committee), “Use of Personal Information in Judgments and Recommended Protocol”, 2005 [http://cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_techissues\\_UseProtocol\\_2005\\_en.pdf](http://cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_UseProtocol_2005_en.pdf)

Dickson, Gary (Sask. Information and Privacy Commissioner), “Administrative Tribunals, Privacy and the Net”, Alberta Law Conference, Canadian Bar Association, 2009, <http://www.oipc.sk.ca/Resources/Administrative%20Tribunals.pdf>

Loukidelis, David, “Privacy and Openness in Administrative Tribunal Decisions”, CJALP, Vol. 22 No. 1 February 2009

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## Use of personal information in decisions and posting of decisions on websites

The Forum considers it important to encourage, to the extent possible, a consistent approach to the use of personal information by administrative tribunals in their decisions and posting of decisions on websites for those administrative tribunals that operate in accordance with the open court principle or that have enabling legislation specifying that their proceedings are in the public interest and that post full texts of their written decisions on their website.

The Forum believes that any policy in this regard should endeavour:

- to strike a balance between the open court principle and the privacy concerns of individuals availing themselves of their rights before administrative tribunals;
- to provide its members with a set of principles for the protection of personal information in conformity with which each administrative tribunal may voluntarily adopt individual measures adapted to its specific needs;
- to avoid placing administrative tribunals in the position of being required to prepare multiple versions of their decisions; and
- to assist administrative tribunals in determining the extent to which names and specific personal information should be included in their reasons for decisions.

The Forum recognizes that the *Protocol for the Use of Personal Information in Judgments* approved by the Canadian Judicial Council in May 2005 (the *CJC Protocol*) provides helpful guidance in assessing what personal information is relevant and necessary to support the reasons for a decision and clearly recognizes the benefits of allowing decision makers to make that assessment.

The Forum further recognizes that the "web robot exclusion protocol", which is respected by commonly used Internet search engines to restrict the global indexing of specifically designated documents posted on websites, is an acceptable technical means for providing fair protection to personal information contained in administrative tribunals' decisions posted on their websites.

While respecting the legitimate needs of administrative tribunals to develop practices that best address the specific concerns of the proceedings they administer, the Forum encourages each of its member organizations that operates in accordance with the open court principle or that has enabling legislation specifying that its proceedings are in the public interest, and that posts full texts of its written decisions on its website, to consider implementing, when appropriate, all or some of the following:

- referring its website, by hyperlink, to this statement on the Forum's website and to the *CJC Protocol* posted on the Canadian Judicial Council's website;
- adopting the *CJC Protocol* ;
- making the *CJC Protocol* part of any training program offered to its decision makers;
- applying the "web robot exclusion protocol" to all full-text decisions containing personal information posted on its website;
- giving notice to individuals availing themselves of their rights before it (e.g. on its website, in its administrative letters opening case files and on the forms that parties must complete to initiate proceedings) that it posts its decisions in full on its website.

Date Modified: 04-06-11



## Policy on Openness and Privacy

### Open justice

The Public Service Labour Relations Board ("the Board") is an independent quasi-judicial tribunal that operates very much like a court when it conducts proceedings under several labour-related statutes, including the *Public Service Labour Relations Act*, the *Parliamentary Employment and Staff Relations Act* and Part II of the *Canada Labour Code*. This document outlines the Board's policy on the openness of its processes and describes how it handles issues relating to privacy.

The open court principle is significant in our legal system. In accordance with that principle, the Board conducts its oral hearings in public, save for exceptional circumstances. Because of its mandate and the nature of its proceedings, the Board maintains an open justice policy to foster transparency in its processes, accountability and fairness in its proceedings.

The Board's website, notices, information bulletins and other publications advise parties and the community that its hearings are open to the public. Parties that engage the Board's services should be aware that they are embarking on a process that presumes a public airing of the dispute between them, including the public availability of decisions. Parties and their witnesses are subject to public scrutiny when giving evidence before the Board, and they are more likely to be truthful if their identities are known. Board decisions identify parties and their witnesses by name and may set out information about them that is relevant and necessary to the determination of the dispute.

At the same time, the Board acknowledges that in some instances mentioning an individual's personal information during a hearing or in a written decision may affect that person's life. Privacy concerns arise most frequently when some identifying aspects of a person's life become public. These include information about an individual's home address, date of birth, financial details, SIN or driver's licence numbers, credit card, or passport. The Board endeavours to include such information only to the extent that is relevant and necessary for the determination of the dispute.

With advances in technology and the possibility of posting material electronically — including Board decisions — the Board recognizes that in some instances it may be appropriate to limit the concept of openness as it relates to the circumstances of individuals who are parties or witnesses in proceedings before it.

In exceptional circumstances, the Board departs from its open justice principles, and in doing so, the Board may grant requests to maintain the confidentiality of specific evidence and tailor its decisions to accommodate the protection of an individual's privacy (including holding a hearing in private, sealing exhibits containing sensitive personal information or protecting the identities of witnesses or third parties).

The Board's policy is consistent with the statement (<http://www.hfatf-fptaf.gc.ca/declaration-web-eng.php>) of the Heads of Federal Administrative Tribunals Forum (endorsed by the Council of Canadian Administrative Tribunals) and the principles found in the Protocol for the Use of Personal Information in Judgments ([http://cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_techissues\\_UseProtocol\\_2005\\_en.pdf](http://cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_UseProtocol_2005_en.pdf)) approved by the Canadian Judicial Council.

### Access to case files and decisions

Board case files, containing correspondence exchanged between the parties, are available to the public for consultation at the Board's premises with appropriate notice. However, information such

as an individual's home address, email address, phone number, date of birth, financial details, SIN or driver's licence numbers, or credit card or passport details is not available for consultation.

Exhibits filed at a hearing are available to the public for consultation at the Board's premises with appropriate notice, once the decision on the merits of the case has been rendered or the Board has otherwise closed its case file. However, exhibits that have been ordered sealed are not available for consultation.

Board decisions are available electronically on its website. In an effort to establish a balance between public access to its decisions and privacy concerns, the Board has taken measures to prevent Internet searches of full-text versions of decisions posted on its website. This was accomplished by using the "[web robot exclusion protocol](#)," which is recognized by Internet search engines (e.g., Google and Yahoo). As a result, an Internet search of a person's name will not yield any information from the full-text versions of decisions posted on the Board's website.

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