
Privacy and Transparency

How do administrative tribunals find the appropriate balance in the Internet age?

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The Internet Age

- “The Internet also creates a new context for the inclusion of people’s names when the decisions of judicial, quasi-judicial and administrative bodies are published....

However I am not convinced that the broad public needs to know the names of individuals involved or requires access to intimate personal details through decisions posted widely on the Internet.” (Jennifer Stoddart, Privacy Commissioner of Canada, CBA Conference, August 17, 2008, Quebec City)

Internet Publication

- Personal information (p.i.) available to anyone anywhere for any use or republication
- P.I. can never be 100% recalled or expunged
- P.I. remains vulnerable to criminals, stalkers, insurers, employers, recruiters and countless others for commercial exploitation
- Risk of prejudice arising from uses not even contemplated today
- That prejudice is qualitatively different than the 'mere embarrassment' in the open courts jurisprudence

Legal Considerations

- No requirement in FOIP Act for Internet publication
 - There is currently no provision in the FOIP Act that expressly authorizes the disclosure of [p.i.] in decisions of [admin.] tribunals. Moreover, the statutes...are generally silent regarding the disclosure of [p.i.] in reasons for their decisions. (Select Special FOIP Review Committee, Final Report, Nov. 2002)
- ‘Disclosure’ only with consent or as permitted by FOIP

Legal Considerations (cont'd)

- FOIP section 40(1) enumerates 33 circumstances for non-consented disclosure – do any apply?
- Section 40(4) “A public body may disclose [p.i.] only to the extent necessary to enable the public body to carry out the purposes described in subsections (1),(2) and (3) in a reasonable manner.”

Legal Considerations (cont'd)

- Does the disclosure meet the consistent purpose test in sections 39(1)(a) & 41?

“For the purposes of sections 39(1)(a) and 40(1)(c), a use or disclosure of [p.i.] is consistent with the purpose for which the information was collected or compiled if the use or disclosure

- (a) has a reasonable and direct connection that purpose, **and**
- (b) **is necessary** for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information”

Legal Considerations (cont'd)

- *“publication on the web is in my view a logical extension of public access to the hard copy”*
(Ottenbreit J., Elaine Germain v. Automobile Injury Appeal Commissioner et al, 2009 SKQB 106, [63])

OR

Legal Considerations (cont'd)

- *“while there is currently limited public access to this information via the physical daily posting of the criminal dockets on site, that does not justify posting world-wide for all time to all of those with access to the internet. Currently privacy is protected by the **practical obscurity** created by the physical inconvenience of attending at each courthouse to examine the criminal dockets by others than those who have personal involvement in the matters then before the courts...”* (Bielby J., Alberta (A.G.) v. Krushell, 2003 ABQB 252, 340 A.R. 227)

Problems with 'open courts' principle

- Assumes a sophistication and Charter awareness on part of citizen and tribunal
- Many individuals appearing before admin. Tribunals may be unrepresented by counsel
- Burden of proof on citizen is problematic:
 - Even experts cannot be precise in how p.i. on the Internet will be misused and when
 - Little likelihood that citizen will be able to make compelling argument in respect of either 1st or 2nd stage of Dagenais/Mentuck test.

Possible remedy

- Reverse the onus for admin. tribunals that collect, use, disclose p.i. in terms of Internet publication
- Default could be no Internet publication without masking identifying information unless proponent can meet burden of proof in establishing injury from non-publication

Possible Remedy

- For admin. tribunals that maintain a formal record, address the issue by:
 - Promoting the data minimization principle i.e. disclose the least amount of identifying p.i. necessary for the purpose of publication
 - Provide physical access to the decision of the admin tribunal at its office consistent with practical obscurity approach

Recommended steps for Admin. Tribunals

- Identify what, if any, p.i. is dealt with in course of its work
- To what extent does that p.i. need to be included in decisions?
- Develop a comprehensive privacy policy to reflect both FOIP requirements and 'best practices'

Recommended Steps (cont'd)

- Appoint FOIP Coordinator/Privacy Officer responsible for:
 - Compliance with FOIP
 - Ensuring appropriate policy and procedures
 - Training staff to comfortable understanding of FOIP requirements
 - Orientation of board members as well as staff
 - Providing ongoing direct advice to CEO

Recommended Steps (cont'd)

- Consider whether Internet publication is warranted given privacy risks involved
- Ensure transparency to citizens of policy particularly any Internet publication
- Consider masking names and excluding personal information pre-Internet posting
- Create protocol to deal with exceptional cases where Internet post is appropriate

Recommended Steps (cont'd)

- If names and p.i. will be posted to Internet consider utilization of a **robot exclusion protocol** to minimize the risk of data profiling

Additional Resources

- *Privacy and Openness in Tribunal Proceedings* (D. Loukidelis, B.C. Information & Privacy Commissioner;available at [www.oipc.bc.ca/publications/speeches_presentations/CBA-CLE_Conference_Admin_Tribunals_Privacy\(4Nov08\).pdf](http://www.oipc.bc.ca/publications/speeches_presentations/CBA-CLE_Conference_Admin_Tribunals_Privacy(4Nov08).pdf))
- *Administrative Tribunals, Privacy and the Net* (G. Dickson, Alberta Law Conference, 2009; available at www.oipc.ab.ca)
- *Policy for Access to Supreme Court of Canada Court Records* (available at www.scc-csc.gc.ca/court-cour/rec-doc/pol-eng.asp)

Questions ??

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