

Administrative Tribunals, Privacy and the Net

*Government agencies must examine the public policy objectives they are attempting to accomplish by making records available on the Internet - the prime one being government accountability. If there are ways to limit the amount of personal information provided online without undermining the public policy objectives of providing access, then such approaches should be considered.*¹

Introduction

In 2008, there were a number of developments and commentaries considering Internet publication by administrative tribunals of their decisions. We do not yet have the benefit of a significant body of relevant case law in Canada.² Consequently, this is an important moment for administrative tribunals to reconsider what types of information they publish on their websites.

The purpose of this paper is to highlight recent developments in this area, then to revisit the ‘open courts’ principle in the context of administrative tribunals and to suggest some options available to tribunals that wish to be transparent and accountable, and yet also to be respectful of the privacy of the individuals with whom they deal.

Consider some recent developments with administrative tribunals at the federal level and in the provinces of Alberta and Saskatchewan.

FEDERAL ADMINISTRATIVE TRIBUNALS

Most federal administrative tribunals qualify as a “government institution” subject to the *Privacy Act*.³ This statute defines “personal information” and codifies the rules

¹ Beth Givens, *Public Records on the Internet: The Privacy Dilemma*, 2002; Available online at <http://www.privacyrights.org/ar/onlinepubrecs.htm>.

² Christopher Berzins, *Personal Information in the Adjudicative Decisions of Administrative Agencies: An Argument for Limits*, *The Advocates Quarterly* Vol. 34, Number 3, 261.

³ R.S.C. 1985, c. P021 as am.

governing the collection, use and disclosure of that personal information. The *Privacy Act* constitutes the Privacy Commissioner of Canada as the oversight agency.

In the course of a consultation with respect to a 2004 initiative of the Canadian Judicial Council, Raymond D'Aoust, Assistant Privacy Commissioner of Canada, stated:

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 [Office of the Privacy Commissioner of Canada] 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.⁴

In July 2008 the office of the Privacy Commissioner of Canada dealt with a complaint about Service Canada's practice of publishing Office of the Umpire (CUB) decisions on the Internet.⁵ These decisions are with respect to employment insurance appeals and contain personal information about individuals. The case was dealt with under the provisions of the *Privacy Act*. The Assistant Commissioner held that the 'open court' principle does not require or justify the electronic publication of the personal information in CUB decisions on the Internet. His recommendations included:

That Service Canada should reasonably depersonalize future decisions through the use of randomly assigned initials in place of names OR post on the Internet only a summary of the decision with no identifying personal information.

Restrict the indexing by name of past CUB decisions by global search engines through the use of an appropriate "web robot exclusion protocol"⁶ OR remove or reasonably depersonalize all past CUB decisions on the Service Canada website.

⁴ Lisa Austin and Frederic Pelletier, *Synthesis on the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records and Privacy*, January 2005 p.10.

⁵ Available online at www.cippic.ca (October 10, 2008).

⁶ The Robot Exclusion Protocol is a practice to prevent cooperating web spiders and other robots from accessing part of a website that is publicly available. "When a compliant Web Robot visits a site, it first checks for a[particular URL] on the site. If this URL exists, the Robot parses its contents for directives that instruct the robot not to visit certain parts of the site." *Web Server Administrator's Guide to the Robots Exclusion Protocol* available online at <http://grox.net/doc/web/robots-exclusion-admin.html>.

In her recent address to the Canadian Bar Association⁷, Canada's Privacy Commissioner, Jennifer Stoddart, observed:

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. In law school, we all learned cases by individuals' names. We often hear that the use of names is a necessary part of truth-finding and in accordance with the fundamental "open court" principle. This is an important part of our legal system based on the historic principle that that the public must be informed about, and be able to scrutinize decision-making processes to ensure they are fair. 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. When these cases were accessible only in specialized legal texts, or search engines accessible to legal professionals only, or copies could be picked up by making a trip to the basement records room of a court or tribunal, the concept of practical obscurity always operated in favour of privacy protection and the need-to-know principle. The story is now different when decisions containing highly sensitive personal information are made available to anyone with an Internet connection. I don't believe we would take away from the educational value of these decisions by replacing names with initials, for example. We will be discussing our findings in several investigations or complaints about personal details being posted in federal tribunal decisions in our next *Privacy Act* annual report this fall. I hope you'll agree we've struck the right balance between the fundamental importance of the open court principle and the fundamental right to privacy.

ALBERTA

In Alberta, there are approximately 93 regulatory/adjudicative agencies⁸. A number of these agencies maintain web sites.⁹ Many of these are 'public bodies' and therefore subject to the *Freedom of Information and Protection of Privacy Act* (AB FOIP).¹⁰ The Alberta Information and Privacy Commissioner provides oversight. The definition of personal information is broad:

⁷ Canadian Bar Association Legal Conference and Expo, Quebec City, Quebec, August 17, 2008.

⁸ *At a Crossroads- The Report of the Board Governance Review Task Force*, Oct. 1, 2007; Available online at <http://www.alberta.ca/home/729.cfm>; ("the Crossroads Report").

⁹ Appeals Commission for the Workers' Compensation Board, Environmental Appeal Board of Alberta, Alberta Labour Relations Board, Alberta Energy and Utilities Board, Human Rights and Citizenship Commission, Information and Privacy Commissioner, Gaming and Liquor Commission, Metis Settlements Appeal Tribunal, Natural Resources Conservation Board and Workers' Compensation Board.

¹⁰ R.S.A. 2000, c. F-25 as am.

1 In this Act,

...

n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;¹¹

The AB FOIP Act sets out the applicable rules for the collection, use and disclosure of personal information by public bodies.¹²

The provision for 'disclosure' of personal information by a public body is section 40. That provides as follows:

40(1) A public body may disclose personal information only

(a) in accordance with Part 1,

(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,

(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

¹¹ Alberta Freedom of Information and Protection of Privacy website, <http://foip.alberta.ca/legislation/act/section1.cfm>.

¹² In Alberta's FOIP Act there is an exclusion for "a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the Administrative Procedures Act applies;" s. 4(1)(b). A similar exclusion exists in the British Columbia FOIP Act, s. 3(1)(b).

- (d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure,
- (e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada,
- (f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,
- (g) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction in Alberta to compel the production of information or with a rule of court binding in Alberta that relates to the production of information,
- (h) to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member,
- (i) to an officer or employee of a public body or to a member of the Executive Council, if the disclosure is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or member to whom the information is disclosed,
- (j) for the purpose of enforcing a legal right that the Government of Alberta or a public body has against any person,
- (k) for the purpose of
 - (i) collecting a fine or debt owing by an individual to the Government of Alberta or to a public body, or to an assignee of either of them, or
 - (ii) making a payment owing by the Government of Alberta or by a public body to an individual,
- (l) for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit,
- (m) to the Auditor General or any other prescribed person or body for audit purposes,
- (n) to a member of the Legislative Assembly who has been requested by the individual the information is about to assist in resolving a problem,
- (o) to a representative of a bargaining agent who has been authorized in writing by the employee the information is about to make an inquiry,
- (p) to the Provincial Archives of Alberta or to the archives of a public body for permanent preservation,
- (q) to a public body or a law enforcement agency in Canada to assist in an investigation
 - (i) undertaken with a view to a law enforcement proceeding, or
 - (ii) from which a law enforcement proceeding is likely to result,
- (r) if the public body is a law enforcement agency and the information is disclosed

- (i) to another law enforcement agency in Canada, or
- (ii) to a law enforcement agency in a foreign country under an arrangement, written agreement, treaty or legislative authority,
- (s) so that the spouse or adult interdependent partner, relative or friend of an injured, ill or deceased individual may be contacted,
- (t) in accordance with section 42 or 43,
- (u) to an expert for the purposes of section 18(2),
- (v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party,
- (w) when disclosure is by the Minister of Justice and Attorney General or an agent or lawyer of the Minister of Justice and Attorney General to a place of lawful detention,
- (x) for the purpose of managing or administering personnel of the Government of Alberta or the public body,
- (y) to the Director of Maintenance Enforcement for the purpose of enforcing a maintenance order under the Maintenance Enforcement Act,
- (z) to an officer of the Legislature, if the information is necessary for the performance of the duties of that officer,
- (aa) for the purpose of supervising an individual under the control or supervision of a correctional authority,
- (bb) when the information is available to the public,
- (bb.1) if the personal information is information of a type routinely disclosed in a business or professional context and the disclosure
 - (i) is limited to an individual's name and business contact information, including business title, address, telephone number, facsimile number and e-mail address, and
 - (ii) does not reveal other personal information about the individual or personal information about another individual,
- (cc) to the surviving spouse or adult interdependent partner or a relative of a deceased individual if, in the opinion of the head of the public body, the disclosure is not an unreasonable invasion of the deceased's personal privacy,
- (dd) to a lawyer or student-at-law acting for an inmate under the control or supervision of a correctional authority,
- (ee) if the head of the public body believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health or safety of any person, or
- (ff) to the Administrator of the Motor Vehicle Accident Claims Act or to an agent or lawyer of the Administrator for the purpose of dealing with claims under that Act.

(2) Notwithstanding subsection (1), a post-secondary educational body may disclose personal information in its alumni records for the purpose of fund-raising

activities of the post-secondary educational body if the post-secondary educational body and the person to whom the information is disclosed have entered into a written agreement

(a) that allows individuals a right of access to personal information that is disclosed about them under this subsection, and

(b) that provides that the person to whom the information is disclosed must discontinue using the personal information of any individual who so requests.

(3) Notwithstanding subsection (1), a post-secondary educational body may, for the purpose of assisting students in selecting courses, disclose teaching and course evaluations that were completed by students.

(4) A public body may disclose personal information 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.¹³

There is no explicit authority in AB FOIP for the Internet publication of decisions of an administrative tribunal.¹⁴

The issue of privacy and Alberta administrative tribunals was addressed by the Select Special Freedom of Information and Protection of Privacy Act Review Committee in its Final Report of November 2002.¹⁵ That report included the following:

Decisions of administrative tribunals

There is currently no provision in the FOIP Act that expressly authorizes the disclosure of personal information in decisions of administrative tribunals. Moreover, the statutes that establish these administrative tribunals are generally silent regarding the disclosure of personal information in reasons for their decisions.

Alberta government ministries are responsible for a diverse array of administrative tribunals that decide matters ranging from individual benefit levels, to labour disputes, to compensation for access to privately owned land for drilling. Some tribunals routinely file their decisions with the courts and make them

¹³ Alberta Freedom of Information and Protection of Privacy website, <http://foip.alberta.ca/legislation/act/section40.cfm>.

¹⁴ Supra, Note.8. The Crossroads Report (October 2007) thoroughly canvassed a broad range of issues related to administrative tribunals and other boards, commissions and agencies but makes no reference to the Internet publication of personal information in decisions.

¹⁵ P. 28, available online at www.legassembly.ab.ca/pro/committees/FOIP_Final_Report.pdf.

publicly available; some post their decisions on their Web sites; others do not make their decisions publicly available and consider them to have little precedential value.

It was suggested to the Committee that, while there is an increasing demand for electronic publication of all records relating to judicial and quasi-judicial proceedings, there has also been a growing debate, in Canada and abroad, as to whether it is appropriate to publish all decisions. It was noted that the Alberta Court of Queen's Bench recently changed its practice of publishing certain types of judgments on the Court's Web site, including decisions under the *Child Welfare Act*, the *Dependent Adults Act*, the *Divorce Act*, the *Domestic Relations Act*, and the *Matrimonial Property Act*. The change followed a similar decision in British Columbia. In all the discussions of publication of judicial and quasi-judicial decisions the case for transparency is countered by the case for preserving some degree of the "practical obscurity" that applied to records before the rise of Web publication and ever more powerful search engines.

The Committee considered a range of options and agreed that each tribunal was in the best position to advise on the appropriateness of disclosure of personal information in its decisions. It was agreed, therefore, that any authorization or requirement to disclose personal information in decisions should be in the legislative instrument that governs the administrative tribunals.

The Committee further agreed that, in view of the practical difficulties of amending a number of statutes separately, it would be helpful to recommend consideration of the use of an omnibus bill to deal with amendments relating to a number of administrative tribunals.

The Committee recommended:

32. That authority for disclosure of personal information in decisions of administrative tribunals be established in the tribunal's governing legislation, and that consideration be given to facilitating the amendment of affected Acts through the use of an omnibus bill in which legislation could be included at the request of individual ministries."

To my knowledge, no such omnibus bill has been introduced in the Legislative Assembly of Alberta nor has reference been made to it in a Speech from the Throne since the Final Report was issued.

There has been criticism of the recommendation that agencies be given the authority to place their decisions online but that the decision on whether to proceed in this manner be left with individual agencies. One commentator suggested that the failure to provide

direction as to how to conduct that exercise is “a recipe for inconsistency and confusion”.¹⁶

In considering the business of publication of personal information and its impact on the privacy of individuals, there is value in looking at the Alberta Court of Queen’s Bench decision in Alberta (Attorney-General) v. Krushell.¹⁷ That case involved a judicial review of an order of the Alberta Information and Privacy Commissioner. This related to an access request under AB FOIP for the lists of names of accused persons and the charges they face which were produced for each criminal docket court each business day. The applicant intended to offer it for sale to the public via the Internet. Although the issue before the court was different than the issue in this paper, a number of the observations of Madam Justice Bielby are relevant to this discussion. This includes the following dicta:

The mischief which could be created by allowing ready public access to the names of unconvicted accused is not difficult to imagine. Statutorily prescribed punishments for the convicted would pale in many cases in comparison to the de facto punishment created by posting information on the criminally charged for the benefit of the gossip and the busybody. Similarity of names might create defamatory impressions. Same-day Internet postings would create concern about courthouse security and judge-shopping which could affect the administration of justice and thus judicial independence in ways the Legislature clearly attempted to avoid by so carefully exempting all matters relating to the judiciary in other subsections of s. 4.

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: United States Department of Justice et al v. Reporters Committee for Freedom of the Press et al, 489 U.S. 749, 109 S.Ct. 1468 (1989) (U.S.S.C.). Similarly, the transitory purpose of these documents described by the Privacy Commissioner in his reasons, in that they are created and used for one day in each courthouse, does not translate into the permanent record that would be created by providing them to [the applicant] for posting on the world-wide web.

¹⁶ Supra, Note 2, p.284.

¹⁷ [2000] A.J. No. 358.

Although the records discussed in this paper would be permanent records and although the questions of court house security, judge shopping and the administration of justice are not engaged in this paper, Justice Bielby clearly recognized differential harm resulting from Internet publication as opposed to a physical record available for examination in one location.

SASKATCHEWAN

In the province of Saskatchewan there are more than fifty provincial boards, commissions and agencies. A number of them are administrative tribunals that routinely deal with personal information and personal health information.¹⁸ Some of those tribunals also maintain websites on which they publish considerable personal information. The development of websites and the population of them with information is at the sole discretion of the tribunal. That discretion appears to be a matter that the Saskatchewan Government was unwilling to restrict when this became an issue in 2005.¹⁹

The relevant legislation that applies to these tribunals is *The Freedom of Information and Protection of Privacy Act*²⁰ (SK FOIP) and *The Health Information Protection Act*²¹ (HIPA).

SK FOIP has two dual themes: public information must be accessible and personal information needs to be protected. It applies to any “government institution” as defined in section 2 and the Schedule to the FOIP Regulation,²² which includes most administrative tribunals in the province. Part IV of SK FOIP defines “personal

¹⁸ This includes such agencies as the Human Rights Commission, Liquor and Gaming Authority, Municipal Board, Workers’ Compensation Board, Automobile Injury Appeal Commission.

¹⁹ The Saskatchewan Minister of Justice and Attorney General asserted that it would be improper for the government to “interfere with the way the commission governs itself”, Saskatchewan Hansard, March 17, 2005. See also Bill Bonner, *The Difficulty in Establishing Privacy Rights in the Face of Public Policy from Nowhere*, Saskatchewan Institute of Public Policy Paper No. 43 (May 2006). Available online at http://www.uregina.ca/sipp/sipp_pub_pol_papers.html.

²⁰ S.S. 1990-91, c. F-22.01, as am.

²¹ S.S. 1999, c. H-0.021, as am.

²² *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg 1.

information”²³ similarly to the corresponding provision in Alberta and then prescribes the rules for the collection, use and disclosure of that personal information. SK FOIP was proclaimed in 1992 and has never been revised in any significant way. It does not address Internet publication. There is no statutory requirement for any government institution to maintain a website and to publish information in that fashion.

Every government institution is also a ‘trustee’ for purposes of HIPA. HIPA applies to trustees that have custody or control of ‘personal health information’. Personal health information is defined as follows:

2 In this Act:

- (m) **“personal health information”** means, with respect to an individual, whether living or deceased:
 - (i) information with respect to the physical or mental health of the individual;
 - (ii) information with respect to any health service provided to the individual;
 - (iii) information with respect to the donation by the individual of any body part or any bodily substance of the individual or information derived from the testing or examination of a body part or bodily substance of the individual;
 - (iv) information that is collected:
 - (A) in the course of providing health services to the individual; or
 - (B) incidentally to the provision of health services to the individual;or
 - (v) registration information;

Disclosure is the activity whereby one trustee transfers possession and control of personal health information by sharing it with another body. Disclosure under HIPA is only permitted with legislative authority or, in limited circumstances, with the consent of the subject.

Oversight of both government institutions and trustees is provided by the Saskatchewan Information and Privacy Commissioner.

²³ SK FOIP, s. 24.

HIPA requires that a trustee disclose the least amount of individually identifying information necessary for the purpose of the disclosure.²⁴ It also requires that personal health information be disclosed only to those persons who have a legitimate need to know.²⁵

Although not explicitly identified in SK FOIP, existing ‘best practices’ include disclosing the least amount of individually identifying information necessary for the purpose of the disclosure.²⁶ As well, this includes disclosing personal information only to those persons who have a legitimate need to know.

As the Saskatchewan Information and Privacy Commissioner I considered the question of Internet publication in Investigation Report 2005-001 (Automobile Injury Appeal Commission).²⁷

At issue was the indiscriminate practice of the Automobile Injury Appeal Commission (Appeal Commission) in posting full-text decisions indexed by appellant name on its website.²⁸ Those decisions were replete with sensitive personal health information, relationship information, and financial information. Decisions would typically include detailed evidence of diagnosis, prognosis, and treatment for injured persons. It included considerable opinion evidence about the bona fides of a claim. The Appeal Commission acknowledged in the course of our investigation that the Appeal Commission’s enabling legislation is silent on the question of Internet publication. Our office considered a number of issues including:

- 1) Did the publication practice comply with *The Health Information Protection Act*?

²⁴ HIPA, s. 23(1).

²⁵ HIPA, s. 23(2).

²⁶ SK OIPC Investigation Report F2007-001 (Workers Compensation Board). Available online at www.oipc.sk.ca.

²⁷ Available online at www.oipc.sk.ca.

²⁸ Available at www.autoinjuryappeal.sk.ca As a result of a new policy adopted by the Commission in June 2008 the decisions available at this website no longer include the names of appellants.

- 2) Was this publication practice exempt from FOIP as material that is a matter of public record?
- 3) Was this access to information or records that would be normally available to the public?
- 4) Was this disclosure for the purpose for which the information was obtained or compiled or for a use consistent with that purpose?
- 5) Was there legislative authority under any Act or regulation that authorizes disclosure in this fashion?
- 6) Did the Appeal Commission's practice correspond to 'best practices' given the Saskatchewan *Overarching Personal Information Privacy Framework for Executive Government*²⁹ (the Framework)?

I found that:

- 1) The Appeal Commission had failed to comply with the requirements of HIPA.
- 2) The report was not a matter of public record and, in any event, the act of publishing personal and personal health information to the world in the fashion followed by the Appeal Commission is qualitatively a different matter than permitting an interested member of the public access to paper records in the office of the Appeal Commission.
- 3) Internet publication was not the purpose for the collection of the personal information and personal health information in question.
- 4) There was no statutory or regulatory authority that authorized disclosure in this fashion.
- 5) The publication of individually identifying personal information on the Internet is contrary to Principles 2, 3, 5, 8 and 9 of the Framework.

²⁹ Available online at www.justice.gov.sk.ca/access and privacy.

I recommended, inter alia, that the Appeal Commission should immediately ensure that the applicants' identity is masked before the decision that relates to them is posted on the Appeal Commission's website.

The Appeal Commission responded to these recommendations. It advised that it would not cease publication of its decisions as rendered in their original form on its website and on www.canlii.org. The Appeal Commission rejected the recommendation to mask the names of appellants on its website. The Appeal Commission also offered observations on the Commissioner's analysis in Report 2005-001. This was considered in this office's 2004-2005 Annual Report³⁰:

The [Chair of the Automobile Injury Appeal Commission] also offered observations on our analysis in our Report specifically our discussion of risks associated with the publication of personal information and personal health information. The position of the Commission appears to be that such risks are not material given the nature of personal information and personal health information that is in fact disclosed when those decisions are published to the world via the Internet. The notion that the detailed information exposed on its website is unrelated to such problems as identity theft, marketing opportunities, commercial data bases, personal safety of victims of domestic violence and stalking is naïve. Identity theft, data mining and those other problems cited in our report are really about collecting information on someone incrementally and linking that data, often through the service of powerful search engines. It is surprisingly easy for the resourceful thief to assemble information about any individual. It means collecting bits and pieces of data from different sources and aggregating it by means of search engines.

Dr. Latanya Sweeney, through her work with the Data Privacy Lab and the Surveillance of Surveillances project at the School of Computer Science at Carnegie Mellon University, Pittsburg, U.S.A., has been an excellent resource to our office with useful information about the risks to privacy posed by Internet publication. Dr. Sweeney and her colleagues have demonstrated the surprising amount of information that can be discovered and assembled using computer searches that begin with little more than someone's name. In other words, identity theft and the other harm that can result from poor privacy practices doesn't even require driver's licences, SIN numbers, credit card numbers, etc. to initiate data profiling of any given individual. We need to understand that a little information gathered from multiple data banks gives identity thieves all they need.

³⁰ P 41. Available online at www.oipc.sk.ca.

In June 2008 the Saskatchewan Automobile Injury Appeal Commission adopted a new policy that requires that only initials of appellants would appear in the reports published on its website and through Canlii. The Commission has also revised its website to substitute initials for the names that appear on archived reports available on its website. The non-redacted individually identifying information in those reports is still available to the public in the Regina office of the Commission.

It is not yet known what effect, if any, this new de-identification practice of the Appeal Commission will have on other administrative tribunals in Saskatchewan that currently publish personal information on the Internet but it certainly is a laudable achievement.

OPEN COURTS PRINCIPLE

The right of the public to access open court has been clearly articulated by the Supreme Court of Canada in what is known as the two-part Dagenais/Mentuck test in two decisions: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442. This test was developed in the context of dealing with requests for publication bans. The two part test is as follows:

- (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.

The principle that court proceedings should be open and accessible has been described as a “quasi-constitutional” principle.³¹

There has been concern about the commercial exploitation of personal information made available to the public through court processes. A submission to the Canadian Judicial

³¹ *Named Person v. Vancouver Sun*, 2007 SCC 43; *Vancouver Sun (re) 2* [2004] S.C.R. 332, 2004 SCC 43; *Sierra Club of Canada v. Canada (minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 4.

Council's Judges Technology Advisory Committee from all three levels of the judiciary in Alberta³² included the following statement:

All restrictions [to the public's right to openness and transparency in the administration of justice] must be tailored closely to the interests to be protected, and also considered in light of the purpose for which access as a general principle exists. As noted in the Discussion Paper, "Fair information practices suggest that information which has been collected is used [or disclosed] for the purposes for which it was provided, not for a collateral purpose." Para 98. This also applies in the context of court records. The presumption is one of openness and accessibility; however it should also be noted that the jurisprudence overwhelmingly bases that presumption on the importance of judicial accountability and the right to understand and criticize democratic institutions. Commercial interest in the data has not been a factor.

Canadian courts may be more tolerant of restrictions on bulk transfers of personal information. The value of such restriction is identified in *Paisley Park Enters., Inc. v. Uptown Prods.*, 54 F.Supp 2d 347, 249 (S.D.N.Y. 1999):

Virtually all have an interest in ensuring that everyone in our society have access to a fair and impartial judicial system without having to pay too high a price of admission in the form of the surrender of personal privacy...courts must be vigilant to ensure that their processes are not used improperly for purposes unrelated to their role.³³

The 'open courts' principle has been applied in a number of recent Canadian cases. On October 9, 2008 the Supreme Court of Canada refused leave to appeal from the Ontario Court of Appeal decision in Hollinger Inc. v. The Ravelston Corporation Limited, 2008 ONCA 207. The Ontario Court of Appeal had granted the appeal by Bell Globemedia Publishing Inc. to set aside a protective order sealing the motion material related to a Mareva injunction against Conrad Black and Barbara Amiel-Black. The majority concluded that:

³² The Honourable Chief Justice Catherine A. Fraser, The Honourable Chief Justice Allan H. Wachowich and the Honourable Chief Judge Ernie J.M. Walter, quoted in the *Synthesis of the Comments on the JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy*, by Lisa M. Austin and Frederic Pelletier, January 2005, p. 11.

³³ *Discussion Paper Prepared on Behalf of Judges Technology Advisory Committee for the Canadian Judicial Council on Open Courts, Electronic Access to Court Records, and Privacy*, May 2003, [38], (Open Courts).

In dealing with the protective order issue, the motion judge correctly identified the Dagenais/Mentuck test as being applicable to all discretionary orders limiting freedom of the press and recognized that Mr. Black's fair trial interest may be imperilled. Indeed, the appellant has acknowledged as much. The balancing pursuant to the Dagenais/Mentuck test requires, however, that a high threshold be met before a protective order will be granted. The court is required to balance the constitutionally entrenched freedom of expression against the right to privacy and the right to a fair trial. The reason for this approach was addressed in *Toronto Star Newspapers v. Ontario*, [2005] 2 S.C.R. 188 at para.4:

It is well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.

In *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20, the Ontario Court of Appeal reviewed the 'open courts' principle in the context of a public inquiry. It concluded that the appellant had not satisfied the burden of demonstrating that there was a serious risk to the administration of justice or that the salutary effects of a publication ban outweighed the deleterious effects on the public interest in openness.

In the Matter of Monseieur A ET Madame B v. Attorney General of Canada Mr. X v. Attorney General of Canada 2008FC1115, applicants sought an order authorizing them to proceed with certain applications anonymously and for an order that certain documents and information be treated confidentially. Mr. X was a former federal civil servant. He was the subject of an investigation by the Public Service Commission (PSC) stemming from allegations of wrongdoing on his part. The PSC intended to include in its annual report, which will be posted publicly on its website, personal information about Mr. X collected during that investigation. Mr. X asserted that the information at issue was damaging to himself, will harm his reputation and cause shame and embarrassment to him and his family. The applicants sought a review of the PSC's decision to publish their personal information. The relief sought was an order that "all personal information concerning the applicants and their family" be redacted and an order permitting disclosure only of information that will not identify the applicants and their family.

Counsel agreed that such a confidentiality order should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

The Court concluded that the balancing of the parties' legitimate confidentiality interests and the public's right of access to judicial proceedings can best be accommodated by protecting the applicants' names and addresses, provided that the circumstances are otherwise publicly filed. This manner of proceeding was described as one that would:

...protect the disclosure of the very information sought to be protected, and thus avoid that any relief to which the Applicants may be entitled becomes nugatory before it can even be ordered. It will also ensure that the issues which are at stake in this application can be understood from the public record, and that they can be transparently debated and determined, in an open and accessible manner.³⁴

The Court noted that:

This court has been slow to recognize humiliation, embarrassment or loss of reputation as justifying confidentiality orders unless clear evidence of serious harm is presented.³⁵

And further that:

In the present matter, the prejudice is presented as arising specifically as a result of the very public posting of the information through the PSC's website. While Court filings are open and accessible to the public, they do not have the same widespread public dissemination as Internet postings.³⁶

³⁴ P.8.

³⁵ Ibid.

³⁶ Ibid.

OTHER JURISDICTIONS

In his July 2008 article³⁷, *Personal Information in the Adjudicative Decisions of Administrative Agencies: An Argument For Limits*, Christopher Berzins discusses a number of decisions of the Ontario Information and Privacy Commissioner relevant to disclosure of personal information by administrative agencies and tribunals. He concludes that “The most useful piece of advice is to exercise caution and go slow with respect to putting decisions online because, as Daniel Solove has argued, at this point we simply do not know what all of the privacy implications are with respect to public records.”³⁸

The British Columbia Information and Privacy Commissioner addressed this issue in his presentation³⁹ to the BC Council of Administrative Tribunals and offered a number of recommendations for ensuring full compliance with that province’s *Freedom of Information and Protection of Privacy Act*.⁴⁰

On September 29, 2008 Nova Scotia Freedom of Information and Protection of Privacy Review Officer, Dulcie McCallum released her Privacy Complaint Report P-07-01.⁴¹ This involved the disclosure of certain personal information by the Halifax Regional Municipality via the Internet. The Review Officer found that there was legislative authority to publish the personal information on the Internet but recommended that the municipality be more transparent about its disclosure of personal information, consider using initials instead of names and addresses and develop a privacy policy and begin educating the public about that policy.⁴²

³⁷ Supra, note 2.

³⁸ Supra, note 2, p. 282.

³⁹ Access to Information, Privacy & Administrative Tribunals, Vancouver, BC, Oct. 27, 2002. Available online at www.oipc.bc.ca.

⁴⁰ R.S.B.C. 1996, c. 165 as am.

⁴¹ Available online at http://www.foipop.ns.ca/rep_recent.html.

⁴² Ibid., p. 5.

RETHINKING THE OPEN COURTS PRINCIPLE

There has been useful commentary from Australia about the principle of ‘open courts’ in the information age. At the commencement of a conference on “Open Justice and the Internet”, Chief Justice Spigelman stated:

We are only now beginning to adapt to the loss of that practical obscurity which past methods of information retrieval conferred on court proceedings. The demands of open justice require that adequate reasons are provided for judicial decisions. The reasons for judgment perform a number of different functions for the parties and for the public processes of the law. Nevertheless, the kind of detailed personal information about parties and witnesses, which judges have become used to including in reasons for judgment, may not all be necessary to serve those functions. The identification of persons by name, in a way which permits the compilation of information about individuals, is not always necessary.⁴³

Peter A. Winn, Assistant U.S. Attorney, has observed:

We have lived in a very forgiving world. The “practical obscurity” of paper judicial records largely sheltered us from the danger of information misuse, while we prided ourselves on our “public” judicial system. The world of electronic information is a far less forgiving place. It is now forcing us to recognize—by our actions, if not yet by our words—that the simple abstract rules developed for a world of paper-based information may no longer suffice to resolve the complex problems of judicial information management. Courts have traditionally been vigilant in protecting individuals from the misuse of sensitive personal information. They must now rise to the difficult task of designing rules to protect litigants and third parties from cyber-mischief and victimization. The failure of the legal system to maintain the ancient balance between access and privacy will lead to the greatest danger of all—inhibiting citizens from participating in the public judicial system. The world of cyber-justice should not be permitted to degenerate into a world where victims of crimes are reluctant to come forward; where people are more unwilling to be witnesses or jurors; and where the rich can seek out private judicial forums to resolve their disputes, while the poor and middle classes are faced with an impossible choice—either foregoing justice to maintain their privacy and security; or permitting their sensitive personal information to be commercialized or stolen, and allowing the intimate details of their personal lives to be made available all over the Internet.⁴⁴

⁴³ Spigelman JJ, ‘Open Justice and the Internet’ Judicial Officers’ Bulletin Vol 16 No.1(Feb 2004).

⁴⁴ Winn, P A, ‘*Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information*’ (2004) 70 Wash L Rev. 307 at 328-329.

In Canada there has been considerable work done by the Canadian Judicial Council to determine how to address the challenges posed by the Internet to the ‘open courts’ principle.

In May 2003 the Canadian Judicial Council (CJC) published a paper, *Open Courts, Electronic Access to Court Records and Privacy* (Open Courts paper).⁴⁵ This paper was prepared on behalf of the Judges Technology Advisory Committee. The authors conclude that it would be inappropriate to recommend a model policy. Instead the discussion paper was designed to provide a framework within which electronic access policies might be established.

At that time, the Open Courts paper provided an up-to-date survey of relevant case law and other important considerations in assessing public access to court records. The paper discusses the importance of open courts but also states:

However, the open court presumption is rebuttable and the Court maintains discretion over the issue of access to its records:

Undoubtedly every court has supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of that right.⁴⁶

The paper discusses the dramatic changes brought by computer technology and concludes that: “...it is not a question of whether the electronic environment will dominate the administrative of justice. It is a question of when.”⁴⁷

The Open Courts paper also quotes Mr. Justice Binnie of the Supreme Court of Canada as follows:

⁴⁵ Available online at http://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pub_techissues_en.asp (Open Courts paper).

⁴⁶ Open Courts, [12].

⁴⁷ Open Courts [44].

It is an important constitutional rule that the courts be open to the public and that their proceedings be accessible to all those who may have an interest. To this principle there are a number of important exceptions where the public interest in confidentiality outweighs the public interest in openness. This balance is dealt with explicitly in the relevant provisions of the Young Offenders Act, which must be interpreted in light of the Declaration of Principle set out in s. 3.⁴⁸

The paper also notes that some provinces “generally restrict access to court records for family law proceedings to the parties and their lawyers.”⁴⁹

One of the conclusions is that there is disagreement about the nature of the exemption to the general rule that the public has a right to open courts.⁵⁰

We note an interesting observation in the Open Court paper as follows:

Even though “every court has the supervisory and protecting power” over records, e-access policies ought not to be made without affording to “the public” in whose name access is protected, an opportunity to advance views as to what openness means in an electronic environment.⁵¹

I am not aware of any efforts to solicit public feedback apart from the fact of publication of the Open Courts paper itself. A number of opinion surveys⁵² undertaken by the Privacy Commissioner of Canada and others confirm that Canadians attach a great deal of importance to control over their personal information and particularly what information about them is disclosed to others without their consent. One key finding was:

...the privacy field is seen as being far more of a moving target as changing technologies shift the nature and status of this area. In fact, 9 in 10 Canadians see a need for ongoing updating of privacy legislation to keep pace with these changes.⁵³

⁴⁸ Open Courts, [28].

⁴⁹ Open Court, [35].

⁵⁰ Open Court [39].

⁵¹ Open Court [81].

⁵² *Canadians, Privacy and Emerging Issue*, EKOS 2005 survey, EKOS 2007 survey, *Electronic Health Information and Privacy Survey-What Canadians Think-2007*; all available at <http://www.privcom.gc.ca>.

⁵³ *Ibid.*

These survey results are consistent with my office's experience with Saskatchewan residents.

In January 2005, the *Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records and Privacy* was published.⁵⁴ This synthesis identified strong support for the Dagenais/Mentuck test as an appropriate framework for balancing the right of the public to access court information with the right of individuals to preserve their privacy. It also found "strong agreement" with respect to such potential problems as data-mining, identity theft and risk of harassment. Such potential problems, it was found, could justify restrictions on access to court records "...so long as those restrictions can be carefully tailored to minimally impair the open courts principle and the deleterious effects of such restrictions on the open courts principle do not outweigh their salutary effects in protecting privacy and other values".⁵⁵ The authors drew the following conclusions:

- (a) There is a general consensus that unrestricted bulk searches should not be permitted to the public generally;
- (b) There is a general consensus that remote public access should be provided to judgments, with privacy concerns dealt with through de-identification protocols for which courts would be responsible;
- (c) There are mixed views regarding remote public access to docket information, partly because of the inconsistent cross-jurisdictional approaches to what is included within docket information. Suggestions to deal with privacy concerns with docket information include implementing de-identification protocols, charging fees for remote access, providing remote access only to specific categories of user, or restricting remote access entirely;
- (d) There is a general consensus that remote public access to the contents of all court records was not desirable. Suggestions to deal with privacy concerns with court records include implementing de-identification protocols, indicating that a document exists without providing details regarding its

⁵⁴ *Supra*, Note 45.

⁵⁵ Executive Summary.

contents, providing differing levels of access to different categories of users, and exempting “sensitive” records from remote access entirely.”⁵⁶

In March 2005 the Canadian Judicial Council approved the *Use of Personal Information in Judgments and Recommended Protocol*.⁵⁷ This instrument was intended to encourage consistency in the way judgments are drafted when privacy interests of individuals should be protected. The purpose was to meet four objectives:

- 1) ensuring full compliance with the law;
- 2) fostering an open and accountable judicial system
- 3) protecting the privacy of justice system participants where appropriate; and
- 4) maintaining the readability of reasons for judgment.

In discussing discretionary protection of privacy rights, the CJC has stated⁵⁸:

Protection of the innocent from unnecessary harm is a valid and important policy consideration (see *A.G. of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175). In these cases, the judge must balance this consideration with the open court principle by asking how much information must be included in the judgment to ensure that the public will understand the decision that has been made. It should be noted that where there is no publication ban in place, the identity of persons sought to be protected by editing reasons for judgment may still be ascertainable by examining the actual court file. Thus, full access to the record is maintained for those who have sufficient reason to take the extra step of attending at the registry or doing an online search for court records. However, by not disseminating the information to easily accessible court websites, some level of protection is maintained.

In September 2005 the Canadian Judicial Council issued its *Model Policy for Access to Court Records in Canada*.⁵⁹ This Model Policy acknowledges that one of the possibilities that may arise from the move towards electronic access is that unrestricted electronic access might facilitate some uses of information that are not strongly

⁵⁶ Ibid.

⁵⁷ Supra, Note 45.

⁵⁸ Page 11.

⁵⁹ Supra, Note 45.

connected to the underlying rationale for open courts and which might have a significant negative impact on values such as privacy, security, and the administration of justice.

The proposed guiding principles for an access policy are:

- (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.

The four instruments discussed above were all developed by or for the Canadian Judicial Council and were specifically focused on courts and not administrative tribunals.

DOES OR SHOULD THE OPEN COURT PRINCIPLE APPLY TO ADMINISTRATIVE TRIBUNALS?

If the courts in Canada however are reconsidering limitations on the right of access to court records, surely administrative tribunals should also be reconsidering the practice of indiscriminately posting decisions to a website.

In a 2007 commentary⁶⁰, Colin McNairn discussed the Canadian experience with the protection of personal information in tribunal records. Although he was not speaking specifically about the publication of decisions on the Internet he concluded as follows:

⁶⁰ Available online at http://www.council-on-tribunals.gov.uk/adjust/item/comment_canada.htm.

I believe that the Canadian experience demonstrates that a statutory regime for the protection of the privacy of personal information needs to be fine tuned in any application to tribunals and their records, which hasn't happened to date except in British Columbia. Otherwise, it is very likely to lead to uncertainties and to threaten the ability of tribunals to function in the full light of public scrutiny. In Canada, the courts have been completely freed of the constraints of legislation for the protection of personal information but tribunals have not. This leads to the anomalous position that personal information that is protected in the record of a tribunal proceeding becomes part of the public record when the tribunal record is certified to a court on appeal or judicial review of the tribunal's decision.

The position originally taken by the Saskatchewan Automobile Injury Appeal Commission⁶¹ was that it subscribed to the open courts principle and therefore concluded that no masking whatsoever was necessary before publishing its decisions on its website complete with individually identifying information of the appellants.

Even if one accepts that the 'open courts' principle should apply to administrative tribunals, it does not follow that indiscriminate posting is necessary. We must be mindful that the 'open courts' principle appears to accommodate steps to prevent abuse resulting from 'bulk transfers' of personal information to anyone who is prepared to pay for it. Commercial exploitation of individuals and their personal information is obviously a risk of Internet publication. I suggest that there no material difference between publishing a report on the Internet where it remains permanently available for whatever misuse may motivate an anonymous individual to download this personal information, and the kind of bulk transfers referred to in the authorities.

Assistant Privacy Commissioner Raymond D'Aoust, in the Service Canada (Office of the Umpire) matter asserted that:

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

⁶¹ SK OIPC Investigation Report 2005-001, [7].

the rights and interests protected by the open court principle and compliance with the Privacy Act.⁶²

Alternatively, perhaps it is not appropriate to apply the ‘open courts’ principle indiscriminately to administrative tribunals. The administrative tribunal, as we know this model in Canada, exhibits a number of very significant differences from superior courts. These include the following:

- Administrative tribunals are subject to freedom of information and protection of privacy laws while courts are excluded from those laws.
- Administrative tribunals are created by legislatures and always accountable to those same legislatures. Courts obviously are independent of legislatures.
- Members of administrative tribunals are selected and appointed usually by executive government. Independence of the judiciary is embedded in the appointment process for members of our courts.
- Citizens appearing before many administrative tribunals do so without any legal representation. In most cases, citizens seeking relief from courts are represented by professionals who presumably are able to identify privacy issues and, when appropriate, initiate applications to protect names or other personal information.
- Administrative tribunals are often made up of citizens untrained in the law. It has been suggested that board directors should be viewed as akin to volunteers.⁶³ Those tribunal members are likely to have little familiarity with exceptions to the open courts principle.
- Administrative tribunals are usually subject to judicial review and are described as inferior to courts of competent jurisdiction.
- Administrative tribunals do not typically deal with issues where there can be penal consequences or where the liberty of the individual is at risk. The prejudice to public confidence and transparency is likely to be more modest in

⁶² P. 2.

⁶³ Crossroads report, p. 11.

the case of severing or masking personal information in most tribunal proceedings than in a criminal case.

- Administrative tribunals have a narrow jurisdictional focus unlike superior courts.
- The public interest in the work of administrative tribunals is arguably more modest than that in the much more diverse work of superior courts.

Administrative tribunals in Saskatchewan are treated for purposes of FOIP no differently than any other public body save for the exclusion already noted in certain jurisdictions of a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity.⁶⁴

Significantly, there is nothing remotely equivalent for administrative tribunals to the Canadian Judicial Council in its development and promotion of model codes for addressing privacy issues. In fact, the recent history of administrative tribunals reflects a very fragmented approach to governance in which the focus is almost exclusively on the uniqueness of each tribunal. Superior courts in Canada are independent of both government and the legislature and yet have developed sophisticated services that promote standardized approaches to processes and consistent promotion of best practices as they are identified. In this respect, administrative tribunals could hardly be more different.

Given the significant differences between superior courts and administrative tribunals, there should be the opportunity to develop an approach to Internet publication that is much more flexible than the 'open courts' principle.

This paper is focused on the publication of names and other personal information on the Internet. Perhaps for those tribunals that deal with sensitive or prejudicial personal information such as Saskatchewan's Automobile Injury Appeal Commission, we should expect that names and other personal information be routinely masked for purposes of

⁶⁴ Alberta FOIP Act, section 4(1)(b).

Internet publication. This would not prevent a reporter, an Opposition researcher, or an interested citizen from attending the office of the administrative tribunal and inspecting the non-redacted version. There would be a kind of practical obscurity as that term was used by Justice Bielby.⁶⁵ That may well be less convenient than being able to boot up your computer anywhere in the world and access the report but arguably any inconvenience is eclipsed by the risks posed by powerful search engines and the exponential developments in data profiling.

Some proponents of ‘open courts’ minimize the risks to the individual posed by Internet publication. They make the argument that those who object to the ‘open courts’ principle are exaggerating the significance of what may be little more than ‘embarrassment’ to individuals. Such an argument suggests perhaps some naivety about Internet search capabilities and the multiple kinds of loss that can result to the individual. These include: Identity theft, discrimination in terms of employment, access to life insurance, and other important areas of activity, stalking and harassment as well as profiling by commercial interests.

Presumably when the ‘open courts’ principle was first developed, there would have been no expectation of the features unique to the Internet, such as the fact that information once published on the Internet can be accessed anonymously anywhere in the world. Such information can never be recalled or eliminated from the Internet. What may be embarrassing to an individual today, may be gravely prejudicial five or ten years later when decisions about hiring, career advancement, eligibility for insurance or for some government program will be influenced by that personal information on the Internet.

SOME CONSIDERATIONS FOR ADMINISTRATIVE TRIBUNALS

Administrative tribunals are encouraged to identify what personal information they routinely deal with in the course of their work and to determine what extent that personal information needs to be included in their decisions.

⁶⁵ Supra, Note 17.

Those tribunals should proceed to develop a comprehensive privacy policy that addresses the collection, use and disclosure of that personal information and ensure that policy is fully transparent to the public.

Tribunals should ensure they have a FOIP Coordinator or Privacy Officer with specific responsibility for compliance with applicable access and privacy legislation. This officer should be responsible for ensuring the tribunal has appropriate policy and procedures, that staff are trained to a comfortable understanding of what can and cannot be done with personal information and for dealing with the public on access and privacy matters. This kind of privacy orientation will be important for members of the tribunal's board as well as staff. This person should be in a position to provide direct advice to the CEO of the tribunal.

If there is no requirement for Internet publication of decisions in the enabling legislation, administrative tribunals should consider whether web publication is even appropriate given the risks involved. It is a dangerous practice to publish decisions on the Internet without careful prior analysis of the consequences and risks in the information age.

If an administrative tribunal concludes that Internet publication of its decisions is important, then it should consider masking the names of individuals and their identifying personal information for purposes of that Internet publication. If there is to be Internet publication of decisions, it will be important for the tribunal to be transparent about that feature. Citizens dealing with a tribunal need to know what kinds of personal information will be published on the Internet before they even engage the tribunal and certainly before they initiate any proceedings.

An administrative tribunal will need to deal with exceptional cases where it is determined that some personal information should be disclosed via its website. There should be a protocol that allows the affected individual to make submissions on the question of Internet publication. This approach may be preferable to putting the onus on the individual to object to Internet publication of her personal information by a tribunal and

to make a strong case in support of that objection. I suggest that this proposal may more closely align with the reality that we likely cannot predict exactly how our personal information may be misused or the extent of the prejudice that any of us may experience due to Internet publication.

If there is to be inclusion of names and personal information on a tribunal's website, the tribunal should consider utilization of a robot exclusion protocol to minimize the risk of inappropriate use of that personal information.

At the end of the day, what will be important to administrative tribunals and the governments that created them, is that citizens have high degree of confidence in those bodies and their ability to operate in a way that is respectful of the privacy of the individuals they deal with. In an ever more privacy-aware world, that desired degree of public confidence will be hard to achieve if the tribunal is seen as indiscriminately publishing to the world the personal information of citizens.