

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.