



Privacy and Openness: Achieving the Right Balance

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Guiding Principles

- Public/judicial accountability
 - open courts; access to court records
- Individual privacy
 - fair information principles
 - don't disclose more personal information than necessary to achieve purpose (“minimal impairment” of individual privacy)

Consequences of online records



- inappropriate or excessive shaming
- destruction of personal reputations
- exposure to identity theft, other abuses
- secondary uses of personal data
- contributing to “digital dossier” society
- unexercised rights; justice avoided
- unequal justice

Canadian Judicial Council



- May 2003: Discussion Paper
 - “Open Courts, Electronic Access to Court Records, and Privacy”
- Sept 2005: Model Policy for Access to Court Records in Canada

<http://www.cjc-ccm.gc.ca>

- Publications

CJC Model Policy



- No unnecessary personal information (name, identifiers, etc.) in court records
 - judges responsible for judgments
 - parties responsible for pleadings
 - court staff responsible for documents they prepare

“[Personal] information shall be included only when required for the disposition of the case....”

CJC Model Policy (cont'd)



- Public should have remote access to judgments and docket information
 - but remote access to case files (full set of docs) should be limited to parties
 - docket information available online should not include DOB, address, unique #'s, biometrics
- Search functions should limit risk of improper use of personal information
 - e.g., limited fields, no full text search (except judgments)

CJC Model Policy (cont'd)



- Provisions for “extended access” (to otherwise restricted records) and “bulk access” (systematic and direct access to court records)
 - only with permission of court, under specified terms and conditions designed to protect individual privacy



Key tenets of policy

1. Redaction/minimization at source

2. Balancing access with privacy
 - need to include/disclose?
 - rational connection; minimal impairment
 - weighing potential harm to individual against public benefit of full access



Legal Publishers

- www.jugements.qc.ca
 - clearinghouse for Quebec jgts
 - engages in redaction where required by law or court/tribunal
- www.canlii.ca
 - offers tool (“NOME”) for privacy redaction by courts/tribunals
 - employs safeguards to prevent unlawful publication
 - 20+ filters for identifying improper disclosures + manual redaction
- www.quicklaw.ca
 - employs redaction safeguards, but concerned about liability
 - prefers that courts/tribunals do own redaction

Admin Boards/Tribunals



- Wide range of policies
 - (a) decisions not posted online
 - (b) anonymous case summaries only
 - (c) minimal redaction to protect privacy
 - (d) full publication; no effort to redact



Best Practices

- Careful redaction to maximize access/precedential value, while protecting privacy
 - provide enough context to make sense of decision and to situate in facts
 - don't identify complainant/applicant/etc.



Names withheld

- Ontario Consent & Capacity Board
 - via CanLII: www.canlii.ca
 - Names replaced with initials
 - sufficiently obscure?
- Ontario Workplace Safety and Insurance Appeal Board
 - www.wsait.on.ca
 - “the worker”; “the employer”
 - should employers be named?

No names; Case Summaries only



- Canadian Forces Grievance Board
 - www.cfqb-cgfc.gc.ca
 - “the grievor”; “the Commanding Officer”
- Privacy Commissioner of Canada
 - www.privcom.gc.ca
 - “the complainant”; “the bank/airline/...”
 - should respondents be named?
 - limited precedential value w/o more context



No Redaction

- Pension Appeals Board
 - www.pab-cap.gc.ca
 - detailed medical/financial histories
- Sask. Auto Injury Appeals Commission
 - www.autoinjuryappeal.sk.ca
 - detailed medical/psychological histories
- Cdn. Human Rights Tribunal
 - www.chrt-tcdp.gc.ca
 - hate speech context – e.g., *Warman* case

PAB - Excerpt



“Mrs. NAME immigrated to Canada from Portugal with her family at the age of five. While she attended elementary school until Grade 8, she remains to this day illiterate, unable to read or write in any language or to do simple arithmetic due to a learning disability that was never addressed.....

Overlaying her physical problems she has had since 1997 constant depression diagnosed at times as periods of sadness and a major depression. In addition, she has had for several years a serious sleep disorder, which improved somewhat after medical advice and drugs but persists to this day.”

PAB - Excerpt



“Mr. NAME currently supports himself, his wife and two children on \$2177.00 per month in private long-term disability payments. He testified that he tries to be active, but he is so fatigued that he is only awake for a few hours a day, and typically, two hours of activity, even as simple as cutting half of his lawn, has him flat on his back for a day or two. He had been proud to do hard physical labour for 12-14 hours a day, and then have an active social life. Now he can’t even visit with friends for more than two hours, and finds people are avoiding him, as he is no longer fun to be with.”

Sask. AIAC - Excerpt



“Mrs. NAME’s testimony was confused and contradictory. We have taken into account that English is not her first language, and that she says she does not read or write English other than restaurant orders. The fact that she has had two WCB claims (1991 and 1999) and three motor vehicle accidents (1988, 19913, and 2002) has potential for confusion between them for symptoms, or forgetfulness and inadvertent omission.....”

Sask AIAC - Excerpt



“In the year 2000, Mr. NAME received a T4 statement from Meadow Honey showing employment income of \$13,200.00.¹¹ In the same year, Mr. NAME was paid \$6,240.00 by Meyer. His total earnings from both companies according to his 2000 Income Tax Return Automobile Injury Appeal Commission Information was \$19,440.00¹³. His total earnings from both companies shown on his 2001 Income Tax Return were \$17,841.00.¹⁴”

Sask. Privacy Commissioner

Investigation Report 2005-1



- AIAC failure to mask ID of applicants violates their right to privacy under s.29(1) of FOIPPA
 - no consent
 - not “a matter of public record”
 - not info. “normally available to the public”
 - not a “consistent use”
 - disclosure not authorized by statute
- AIAC policy fails to meet standards in gov’t “Privacy Framework”

AIAC Response



- Refused to cease publication of full, unredacted decisions on its website and via www.canlii.ca
 - Sask Privacy Commissioner has no order-making powers
 - A-G, Legislature missed the point

CHRT – Hate Speech



- Complainants first complain to CHRC
 - Name disclosed to Respondent(s)
- Matter may be referred to CHRT
 - Name published as part of decision
(unless confidentiality order obtained)

CRHC/CRHT – The Issue



- Personal safety of hate speech complainants at risk
 - Richard Warman – death threats; harassment

CRTC



- Holds public proceedings on telecom and broadcasting issues
 - Public invited to comment by mail, fax, email, or webform
 - Many individuals do send in comments
 - e.g., telemarketing rules, deregulation of phone service, etc.

CRTC - The Issue



- Personal contact details (as provided on letterhead, in email message, etc.) being posted along with name and comment.
 - No redaction of unnecessary info.
 - Webforms require name + contact info. (street, city + one mode of contact – email, tel, letter)

Initial CRTC Position



- Posting names and contact info of individual interveners is necessary for transparency and accountability
 - deters forged interventions
- Intervenors have notice that their personal info will be posted online
- Redacting contact info. requires too much administrative effort

CRTC Notice



“Your personal information on our website

Note that all information you provide as part of a public process, except information granted confidentiality, whether sent by postal mail, facsimile, e-mail or through the Commission’s website at www.crtc.gc.ca, becomes part of a publicly accessible file and will be posted on the Commission’s website. This information includes your personal information, such as your full name, e-mail address, postal/street address, telephone and facsimile number(s), and any other personal information you provide.”

CRTC Notice



Notice provided in three ways:

1. On website
2. In Public Notices
3. In auto-response to emails

Problem: interveners don't necessarily see website notice, Public Notice, or email reply

CIPPIC position



- Posting contact info. of interveners is excessively privacy invasive
- Balance between transparency and privacy is best achieved by posting name alone (no contact info), with intervention

Ultimate Resolution



- CRTC agreed to implement new procedures:
 - standardize warning notices re: publication of personal data online
 - install software program to protect personal data from most web searches
 - can only be accessed by direct file search
 - put in place mechanisms to prevent email harvesting of personal data on site
- OPCC satisfied; no further investigation
 - despite CIPPIC's request for broader review



Conclusions

- Both access and privacy are important and can be achieved through appropriate disclosure/redaction policies
- Need for a general policy designed for administrative boards and tribunals
 - Different proceedings/contexts require different solutions
- Redactions should be done at source (avoid multiple redacted versions)



www.cippic.ca