



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Balancing Privacy and Openness: Guidelines on the Electronic Publication of Decisions of Administrative Tribunals July 2011

Administrative tribunals in British Columbia deal with a wide range of issues such as the granting or denial of social benefits, disputes between employees and employers, complaints about professionals and allegations of regulatory violations. Administrative tribunals, which as public bodies are subject to the *Freedom of Information and Protection of Privacy Act* (“FIPPA”), commonly publish their decisions on the Internet. As a result, the personal information contained in decisions becomes widely available.

The Internet is an efficient, inexpensive and effective tool to communicate tribunal decisions to the public. However, tribunal members should write decisions to reflect the fact that the Internet provides access to tribunals’ decisions to unlimited persons for unlimited uses. In many cases, a tribunal can comply with FIPPA and accomplish its goals with respect to openness, accountability and transparency through the publication of decisions that do not include the names of parties or witnesses or other personally identifiable information.

When tribunals make personal information available on the Internet, individuals lose control over their personal information and are at greater risk of identity theft, stalkers, data profilers, data miners and discriminatory practices. Individuals may think a tribunal will only use and disclose their information in certain ways, but once a decision is online, anyone can take an individual’s information and use it out of context or in illegitimate ways.

The Office of the Information and Privacy Commissioner for British Columbia (“OIPC”) shares the concerns of individuals who hesitate about participating in a tribunal proceeding because of their loss of privacy if a tribunal posts decisions online. This document offers general guidelines for tribunals to adopt and apply to their individual circumstances in order to achieve an appropriate balance between privacy

interests of individuals and transparency and accountability in the publication of decisions on the Internet.¹

CONSIDER RELEVANT LEGISLATION AS WELL AS PUBLIC INTEREST IN DISCLOSURE

Given the diversity of tribunals in British Columbia, their enabling legislation, the application of the *Administrative Tribunals Act* (“ATA”)² and the mandates tribunals discharge, a “one-size-fits-all” approach to the disclosure of personal information on the Internet is not possible.

In considering relevant legislation, tribunals are encouraged to:

- Assess whether their enabling legislation provides for public disclosure of decisions;³ and
- Determine whether they are subject to the provisions of FIPPA that prohibit or limit the public disclosure of parties and witnesses’ personal information.⁴

Even assuming there is statutory authority for a tribunal to disclose personal information in its decisions, every tribunal should consider whether it is necessary or appropriate to disclose personal information if there is not a clearly identified public interest for the disclosure.

Tribunals should consider and specifically identify the public interest in disclosing personal information of parties or witnesses in each case. For example, a public interest in the disclosure of personal information may exist where disclosing the information could protect the public from fraud, physical harm or professional misconduct or if disclosing the personal information would promote deterrence.

If there is a clearly identified public interest in disclosure, tribunals should also consider the following factors:

- 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 the tribunal;

¹ These guidelines are based on the Office of the Privacy Commissioner of Canada’s 2010 document entitled “Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals” which that office produced after consultations with various provincial and territorial Commissioners’ offices.

² The ATA is not “stand alone” legislation. A tribunal selectively adopts the ATA’s provisions in its enabling legislation to reflect each tribunal’s particular mandate and needs.

³ If a tribunal’s enabling legislation adopts s. 50 of the ATA, the tribunal must make its decisions accessible to the public.

⁴ FIPPA applies to decisions of administrative tribunals unless the tribunal’s enabling statute specifies that s. 61 of the ATA applies. Section 61 of the ATA expressly overrides FIPPA and ousts its application to publicly available tribunal decisions (amongst other things). For more information regarding s. 61 of the ATA, please see the following Ministry of Attorney General bulletin:

http://www.ag.gov.bc.ca/ajo/tool_kit/information_bulletins/app_of_foi_admin_tribunals.htm.

- 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 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 proceeding and its outcome;
- The finality of the tribunal's decision and the availability of a right of appeal or review; and
- Any circumstances or privacy interests specific to individual cases.

After weighing the relevant factors, an administrative tribunal should determine whether disclosure of the personal information of each party or witness is necessary or appropriate to satisfy the public interest in disclosure.

HOW CAN A TRIBUNAL LIMIT DISCLOSURE OF PERSONAL INFORMATION?

If an administrative tribunal is posting its decisions electronically, the OIPC recommends taking the following measures in order to protect the privacy of individuals:

- Consider whether all decisions, or only leading decisions or summaries, need to be posted online. Publish a notice describing the tribunal's policy in this regard;
- Provide notice to parties (and witnesses, where feasible) when decisions will be posted on the Internet;
- Develop decision-writing policies for members of the tribunal to minimize, anonymize or remove personal information that may identify parties. This may include:
 - Using initials or pseudonyms instead of names;
 - Having personal information in a separate appendix that is provided only to the parties;
 - Not including a party's date of birth or age;
 - Not including an individual's workplace or residential address;
 - Not including information such as bank details, driver's license numbers or social insurance numbers; and
 - Not including information about marital status, sexual orientation, national origin, criminal history or medical history unless it is truly relevant to the decision of the tribunal.

- Inform parties about their responsibilities to include only the personal information that is necessary to inform the tribunal about the nature of the dispute and the relevant issues in any filed documents.⁵

How can a tribunal utilize the benefits of technology while minimizing the privacy risks?

Tribunals can employ technological means of protecting privacy on the Internet by using robot exclusion protocols⁶ and eliminating the option of public search queries by name. This makes it more difficult for search engines such as Google to locate and display search results of a tribunal's decision pertaining to a specific individual.

If you have any questions about these guidelines, please contact:

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⁵ Other aspects of a tribunal's practice and procedure, such as access to tape recordings and transcripts, should also take privacy interests into account. These are discussed in a related OIPC publication entitled "Access and Privacy Issues: A Guide for Tribunals" that is available on the OIPC website at <http://www.oipc.bc.ca/guidance-documents/1607>

⁶ A robot exclusion protocol is a convention used to prevent web robots from accessing all or part of a website that is otherwise publicly viewable.