Halifax, NS

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February 18, 2015

VIA EMAIL

Judicial Administrator
Federal Court of Appeal
Ottawa, ON K1A 0H9

Dear Madam or Sir:

Re: Dr. Gábor Lukács v. Canadian Transportation Agency
Federal Court of Appeal File No.: A-218-14
Request for directions

I am the applicant in the above-noted application for judicial review, brought pursuant to s. 28 of the *Federal Courts Act*, which has been set down to be heard on March 17, 2015. I am writing to seek directions from the Honourable Court with respect to two recent developments.

I. Relevant documents discovered in Federal Court File No. T-1659-08

Motivated by the January 23, 2015 reply of the Privacy Commissioner, which cited Federal Court File No. T-1659-08, I have recently reviewed this file at the Halifax Registry, and I discovered that the Canadian Transportation Agency was an intervener in File No. T-1659-08, and that:

1. on January 17, 2011, the Agency filed a memorandum of fact and law with respect to the open court principle and the *Privacy Act*, and took a position that is diametrically opposite to the position it is advancing before this Court (see attached, paras. 12, 16, 21-23, and 26);

2. the position advanced by the Agency in File No. T-1659-08 is virtually identical to my position in the present proceeding; and

3. the Agency tendered as evidence in File No. T-1659-08 an affidavit sworn by Ms. Catharine Murphy, the Secretary of the Agency, which confirms the procedure that is supposed to be followed with respect to personal information contained in the filings of the parties (see attached, paras. 6 and 27-29).

These two documents, whose existence was unknown to me until a few days ago, are relevant to the present application, because they demonstrate that the Agency's impugned practices and actions are contrary to the Agency's own interpretation of its policies, rules, and the law, as represented to the Federal Court by the Agency. Since these documents were filed on behalf of the Agency, they are unlikely to cause any prejudice to the Agency.

I am seeking the guidance of this Honourable Court as to the appropriate procedure to ensure that the two documents in question are available to the Panel hearing the present application, bearing in mind the shortness of time remaining until the hearing of the application. I would respectfully propose to serve and file a supplementary record containing these two documents.

II. Attempt of the Commissioner to add to the evidentiary record

Tabs 15 and 19 of the Intervener's Authorities are not proper authorities, but rather evidence that the Commissioner relies upon in his submissions (at paras. 41 and 59, respectively). In fact, Tab 19 is a printout from the Commissioner's own website.

Aside from the impropriety of the manner chosen by the Commissioner to introduce facts (which has recently been addressed in *Lukács v. Canadian Transportation Agency*, 2014 FCA 239, at para. 9), the Commissioner's conduct is contrary to paragraph 1(d) of the December 10, 2014 Order of Mr. Justice Stratas, J.A.:

> The Privacy Commissioner shall not add to the evidentiary record. The Privacy Commissioner shall not seek costs, nor shall it have costs awarded against it.

Since the shortness of time until the hearing of the application makes it impractical to bring a motion to strike out these portions of the Commissioner's submissions and book of authorities, I am seeking the guidance of this Honourable Court as to the procedure to follow to object to the Commissioner's attempt to add to the evidentiary record.

Sincerely yours,

Dr. Gábor Lukács
Applicant

Enclosed: Memorandum of Fact and Law, dated January 17, 2011 (File No.: T-1659-09)
Affidavit of Ms. Catharine Murphy, Secretary of the Agency (File No.: T-1659-09)

Cc: Mr. Allan Matte, counsel for the Canadian Transportation Agency
Ms. Jennifer Seligy, counsel for the Privacy Commissioner of Canada

Court File No. T-1659-08

FEDERAL COURT

BETWEEN:

PATRICK HOLLIER

Applicant

- and –

PUBLIC SERVICE COMMISSION OF CANADA

Respondent

- and –

PRIVACY COMMISSIONER OF CANADA,
PUBLIC SERVICE LABOUR RELATIONS BOARD,
MILITARY POLICE COMPLAINTS COMMISSION
PUBLIC SERVICE STAFFING TRIBUNAL, and
CANADIAN TRANSPORTATION AGENCY

Interveners

MEMORANDUM OF FACT AND LAW OF OF THE TRIBUNAL INTERVENERS

PART I – FACTS

1. On November 24, 2009, pursuant to an Order of Madam Prothonotary Aronovitch, the Canadian Transportation Agency, the Military Police Complaints Commission, the Public Service Labour Relations Board and the Public Service Staffing Tribunal (collectively the "Tribunal Interveners"), were granted leave to intervene jointly in the within proceeding and to file a memorandum of fact and law.

PART II – ISSUES

2. The Tribunal Interveners were granted leave to address the following issues: (a) the right of an independent statutory tribunal to report personal information in the course of conducting an investigation or rendering a decision or report, including by way of posting on its website; and (b) the application of the open court principle to the proceedings and decisions of administrative tribunals.

PART III – SUBMISSIONS

3. It is respectfully submitted that quasi-judicial administrative tribunals have the right to include personal information in their decisions, and to post their decisions on their own websites, by virtue of both the open court principle and because personal information that is otherwise publicly available is not subject to any prohibition against disclosure contained in the *Privacy Act*.

A. OPEN COURT PRINCIPLE

4. The Supreme Court of Canada has described the open court principle as a broad principle of general application to all judicial proceedings and a "hallmark of a democratic society" which has "long been recognized as a cornerstone of the common law". It has explained that open access to the courts allows anyone the opportunity to see "that justice is administered in a non-arbitrary manner, according to the rule of law."

> *Named Person v. Vancouver Sun*, **[2007] S.C.J. No. 43 at paras. 31 and 32 [Tab 4].**

5. For its part, this Court has held: "Although variously expressed from time to time, the essence of that doctrine is that the better if not the only way to assure the proper exercise of judicial functions is to have court proceedings open to the public. The public, in such fashion, is a permanent or standing jury whose role is to ensure that the integrity of the judicial system is maintained."

> *Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia)*, **[1993] F.C.J. No. 833 at para. 4 [Tab 5].**

6. The open court principle applies not only to judicial proceedings themselves, but also to the publication of fair reports of judicial proceedings and the publication of pleadings which were filed in those proceedings. In *Nova Scotia (Attorney General) v. MacIntyre*, the Supreme Court quoted approvingly the reasoning of that Court in *Gazette Printing Co. v. Shallow*, (1909), 41 S.C.R. 339, wherein Justice Duff wrote:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.
>
> *Nova Scotia (Attorney General) v. MacIntyre*, **[1982] 1 S.C.R. 175 at p. 6 of 16 [Tab 6].**

7. A similar view of the open court principle was very recently reiterated by the Federal Court of Appeal in *Grace Singer v. Canada (Attorney General)*, wherein Justice Mainville wrote: "One of the basic tenets of our legal system and of our democratic system of government is that court hearings and decisions as well as court pleadings and evidence are accessible to the public."

> *Grace Singer v. Canada (Attorney General)*, **2011 FCA 3 at para 6 [Tab 7].**

8. Both the Federal Court of Appeal and this Court have held that the open court principle applies not only to judicial proceedings but also to the proceedings of quasi-judicial administrative tribunals. The underlying rationale for this position was perhaps best articulated by this Court in *Southam Inc. v. Canada (Minister of Employment and Immigration)*, which held, in part, as follows:

> ...statutory tribunals exercising judicial or quasi-judicial functions involving adversarial-type processes which result in decisions affecting rights truly constitute part of the "administration of justice". The legitimacy of such tribunals' authority requires that confidence in their integrity and understanding of their operations be maintained, and this can be effected only if their proceedings are open to the public.
>
> *Southam Inc. v. Canada (Minister of Employment and Immigration)*, **[1987] F.C.J. No. 658 at para 9 [Tab 8].**

9. The reasoning in *Southam* was subsequently endorsed and adopted by the Federal Court of Appeal in *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*, where it held that the Court in *Southam* was entirely correct in its analysis "both as to the quasi-judicial nature of the adjudicator's role in an inquiry and as to the consequences with respect to access."

> *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*, **[1991] F.C.J. No 313 at p. 9 of 15 [Tab 9].**

10. Yet, the open court principle is not absolute. Certain tribunals have enabling legislation which directs them to conduct some of their proceedings in private. As an example, the *National Defence Act* provides that the Military Police Complaints Commission shall hold its hearings in public unless it is of the opinion that certain specified types of information will likely be disclosed in the course of a hearing.

> *National Defence Act*, **R.S. 1985, c. N-5, s. 250.42 [Tab 1].**

11. That said, however, the relevant authorities are clear that the presumption is that judicial and quasi-judicial proceedings shall be open to the public. To that end, the Courts have established a clear test to be applied in cases where a party wishes to rebut this presumption. The *Dagenais/Mentuck* test, established by the Supreme Court of Canada in two of its decisions[1], has been recently summarized as follows:

> The *Dagenais/Mentuck* test requires the party opposing media access to demonstrate that the order is necessary to prevent a serious risk to the proper administration of justice and that the salutary effects of the order sought outweigh the deleterious effects on the rights and interests of the parties and the public.
>
> *R. v. Canadian Broadcasting Corp.*, **[2010] O.J. No. 4615 at para. 9 [Tab 10].**

12. For these reasons, the Tribunal Interveners submit that the open court principle applies to the proceedings of quasi-judicial administrative tribunals and, as a result, there is a presumption that the public will have access to all aspects of those proceedings

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[1] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R v. Mentuck*, [2001] 3 S.C.R. 442.

absent some form of restriction in their enabling legislation or an Order of the relevant tribunal prohibiting the same.

B. OPEN COURT PRINCIPLE AND THE *PRIVACY ACT*

13. The first issue before this Honourable Court, therefore, is how it can reconcile the application of the open court principle with the fact that the majority of federal administrative tribunals, including the Respondent and the Tribunal Interveners, are subject to the *Privacy Act*. It is respectfully submitted that the answer lies in how the *Privacy Act* applies to information which is otherwise available to the public.

i. Decisions Contain Publicly Available Information

14. While the *Privacy Act* provides that personal information under the control of a government institution shall not be disclosed by that institution without the consent of the individual to whom the personal information relates, subject to certain enumerated exceptions, that general restriction does not apply to personal information which is publicly available. More specifically, s.69(2) of the *Privacy Act* reads as follows:

> Section 7 and 8 do not apply to personal information that is publicly available.
>
> *Les articles 7 et 8 ne s'appliquent pas aux renseignements personnels auxquels le public a accès.*
>
> *Privacy Act*, **R.S. 1985, c. P-21, s. 69(2) [Tab 2].**

15. Most quasi-judicial administrative tribunal proceedings are, in some manner, open and accessible to the public. Certain tribunals hold open public hearings which members of the general public can attend, while others fulfill their mandate via an exchange of written submissions which can be viewed by interested members of the public at the relevant tribunal's offices.

16. All of the personal information about the parties, including their identities, can therefore be obtained by either attending the tribunal hearings, when and where they are held, or, alternatively, asking to review the tribunal's file. For this reason, any personal

information that would be contained in a tribunal's decisions would otherwise be "publicly available" within the meaning of s.69(2) of the *Privacy Act*.[2]

ii. Decisions are Purpose for which Information was Obtained

17. In the alternative, if the release of personal information obtained in the course of adjudicative proceedings is covered by the prohibition contained in s.8 of the Act, which is not conceded but expressly denied, it is submitted that any such information would still be excluded from the general prohibition because the issuance of reasons was the very purpose for which the information was obtained by the administrative tribunal.

18. Subsection 8(2)(a) of the *Privacy Act* provides that personal information under the control of a government institution may be disclosed for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose. It is respectfully submitted that the information given to an administrative tribunal is generally provided in order to obtain a decision from that tribunal.

Privacy Act, **ss.8(2)(a) [Tab 2].**

19. The most common way in which a quasi-judicial administrative tribunal receives or obtains personal information is when that information is received or obtained in the context of a tribunal proceeding. The information can be contained in either the originating document or any reply submissions filed by the parties. It can also be contained in any of the documentary or oral evidence provided to the tribunal.

20. The purpose for which the information is provided is to allow the tribunal to adjudicate the matter before it and, ultimately, issue a decision. To that end, the issuance of a decision with reasons is either the very purpose for which the information was obtained by the tribunal or, at a minimum, a use consistent with that purpose insofar as it is the known, natural and desired outcome of the tribunal's proceedings.

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[2] Sections 7 and 8 of the *Privacy Act* apply to tribunals in respect of their administrative functions – simply not their quasi-judicial functions. Any personal information obtained outside of a public proceeding, including employee records, would be subject to disclosure only in accordance with the *Privacy Act*.

iii. No Balancing Act Required

21. The Tribunal Interveners respectfully reject the view advanced by some that quasi-judicial administrative tribunals cannot disclose personal information under their control unless or until they have determined, in every case, that the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure pursuant to subsection 8(2)(m)(i) of the *Privacy Act*.

22. First, as set out in the previous section, judicial and quasi-judicial proceedings should be open to the public unless the Court or tribunal in question issues an Order limiting access to the proceedings after having applied the *Dagenais/Mentuck* test. If the public interest analysis contained in subsection 8(2)(m)(i) of the *Privacy Act* is forced on tribunals, it would contradict and counteract the *Dagenais/Mentuck* test.

23. The *Dagenais/Mentuck* test assumes that there should always be public access to judicial or quasi-judicial proceedings unless it is shown, on a case by case basis, that the interest against access outweighs the public interest in open proceedings. Contrastingly, the test in 8(2)(m)(i) of the *Privacy Act* assumes that there should never be public access to information unless it can be proven that the public interest trumps the privacy interest.

24. Similarly, and by way of example, s.250.42 of the *National Defence Act* provides that the Military Police Complaints Commission's hearings shall be held in public except in certain specified circumstances. The limited list of circumstances includes when there could be information affecting a person's privacy or security interest, but only where "that interest outweighs the public's interest in the information."

National Defence Act, **ss. 250.42(c) [Tab 1].**

25. The language of that provision is clearly consistent with both the open court principle and the *Dagenais/Mentuck* test. This is because the public interest in having the information available to the general public is presumed to outweigh the privacy interest of the parties. It is the reverse of what is contemplated by the *Privacy Act*, where the prohibition in s.8 presupposes that the information should not be made public.

26. It is respectfully submitted that the open court principle can be easily reconciled with the application of the *Privacy Act* without requiring quasi-judicial administrative tribunals to undertake some form of reverse-*Dagenais/Mentuck* test. By virtue of the open court principle, tribunal proceedings are publicly accessible and therefore exempt from the prohibition in s.8 of the *Privacy Act* by virtue of s.69(2) of the *Privacy Act*.

C. POSTING OF DECISIONS ON TRIBUNAL WEBSITES

27. The second issue before this Court is whether the proper application of the open court principle to quasi-judicial administrative tribunals creates a corresponding right which allows those tribunals to post unredacted electronic copies of their decisions on their respective websites. The Tribunal Interveners respectfully submit, for the various reasons that follow, that it does.

28. The Supreme Court of Canada has held that, as a general rule, tribunals are considered to be "masters in their own house" in relation to their own procedures. In the absence of specific rules laid down by statute or regulation, "they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."

> *Prassad v. Canada (Minister of Employment and Immigration)*, **[1989] S.C.J. No. 25 at para. 16 [Tab 11].**

29. To that end, the Supreme Court has further held that the duty of procedural fairness requires that reasons be provided for administrative decisions where the decision has important significance for the individual, where there is a statutory right of appeal, or there are other circumstances which warrant some form of written explanation for the decision reached by an administrative decision-maker.

> *Baker v. Canada (Minister of Citizenship and Immigration)*, **[1999] 2 S.C.R. 817, at para. 43 [Tab 12].**

30. The Tribunal Interveners submit that the posting of federal administrative tribunal decisions via their websites is a practice consistent with the *Reproduction of Federal Law Order*, which authorizes the reproduction, without charge, of tribunal decisions on the

basis that it is of "fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law."

Reproduction of Federal Law Order, **SI/97-5 [Tab 3]**

31. In this context, the Court will note that electronic versions of most tribunal decisions are already available on legal research websites including *Westlaw* and/or *Quicklaw*. The decisions of the Public Service Labour Relations Board and the Public Service Staffing Tribunal are also available on *CanLII*, a free website managed by the Canadian Legal Information Institute and the Federation of Law Societies of Canada.

32. Moreover, the posting of decisions on websites is not uncommon. The Federal Court of Appeal, the Tax Court of Canada and this Court all post unredacted electronic versions of decisions on their respective websites. While the Supreme Court of Canada does not do so directly, its website does provide a link which connects visitors to another publicly accessible website where the full text of its decisions have been posted.

33. This is not to say that quasi-judicial administrative tribunals are not mindful of the significance of certain types of personal information. Like the Courts, federal tribunals have adopted the Canadian Judicial Council's *Protocol for the Use of Personal Information in Judgments* which recommends that decisions be written without reference to personal data identifiers (e.g. social insurance numbers, credit card numbers, etc...).

Statement on the Use of Personal Information in Decisions, **Heads of Federal Administrative Tribunals Forum [Tab 14].**

34. Rather, the tribunal interveners respectfully submit that the posting of quasi-judicial administrative tribunal decisions on their websites is consistent with the best practices employed by the Courts and, moreover, that it is not inconsistent with the provisions of the *Privacy Act*. Indeed, almost identical reasoning has already been endorsed by a Canadian Court.

35. In *Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, Justice Ottenbreit of the Saskatchewan Court of Queen's Bench recently observed that "it seems illogical that members of the public could sit at a hearing and listen to all of the evidence

but not have access to the decision of the Commission." He then added: "The written decision is the last piece of the hearing process."

> *Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, **[2009] S.J. No. 169 at para. 73 [Tab 13].**

36. The issue in *Germain* was the very same as the one before this Court, being whether statutory tribunals can post their decisions on their websites. Justice Ottenbreit held they can, noting: "public access to decisions made by the Commission is important to assist individuals in presenting their claims and understanding the process of the Commission and to further the principle of public access to adjudicative bodies."

> *Germain*, **at para. 73 [Tab 13].**

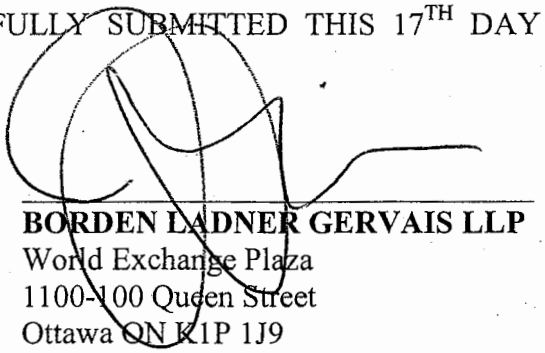
37. The Court in *Germain* also held that the open court principle applied to the tribunal in question, that the issuance of decisions was incidental and necessary to its mandate, and that there was no prohibition in law which prevented the posting of its decisions on its website. While the decision has been appealed, it has not been overturned and, therefore, remains a persuasive decision for this Court to consider.

38. The Tribunal Interveners respectfully submit that the principles outlined in *Germain* with respect to the Automobile Injury Appeal Commission can be easily applied to any federal quasi-judicial administrative tribunal. The issues and factors considered by the Saskatchewan Court of Queen's Bench in that case were essentially identical to those being considered by this Court in the within Application.

PART IV – ORDER

39. Pursuant to the Order of Madam Prothonotary Aronovitch dated November 24, 2009, the Tribunal Interveners are not entitled to seek or be awarded costs or be subject of an award of costs against them in the within proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17TH DAY OF JANUARY, 2011.



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PART V – AUTHORITIES

Appendix A

1. *National Defence Act*, R.S. 1985, c. N-5, s. 250.42

2. *Privacy Act*, R.S. 1985, c. P-21, s 8(2)(a) and s. 69(2)

3. *Reproduction of Federal Law Order*, SI/97-5

Appendix B – Caselaw and Other Sources

4. *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43

5. *Travers v. Canada (Board of Inquiry on the Activities of the Canadian Airborne Regiment Battle Group in Somalia)*, [1993] F.C.J. No. 83

6. *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175

7. *Grace Singer v. Canada (Attorney General)* , 2011 FCA 3

8. *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 658

9. *Pacific Press Ltd. v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No 313

10. *R. v. Canadian Broadcasting Corp.*, [2010] O.J. No. 4615

11. *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] S.C.J. No. 25

12. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

13. *Germain v. Saskatchewan (Automobile Injury Appeal Commission)*, [2009] S.J. No. 169

14. *Statement on the Use of Personal Information in Decisions*, Heads of Federal Administrative Tribunals Forum

Court File No. T-1659-08

FEDERAL COURT

MR. PATRICK HOLLIER

Applicant

- and -

THE PUBLIC SERVICE COMMISSION OF CANADA

Respondent

- and -

THE PRIVACY COMMISSIONER OF CANADA

Intervener

AFFIDAVIT OF CATHARINE MURPHY
(sworn October 9th, 2009)

I, Catharine Murphy, of the City of Gatineau, SWEAR THAT:

1. I am the Secretary of the Canadian Transportation Agency (the "Agency") and as such have personal knowledge of the matters to which I depose in this affidavit. Where I make statements of my information and belief, I have identified the source and grounds of the information and believe the information to be true.

The Canadian Transportation Agency

2. The Agency is established under the *Canada Transportation Act*, S.C. 1996, c. 10 (*CTA*).

3. The Agency's purpose is to implement the national transportation policy, which is found in section 5 of the *CTA*. More specifically, the mandate of the Agency is to administer economic regulatory provisions of Acts of Parliament affecting modes of transport under federal jurisdiction as well as removing undue obstacles to the mobility of persons with disabilities within the federal transportation network.

4. One aspect of the Agency's mandate is to resolve disputes related to various aspects of transportation through both alternative dispute resolution mechanisms such as

facilitation, mediation, arbitration, final offer arbitration and through a formal adjudicative process. In its role as quasi-judicial administrative tribunal, the Agency exercises court-like powers to ensure that its processes are responsive, fair and transparent and that it considers the interests of all parties in the national transportation system.

5. The Agency's vision is to be a respected, leading tribunal contributing to a competitive and accessible national transportation system efficiently meeting the needs of users and service providers and the Canadian economy and always acting with integrity and accountability. A copy of the Agency's Mission, Mandate, Vision and Values section of the website is attached hereto as Exhibit "A".

6. As a quasi-judicial tribunal, the Agency is bound by the constitutionally protected open court principle. This means that information filed with the Agency becomes part of a public record and is generally available to the public. When adjudicating a dispute, administrative law principles require that the Agency issue a reasoned decision, which includes a summary of the evidence presented and of the arguments of the parties, as well as an articulation of the reasons supporting the findings. The most recent statement of the Agency in relation to the open court principle was in an accessible transportation case and, for this reason, the examples and circumstances referred to in this affidavit will be predominantly in relation to the accessible transportation mandate of the Agency.

7. For example, the Agency is responsible for ensuring that undue obstacles to the mobility of persons with disabilities are removed from federal transportation services and facilities. The Agency accomplishes this in part by resolving individual complaints, either formally, through adjudication, or informally, through facilitation and mediation. To the extent that such complaints involve individuals with disabilities, the Agency is required to consider and develop a body of jurisprudence similar to that of a human rights tribunal in order to deal with these complaints in a transparent and consistent manner. This body of jurisprudence provides information on the accessibility standards that the Agency is empowered to prescribe, administer and enforce. For example, the Agency has addressed complaints about economic disadvantage in air fare policies, including its January 10, 2008 decision by which it ordered two Canadian airlines to adopt a One-

Person-One-Fare Policy for persons who require additional seating either due to obesity or who are required to be accompanied by an attendant for their personal care or safety in flight. A copy of the "Highlights of One-Person-One-Fare Policy Decision" is attached hereto as Exhibit "B". While the decision is only applicable to Air Canada and WestJet, it is important that the information be disseminated to the community of persons with disabilities so that individuals will understand their rights under the decision as well as to the aviation industry at large so that they are aware of the decision.

Powers of the Canadian Transportation Agency

8. As stated in paragraph 4 above, the Agency exercises court-like powers in the fulfillment of its adjudicative function. What follows is a review of some of those powers.

9. Pursuant to section 25 of the *CTA*, the Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

10. Pursuant to section 25.1 of the *CTA*, the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.

11. Pursuant to section 28 of the *CTA*, the Agency may in any order, direct that the order or part thereof shall come into force at a future time, on the happening of any contingency, event or condition or on the performance of any terms. It may also direct that the whole or any portion of an order shall have force for a limited time or until the happening of a specific event. Further, the Agency may, instead of making an order final, make an interim order and reserve further directions for an adjourned hearing of a matter or for further application.

12. Pursuant to subsection 27(1) of the *CTA*, the Agency may grant the whole or part of an application or may make any order or grant any further or other relief that to the Agency seems just and proper.

13. Pursuant to subsection 21(1) of the *CTA*, the Secretary of the Agency shall:

(a) Maintain a record in which shall be entered a true copy of every rule, order, decision and regulation of the Agency and any other documents that the Agency requires to be entered in it; and

(b) Keep at the Agency's office a copy of all rules, orders, decisions and regulations of the Agency and the records of proceedings of the Agency.

14. Pursuant to section 22 of the *CTA* , upon application of any person, the Secretary of the Agency shall issue under the seal of the Agency, a certified copy of any rule, order, regulation or any other document issued by the Agency.

15. Pursuant to section 17 of the *CTA*, the Agency may make its own rules of procedure and has done so under the *Canadian Transportation Agency General Rules*, SOR/2005-35 (the General Rules).

16. Subsection 23(1) of the General Rules provides that:

> The Agency shall place on its public record any document filed with it in respect of any proceeding unless the person filing the document makes a claim for its confidentiality in accordance with this section.

Filing in the Federal Court of Decisions Rendered under the Canada Transportation Act

17. A decision or order of the Agency may be made an order of the Federal Court or of any superior court, pursuant to section 33 of the *CTA* and is thereby enforceable in the same manner as such an order. To make a decision or order an order of a court, either the usual practice and procedure of the court in such matters may be followed or the Secretary of the Agency may file with the registrar of the court a certified copy of the decision or order.

18. The Federal Court maintains a publicly searchable registry of documents filed with the Federal Court. The Federal Court's website allows a user to search the Federal

Court's Court Index and Docket by party name to determine whether an order of a tribunal has been filed with the Federal Court.

Open Court Principle

19. As a quasi-judicial tribunal operating like a court, the Agency operates based on the open court principle. This is clearly stated in, for example, the Agency's online Privacy Statement - Agency's Complaint Process in connection with Disability-Related Complaints, a copy of which is attached hereto as Exhibit "C".

20. The legitimacy of the Agency's authority requires that confidence in its integrity and understanding of its operations be maintained and this can only occur if proceedings are open to the public. This openness supports the public confidence in the Agency's decisions, the public's understanding of the Agency's process and the accountability of its Members. It is also important that the Agency's decisions be made public insofar as many of these decisions form the bases of the Agency's regulations and policies, particularly in relation to accessible transportation. Many of the issues that the Agency considers are of sufficient public interest to reach the Federal Court of Appeal and, at times, the Supreme Court of Canada and for this reason, full decisions of the Agency, the body with a high level of expertise in the transportation field, must be available for public and judicial scrutiny.

Nature of the Disclosure of Personal Information by the Agency

21. Agency decisions include the names of persons and witnesses and may contain personal information about these individuals that is relevant to the Agency's decision. This may include, for example, information about the applicant's health condition where it is relevant to the Agency's determination that the applicant is a person with a disability.

22. Agency decisions are transmitted to the parties as well as to any intervenors and interested parties who have requested to be provided with a copy of the decision.

23. In accordance with the Reproduction of Federal Law Order, SI/97-5 and in order to ensure the transparency of its processes, the Agency posts the full text of its decisions on its website in both official languages. Decisions are searchable by year and by sector

of the Agency's jurisdiction (Accessible Transportation, Air, Rail, Marine). A copy of the Reproduction of Federal Law Order is attached as Exhibit "D".

24. In addition, individuals and organizations have subscribed to receive automatic notification when the Agency posts a new decision on-line.

25. Finally, pursuant to section 42 of the CTA, the Agency is required to make annual reports of its activities to the Governor in Council describing briefly, in respect of a given year,

(a) applications to the Agency and the findings on them; and

(b) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Mitigative Measures Taken by the Agency to Balance need to Disclose with Privacy Interests

26. In an effort to establish a fair balance between public access to its decisions and the individual's right to privacy, the Agency has implemented the following series of mitigative measures to limit the disclosure of personal information in its decisions as well as its impact on individuals.

27. For example, applicants are advised on the application form (Exhibit "E") that the Agency follows the open court principle in order that this may be taken into consideration in the drafting of their applications and to provide them with an opportunity to seek an order for non publication of certain information before they file their applications.

28. Once an application is filed, applicants are advised a second time of the Agency's use of the open court principle and other parties are also informed of this fact through the attachment to the letter opening pleadings (see Exhibit "F").

29. Requests for non publication are assessed by the Agency pursuant to the Dagenais/Mentuck test developed by the Supreme Court of Canada as reformulated in

Sierra Club of Canada v. *Canada (Minister of Finance)* [2002] S.C.R. 522. The Agency recognizes that there may be exceptional cases to warrant omission of certain identifying information from a Agency decision such as, for example, where minor children or innocent third parties may be harmed.

30. Agency decisions and comprehensive supporting reasons are drafted in such a way as to ensure that only personal information that is relevant and necessary to the decision is included. The Agency is mindful of the impact of including unnecessary personal information in its reasons for decisions and, for example, personal address or phone numbers are not mentioned.

31. Furthermore, in May 2009, the Agency endorsed a statement on the *Use of personal information in decisions and posting of decisions on websites,* adopted by the Heads of Federal Administrative Tribunals Forum (the "Forum"), a community of Chairs of federal administrative tribunals of which the Agency is a member. A copy of the information bulletin posted on the Forum website is attached hereto as Exhibit "G" and the Forum's statement on the use of personal information in decisions of administrative tribunals and the posting of decisions on websites of administrative tribunals attached hereto as Exhibit "H".

32. Given its use of names and personal information in decisions and orders, the Agency adopted the protocol approved by the Canadian Judicial Council in March 2005 for the use of personal information in judgments (the CJC Protocol). A copy of the protocol is attached hereto as Exhibit "I".

33. The Agency has also completed the installation on its website of a Web Robot Exclusion protocol to block global search engines such as Google and Yahoo from accessing full-text reasons for decisions posted on the Agency's website. The only decision-related information on the Agency's website that will be available to Internet search engines are decision summaries and comments contained in the Agency's annual reports and news releases.

The Canadian Transportation Agency's Interest in this Application

34. Mr. Hollier's application raises the following important legal issues:

(a) the right of an independent, quasi-judicial statutory tribunal to report personal information in the course of conducting an investigation or rendering a report, including by way of posting on its website, based on the open court principle; and

(b) the sufficiency of voluntary or compulsory measures to mitigate the disclosure of personal information in this context.

35. These issues were canvassed by the Privacy Commissioner in her 2007-2008 Annual Report to Parliament on the *Privacy Act* where she discussed complaints regarding the disclosure of personal information on the Internet by bodies created by Parliament to adjudicate disputes. A copy of the relevant excerpt from the Privacy Commissioner's Annual Report is attached hereto as Exhibit "J".

36. Although no official complaint was made against the Agency, to the extent that the Agency carries out similar functions to certain of the bodies, the Agency has an interest in these proceedings. For example, like the bodies subject to complaints in 2007-2008, the Agency adheres to the open court principle as discussed by the Privacy Commissioner at page 26 of her Annual Report. This principle is of particular importance given the Agency's role as the national transportation oversight body which deals with issues involving transportation carriers and the general public.

37. The Privacy Commissioner in her report recognized the benefit of technical measures preventing the names of individuals who participate in quasi judicial proceedings from creating "search hits" when typed into major search engines. One of the recommendations that she made to government institutions (page 29) is to adopt the following practice:

> Restrict the indexing by name of past decisions by global search engines through the use of an appropriate "web robot exclusion protocol";

38. As set out above, the Agency has taken steps to balance the open court principle with individual privacy interests, in particular, by adopting the Canadian Judicial Council protocol on the use of personal information in judgments, a Web Robot Exclusion protocol as recommended by the Privacy Commissioner and by providing notice to applicants before they apply to the Agency, and subsequently providing notice to all other parties, that it follows the open court principle and that some personal information may be part of its decision.

39. The issues raised in this application have implications ranging beyond the specific circumstances raised in it.

40. The Court's findings in relation to the issues raised in Mr. Hollier's application will likely have an impact on the Agency's practices with respect to posting decisions on its website as well as on the measures taken by the Agency to balance individual privacy requests with the open court principle applicable to its processes. This is particularly likely given the Privacy Commissioner's findings and recommendations regarding the online posting of reasons for decisions by administrative and quasi-judicial bodies and her intervention in these proceedings.

41. I believe that based on its statutory mandates, powers and procedures, the Agency can bring to these proceedings its unique perspective as a tribunal which seeks to balance transparency and individual privacy interests.

42. The submissions of the Agency as a transportation regulatory tribunal and human rights tribunal will offer a different perspective from those of the immediate parties and the Privacy Commissioner. I believe that in considering the position of the Privacy Commissioner as regards individual privacy interests, this Court will benefit from the differing position of the Agency insofar as it endorses the open court principle in

rendering its decisions and building its body of jurisprudence, and, concurrently, seeks to recognize privacy interests while respecting that principle.

43. I make this affidavit in support of the motion by the Public Service Labour Relations Board, the Public Service Staffing Tribunal, the Military Police Complaints Commission and the Canadian Transportation Agency for an Order for leave to intervene in these proceedings and for no other or improper purpose.

SWORN BEFORE ME at the City of Gatineau, on October 9th, 2009.

Commissioner for taking affidavits

CLAUDE JACQUES, AVOCAT
176294-0
BARREAU DU QUÉBEC

Court File No. T-1659-08

FEDERAL COURT

BETWEEN:

MR. PATRICK HOLLIER

Applicant

- and -

THE PUBLIC SERVICE COMMISSION OF CANADA

Respondent

- and -

THE PRIVACY COMMISSIONER OF CANADA

Intervener

AFFIDAVIT OF CATHARINE MURPHY
(sworn October 9th, 2009)

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa ON K1P 1J9

Barbara A. McIsaac, Q.C.
LSUC#: 15297G
Tel: 613-237-5160
Fax: 613-230-8842

Counsel for the Proposed Interveners
OTT01\3809894\1

This is Exhibit A
to the Affidavit of Catherine Murphy
sworn this 1st day of October, 2009

Commissioner for Taking Affidavits, etc.

CLAUDE JACQUES AVOCAT
176294-0
BARREAU DU QUÉBEC

About the Agency

The Canadian Transportation Agency is an independent administrative tribunal of the Government of Canada that operates like a court.

It is responsible for:

- dealing with and resolving disputes related to various aspects of transportation;
- improving access to transportation services; and
- making decisions in air, rail and marine transportation as an economic regulator.

The Agency supports the goal of a Canadian transportation system that is competitive, efficient and accessible, meeting the needs of those who provide or use transportation services.

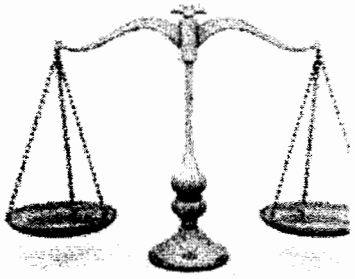
Canadian Transportation Agency | Office des transports du Canada

Canada

Canadian Transportation Agency

Mission, Mandate, Vision and Values

Mission



The Agency's mission is to assist in achieving a competitive, efficient and accessible transportation system through dispute resolution, essential economic regulation and communication in a fair, transparent and timely manner.

Mandate

The Agency is one of many Canadian partners helping achieve transportation that works for everyone. It ensures that the transportation system is competitive, economic, efficient and accessible, meeting the needs of those who provide or are affected by transportation services.

The Agency's responsibilities include:

- *Dispute Resolution*, to resolve complaints about transportation services, rates, fees and charges;
- *Accessibility*, to ensure that our national transportation system is accessible to all persons, particularly those with disabilities;
- *Economic Regulation*, to provide approvals, licences, and make decisions on a wide range of matters involving federally-regulated air, rail and marine transportation; and
- many other services that support economic vitality and benefit all Canadians.

Vision

Our vision is to be a respected, leading tribunal contributing to a competitive and accessible national transportation system efficiently meeting the needs of users and service providers and the Canadian economy.

Values

- *Integrity.* We act with honesty, fairness and transparency.
- *People.* We treat people with fairness, courtesy and respect, and foster a cooperative, rewarding working environment.
- *Quality Service.* We provide the highest quality services through expertise, professionalism and responsiveness.
- *Communications.* We promote the constructive and timely exchange of views and information.
- *Innovation.* We commit to creative thinking as the driving force to achieve continuous improvement.
- *Accountability.* We take full responsibility for our obligations and commitments.

This is Exhibit B

to the Affidavit of Catherine Murphy

sworn this 1st day of October, 2009

CLAUDE JACQUES, AVOCAT
176294-0
BARREAU DU QUÉBEC

Commissioner for Taking Affidavits, etc.

Canadian Transportation Agency | Office des transports du Canada

Canada

Canadian Transportation Agency
www.cta.gc.ca

Highlights of One-Person-One-Fare Policy Decision

The Canadian Transportation Agency has a number of ongoing cases concerning accessible transportation. The following are highlights from the Agency's One-Person-One-Fare Policy Decision.

After extensive written pleadings and evidence, and two hearings, the Agency issued a Decision expected to affect some 80,000 persons with disabilities.

On January 10, 2008, the Agency ordered Air Canada, Air Canada Jazz and WestJet to adopt a One-Person-One-Fare Policy for persons with severe disabilities on flights within Canada. The airlines were given up to one year to implement the Policy, which does not apply to domestic segments of transborder and international trips.

The Decision means that, for domestic services, these carriers may not charge more than one fare for persons with disabilities who:

- are accompanied by an attendant for their personal care or safety in flight, as required by the carriers' domestic tariffs; or
- require additional seating for themselves, including those determined to be functionally disabled by obesity.

As well, the Agency ordered the Gander International Airport Authority, also a respondent in the case, not to charge its improvement fee for attendants of persons with disabilities.

The Decision does not apply to:

- persons with disabilities or others who prefer to travel with a companion for personal reasons;
- persons with disabilities who require a personal care attendant at destination, but not in-flight; and
- persons who are obese but not disabled as a result of their obesity.

The Agency offered to facilitate a collaborative process to develop a common screening process for implementation of the One-Person-One-Fare Policy. Such a co-operative approach to work out common terms of compliance would potentially benefit Air Canada, Air Canada Jazz, WestJet and the Gander International Airport Authority, as well as other Canadian air carriers and airport authorities that may consider voluntary implementation of the Policy.

In February 2008, Air Canada, Air Canada Jazz and WestJet sought leave to appeal to the Federal Court of Appeal.

In May 2008, the Federal Court of Appeal dismissed the airlines' application.

In August 2008, the airlines applied to the Supreme Court of Canada for leave to appeal the Federal Court of Appeal's Decision to dismiss their application.

On November 20, 2008, the Supreme Court of Canada dismissed Air Canada, Air Canada Jazz and WestJet's application for leave to appeal. The Agency's January 2008 Decision stands.

Current status

Air Canada, Air Canada Jazz and WestJet are to implement a One-Person-One-Fare Policy by January 10, 2009.

Eligibility for the One-Person-One-Fare Policy is determined by the airlines. The carriers are implementing screening processes to determine eligibility. This process will require persons to submit documentation from their physicians or other medical practitioners upon reservation and usually at least 48 hours in advance of travel. Information on eligibility, process and medical documentation required is available from Air Canada and WestJet.

The carriers have internal processes for addressing complaints regarding their services including those offered to passengers with disabilities. Concerns regarding the carriers' application of their One-Person-One-Fare Policy should be directed to the carriers in order that they have an opportunity to address them. Recognizing that this Policy is new for the carriers and requires the administration of relatively complex processes, the Agency will monitor the implementation of the One-Person-One-Fare Policy and, if needed, will offer its facilitative assistance as a means of addressing any difficulties that may arise regarding persons' access to the Policy.

The One-Person-One-Fare Policy Decision is based on longstanding principles of equal access to transportation services for persons with disabilities, regardless of the nature of the disability, and the Agency's legislative mandate to remove "undue obstacles" to their mobility. The Decision respects related decisions of the Supreme Court of Canada and Federal Court of Appeal.

For more information on the Agency's One-Person-One-Fare Policy Decision:

News Release - Canadian Transportation Agency decides in favour of One-Person-One-Fare Policy

Backgrounder - One-Person-One-Fare application

One-Person-One-Fare Policy Decision

News Release - Canadian Transportation Agency proposes co-operation in implementing order

For News Media Enquiries: Judy Deland at 819-953-8926

For General Public Enquiries: info@otc-cta.gc.ca; toll-free number 1-888-222-2592

TTY: 1-800-669-5575 (Canada only)

To keep up-to-date with our latest news releases and other information, subscribe to our electronic mail service.

This is Exhibit C
to the Affidavit of Catherine Murphy
sworn this 1st day of October, 2009

CLAUDE JACQUES, AVOCAT
176294-0
BARREAU DU QUÉBEC

Commissioner for Taking Affidavits, etc.

Privacy Statement - Agency's Complaint Process

Open Court Principle

As a quasi-judicial tribunal operating like a court, the Canadian Transportation Agency is bound by the constitutionally protected open-court principle. This principle guarantees the public's right to know how justice is administered and to have access to decisions rendered by administrative tribunals.

In accordance with the values of the open court principle and pursuant to the Canadian Transportation Agency General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing. The names of parties and witnesses involved in a complaint are public.

Agency Process

Information provided to the Agency will be used to investigate complaints and a copy of the complaint will be forwarded to the transportation service provider for comments.

In some instances, the Agency may process complaints together where similar issues have been raised. In such circumstances, information provided to the Agency on each of the complaints may be distributed to parties in the other complaints.

If a complaint is dealt with pursuant to the Agency's formal process, a decision will be issued that contains a summary of the complaint, a summary of other information provided during the pleadings and an analysis of the case, along with the Agency's determination and any corrective action deemed necessary by the Agency.

Publication on Web Site

The decision will be posted on the Agency's Web site and will include the names of the parties and witnesses. The decision will also be distributed to a number of organizations and individuals that have subscribed to receive Agency decisions. In its use of names and personal information in decisions and orders, the Agency has adopted the protocol approved by the Canadian Judicial Council in March 2005 for the use of personal information in judgements. This protocol sets out guidelines to assist administrative tribunals when dealing with requests for the non-publication of names.

In an effort to establish a fair balance between public access to its decisions and the individual's right to privacy, the Agency has taken measures to prevent Internet searching of full-text versions of decisions posted on our Web site. This is done by applying instructions using the "web robots exclusion protocol" which is recognized by Internet search engines (e.g., Google and Yahoo).

Therefore, the only decision-related information on the Agency's Web site that will be available to Internet search engines are decision summaries and comments contained in the Agency's annual reports and news releases. The full-text version of decisions is posted on our Web site, but will not be accessible by Internet search engines. As a result, an Internet search of a person's name mentioned in a decision will not provide any information from the full-text version of decisions posted on the Agency's Web site.

We cannot guarantee that the technological measures taken will always be respected or free of mistakes or malfunctions.

There may be exceptional cases to warrant the omission of certain identifying information from an Agency decision. Such omission may be considered where minor children or innocent third parties will be harmed, where the ends of justice will be undermined by disclosure or the information will be used for an improper purpose. In such situations, the Agency may consider requests, supported by proper evidence, to prevent the use of information which identifies the parties or witnesses involved. Any individual who has concerns with respect to the publication of his or her name may contact the Agency's Secretariat by e-mail at NDN-NPN@otc-cta.gc.ca, or by calling 819-997-0099 or 1-888-222-2592 or TTY 1-800-669-5575, or by writing to the Canadian Transportation Agency, Ottawa, Ontario, K1A 0N9.

Privacy of Records

In all cases, the Agency's records relating to complaints will be retained in the Personal Information Bank numbers CTA-PPU-033 for 10 years after the complaint has been resolved & in CTA-PPU-014 for 10 years once received. An individual has the right of access to their personal information as this information will be protected in accordance with the *Privacy Act*. Questions or comments regarding your privacy may be directed to the Privacy Co-ordinator by e-mail at Patrice.Bellerose@otc-cta.gc.ca, by calling 819-994-2564 or 1-888-222-2592 or TTY 1-800-669-5575, or by writing to the Canadian Transportation Agency, Ottawa, Ontario, K1A 0N9.

Next (The Formal Process for Complaint Resolution)

This is Exhibit D

to the Affidavit of Catherine Murphy

sworn this 1st day of October, 2009

Commissioner for Taking Affidavits, etc.

Department of Justice Canada | Ministère de la Justice Canada

Canada

Reproduction of Federal Law Order (SI-97-5)

Regulation current to September 8th, 2009

Attention: See coming into force provision and notes, where applicable.

Table Of Contents

Reproduction of Federal Law Order

SI/97-5

Registration January 8, 1997

OTHER THAN STATUTORY AUTHORITY

Reproduction of Federal Law Order

P.C. 1996-1995 December 19, 1996

Whereas it is of fundamental importance to a democratic society that its law be widely known and that its citizens have unimpeded access to that law;

And whereas the Government of Canada wishes to facilitate access to its law by licensing the reproduction of federal law without charge or permission;

Therefore His Excellency the Governor General in Council, on the recommendation of the Minister of Canadian Heritage, the Minister of Industry, the Minister of Public Works and Government Services, the Minister of Justice and the Treasury Board, hereby makes the annexed *Reproduction of Federal Law Order*.

Anyone may, without charge or request for permission, reproduce enactments and consolidations of enactments of the Government of Canada, and decisions and reasons for decisions of federally-constituted courts and administrative tribunals, provided due diligence is exercised in ensuring the accuracy of the materials reproduced and the reproduction is not represented as an official version.

SI/98-113(F).

Last updated: 2009-10-05

Important Notices

This is Exhibit E
to the Affidavit of Catherine Murphy
sworn this 9th day of October, 2009

Commissioner for Taking Affidavits, etc.

CLAUDE JACQUES AVOCAT
176294-0
BARREAU DU QUÉBEC

Canadian Transportation Agency | Office des transports du Canada

Canada

DISABILITY-RELATED COMPLAINT FORM

This form should be used by persons with disabilities who consider that they have encountered an obstacle in their use of transportation services and who wish to file a complaint with the Agency.

Please note that an application may be filed on behalf of a person with a disability. If this is the case, the person with a disability must provide written consent for the representative to act on his or her behalf.

Contact Information

If you have any questions regarding this form, please contact the Agency.

Telephone: 1-888-222-2592
FAX: 819-997-6727
TTY: 1-800-669-5575
E-mail: info@otc-cta.gc.ca

Addresses

Postal:
Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9

Office:
Canadian Transportation Agency
15 Eddy Street
Gatineau, Quebec
J8X 4B3

Client Satisfaction Surveys

As a party to a complaint, you may be asked to participate in a survey as part of the Agency's ongoing efforts to improve its service delivery. Participation in the survey is voluntary. Your response will be kept confidential and will be reviewed by an independent third party, not the Agency. Any information provided during the survey process will remain protected and will not be used for any other purpose.

Confidentiality

You may wish to read the Privacy Policy before completing the complaint form.

Complaint Form

Please complete Parts 1 through 7, as they apply to your situation. Part 2 is to be completed only if you are submitting a complaint on someone else's behalf. Part 5 is to be completed only if your reservations were made through a travel agency or organization other than the transportation service provider.

Any field marked by an asterisk (*) must be completed.

Part 1 - PERSON WITH DISABILITY

Name of person with a disability

Salutation:

Given Name: *

Surname: *

Address of person with a disability

Number/Street/Apt.: *

City: *

Province/State: * (Canada/U.S.)

Country: *

Postal/Zip Code: * (Canada/U.S.)

Contact information for person with a disability

Day Number: Extension:

Evening Number: Extension:

Cellular Number:

TTY Number:

Fax Number:

International Phone:

International Fax:

E-mail Address:

Preferred method of communication (example: E-mail, FAX):

Best time to contact

you:

If you are filing this complaint on your own behalf, please proceed to Part 3.

Part 2 - REPRESENTATIVE INFORMATION

(Complete this part only if the complaint is filed on behalf of the person with a disability.)

Any field marked by an asterisk (*) must be completed for the representative.

Representative name

Salutation:

Given Name: *

Surname: *

Representative address

Number/Street/Apt.: *

City: *

Province/State: * (Canada/U.S.)

Country: *

Postal/Zip Code: * (Canada/U.S.)

Contact information for representative

Day Number: Extension:

Evening Number: Extension:

Cellular Number:

TTY Number:

Fax Number:

International Phone:

International Fax:

E-mail Address:

Preferred method of communication (example: E-mail, FAX):

Best time to contact you:

Part 3 - DISABILITY INFORMATION

Who does the Agency consider to be a person with a disability?

Please provide details of your disability that are relevant to your complaint, in terms of how the disability causes limitations to your access to and use of the transportation service: *

Mobility Aids

Do you need any of the following disability aids when travelling? (check all that apply):

- ☐ Attendant (provision of assistance)
- ☐ Brace/prosthetic
- ☐ Communication Board (eg., alpha-numeric and/or symbol)
- ☐ Crutches/walker/cane
- ☐ Hearing devices
- ☐ Optical device (other than glasses/contact lens)
- ☐ Oxygen (cylinder or POC)
- ☐ Scooter
- ☐ Service animal (such as guide dog)
- ☐ Speech aid (eg., laptop with synthesized speech or a dedicated speech device)
- ☐ Stretcher
- ☐ Wheelchair - manual
- ☐ Wheelchair - power
- ☐ White cane
- ☐ Other

If other, please specify:

Part 4 - RESERVATION INFORMATION

With whom did you reserve?

If you made your reservations directly with the transportation service provider, please proceed to Part 6.

Part 5 - RESERVATION AGENT INFORMATION

(Complete this part only if your reservations were made through a travel agency or organization other than the transportation service provider.)

Any field marked by an asterisk (*) must be completed for the reservation agent.

Reservation Agent Name

Company Name: *

Reservation Agent Address

Number/Street/Apt.:

City:

Province/State:
(Canada/U.S.)

Country:

Postal/Zip Code:
(Canada/U.S.)

Reservation Agent Contact Information

Day Number: Extension:

Fax Number:

International Phone:

International Fax:

E-mail Address:

Reservation Agent Contact Name

Salutation:

Given Name:

Surname:

What information concerning your disability or your accessibility needs was provided to the reservation agent?

What accessibility-related services were requested by you or your agent prior to departure (e.g. at the time of the reservation) with the transportation service provider?

Part 6 - TICKET INFORMATION

Ticket issue date: (yyyy-mm-dd)

Please provide details concerning the travel. Most of the information is available from the ticket.

Outbound Travel

Carrier code	Flight/rail/ferry number	From (City)	To (City)	Date (yyyy-mm-dd)	Fare Basis

Carrier code	Flight/rail/ferry number	From (City)	To (City)	Date (yyyy-mm-dd)	Fare Basis

Carrier	Flight/rail/ferry	From	To	Date	Fare

code	number	(City)	(City)	(yyyy-mm-dd)	Basis

Inbound Travel

Carrier code	Flight/rail/ferry number	From (City)	To (City)	Date (yyyy-mm-dd)	Fare Basis
Carrier code	Flight/rail/ferry number	From (City)	To (City)	Date (yyyy-mm-dd)	Fare Basis
Carrier code	Flight/rail/ferry number	From (City)	To (City)	Date (yyyy-mm-dd)	Fare Basis

Submit a copy of your ticket, if available.

Part 7 - COMPLAINT DETAILS

Date of the incident: * (yyyy-mm-dd)

Provide a complete description of what happened, including where the incident occurrred (e.g. check-in, boarding or deplaning, in the terminal or during travel), and explain the obstacles you encountered: *

If services to accommodate your disability were requested at the time of the incident/travel date, when and from whom was this requested?

Names of those involved in the incident and their contact information, if available, e.g. witnesses and the name and title of employees:

Provide a description of the solutions you are seeking: *

Have you attempted to resolve your concerns directly with the transportation service provider or terminal operator? *

If you answered "yes" to the above question, what is the approximate date of your most

recent attempts? (yyyy-mm-dd)

Are you interested in mediation to resolve your complaint? This is a voluntary approach to resolving complaints in which an Agency-appointed mediator works with the parties with a view to obtaining a satisfactory solution to both parties. During mediation, the formal complaint process is put on hold. Failing to reach an agreed settlement on any or all of the concerns raised in the application, the case will be returned to the formal complaint adjudication process. *

Forward to the Agency any available supporting documents.

I believe that the concern(s) outlined in this application constitute(s) an undue obstacle to the mobility of travellers with disabilities. I ask that the Agency inquire into the matter in accordance with subsection 172(1) of the *Canada Transportation Act*.

Should it be determined that an undue obstacle exists, I ask that the Agency order the taking of appropriate corrective measures and/or payment of compensation for any expense I have incurred arising out of the obstacle.

(If you would like a printed copy of your completed form, please print before submitting the form.)

Submit Complaint Clear Form

Privacy Statement - Agency's Complaint Process

Open Court Principle

As a quasi-judicial tribunal operating like a court, the Canadian Transportation Agency is bound by the constitutionally protected open-court principle. This principle guarantees the public's right to know how justice is administered and to have access to decisions rendered by administrative tribunals.

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corrective action deemed necessary by the Agency.

Publication on Web Site

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There may be exceptional cases to warrant the omission of certain identifying information from an Agency decision. Such omission may be considered where minor children or innocent third parties will be harmed, where the ends of justice will be undermined by disclosure or the information will be used for an improper purpose. In such situations, the Agency may consider requests, supported by proper evidence, to prevent the use of information which identifies the parties or witnesses involved. Any individual who has concerns with respect to the publication of his or her name may contact the Agency's Secretariat by e-mail at NDN-NPN@otc-cta.gc.ca, or by calling 819-997-0099 or 1-888-222-2592 or TTY 1-800-669-5575, or by writing to the Canadian Transportation Agency, Ottawa, Ontario, K1A 0N9.

Privacy of Records

In all cases, the Agency's records relating to complaints will be retained in the Personal Information Bank numbers CTA-PPU-033 for 10 years after the complaint has been resolved & in CTA-PPU-014 for 10 years once received. An individual has the right of access to their personal information as this information will be protected in accordance with the *Privacy Act*. Questions or comments regarding your privacy may be directed to the Privacy Co-ordinator by e-mail at Patrice.Bellerose@otc-cta.gc.ca, by calling 819-994-2564 or 1-888-222-2592 or TTY 1-800-669-5575, or by writing to the Canadian Transportation Agency, Ottawa, Ontario, K1A 0N9.

> Complaint Form

Who the Agency considers to be a person with a disability

In the vast majority of cases decided by the Agency, the question of whether the person who is the subject of the complaint is a person with a disability is obvious and has not been contentious. Indeed, there is no definition for "disability" in the legislation or the regulations.

A person who has a health-related problem that limits their ability to travel or who has difficulties in travelling or using the federal transportation network may have a disability for the purposes of the Agency.

While a person may not generally be a person with a disability, depending on the circumstances of the travel experience, the person may, in fact, be considered by the Agency to be a person with a disability in this context (using the federal transportation network).

For example, a person who is a senior citizen who does not consider themself to be a person with a disability but who has a health-related problem that results in a difficulty travelling by air, such as ascending or descending stairs from the aircraft or requiring a wheelchair for distance, may be considered a person with a disability by the Agency.

The Agency has considered the phrase 'persons with disabilities' to include both permanent and temporary disabilities arising from medical conditions.

> Return to Part 3

Last Modified: 2009-09-16

This is Exhibit F
to the Affidavit of Catherine Murphy
sworn this 1st day of October, 2009

CLAUDE JACQUES, AVOCAT
176294-0
BARREAU DU QUÉBEC

Commissioner for Taking Affidavits, etc.

File No.

Addressee(s)

Dear xxx:

Re:

Description of the case and issues raised by the application/complaint.

This refers to an application/a complaint filed by _____ (applicant/complainant) against _____ (respondent) on _____.

The applicant/complainant has requested the Canadian Transportation Agency (Agency) to proceed with the formal adjudication process. The parties can, however, opt for mediation at any point during the adjudication process and while mediation is taking place, the formal adjudication process will be on hold.

This application process is a quasi-judicial one carried out pursuant to the *Canada Transportation Act* (CTA) and the *Canadian Transportation Agency General Rules* (General Rules), which can both be accessed on line at http://www.cta.gc.ca.

The Agency strives to deal with all of its cases within 120 days. However, the Agency may take more than 120 days to issue a decision due to the complexity or the particular circumstances of a case. If any party has concerns that the time it may take to render a decision could exceed 120 days, please advise the undersigned promptly.

The General Rules prescribe directions on how and when submissions are to be filed by the parties (pleadings process). The respondent has 30 days from the date of receipt of this letter to submit its answer to the Agency and provide a copy to the applicant/complainant and upon receipt of the answer, the applicant/complainant will have 10 days to file a reply with the Agency, with a copy to the respondent. **It is the parties' responsibility to ensure that their submissions are filed within the stated time frames.**

To ensure that Agency proceedings are effective, the Agency will only grant extensions of time in exceptional circumstances. The factors taken into consideration by the Agency for any extension request can be accessed on line at http://www.cta-otc.gc.ca

/publications/information/2007/2007-09-13_e.html. Parties must provide clear and convincing evidence for any such request.

IN THIS SECTION, THE WRITER SHOULD CLEARLY SET OUT THE INFORMATION THAT MUST BE FILED AND DIRECT SPECIFIC QUESTIONS IF ANY WHICH MUST BE ANSWERED FOR THE AGENCY TO MAKE ITS DECISION.

THE FOLLOWING PARAGRAPH SHOULD BE INSERTED FOR CONSUMER AND TARIFF COMPLAINTS AND ATD CASES

Furthermore, should _____ ***(respondent name)*** wish to dispute the facts alleged by _____ ***(applicant/complainant name)*** in the application, it should include with its answer:

- •a copy of any documents which would support _____'s ***(respondent name)*** statement of the facts, including reports prepared in relation to the incident, and signed statements from the individual employees and/or contracted personnel who have direct knowledge of the incident and/or who had direct contact with the person(s) involved.

Investigations are generally completed in writing, although the Agency may decide that a public hearing is necessary. In addition, the Agency may seek further information and/or clarifications from the parties and from third parties (such as travel agents). The Agency may also ask parties to submit witness statements and/or affidavit evidence to complete the pleadings.

It is important to read the attached privacy information.

Should you have any questions regarding your application/complaint, you may contact xxx

Sincerely,

Signatory, title
Directorate and Branch Information

NOTE: Each directorate can add other details to the letter that is appropriate to their area.

Attachment

Important privacy information

Open court principle

As a quasi-judicial tribunal operating like a court, the Canadian Transportation Agency is bound by the constitutionally protected open-court principle. This principle guarantees the public's right to know how justice is administered and to have access to decisions rendered by administrative tribunals.

Pursuant to the General Rules, all information filed with the Agency becomes part of the public record and may be made available for public viewing.

A copy of the application/complaint is provided to the respondent when the pleadings process begins and all information provided during the pleadings process will be used by the Agency to investigate the application/complaint.

In some instances, the Agency may process other applications/complaints together with this application/complaint, where similar issues have been raised. In such circumstances, information provided to the Agency on each of the applications/complaints may be distributed to parties to the other complaints.

An Agency decision will be issued that contains a summary of the application/complaint, a summary of other information provided during the pleadings and an analysis of the case, along with the Agency's determination and any corrective action deemed necessary by the Agency.

The decision will be posted on the Agency's Web site and will include the names of the applicant/complainant, the respondent and witnesses. The decision will also be distributed to a number of organizations and individuals that have subscribed to receive Agency decisions. In its use of names and personal information in decisions and orders, the Agency has adopted the protocol approved by the Canadian Judicial Council in March 2005 for the use of personal information in judgements. This protocol sets out guidelines to assist administrative tribunals when dealing with requests for the non-publication of names.

In an effort to establish a fair balance between public access to its decisions and the individual's right to privacy, the Agency has taken measures to prevent Internet searching of full-text versions of decisions posted on our Web site. This is done by applying instructions using the "web robots exclusion protocol" which is recognized by Internet search engines (e.g. Google and Yahoo).

Therefore, the only decision-related information on the Agency's Web site that will be available to Internet search engines are decision summaries and comments contained in the Agency's

annual reports and news releases. The full-text version of decisions is posted on our Web site, but will not be accessible by Internet search engines. As a result, an Internet search of a person's name mentioned in a decision will not provide any information from the full-text version of decisions posted on the Agency's Web site.

We cannot guarantee that the technological measures taken will always be respected or free of mistakes or malfunctions.

There may be exceptional cases to warrant the omission of certain identifying information from an Agency decision. Such omission may be considered where minor children or innocent third parties will be harmed, where the ends of justice will be undermined by disclosure or the information will be used for an improper purpose. In such situations, the Agency may consider requests, supported by proper evidence, to prevent the use of information which identifies the parties or witnesses involved. Any individual who has concerns with respect to the publication of his/her name should contact the Agency's Secretariat by e-mail at NDN-NPN@otc-cta.gc.ca or by calling 819-997-0099.

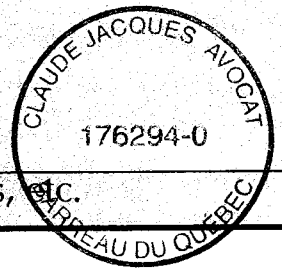
Privacy of records

In all cases, the Agency's records relating to the application/complaint will be retained for 10 years. An individual has the right of access to their personal information, on request, in accordance with the *Privacy Act*. Questions or comments regarding your privacy may be directed to the Privacy Co-ordinator by e-mail at Patrice.Bellerose@cta-otc.gc.ca or by telephone at 819-994-2564 or 1-888-222-2592 or TTY at 1-800-669-5575.

This is Exhibit G

to the Affidavit of Catherine Murphy

sworn this 1st day of October, 2009



Commissioner for Taking Affidavits, etc.

Government of Canada / Gouvernement du Canada

Canada

Home > Information Bulletin

Information Bulletin

On May 27, 2009, the Heads of Federal Administrative Tribunals Forum (the Forum) adopted the following statement on the use of personal information in decisions of administrative tribunals and the posting of decisions on the websites of administrative tribunals.

Statement on the use of personal information in decisions and posting of decisions on websites

The Forum considers it important to encourage, to the extent possible, a consistent approach to the use of personal information by administrative tribunals in their decisions and posting of decisions on websites for those administrative tribunals that operate in accordance with the open court principle or that have enabling legislation specifying that their proceedings are in the public interest and that post full texts of their written decisions on their website.

The Forum believes that any policy in this regard should endeavour:

- to strike a balance between the open court principle and the privacy concerns of individuals availing themselves of their rights before administrative tribunals;
- to provide its members with a set of principles for the protection of personal information in conformity with which each administrative tribunal may voluntarily adopt individual measures adapted to its specific needs;
- to avoid placing administrative tribunals in the position of being required to prepare multiple versions of their decisions; and
- to assist administrative tribunals in determining the extent to which names and specific personal information should be included in their reasons for decisions.

The Forum recognizes that the *Protocol for the Use of Personal Information in Judgments* approved by the Canadian Judicial Council in May 2005 (the CJC *Protocol*) provides helpful guidance in assessing what personal information is relevant and necessary to support the reasons for a decision and clearly recognizes the benefits of allowing decision makers to make that assessment.

The Forum further recognizes that the "web robot exclusion protocol", which is respected by commonly used Internet search engines to restrict the global indexing of specifically designated documents posted on websites, is an acceptable technical means for providing fair protection to personal information contained in administrative tribunals' decisions posted on their websites.

While respecting the legitimate needs of administrative tribunals to develop practices that best address the specific concerns of the proceedings they administer, the Forum encourages each of its member organizations that operates in accordance with the open court principle or that has enabling legislation specifying that its proceedings are in the public interest, and that posts full texts of its written decisions on its website, to consider implementing, when appropriate, all or some of the following:

- referring its website, by hyperlink, to this statement on the Forum's website and to the CJC *Protocol* posted on the Canadian Judicial Council's website;
- adopting the CJC *Protocol*;
- making the CJC *Protocol* part of any training program offered to its decision makers;
- applying the "web robot exclusion protocol" to all full-text decisions containing personal information posted on its website;
- giving notice to individuals availing themselves of their rights before it (e.g. on its website,

in its administrative letters opening case files and on the forms that parties must complete to initiate proceedings) that it posts its decisions in full on its website.

Click here to read the statement >

Background:

The HFATF is a community of Chairs of federal administrative tribunals. Some of these tribunals operate in accordance with the open court principle. Others have enabling legislation specifying that their proceedings are in the public interest.

On October 29, 2008, the HFATF struck a working group on the use of personal information in decisions of administrative tribunals and the posting of decisions on the websites of administrative tribunals. On January 19, 2009, the working group presented its report to the HFATF members. Following further discussions and meetings, the working group developed a position statement on the issue. This statement was adopted by the HFATF on May 27, 2009.

The HFATF members would like to extend their thanks to the working group for carrying out their mandate in a thorough and timely manner:

Serge-Marc Brazeau (working group leader)
Senior Counsel, Public Service Labour Relations Board

Claude Jacques
General Counsel, Canadian Transportation Agency

Julianne C. Dunbar
General Counsel, Military Police Complaints

Rachel Dugas
Legal Counsel, Public Service Staffing Tribunal

Greg Miller
Counsel, Canadian Human Rights Tribunal

Date Modified: 10-07-09

This is Exhibit H

to the Affidavit of Catherine Murphy

sworn this 1st day of October, 2009

CLAUDE JACQUES AVOCAT
176294-0
BARREAU DU QUÉBEC

Commissioner for Taking Affidavits, etc.

Use of personal information in decisions and posting of decisions on websites

The Forum considers it important to encourage, to the extent possible, a consistent approach to the use of personal information by administrative tribunals in their decisions and posting of decisions on websites for those administrative tribunals that operate in accordance with the open court principle or that have enabling legislation specifying that their proceedings are in the public interest and that post full texts of their written decisions on their website.

The Forum believes that any policy in this regard should endeavour:

- to strike a balance between the open court principle and the privacy concerns of individuals availing themselves of their rights before administrative tribunals;
- to provide its members with a set of principles for the protection of personal information in conformity with which each administrative tribunal may voluntarily adopt individual measures adapted to its specific needs;
- to avoid placing administrative tribunals in the position of being required to prepare multiple versions of their decisions; and
- to assist administrative tribunals in determining the extent to which names and specific personal information should be included in their reasons for decisions.

The Forum recognizes that the *Protocol for the Use of Personal Information in Judgments* approved by the Canadian Judicial Council in May 2005 (the CJC *Protocol*) provides helpful guidance in assessing what personal information is relevant and necessary to support the reasons for a decision and clearly recognizes the benefits of allowing decision makers to make that assessment.

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While respecting the legitimate needs of administrative tribunals to develop practices that best address the specific concerns of the proceedings they administer, the Forum encourages each of its member organizations that operates in accordance with the open court principle or that has enabling legislation specifying that its proceedings are in the public interest, and that posts full texts of its written decisions on its website, to consider implementing, when appropriate, all or some of the following:

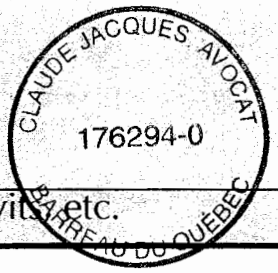
- referring its website, by hyperlink, to this statement on the Forum's website and to the CJC *Protocol* posted on the Canadian Judicial Council's website;
- adopting the CJC *Protocol* ;
- making the CJC *Protocol* part of any training program offered to its decision makers;
- applying the "web robot exclusion protocol" to all full-text decisions containing personal information posted on its website;
- giving notice to individuals availing themselves of their rights before it (e.g. on its website, in its administrative letters opening case files and on the forms that parties must complete to initiate proceedings) that it posts its decisions in full on its website.

Date Modified: 10-08-09

This is Exhibit I

to the Affidavit of Catherine Murphy

sworn this 1st day of October, 2009



Commissioner for Taking Affidavits, etc.

Judges' Technology Advisory Committee

Use of Personal Information in Judgments and Recommended Protocol

Approved by the Canadian Judicial Council, March 2005

Contents

Background

[1] The JTAC Open Courts and E-Access to Court Records and Privacy Subcommittee was asked in February, 2004 to consider developing and implementing a standardized national protocol to de-identify family judgments which would allow all of them to be posted on court websites (see the Council's Discussion Paper on *Open Courts, Electronic Access to Court Records, and Privacy*, available at { HYPERLINK "http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf" }).

[2] The subcommittee drafted a recommended protocol that was endorsed by JTAC on February 4, 2005. It should be noted that this protocol extends to all judgments in which sensitive personal information or information subject to publication bans may be contained as it is clear that these issues are not limited to family cases.

Threshold Questions

[3] In fulfilling its mandate, the subcommittee has identified two threshold questions that should be considered and debated by JTAC in the context of considering the recommended protocol.

I. Who should be responsible to ensure that the content of judgments conforms with publication bans?

II. Is it desirable for courts to publish all of their judgments on the internet given the answer to question one as well as other policy considerations?

The threshold questions are dealt with separately as a preface to the protocol.

Discussion of Threshold Questions

I. Responsibility for the Contents of Judgments

[4] A question has been raised about whether judges should take responsibility for ensuring that the contents of their judgments do not violate publication bans or whether this should remain in the hands of publishers. Traditionally, the courts have left the dissemination and publication of their judgments to publishers. As a result most publishers have adopted guidelines and employed editing staff to remove sensitive identifying information from judgments in cases subject to publication bans and in some instances, in all cases falling within a particular category regardless of whether there is an order banning the disclosure of this information. It would appear that the latter practice is, at least in part, a protective measure against the situation where the existence of a publication ban is not communicated to the publisher by the court. Now several courts across Canada have themselves become publishers by posting judgments on their own websites and are facing the same issues.

[5] One potential advantage to having a publisher deal with editing the judgments to conform with publication bans and non-disclosure provisions is that judges can focus on writing a decision that is most meaningful to the parties and do not have to concern themselves with whether the contents of the judgment, when more widely circulated beyond the parties, might violate a publication ban. One disadvantage of placing the onus on a publisher is that the court, not the publishers, is in the best position to be aware of the existence of publication bans. Moreover, this is not an option for those courts that publish decisions directly on their websites and do not have the resources to employ staff to edit those judgments. In addition, there is likely to be inconsistency between publishers as to how judgments are edited and this will be particularly acute when the same judgment is edited in different ways by different publishers. When the editing process takes place during the drafting stage, this is avoided.

[6] In considering this question, it is relevant to consider who bears the responsibility to ensure that judgments which contain information subject to publication bans are not published in contravention of a publication ban. The sub-committee also considered what liability may flow from the breach of a publication ban through the posting of a judgment on a court website. Courts are not immune from censure for the failure to withhold court information that is subject to a non-disclosure provision. In *Re (F.N.)*, [2000] 1 S.C.R. 880, the Supreme Court of Canada held that the court staff of the St. John's Youth Court had breached the non-disclosure provisions of the *Young Offenders Act* by routinely distributing its weekly Youth Court docket to local school boards. One of the dockets distributed disclosed the name of the appellant and the fact that he was charged with two counts of assault and breach of probation. The young person sought an order of prohibition. Although there were several exceptions to the relevant disclosure provisions in the

Young Offenders Act, none of them were found to justify the disclosure made by the court's staff.

[7] Provisions for publication bans on the identity of victims, complainants and young persons set out in the *Criminal Code* and the *Youth Criminal Justice* Act include an exception for the disclosure of information "in the course of the administration of justice where it is not the purpose of the disclosure to make the information known in the community" (see section 486(3.1) of the *Criminal Code* and section 110(2)(c) of the *Youth Criminal Justice Act*). While the dissemination of judgments may be part and parcel of the administration of justice, it is doubtful that the publication of judgments on the internet would be found to fall within this exception as the whole purpose of posting judgments is to inform the public and facilitate access to the decisions of the court.

[8] It seems equally clear that publishers not connected with the courts also have a responsibility to ensure that judgments published by them conform to the law in respect of publication bans.

[9] The sub-committee recommends that the ultimate responsibility to ensure that reasons for judgment comply with publication bans and non-disclosure provisions should rest with the judge drafting the decision. The sub-committee recognizes that judges need support in the form of information and resources to ensure that this responsibility can be carried out. The sub-committee recommends that the protocol, if adopted, be proposed as a part of the curriculum of the judgment writing course offered by the National Judicial Institute. It is also recommended that the Chief Justices in each jurisdiction be encouraged to provide informational support by maintaining an up to date document which informs judges of the publication ban and statutory non-disclosure provisions applicable in their jurisdiction similar to the compendium appended to the discussion paper *Open Courts, Electronic Access to Court Records and Privacy.*[1]

II. Desirability of Placing All Judgments on the Internet

[10] One of the purposes of the protocol is to encourage each court to post all of its judgments to its website. The subcommittee has debated whether this is desirable. Providing public access to reasons for judgment is an important aspect of the open courts principle as it allows for justice to be seen to be done. Having judgments available on court websites enhances access to the courts. Free access to all decisions of the court also facilitates research for the legal profession, the media, and the public. On the other hand, concerns have been raised about the need to place certain judgments, particularly family judgments which contain sensitive personal information which may be relevant only to the parties before the court, on the internet for all to see.

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[1] On-line: The Canadian Judicial Council <http://www.cjc-ccm.gc.ca/cmslib/general/OpenCourts-2-EN.pdf>.

[11] In debating this question, the sub-committee considered the risks of placing judgments on court websites. One potential risk examined was liability for defamation and whether posting a judgment to the internet constitutes publication for the purposes of the law of defamation. Posting material on the internet has been held to constitute publication for the purposes of the law of defamation[2]. However, judges enjoy an absolute privilege to write and speak without legal liability for defamation when doing so in the context of a judicial proceeding.[3] This includes written reasons for judgment.[4] One author describes the rationale for this immunity from prosecution as follows:

> ... in the proper administration of justice, the participants in such proceedings should feel free to speak freely, frankly, openly and candidly and not be subject to constraints inhibiting the disclosure of the processing of information essential to the judicial process or be left open to fear of influence by fear of a possible defamation action and the vexation of having to defend them.... The privilege promotes the search for the truth, the very heart of the process.[5].

[12] It has been held that this immunity is unchanged by the fact that a judge has permitted his or her judgment to be broadcast through the communications media.[6] However, the publishing of judgments on court websites is a function performed by court staff. This immunity has been held to extend to court staff who carry out the administrative duties.[7] Thus, it would appear that there is little risk of liability for defamation for court staff in posting judgments to court websites.

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[2] *Vaquero Energy Ltd. v. Weir*, 2004 ABQB 68; *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329; *Ross v. Holley*, [2004] O.J. No. 4643

[3] Linden, *Canadian Tort Law*, 6th Ed. (Toronto: Butterworths, 1997) at 699.

[4] *Stark v. Auerback* (1979), 11 B.C.L.R. 355 (S.C.)

[5] Brown, *The Law of Defamation in Canada*, 2nd Ed. Looseleaf (Toronto: Carswell, 1999) at para 12.4(1).

[6] *Irwin v. Ashurst*, 158 Or 61, 74 P.2d 1127 (1938) as quoted in Brown, *supra* at para 12.4(4)(b)

[7] *Crispin v. Registrar of the District Court*, [1986] 2 N.Z.L.R. 246 (H.C.). Here the plaintiff, Crispin, was incorrectly named as a defendant in a default summons. He took steps to have the correct defendant substituted in the pleadings. In spite of this correction, when the registrar entered default judgment, he mistakenly entered Crispin's name in the civil record book as the defendant. This information was then subsequently published in a local weekly business publication. The court found that the registrar was exercising a judicial function in entering the name in the civil record book and on that basis held that he was immune from prosecution for defamation. However, the court went on to consider whether judicial immunity extends to court staff performing purely administrative functions. The court held as follows at page 252:

> The immunity is not confined to words spoken or written in a Courtroom. It extends to at least some categories of documents prepared outside a Courtroom collateral to the case concerned. Well known examples are briefs of evidence for witnesses as in *Thompson v. Turbott*, pleadings as in *Atkins v. Mays*, and written decisions or findings as in *Jekyll v. Sir John Moore* (1806) 6 Esp 63 and *Addis v. Crocker* [1961] 1 QB 11. The authors of such decisions are entitled to immunity. Logically, those responsible for recording and directing such decisions should have like protection. The underlying policy is that those required to exercise judicial functions should have

[13] Although the sub-committee was not able to come to a unanimous view on this question, it recommends that courts be encouraged to post all of their written judgments on their own court websites or make them available to other publicly accessible sites such as the site hosted by CANLII. While there may be privacy concerns associated with doing so, a majority of the sub-committee holds the view that these concerns are outweighed by the benefits of facilitating open access to the decisions of the court and that any adverse impacts on the privacy of justice system participants can be significantly reduced by following the guidelines set out in the attached protocol.

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freedom to speak and act without fear of reprisal. That will be subverted if, while the author is free from attack, his subordinates in the form of officers of the Court required to record and despatch his decisions are not protected. Obviously a judge must not be in a position where he knows that what he does or says may expose the staff of his Court to a personal liability.... The position of a Registrar who records a judgment will indeed involve "perilous duty" if not protected by immunity, and the judiciary will indeed have a very weak flank if despite individual immunity for Judges, Court staff are open to attack. I have no doubt that even if a registrar recording entry of a judgment by default is at that stage merely acting administratively, he is protected by the immunity. The administration of justice requires it.

Recommended Protocol for the Use of Personal Information in Judgments

I. Why a Protocol is Needed

[14] The principle of open justice is a cornerstone of our judicial system. Except in the most exceptional of cases, proceedings before the court are open to the public. Generally speaking, the identity of participants in court proceedings is a matter of public record and, for the most part, individuals are not protected from being named in reasons for judgment. However, it is also clear that there are times when the privacy interests of participants in the judicial system outweigh the public interest of open justice. This is reflected in legislative and common law restrictions on the publication of certain personal facts or information disclosed in court documents, proceedings, and reasons for judgment.

[15] In the past, judgments were made accessible to the public through court registries and legal publishers. Decisions were published through law reports and were traditionally available only at law libraries and more recently, through electronic subscription services. Where publication bans were ordered by the court, commercial case law reporters traditionally assumed the task of editing reasons before publication to ensure compliance with the law.

[16] In the past ten years, court decisions have been made much more widely available over the internet on court websites. Judicial decisions are now available free of charge to any member of the public who has access to a computer and an internet connection. This is a very positive development which greatly enhances access to justice by giving more members of the public the opportunity to understand how court decisions are made. At the same time, the wide dissemination of decisions by the courts over the internet has raised new privacy concerns that must now be addressed by the courts and the judges. Reasons for judgment in any type of proceeding before the court can contain personal information about parties to the litigation, witnesses, or third parties with some connection to the proceedings. Beyond the restrictions imposed by legislative and common law publication bans, some have begun to question the need to disseminate sensitive personal information in judgments which are posted on the internet.

[17] Courts across Canada have developed a variety of different solutions to protect the privacy of the parties and others involved in litigation. Although concerns about personal information can arise in any type of proceedings, decisions involving family law matters are particularly sensitive. Some courts do not publish family law decisions on their websites; others publish only headnotes, using initials; while others publish the decisions with full names. The anomalies in the electronic publishing of judgments across jurisdictions were highlighted in the *Discussion Paper on Open Courts, Electronic Access to Court Records and Privacy* prepared by the Judges Technology Advisory Committee for the Canadian Judicial Council at

paragraphs 55 to 57. The uneven dissemination of family law judgments across the country has caused some concern among the public and legal community as the internet has come to be a resource heavily relied upon by the public, lawyers and the media for information on noteworthy decisions and case law research.

II. Objectives of the Protocol

[18] The purpose of the protocol is to encourage consistency in the way judgments are drafted when publication bans apply or when the privacy interests of the parties and others involved in proceedings should be protected. It is preferable to have judges address these issues when their decisions are drafted, rather than to have decisions either edited inconsistently by the various publishers after they are issued, or to have judgments removed from the scrutiny of the public and the legal community by not posting them to court websites. It is hoped that through use of the protocol, courts will be encouraged to publish all of their decisions on the internet and to reconsider whether it is necessary to exclude certain classes of cases from internet publication to adequately protect privacy.

[19] This protocol is intended to assist judges in striking a balance between protecting the privacy of litigants in appropriate cases and fostering an open judicial system when drafting reasons for judgment. As noted above, unless there are publication bans in place with respect to the name of a party, individuals, are generally not protected from being named when involved in court proceedings. However, even in cases where no publication ban is in place, it may still be appropriate for a judge when drafting reasons to omit certain personal information from a judgment in the interest of protecting the privacy of the litigants or other participants in the proceedings. The protocol establishes some basic types of cases where individual identities or factual information needs to be protected and suggests what types of information should be removed. There are four objectives which must be taken into account when determining what information should be included or omitted from reasons for judgment:

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.

[20] Compliance with the law relates to decisions where there are legal publication restrictions in place. Openness of the judicial system requires that even where restrictions are in place or a case involves highly personal information, such as in family matters, the public still should have access to the relevant facts of the case and the reasons for the judge's decision. The tensions among these objectives need to be considered when editing judgments for privacy concerns. For example,

publishing egregious facts in a case may be seen to violate privacy concerns of a litigant, but if these facts are highly relevant to the case and in particular, to an understanding of the decision reached, their omission would deny the public full access to the judicial system. It is also important to ensure that judgments are understandable and that the removal of information does not hinder the ability of the public to comprehend the decision that has been reached.

III. Levels of Protection

[21] The protocol addresses the following three levels of protection:

A. **Personal Data Identifiers:** omitting personal data identifiers which by their very nature are fundamental to an individual's right to privacy;

B. **Legal Prohibitions on Publication:** omitting information which, if published, could disclose the identity of certain participants in the judicial proceeding in violation of a statutory or common law restriction on publication; and

C. **Discretionary Protection of Privacy Rights:** omitting other personal information to prevent the identification of parties where the circumstances are such that the dissemination of this information over the internet could harm innocent persons or subvert the course of justice.

A. Personal Data Identifiers

[22] The first level of protection to be considered relates to information, other than a person's name, which serves as part of an individual's legal identity. This type of information is typically referred to as personal data identifiers and includes:

- day and month of birth;
- social insurance numbers;
- credit card numbers; and
- financial account numbers (banks, investments etc.).

[23] This type of information is susceptible to misuse and, when connected with a person's name, could be used to perpetrate identity theft especially if such information is easily accessible over the internet. Individuals have the right to the privacy of this information and to be protected against identity theft. Except in cases where identification is an issue, there is rarely any reason to include this type of information in a decision. As such, this type of information should generally be omitted from all reasons for judgment. If it is necessary to include a personal data identifier, consideration should be given to removing some of the information to obscure the full identifier.

B. Legal Prohibitions on Publication – Statutory and Common Law Publication Bans and Legislative Restrictions

[24] Publication bans are imposed either by order of the court or through the operation of a federal or provincial statute. The most common bans occur in the context of *Youth Criminal Justice Act* matters, criminal pre-trial proceedings, criminal jury matters and criminal proceedings relating to sexual and other violent criminal offences. Typically, these bans prohibit the publication of the identity, or any information which would disclose the identity, of a complainant, witness or youth dealt with under the *Youth Criminal Justice Act*. Provincially there may also be statutory bans in proceedings involving adoption, family law, child protection, health and social assistance statutes, as well as some professional discipline statutes.

[25] Appendix A provides guidelines for the removal of names from a decision where it is appropriate to do so. However, avoiding the use of the name of the person who is sought to be protected by a publication ban is often not sufficient in and of itself to prevent disclosure of identity. Sometimes further information connected to the individual must also be omitted to ensure that the identity is protected. The following general considerations may be helpful in determining what further information should be avoided to comply with a publication ban:

- The presence of **personal data** (e.g., address, account numbers) and **personal acquaintances' information** (e.g., personal data of parents, workplace, school) in a decision represents a high risk of disclosure of identity and should not be included in a judgment where there is a prohibition on publishing the identity of a person.

- With respect to the ability of the public to understand why a decision was reached, **specific factual information** (names of communities, accused persons or persons acting in an official capacity) tends to have little or no legal relevance in and of itself, while **general factual information** (age, occupation, judicial district of residence) tends to be more relevant.

- Sometimes the presence of **specific factual information** could increase the risk of identification. This type of information should also be avoided unless it is clear that once **personal data** is eliminated from the judgment, there is a minimal risk of identification through this **specific factual information**. Caution should be exercised here as often leaving such specific factual information out can impair the readability of the reasons for judgment.

- The presence of **general factual information** in a decision tends to represent a low risk of identification of a person if **personal data** (e.g., name, address) and **personal acquaintances** have not been included.

[26] Avoiding **personal data, personal acquaintances' information** and **specific factual information** will generally be sufficient to prevent the disclosure of the identity of the person sought to be protected by the ban. The following list more specifically identifies the types of information which falls into these three categories of information.

1. Personal Data

[27] Personal data is information that allows for direct or indirect contact with a person. This would include:

- Names, nicknames, aliases;
- Day and month of birth;
- Birthplace;
- Addresses – street name and number, municipality, postal code, phone, fax, e-mail, URL, IP address;
- Unique personal identifiers (e.g., numbers, images or codes for social security, health insurance, medical record, passport, bank or credit card accounts);
- Personal possession identifiers (e.g., licence or serial number, property or land identification, corporate or business name).

2. Personal Acquaintances Information

[28] Personal acquaintances information is names and other personal data of persons or organizations with which a person is directly involved. This type of information would include names and other personal data of:

- Extended family members: parents, children, brothers and sisters, in-laws, grandparents, cousins;
- Foster family members, tutors, guardians, teachers, babysitters;
- Friends, co-habiting persons, lessors, tenants, neighbours;
- Employers, employees, co-workers, business associates, schools, sports teams.

3. Specific Factual Information

[29] This type of information includes:

- Names of communities or geographic locations;
- Names of accused or co-accused persons (if not already included in the publication restriction);
- Names of persons acting in an official capacity (e.g., expert witnesses, social workers, police officers, physicians);

- Extraordinary or atypical information on a person (e.g., renowned professional athlete, very large number of children in the family, unusually high income, celebrity).

[30] If personal data and any other potentially identifying information is avoided in the judgment, certain other types of specific factual information may be safely included if doing so will improve readability and is required to explain the rationale for the decision. The possibility that some people in the local area may be able to deduce the individual involved by piecing together the specific factual information should not outweigh the public interest in providing a cohesive, reasoned decision. This type of information would include:

- Year of birth, age;
- Gender and sexual orientation;
- Race, ethnic and national origin;
- District, jurisdiction and country of birth and residence;
- Professional status and occupation;
- Marital and family status;
- Religious beliefs and political affiliations.

C. Discretionary Protection of Privacy Rights

[31] Absent a legislative or common law publication ban, there may be exceptional cases where the presence of egregious or sensational facts justifies the omission of certain identifying information from reasons for judgment. However, such protection should only be resorted to where there may be harm to minor children or innocent third parties, or where the ends of justice may be subverted by disclosure or the information might be used for an improper purpose. In such a situation it may be necessary to avoid the use of information which identifies the parties in order to protect an innocent third party.

[32] 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.

[33] Cases in which it may be appropriate to exercise a discretion to remove personal identifying information may include those involving allegations of sexual assault or exploitation or the sexual, physical or mental abuse of children or adults.

In such cases, consideration should be given to whether the identity of the victims should be included in reasons for judgment. The abuse of children may be severe enough to warrant name protection if the children were subjected to serious physical or psychological harm. The protection might also be extended in situations where the child welfare authorities have been contacted concerning abuse or lack of care, or if there is any mention of child protection proceedings, foster care, guardianship or wardship. In divorce or custody proceedings where allegations of sexual abuse are made, consideration could be given to protecting the identity of all family members, even where the allegation is unfounded. In proceedings where a paternity issue is raised, it may also be appropriate to protect the identity of the children involved.

References:

Alberta Courts Website Privacy Policy (Revised May 17, 2002) (contact Kate Welsh, Privacy Officer)

Brenner, Chief Justice Donald I. and Hoffman, Judith, *Electronic Filing, Access to Court Records and Privacy*, Report Prepared for the Administration of Justice Committee, Canadian Judicial Council (March, 2002)

British Columbia Court of Appeal "*Guidelines for Protecting Privacy Interests in Reasons for Judgment*" (2004)

Open Courts, Electronic Access to Court Records, and Privacy, Discussion Paper prepared on behalf of the Judges Technology Advisory Committee, Canadian Judicial Council, (May 2003)

Pelletier, Frédéric, *Protecting Identities in Published Case Law* (December 12, 2003)

Quicklaw Case Name Indexing Manual (July 2001)

Appendix A

Removing Names from Decisions

[34] Where it is considered to be appropriate to avoid using a name in a decision, the name should be replaced either with initials, omission marks or both, as provided for below. Initials are used to allow for the creation of a wider variety of case names (e.g., "*M.L. v. D.L.*").

[35] In very rare instances where initials, combined with the facts of the case, would clearly reveal the identity of an individual or of an organization, the letter "X" is used to replace the name instead of initials. For an additional individual or organization, the letter "Y" is used for the second individual/organization named, then "Z" for the third, "A" for the fourth, "B" for the fifth, and so on.

[36] The same initials are used to replace each occurrence of an individual or an organization's name throughout the judgment, including cover pages and headnotes, even if there are variations in the way this individual/organization is referred to in the decision.

[37] If the judge has expressly used a fictitious name to replace a real name, this fictitious name must be used throughout the decision.

A. Name of an Individual

[38] When the name of an individual must be replaced, the full initials of the name are used: one initial for each forename and one initial for the surname.

[39] Only one initial is used for a compound or hyphenated forename or surname.

Examples:

Name	Replaced by:
Mary Jane Davis	M.J.D.
Linda S. St-James	L.S.S.
Kate van de Wiel	K.V.
John McKeown	J.M.
Sean O'Neil	S.O.
Marie-Claude Desbien-Marcotte	M.D.
Simon B. de Grandpré	S.B.D.

[40] To avoid confusion between many individuals who have the same initials, a fictitious initial is added after the first forename of the other persons named in the decision that have the same initials. This fictitious initial is the second letter of the person's first forename for the second one named, the third letter for the third named, and so on.

Examples

Names	Replaced by
John McKeown and James Morgan	J.M. and J.A.M.
Mary Jane Davis and Mark John Dalton	M.J.D. and M.A.J.D.
Mary, Mark and Mario Davis	M.D., M.A.D. and M.R.D.

B. Name of an Organization

[41] When the name of an organization is to be avoided (e.g., for a person's employer, a business, a community or a school), only its first initial is used, followed by omission marks.

Examples

Names	Replaced by
Air Canada	A....
John McCain Auto Parts Inc.	J....
Sydney Steel Corporation	S...
Municipality of Truro	T...

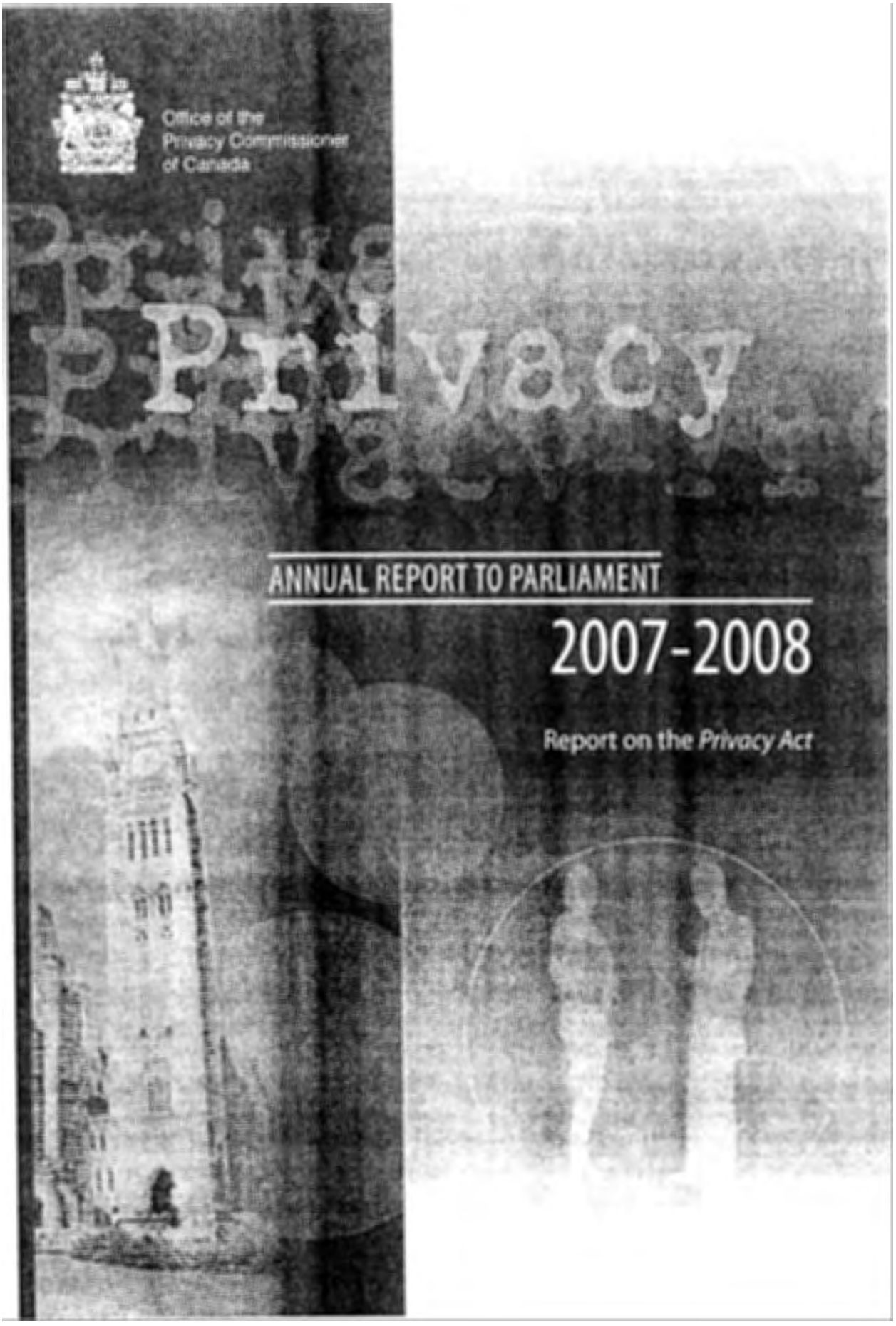
[42] To avoid confusion between two organizations which are being referred to by initials but have the same initial, a second letter is added to the initial of the name of the second organization named in the decision that has the same initial. This second letter is the second letter of the organization's name for the second one named, the third letter for the third named, and so on.

Examples

Names	Replaced by
Air Canada and Alimport Inc.	A... and A.L....
Air Canada, Alimport and Alcan	A..., A.L.... and A.C....

This is Exhibit J
to the Affidavit of Catherine Murphy
sworn this 9th day of October, 2009

Commissioner for Taking Affidavits, etc.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Privacy Commissioner
of Canada
Privacy
ANNUAL REPORT TO PARLIAMENT
2007-2008
Report on the Privacy Act

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December 2008

The Honourable Noël A. Kinsella, Senator
The Speaker
The Senate of Canada
Ottawa, Ontario K1A 0A4

Dear Mr. Speaker:

I have the honour to submit to Parliament the Annual Report of the Office of the Privacy Commissioner of Canada on the *Privacy Act* for the period from April 1, 2007 to March 31, 2008.

Sincerely,

Jennifer Stoddart

Jennifer Stoddart
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December 2008

The Honourable Peter Milliken, M.P.
The Speaker
The House of Commons
Ottawa, Ontario K1A 0A6

Dear Mr. Speaker:

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Sincerely,

Jennifer Stoddart

Jennifer Stoddart
Privacy Commissioner of Canada

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ADMINISTRATIVE AND QUASI-JUDICIAL BODIES:
BALANCING OPENNESS AND PRIVACY IN THE INTERNET AGE

Complaints to the OPC highlight concerns about federal administrative and quasi-judicial tribunals posting highly sensitive personal information to the web

Highly personal information about Canadians fighting for government benefits and taking part in other federal administrative and quasi-judicial proceedings is being posted to the Internet – exposing those people to enormous privacy risks.

In 2007-2008, the OPC investigated 23 complaints regarding the disclosure of personal information on the Internet by seven bodies created by Parliament to adjudicate disputes. (We received three more similar complaints in May 2008.)

These administrative and quasi-judicial bodies consider issues such as the denial of pension and employment insurance benefits; compliance with employment and other professional standards; allegations of regulatory violations; and irregularities in federal public service hiring processes.

The adjudication process often involves very intimate details related to people's lives, including their financial status, health, job performance and personal history.

Few would question the fundamental importance of transparency in tribunal proceedings.

But is it in the public interest to make considerable amounts of an individual's sensitive personal information indiscriminately available to anyone with an Internet connection?

Why should a law-abiding citizen fighting for a government benefit be forced to expose the intimate details of her personal life to public scrutiny?

Why should a law-abiding citizen fighting for a government benefit be forced to expose the intimate details of her personal life to public scrutiny?

The Human Impact

The decisions of administrative and quasi-judicial decision-makers are routinely packed with personal details that not many people would be comfortable sharing widely: salaries, physical and mental health problems as well as detailed descriptions of disputes with bosses and alleged wrongdoing in the workplace.

"Anybody, anywhere in the whole world, who types my name comes immediately to this personal information.... this situation leaves me open to criticism and mockery."

In addition to the types of personal information legitimately needed in these bodies' reasons for decision, seemingly irrelevant information is often included – the names of participants' children; home addresses; people's place and date of birth; and descriptions of criminal convictions for which a pardon has been granted, for example.

Many complainants told us they were distressed to discover – typically with no prior notice – that this type of information about them was available on the Internet for neighbours, colleagues and prospective employees to peruse.

The following are some of the comments we heard:

"By posting my name, I feel violated in my privacy and this could adversely affect my prospects for jobs, business and my image in the community. I have never given consent."

"Anybody, anywhere in the whole world, who types my name comes immediately to this personal information.... this situation leaves me open to criticism and mockery."

"I'm at a loss to understand why this would have been done, except to think that this is further punitive measures taken against me."

The potential for embarrassment, humiliation and public ridicule is significant. A long-ago legal transgression or temporary lapse in judgment could continue to haunt an individual for many, many years into the future.

Individuals whose personal information, particularly financial information, is disclosed on the Internet may be at greater risk of identity theft. They also face a risk of discrimination, harassment and stalking. The information could also be used by data brokers that compile profiles of individuals.

A list of the bodies whose practice of posting personal information online have resulted in complaints investigated by the OPC in 2007-2008:

Canada Appeals Office on Occupational Health and Safety

The Canada Appeals Office on Occupational Health and Safety (CAO), now known as the Occupational Health and Safety Tribunal Canada, is a quasi-judicial administrative tribunal that determines appeals of decisions and directions issued by health and safety officers. It operates under the auspices of Human Resources Development Canada. Decisions rendered by this tribunal may include an individual's name, coupled with that person's personal opinions or views and place of employment.

Military Police Complaints Commission

The Military Police Complaints Commission is an independent federal body that oversees and reviews complaints about the conduct of Military Police members. The Commission is empowered to: review the Provost Marshal's handling of complaints concerning the conduct of Military Police; deal with complaints alleging interference in military police investigations; and conduct its own investigations or hearings related to complaints when the Commission believes that doing so is in the public interest.

All of the Military Police Complaints Commission decisions are vetted by the Commission with a view to the standards expressed in the *Privacy Act*. Most decisions rendered by the Military Police Complaints Commission are published on the Internet in summary and depersonalized form. Where decisions are not depersonalized, they may contain extensive personal information about military police members.

Pension Appeals Board

The Pensions Appeal Board is responsible for hearing appeals flowing from decisions of the Canada Pension Plan Review Tribunals. A hearing before the board may be initiated by an individual seeking Canada Pension Plan (CPP) benefits or by the Minister of Social Development. The board has the authority to determine, among other things, whether benefits under the CPP are payable to an individual.

Board decisions reveal a considerable amount of sensitive personal information about individuals seeking benefits, including dates of birth, detailed family, education and employment histories, extensive personal health information and personal financial data.

Public Service Commission

The Public Service Commission is a quasi-judicial tribunal that may conduct investigations and audits on any matter within its jurisdiction, including safeguarding the integrity of appointments and in overseeing the political impartiality of the federal public service. Its decisions may include information relating to individuals' education or medical or employment history.

Public Service Staff Relations Board

The board, which has been replaced by the Public Service Labour Relations Board, was a federal tribunal responsible for administering the collective bargaining and grievance adjudication systems in the federal public service.

Decisions may include descriptions of individuals' conduct and issues at work as well as disciplinary sanctions they've faced.

RCMP Adjudication Board

An RCMP Adjudication Board conducts formal disciplinary hearings respecting RCMP members' compliance with the Code of Conduct adopted under the *Royal Canadian Mounted Police Act*. Decisions include information about alleged misconduct, and, in some cases, other personal information such as an officer's marital situation and medical information. Adjudication Board decisions, which include the names of individuals, are published on the RCMP intranet, although the Board has advised that it intends to post its decisions on the Internet.

Umpire Benefits Decisions (Service Canada)

The *Employment Insurance Act* permits claimants and other interested parties to appeal to an umpire certain decisions rendered under that Act. An umpire is empowered to decide any question of fact or law that is necessary for the disposition of an appeal.

Decisions by an umpire tend to reveal detailed information about the employment history of claimants. A typical decision might also reveal information about a claimant's place of residence, marital status and sources of income.

Access to Justice

Another concern we have is that access to justice could suffer if tribunals, boards and other administrative decision makers continue to post decisions on the Internet.

The risk of having one's personal details made public may make people increasingly reticent to assert their rights in administrative and quasi-judicial proceedings. People trying to obtain benefits required to provide food and shelter for themselves and their families may feel that participation in tribunal proceedings is essentially mandatory – and that they have no option other than to give up their right to privacy.

In some cases, however, individuals have declined to exercise their legal right to appeal administrative decisions that significantly impacted them because of the loss of privacy this would entail.

"Open Court" Principle

The widespread practice of posting reasons for decisions on the Internet appears to be based on the assumption by decision makers that the rules – or lack of rules – which apply to judicial proceedings apply equally to administrative and quasi-judicial proceedings.

Many of the institutions investigated argued that the "open court" principle required the online publication of decisions.

The open court principle is an important part of our legal system and 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. Opening decision-making processes up to public scrutiny assists to further these goals.

However, there is an important distinction between the courts and the institutions we investigated. The *Privacy Act*, which does not apply to the courts, applies to many administrative tribunals and quasi-judicial bodies and imposes specific rules on them regarding the disclosure of personal information. Through the *Privacy Act*, Parliament may be said to have set express limits on the extent to which the open court principle could authorize publication of decisions of the administrative tribunals subject to its provisions via the Internet.

Striking a Reasonable Balance

Respect for the open court principle can co-exist effectively with government institutions' statutory obligations under the *Privacy Act* through reasonable efforts to depersonalize any decisions posted online by replacing names with random initials.

It is beyond debate that the public requires access to the information necessary to maintain confidence in the integrity of a tribunal's proceedings, to enhance the evidentiary process, to promote accountability and to further public education. Yet in most cases, these important goals may be accomplished without disclosing the name of an individual appearing before a tribunal.

The identity of individuals appearing before tribunals is not obviously relevant to the merits of any given tribunal decision. As the open court principle is intended to subject *government institutions* to public scrutiny, and not the lives of the *individuals* who appear before them, the OPC has taken the position that the public interest in accessing information about tribunals' proceedings does not obviously or necessarily extend to accessing identifying information about individual participants.

Furthering the values that the open court principle promotes will not be hindered if, consistent with government institutions' obligations under the *Privacy Act*, only de-personalized decisions that do not reveal the identities of participants are made available to the public. It is, of course, also open to tribunals to redact all personal information that would otherwise be found in reasons for decision made available to the public. However, simple suppression of direct and obvious identifiers such as names is likely to represent the most efficient and effective means of complying with the *Privacy Act*. This method of protecting privacy poses no significant threat to tribunals' independence and ensures that the facts and issues in individual cases may be fully and transparently debated in an open and accessible manner.

Where there is a genuine and compelling public interest in disclosure of identifying information that clearly outweighs the resulting invasion of privacy, institutions have the legal authority to exercise their discretion to disclose personal information in identifiable form in their decisions. For example, where the public has a compelling interest in knowing the identity of an individual who has been found guilty in disciplinary proceedings, or of someone who poses a potential danger to the public, a tribunal may exercise its discretion to disclose personal information, including that individual's name, to the public.

Likewise, where Parliament or a body empowered to make regulations has drafted a law or regulation that authorizes the disclosure of personal information, the *Privacy Act* permits disclosure of personal information in accordance with such a provision. In this way, the Act recognizes the right of lawmakers to craft disclosure regimes that are responsive to particular tribunals' mandates and the associated demands of the open court principle.

There is, thus, no intractable conflict between the rights and interests protected by the open court principle and compliance with the *Privacy Act*.

It is also noteworthy that courts, too, are increasingly recognizing the need to limit the disclosure of personal information in judgments. The Canadian Judicial Council has published a Recommended Protocol for the use of personal information in judgements. This protocol recognizes it can be appropriate for judges to omit some personal information from a judgment in the interests of protecting privacy. Where appropriate, these guidelines encourage the judiciary to omit from judgments personal data identifiers, highly specific personal information and extraneous personal information with little or no relevance to the conclusions reached.

Privacy Act Limits

During our investigation, we found there is a significant lack of consensus among administrative and quasi-judicial decision-makers on the limits that the *Privacy Act* places on the Internet disclosure of personal information in their decisions.

The decisions of most, if not all, institutions subject to the *Privacy Act* contain personal information to which the protections of the legislation apply.

The *Privacy Act* says that personal information under the control of a government institution may be disclosed for the purpose for which it was obtained or compiled, or for a use consistent with that purpose.

The OPC concluded that the blanket electronic disclosure of these bodies' reasons for decision on the intranet or Internet is not the purpose for which the information was obtained. Rather, tribunals collect personal information for the purpose of making a decision on the facts of each specific case before them.

Moreover, disclosing administrative or quasi-judicial decisions with identifiable personal information on the Internet as a matter of course was not found to be reasonably necessary for the accomplishment of the investigated institutions' mandates. It was not a disclosure for a use that was consistent with the purpose for which the personal information was obtained – particularly when the uses to which sensitive personal information would be put could not be identified in advance or controlled in any way.

...disclosing administrative or quasi-judicial decisions with identifiable personal information on the Internet as a matter of course was not found to be reasonably necessary for the accomplishment of the investigated institutions' mandates.

Under the *Privacy Act*, limits on the disclosure of personal information do not

apply to publicly available information. Some of the institutions investigated argued that the publicly accessible nature of administrative and quasi-judicial proceedings rendered the personal information discussed during those proceedings publicly available for the purposes of the Act.

However, none of those institutions presented any evidence to indicate there was any record, in any form, of the personal information disclosed during the course of proceedings that is available in the public domain. Our Office found that disclosure of personal information during a proceeding did not in itself render that information available in the public domain.

The *Privacy Act* also allows for disclosure of personal information in accordance with any Act of Parliament or regulation authorizing such a disclosure.

Some institutions argued that the disclosure of personal information was permissible due to the fact that relevant legislation or regulations did not prohibit or address disclosure. We rejected this argument. There must be some specific indication in an Act or regulation that Parliament intended to permit disclosures of personal information outside of the quasi-constitutional regime created by the *Privacy Act*. Legislative silence on the issue does not constitute a legal authority to disclose personal information.

Recommendations

In the well-founded complaints we investigated, our Office made a number of recommendations to government institutions:

- Reasonably depersonalize future decisions that will be posted on the Internet through the use of randomly assigned initials in place of individuals' names; or post only a summary of the decision with no identifying personal information.

- Observe suggested guidelines respecting the exercise of discretion to disclose personal information in any case where an institution proposes to disclose personal information in decisions in electronic form on the Internet.

- Remove decisions that form the basis of the complaints to the OPC from the Internet on a priority basis until they can be reasonably depersonalized through the use of randomly assigned initials and re-posted in compliance with the *Privacy Act*.

- Restrict the indexing by name of past decisions by global search engines through the use of an appropriate "web robot exclusion protocol;" or remove from or reasonably depersonalize all past decisions on the Internet through the use of randomly assigned initials, within a reasonable amount of time.

Response to OPC Concerns

Even after being advised of privacy issues, most government institutions were reticent to change their policies and practices.

Notwithstanding the growing number and severity of privacy threats to individuals whose personal information is posted indiscriminately on the Internet, some government institutions told us they plan to continue posting sensitive personal information as they always have.

Others took important but incomplete steps towards improved compliance with the *Privacy Act*. As a result of our investigations, some institutions have implemented technical measures to prevent the names of individuals who participate in their decision-making processes from creating "search hits" when typed into major search engines. Others have agreed to use initials in place of individuals' names.

Notably, Service Canada and Human Resources Development Canada agreed to fully implement our recommendations.

The OPC has relayed the results of its investigation to the complainants. In cases where these results were disappointing, the OPC remains committed to working with the bodies involved with a view to improving privacy protections for those who participate in administrative and quasi-judicial processes.

The varying degrees of responsiveness to the OPC's recommendations means that, even among those institutions investigated, there remains inconsistent privacy protection for Canadians who participate in these institutions' administrative and/or quasi-judicial proceedings.

It is also worth noting that many other administrative and quasi-judicial bodies post online reasons for decisions that link identifiable individuals with a great deal of sensitive personal information, but the OPC has not received complaints about them.

Next Steps

Under the *Privacy Act*, this is not a matter that we are empowered to bring before the courts for further guidance.

However, our Office is committed to continuing to work with the government institutions which have been reluctant to implement all of the recommendations. We hope that by maintaining a constructive dialogue, we will be able to persuade these organizations to take the steps necessary to protect Canadians' privacy.

We also see a need for a new government-wide policy on this privacy issue. Given the complexity of the issues involved, recommendations flowing from our investigation of a small number of institutions are not the best instruments around which to build government-wide compliance with the *Privacy Act*. A comprehensive policy document based on consultations with a wider range of government institutions is required.

We hope that by maintaining a constructive dialogue, we will be able to persuade these organizations to take the steps necessary to protect Canadians' privacy.

We have already conveyed to the Treasury Board Secretariat our view that centralized policy guidance is required. This guidance will ensure consistency in the privacy protection available to Canadians who participate in administrative and quasi-judicial proceedings.

Many institutions we investigated agreed with our view that centralized policy guidance is required and would welcome the same. They were willing to participate in consultations with Treasury Board to develop policy guidance and comply with this guidance when it took effect.

Treasury Board has advised our Office that its officials continue to work on developing guidance for federal institutions subject to the *Privacy Act* with respect to the posting of personal information on government websites. Treasury Board has also indicated that it will consult with our Office on any draft guidance that is developed.

Electronically publishing personal information contained in the administrative and quasi-judicial decisions of government institutions is risky privacy business. We look forward to working with Treasury Board on this important issue to ensure Canadians' privacy will be better protected by strong policy guidance in the future.

The trend to put more and more federal government information online raises important questions about how to balance the public interest and individual privacy rights.

While the use of the Internet to promote transparency and accountability in the federal government – posting contracts and travel expenses, for example – is a welcome development, it is clear there must be limits when it comes to the disclosure of personal information.