OBA Submission

Adjudicating Human Rights: Transparency and the Protection of Privacy in an Administrative Law Context

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Submitted to: David Wright, Interim Chair
Human Rights Tribunal of Ontario

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association (OBA) represents 18,000 lawyers from a broad range of sectors, including those working in private practice, government, non-governmental organizations and in-house counsel. Our members have, over the years, analyzed and provided comments to the Ontario government on numerous legislation and policy initiatives.

This submission was developed by a multi-section working group and has been approved by the OBA Board of Directors.

DISCLAIMER: No OBA member who is employed by the Office of the Information and Privacy Commissioner of Ontario participated in this consultation or endorsed the recommendations in this submission.

Essential File Documents

#1

Should the Tribunal routinely make available to third parties (the public) the following documents filed in a human rights application (the "essential file documents")

- **Applications, Responses, Replies and other information submitted on Tribunal forms**
- **Documents filed by the parties in support of their positions, such as exhibits and witness lists and witness statements**
- **Other correspondence between the parties and the Tribunal**

Many members of our committee believe that none of the documents listed above should be disclosed for any reason outside of the Tribunal's procedures. This view is based on a concern for protecting the privacy of the parties and not creating a chilling effect on the willingness and interest of complainants to bring matters forward to the Tribunal. There is a concern that given the often private and delicate nature of these complaints that the possibility of some or all of the file being exposed to the public will cause people to hesitate in making application to the Tribunal. As well a respondent to such a complaint is entitled to maintain their reputation until such time as matters are decided by a Vice Chair. The question posed was why the public would need to know anymore than is disclosed in a decision of the Tribunal. The experiences expressed indicated that generally administrative tribunals do not make these documents public and they are not and should not be subject to the same obligations of public access that the Courts have.

Some members held the view that those documents that formally exchange positions (the pleadings), that is an Application, Response and Reply should be available to the public at a later

stage in the proceedings, likely after a decision is made and perhaps with any personal data redacted. This view is based on considerations of both transparency and accountability.

Even with that level of disclosure it was felt that other items such as exhibits, witness lists, documents, and correspondence should always be kept confidential at all times unless and until and only after a formal information request has been directed through the IPC/O. Query whether there is not a reduced expectation of privacy when a party asks a public institution to assist in resolving a dispute and participates in its processes.

There should be a distinction between pleadings and all other documents for two reasons: One is efficiency. It seems that it would be onerous on an already overworked Tribunal to have to produce individual pieces of documentary evidence or correspondence on demand. Secondly, considering privacy concerns – witness statements and witness lists usually will contain information about non-parties who likely had no reasonable expectation that their names and contact information could be made routinely publicly available. Correspondence can also contain information regarding third parties. The privacy expectation with respect to correspondence copied to the Tribunal is different than it is with pleadings. Counsel and parties may expect that pleadings will be part of a public record. Clarifying that for the public would be a necessary and important step in this process

What considerations favour routine public access to these file documents?

Review of the pleadings might allow a better understanding of the issues raised by the parties involved in the proceedings for anyone interested in a particular case.

Since documents relating to matters that proceed before the Divisional Court from the Tribunal are made public in accordance with the Court`s practices, efforts made by the Tribunal to safeguard the privacy of parties in a proceeding could be undermined if the matter actually proceeds before the Divisional Court.

Perhaps there should be a coordinated policy on disclosure with the Court when matters are coming before it from this Tribunal

What considerations favour the non-disclosure of such documents by the Tribunal?

Privacy and a recognition that the “pleadings” are to an extent adversarial in nature and comments or positions taken in them may be exaggerated, overly critical and ultimately proven to be inaccurate. If these allegations become public knowledge in advance of a hearing and a determination by a Vice Chair they could have negative consequences outside of the specific complaint.

Do these considerations differ depending on the type of file document, as listed above?

Considerations differ depending on the type of file document. For example, "docket" information that includes the bare facts of the case (names, names of counsel, date and location of hearing) should be available to the public.

Do these considerations differ depending upon the nature of the case (e.g. sexual harassment, discrimination because of a disability for which there may be a stigma attached, such as HIV/AIDS or mental disability), or who the parties are (e.g. a minor)?

A cautious approach to disclosure should be taken, given the highly sensitive nature of many of the submissions, allegations, witness statements, expert reports, photographs, letters and other electronic and documentary evidence. For example one could imagine if the evidence included vile racist epithets or sexually explicit information disclosure could subject complainants to shame and fear of ridicule. One must be mindful that many complainants are from historically marginalized groups; broad disclosure policies may have the unintended affect of compounding their problems and allowing respondents to use disclosure requirements/ and parties with an adverse interest to use the information as a weapon against complainants. In addition, disclosure of information may create a 'chill' if witnesses and complainants know that their sensitive information is publicly available.

There may be circumstances when disclosure may be necessary or relevant, namely if needed in another legal proceeding. There should be a process available to apply with justification to gain access to information.

Generally, these considerations should not differ based on the nature of the case. It would be very difficult to develop a set of criteria as to which cases are sensitive enough to warrant a higher level of protection. For example, from a Respondent's standpoint, every case involves the serious stigma of potentially being labeled as a person who violates human rights. From the Applicants' perspective, every case is potentially sensitive and could cause damage to one's reputation.

There should never be public access in matters involving minors. Minors might be Applicants or witnesses in proceedings. While their parents might feel that there are NO privacy concerns, the minor might not share that view or position, and in many cases would not feel able to freely communicate their views.

It is our position that the identity of minors, including Applicants, Personal Respondents and witnesses, should always be protected, even when parents wish to waive such protection.

Also, in many cases, a minor will be represented by an adult with the same name or who by association could lead to the identification of the minor, in which case that name should also be kept confidential.

In some smaller communities, information such as the name of the minor's school, or the specific programs, services and protocols that are provided might assist to identify the minor, in which case, we would support the redaction of such information.

#2

If the Tribunal allows routine public access to essential file documents when should this access be given?

Only after a decision is made and the appeal period(s) have expired and then only if application is made to the Vice Chair hearing the matter for their approval to grant such access.

For example, should the Tribunal make public access to essential file documents contingent on the scheduling of a hearing? Should access to file documents only be made available on the day of the hearing or following a hearing?

As noted immediately above.

Should access to these documents only be made available if they are used in the hearing?

Yes, as anything filed but never used in the course of the Application should not be made public given the concerns expressed above.

The Tribunal offers parties to an application made under the Code the opportunity to resolve their dispute through a mediated settlement, held prior to scheduling a hearing. Should file documents be available to the public before mediation occurs, or should access be deferred until after mediation has been held?

Access should not be allowed before mediation as that could inject outside interference that would impair the ability of the matter to be dealt with at mediation.

If public access is permitted, which we believe should not be the case it should only be at the conclusion of a proceeding up to and including a hearing and any appeals. Documents used and positions taken at mediation are not necessarily the same as those presented at a hearing and are always off any formal record.

#3

If public access to essential file documents is not made available before a hearing is held, but is provided as a result of the Tribunal holding an open hearing, should these file documents remain public thereafter?

If the Tribunal allows a public observation of a hearing and all that is presented at it then, subject to FIPPA restrictions, file documents referenced and used in the hearing should become and remain

available for subsequent public access subject to any other ruling made by the Vice Chair conducting the hearing.

Other Types of Documents or Information

#4

Should the Tribunal routinely provide access, either orally or in written form, to docket information about Tribunal files?

Presuming docket information is restricted to the names of the parties, the status of the application and any dates scheduled for the matter, then public access to that information should routinely be made available except in the case of a matter involving a minor in which case an application to the Vice Chair responsible for the file should be required.

What considerations support routine disclosure of this information, or some of it, and why?

For considerations supporting disclosure or not, see answers to Q1. As this information is basic and should not contain any private or questionable information, its disclosure should not offend privacy concerns and would go some way to providing a degree of transparency.

What considerations support not disclosing this kind of information generally or specific aspects of it?

Are these considerations different depending on whether the information is compiled, or is specific to a Tribunal case file?

In general, anything beyond basic information should not be provided. If individuals require this information, they may seek it from the parties. While providing information is an important consideration, it must be balanced with not further impacting already marginalized members of society.

There is an element of security involved in this issue. The Superior Court's practice is not to release docket information until the morning of a hearing when it is posted on the notice board. It is possible that providing this information to the public any earlier than the "morning of" creates a security risk for anyone involved in the hearing.

#5

Given the limited nature of documents in Tribunal files about mediation or settlement discussions, are there any additional considerations specific to the nature of the mediation or settlement process that the Tribunal should take into account in deciding on public access to such documents?

In addition to the position advanced in Question 2 above, it is our view that mediation materials and records should not be made available to the public at any stage. Strict confidence for those materials should always be maintained. Positions adopted at a mediation are always encouraged to be taken without prejudice to a future hearing or other resolution so as to encourage a frank and open consideration of a compromise resolution. Confidentiality for those records must be preserved to give credibility to the mediation process which is extremely useful in reducing the number of cases going to hearing. The possibility of public access to these materials at any time would likely reduce the openness and frankness needed to get the parties to the core of a dispute and get it resolved.

#6

Are there any considerations that the Tribunal has not but should take into account with respect to the public availability of its decisions?

The publication of decisions enhances the transparency of the tribunal and justice system in general and assists in the education of the public and the profession. Decisions also contain (or should) the relevant evidence the tribunal used to reach its decision. All these factors make a stronger case for the automatic disclosure of decisions to the public. However, FIPPA may require that the tribunal redact personal information or delete any information that may identify the parties.

Use of Personal Information in Tribunal Decisions and other Documents

#7

Should the Tribunal leave issues of confidentiality to be determined on a case-by-case basis through adjudication?

The Tribunal should consider developing general principles in order to ensure consistency.

The Tribunal should be open to hearing arguments about when public access should be allowed within the overall umbrella of privacy and confidentiality. There should be some controls in place that limit applications of this sort (such as a fee), as too much time could be wasted on preliminary motions.

Alternatively, should the Tribunal consider routinely anonymizing all names of participants in a Tribunal proceeding in its decisions?

A tribunal could consider routinely anonymizing the names of all participants (including children). An alternative could be the assessment, on a case-by-case basis, of whether the names of some or all of the parties or witnesses should be anonymized.

If the Tribunal does not anonymize the names of all participants, are there some circumstances that might justify routine anonymization of a specific class of participants, such as children?

Yes.

Minors, victims of sexual harassment, and members of other groups who might be stigmatized.

What considerations favour the routine anonymization of participants or classes of participants in Tribunal proceedings?

When applicants file their application, they will feel reassured that their names and other personal information will not be disclosed to the public. Consequently, that will encourage them to "put their best case forward" by revealing all relevant information without having to worry about privacy issues.

Factors weighing in favour of routine anonymization would be the protection of witnesses, parties, and third parties whose names are discussed in proceedings but who are not present. This may encourage more open participation in hearings and may encourage potential Applicants to come forward with their Code-related issues. There may be some benefit in terms of avoiding reprisals against Applicants, witnesses, and Respondents alike. Specifically, if someone has been named in a human rights decision, a potential employer may be able to find that decision by Googling the person's name and then may decline to hire them based on what he or she reads in the decision.

By doing it routinely, there is no need to assess each case, either administratively or at hearings.

What considerations weigh against such routine anonymization?

The consideration weighing against such routine anonymization is that it may reduce the transparency of the adjudicative process and involve significant time and resources to accomplish.

Other Issues

#8

Are there any other issues that the Tribunal should take into consideration with respect to public access to documents or information about Tribunal proceedings?

Efficiency and the use of resources is an important issue that sometimes gets overlooked in privacy/confidentiality discussions. Specifically with reference to public access to the Tribunal file if the Tribunal was going to give the public access to pleadings a fee should be considered to account for the time and reproduction expense involved in complying with information requests. For the other documents in the Tribunal file (evidence, correspondence, etc.) as mentioned above we believe that the public should have to comply with some form of procedure to gain access. There should be a fee involved in that process as well. The fee should be reflective of the resources that each request consumes. A reasonable fee schedule may also dissuade frivolous requests.

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