

MEMORANDUM

TO: Commissioners and Observers, ULC Study Committee on Redaction of Personal Information from Public Records (RPIPR)

FROM: Barbara Bintliff, Study Committee Reporter
Vince DeLiberato, Study Committee Chair
Keith Pickard, Study Committee Vice Chair

DATE: September 13, 2022

SUBJECT: Items for discussion at September 26, 2022 meeting (based on memos of April 27 and June 1)

Welcome back to all after a summer break! I hope everyone had an opportunity for rest, relaxation, and refreshment, however defined! We will have a busy autumn as we begin to wrap up the Study Committee's deliberations. This memo is intended to guide discussion at our upcoming meeting.

Most of the information in this memo is based on the April 27 memo (intended for the May 17 meeting) and the May 23 memo (intended for the June 1 meeting). Several more items have been added to the "Generally accepted points from previous meetings" list. We agreed that there was a general consensus on these items. If you think there are other points to add or if something on this list needs amendment or clarification, please let me know.

The series of questions intended to guide our discussion remains unchanged. Our focus in this meeting will be on *Item C: Should redaction be available to additional individuals or groups (immediate family members, certain individual public employees, others)?*

NOTE: This may include consideration of how potential victims of domestic violence, who are not eligible for *per se* redaction (for example, they do not have a court order or meet jurisdictionally defined criteria), might request redaction of PII from public records.

Please remember that our Study Committee is looking at issues, areas of concern, possible problems and pitfalls to offer some guidance and context for a drafting committee. We are not making decisions that are cast in stone.

Finally, a series of questions is added for future consideration, whether by the Study Committee or an eventual Drafting Committee. This is a dynamic list, with additions, modifications, and deletions as our deliberations proceed. Please send your suggestions to add to the list.

Thanks to all for approaching the Study Committee's deliberations with such interest, knowledge, experience, and the willingness to contribute.

I. Generally accepted points from previous meetings:

From January 18 meeting:

- The project is dealing with redacting information from civil records only.
- Redacting information from court/judicial branch records might implicate separation of powers; a drafting committee (or we) could offer bracketed options for dealing with court/judicial branch records for those states in which legislative instructions to the judicial branch would not be a problem.
- The First Amendment is probably not implicated; our project outcomes should fit within the existing structure of exceptions to state open records/public access/FOIA laws.
- Clarity will be needed regarding where unredacted records are stored and how and by whom they will be accessible (the "double books" issue). The original, unredacted content of records is needed for many purposes. Complete, unredacted government records must be available and must have integrity and reliability to provide constructive/public notice.
- Any proposal must maintain a balance between public access to information and personal safety/security needs.
- The project is dealing with access to information, not its use. We are not looking to criminalize use of or penalize those using information from public records, including information lawfully obtained before redaction.

From March 8 meeting:

- We agree on definitions and categories of two types of individuals who may need to have personal information in public records redacted: public officers and public employees. (We have not tackled "everybody else.")
- We will recommend that any drafted act defer to each state to define public record, to the extent possible. We may recommend that a drafting committee also provide a model definition of public record.
- Regarding the "personally identifiable information" definition, we agree that SSN, address, and date of birth are components.
- Definition of redaction includes "obscuring" information but not "removing" information permanently. Distinction must be made between redaction and expungement/permanent deletion of information.

From April 5 meeting:

- We will concentrate on who needs protection (not privacy) via redaction of public records. We will focus on safety issues as a key to identifying those for whom redaction is available.

- We will focus on making redaction more “sensible.” We are not creating something new; we’re considering a more uniform approach among the states.
- “Public officers” can’t be used as a blanket category for those eligible to have information redacted. We need to keep a narrow focus.
- We can only affect government databases.
- It seems that a two-tiered approach is most acceptable. Some will be entitled to automatic/*per se* redaction (possibly automatic upon request) and some will need to apply/get permission based on certain criteria/standards. Redaction by court order should be recognized as an option.

From May 17 meeting:

- There should be *per se* redaction available for public employees classified as judicial or law enforcement personnel (and possibly including other “sensitive personnel”) (as defined by a drafting committee).
- There should be *per se* redaction available for a victim of domestic violence with an appropriate judicial order (as defined by a drafting committee) for the term that the order is in effect.
 - Note:** There was some preliminary identification of categories of individuals potentially eligible for *per se* redaction. In addition to judicial and law enforcement personnel and victims of domestic violence, for which there was general consensus, the categories included public school personnel (which might include superintendents, principals, vice-principals and/or top aides, or Board of Education members) and potential victims of domestic violence.
- There is a group of people, whether or not they are public officials, for whom redaction should be available with evidence of credible risk of harm, via an application process (all as defined by a drafting committee).

From June 1 meeting:

- Regarding the “public officials” and “public employees” categories, we will recommend that the person must be a judge (elected or appointed), a law enforcement officer (for example, elected or appointed prosecutors), or a police officer for *per se* redaction. We will suggest that a drafting committee use a standard definition. States would have discretion to include others.
- *Per se* status would end when the person leaves office (term expires, not reelected, resignation, retirement, etc.). Individuals should have an opportunity to apply for continued redaction via a case-by-case/application process.
- A process should be available to potential victims of domestic violence (those without a court order) to request redaction of PII. This may be part of the case-by-case/application process or may be via a different process.
- *Per se* redaction eligibility should not be determined by a ministerial employee. There must be a statutory determination, court order, or other approved document (commission, appointment letter, etc.). This should not be a discretionary process.

II. For discussion

Working definition of *per se* redaction: PII (however defined) is automatically redacted from all government-maintained databases for a person in an identified group or category or status.

A. Should *per se* redaction be an option for any public employee?

i. If yes, for what group or category of public employees is *per se* redaction available? Is this at the discretion of the enacting jurisdiction?

ii. If yes, is *per se* redaction automatic on assumption of public office for the identified group or category (either by election or appointment—blanket, automatic redaction) or must it be requested (but no showing of threat, harm, etc. is required—individual, automatic redaction)?

iii. If no, by what criteria is an application for redaction evaluated? Who evaluates the application? If the application is denied, is there an appeal from the decision and to whom is the appeal addressed?

iv. Is redaction permanent? Is it temporary while the person is in the identified group or category? Are redacted records “unredacted” and made publicly available at any point?

B. Should redaction be available for victims of domestic violence (DV)? (NOTE: many states, if not most, already have provisions for some sort of alternative address or other way to shield the identity of victims of DV. Any redaction process would need to work in conjunction with existing provisions. Redaction is an additional way to provide protection.)

i. If yes, how to establish that a person is a victim of DV? Should a court order, police report/recommendation, TRO, protective order, medical record, removal to safehouse, etc., be required? Is this at the discretion of the enacting jurisdiction?

ii. If yes, once DV status is established, should redaction be *per se* or must it be requested? If requested, must there be a showing of harm, threat, etc.?

iii. If not *per se*, by what criteria is application for redaction evaluated? Who evaluates the application? If the application is denied, is there an appeal from the decision and to whom is the appeal addressed?

iv. Is redaction permanent? Is it temporary while the person is a victim of DV? Are redacted records “unredacted” and made publicly available at any point?

C. Should redaction be available to additional individuals or groups (immediate family members, certain individual public employees, others)?

i. If available, can or should categories or groups or statuses be identified to determine eligibility or should redaction be only on an individual, case-by-case basis?

ii. If available, and categories or groups or statuses are identified, is redaction *per se*, automatic upon application, or evaluated by established criteria? Who evaluates the application? If the application is denied, is there an appeal from the decision and to whom is the appeal addressed?

- iii. If available, but no categories or groups or statuses are identified, by what criteria is application for redaction evaluated? Who evaluates the application? If the application is denied, is there an appeal from the decision and to whom is the appeal addressed?
- iv. Is redaction permanent? Is it temporary while the person is in office, under threat of harm, etc.? Are redacted records “unredacted” and made publicly available at any point?

Some additional questions:

- What is a judge?
 - State level only? Or also federal judges based in the enacting state?
 - All levels—trial, intermediate appellate, court of last resort?
 - What about special courts (water courts, juvenile or probate courts, drug courts, etc.)?
 - Elected and appointed?
 - Magistrates?
 - Judicial only or also administrative law judges?
 - What about retired judges?
- What is an immediate threat?
 - Physical harm only?
 - How is credibility of threat assessed?
 - Can an immediate threat include financial harm (fraudulent liens, etc.)?

III. Questions for future consideration

- How does the redaction of information relate to a jurisdiction’s FOIA/Sunshine Act/Open Records Laws and existing exceptions?
- Do we address where unredacted information is stored?
- Do we specify a custodian of the unredacted information?
- Do we address accessibility of unredacted information (by whom, under what circumstances, application procedures, etc.)?
- Do we need a “savings clause” or “catch-all provision” (something like “nothing in this act excludes a court of competent jurisdiction to order expungement of certain information in a public record” or “nothing in this act affects the operation of regularly adopted records retention practices”) or exclusionary language (“the term does not include”) for any of the definitions?
- How are concepts of “risk” and “harm” balanced with the request or approval to redact (a) certain information of (b) a specific individual for privacy/security purposes?
- Do we address issues of implementation (time frame for redaction, penalties for slow or improper redaction, etc.)?

- Do we suggest a process for the approval of a redaction request, maybe with a sliding scale of proof required depending on the category of applicant, and let anyone apply for redaction of PII? Or is the same level of proof required for all applicants (Possible standards suggested: Potential danger; Reasonable danger; Immediate threat; Substantial evidence; Reasonable suspicion; Pattern of behavior alarming to the court; Proven to the satisfaction of the court; “rule of reason”).
- Do we recommend that a database be maintained of those who have requested redaction (regardless of whether *per se* or via a case-by-case/application process)? Would we exempt victims of domestic violence from this database? Do we address who may get access to any such database, procedures for requesting access, etc?
- Should there be a state officer or agency with an administrative process responsible for a quasi-adjudicative determination of redaction requests (similar to state open records offices)? We must take bureaucratic realities into account with any recommendations. Redaction eligibility (whether *per se* or case-by-case/application process) should not be determined by a ministerial employee.