

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: November 17, 2022

SUBJECT: Items for discussion at November 29, 2022 meeting (based on previous memos)

The Study Committee on Redaction of Personal Information from Public Records is winding up its deliberations. In this meeting, the committee will begin consideration of what it will recommend to the ULC.

A list of questions that will be considered in this meeting opens the memo, followed by the “Generally accepted points from previous meetings” list. The commissioners and observers have been in general agreement with these items at our previous meetings, including the one in September. Finally, a series of questions is added for future consideration, presumably for a potential Drafting Committee. The “questions for future consideration” is a dynamic series of questions; please send your suggestions for additions, modifications, and deletions.

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

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

I. Questions to consider:

There are three general questions to consider in this meeting:

A. Can, or should, the Study Committee go further in its deliberations? In particular, recognizing that redaction of personally identifying information from public records is an incremental step in offering protection, are there alternative ways to make people safer? Is there any safety approach that will satisfy participants in the Study Committee, including those from the media and open government organizations? Participants, including observers to the Study Committee, are encouraged to bring suggestions to the discussion.

- Consideration needs to be given to the charge of the Study Committee and whether the ULC Executive Committee or the Scope and Program Committee would be open to expanding the work of the committee.
- B. If the Study Committee does not go further as suggested in A. (above), do we recommend proceeding to a drafting committee or dropping the project?
- Consideration needs to be given to potential costs of implementation.
 - Consideration needs to be given to enactability.
- C. If the recommendation is to proceed to a drafting committee, do we recommend drafting a uniform act or a model act?
- Consideration needs to be given to the many existing state redaction programs already in existence and how a uniform or model law may be received in the states.

II. 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.

From September 26 meeting:

- If the Study Committee’s recommendation is to proceed, we will recommend that eligibility for *per se* redaction of personally identifiable information from public records be limited to judicial officers and law enforcement officers, both categories as defined by a drafting committee.
- If the Study Committee’s recommendation is to proceed, we will recommend that victims of domestic violence, however defined, not be eligible for *per se* redaction of personally identifiable information from public records. This recommendation is based in part on the situation that most, if not all, states have established programs and frameworks for the protection of victims of domestic violence.
- If the Study Committee’s recommendation is to proceed, we will recommend that there be some kind of judicial or administrative determination on a case-by-case basis allowing other individuals to have personally identifiable information redacted from public records. There is consensus that a reason for redaction would have to be established. A drafting committee would determine what other individuals may be eligible for redaction.
- If the Study Committee’s recommendation is to proceed, we will recommend that the costs of redaction be considered by a drafting committee, whether from a person in a *per se* category or by an individual case-by-case determination. Should taxpayers pay for any redaction? Should those requesting redaction, whether they are in a *per se* category or for individual reasons, bear the costs?
- Some Study Committee participants, including virtually all media and open government observers, stated opposition to any kind of redaction, regardless of whether in a uniform or model law.
- Almost all open-government advocates and representatives of commercial interests oppose any redactions that might interfere with their ability to obtain direct and

immediate access to certain government information. Their position appears to be that such access outweighs the personal safety of individuals who may be eligible to have personally identifying information redacted.

III. Questions for future consideration: Issues for potential drafting committee

- 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.

