

MEMORANDUM

TO: Members, ULC Study Committee on Redaction of Personal Information from Public Records

FROM: Barbara Bintliff, Study Committee Reporter
Vince DeLiberato, Study Committee Chair
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DATE: December 30, 2021

SUBJECT: Preliminary Issues

To help structure the initial discussions on the feasibility of drafting a uniform or model law on Redaction of Personal Information from Public Records (RPIPR), the following issues have been identified. They are grouped into two sections: substantive issues and drafting issues. The issues are intertwined and the lists could easily be ordered differently.

This is not an exhaustive list of issues; more matters will be identified during discussions. Additions, modifications, and corrections are welcomed.

Initial substantive issues

I. How can governmental transactions and the public's right to know be balanced against an individual's personal privacy and security?

- How to balance basic governmental principles of transparency, accountability, and the public's right to know with individual needs?
- Are there any 1st Amendment implications (for example, freedom of the press)?
- What duties or responsibilities does the government have to protect citizens in this situation (making public personally identifiable information)?
 - How to accommodate an individual's right to privacy and security (by taking prospective actions?)
 - How to accommodate an individual's right to privacy and security (by taking retrospective actions?)

II. Are there parallels with, guidance from, or restrictions imposed by other doctrines?

- Are State FOIA or Open Records Acts involved?
- Does the state's administrative procedures act factor in?
- Does the General Data Protection Regulation (GDPR, EU law/right to be forgotten) or California or other US jurisdictions' laws offer guidance?

III. Who should be able to have information in public records redacted?

- Public officials
 - When should the public know information about officials such as addresses? (For example, allowing verification that an elected official lives in the correct district or allowing the public access to an official's address to allow for protests at his or her home.)
 - Are all public officials covered?
 - Elected only?
 - "Senior" levels only?
 - Only certain positions (e.g. judges and magistrates, law enforcement officials)?
 - What is an "official"?
- Private citizens
 - Examples:
 - Domestic violence victims (in all instances? Is a temporary restraining order or restraining order required? Is an arrest or conviction required? Are safe houses included?)
 - Whistleblowers
 - Possessors of "privileged" information not covered by evidentiary rules (e.g. journalists)?
 - Immediate family of public officials

III. What records should be included? How far should the ability to have public records redacted extend?

- Any records with addresses, phone numbers, emails, etc.
- Real property records
- Human Resources/employment records
- Educational records (Classes taken? Clubs/ organizations joined? In all instances, not otherwise covered by FERPA, etc.)
- Public university research (any intersection with government funding rules?)
- Library resources used (what is the intersection with state library laws?)
- Trade secrets and patents (including those under development by public university research)
- Health records (not otherwise covered by HIPAA, etc.)
- Adoptions

IV. For how long should information remain redacted? When or under what conditions should information be "unredacted"? Should it ever be unredacted?

V. Who can access redacted information and in what situation(s)?

VI. Who is in charge of redacting records?

- Should there be governmental and/or personal liability for improper redaction or improperly releasing redacted information?
- Should civil or criminal penalties be imposed?
- Should there be an individual right to recourse?
- What governmental office or official oversees redaction policies and practices?

VI. Are there identifiable or foreseeable consequences of redaction (e.g., American Land Title Association's concern about clear titles to real property)? Can the consequences be mitigated?

Potential drafting issues

I. Should an act be outcomes-based ("we don't care how you do it, but at the end of the day this is what needs to happen") or more procedural/prescriptive in nature ("these are the steps required")?

- An outcomes-based act would require a "philosophy" ("this is what we're doing and why") and recommendations consistent with the philosophy
 - This would leave more discretion to each enacting state but might lead to a wide range of approaches.
 - Existing state statutory or regulatory regimes could be recognized or incorporated.
- A procedural/prescriptive act would require concrete steps, for example:
 - Redaction standards (what specific records can be redacted and when they can be redacted)
 - A decision on whether redaction should be automatic or discretionary
 - If discretionary, who makes the decision? Would this vary depending on the situation?
 - If automatic, is redaction upon assumption of public office or must there be a triggering event?
 - Should there be an application process, possibly with specified criteria?
 - What is the threshold for redaction? What kind or level of triggering events would qualify for redaction?
 - Should there be an automatic duty to redact (with corresponding liabilities) if specified criteria is met or should redaction always be discretionary?
- Should there be a combination of these approaches?
- Should this be a uniform or a model act?
 - If uniform, the act could include incentives for states to adopt:
 - Deferential standard of review?
 - Reciprocity (recognition of validity of redaction automatically)?

- Public official could have records redacted in one state that automatically triggers redaction in other states (ease of administration)?
- If model, state discretion would allow for adoption of selected provisions:
 - It might be easier for adopting states to harmonize the redaction process with other, existing state laws or rules
 - Alternative approaches could be offered to and adopted by legislatures (e.g. Should there be different standards or procedures depending on whether a public official or some other citizen requests redaction?)
 - Flexibility and legislative discretion could make wider enactment possible.