

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: April 27, 2022

SUBJECT: Items for discussion at May 17 meeting

Many thanks to all commissioners and observers for their continued contributions to our discussions. This memo is intended to guide discussion at our next meeting.

Several types of information are offered, all drawn from the previous committee discussions. First is a growing list of points that have been largely agreed to by the group; we have a general consensus on these items. If you think there are other points to add or if something on this list needs amendment, please let me know.

Next is a series of questions intended to guide a discussion of per se redaction vs redaction by application. 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.

II. For discussion at May 17 meeting: *Per se* redaction vs redaction by application

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 identify 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 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 a victim of DV? Are redacted records “unredacted” and made publicly available at any point?

Some additional questions:

- What is a judge?
 - State 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.)?