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## **PRIVACY COMMISSIONER RELEASES DRAFT POSITION PAPER ON ONLINE REPUTATION**

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*By Esther Shainblum\**

### **A. INTRODUCTION**

On January 26, 2018, the Office of the Privacy Commissioner of Canada (the “OPC”) released the Draft OPC Position on Online Reputation (the “Paper”),<sup>1</sup> drafted as part of an OPC consultation on online reputation (the “Consultation”).<sup>2</sup> The Consultation is being conducted more generally as part of the OPC’s work on “Reputation and Privacy”, one of the OPC’s four strategic privacy priorities for 2015-2020.<sup>3</sup> The OPC’s goal, in this regard, is to “create an environment where individuals may use the Internet to explore their interests and develop as persons without fear that their digital trace will lead to unfair treatment.”<sup>4</sup> The validity of this goal was supported by the submissions made to the OPC during the Consultation, many of which highlighted the need for individuals to have some control over their online reputation. This Bulletin provides a summary of the Paper and highlights the aspects of it that are most relevant to charities and not-for-profits.

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<sup>1</sup> Office of the Privacy Commissioner of Canada, “Draft OPC Position on Online Reputation” (26 January 2018), online: <[https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos\\_or\\_201801/](https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos_or_201801/)>.

<sup>2</sup> Office of the Privacy Commissioner of Canada, “consultation on online reputation” (27 January 2018), online: <<https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/>>.

<sup>3</sup> Office of the Privacy Commissioner of Canada, “The strategic privacy priorities” (09 September 2016), online: <<https://www.priv.gc.ca/en/about-the-opc/opc-strategic-privacy-priorities/the-strategic-privacy-priorities/>>.

<sup>4</sup> *Supra* note 1.

## B. SUMMARY OF POSITION PAPER

Throughout the Paper, the OPC grapples with the competing societal values of privacy protection and freedom of expression. While freedom of expression is a broad right protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*,<sup>5</sup> the OPC recognizes that it is not an absolute right and that it is necessary to strike the appropriate balance between an individual's right to privacy and reputational interests and the equally important values protected by freedom of expression.

Seeking mechanisms for enhancing individual control over their online reputation that strike that balance and that are consistent with existing Canadian privacy law, namely the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"),<sup>6</sup> the OPC identifies two in particular that can provide individuals with control over their online reputation.

The first mechanism highlighted in the Paper is "de-indexing", which would remove the links between online content and an individual's name, so that the content would not be found when the individual's name is entered into a search engine. Although the content is not removed from the internet, de-indexing would prevent it from being linked to an individual's name, thus providing individuals with some control over their online reputation. Concluding that search engines are subject to PIPEDA, the OPC suggests that de-indexing is also consistent with PIPEDA, primarily those provisions relating to the right of individuals to challenge the accuracy of personal information and to have it amended as required. The OPC concludes that de-indexing is an effective way to remedy privacy harms to individuals, that it strikes the right balance between privacy rights and freedom of expression and that it is consistent with existing law.

The second mechanism highlighted in the Paper is "source amendment/takedown at the source", in which the online information would actually be deleted or modified. The Paper recommends that individuals should have the near absolute right to delete material that they have posted about themselves and that they should be able to require the correction or removal of inaccurate, incomplete or out of date information that was posted by others. Again, the Paper points to existing PIPEDA principles as supporting the

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<sup>5</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

<sup>6</sup> SC 2000, c 5.

existence of this right and argues that it strikes the appropriate balance between freedom of expression and privacy protection.

The Paper spends some time on the special needs of young people, who are seen as inherently vulnerable and who are at risk of posting materials online that might cause themselves lifelong reputational damage. The Paper recommends that, in the case of youth, considerations should weigh more heavily in favour of de-indexation or removal, that youth should have the near absolute right to delete materials that they have posted about themselves, and that Parliament should pass legislation to that effect. It also recommends that legislation should be passed to allow young people who have reached the age of majority to remove online information that was posted about them by their parents or substitute decision makers when they were minors. Echoing its previous consent report,<sup>7</sup> the OPC also recommends that consent for the collection, use and disclosure of personal information of youth under the age of 13 must be obtained from their parent or guardian.

The Paper acknowledges that the abilities to request de-indexation and/or source takedown of information are similar to the European Union's "right to erasure" and "right to be forgotten" under Article 17 of its *General Data Protection Regulation* ("GDPR"),<sup>8</sup> which comes into force in May 2018. However, the OPC points out that the Paper deals with these as possible remedies that can be found in existing Canadian law and that it has not simply imported the GDPR regime into Canada.

The Paper also emphasizes the importance of privacy education, calling for privacy protection to be incorporated into digital education curricula and stating that rights-based privacy education will equip people to protect themselves and develop good online citizens.

Other recommendations in the Paper include clarifying the application of PIPEDA to search engines, promoting further research into appropriate options and controls, especially with respect to youth, women and other groups disproportionately targeted for online abuse, giving the OPC a more proactive role in addressing systemic or sector-wide online privacy risks, enhancing the OPC's powers to include stronger

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<sup>7</sup> Office of the Privacy Commissioner of Canada, "2016-17 Annual Report to Parliament on the *Personal Information Protection and Electronic Documents Act* and the *Privacy Act*" (21 September 2017), online: <[https://www.priv.gc.ca/en/opc-actions-and-decisions/ar\\_index/201617/ar\\_201617/#heading-0-0-3-1](https://www.priv.gc.ca/en/opc-actions-and-decisions/ar_index/201617/ar_201617/#heading-0-0-3-1)>.

<sup>8</sup> EU General Data protection Regulation (GDPR), online: <<https://www.gdpreu.org/the-regulation/list-of-data-rights/right-to-erasure/>>.

enforcement mechanisms and the power to act proactively and developing an industry-wide code of practice for takedown policies, privacy defaults and procedures.

## C. CONCLUSION

Given the broad application of privacy concerns for online reputations, the Paper provides insight into privacy issues along with present and future solutions that may be of interest to charities and not-for-profits that have an online presence and whose employees may have an online presence.

The OPC is asking for stakeholders to provide their views on the proposals outlined in the Paper to be submitted by April 19, 2018. In this regard, the OPC has posted a Notice of Consultation webpage containing specific questions concerning the Paper, along with submission criteria.<sup>9</sup>



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<sup>9</sup> Office of the Privacy Commissioner of Canada, “Notice of Consultation and Call for Comments on Draft Online Reputation Position Paper” (26 January 2018), online: <[https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/or\\_notice-avis\\_201801/](https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/or_notice-avis_201801/)>.