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Office of the Privacy Commissioner of Canada
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Gatineau, QC K1A 1H3

Submission of the British Columbia Civil Liberties Association (BCCLA) to the Office of the Privacy Commissioner (OPC) regarding the Draft OPC Position on Online Reputation, Part A (De-Indexing)

1. The BCCLA is one of Canada's oldest and most active civil society organizations. Our mandate is to preserve, defend, maintain and extend civil liberties and human rights in Canada. We are an independent, non-partisan organization. We speak on the principles which protect individual rights and freedoms, and have played an important and prominent role in defending and promoting both freedom of expression and privacy.

2. This brief is limited to Part A (De-Indexing) of the Draft OPC Position on Online Reputation. The BCCLA generally supports the position of the OPC as articulated in that portion of the draft position. In our view, the draft position appropriately addresses the tension between the privacy rights and freedom of expression rights at play in online reputation. That said, we have some recommendations for how to strengthen the protections for the rights at issue.

3. As a threshold matter, we agree with the OPC that search engines do fall within the scope of the application of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA). Search engines are engaged in commercial activity while collecting, using or disclosing personal information, and therefore fall within the scope of application. For instance, when a person queries an individual's name, the search engine "uses" personal information in the creation of a "profile of the most relevant information" about the person whose name was searched.

4. As a result of this interpretation, organizations that operate search engines by indexing web pages and displaying search results have obligations under PIPEDA.

5. One of the obligations imposed by PIPEDA upon search engines is that "personal information shall be as accurate, complete, and up-to-date as is necessary for the purpose for which it is to be used" (Principle 4.6 of Schedule 1). We endorse the OPC's position that an individual should be able to challenge the accuracy, completeness or currency of the search results generated by a query of their name.

6. A successful application must result in a modification of the use or disclosure of the personal information in question. This would generally see some change to the relevant search results. As the draft position points out, there are various methods for addressing search engine results found to not to be accurate, complete or current. One way would be through de-indexing. Other means, such as flagging the results as inaccurate or lowering the ranking of the contested result, are also ways to address the matter.

7. The draft position also notes that another key obligation under PIPEDA is the overarching requirement for reasonableness. Under the act, an "organization may collect, use or disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances" (s. 5(3)). We concur with the OPC that there are limited circumstances in which a reasonable person would not think it appropriate to provide search results prominently in relation to a search of an individual's name. For instance, where the access to the personal information causes significant harm to a person's reputation and there is no public interest associated with the display of the search result. Consequently, search engines should have to remove the links to the harmful content once satisfied that the challenger does falls within this very narrow scope of circumstances.

8. Like the OPC, we acknowledge that this is a line drawing exercise that raises genuine concerns about expressive freedom. In our view, the importance of expressive freedom cannot be over-stated, although public discussions on this subject illustrates that there is considerable confusion over what is at issue in relation to de-indexing.

9. It is obvious that a person's access to information can be compromised by de-indexing. That said, there is often a very significant difference between the critical importance of access to information in respect of issues involving matters of public interest verses matters that do not. If a political figure is quoted as saying something stupid, we assume that the voting public may be interested in these remarks no matter if they are "dated". The public interest in this case would not favour de-indexing. However, if your neighbour down the street who is not in any way implicated in the public interest is quoted as saying something stupid, it is prejudicial to their future life chances for them to essentially be defined through that error in judgement to anyone who searches for them by name. This may well be a case where de-indexing would be very important for the privacy of the individual and have a miniscule impact on expressive freedom.

10. The problem of course arises about what party is to make the decision. Like every assessment affecting an individual's rights, this is the kind of decision that ideally an independent decision-maker could take up. But that is simply impracticable. We agree with the OPC that it is reasonable, as with all the other initial assessments with respect to rights under PIPEDA, for the private sector to make the first assessment, with an ability to have that decision reviewed.

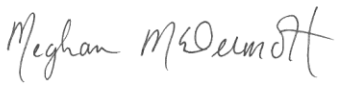
11. We recommend two features to help assure that the rights assessments made in the context of requests for de-indexing give appropriate weight to expressive freedom.

12. Firstly, the OPC should issue clear guidance on what the relevant considerations are in evaluating de-indexing requests from individuals. These should be sufficiently nuanced to capture how, as in our example about the regrettable statement, the correct weighing of factors may include the positon of the requester and other contextual factors.

13. Secondly, in order to assure that the correct criteria and balancing of rights is being applied by the private sector organizations that operate search engines, we recommend that the OPC undertake audits to evaluate the appropriateness of decisions in relation to requests for de-indexing. This authority should be available to the OPC under section 18 of PIPEDA.

14. With these safeguards, we believe that the availability of de-indexing in appropriate cases can significantly enhance Canadians' privacy rights with minimal impact on the critically important right to expressive freedom.

Respectfully submitted,



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