Comments on the Canada Draft OPC Position on Online Reputation

ARTICLE 19: Global Campaign for Free Expression

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1. ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19) is an independent human rights organisation that works around the world to protect and promote the rights to freedom of expression and freedom of information. ARTICLE 19 has significant experience working on the 'right to be forgotten'.[1] For instance, we gave oral and written evidence in international hearings organised by Google on this issue in 2014.[2] We analysed the Russian law on the same issue in 2015[3] and set out our position in detail in our 2016 Policy Brief, *Right to be forgotten: Remembering Freedom of Expression.*[4] Most recently, we intervened before the Conseil d'Etat and the Court of Justice of the European Union ('CJEU') in the case of *Google v CNIL* concerning the territorial scope of de-indexing orders.[5]

Summary of the submission

2. ARTICLE 19 welcomes the opportunity to comment on the Draft OPC Position on Online Reputation (Draft OPC Position). While we consider the Draft Position represents a good faith attempt to balance the rights to freedom of expression and privacy, it fails in our view to afford sufficient weight to the latter:
   - First, the Draft Position nowhere explains why a 'right to be forgotten' is needed and existing remedies are insufficient to protect people's online reputation.
   - Second, it derives a 'right to de-indexing' and a 'right to source takedown' from a somewhat questionable interpretation of existing legislation.[6] Nor does it attempt to ground any of these new rights in privacy rather than data protection law.
   - Last and in any event, we believe that the creation of new remedies should not be left to creative interpretation by data protection authorities or the courts but laid down by statute in order to ensure greater predictability and legitimacy in the protection of the rights at stake.

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[1] ARTICLE 19 understands the so called 'right to be forgotten' as a remedy which in some circumstances enables individuals to demand from search engines the de-listing of information about them which appears following a search for their name. It can also refer to demands to websites' hosts to erase certain information.

[2] ARTICLE 19, Right to Be Forgotten: ARTICLE 19 calls on Google and Data Protection Watchdogs to protect free speech, 16 October 2014, available from https://bit.ly/2r3qiEW.

[3] ARTICLE 19, Legal Analysis: Russia's Right To Be Forgotten, 16 September 2015, available from https://bit.ly/2Hu77zt.

[4] ARTICLE 19, The "Right to be Forgotten": Remembering Freedom of Expression, 2016, available from https://bit.ly/2aWf3tr.

[5] ARTICLE 19, Civil society tells EU Court: Right to be forgotten should not be global, 30 November 2017, available from https://bit.ly/2qYY6Ea.

[6] See, for example, Michael Geist, Why the Canadian Privacy Commissioner's Proposed Right to be Forgotten Creates More Problems Than it Solves, 29 January 2018, available from https://bit.ly/2Kg3z1f.

3. Turning to the OPC's proposals for a 'right to de-indexing', again we recognise that the proposal seeks to strike an appropriate balance between the rights to freedom of expression and privacy. However, we consider that the proposal has a number of shortcomings.
    - First, it puts search engine operators in the initial position of having to determine the balance between a 'right to de-indexing and the right to freedom of expression. In our view, private companies are ill-suited to make these determinations and such an approach would simply increase the de facto power of Internet search giants such as Google.
    - Secondly, the supervision of these decisions by search engines is put in the hands of a single-issue regulator – the OPC, whose mandate is to protect the right to privacy rather than freedom of expression. It seems to us, therefore, that there will inevitably be an in-built, structural bias in favour of privacy interests (which the OPC understands well) as opposed to free expression (in which the OPC, with respect, lacks expertise and - indeed - a statutory mandate). Regrettably, this much is clear from the draft position paper itself, which shows the OPC to be more concerned with the protection of privacy and reputation than freedom of expression (See section D, last two paragraphs). With the best will in the world, the OPC is simply more likely to err on the side of the protection of privacy, particularly in circumstances where the case for freedom of expression will not be made by the parties directly affected (i.e. those searching for information or content publishers), but rather guessed at by an unaccountable regulator.
    - Thirdly, the criteria developed to undertake the balancing exercise are fairly limited and would require further elaboration and rules of interpretation (such as the public interest, whether significant harm has been incurred etc.).
    - Fourthly, the OPC does not fully engage with the right of publishers to be notified that de-indexation of their content has been sought or that de-indexation has occurred.

4. Lastly, ARTICLE 19 is concerned that the proposed 'right to source takedown' is seriously lacking in detail, particularly in terms of procedural safeguards, which seem to be left to the discretion of private companies. Given their well-known shortcomings in this area, this is a matter of serious concern.

General observations on framing

5. At the outset, ARTICLE 19 notes that the Draft Position is written in a style designed to make it easily accessible to the wider public. This is a commendable approach; however, we are concerned that - as a result - it sometimes presents the issues simplistically. For instance, the Draft Position does not in our view sufficiently explain the relationship between reputation, defamation, privacy and personal information (see executive summary). We note that the protection of reputation was traditionally limited to the protection of people from *false* statements of a factual nature that lowered the esteem in which they were held in their communities (i.e. defamation law). By contrast, privacy torts protected individuals from the publication of *true* but private information. Over the years, however, we have seen the emergence of claims to the protection of reputation

being made under the right to privacy.[7] With the Internet, we are now seeing data protection increasingly being used to protect the reputation of individuals from the availability of information about them which is not only true but also of a *public* nature (e.g. reporting on court proceedings) since data protection protects both public and private information about an individual (personal information). Yet, the Draft Position consistently fails to make clear that the right to de-index concerns information which is not necessarily private but may well be eminently public, e.g. a criminal conviction. We are particularly concerned that the use of data protection may be extended over time to protect individuals' reputation in relation to the *publication* of such information (i.e. beyond mere de-indexing).[8]

6. Consequently, the Draft Position frequently frames the issues in such a way as to undermine the importance the right to freedom of expression. For instance, the OPC seems to take the view that individuals must be able to 'control' their online reputation, much like personal data (See 'objective' section of the paper). In our view, this is problematic. Simply because information is *about* an individual does not mean that information *belongs* to them or that they should be able to control it in a proprietary sense. In particular, individuals should not be able to restrict access to information about them which has been published by third parties, except where that information is private or defamatory and its publication is not otherwise justified. In other words, information about individuals may also equally "belong" to the public, who consequently should not be prevented from accessing that information. The idea that it is the individual who should retain ultimate control over that information is not only solipsistic but also ignores the broader right of the public to share and receive material that is legitimately in the public domain. None of this is apparent in the Draft Position. Instead, the OPC seems to take the view that only the individual concerned - and a privacy regulator - can be trusted to contextualise information on the Internet and decide whether that information represents an accurate picture of an individual. The assumption seems to be that the public is unable to form a balanced view of someone's reputation on the basis of information online.[9]

7. Similarly, the Draft Position makes a number of assertions about the impact of the availability of information on reputation without explaining what that impact is. For instance, the paper does not clearly explain how "information, once posted online, gains characteristics that affect reputation" (see executive summary). It is arguable, for example, that defamatory comments posted on an obscure blog are unlikely to have the same impact on an individual's reputation as serious allegations made in a national or provincial newspaper. However, the Draft Position does not clearly distinguish between degrees of harm caused to reputation.

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[7] This is particularly apparent in the case law of the European Court of Human Rights: https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf

[8] See for instance, the report of the Law Commission of Ontario, which charts recent developments in the protection of reputation: Law Commission of Ontario, *Is "Truthtelling" Decontextualised Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age,* July 2017, available from https://bit.ly/2HNHqJo.

[9] A similar line of argument was rejected by the UK Supreme Court in relation to anonymity orders and public's right to know and press' right to report the identity of individuals suspected of terrorism offences [2010] UKSC 1. Delivering the judgment, Lord Rodger said "members of the public, including members of the Muslim community, are more than capable of drawing the distinction between mere suspicion and sufficient evidence to prove guilt. Any other assumption would make public discussion of these and similar serious matters impossible".

8. The Draft Position also asserts that "It is clear that Canadians need better tools to help them to protect their online reputation". Yet, it does not explain why existing remedies in Canadian law are found wanting. Overall, it appears that the OPC's position is more informed by people's perception of harm to their reputation (which might tend to be significant) than hard evidence or analysis of the effectiveness of existing remedies.

9. Finally, we note that freedom of expression and privacy are often presented as mere "societal values" or "interests" throughout the report. In our view, this fails to recognise that freedom of expression and privacy are human rights, which are protected by the Canadian Charter of Fundamental Rights as well as the International Covenant on Civil and Political Rights and the American Convention on Human Rights to which Canada is a party.

Legal basis for a new 'right to de-index' and 'sources takedown'

10. Although the OPC's interpretation of Canada's federal privacy law (PIPEDA) is not surprising in light of the CJEU judgment in *Google Spain,* it nonetheless remains questionable - in our view - to derive de-indexing or takedown 'rights' and procedures from statutes which plainly did not contemplate them at the time of their adoption.[10] Such an approach not only risks undermining legal certainty but also lacks democratic legitimacy. In our view, the creation of such new and specific rights, if thought necessary, should be enacted by the legislature rather than left to the creative interpretation of data protection authorities or the courts. The OPC seems to recognise this by calling on Parliament to undertake a "study" on this issue[11] and consider enshrining in law the near absolute 'right to be forgotten' for youth in relation to content they have posted themselves or information they have shared for publication by third parties. In the absence of a proper legal basis for the 'right to de-link' or the 'right to source takedown, however, we believe that it is both premature and inappropriate for the OPC to 'take action'. In our view, further consultations should be taking place, involving other stakeholders and governments agencies, including the Canada Human Rights Commission, the Office of the Information Commissioner and National Library of Canada among others.

11. We also note that the OPC's conclusions seem to go against the opinion of the majority of contributors to its earlier consultation on this matter.[12] Indeed, several commentators had warned against the adoption a 'right to be forgotten' similar to the one developed in the EU. Yet, the OPC's proposals for a 'right to de-indexing' bear striking similarities to the European data protection framework despite the OPC's assertions to the contrary.

[10] See also Michael Geist, *op.cit.*.

[11] See Towards Privacy by Design: Review of the Personal Information Protection and Electronic Documents Act, Report of the Standing Committee on Access to Information, Privacy and Ethics, February 2018, available from https://bit.ly/2FquyVe.

[12] Summary of reputation submission, available from https://bit.ly/2Fh1C19.

The right to de-indexing

12. As noted above, we believe that the OPC needs to present a much stronger case that a 'right to de-indexing' is necessary in the first place. If, despite our misgivings, action is taken to give effect to such a right or such a right is adopted by the Canadian Parliament, we suggest that the following criteria should be applied when balancing a 'right to de-indexing' with the right to freedom of expression:[13]
    - **Whether the information at issue is of a private nature**: e.g. details of intimate or sex life, health information, social security or credit card numbers, private contact or identification information, other sensitive information such as trade union membership, racial or ethnic origins, political opinions, philosophical or religious beliefs which could be considered private;
    - **Whether the applicant had a reasonable expectation of privacy,** which could be forfeited depending on prior conduct, prior consent or the prior existence of the information in the public domain;
    - **Whether the information at issue is in the public interest,** which must be interpreted broadly**;**[14]
    - **Whether the information at issue pertains to a public figure;**
    - **Whether the information is part of the public record**, in particular whether the information originates from or is linked to journalistic, artistic, literary or academic material or government information;
    - **Whether the applicant has demonstrated substantial harm:** such harm should be more than embarrassment or mere discomfort, except in the case of children and young persons to whom this criteria should not apply;
    - **How recent the information is and whether it retains public interest value**.

13. We note that the OPC's own list of criteria in balancing the 'right to de-indexing' with the right to freedom of expression is not exhaustive. In light of this, we hope that our proposals may prove useful in elaborating these criteria further. In particular, we would stress the need for individuals requesting the de-indexing of links to establish substantial harm to their reputation. In this respect, the concepts developed under defamation law might be useful.[15] For instance, the European Court of Human Rights has found that the reputational element of Article 8 (right to privacy) will only be engaged where an attack on a person's reputation attains a minimum level of seriousness.[16] In our view, when information about an individual is in the public domain and not otherwise illegitimate, it is not enough for individuals simply to assert an interference with their reputation. Given that freedom of expression is a fundamental right, a presumption in favour of de-

[13] For more details, see ARTICLE 19, Right to be Forgotten, *op.cit.*.

[14] See Definitions in ARTICLE 19's Global Principles on the protection of freedom of expression and privacy: http://article19.shorthand.com/. We believe that the 'public interest' test should be interpreted broadly so as to address the type of concerns raised by Emily Laidlaw in her contribution to this consultation; see Emily Laidlaw, A Right to be Forgotten Online: A Response to the Office of the Privacy Commissioner Draft Position, 12 February 2018, available from https://bit.ly/2BpIII6.

[15] See for instance, European Court, *Tamiz v the United Kingdom,* App. no. 3877/14, 19 September 2017.

[16] See e.g. European Court, *Axel Springer AG v Germany* [GC], App. no. 39954/08, 7 February 2012, para. 83; or *Tamiz v the United Kingdom,* App. no. 3877/14, 19 September 2017, para 80, in which the Court agree with us that "the reality is that millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. However, the majority of comments are likely to be too trivial in character, and/or the extent of their publication is likely to be too limited, for them to cause any significant damage to another person's reputation".

indexing is simply untenable in the absence of any demonstrable harm caused by publication of the information in question. Indeed, if the information is already available, the presumption should be that it ought to *remain* publicly available. Defamation law concepts may also be useful in assessing the 'accuracy' criterion under data protection law as the High Court of England and Wales recently did in the first 'right to be forgotten' case to come before it.[17]

14. While the OPC should otherwise be commended for acknowledging some of the difficulties in this area, it leaves a lot of important issues unanswered. Indeed, many issues appear to be left in practice to the discretion of private companies, from the criteria effectively applied by search engines to issues of procedure such as notification to publishers. In our view, the OPC should recommend that, as a rule, data publishers should be notified and put in a position to challenge 'right to request de-indexing' requests or decisions. In the absence of such a right, the case for the protection of the right to freedom of expression is simply not represented. We otherwise reiterate and endorse the many criticisms that have been made regarding the privatisation of adjudication of these types of claims, which entrenches the dominant position of US tech giants in the provision of information society services.[18]

Source takedown

15. ARTICLE 19 recognises that the right to freedom of expression includes the right not to speak, to change one's opinion and to delete, or to request a hosting provider or third party to delete, content authored and originally published by oneself, including online. At the same time, we believe that mandating the creation of tools to enable the deletion of 'self-posted' information is liable to go too far and impose an undue burden particularly on small information society providers. In those cases where such tools are not available, we consider that in deciding whether a request for the deletion of content authored and originally published by oneself should be granted by hosts and third parties, regard should be had to the following factors:
    - Whether the request has been made by a child, or a young person;
    - Whether the request has been made by a person in a situation of vulnerability;
    - Whether the request has been made by someone who was a child, a young person or a person in a situation of vulnerability at the time the content in question was authored or published;
    - Whether the content represents that person's own authorship;
    - Whether the person making the request is a public figure or was at the time the content was authored or published;
        - Whether the content at issue is in the public interest;and
        - Whether it is necessary and proportionate to remove the content taking into consideration all the circumstances of the case.

16. By contrast, we believe that hosts and third parties should not be required to delete or otherwise remove content containing personal information published by third parties on the basis of national data protection laws. In our view, hosts may only be required to delete content containing personal information published by third

[17] See *NT1 and NT2 v Google Inc. and the Information Commissioner*, [2018] EWHC 799 (QB), para. 79, available from https://bit.ly/2HHe8tr.
[18] See ARTICLE 19, Right to be Forgotten, *op.cit.*; Emily Laidlaw. *Op.cit.*; and Michael Geist, *op.cit.*

parties where the publication of the information by a third party constitutes an unlawful act, e.g. privacy offence or tort or offences such as harassment, threats of violence or malicious disclosure or distribution of personal information or private sexual content (such as photographs or films). In determining whether a request for the deletion of content containing private information published by third parties should be granted, the traditional criteria applied in balancing the rights to freedom of expression and privacy should be applied.[19] Sufficient procedural safeguards should also be put in place.

17. In our view, the OPC's position on source takedown and the case of youth is broadly compatible with the above principles. However, it remains woefully short on detail when it comes to procedural safeguards. Although a future industry Code of Practice may provide some answers, our experience of self-regulatory initiatives in Europe is that the right to freedom of expression is usually given short shrift.[20] Legislation may well be needed in order to ensure adequate protection of the right to freedom of expression. In any event, we recommend that any legislation or future industry Code of Practice take due account of the Manila Principles on Intermediary Liability, which lay down best practices in this area on the basis of international standards on freedom of expression.[21]

Educational measures

18. Although we welcome the OPC's proposals on privacy education, we would strongly recommend that any educational programmes are not solely centered on privacy and the protection of online reputation. Any such programme should also explicitly recognise the importance of freedom of expression as a fundamental right.

Other concerns

19. ARTICLE 19 remains doubtful that the balance between freedom of expression and privacy/data protection should be left to search engines and privacy regulators, however well-intentioned they might be, rather than the courts. At a minimum, it is vital that decisions made by regulators be made subject to appeal. Consideration could also be given to creating a position of a public interest advocate for the protection of freedom of expression in order to ensure proper representation of this side of the argument in 'de-indexing' or 'takedown' disputes. In any event, we believe that relevant providers, public authorities and courts should publish transparency reports, including information about the nature, volume and outcome of de-listing or takedown requests made on the basis of privacy or data protection in order to promote greater accountability in this area. This would be particularly important with respect to private companies should any future law provide for hefty fines for failure to de-list links in compliance with its provisions.[22]

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[19] See ARTICLE 19, Global Principles, *op.cit.*, Principles 12 and 13. The Global Principles seek to synthesise international standards and comparative best practices in this area with a view to promoting the highest standards of protection for freedom of expression and privacy.

[20] See e.g., ARTICLE 19, The EU Code of Conduct for Countering Illegal Hate Speech Online, June 2016, available from https://bit.ly/2vvIzQM.

[21] Manila Principles, available from https://www.manilaprinciples.org. The Principles have been cited with approval by the UN Special Rapporteur on freedom of expression, David Kaye.

[22] Provisions which we would oppose, as companies would be much more likely to de-list links, when requested to do so, in order to pre-empt accusations of mishandling personal data.

Conclusion

20. ARTICLE 19 welcomes the OPC's consultation and the Draft Position as a helpful starting point for discussion on the protection of freedom of expression and reputation in the digital age. In our view, however, the creation of new rights to protect online reputation is the responsibility of the Canadian Parliament rather than the OPC. In the meantime, current proposals need to be significantly improved for freedom of expression to be properly protected.

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