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April 28, 2016

Daniel Therrien
Privacy Commissioner of Canada
30 Victoria Street
Gatineau, Quebec
K1A 1H3

Via email: OPC-CPVPconsult2@priv.gc.ca

Dear Mr. Therrien:

The Office of the Privacy Commissioner in January of this year announced that it was "launching a dialogue on reputation and privacy" in order to advance the public debate on these issues. It is in that spirit of dialogue that we offer these comments.

The signatories to this letter are U.S. news media organizations, primarily nonprofit public interest groups and membership associations, that represent the interests of a wide range of journalists.

We hereby acknowledge that we have read and understood the consultation procedures published by this office in January. Our comments, which specifically address Questions 3, are submitted on behalf of the interests of the news media and the public generally.

Summary of argument:

- A general statement of any "right to be forgotten" will necessarily be vague and overbroad, and will never be a feasible solution to protecting individual privacy interests.

- Adoption of this European principle is fundamentally inconsistent with Canadian and international values of free expression. There must be a presumption in favor of public knowledge.

- Control of information distribution to this extent would be oppressive and unworkable, whether applied worldwide or just in Canada. International free expression cannot survive on the Internet if every nation's laws apply to every website.

"Question 3: Can the right to be forgotten find application in the Canadian context and, if so, how?"

Any attempt to protect a general interest in personal privacy, including the "right to be forgotten," will almost necessarily be overbroad without further definition and context. For instance, the right to keep medical records

confidential when they are provided to a doctor to seek medical care is fundamentally different than the right to hide a criminal conviction from the general public, and deciding that both examples merit the same protections leads to overregulation of information.

Because of this, it is impossible to simply balance the interest in privacy against the public interest in receiving information to fashion a general rule that will govern in most situations. It is imperative to recognize that the public interest in information about public affairs must presumptively trump privacy interests, absent a specific showing that a *particular* privacy interest outweighs a minimal or nonexistent public interest in certain information.

There may well be consequences to personal privacy of having court records available publicly, but the solution should not be imposition of a censorship regime that suppresses information of public interest and importance. For example, governments should not make the underlying acquisition of knowledge about how the criminal justice system works impossible through overreaching regulation of the protected communications of Internet search engines. The better solution is to regulate specific improper uses of that information where the personal privacy interests are overwhelming. The standard for the "right to be forgotten" now recognized in the European Union is "vague, ambiguous and unhelpful" and harmful to entire system of free expression.[1]

The implementation of a broad "right to be forgotten," which almost necessarily suggests the subject's involvement in a matter of public interest or concern that he or she no longer wishes to be associated with, is not a workable solution in any free society. Information of legitimate public interest may well be considered private by those named, but the legitimate privacy interests in traditionally nonpublic information like medical and tax records can be sufficiently protected without a need to be "forgotten" sometime later.

- ***The right to be forgotten does not adequately protect the fundamental rights of free expression and access to information.***

This office's January 2016 discussion paper concludes that a "right to be forgotten" would require "a careful balancing with other societal values, such as the right to freedom of expression, which is guaranteed under the Canadian Charter of Rights and Freedoms. . . . [F]reedom of expression remains a corner stone of Canada's democratic system."

But the interests in receiving information and reporting it to the public are not simply interests to be somehow balanced against privacy: The result of the balancing test will be entirely subjective and largely arbitrary. Adoption of this European principle is fundamentally inconsistent with Canadian values of free expression.

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[1] Owen Bowcott, Right to be forgotten is unworkable, say peers, The Guardian (July 29, 2014), http://www.theguardian.com/technology/2014/jul/30/right-to-be-forgottenunworkable-peers.

When the information is a matter of public concern, there should be a presumption in favor of public knowledge, overcome only when there is a specific showing that a *particular* interest outweighs the minimal or nonexistent public interest in certain information.

The right of expression and knowledge cannot be called a "corner stone of Canada's democratic system" if it can disappear in the balancing with any privacy interest. Instead, the first and most important test has to be an evaluation of the public interest in access to the information.

Members of the news media depend on an open Internet to research and verify information, and to reach and inform readers in all the countries of the world. A broad "right to be forgotten" that expands well beyond personal tax and medical records to encompass police, court, and other governmental records deprives the general public of the knowledge it needs to self-govern and should not be imported into North America.

International standards recognize the importance of protecting free expression interests in this area. Article 19 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[2] As the Court of Justice of the European Union has recognized, European governments must make sure they do not interpret data privacy directives in a way that "would be in conflict with the fundamental rights protected by the Community legal order."[3] European privacy regulators are thus obligated to interpret the data directive and any decisions under it to comport with the fundamental right of free expression as well as with the right of the public to receive information, opinions, and ideas.[4]

Restrictions on freedom of expression will be even more troubling if Canada follows the example in Europe and tries to bar Internet search providers from notifying web sites when their content has been delisted.[5] Preventing free and open contact with the news media will only serve to delegitimize delisting demands placed on search engines. To forbid search engines from communicating with news organizations about truthful and lawful information that the media has every right to report on and the public has every right to receive is a restraint on speech that runs contrary to free expression guarantees in Canadian and international law and would suppress protected journalistic activities.

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[2] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 19, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).
[3] Case C-191/01 Bodil Lindqvist EU:C:2003:596, paragraph 87; see also Case C-73/07 Satakunnan Markkinapörssi and Satamedia EU:C:2008:727, paragraph 53, 56.
[4] European Convention on Human Rights art. 10.
[5] Dave Lee, BBC Forgotten List 'Sets Precedent,' BBC (June 26, 2015), http://perma.cc/Q2GH-38Y9.

- ***The imposition of information controls would make any regulation in this area oppressive and unworkable, whether applied worldwide or just in Canada.***

French privacy regulators decided that to protect their citizens' privacy interests, Google had to limit its search engine results *worldwide,* not just on the French top-level domain or for French IP addresses.[6] Thus, a nation that chooses to protect privacy by limiting access to information necessarily becomes an international information censor. Yet if Canada takes the more reasonable approach to only apply its restrictions domestically, what will it do when it finds the very privacy-protection tools that allow its citizens to hide their digital trail can be used to circumvent the controls it imposes, for instance by tunneling through a VPN to appear to an American search engine as an American user? Both approaches are problematic and unworkable.

International free expression cannot survive on the Internet if every nation's laws apply to every website. Surveys of speech restrictions reveal a landscape of censorship. Saudi Arabia does not allow criticism of its leadership nor questioning of Islamic beliefs; Singapore bans speech that "denigrates Muslims and Malays;" and Thailand prohibits insults to the monarchy. Expression supporting gay rights authored by a European writer for a European audience violates the law in Russia.[7] There are countless more examples. In Internet and the Law: Technology, Society, and Compromises, professor Aaron Schwabach writes that banning all online expression that violates the law of any country would mean that "all Internet users would be held not to the standard of their own country, but to a composite standard forbidding all speech that was forbidden by any nation's law, and was thus more restrictive than the law of any individual nation."[8]

Indeed, applying local speech laws to the Internet as a whole may embolden the countries with the most stifling controls on expression to demand compliance with their own laws worldwide. As the editorial board of The New York Times concluded, extraterritorial application of Europe's right to be forgotten laws "sets a terrible example for officials in other countries who might also want to demand that Internet companies remove links they don't like."[9] This "race to the bottom" is a frightening prospect not just for news

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[6] See "Right to be delisted: the CNIL Restricted Committee imposes a €100,000 fine on Google," CNIL (March 24, 2016), https://www.cnil.fr/en/right-be-delisted-cnil-restricted-committee-imposes-eu100000-fine-google, archived at https://perma.cc/GRF3-WEUT.

[7] See OpenNet Initiative Research, https://opennet.net/research/profiles/saudi-arabia; https://opennet.net/research/profiles/singapore; https://opennet.net/research/profiles/thailand; *License to Harm: Violence and Harassment against LGBT People and Activists in Russia*, HUMAN RIGHTS WATCH (Dec. 15, 2014), https://perma.cc/XF7A-HEJA.

[8] Aaron Schwabach, Internet and the Law: Technology, Society, and Compromises 132-33 (2d ed. 2014).

[9] Europe's Expanding Right to Be Forgotten, The New York Times (Feb. 4, 2015), http://nyti.ms/1u6zuXZ; see also Americans shouldn't demand a right to be forgotten

organizations but also for other information gatherers who publish to a global audience, such as human rights groups, democracy activists, and NGOs.[10]

Concerns already exist that the right to be forgotten will be the trigger that sets off a worldwide race for digital one-upmanship on the Internet. Canada should not become another player in a contest that the most oppressive regimes around the world will be destined to win.

Universal application of a right to be forgotten is unworkable because it contains no limiting principle: every website is in theory accessible from every computer in every country that is connected to the web. Given that Canadian delisting rules would do little to protect Canadian citizens while at the same time exacting significant harm on the rights of people around the world to receive information that is lawful in their nations, Canadian privacy regulators should not pursue implementation of a right to be forgotten.

Sincerely,

The Reporters Committee for Freedom of the Press
American Society of News Editors
Committee to Protect Journalists
Media Law Resource Center
The National Press Club
Newspaper Association of America
Online News Association
PEN American Center
Radio Television Digital News Association

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online, The Washington Post (Aug. 28, 2015), https://perma.cc/QR2W-SDCA (stating that "Europe's regulatory overreach may affect the whole Internet").

[10] See Peter Fleischer, Implementing a European, not global, right to be forgotten, Google Europe Blog (July 30, 2015), http://perma.cc/2RY9-XYGZ