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April 27, 2018

Daniel Therrien
Privacy Commissioner of Canada
30 Victoria Street
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Via email: OPC-CPVPconsult2@priv.gc.ca

Dear Mr. Therrien:

We write to offer comments on the Office of the Privacy Commissioner's ("OPC") draft "Position Paper on Online Reputation," released in January. 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 previously offered comments on OPC's discussion paper on online reputation in August 2016.¹ Our comments below, which specifically address Questions 2 and 3 in the call for comments, are submitted on behalf of the news media and reflect the general public's interest in a robust right of free expression.

Summary of argument:

With respect to Question 2 on whether OPC's draft position paper has struck the appropriate balance between privacy and free expression:

- The draft position paper must clarify that websites performing a journalistic function are exempt from any takedown obligation.
- The draft position paper claims, in the context of de-indexing, that a search engine may *never* act for journalistic or literary purposes (or at least not exclusively for such purposes) because search engines fail to distinguish journalistic or literary search results from other search results.² Such an all-or-nothing approach may result in unintended consequences. Complete lack of protections for journalistic content indexed by search engines could mean, for

¹ *Submission to the OPC's Consultation on Online Reputation (Reporters Committee for Freedom of the Press)*, Office of the Privacy Commissioner (Aug. 2016), <https://perma.cc/UUK8-ND8G>.

² The question is relevant to the exemption under the Personal Information Protection and Electronic Documents Act ("PIPEDA") for personal information collected pursuant to a journalistic, literary or artistic function. S.C. 2000, c. 5, § 4(2)(c).

instance, that news produced by a search engine or an affiliated outlet and included in its results would not be considered “journalistic.”

- The draft position paper gives insufficient weight to de-indexing’s grievous effects on the free exchange of ideas.

With respect to Question 3 on whether the OPC draft position paper should address any additional considerations:

- OPC should provide more guidance as to how search engines should balance privacy and the public interest in evaluating de-indexing requests. This should include, at the very least, a strong presumption that de-indexing or takedowns are against the public interest when the requester is a public figure or the request relates to a public figure.
- To properly protect the public interest, search engines should be encouraged to notify source websites about requests to de-index search results, and source websites should have access to an appeals process at both the search engine and governmental levels.

Question 2: Of the positions taken in this paper, have we struck an appropriate balance between individuals’ right to privacy and the right to free expression? Why or why not?

We commend OPC’s recognition in the draft position paper that free expression is an important component within this discussion of online reputation and privacy. However, the draft position paper ultimately fails to protect the public’s essential right to free expression for several reasons.

First, OPC must clarify that websites that are performing a journalistic function should be off limits for any law that mandates content takedowns under threat of legal sanction. Without such a clarification, the temptation for a government to use such a law against its critics will be significant.

Second, the draft position paper may be overly exclusionary in its definition of a journalistic, literary or artistic function. The collection of information and the use of editorial skill to provide the most relevant information to the public is a key part of the functional definition of journalism. And, as OPC notes, search engines strive to “provide people with access to relevant information from the most reliable sources available.”³ It is true that search engines index information beyond just news sources. But OPC’s all-or-nothing conclusion that search engines can *never* perform a journalistic function may sweep in what even Parliament may consider to be journalistic activity, as explained below.

Third, and irrespective of whether search engines serve a journalistic, literary or artistic function, the draft position paper also fails to properly consider de-indexing’s grievous effects on the free exchange of ideas. OPC argues that the de-indexing of information—including true but “out-of-date” information—has only a narrow effect on the public’s right to access information, and on

³ *Draft OPC Position on Online Reputation*, Office of the Privacy Commissioner (Jan. 2018), <https://perma.cc/J2K9-RB57>.

the source websites themselves. This is demonstrably untrue. As explained in our response to Question 3, treating these serious consequences lightly could lead search engines—who will look to OPC’s guidance in enforcing any de-indexing regime—to err on the side of de-indexing. That is, they will give insufficient weight to the right of free expression, at significant cost to the public’s right to access information.

We discuss these three points in greater detail below.

- ***The draft position paper should explicitly state that news websites are exempt from forced takedowns.***

OPC should make clear that its proposal to require source amendment or takedowns, in certain circumstances, of information provided by others to third parties, does not apply to news media websites. While the draft position paper acknowledges PIPEDA’s journalistic function exception when discussing whether PIPEDA applies to *de-indexing* requests made to search engines, discussion of this exception is noticeably absent from the draft position paper’s analysis of the source takedown requirement. Because news organizations clearly collect, use or disclose any personal information for journalistic purposes, OPC should state explicitly that news websites are exempt from the proposed source amendment or takedown requirements.⁴

- ***OPC should take a more nuanced approach as to whether search engines may, in context, perform a journalistic, literary or artistic function under PIPEDA.***

The draft position paper takes the position that search engines may *never* be covered by the journalistic, literary or artistic exemption under PIPEDA⁵ because they do not “distinguish between journalistic/literary material” and “return content in search results regardless of whether it is journalistic or literary in nature.”⁶

First, just as a practical matter, search engines may be deliberately distinguishing journalistic, literary or artistic material from other results. For instance, if one searches for “Bernie Sanders NAFTA story in the Globe and Mail,” any search engine will be doing its best, algorithmically, to distinguish between news stories and other results.⁷ Similarly, if one searches for “paintings of Prime Minister Trudeau,” a search engine would be striving to return only “artistic” results. That culling of journalistic information from other information can be a function of search.

⁴ Similarly, if social media websites perform journalistic functions, PIPEDA’s journalistic function exception should also apply and exempt social media websites from any source amendment or takedown requirements.

⁵ See PIPEDA, s. 4(2)(c) (stating that PIPEDA does not apply to “any organization in respect of personal information that the organization collects, uses or discloses for journalistic, artistic or literary purposes and does not collect, use or disclose for any other purpose”).

⁶ *Draft OPC Position on Online Reputation*, Office of the Privacy Commissioner § a.i (Jan. 2018), <https://perma.cc/J2K9-RB57>.

⁷ As searched on the evening of April 17, 2018, the first 17 hits in response to that query on the search engine DuckDuckGo are news stories, and the first seven are stories about NAFTA in *The Globe and Mail* referencing Senator Bernie Sanders, Democrat of Vermont.

Additionally, the draft position paper implies that the inclusion of an external web search on a website could automatically deny it the protection of the PIPEDA exemption for journalistic, literary or artistic collection because a search for the article would produce non-journalistic results. By contrast, an internal search of a newspaper's web archive would, indeed, only produce journalistic results and thus would seem to be covered by OPC's narrow approach to PIPEDA's exemption. In some cases, however, original reporting and broader search functionality have been combined. For example, in 2011, Yahoo News began hiring a number of journalists to provide original news content to users in addition to search functionality through Yahoo Search.⁸ It seems inconsistent that original reporting would be exempt from de-indexing from an online newspaper archive search, but a Yahoo News article would be subject to de-indexing on Yahoo (and indeed across all search engines, meaning that it would be virtually disappear from the internet).

Third, there is also the growing significance of data journalism, which often includes making large datasets that include personal information publicly available with a search function. For example, ProPublica publishes many databases useful to the public, including one in which users can search among payments from pharmaceutical companies to their local doctors.⁹ Factba.se allows users to search years of archived speeches, interviews and other material by U.S. President Donald J. Trump.¹⁰ Opensecrets.org permits users to search for campaign contributions by name.¹¹ The International Consortium of Investigative Journalists has analyzed the enormous amount of data in the Panama Papers and has created a robust search function.¹² OPC must make clear that data journalism search engines such as these would be exempt from de-indexing requests.

At the very least, as this brief discussion shows, the analysis here is much more complicated than the draft position paper acknowledges, and, crucially, deserves more attention than the draft position paper provides.¹³

Finally, even if a search engine's search function is not exempt from de-indexing requests, content from news websites should be. Indeed, de-indexing the news from search results effectively hides the information from public view, as explained more fully below in response to Question 3. Parliament clearly intended that journalistic, literary and artistic content receive

⁸ See, e.g., Dylan Stableford, *Yahoo News Hires Oliver Knox as Its First White House Correspondent*, Yahoo News (Feb. 1, 2012), <https://perma.cc/WZ22-PEB5>.

⁹ *Dollars for Docs*, ProPublica, <https://perma.cc/7RET-2V6T> (last updated Dec. 13, 2016).

¹⁰ See *Donald Trump*, Factba.se, <https://factba.se/trump> (last visited Apr. 16, 2018).

¹¹ Opensecrets.org, Ctr. for Responsive Politics, <https://www.opensecrets.org> (last visited Apr. 16, 2018).

¹² Int'l Consortium of Investigative Journalists, *Data Journalism*, <https://www.icij.org/data> (last visited Apr. 17, 2018).

¹³ Moreover, even if the search engines are not performing a journalistic function, de-indexing has serious negative effects on the free flow of information that may be in the public interest, as we discuss in response to Question 3.

special protection under the law. Permitting it to be de-indexed would eviscerate that exemption, as most people rely on search engines to find news articles, literature or art.

- ***De-indexing information from search engine results has a substantial impact on the public's access to information and the free exchange of ideas.***

Irrespective of the discussion above, any mandatory de-indexing regime, and especially one such as this where search engines have an incentive to err on the side of censorship, will harm the ability of Canadians to access information.

Canadians increasingly rely on the internet as a vital source of all types of information.¹⁴ Search engines, in particular, are among the primary ways the public seeks out and accesses information on the internet, including news, news outlets, and other sources of reporting.¹⁵ Thus, limitations on the ability to access and disseminate information on the internet amount to a severe restriction of the public's ability to search for truth and engage in democratic discourse—principles protected within the freedom of expression.

Given search engines' central role in the exchange of information online, any de-indexed information is effectively censored from public view. Search engine users typically seek out information by entering descriptive search terms, such as a person's name.¹⁶ If the information they seek is not available in the search results, many people lack the skill, technical or otherwise, to find the information through other means. Therefore, de-indexing content from search results for a particular person's name removes one of the most likely methods by which the public could find that information online. Even if the de-indexed information may still be accessible to those with the necessary skill to find it by other methods, it is effectively inaccessible to the vast majority of people if they cannot find these websites via search engines. Thus, as noted, de-indexing the news essentially circumvents protections for journalism, literature and art in Canadian privacy law by effectively removing it from the public's reach.

As a result, de-indexing will have a significant impact on source websites, including news organizations' websites. The search engine is the digital equivalent of the newsstand in the modern era. Search engines drive a great deal of traffic to news websites and other online

¹⁴ Pete Evans, *Canadians More Web-Connected, But at Possible Cost to Work-Life Balance*, StatsCan says, CBC (Nov. 14, 2017), <https://perma.cc/P9DJ-33ZM> (“[M]ore and more Canadians are accessing the internet on a regular basis, with 91 per cent of Canadians over the age of 15 using the internet at least a couple of times every month last year.”).

¹⁵ For example, about one in five people in Europe and the United States use search engines as a primary means of accessing news. See “New Eurobarometer shows how 15 to 45 year olds use the internet to access music, films, TV series, images and news,” Sept. 14, 2016, <https://perma.cc/JW5S-TT85>; “How Americans Encounter, Recall and Act Upon Digital News,” Pew Research Center (Feb. 2017), p. 12, <https://perma.cc/V7J7-S2WX>.

¹⁶ Indeed, this is why search engines prioritize these types of terms in their results. See, e.g., *Bing Webmaster Guidelines*, Bing, <https://perma.cc/3GGH-GRDX> (last visited Apr. 5, 2018) (recommending websites to use keywords and phrases multiple times to improve their standings in search results).

sources of information, thereby aiding news organizations in the distribution of content that promotes democratic discourse.¹⁷ If a news organization's content is removed from relevant search results, it will affect the circulation of news to the members of the public to which it is most relevant. Further, less traffic often means less revenue for news websites, making it even more difficult for the news media to financially sustain the dissemination of information.

De-indexing search results may also affirmatively mislead members of the public into believing the information does not exist at all. Indeed, when a search for a particular person does not reveal information, many users may conclude there is nothing to be found about that person,¹⁸ when in fact there is information that has simply been de-indexed.

By contrast, when users find "incomplete" or "outdated" information in search results, users generally have context (such as published dates or the location within a site's archives) to understand that further events may have transpired since the information was originally posted. The "outdated" information is at least a starting point for a larger search. When the information cannot be found at all, there is no context to suggest to users that more research is necessary. Thus, a system by which information is routinely de-indexed from search results not only inhibits the search for truth, but is *actively misleading*.

Question 3: Are there gaps that have not been identified in the position paper that require further direction from the OPC?

Given the serious consequences of de-indexing on the public's ability to access and disseminate information online, OPC should provide much stronger guidance on the balancing of privacy interests and the interests in free expression that search engines must perform when they receive a de-indexing request. At the very least, OPC should presume that true information, especially about public figures or issues in the public interest, is presumptively beyond the reach of any de-indexing (or takedown) request.

In addition, the draft position paper does not provide for any governmental oversight to ensure that the proper balancing is done. OPC should revise the draft position paper to encourage search engines to inform website publishers of de-indexing requests so they may advocate for their interests in keeping the information up. OPC should also encourage search engines to create a meaningful right to appeal any de-indexing decision. And the government should itself have a robust appeals process when the government mandates de-indexing or source takedown.

¹⁷ Matt Rosoff, *Online News Sites Get 80% of Their Readers from Two Sources: Facebook and Google*, Business Insider (June 30, 2016), <https://perma.cc/EV6E-JS9C> (noting that 40% of traffic to news websites in January and February 2016 came from search engines).

¹⁸ Indeed, Google compares itself to "an impressive index telling you exactly where *everything* is located." *How Google Search Works*, *supra* (emphasis added).

- ***OPC should provide precise guidance as to how search engines should balance privacy rights and the public interest.***

As we previously noted in our 2016 comments on OPC’s discussion paper on online reputation, any “result of the balancing test [between privacy and the public interest] will be entirely subjective and largely arbitrary.”¹⁹ This concern is greatly amplified by the lack of analytical guidance in the draft position paper’s proposed balancing of interests in evaluating a de-indexing request, leaving little instruction to search engines on how to properly weigh and protect the public interest in the free flow of ideas and information.

For instance, and importantly, although the draft position paper acknowledges that an individual’s status as a public figure is one factor among others that is relevant to the balancing of interests, it does not indicate how much weight search engines should give this factor, nor any of the other factors identified by the draft position paper.

We respectfully submit that an individual’s status as a public figure should, in virtually all cases, be dispositive of the public interest inquiry.²⁰ Before the United States Supreme Court clarified the law, the relative ease with which public figures could bring defamation claims in the U.S. resulted in numerous spurious suits that often succeeded in silencing critics. A de-indexing or takedown regime lacking clear guidance, such as the one proposed by OPC, will result in the modern day equivalent of specious defamation claims brought by public officials against news organizations to stifle critical news coverage.²¹

There is a long history in the United States of public officials using privacy and reputational rights to attempt to silence their critics or stamp out stories of great public interest. In the 1950s and 1960s, for example, proponents of racial segregation used American libel laws to attempt to stymie coverage of the civil rights movement.²² In the seminal case of *New York Times v. Sullivan*, a city commissioner in Alabama alleged he had been libeled by a 1960 advertisement in

¹⁹ *Submission to the OPC’s Consultation on Online Reputation (Reporters Committee for Freedom of the Press)*, Office of the Privacy Commissioner (Aug. 2016), <https://perma.cc/UUK8-ND8G>.

²⁰ Under U.S. law, public figures would be able to bring a successful defamation claim only in the rare cases that the publisher of the information published it knowing it was false or with reckless disregard of its falsity. In those cases, all indications are that a search engine would remedy the situation itself and a news organization would issue a correction or take other steps.

²¹ For example, the British newspaper *The Telegraph* reported that Google has delisted many of its stories, including stories about the Catholic Church reaching a settlement with a sexual abuse victim, about a police officer who “who sparked an armed siege inside a police station” after making threats to coworkers, and about the “war plan” of a convicted mass murderer. Rhiannon Williams, *Telegraph Stories Affected by EU “Right to be Forgotten”*, *Telegraph* (Sept. 3, 2015), <https://bit.ly/2It5XAb>.

²² See Christopher W. Schmid, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 *Ala. L. Rev.* 293, 305 (2014), <https://www.law.ua.edu/pubs/lrarticles/Volume%2066/Issue%202/Schmidt%20.pdf>.

The New York Times that accused city police of responding to civil rights protests with “intimidation and violence.”²³

Importantly, the U.S. Supreme Court developed a rigorous test to balance the right of free expression against the plaintiff’s alleged reputational interests. First, information that is true (regardless of how old or outdated it is) is always protected. In addition, even untrue or misleading statements may be protected because the Court recognized that requiring complete accuracy would have a dangerous chilling effect on speech. Second, when a public figure is concerned, there is a strong presumption in favor of the public interest in publishing the information, unless the plaintiff can prove the defendant acted with actual malice.²⁴ Indeed, the Court found the advertisement in *Sullivan* was not punishable under American libel law, despite some minor inaccuracies about the events that had transpired.

As a result of the *Sullivan* decision, there is a solid analytical framework in the United States for the resolution of disputes about the reputational interests of public figures. The framework keeps the public interest at the forefront and settles cases in a less arbitrary way than a simple balancing test, such as the one put forward by OPC, in which the requester’s status as a public figure is but one factor in a non-exhaustive, merely illustrative list.

If the facts of *Sullivan* were to occur today, that Alabama city commissioner may go to a search engine to demand it de-index websites he believes harms his reputation. Indeed, the lack of concrete guidance on how the balancing test should be conducted could incentivize spurious de-indexing or takedown requests. Under OPC’s draft position paper, we are left to wonder how the search engine would approach the city commissioner’s request and what would be the result. The sparse discussion of factors weighing for and against the public interest does not lead search engines to any certain conclusion. This approach leaves too much discretion to search engines to effectively hide from public view the very content that PIPEDA’s journalistic exemption purports to protect. And while the facts of *Sullivan* may seem like an easier case almost 60 years later, absent strong guidance from OPC, how will search engines handle the difficult cases of today?

Further, as noted, the limited guidance the draft position paper provides to search engines will lead to arbitrary results that could favor those with resources or political power. Indeed, those who can afford an attorney or otherwise have the ability to navigate OPC’s murky factors would have a much greater chance of convincing the search engine to de-index the allegedly offending content or succeed in getting regulators to order a de-indexing or takedown.

At the same time, these powerful individuals are also more likely to be able to engage in counter-speech—the ideal answer in a democracy to offensive speech. The less powerful—those whom OPC purportedly seeks to protect with the de-indexing regime—would be left to petition search engines without the same resources or political clout, which could, perversely, create an incentive for search engines to deny their requests.

²³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 256–58 (1964).

²⁴ In U.S. libel law, “actual malice” means the defendant knew the challenged statements were false or acted with reckless disregard for the truth. *Id.* at 279–80.

More substantive, concrete guidance will result in more predictable, reliable, fair, and consistent results. And, as we argued in our 2016 comments, the proposed balancing test should begin with the presumption that wide access to all information is in the public interest.

- ***To properly balance and protect the public interest, OPC should encourage search engines to notify source websites about a de-indexing request, and source websites should have access to an appeals process.***

The ability for a party to advocate on behalf of the public interest when search engines are considering de-indexing requests is of utmost importance. Without an adversarial process in evaluating the requests, search engines will likely often err on the side of de-indexing, in fear of violating their claimed obligations under PIPEDA.²⁵ This dynamic will result in even greater curtailment on the public's access to important information, and certainly does not promote a "large and liberal interpretation" of the freedom of expression.²⁶

Unfortunately, the draft position paper fails to counter the impulse by search engines to err on the side of censorship. The draft position paper does not prohibit search engines from notifying websites of de-indexing requests, which we commend as a good first step. However, search engines may not take the initiative on their own, and thus OPC should recommend that search engines attempt to notify source websites. Search engines should also be encouraged to notify *the public on the search website* that they have de-indexed a request.

Further, and crucially, where the government has ordered a de-indexing, for example through a court order, the government should be required to notify the source website. And where a court has ordered a takedown, the government should be required to notify any third parties clearly affected by the takedown.

Again, if *Sullivan* were to occur today and the search engine were to grant the Alabama city commissioner's request to de-index the information, *The New York Times* may have no way of knowing its content was de-indexed and no way to oppose the request under the draft position paper's approach. Instead, encouraging notification would give source websites the opportunity to make the case that the de-indexed information is in the public interest and should remain available in search results. OPC asserts that search engines face practical limitations to notification, but the draft position paper fails to explain what these limitations are or consider how they could be overcome. OPC should, at a minimum, affirmatively encourage search engines to notify the source websites of any de-indexing requests and provide suggestions to search engines on how these alleged limitations might be mitigated. Crucially, the Canadian government should be required to notify affected parties when the government mandates a de-indexing or takedown.

²⁵ This risk is even greater under the present vague guidance given by the draft position paper on balancing the interests involved.

²⁶ *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712 at para. 59.

Beyond notification, OPC should advocate for and facilitate an appeals process to allow source websites to challenge a search engine's de-indexing action both internally and ultimately to a governmental authority.

While the draft position paper argues that search engines already have mechanisms in place to respond to de-indexing requests as a result of their approaches to removing harmful content like credit card numbers or illegal content such as copyright infringement, the balancing involved in the wide variety of material that will be at issue in de-indexing requests is far more complicated than requests to remove credit card numbers and material that infringes upon copyright. Further, de-indexing requests would be cheaper and easier than seeking court action, meaning the sheer volume will increase the risks that illegitimate requests will be made and approved. OPC should advocate for a scheme that creates a robust appeals process at the search engine. Even still, because of the significant consequences to the public interest these decisions represent in the aggregate, it should not be left entirely to the search engines to safeguard this process. A government-level process should be established to adjudicate appeals and properly and consistently safeguard the public interest.

Sincerely,

The Reporters Committee for Freedom of the Press
American Society of News Editors
Committee to Protect Journalists
Media Law Resource Center
News Media Alliance
Online News Association
Radio Television Digital News Association
Society of Professional Journalists