Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Applying Transparency Principles to Hearing Exhibits

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Hearings are public. That used to mean little more than the public could attend if they heard about it. Before the internet, "public notice" of hearings was often just a piece of paper posted in the reception area of the regulator and a person answering specific questions on the telephone.

With the advent of websites, regulators began posting notices of upcoming hearings online and, sometimes sent email notifications to those who had signed up for them. Notices began to include a summary of the allegations against the registrant and, more recently, a copy of the notice of hearing itself. Now most regulators post the decision and reasons online as well. Posting these documents has resulted in regulators either editing the documents to remove highly sensitive information (e.g., about clients) or drafting the documents with public access in mind from the very start.

Renewed attention has now turned towards access to documents and exhibits filed in public hearings. Recent media reports have highlighted the disconnect between being able to hear evidence and argument referring to exhibits if one attends the hearing in person, while having limited or no access to them if one asks to see them the next day: https://www.thestar.com/news/canada/2017/02/07/star-launches-legal-challenge-to-end-secrecy-in-ontario-tribunals.html.

For regulators, the primary concern is the confidentiality of information related to third parties, particularly clients of practitioners. Most clients have a high expectation of privacy and they share information with their practitioners on that basis. The information can be very sensitive (e.g., about the health, finances, and private personal choices of the client). Clients should not have to give up that privacy entirely just because they make a complaint or simply because the regulator investigates their practitioner.

There are other reasons why access to hearing exhibits might be limited, such as where they involve disturbing pictures / videos or trade secrets.

There are a number of options for providing access to hearing exhibits:

1. **No Access.** Deeming all such information as sensitive is certainly the easiest option to administer. However, it is inconsistent with the notion of public hearings and leads to the absurd scenarios articulated by the media. This approach can lead to legal challenges.
2. **Require a Motion.** Probably the most common current practice, this approach requires anyone wanting access to the hearing exhibits to make a formal request with notice to affected parties. This enables the tribunal to hear from all sides before conducting an individualized assessment of the competing interests (i.e., transparency versus privacy). The formality and speed of this option can vary, ranging from a five minute break in the hearing in order to hear oral submissions, to a weeks-long process involving serving motion records and submissions by lawyers. A variation of this approach for government

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tribunals is to require a freedom of information request, which can takes weeks or even months. Critics of this approach say that it places unnecessary barriers to obtaining information that should be readily available.

3. **Default Automatic Access.** This is the approach followed by the courts. Generally, any document filed in a court proceeding can be viewed upon request (sometimes with the payment of a small fee). This approach is formalized in a written policy: https://www.attorneygeneral.jus.gov.on.ca/english/courts/policies_and_procedures/public_access/public_access_to_court_documents-EN.html. In a high profile case, court staff will often have copies of hearing exhibits available to the media on the same day they are filed. (In sensitive matters, documents can be prepared from the start with public access in mind, for example by not using identifying information about clients or other third parties. The Ontario College of Teachers provides access to agreed statement of facts and joint submission documents to anyone who makes a written request, with limited exceptions for sealed documents or documents with sensitive information that may require a motion in order to obtain access.) Under this approach, if a party is concerned about public access because of privacy or other concerns, the party could apply in advance for an order to "seal" the document when filing it. Or, a court or tribunal can identify the concern on its own and make an order limiting access to it. These rulings can be challenged by bringing an access motion. Default automatic access constitutes a commitment to the values of transparency and openness.
4. **Automatic Posting on a Website.** An even stronger commitment to transparency occurs where the regulator routinely posts all documents on its website (again with limited exceptions where there is a compelling privacy or other interest). This approach removes the barrier of having to physically attend at the regulator's office to request and see the file. This is the approach taken by the Ontario Energy Board. Again, parties preparing documents for the hearing can remove identifying information about third parties referred to in the documents. This approach is administratively easier where the tribunal operates entirely with electronic documents.

These approaches can also be combined. For example, frequently requested documents, such as the notice of hearing, can be posted on the regulator's website or be available for the asking while less commonly requested documents could require a formal request with an individualized determination by the tribunal.

This would be a good time for regulators, who have not already done so, to review their transparency approach to hearing documents to ensure that unnecessary barriers are removed.