

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-039

May 29, 2002

ALBERTA SECURITIES COMMISSION

Review Number 1978

Office URL: <http://www.oipc.ab.ca>

Summary: The Complainant alleged that the Alberta Securities Commission (the “ASC”) had collected and disclosed personal information about the Complainant’s criminal history in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Acting Commissioner found that the ASC had collected the Complainant’s personal information in compliance with the Act, and that there was no evidence of disclosure by the ASC in contravention of the Act, as had been alleged by the Complainant.

Statutes Cited: *Criminal Code*, R.S.C. 1985 c. C-46; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, section 1(n) [previously section 1(1)(n)], 33(c) [previously section 32(c)], 34(1)(a)(i) [previously section 33(1)(a)(i)], section 40(1)(c) [previously section 38(1)(b)], section 65(3) [previously section 63(3)], section 72 [previously section 68], section 92(1)(a) [previously section 86(1)(a)]; section 10, Part 4 of the *Securities Act*, R.S.A. 1980, c. S-6.1.

Orders Cited: **AB:** Order F2002-001; **B.C:** Order 01-027.

Cases Cited: *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301.

I. BACKGROUND

[para. 1.] The Complainant applied in 1996 to the Alberta Stock Exchange (the “ASE”) for approval as a director of a publicly listed company in Alberta (the “company”). As part of his application, the Complainant completed a mandatory Personal Information Form (the “PIF”). The PIF contained a number of questions requiring the Complainant to

disclose to the ASE whether he had a criminal record. The Complainant said no, and later affirmed his responses in a statutory declaration he signed in March 1996.

[para. 2.] The PIF was passed on to the Alberta Securities Commission (the “ASC”), which performed a routine Canadian Police Information Centre search (the “CPIC search”) on the Complainant, using its CPIC terminal access, at the request of the ASE. The ASC advised the ASE that the CPIC search disclosed that the Complainant had a criminal history.

[para. 3.] An employee of the ASE wrote a letter to the Complainant, marked “PERSONAL & CONFIDENTIAL”, on April 29, 1996. The employee informed the Complainant of the results of the CPIC search, and requested that the Complainant resign from any director or officer position with the company until the ASE had reviewed his explanation of that information (the “ASE letter”). The ASE letter indicated that a copy had been circulated to the Chair of the company.

[para. 4.] By letter received on July 27, 2000, the Complainant filed a complaint under the *Freedom of Information and Protection of Privacy Act* (the “Act”) against the ASC. The Complainant complained about the 1996 CPIC search, alleging that the ASC had collected his personal information in violation of the Act. The Complainant also alleged that the ASC was involved in the unlawful disclosure of his personal information, which was contained in a private and confidential letter to him from the ASE, at an annual general meeting of the company in the spring of 1998 (the “AGM”).

[para. 5.] The Commissioner assigned a Portfolio Officer to investigate the complaint. An investigation report was issued on November 15, 2000.

[para. 6.] The Complainant was not satisfied and requested that the matter proceed to inquiry. A written inquiry was set down and delayed, as the Complainant obtained extensions of time to prepare his submission. The inquiry commenced in late 2001, and concluded on April 10, 2002, after I had dealt with the preliminary issue discussed later in this Order.

[para. 7.] On January 1, 2002, the Revised Statutes of Alberta 2000 came into force. Although this did not result in substantive changes to the Act, various sections of the Act were renumbered. The submissions of the parties refer to the previous section numbers of the Act, as those were the section numbers in use at the material times. As such, for ease of reference, in this Order I will refer to both the current and the previous applicable section numbers of the Act.

II. RECORDS

[para. 8.] As this is a request for review under section 65(3) of the Act [previously section 62(3)], there are no records at issue.

III. PRELIMINARY ISSUE

[para. 9.] Both the Complainant and the ASC provided initial submissions and rebuttals. The ASC requested that I receive three records *in camera* as part of its rebuttal submission. The Complainant objected to the submission of the records *in camera*. I issued my ruling in a letter which is attached to this Order as “Appendix A.” The ASC openly submitted the evidence that I refused to accept *in camera*, providing it to the Complainant, who did not make a further submission.

IV. ISSUES

[para. 10.] There are two issues to address in this inquiry:

- A. Did the Alberta Securities Commission properly collect the personal information of the Complainant from the Canadian Police Information Centre?

- B. Did the Alberta Securities Commission have any involvement in the disclosure of a letter addressed to the Complainant as “private and confidential,” containing personal information, at an annual general meeting of the company in which the Complainant was a director?

A. Did the Alberta Securities Commission properly collect the personal information of the Complainant from the Canadian Police Information Centre?

(i.) Is the information at issue the Complainant’s “personal information” under the Act?

[para.11.] The relevant provisions of the definition of “personal information” found in section 1(n) of the Act [previously section 1(1)(n)] are:

(1)(n) ‘Personal information’ means recorded information about an identifiable individual, including

(i) the individual’s name...

...

(vii) information about the individual’s...criminal history, including criminal records where a pardon has been given

[para. 12.] In Order F2002-001, at paragraph 12, Adjudicator Bell noted that there is no definition of “criminal history” in the Act. He referred to the definition of “criminal” in Black’s Law Dictionary (Sixth Edition), which defines criminal as “that which pertains to or is connected with the law of crimes, or the administration of penal justice.” Adjudicator Bell also considered British Columbia Order 01-027, where Commissioner Loukidelis found that the reference in the British Columbia *Freedom of Information and Protection of Privacy Act* to “criminal history” in the context of personal information included “information about an individual’s alleged criminal history or acts.” Adjudicator Bell found that information pertaining to a criminal investigation, and the laying of

charges, was part of an individual's "criminal history" for the purposes of the Act. Following those interpretations of the phrase, I am satisfied that information pertaining to an individual's criminal convictions and charges are his "criminal history," and consequently is an individual's personal information under section 1(n)(i) and (vii) of the Act [previously section 1(1)(n)(i) and (vii)].

[para. 13.] The ASC submission indicated that it had obtained the Complainant's "criminal record" from CPIC. The ASE letter shows that the ASC collected information about the Complainant pertaining to four criminal convictions and seven criminal charges, none of which appeared to have resulted in a conviction. I am satisfied that the Complainant's name, and information pertaining to his criminal history, is the Complainant's personal information for the purposes of the Act.

(ii.) Did the ASC have the authority to collect the Complainant's personal information from the Canadian Police Information Centre?

[para. 14.] The ASC relied on section 33 [previously section 32] of the Act, which reads:

33 No personal information may be collected by or for a public body unless

...

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

[para. 15.] The ASC admitted that it collected the Complainant's personal information. It argued that it collected the Complainant's personal information under Part 4 of the *Securities Act*, which tasks the ASC to regulate public capital markets in Alberta. The regulatory mandate of the ASC includes acting as an oversight agency for the ASE, which is not subject to the Act, and ensuring potential directors of publicly listed companies "have a suitable personal and corporate history." The ASC argued that collecting information about the criminal history of a potential director or officer of a publicly listed company relates directly to and is necessary for its core activities and is therefore permitted under section 33(c) of the Act [previously section 32(c)]:

[a] person's criminal background, particularly charges and convictions relating to theft and fraud, have a direct bearing on whether that person should be charged with the fiduciary responsibilities of acting as a director of a public company. Confidence in and integrity of the Alberta capital markets requires that this type of information be obtained by the regulatory authorities in conducting their reviews of potential directors.

[para. 16.] In its rebuttal, the ASC returned to this issue:

..the CPIC information was, and continues to be, a necessary and integral part of the listing program administered by the Exchange under the supervision of the ASC. The ASC administers the province's securities laws, based on a broad public interest mandate; more specifically, the ASC is charged with maintaining the efficiency and integrity of the capital market in Alberta It is for this reason that the ASC (as well as other securities commissions in Canada) arranges to obtain CPIC results for potential officers and directors operating within its/their jurisdiction(s).

[para. 17.] The Complainant argued that the CPIC search was a fishing expedition that was “not within the terms” of what was section 32 of the Act.

[para. 18.] I reviewed the relevant provisions of Part 4 of the *Securities Act*, as well as section 10(1) of that Act, which reads:

10(1) The Alberta Securities Commission is...responsible for the administration of the Alberta securities laws.

[para. 19.] The Supreme Court of Canada has commented on the broad duties of securities commissions. In *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 at paras. 31-32, L’Heureux-Dube J., writing for the court, observed:

[31.] Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act.

[32.] Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 564, where Fauteux J. observed at p. 588:

The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province therein carrying on such a business.

[para. 20.] I accept the ASC argument that collecting information about the criminal history of a prospective corporate director of a company listed with the ASC relates directly to and is necessary for ASC operations and activities. I am satisfied that the ASC properly collected the Complainant’s personal information pursuant to section 33(c) of the Act [previously section 32(c)].

(iii.) Is the indirect collection of the Complainant’s personal information permitted under the Act?

[para. 21.] The relevant provisions of section 34 of the Act [previously section 33] of the Act read:

34(1) A public body must collect personal information directly from the individual the information is about unless

(a) another method of collection is authorized by

(i) that individual

[para. 22.] The PIF completed by the Complainant contains a separate section titled “Offences under the Law.” That section contains questions about an Complainant’s

criminal history, including personal past convictions and current charges. The PIF definition of an “offence” precedes the questions under this section. That definition includes a summary conviction or indictable offence under the *Criminal Code*, R.S.C. 1985 c. C-46. The final section of the PIF is titled “Caution” and contains a caution, printed in bold type, and a consent provision, which read:

Filing of any false information or failure to disclose full information required by or on this Personal Information Form may result in a refusal by the Alberta Stock Exchange to accept notice of the Deponent/Applicant as an Officer or Director of the listed company or of any company listed on The Alberta Stock Exchange.

I ACKNOWLEDGE THAT this is notice that, and consent that, any of the self-regulatory bodies in its or their discretion may obtain any information whatsoever (which may include personal or other information) from any source, and more specifically from an investigative agency as permitted by law in any jurisdiction in Canada or elsewhere.

[para. 23.] The ASC argued that it collected the Complainant’s personal information in compliance with section 34(1)(a)(i) [previously section 33(1)(a)(i)]. The Complainant signed the consent provision on the PIF. The Complainant authorized any self-regulatory body to obtain “any information whatsoever” from an investigative agency, which covers off the ASC obtaining the Complainant’s personal information from CPIC, and then passing it back to the ASE. Consequently, the ASC maintains that the Complainant’s consent is adequate under the Act.

[para. 24.] The Complainant argued that he did not authorize the ASC to obtain information about him: the personal information obtained by the ASC exceeds “any reasonable interpretation of the consent [provided] to obtain information.” The Complainant should have provided his CPIC record directly, rather than it being obtained indirectly. The language of the consent provision ought to have been very clearly worded to indicate that CPIC checks could be done. The Complainant also says that the ASC also contravened section 34(2) of the Act [previously section 33(2)] because it failed to inform the Complainant that his personal information had been collected.

[para. 25.] Section 34(1)(a)(i) [previously section 33(1)(a)(i)] does not require express written “consent,” as is required elsewhere in the Act, but only “authorization.” The Act does not define “authorization.” The Dictionary of Canadian Law (2nd Edition) defines “authorize” as “1. to empower. 2. ...defined by the jurisprudence as meaning ‘sanction, approve, and countenance’..” This suggests that authorization is a matter of substance. In the circumstances, did the Complainant authorize the ASC to indirectly collect information about his criminal history from CPIC?

[para. 26.] The PIF contains sufficient evidence on that point. There are several questions about the Complainant’s criminal history in the “Offences under the Law” section. The caution warns the Complainant about filing false information, or failing to fully disclose relevant information, which together with the consent provision communicates that the information volunteered by the Complainant—including information about his criminal history--could be independently verified by the ASC and passed back to the ASE. The

broad language of the consent indicates that a self-regulatory body could obtain “any information” from “any source”, including an “investigative agency”, which includes the R.C.M.P. and CPIC, a National Police Service of the R.C.M.P.

[para. 27.] Since the ASC functions as a self-regulatory body and has an investigative component, I reject the Complainant’s argument that the conduct of the ASC exceeded the scope of the Complainant’s authorization on the PIF. I find that by signing the consent provision on the PIF the Complainant authorized the ASC to indirectly collect the Complainant’s personal information from CPIC, for the purposes of what is now section 34(1)(a)(i) of the Act [previously section 33(1)(a)(i)]. As the Complainant authorized the indirect collection, there is no requirement of notice to him under the Act.

[para. 28.] The Complainant questioned whether the indirect ASC collection of the Complainant’s personal information from CPIC was lawful. The Complainant says that the language of a Memorandum of Agreement (the “MOU”) between the ASC and the R.C.M.P. in 1995, relating to the ASC use of CPIC, prohibited the ASC from directly conducting the background criminal check that was performed on him. The Complainant relied on provisions of the MOU, including paragraph 8 under heading #3 “Organizational Obligations” of the MOU (“paragraph 8”):

[u]nder the MOU, it is unlawful for the ASC to use its secret CPIC terminal except as part of the ASC Enforcement Branch’s law enforcement mandate. Specifically, the ASC agreed: [at paragraph 8, MOU] ‘CPIC access is not to be used for conducting security or reliability checks of persons.’

[para. 29.] In its rebuttal, the ASC argued that the MOU is boilerplate prepared for all category II (B) agencies (including the ASC), and was not drafted specifically for the ASC. The language of the MOU “is necessarily vague and of general application.” The ASC supplied records *in camera* that it argued showed that the type of background check conducted on the Complainant was specifically permitted under the MOU.

[para. 30.] I also reviewed the MOU and noted that paragraph 7 under heading #3 of the MOU (“paragraph 7”), the provision immediately preceding the one cited by the Complainant, reads:

[t]he agency [the ASC] agrees that the computer terminal used to access the CPIC system shall be used only in support of authorized law enforcement investigations being undertaken in accordance with CPIC policy and within the agency’s legislated mandate.

[para. 31.] The Complainant did not dispute that the ASC legislated mandate includes investigating the criminal background of a potential corporate officer or director. It is not clear whether that ASC activity, which appears to be permitted in general terms under paragraph 7, is a prohibited “security” or “reliability” check under paragraph 8. Consequently, as the MOU is ambiguous on the scope of the ASC permission to remotely access CPIC, I found it proper to resort to the records underlying the agreement that were submitted *in camera* by the ASC to clarify the intention of the contracting parties.

[para. 32.] The evidence that I refused to accept *in camera* shows that, in January of 1994, the R.C.M.P. expressly granted the ASC permission to remotely access the CPIC system to perform “security background inquiries on potential officers and directors of public companies,” as well as “background security enquiries of potential officers and directors of companies which deal in securities.” The evidence suggests that the MOU, including paragraph 8, intended to reflect the agreement that the ASC could not use CPIC to conduct a security or reliability check of a specific category of persons (who are not at issue here). Therefore, I accept the ASC argument that the MOU simply allowed the ASC to obtain the necessary information through its own terminal, rather than make the request of the R.C.M.P. The Complainant’s challenge to the ASC authority to collect the personal information of applicants remotely from CPIC is without merit.

Conclusion under issue A

[para. 33.] I find that the ASC properly collected the personal information of the Complainant from the Canadian Police Information Centre under the Act.

B. Did the Alberta Securities Commission have any involvement in the disclosure of a letter addressed to the Complainant as “private and confidential,” containing personal information, at an annual general meeting of the company in which the Complainant was a director?

[para. 34.] The Notice of Inquiry tracked the Complainant’s original complaint. In his submissions, the Complainant attempted to enlarge the inquiry by adding new issues around the alleged dissemination of his personal information at the AGM. I will confine my analysis to the alleged disclosure at the AGM that was raised in the complaint. Before I can apply the law to this issue, I must establish the facts. While I will review the conduct of the ASC, the Complainant bears the burden of providing some credible evidence that a disclosure of his personal information happened as alleged.

[para. 35.] The ASC admitted that it passed on the Complainant’s personal information to the ASE, but argued that it was not responsible for the further dissemination of that information, and in any event there was no evidence of inappropriate disclosure of the Complainant’s personal information by the ASE. The personal information was properly disclosed to the ASE as a necessary step in the application review process, and was disclosed to the ASE for the purpose for which it had been collected by the ASC. The ASC argued that “there is no consistent, independent evidence” provided by the Complainant “as to which exact documents were disseminated at the shareholders’ meeting” [the AGM]. “It appears that neither [the Complainant] nor [his witness] is clear as to which document(s) were purportedly circulated.”

[para. 36.] In support of its argument about the unreliable nature of the Complainant’s evidence, the ASC submitted an earlier complaint that the Complainant had filed in relation to the disclosure of his personal information at the AGM. On May 27, 1998, the Complainant made a written complaint to the Calgary Police Service, alleging that a copy of his “CPIC police record” had been circulated at the AGM. The Complainant attached a

copy of the document he alleged was circulated at the AGM, which was headed “To Whom it May Concern”, dated April 30, 1996, and printed on Calgary Police Service letterhead.

[para. 37.] When he filed the complaint under this Act, the Complainant alleged that the material distributed at the AGM was confidential correspondence from the ASE to the Complainant, containing information about his criminal history. The ASC submitted a letter that the Complainant supplied to the investigating Portfolio Officer during the investigation of his complaint, dated October 4, 2000, in which he stated:

The origination of my complaint against the ASC: [the “eye witness”] attended an annual general meeting of this company on May 20, 1998, where he personally was a witness to dissemination [sic] of a correspondence from the Alberta Stock Exchange to this writer and was ‘private and confidential’ and its distribution cause this writer irrapable [sic] harm.”

[para. 38.] The ASC also submitted a letter obtained by the Portfolio Officer from a purported eye witness at the AGM, dated October 4, 2000. The relevant parts of that letter read:

I understand that [the Complainant] has been in touch with you regarding certain matters involving...the Alberta Securities Commission. In particular this concerns the unauthorised circulation of [the Complainant’s] PIF or Personal Information Form, submitted by him in support of his application for approval as a director of a public company. This document is supposed to be highly confidential, yet a copy of it was circulated at the annual general meeting of [the company] held on the 20th day of May 1998...The writer saw the document in question at that time. I have concluded that this must have come from the ASC.

[para. 39.] The Complainant’s version of events is reiterated by his counsel in his rebuttal:

[The Complainant] is quite clear that the disclosure of information in his complaint [at Tab 8 of the ASC materials] was a ‘private and confidential correspondence from the Alberta Stock Exchange.’

[para. 40.] Disclosure of personal information by a public body such as the Alberta Securities Commission is regulated under Part 2 of the Act. The relevant provision is section 40(1)(c) [previously section 38(1)(b)], which states:

40(1)A public body may disclose personal information only

...
(b) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

[para. 41.] I am satisfied that the ASC properly disclosed the Complainant’s personal information for the purpose for which the information was collected or compiled, as provided by section 40(1)(c) of the Act [previously section 38(1)(b)]. I am not persuaded the ASC was involved in an improper disclosure of the Complainant’s personal information at the AGM. The inconsistencies in the evidence about which documents were disclosed at the AGM undercut the credibility of the Complainant’s version of

events. I am struck by the statement of the eye witness, who says that what he saw circulated at the meeting was the PIF prepared by the Complainant, and not an ASE letter. Consequently, I find that there is no persuasive evidence that the ASC was involved in the disclosure of the Complainant's personal information at the AGM, as alleged by the Complainant.

Conclusion under issue B

[para. 42.] I find that the ASC properly disclosed the results of the CPIC search to the ASE under section 40(1)(c) of the Act [previously section 38(1)(b)]. I find that there is no evidence that the ASC had any involvement in the dissemination of a letter addressed to the Complainant as "private and confidential," containing his personal information, at an annual general meeting of a company in which the Complainant was a director.

[para. 43.] Finally, in his rebuttal the Complainant asked me to consider whether the ASC breached "section 87(1)" of the Act. The Complainant meant to raise what is now section 92(1)(a) of the Act [previously section 86(1)(a)], which prohibits a person from wilfully collecting, using or disclosing personal information in contravention of Part 2 of the Act. I am satisfied that there is no evidence that the ASC collected or disclosed the Complainant's personal information in contravention of Part 2 of the Act. As I have found that there is no contravention of Part 2 of the Act, section 92(1)(a) does not apply.

V. ORDER

[para. 44.] I make the following Order under section 72 [previously section 68] of the Act:

1. I find that the Alberta Securities Commission properly collected the Complainant's personal information from the Canadian Police Information Centre under the Act.
2. I find that the Alberta Securities Commission properly disclosed the results of the CPIC search to the ASE under section 40(1)(c) of the Act [previously section 38(1)(b)]. I find that there is no evidence that the ASC had any involvement in the disclosure of a letter addressed to the Complainant as "private and confidential," containing his personal information, at an annual general meeting of a company in which the Complainant was a director.

Frank Work, Q.C.
Acting Information and Privacy Commissioner