

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-019

March 3, 2008

EDMONTON PUBLIC SCHOOL BOARD DISTRICT NO.7

Case File Number F3634

Office URL: www.oipc.ab.ca

Summary: A student's parents complained to the Commissioner that his high school had collected and used his personal information when its administrators confiscated his cell phone and accessed the photographs it contained.

The Commissioner found that the evidence did not establish that the parents had standing to make the complaint under the Act or that the son's personal information had been collected or used by the Public Body.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 65, 70, 72, 84; *Personal Information Protection Act* S.A. 2003, c. P-6.5 s. 1; *Interpretation Act* R.S.A. 2000 c. I-8 s. 28

Authorities Cited: **AB:** Orders 97-002, P2006-004, P2006-008

I. BACKGROUND

[para 1] On March 19, 2006, the parents of a student attending a public high school in Edmonton complained to my office that the high school's administrators had collected and used the student's "private information" when his cell phone was confiscated. The parents also complained that the high school administrators had circumvented the cell phone's lock code and reviewed the photographs on it, deleting some of them. The

parents complained that an invasion of privacy had occurred not only to their son, but also to all the individuals in the photographs stored on the camera, including themselves, when the cell phone was confiscated.

[para 2] I authorized mediation to resolve the issue. However, as mediation was unsuccessful, the matter was set down for a written inquiry. Both parties provided initial and rebuttal submissions.

II. RECORDS AT ISSUE

[para 3] There are no records at issue.

III. ISSUES

Issue A: Did the Public Body collect the son's personal information in contravention of Part 2 of the Act?

IV. DISCUSSION OF ISSUES

Preliminary Issue: Evidence and the Burden of Proof

[para 4] As neither party provided evidence to support its position, I have decided to review the evidentiary requirements for making complaints about collection, use and disclosure of personal information.

Evidence

[para 5] Even though a hearing is conducted through written submissions, it is still necessary to provide evidence to support a party's position. This can be done by submitting affidavit evidence, or the direct evidence of individuals with first-hand knowledge of the issues.

[para 6] "FOIP" Practice Note 10 offers a helpful distinction between evidence and arguments. It explains:

"Evidence" is the material that public bodies must submit in inquiries to establish the facts upon which the Commissioner makes decisions. "Arguments" are the interpretation of the law based on the facts ... Public Bodies do not meet the burden of proof if they do not provide evidence to support written or oral arguments made in inquiries. Providing arguments alone is not sufficient. Arguments are not a substitute for evidence. It is also not sufficient to provide the Commissioner with records, and leave it up to the Commissioner to figure out from the records the facts upon which he will base his decisions. The Commissioner requires that persons within the Public Bodies provide evidence by speaking to the contents of records. Affidavit evidence is preferred. Public Bodies that do not provide evidence for inquiries risk having decisions go against them for lack of evidence to support their arguments.

[para 7] The same holds true for complainants in situations where they have the burden of proof and there is insufficient evidence before me to support their position.

The Burden of Proof

[para 8] The Act is silent as to where the burden of proof rests for an inquiry into a complaint about the collection, use and disclosure of personal information. In Order P2006-008, I discussed the burden of proof in these types of complaints both in relation to the *Personal Information Protection Act* and the Act. I said:

In *R. v. Stone* [1999] 2 S.C.R. 290, the Supreme Court of Canada cited Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* which contrasted the evidential burden with the legal or persuasive burden as follows:

The significance of the evidential burden arises when there is a question as to which party has the right or the obligation to begin adducing evidence. It also arises when there is a question as to whether sufficient evidence has been adduced to raise an issue for determination by the trier of fact. The legal burden of proof normally arises after the evidence has been completed and the question is whether the trier of fact has been persuaded with respect to the issue or case to the civil or criminal standard of proof. The legal burden, however, ordinarily arises after a party has first satisfied an evidential burden in relation to that fact or issue.

The *Personal Information Protection Act* (“PIPA”) like the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) is silent with regard to where the burden of proof rests for an inquiry into a complaint about the collection, use and disclosure of personal information. In Order P2005-001, I adopted the approach previously taken in Order 97-004 with regard to the FOIP Act that addressed the burden of proof issue and applied the following criteria:

- a) who raised the issue; and
- b) who is in the best position to meet the burden of proof

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information.

This initial burden is what has been termed the “evidential burden”. As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act...

As stated in by the Supreme Court of Canada in *R. v. Schwartz* [1988] 2 S.C.R. 443 at paragraph 38:

The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed.

As the Complainant has raised the initial issue as to the reasonableness of the Organization’s collection of personal information, it will be the Organization who will be best placed to demonstrate the reasonableness of such collection and the other issues raised in this inquiry. The Complainant has raised a *prima facie* case. The Organization is far better placed than the Complainant to meet the burden of proof with regard to the issues touching its commercial activities, the authority and reasonableness of its collection of personal information and the security and notification arrangements undertaken...

I do not envision complainants having a legal burden under the Act. The Complainant's burden ends with having met the evidential burden, as discussed. The Organization then bears the evidential burden to demonstrate that its collection, use and disclosure of information is in accordance with the Act.

I believe that the Organization is concerned that I am placing a "reverse onus" on it to prove a negative, that is, to prove that it did not breach the Act. On the contrary, the burden is on an organization to show that it has the authority under the provisions of the Act to collect, use or disclose personal information. This is the same burden of proof that is on a public body under the FOIP Act and a custodian under the *Health Information Act*.

[para 9] The person initiating the complaint has the onus of establishing that he or she has standing to bring the complaint, and to point to evidence suggesting that his or her personal information has been collected, used or disclosed under the Act. Once the complainant has met the evidential burden, the onus then shifts to the public body to establish that its collection, use or disclosure of the complainant's personal information was authorized by the Act.

[para 10] In the present case, the student's parents have the burden of establishing that they have standing to bring a complaint under the Act, and to point to evidence that establishes that personal information within the meaning of the Act was collected, used or disclosed by the public body.

Issue A: Did the Public Body collect the son's personal information in contravention of Part 2 of the Act?

[para 11] Section 65(3) creates my jurisdiction to review complaints regarding a public body's collection, use and disclosure of personal information. It states:

65(3) A person who believes that the person's own personal information has been collected, used or disclosed in contravention of Part 2 may ask the Commissioner to review that matter.

[para 12] The complaint must be made by a person, and the complaint must be about a collection, use and disclosure of the person's own personal information. In other words, an individual cannot complain about a public body's collection, use or disclosure of someone else's personal information.

[para 13] Section 84 of the Act explains when other persons may act on behalf of an individual. It states, in part:

84(1) Any right or power conferred on an individual by this Act may be exercised

- (a) if the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate,*
- (b) if a guardian or trustee has been appointed for the individual under the Dependent Adults Act, by the guardian or trustee if the*

- exercise of the right or power relates to the powers and duties of the guardian or trustee,*
- (c) *if an agent has been designated under a personal directive under the Personal Directives Act, by the agent under the authority of the directive if the directive so authorizes,*
 - (d) *if a power of attorney has been granted by the individual, by the attorney if the exercise of the right or power relates to the powers and duties of the attorney conferred by the power of attorney,*
 - (e) *if the individual is a minor, by a guardian of the minor in circumstances where, in the opinion of the head of the public body concerned, the exercise of the right or power by the guardian would not constitute an unreasonable invasion of the personal privacy of the minor, or*
 - (f) *by any person with written authorization from the individual to act on the individual's behalf.*

[para 14] The parents may make a complaint on behalf of their son if any of the circumstances in section 84 apply. However, I have no evidence before me that section 84 does apply. There is nothing in their letter of complaint to indicate why they, and not their son, are making the complaint. In addition, there is nothing in their evidence to establish that their son is even aware that his parents have made a complaint on his behalf. While it is usual for parents to act as legal guardians of minor children, I have no evidence as to the age of the son at the time the complaint was made. Nor do I have evidence that he authorized his parents to act as his representatives if he is not a minor.

[para 15] Alternatively, the parents may be making a complaint that their own personal information was collected. Section 28(1)(nn) of the *Interpretation Act* explains what “person” means in enactments, such as section 65(3) the Act:

28(1)(nn) “person” includes a corporation and the heirs, executors, administrators or other legal representatives of a person;

The Act requires each parent to make his or her own complaint, as collectively, the parents are not a person within the meaning of the Act. Even if I had found that they had standing to complain that their personal information had been collected by the Public Body, the parents have not submitted evidence to establish that the photographs reviewed by the Public Body are about them as identifiable individuals within the meaning of section 1(n) of the Act.

[para 16] Had I found that there was evidence establishing that the parents have standing to make a complaint on their son's behalf, the evidence does not establish that the school administrators collected, used or disclosed his personal information.

[para 17] In this case, evidence explaining what the photographs were of and who and why they were taken would be necessary to establish whether the photographs contained the son's personal information or that of his parents. While the parents advised

that they had unsuccessfully sought evidence regarding data usage from their mobile service provider, this evidence would not be on point. Instead, the photographs in question, or the direct or affidavit evidence of individuals who reviewed the photographs and can attest to their contents, would be relevant to the issue.

[para 18] Section 1(n) of the Act defines personal information. It states:

- 1(n) “personal information” means recorded information about an identifiable individual, including*
- (i) the individual’s name, home or business address or home or business telephone number,*
 - (ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*
 - (iii) the individual’s age, sex, marital status or family status,*
 - (iv) an identifying number, symbol or other particular assigned to the individual,*
 - (v) the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
 - (vi) information about the individual’s health and health care history, including information about a physical or mental disability,*
 - (vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
 - (viii) anyone else’s opinions about the individual, and*
 - (ix) the individual’s personal views or opinions, except if they are about someone else;*

[para 19] In Order 97-002, the previous Commissioner considered the meaning of “personal information”. He said:

“Personal information” also includes any recorded information that can identify an individual, including facts and events discussed, observations made, and the circumstances (context) in which information is given, as well as the nature and content of the information...

[para 20] In Order P2006-004, I considered the meaning of “personal information about an identifiable individual” within the meaning of the *Personal Information Protection Act*:

The Act defines “personal information” as “information about an identifiable individual”. In my view, “about” in the context of this phrase is a highly significant restrictive modifier. “About an applicant” is a much narrower idea than “related to an Applicant”. Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily “about” that person.

The same analysis holds true for the definition of “personal information” in the Act. While the definition is not intended to be exhaustive, clearly, information must be about an identifiable individual to be “personal information”.

[para 21] In their arguments, the parents stated:

Several of these pictures were of naïve young kids fooling around taking staged pictures with props...

If the pictures are of other students, then their son’s personal information has not been collected, used or disclosed by school administrators. As discussed above, to be personal information under the Act, information must be *about* an identifiable individual. In this case, the parents indicate that the pictures are of persons other than their son. I have no evidence that their son is in the photographs or that if he was, that he was identifiable. Under the Act, the pictures are not the personal information of the son, if they are not about him. Consequently, the school administrators may not have collected or used the son’s personal information when they viewed the photographs on the cell phone.

[para 22] It is possible that the pictures may contain the personal information of other students. However, only those individuals whom the photographs are about would have standing to make a complaint that the public body collected their personal information when the school administrators viewed the photographs on the cell phone.

[para 23] Reviewing the parents’ complaint, it appears that it turns on the fact that the cell phone was seized and that the pictures were accessed by school administrators. In fact, the original complaint is about the Public Body’s collection and use of “private information”-- in other words, information that their son wished to keep private. However, information or items that an individual wishes to keep private is not “personal information” under the Act.

[para 24] The Public Body argued that it accessed the photographs on the cell phone for a law enforcement purpose. It points to sections 12 of the *School Act* as authorizing its actions. However, the Public Body provided no evidence from the school administrators who seized the cell phone and accessed the photographs as to their intentions. As a result, the evidence does not establish that the Public Body did in fact have a law enforcement purpose when it accessed the photographs. Because the evidence does not establish that the photographs contained the personal information of the parents or the son, or that the

parents have standing to make the complaint, the lack of evidence as to the Public Body's purpose in collecting the photographs is not fatal to its case in the circumstances.

[para 25] For these reasons, I find that the evidence does not establish that the Public Body collected personal information in contravention of Part 2 of the Act and I will make an Order under section 72 accordingly. This Order is in relation to the parents' complaint that their son's personal information was disclosed, only. It is not in relation to any complaint their son may make on his own behalf. The son is not precluded from making his own complaint in the future, and may be represented by his parents in that complaint if he so chooses or if the evidence establishes that they are his guardians. Such a complaint would be set down for a written inquiry by an adjudicator on an expedited basis and the parties would be given the opportunity to provide evidence and make representations.

V. ORDER

[para 26] I make this Order under section 72 of the Act.

[para 27] As I have found that the parents do not have standing to bring the complaint, there is no order that I can make.

Frank Work, Q.C.
Information and Privacy Commissioner