

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2011-013

October 26, 2011

CITY OF EDMONTON

Case File Number F5470

Office URL: www.oipc.ab.ca

Summary: The Complainant complained to his City Councillor in relation to his neighbour's home-based business. The Councillor's request for information as to whether a business was being operated out of the neighbour's residence and for any additional pertinent information was forwarded to a Senior Development Compliance Planner, who investigated the situation. In conducting her investigation, the Senior Development Compliance Planner inspected the neighbour's property and interviewed that neighbour and his spouse as well as another neighbour. Ultimately, the inspection revealed that, although the neighbour was operating a business out of his home, there was no zoning violation. The interviews, on the other hand, revealed that the Complainant and his spouse were involved in ongoing disputes with their neighbours.

The Complainant complained to the Information and Privacy Commissioner that his personal information was collected, used and disclosed without the requisite authority under Part 2 of the *Freedom of Information and Protection of Privacy Act*. Specifically, the Complainant complained that the Senior Development Compliance Planner had collected and reported irrelevant, incomplete, biased information about himself and his wife, their property and its maintenance, and that she had disclosed to the neighbours in the course of her investigation the identity of the Complainant and his wife as being the source of the complaint.

At inquiry, the Commissioner found that the Public Body had authority to collect the Complainant's personal information, and had authority to collect it indirectly, for the

purposes of law enforcement. The Commissioner also found that the Public Body's limited use of the Complainant's personal information was for the same purpose, or for a use consistent with that purpose, and was only to the extent necessary to enable the Public Body to carry out its purpose in a reasonable manner, and was, therefore, authorized. Finally, the Commissioner found that there was no disclosure of the Complainant's personal information and, therefore, did not consider authority for the alleged but unproven disclosure. The Commissioner also found that he had no jurisdiction to address any complaint about the accuracy of the personal information at issue or about the collection, use or disclosure of the Complainant's wife's personal information.

As such, the Commissioner made no order against the Public Body in the inquiry.

Legislation Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 33, 34, 36, 39, 65, 72, 84; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 1; *Municipal Government Act*, R.S.A. 2000, c. M-26, ss. 7, 8, 9, 542; City of Edmonton, Revised Bylaw No. 12800, *Zoning Bylaw* (20 July 2011); City of Edmonton, Consolidated Bylaw No. 13138, *Business Licence Bylaw* (27 April 2011), ss. 21, 53.

Orders Cited: **AB:** 96-006, 96-019, 96-021, 99-010, 2000-019, 2001-039, 2001-040, F2002-020, F2003-017, F2004-022, P2006-008, F2006-016, F2006-018, F2008-031.

Court Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112.

Other Sources Cited: *Black's Law Dictionary*, 6th ed., s.v. "administrative"; *Black's Law Dictionary*, 7th ed., s.v. "sanction".

I. BACKGROUND

[para 1] The Complainant submitted a complaint to the Public Body, the City of Edmonton, via his City Councillor (the "City Complaint"). The Public Body states that the City Complaint was about the effects of the Complainant's neighbour (the "Neighbour") operating a construction business out of his residence; the Complainant states that he "did not in fact complain about [the Neighbour]", but rather, that he contacted his City Councillor "to complain about the City's policy of granting home-based business licenses to construction companies to operate in residential neighbourhoods". Regardless, as a result of the Complainant's call to his City Councillor, the Councillor sent an email to three individuals summarizing the telephone conversation and asking them to "advise as to whether a business is operating out of [the Neighbour's residential address] and any further pertinent information." This email was then forwarded to a Senior Development Compliance Planner (the "Investigator") for the Public Body, who conducted her investigation of the City Complaint (consisting mainly of site inspections and neighbour interviews) and summarized it in an email message dated June 15, 2010.

[para 2] The Complainant submitted a Complaint to this Office dated July 28, 2010 (the “FOIP Complaint”) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the “Act”) against the Public Body. In it, the Complainant complains that, “[i]n the course of investigating an issue surrounding a home-based business, a City of Edmonton by-law enforcer [*sic*] officer...inappropriately indicated that my wife and I were complainants to the home-based business owner and another neighbour...[,] [and]...collected and reported irrelevant information about our property and its maintenance – furthermore such information was incomplete and biased...” Attached to and forming part of the FOIP Complaint are the first of two pages of a print-out of the aforementioned email message of the Investigator dated June 15, 2010 (the “Email”). The Email is from the Investigator to the City Councillor and copied to others who are identified by name only. It details the site inspections of the two neighbouring properties, one of which belongs to the Complainant and the other to the Neighbour, as well as informal interviews with the Neighbour and his wife and with a third neighbour who lives across the street from the others. The Email indicates that the Investigator also attempted to speak with the Complainant, but without success.

[para 3] I authorized mediation to attempt to resolve the FOIP Complaint. However, as mediation was unsuccessful, the matter was set down for a written inquiry. In the inquiry, the Complainant relied on his FOIP Complaint and his Request for Inquiry as his initial submission. The Public Body provided an initial written submission consisting of argument with authorities and a Statutory Declaration sworn by the Investigator. The Complainant then submitted a rebuttal consisting of written argument and his Statutory Declaration. The Public Body also provided rebuttal argument attaching a copy of the portfolio officer’s findings letter; however, I wrote to the parties advising that I would not review the portfolio officer’s findings letter, nor would I consider any references to her findings or to the process she conducted as contained in either of the parties’ submissions.

II. RECORDS AT ISSUE

[para 4] Because this inquiry relates to the FOIP Complaint about the collection, use and disclosure of personal information, there are no records at issue *per se*.

III. ISSUES

[para 5] The Notice of Inquiry sets out three issues in this inquiry:

- A. Did the Public Body collect the Complainant’s personal information in contravention of Part 2 of the Act?
- B. Did the Public Body use the Complainant’s personal information in contravention of Part 2 of the Act?
- C. Did the Public Body disclose the Complainant’s personal information in contravention of Part 2 of the Act?

IV. DISCUSSION OF THE ISSUES

Personal Information of the Complainant's Spouse

[para 6] Section 65(3) of the Act states: "A person who believes that the person's own personal information has been...disclosed in contravention of Part 2 may ask the Commissioner to review that matter." In order to submit the FOIP Complaint on behalf of his spouse, the Complainant would have to have been duly authorized under section 84(1) of the Act. However, there is no evidence before me that any of the circumstances of section 84(1) are met in this case. For this reason, I find that I lack jurisdiction to deal with the FOIP Complaint to the extent that it relates to a complaint about the collection, use and/or disclosure of the personal information of the Complainant's spouse.

Burden of Proof

[para 7] Although it was not identified as an issue in this inquiry, both parties made submissions on the applicable burden of proof. The Public Body, in its initial submission, quoted Orders F2006-016, 2001-039 and F2003-017 in support of its position that a complainant who alleges that a public body has collected, used and/or disclosed personal information in contravention of the Act must prove that the collection, use and/or disclosure occurred.

[para 8] The Complainant responds in his rebuttal submission by stating:

The information provided to complainants clearly addresses the issue of the burden of proof. **ADJUDICATION PRACTICE NOTE 2** of January 2010 states: "In most inquiries, the public body, organization or custodian has the burden of proof." Based on this, the burden of proof in this case rests with the Public Body.

[para 9] Despite the Complainant's urging to the contrary, he bears an evidentiary burden to prove that his personal information was collected, used and/or disclosed. Only once he has satisfied this evidential burden does the burden shift to the Public Body to show, on a balance of probabilities that it had the requisite authority to collect, use and/or disclose the personal information; this is the public body's legal burden. I refer to the Court's decision in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, which adopts my reasoning in Orders F2002-020 and P2006-008 in this respect.

A. Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?

The Parties' Submissions

[para 10] Part of the Complainant's FOIP Complaint is that the Investigator "collected and reported irrelevant information about our property and its maintenance –

furthermore, such information was incomplete and biased.” Similarly, one of the Complainant’s issues or concerns stated in the Request for Inquiry is the “collection of irrelevant, biased personal information, recording it, and reporting it...Corrective action is needed.” However, this inquiry relates only to a complaint about unauthorized collection, use and/or disclosure of personal information. Since the Complainant made no request to the Public Body under section 36 of the Act to correct personal information, I have no jurisdiction to deal with that matter. Accordingly, I will not deal with any issues related to accuracy, completeness or correction, but rather will only determine whether the Public Body had authority to collect (and use and/or disclose) under the Act.

[para 11] The Public Body’s initial submission does not discuss the Complainant’s allegations about unauthorized collection except to point out that the Complainant first bears the burden of proving that collection occurred as alleged. Beyond this, it is silent.

[para 12] In his rebuttal submission, the Complainant points out that the Public Body is silent as to collection and use of his personal information, then goes on to discuss his version of the City Complaint. Insisting that he contacted the City Councillor “to complain about the City’s policy of granting home-based business licenses to construction companies to operate in residential neighbourhoods”, he questions why the City Complaint was interpreted as a complaint against the Neighbour, “especially since [he] was not contacted by any City officials before the investigation was started. It appears that the City simply proceeded, without ever talking to me, and sent out its investigator.” The Complainant gives examples of personal information collected in the investigation of the City Complaint (as well as other personal information that was not collected which, he believes, renders that which was collected “irrelevant, incomplete, and biased” and shows that the Investigator “wilfully attempted to discredit [him] as the purported complainant”), specifically the neighbours’ comments about singing, causing trouble and driveway shovelling, saying that this information “had no bearing on the investigation of the home-based business at [the Neighbour’s address] and should not have been collected, officially documented, and shared in any way with [the City Councillor] or any other persons”. He states that “[s]uch collection and reporting of extraneous personal information are contrary to Part 2 of the [Act].” The Complainant’s Statutory Declaration does not touch upon collection or use of his personal information, although he does declare that “[the Investigator] neither telephoned us nor left us any messages – there was no evidence to suggest that she had tried to contact us.”

[para 13] The Public Body responds by stating:

[i]n this matter, the main issue before the OIPC is whether or not the Public Body collected and/or disclosed the Complainant’s personal information in contravention of the [Act]. However, in order to consider such issues and determine the reasonableness of the Public Body’s conduct, the OIPC must first determine whether any personal information was in fact disclosed in this situation. If personal information was not disclosed, there is no need to consider whether or not the Public Body contravened the [Act].

The Public Body continues by discussing, primarily, whether or not the Investigator disclosed the Complainant's identity to his neighbours, as alleged. The Public Body touches upon collection when it indicates, in its rebuttal submission, that

as part of her discussions with both neighbouring owners, the [Investigator] was informed of details regarding an existing neighbourhood dispute. In the course of those discussions, both owners identified the Complainant as the 'neighbour' identified in the [City Councillor's email]

and that all information other than the reason for the investigation of the City Complaint, "was provided to [the Investigator] by the Complainant's neighbours". The Public Body concedes:

There is no dispute that the [Investigator] received information suggesting that the Complainant was the 'neighbour' referred to in the [City Councillor's email]. It is important to note, however, that this information was not solicited; rather, it was spontaneously offered by neighbouring owners as part of the discussions surrounding the existing neighbourhood dispute.

It also states that, "[w]hile the [Investigator] acknowledges that she was informed of the Complainant's name and address [by his neighbours] as part of her investigation, she clearly notes that she did not confirm [or thereby disclose] such information."

Analysis and Findings

[para 14] The Email clearly contains some personal information of the Complainant. Unfortunately, the Public Body has provided no argument or evidence in support of its authority to collect the personal information of the Complainant in the course of investigating the City Complaint by interviewing his neighbours; rather, it seems to have proceeded on the assumption that, if there was no disclosure on the facts, then the issue of collection, including authority to collect, is not raised. However, the flaw in that analysis lies in the simple fact that the personal information that was allegedly disclosed, being the Complainant's identity, is not the same as the personal information collected from the Complainant's neighbours, the collection of which is also challenged.

[para 15] Sections 33 and 34 of the Act stipulate the purposes for which, and manner in which, a public body may collect personal information:

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

- (a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,*
- (b) that information is collected for the purposes of law enforcement, or*
- (c) that information relates directly to and is necessary for an operating program or activity of the public body.*

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,*
 - (ii) another Act or a regulation under another Act, or*
 - (iii) the Commissioner under section 53(1)(h) of this Act,*
 - ...*
- (g) the information is collected for the purpose of law enforcement,*
-*

Further, section 1(h) defines law enforcement:

- (h) “law enforcement” means*
 - (i) policing, including criminal intelligence operations,*
 - (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*
 - (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;*

[para 16] For the reasons discussed below, I find that the Public Body had authority to collect the Complainant’s personal information, and to do so indirectly, for the purposes of law enforcement.

[para 17] Sections 7, 8 and 9 of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (the “MGA”) state, in part:

7 *A council may pass bylaws for municipal purposes respecting the following matters:*

- (a) the safety, health and welfare of people and the protection of people and property;*

...

(e) *businesses, business activities and persons engaged in business;*

...

(i) *the enforcement of bylaws made under this or any other enactment, including ...*

....

8 *Without restricting section 7, a council may in a bylaw passed under this Division*

(a) *regulate or prohibit;*

(b) *deal with any development, activity, industry, business or thing in different ways, divide each of them into classes and deal with each class in different ways;*

(c) *provide for a system of licences, permits or approvals, including ...*

...

....

9 *The power to pass bylaws under this Division is stated in general terms to*

(a) *give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and*

(b) *enhance the ability of councils to respond to present and future issues in their municipalities.*

The Public Body has passed both the City of Edmonton *Zoning Bylaw* 12800 (the “*Zoning Bylaw*”) and the City of Edmonton *Business Licence Bylaw* 13138 (the “*Business Licence Bylaw*”), either or both of which were potentially relevant to the City Complaint and the Investigation. The *Business Licence Bylaw* cites as its authority sections 7(a), 7(e), 7(i) and 8 of the *MGA*. Although the *Zoning Bylaw* does not cite any specific authority so far as I see, presumably it was enacted under the same, and perhaps additional, general authorities within the *MGA* or elsewhere.

[para 18] In Order 96-006 and again in Order 2000-019, the former Commissioner held that “law enforcement” encompasses the notion of a violation of a statute or regulation. In Order 2001-040, I noted that section 1(1)(c) of the *Interpretation Act*, R.S.A. 2000, c. I-8, defines “regulation” to include a “bylaw...enacted...in the execution of a power conferred by or under the authority of an Act...”. I find, therefore, that a contravention, or alleged contravention, of either the *Zoning Bylaw* or the *Business Licence Bylaw* falls within the ambit of “law enforcement”.

[para 19] The definition of “law enforcement” in section 1(h)(ii) of the Act has two requirements: first, there must be a police, security or administrative investigation, and second, such investigation must, at least potentially, lead to the imposition of a penalty or sanction.

[para 20] In Order 96-019, the former Commissioner accepted the following definition of the word “investigation”: “to follow up step by step by patient inquiry or observation; to trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry”. This definition has been applied in numerous subsequent orders. Although subsequent editions do not define it in isolation, the 6th edition of *Black’s Law Dictionary* defines “administrative” to include the following: “[c]onnotes of or pertains to administration, especially management, as by managing or conducting, directing, or superintending, the execution, application or conduct of persons or things...”. I find that an investigation to determine whether a home-based business owner is contravening either the *Zoning Bylaw* or the business licence granted under the *Business Licence Bylaw* or both falls within the definition and intended interpretation of an “administrative investigation”, thereby satisfying the first requirement of the definition of “law enforcement” in section 1(h)(ii) of the Act. Further, the evidence is clear that the Investigator in fact conducted an administrative investigation, as defined above.

[para 21] In Orders 96-006 and 96-021, respectively, the former Commissioner defined “sanction” broadly to include such things as “imprisonment or a fine, the revocation of a licence or an order requiring a person to cease an activity” and “a penalty for disobeying a rule or law..., ...a consideration operating to enforce obedience to any rule of conduct, or an action to coerce conformity to an agreement or norms of conduct”. In Order F2004-022, I accepted the definition of “sanction” in *Black’s Law Dictionary* (7th ed.), including: “a penalty or coercive measure that results from failure to comply with a law, rule order”. Section 7 of the *MGA* grants the council of the Public Body the power to pass bylaws for municipal purposes, including enforcement of bylaws by means of the creation of offences and the imposition of fines, penalties, imprisonment, and so on; specifically, contravention of either the *Zoning Bylaw* or the *Business Licence Bylaw* may, ultimately, result in the imposition of monetary penalties under those respective *Bylaws*. Clearly, these constitute sanctions or penalties. I find that the administrative investigation conducted in the present case had the potential to lead to the imposition of a penalty or sanction, thereby satisfying the second requirement of the definition of “law enforcement” in section 1(h)(ii) of the Act.

[para 22] Further, Orders 99-010, F2006-018 and F2008-031 have held that, to meet the definition of section 1(h)(ii), the Public Body's authority to investigate and the penalty or sanction must be under the same statute. Section 7(i) of the *MGA* grants authority to city councils to "pass bylaws for municipal purposes respecting...the enforcement of bylaws...including...(i) the creation of offences; (ii) for each offence, imposing a fine...or imprisonment...or both; (iii) providing for the imposition of a penalty...; (vii) providing for inspections to determine if bylaws are being complied with; (viii) remedying contraventions of bylaws." Also, as an example, although not directly applicable to the facts of this case, section 542 of the *MGA* grants municipalities further powers relating to inspections and enforcement. The interpretation of these provisions is informed by section 9 of the *MGA*, which states that the "power to pass bylaws...is stated in general terms to (a) give broad authority to councils...within [their] jurisdiction..., and (b) enhance the ability of councils to respond to...issues in their municipalities." In addition, the *Business Licence Bylaw* grants powers of inspection for the purpose of determining compliance with it at sections 21 and 53. I find that, in the specific, limited context of the *MGA* and bylaws passed thereunder, the term "inspection" is used in place of "investigation". To enforce a law and impose a sanction or penalty, it is first necessary to determine whether a contravention has occurred; determining whether there has been a contravention requires that some investigation be undertaken. A common, and perhaps the primary, means of determining whether or not a resident is complying with a bylaw or business licence is to conduct an inspection, as was done of the Neighbour's property in this case. I find that the requirement under section 1(h)(ii) of the Act, as established by previous orders, that the Public Body's authority to investigate and the penalty or sanction be under the same statute is met in this case. Perhaps more importantly, regardless of the common statutory source of both such authority and the resulting penalty or sanction, the Public Body actually conducting the law enforcement investigation is the one explicitly authorized to do so by statute.

[para 23] Moreover, I find that the authority under section 33(b) of the Act to collect personal information for the purposes of law enforcement should be interpreted such that the public body conducting the law enforcement investigation must be able to gather, consider and evaluate a range of potentially relevant information; it should be permitted to cast a wide net so as not to inadvertently exclude potentially crucial factors. In this case, the Investigator was investigating the City Complaint, however characterized, and doing so led to the uncovering of the neighbours' impressions, opinions and observations of the Complainant and his overall demeanour and behaviour patterns within the dynamic of, and his interactions within, the neighbourhood. Whether or not the Complainant was the source of the City Complaint (since, as I will discuss later, the evidence is that the Investigator did not, in fact, know whether or not he was), the neighbours' statements about the Complainant and about the Neighbour could be directly relevant, at the very least, to the validity of the City Complaint, again, however characterized.

[para 24] As such, I find that the Public Body had authority under section 33(b) of the Act to collect all of the Complainant's personal information that it did collect.

[para 25] Further still, given my finding that collection of the Complainant’s personal information by the Public Body was authorized under section 33(b) as being for the purposes of law enforcement, I also find that the Public Body had authority under section 34(1)(g) to collect the Complainant’s personal information indirectly from the neighbours, as the Investigator in fact did, for those purposes.

[para 26] In summary, I find that the Public Body, through the Investigator, had authority under sections 33(b) and 34(1)(g) to collect the Complainant’s personal information from his neighbours. Even if the nature of the Investigator’s investigation differed from the City Complaint as characterized by the Complainant himself, there is no impediment to the Public Body investigating a potential contravention of the *Zoning Bylaw* and/or the *Business Licence Bylaw*, or the business licence itself, once alerted to such possible contravention, nor was it incumbent upon the Public Body to contact the Complainant before launching, or even while conducting, such an investigation, despite the Complainant’s suggestion to the contrary in his rebuttal submission.

[para 27] Finally, because I have found that the Public Body had authority to collect the Complainant’s personal information under section 33(b) of the Act, it is unnecessary for me to consider whether or not the Public Body may also have been authorized to collect the Complainant’s personal information under either or both of sections 33(a) and 33(c).

B. Did the Public Body use the Complainant’s personal information in contravention of Part 2 of the Act?

The Parties’ Submissions

[para 28] The only “use” of his personal information complained of by the Complainant insofar as I can discern is the recording and reporting of it in the Email. Again, he complains, in his rebuttal submission, that such information about him was “irrelevant, incomplete, and biased”. The Public Body, on the other hand, does not comment at all substantively on any possible use of the Complainant’s personal information, but merely states, in its rebuttal submission, that “after concluding her investigation, the [Investigator] summarized the information provided to her by [*sic*] Complainant’s neighbours and responded to the request for investigation...”.

Analysis and Findings

[para 29] Section 39 of the Act states, in part:

39(1) *A public body may use personal information only*

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

....

...

(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

[para 30] I am not convinced that merely recording the information gathered in the course of investigating the City Complaint and forwarding it in the Email in response to the City Councillor's request that he be "advise[d] as to whether a business is operating out of [the Neighbour's residential address] and [of] any further pertinent information" constitutes a "use" of the Complainant's personal information. Rather, the only use that is clear to me on the evidence is that the Investigator considered all of the information gathered during her investigation and concluded that this was a neighbour dispute with no concomitant violation of law. Regardless, it is ultimately unnecessary for me to decide whether the Complainant has, in fact, complained of a use of his personal information because I find that any such use was only for the purpose of law enforcement or a use consistent with that purpose, namely concluding its investigation and communicating those conclusions to the City Councillor who received the City Complaint from the Complainant, and was, on these facts, only to the extent necessary for the Public Body to reasonably carry out that purpose. Because law enforcement was the very purpose for which the Complainant's personal information, and indeed all of the information in the Email, was collected, I find that the Public Body's use of the Complainant's personal information was permitted under section 39(1)(a) and did not exceed the extent permitted under section 39(4) of the Act.

C. Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?

The Parties' Submissions

[para 31] The Complainant alleges that, in the course of the investigation, the Investigator identified him as the complainant in the City Complaint to both the Neighbour and the Neighbour's wife (who were the subjects of his City Complaint and the investigation) and the neighbour across the street (who was interviewed by the Investigator). This is the only disclosure alleged by the Complainant and about which he complains.

[para 32] The Complainant submits that the Email documents this disclosure. Insofar as the Neighbour is concerned, the Email states: "[The Neighbour] knew who the complainant was and stated that there has been an ongoing neighbour dispute from [*sic*] the property owners of [the Complainant's address]." As for the neighbour across the street, the Email states: "She stated that the neighbours at [the Complainant's address] like to cause trouble and she stated that they do not take care of their property and do not shovel their driveway in winter."

[para 33] In his FOIP Complaint, the Complainant writes that he discussed the incident with the neighbour across the street “who was concerned that the [Investigator] would tell her that we had complained – she always believed that such information was confidential.”

[para 34] In its initial submission, the Public Body argues that the Complainant must provide some credible evidence that a disclosure of his personal information occurred, as alleged in the FOIP Complaint. The Public Body points out that, at the time it made its initial submission, the only evidence submitted by the Complainant was the FOIP Complaint itself, including the Email. The Public Body’s initial submission included the Investigator’s Statutory Declaration, in which she swears that the personal information of the Complainant was not disclosed in the course of the investigation of the City Complaint. I note with interest that the Investigator has been employed by the Public Body for 25 years, and that she has been investigating “planning and development matters for eight years and [has] acted as a supervisor of the Development Compliance and Inquiries Unit for the past two years”. In her Statutory Declaration, the Investigator declares:

...

8. During my investigations on June 14, 2010, I informed both the owner of [the Neighbour’s address] and [the address across the street] that I was responding to a complaint regarding a home-based business being operated from the property located at [the Neighbour’s address].

9. I did not disclose the identity of the complainant to any person as part of my investigation. I do not reveal information regarding the identity of a complainant during an investigation. In this particular matter, the request for investigation did not identify the complainant so I did not know the name of the complainant during the investigation.

10. During the investigation, both the owner of [the property next door to the Complainant] and [the property across the street] stated that they knew the identity of the complainant and identified that person to me by name.

11. I did not confirm or deny the identity of the complainant during my investigation to either property owner, and in fact, did not know the name of the Complainant.

...

Attached as an exhibit to the Investigator’s Statutory Declaration is a print-out of an email chain that begins with the email from the Councillor asking that the City Complaint be investigated. That email message does not identify the Complainant except to say that “[the Councillor] received a phone call yesterday from a neighbour re: [the Neighbour’s property]”. The Public Body concludes its initial submission by stating that because the Complainant’s personal information was not disclosed, it is not necessary to consider whether such disclosure contravened the Act.

[para 35] The Complainant responds to the Statutory Declaration with rebuttal argument and his own Statutory Declaration. He argues that the Investigator’s evidence is contradictory in a number of respects. First, he says, if indeed the Investigator did not know the Complainant’s name, then she would not have recognized the name given by the neighbours. Second, he says, even if the Investigator did not initially know the Complainant’s name, her investigation clearly led her to conclude that the resident(s) of his address made the City Complaint, and she was then able to disclose his identity to the neighbours and in her Email responding to the Councillor. Further, in his Statutory Declaration, he declares that he discussed the Investigator’s Email with his neighbour across the street. He gives the following hearsay evidence:

...

3. While I was speaking with [the neighbour across the street] about her comments, she spontaneously told me that the city’s investigator had clearly identified my wife and myself as complainants during their discussion on [date]. This disclosure had surprised her, because she had always understood that complaints were to be handled confidentially. We talked about this at length.

...

[para 36] The Public Body’s rebuttal submission reiterates that, as per Order F2006-016, “[d]etermining whether or not the Complainant’s personal information has in fact been disclosed is a preliminary threshold issue that must be resolved before the conduct of the Public Body can be considered.” The Public Body states that, if the Complainant’s personal information was not disclosed, there is no need to consider whether his personal information was collected and/or disclosed in contravention of the Act. The Public Body goes on to paraphrase the Investigator’s evidence submitted previously, including reference to paragraphs 8 to 11 of the Statutory Declaration to the effect that “the only information disclosed by the [Investigator] as part of the investigation was the reason for the [Investigator’s] presence in the area, namely to investigate a complaint regarding a home-based business. All other information was provided to the [Investigator] by the Complainant’s neighbours”. The Public Body continues that information about the Complainant’s identity was not solicited by the Investigator but, rather, “was spontaneously offered by neighbouring owners as part of the discussions surrounding the existing neighbourhood dispute”. The Public Body maintains that the Investigator did not know the identity of the Complainant and, as such, did not disclose his identity, and that the Investigator would not have disclosed the identity in any event; the Public Body therefore concludes that I need not consider whether any such non-existent disclosure contravened the Act.

Analysis and Finding

[para 37] Despite the Complainant’s attempts to demonstrate inconsistencies in the Investigator’s sworn evidence that no disclosure occurred, he fails to do so. The

Investigator's evidence is clear, unequivocal, credible and within her personal knowledge; the Complainant's evidence in this regard is hearsay and is, therefore, less convincing than if it had been given directly by the neighbour across the street, in the form of a sworn statutory declaration or otherwise, the truthfulness of which could be tested. In short, I prefer and accept the Investigator's evidence in this regard, and find that the Complainant has failed to discharge his initial evidential burden to show that his personal information, namely his identity, was disclosed to his neighbours. Accordingly, it is unnecessary for me to consider the issue of authority under the Act for such non-existent disclosure.

V. ORDER

[para 38] I find that the Public Body had authority under sections 33(b) and 34(1)(g) of the Act, respectively, to collect the Complainant's personal information, and to do so indirectly from his neighbours.

[para 39] Further, I find that the Public Body had authority under section 39(1)(a) of the Act to use the Complainant's personal information in the manner that it did, and that it did so only to the extent necessary to enable it to carry out its purpose in a reasonable manner, in accordance with section 39(4) of the Act.

[para 40] Finally, I find as a fact that the Public Body did not disclose the Complainant's personal information as alleged by the Complainant. As such, I make no finding as to whether or not the Public Body had authority under the Act to disclose the Complainant's personal information.

[para 41] Accordingly, I make no order under section 72 of the Act against the Public Body in this inquiry.

Frank Work, Q.C.
Information and Privacy Commissioner