ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2008-002

September 15, 2008

REAL ESTATE COUNCIL OF ALBERTA

Case File Number P0429

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that the Alberta Real Estate Council (the Organization) required her to provide a copy of her birth certificate as a condition of renewing her realtor's license, and retained the copy for its records. The Organization's practice of requiring and retaining copies of birth certificates, drivers' licenses and passports had been for the purpose of authenticating identity to prevent mortgage fraud and identity fraud in the real estate market. The Organization argued that as it had since changed its practice so as to no longer retain such documents, the issue was moot and the Adjudicator should not decide it.

The Adjudicator found that the issue was not moot. She found that while it was reasonable to confirm identity with birth certificates, drivers' licenses and passports in order to prevent fraud, it was unreasonable to collect copies of these documents and to keep them once identity had been confirmed. The Adjudicator ordered the Organization to cease its practice of requiring persons to provide copies of birth certificates, drivers' licenses, and passports and retaining these copies.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1(k), 11, 11(2), 36(2), 46(2), 50, 52

Orders Cited: AB: Orders 99-005, P2006-011, P2007-IR-006, P2007-016, F2008-001

Court Cases Cited: *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.); *Grimble v. Edmonton (City)* (February 26, 1996), Edmonton Appeal No. 9403-0661-AC (Alta. C.A.)

I. BACKGROUND

[para 1] On April 7, 2006, the Complainant, a realtor, complained to the Commissioner that the Real Estate Council of Alberta (the Organization) had required her to provide a copy of her birth certificate and that it had retained this document in its files. The Complainant stated that she had been "under threat of losing [her] license" had she not provided a copy of her birth certificate.

[para 2] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] The Complainant requested that her name be withheld from the Organization in this inquiry, and the Organization objected that it had not received a copy of the complaint or been notified of the name of the Complainant. I requested that the parties provide further submissions with respect to this issue. On November 14, 2007, I issued a preliminary decision as to whether the inquiry would proceed without naming the Complainant. A copy of the decision letter on this preliminary issue is attached as Appendix A and forms part of this Order. I decided that in the circumstances of this case, in order for the inquiry to proceed, the identity of the Complainant would be disclosed to the Organization, and the Organization would be given a copy of the complaint.

[para 4] The Complainant did not provide any further submissions. The Organization provided initial submissions. In its submissions, the Organization acknowledged that it had in the past required and retained copies of driver's licenses, passports, and birth certificates for the purpose of identity verification and fraud prevention, but it advised that it has changed its policies regarding the requirement for and retention of such documents. It no longer requires or retains copies of this information. It further advised that it was in the process of purging and destroying any and all copies of such information in its possession, and has already purged the copy of the Complainant's birth certificate from her file and destroyed it.

II. RECORDS AT ISSUE

[para 5] There are no records at issue, as this is a complaint about collection of personal information.

III. ISSUES

[para 6] The Organization argues that because it has changed its practices, the issue before me is now moot. I will therefore address mootness as a preliminary issue.

Preliminary Issue: Is the complaint moot?

Issue A: Is the Organization collecting personal information contrary to, or in compliance with section 11(2) of PIPA?

IV. DISCUSSION OF ISSUES

Preliminary Issue: Is the complaint moot?

[para 7] The Complainant complained to the Office of the Information and Privacy Commissioner about the collection of her personal information in April, 2006. Her complaint falls under section 46(2) of the Act, which allows individuals to make complaints with respect to the issues in section 36(2). Section 36(2) states in part:

> *36(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that*
>
> …
>
> *(e) personal information has been collected, used or disclosed by an organization in contravention of this Act or in circumstances that are not in compliance with this Act;*
>
> *(f) an organization is not in compliance with this Act.*

[para 8] The Organization has been provided with a copy of the complaint. It is clear from this document that it is a complaint that the Organization required the Complainant to provide a copy of her birth certificate for its files some time between March 7, 2006 and April 4, 2006, and that it retained this document in its files.

[para 9] In its submission the Organization acknowledges that it did in fact require and retain a copy of the Complainant's birth certificate. Its evidence also establishes that the practice of retaining copies of birth certificates, driver's licenses or passports or any other identification documents largely ceased (for authenticating identity of persons with no middle name) in September, 2006. The practice ceased entirely (including for the one type of application for which it had still been continuing - applications processed by a staff member of the Organization as opposed to by a broker by means of an on-line system) in mid-January, 2008. Further, the Organization indicated that it had begun to destroy copies of the records it had retained, and has destroyed its copy of the Complainant's birth certificate.

[para 10] Section 50 establishes my jurisdiction to conduct an inquiry regarding the Complainant's complaint. Section 50 states, in part:

> *50(1) If a matter under review or relating to a complaint*
>
> *(a) is not referred to mediation,*

(b) is not settled pursuant to mediation under section 49, or

(c) is not resolved,

the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[para 11] I may hold an inquiry in relation to a complaint, provided that the complaint is not in the process of mediation, has not been settled through mediation, or has not been resolved. I do not find that the issue is undergoing mediation or has been settled by mediation.

[para 12] With respect to a possible resolution, the Complainant's complaint is that her personal information was collected contrary to the Act. The Organization has, following commencement of this review, advised that it will no longer retain the information or other such information in its files. I do not find that the issue of the collection and retention of the copy of the birth certificate has been resolved. While the Organization has now taken the step of destroying its copy, it has not addressed the Complainant's complaint that she was required to provide a copy of her birth certificate in the first instance. To find there was a resolution I would need to have an indication from the Complainant that she considers her complaint to have been resolved. I have received no such indication.

[para 13] As the issue has not been settled or resolved, I have discretion to conduct the inquiry. If the issue is moot, then it may be appropriate to apply my discretion not to conduct the inquiry. I will therefore consider whether the issue between the parties is moot.

[para 14] In Order 99-005, the former Commissioner considered the case law regarding mootness, as follows.

> The Supreme Court of Canada discusses "mootness" in *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.). In that case, Justice Sopinka stated:
>
>> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.
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> In *Grimble v. Edmonton (City)* (February 26, 1996), Edmonton Appeal No. 9403-0661-AC (Alta. C.A.), the Alberta Court of Appeal said that a case is moot if some event occurs after proceedings were commenced, which eliminates the controversy between the parties.

> The Court of Appeal then followed the two-step analysis in *Borowski v.Canada (Attorney General)* in considering (i) whether the dispute had disappeared and the issues had become academic (moot), and (ii) whether the court should nevertheless exercise its discretion to hear the case even if the issue had become moot.
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> As discussed in *Borowski v. Canada (Attorney General)*, I accept that an issue is "moot" when no present live controversy exists, which affects the rights of the parties.

[para 15] Applying the principles set out in *Borowski* and *Grimble*, I find that the issue is not moot. Whether the collection of the information at the time it happened was in compliance with or in contravention of the Act is not merely a hypothetical or abstract question. The practical effect of deciding this question is that it will determine how I exercise my authority under section 52 of the Act to either require the Organization to stop collecting personal information in contravention of the Act, or to confirm a decision of the Organization to collect personal information. The fact an organization has voluntarily ceased an activity that is in contravention of the Act does not obviate the need for an order confirming that it is required to do so. Thus I may make an order even though an organization has subsequently changed its information collection practices.

[para 16] I note as well that in Order P2007-016, the Commissioner adopted the following approach, taken by the Adjudicator in Order F2008-001, to inquiries in which an organization has voluntarily changed its policies after a complaint is received by this office:

> I am satisfied that the Public Body took appropriate measures to limit collection, use and disclosure of personal information that contravenes the Act following this complaint. However, as the Order must address the circumstances leading to the complaint, I will order the Public Body to cease collecting, using and disclosing the Complainant's personal information. Even though the Public Body has already done so voluntarily, the purpose of an order is to confirm that it is required to do so.

[para 17] Thus if I determine that the Organization contravened the Act, I will make an order confirming that it is required to stop contravening the Act, even though it has now adopted new policies. If I do not find that the Organization has contravened the Act, I will make an order confirming that the Organization met its obligations under the Act.

[para 18] I note as well that in support of its point that the issue is moot, the Organization points to the fact the issue in the Notice of Inquiry is worded in the present tense. The Notice asks whether the Organization "is collecting" personal information contrary to, or in compliance with PIPA. This point does not, in my view, support the Organization's argument that I should not complete the inquiry in this case. The issue as phrased is referable to the point in time at which the complaint was made. The present-tense wording captures both past and present conduct of the Organization in the event the conduct complained of is continuing. Using the present tense in the Notice does not move the subject of the inquiry from the past, when the complaint was made about conduct occurring at that time, exclusively into the present.

[para 19] Consequently, as the issue has not been resolved or settled and is not moot, I will exercise my jurisdiction to conduct the inquiry under section 50 of the Act.

Issue A: Is the Organization collecting personal information contrary to, or in compliance with section 11(2) of PIPA?

[para 20] The Organization did not make any arguments in its submission that its requirement for and retention of information was in compliance with section 11(2) of the Act. However, it provided some evidence that appears to be the justification for the former practice, which can arguably be taken as supporting such an argument. I will consider whether this justification supports the idea that the collection and retention of the information was in compliance with the provision.

[para 21] Section 11 limits the ability of an organization to collect personal information. It states:

> *11(1) An organization may collect personal information only for purposes that are reasonable.*
>
> *(2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.*

[para 22] The Organization presented evidence that it was faced with the problem of pervasive mortgage fraud and identity fraud in Alberta's residential real estate market in the licensing year 2005/2006. As a result, "to combat fraud", it decided to verify the identity of current license holders and new applicants for licenses. On discovering that 20% of its members did not have middle names and that "authorization information" of industry members with the same names was sometimes being recorded in the wrong industry member file, it decided in early 2006 to require all new applicants and licensed members who did not have middle names to supply copies of proof of identity such as driver's licenses, birth certificates, and passports, which were then retained in the Organization's files. It conceded that it had collected and retained a copy of the Complainant's birth certificate as part of this process.

[para 23] Under section 1(k) of the Act, "personal information" is defined as information about an identifiable individual. Records such as birth certificates, passports and drivers' licenses contain personal information as defined by the Act.

[para 24] In Order P2006-011, the Commissioner adopted the following approach to the application of section 11. He said:

> Section 11(1) makes it clear that the purpose for collecting personal information must be reasonable. Section 11(2) is equally clear that the collection of personal information must be reasonably related to the purpose for collection. For example, protecting life, liberty, and security of the person may be a reasonable purpose in the abstract, but an organization must also establish

> that its collection of personal information, in this case, the fronts of driver's licenses, is reasonably related to that purpose to meet the requirements of section 11.

[para 25] I do not question that the Organization's purpose in asking to see the Complainant's personal information was reasonable. Mortgage fraud is a serious matter, and confirmation of the identity of real estate industry members is reasonably related to the prevention of mortgage fraud.

[para 26] In Order P2007-016, the Commissioner found that while confirmation of identity is a reasonable step to prevent fraud, recording a driver's license number, or other forms of identification intended for specific, legislated purposes, was unnecessary. He said:

> While requiring government information to confirm identity can be necessary to prevent fraud, I do not find that recording a driver's license number for entry into a database is necessary to complete a return transaction for the reasons provided in Investigation Report P2007-IR-006, a joint order of my office and the federal Office of the Privacy Commissioner. In that report, we said:
>
>> The OPC has found in earlier cases that, for the purposes of deterring fraud during the return of goods, the extent of reasonable collection of personal information was limited to name and address. Thus, the collection of customers' names and addresses for this purpose is reasonable and appropriate in the circumstances, as per subsections 5(3) of PIPEDA and 11(1) of PIPA.
>>
>> The collection of the drivers' license information, however, is a different matter. In our view, we can draw an analogy between the collection of drivers' license numbers as numeric identifiers and the collection of the Social Insurance Number. The OPC and AB OIPC have stressed that a SIN is not a *de facto* identifier and should only be used for legislated, social benefit purposes, as was intended.
>>
>> …
>>
>> We are not suggesting that identifying and investigating frequent returns for loss-prevention purposes is not a legitimate activity. The organization confirmed that the refund-management system could operate with any unique numeric identifier. It does not specifically require a driver's license or other provincial identification number.

Similarly, once identity has been confirmed by reviewing the birth certificate and any other identifying information, there is no need to collect a copy of the birth certificate for the Organization's files.

[para 27] I find that in requiring the Complainant to provide a copy of her birth certificate which it retained, the Organization collected the Complainant's personal information to an extent that was unnecessary, and therefore unreasonable, for meeting its purpose of preventing mortgage fraud. While reviewing identification documents to confirm identity of members was reasonable, retaining a copy of the Complainant's birth certificate for its records was not. I note that the purpose of retaining a copy of the Complainant's birth certificate, as stated in the affidavit of the Organization's privacy officer (para 7), was to confirm that identification had been supplied. However, this purpose could have been achieved by documenting that the Complainant had supplied

satisfactory identification, rather than by keeping a copy of the identification document for its records.

[para 28] For these reasons, I find that the Organization contravened section 11(2) of PIPA when it collected and retained a copy of the Complainant's birth certificate.

V. ORDER

[para 29] I make this Order under section 52 of the Act.

[para 30] I require the Organization to cease collecting and retaining copies of birth certificates, drivers' licenses and passport numbers and other similar identification documents for its records, once identification has been confirmed by reviewing the records, and to destroy any such documents that remain in its possession.

[para 31] I order the Organization to notify me in writing, within 50 days of its receipt of a copy of this Order, that it has complied with my Order.

Christina Gauk, Ph.D.
Director of Adjudication

APPENDIX A

TO: UNDISCLOSED
(Complainant)

REAL ESTATE COUNCIL OF ALBERTA
(Organization)

Re: Case File Number P0429

Preliminary Issue: Can this Inquiry proceed without naming the Complainant under the *Personal Information Protection Act?*

1. Background

This case involves a complaint that arises out of an allegation that the amount of personal information that is being collected by the Real Estate Council of Alberta (RECA) (photocopy of driver's licence AND a photocopy of a birth certificate, or, alternatively, only a passport photocopy) from persons whom it licences is excessive to satisfy its purposes of authenticating identity. The complainant did not wish to be named. The respondent to the complaint, the Real Estate Council of Alberta, has argued that I may not proceed in this matter without naming the complainant.

2. Discussion of the Issue

I do not accept the respondent Organization's argument that in order to proceed to inquiry on the basis of a complaint, this office must necessarily provide to the respondent a signed complaint that relates to a particular information transaction. Under section 48(2) of the Act, I have discretion whether to provide a copy of a complaint to the respondent, and if I do so, I have the discretion to sever as much of it as I regard appropriate. Thus the Act, on its face, empowers the Commissioner (or his delegate) to proceed to an inquiry under certain circumstances even though the complaint is not provided and/or the complainant is not named.

In my view, one circumstance where the complainant need not be named is where the Commissioner receives a complaint and regards it as imperative that his office address the matter. Examples might be where the alleged facts are egregious, or the alleged practice is highly pervasive. In such a case, the Commissioner may, in my view, proceed to conduct an inquiry and issue an order even though the complainant does not wish to participate or to be named, and he may rely on his powers under the *Public Inquiries Act* to require evidence about the organization's practice from other sources or the organization itself, rather than from the complainant. There is no provision in the Act that requires a complainant to participate in an inquiry or provide sufficient evidence to substantiate the complaint they have made. As long as the respondent Organization is given sufficient information to understand what practice has been complained of and the

case they must meet, the terms of the Act and the requirements of procedural fairness will have been met. While I agree with the Organization that the existence of the practice must be established before any finding adverse to the Organization is made, it does not necessarily fall to the complainant to establish it.

More commonly, however, the issues in a complaint are of such a nature that it is more appropriate that the inquiry be complainant-driven, in the sense that the Commissioner will rely on the complainant to present a case sufficient to require a response from the organization. Even in such a circumstance, the complainant's name can be withheld, but in this kind of case, this will happen only if the complainant can provide a compelling reason why his or her name should not be disclosed in the process.

3. Conclusion

Turning to the facts of this case, I do not regard the alleged practice as sufficiently egregious or pervasive to make it appropriate that I should take carriage of the matter and determine, without relying on the complainant, whether there has been a violation of the legislation. Rather, I regard this matter as one which should be complainant-driven.

The question remains whether it is appropriate in this case to sever the name of the complainant on the basis that there is a compelling reason to do so. The complainant has provided a reason for not wanting to be named, but I find that this reason is speculative and inadequately substantiated. Accordingly, I do not see it as appropriate to sever the complainant's name before providing the complaint to the respondent.

4. Preliminary Ruling

I have therefore decided that if the complainant wishes the inquiry to proceed, his or her name will be provided to the Organization. The complainant has indicated to me that this is the course that I am now to follow. I will therefore issue a Notice of Inquiry on January 3, 2008, that indicates the name of the complainant, and I will attach a copy of the complaint that reveals the complainant's name. The deferral of the issuance of the amended Notice of Inquiry will provide an opportunity to challenge my decision that the name must be disclosed, should the complainant wish to do so.

Christina Gauk, Ph.D.
Director of Adjudication