

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2009-002

September 4, 2009

BEATTIE HOMES (EDM) INC.

Case File Number P0674

Office URL: www.oipc.ab.ca

Summary: The Complainants complained that Beattie Homes (the Organization) disclosed their personal information contrary to PIPA. The Complainants alleged that an employee or employees of the Organization phoned the former spouse of one of the Complainants and disclosed information about the home they were building to her. The Complainants allege that the disclosure took place because the Organization contacted a phone number printed on their cheques, rather than other phone numbers they had provided. The Complainants also complained that the Organization had failed to make reasonable efforts to ensure that the personal information it used to contact them was accurate.

The Adjudicator found that the evidence did not establish that the Organization had disclosed the Complainants' personal information. She also found that the Organization had made reasonable efforts to ensure the accuracy of the personal information it used in this case. It was reasonable for the Organization to assume that the phone number on the Complainants' cheque was their own and not that of someone else.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1, 7, 8, 20, 33, 52

Authorities Cited: AB: Orders P2006-008, P2007-004
Sopinka, John, et al. *The Law of Evidence in Canada* 2nd ed. Markham: Butterworths, 1999.

I. BACKGROUND

[para 1] On April 11, 2007, the Complainants made a complaint to the Commissioner that Beattie Homes (Edm) Inc.(the Organization) had disclosed their personal information without their consent, contrary to the *Personal Information Protection Act* (PIPA). Specifically, the Complainants complained that the Organization had disclosed to a former spouse of one of the Complainants details of upgrades they had chosen for their home. The Complainants allege that this disclosure occurred because a representative of the Organization called a phone number they had not authorized the Organization to use and did not take steps to confirm the identity of the individual with whom the representative was speaking.

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

[para 3] Both parties made initial and rebuttal submissions. I reviewed the parties' submissions. On June 29, 2009, I wrote the parties to explain the burden of proof in an inquiry and invited them to provide further evidence or submissions in support of their positions if they chose.

[para 4] The Complainants submitted the mediator's report as evidence. I returned this report to them as mediator's reports are not admissible as evidence in an inquiry. Neither party submitted any additional evidence. I will therefore proceed to make a decision based on the evidence initially provided to me.

II. RECORDS AT ISSUE

[para 5] As this matter is a complaint that personal information was disclosed contrary to PIPA there are no records at issue.

III. ISSUES

Issue A: Did the Organization disclose “personal information” of the Complainants as defined in section 1(k) of the Act?

Issue B: Did the Organization disclose personal information contrary to, or in compliance with section 7(1)(d) of the Act (no disclosure without either authorization or consent)?

a. Did the Organization have the authority to disclose the information without consent, as permitted by section 20 of the Act?

b. If the Organization did not have the authority to disclose the information without consent, did the Organization obtain the Complainants' consent in accordance with section 8 of the Act before disclosing the information?

Issue C: Did the Organization make a reasonable effort to ensure that the Complainants' personal information was accurate and complete, as required by section 33 of the Act (accuracy of information)?

IV. DISCUSSION OF ISSUES

Issue A: Did the Organization disclose “personal information” of the Complainants as defined in section 1(k) of the Act?

[para 6] In Order P2006-008, the Commissioner explained the burden of proof in relation to complaints made under PIPA in the following way:

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.

[para 7] The authors of *The Law of Evidence* 2nd Edition describe the evidential burden in the following way:

A party... may satisfy an evidential burden without doing anything; for example, a witness called by the Crown testifies to facts, which raise the issue of self-defence. Thus, a party may discharge an evidential burden by pointing to some evidence already on the record. In these circumstances, the defendant does not adduce evidence but rather, the issue is raised by the evidence...

The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

[para 8] A complainant bears the initial burden of adducing or pointing to evidence that establishes his or her information was collected, used or disclosed, depending on the nature of the complaint. In the present case, the Complainants allege that Beattie Homes disclosed their personal information without their consent. Consequently, the Complainants bear the evidential burden of establishing that Beattie Homes disclosed their personal information.

[para 9] In deciding this issue, I must first consider whether the evidence establishes that the Organization disclosed the personal information of the Complainants.

[para 10] Personal information is defined in section 1(k) of PIPA as:

1 In this Act,

(k) “personal information” means information about an identifiable individual...

[para 11] In Order P2007-004, the Adjudicator considered whether information about a place occupied by an individual is personal information about the individual under section 1(k) of PIPA. She concluded that it can be, provided the information about the residence conveys something about the individual.

The conclusion I draw from the cases is that information as to the nature or state of property owned or occupied by someone is their personal information if it reflects something of a personal nature about them such as their taste, personal style, personal intentions, or compliance with legal requirements.

[para 12] I agree with this reasoning. Further, I find that information about the Complainants’ selections for their home is personal information, given that it conveys something about their taste, personal intentions and finances. As I have found that information about their selections is the Complainants’ personal information, I must now consider whether the Organization disclosed it.

[para 13] The evidence of the Complainants consists of the complaint itself and a series of emails between one of the Complainants and an employee of Beattie Homes. The complaint states:

Our situation is this... We are currently building a home together with Beattie Homes in ... Alberta. Knowledge of the breach of privacy occurred during a mediation appointment regarding division of matrimonial assets between [a Complainant] and [the Complainant’s] ex-spouse in July 2006, where it was divulged by [the former spouse] that [the former spouse] had acquired precise details regarding the pricing of the home, including very specific details regarding upgrades, location, etc. During this mediation appointment when [the Complainant] asked [the former spouse] how the [former spouse] received this information from Beattie Homes, [the former spouse] first stated that the information was left on [the former spouse’s] answering machine. When [the Complainant] questioned [the former spouse] that [the Complainant] found it very difficult to believe that Beattie Homes would leave confidential information like that simply on an answering machine, [the former spouse] admitted that [this information was obtained verbally] and stated “I did get it from someone from Beattie, and they were stupid enough to tell me.”... We still do not know if [the former spouse] misrepresented herself as [one of the Complainants] to obtain this information, or if Beattie Homes did not follow due diligence in releasing confidential information to an unknown individual.

[para 14] The Complainants also note that the former spouse’s telephone number is the telephone number that appears on a cheque provided to Beattie Homes as a deposit on October 25, 2005. However, they note that the contact phone numbers they provided to Beattie Homes did not include that number. The Complainants state that Beattie Homes left messages on the answering machine at the phone number printed on the cheque for them numerous times. They state that the sales representative from Beattie Homes was told never to contact the phone number printed on the cheque.

[para 15] The complaint also states:

What is odd is that we have been in constant communication with Beattie Homes via telephone since the lot hold in October, 2005. In fact [an employee of Beattie Homes] crossed out the phone number on our lot hold form (refer to document "Lot Hold Form" enclosed). Suddenly, out of nowhere, an old number for an ex-spouse is being called. What is further suspicious to us as to the intent of this information being released, is that around that time we were encountering difficulties with [the employee] regarding errors that were made subsequently having a huge impact on pricing and cost to ourselves. We have no idea as to how this happened. Was this intentional on the sales representative from Beattie, or did [the former spouse] intentionally misrepresent herself to the company.

[para 16] The Complainants' submissions for the inquiry state:

[One of the Complainants] questioned [the former spouse] on how this in depth and detailed of information could be left on an answering machine. [The former spouse] later admitted that she obtained this information verbally and stated, "I did get it from someone from Beattie Homes, and they were stupid enough to tell me." Obviously Beattie Homes did not follow due diligence in releasing private information to an unknown individual over the telephone.

[para 17] The Complainants also submitted a series of emails exchanged between one of the Complainants and employees of Beattie Homes in July 2006.

July 21, 2006

[Name of Employee]

I don't know if am just not explaining myself, or if there is a whole avoidance of the matter... [My former spouse] knows ALL of the number right down to the upgrades chosen. This information doesn't come from leaving a message on an answering machine...

[Name of Complainant]

July 15, 2006

Sorry [Name of Complainant]

I have never left a message for you or [name of a Complainant] on a machine that said "[name of former spouse] is not in", I spoke to everyone at Beattie who may have called you, NOT ONE PERSON has given out any personal information to someone over the phone. I do have several of your cheques on file with your address and old phone number on it, plus it has been on documentation that you have signed. The only reason we have your old phone number is because you gave it to us. When you were not returning any phone calls, our designer did try all numbers that were in your file. You may want to check out some other avenues on how your Ex-wife knows all your costs and upgrades of your home.

[Name of Employee]

July 14, 2006

[Name of employee]

I was quite clear in what I am looking for from you. HOW did mine and [one of the Complainants'] personal and confidential information get passed along to my ex-spouse.? This

number... was NEVER a number that was given to you for contact. You took this number off of an old cheque that I wrote to you at the beginning of our conversations. After the first time you called that number we explicitly told you to not ever call that number. As stated by my ex-spouse, when the answering machine says "[the former spouse] is not in, leave a message" and a message is left for [the Complainants]??? And by the sounds of things messages have been left on that number with that message numerous times. We have been out of the country and I have been out of town working for the past number of weeks...

July 14, 2006

[Name of Complainant], I did speak with the designer and she has called the old number and also has called the new number, being as no one has responded to any of the phone calls she has tried both on several occasions. However she has not talked to anyone at either number, nor has she given out any pricing details? I have your new phone numbers on file, and have not phoned your home number for months we have mainly been in contact via e-mail and cell or work phone. I will be contacting [an employee] our customer liaison to make sure she is not calling any old numbers that would be on original paperwork...

[name of employee]

July 13, 2006

[Name of Employee]

...Unfortunately as of this evening it was brought to my attention that you, the designer, as well as whoever else has been calling the phone number ... to attempt to get in contact with me. This is an old number and the number to an ex-spouse. Apparently a lot of detailed information has been given to my ex-spouse which is now causing DRAMATIC difficulties to say the very least. EFFECTIVE IMMEDIATELY stop calling that number. Apparently my ex-spouse keeps telling whoever is calling that I do not live there, but the calls continue!! Very early in our conversations you mentioned you called the above number and I made it clear that number was not to be called. My ex-spouse knows ALL of the cost numbers, home details, and even the upgrades we chose. I want to know HOW this information was passed on. This is a breach of confidentiality in its purest form...

The ONLY phone numbers to call are...

[Name of Complainant]

[para 18] Beattie Homes supplied affidavit evidence from two individuals whom it employed as a design consultant and a construction administrator, respectively, in July 2006. The design consultant states that the first meeting she recalls with the Complainants was on August 28, 2006 and that she has no recollection of contacting the Complainants prior to this appointment. She indicates that the phone number printed on the cheques appeared on change orders. She also indicates that she was told, as of July 13, 2006, not to contact that telephone number. The construction administrator states that she recalled contacting the Complainants on two or three occasions. She states that she did not contact the Complainants using the former spouse's phone number. Both the construction supervisor and the design consultant state that they were not told that the former spouse's phone number should not be used until July 13, 2006.

[para 19] The Organization argues that it was unable to submit evidence from a third employee and that it is unable to confirm or deny with any certainty whether that

employee disclosed details. However, the two emails of July 14, 2006 and July 15, 2006, cited above, are written by the third employee. Therefore, there is evidence from that employee. Further, the evidence of the third employee is that she did not ever leave messages at the number on the Complainants' cheques. She also states that she asked every employee of the Organization who might have reason to contact the Complainants and was told that none of them had given personal information to someone over the phone. She also told them she had taken steps to ensure that no further calls would be made to the number printed on the cheques.

[para 20] Although the emails of the third employee, cited above, are hearsay evidence, given that they were not created to be given in evidence at this inquiry, I find that this evidence is likely to be reliable. I make this finding because the statements in the email are made by her and are not simply attributed to her. Further, her statements are supported by the affidavit evidence and exhibits submitted by the Organization. The affidavit evidence confirms that the phone number on the cheques appeared on change orders. In addition, the affidavit evidence confirms that employees were told on July 13, 2006 not to contact the Complainants at the phone number printed on their cheques, and states that neither of these employees disclosed information about the Complainants' choices.

[para 21] The Organization supplied copies of cheques it received from the Complainants. There are three cheques in total, dated October 25, 2005, November 30, 2005 and January 2, 2006. Each cheque lists the phone number of the former spouse as the phone number of the Complainants.

[para 22] As noted above, the Complainants allege that an employee of the Organization disclosed their personal information -- specifically, information about the upgrades they had chosen -- to the former spouse of one of the Complainants. They point to the fact that employees of the Organization left messages on the former spouse's answering machine and used the former spouse's telephone number as a contact number. They conclude: "obviously the Organization did not follow due diligence in releasing private information to an unknown individual over the telephone." The argument of the Complainants is that because employees of the Organization attempted to contact them at the telephone number printed on their cheque, the Organization must also have disclosed information about their selections

[para 23] The Organization does not concede that it disclosed the personal information of the Complainants. Alternatively, it argues that the Complainants have not established that any personal information that may have been disclosed was disclosed contrary to PIPA:

The Complainants submissions provide no information as to the exact nature of the information allegedly disclosed. The Complainants make a bare assertion that the disclosure consisted of 'detailed pricing of our home, specific details and costs of upgrades, as well as location of our home'.

The Complainants are unsure whether, and to what extent, the alleged disclosure occurred during a telephone answering machine message or a telephone conversation or both. As stated in the

Organization's initial submissions, the Organization is unable to confirm or deny whether any of its employees or contractors disclosed details regarding the pricing, location and / or upgrades of the Property either in an answering machine message or during a conversation with [the former spouse]. Assuming a telephone conversation did take place, it cannot be excluded that the employee or contractor was either led to believe, innocently or otherwise, that the individual on the telephone was [one of the Complainants]. This is supported by the alleged comment of [the former spouse] that, "I did get it from someone from Beattie Homes, and they were stupid enough to tell me.

[para 24] I find that the evidence establishes the following:

- The Complainants provided three cheques to the Organization with the phone number of the former spouse of one of the Complainants printed on them.
- The cheques do not indicate that the phone number is that of a former spouse, but indicate that the phone number is that of the Complainants.
- The cheques do not indicate that the phone number printed on them should not be called.
- The designer attempted to contact the Complainants at the number printed on the cheques.
- The former spouse of one of the Complainants obtained information about the Complainants' selections.

[para 25] I find that the evidence does not establish that the Organization disclosed the personal information of the Complainants to the former spouse of one of the Complainants.

[para 26] The only evidence supporting the Complainants' claim that the Organization disclosed their personal information to the former spouse of one of the Complainants is the statements they attribute to the former spouse. This kind of evidence is known as "hearsay evidence". As noted above, "hearsay evidence" refers to statements made by someone in circumstances other than giving testimony at a proceeding in which it is offered. Because hearsay evidence can be unreliable and because the credibility of the person making the statement cannot always be tested through questioning or cross-examination at the proceeding, courts do not permit parties to enter hearsay evidence, unless an exception to the hearsay rule applies. Unlike a court, I am not bound by the rules of evidence and may accept hearsay evidence. However, before I can place any weight on hearsay evidence, that is, before I can rely on hearsay evidence to make a decision, I must be satisfied that the hearsay evidence is likely to be reliable.

[para 27] The statements attributed to the former spouse are missing important details, such as when the alleged conversation took place, the identity or position of the person with whom she spoke, what details she was told, and under what circumstances. Most importantly, the statements attributed to her contradict one another on material

points. The first statement indicates that she received the information on her answering machine. The second statement indicates that she received the information directly. I am not in a position to find that either of these vague, conflicting statements is likely to be true, as there is no evidence to corroborate either statement. The Complainants suggest that the first statement is false and that the second statement is true. However, the fact that one statement is false does not mean that the other statement is true. Both statements may be false.

[para 28] I am not satisfied that the former spouse could only have obtained the information she apparently received through disclosure from the Organization in the circumstances alleged by the Complainants. First, I have not been told the details of the information the former spouse obtained and when she obtained them. Second, I have not been told that there were no other persons with information about the Complainants' choices, or the steps the Complainants took to safeguard their information from disclosure.

[para 29] For all these reasons, I find that that the evidence does not establish that the Organization disclosed the Complainants' personal information to the former spouse of one of the Complainants.

Issue B: Did the Organization disclose personal information contrary to, or in compliance with section 7(1)(d) of the Act (no disclosure without either authorization or consent)?

a. Did the Organization have the authority to disclose the information without consent, as permitted by section 20 of the Act?

b. If the Organization did not have the authority to disclose the information without consent, did the Organization obtain the Complainants' consent in accordance with section 8 of the Act before disclosing the information?

[para 30] As I have found that it has not been established that the Organization disclosed the Complainants' personal information, I need not answer these questions.

Issue C: Did the Organization make a reasonable effort to ensure that the Complainants' personal information was accurate and complete, as required by section 33 of the Act (accuracy of information)?

[para 31] Section 33 of PIPA imposes a duty on organizations to ensure the accuracy of personal information. It states:

An organization must make a reasonable effort to ensure that any personal information collected, used or disclosed by or on behalf of an organization is accurate and complete.

[para 32] The position of the Complainants is that the Organization did not make reasonable efforts to ensure that their personal information was accurate because if it had, it would not have attempted to contact the Complainants at the phone number printed on their cheques. They argue the following:

From what [the former spouse] stated, numerous messages were left at her telephone number... that has an answering machine message that states, "This is the home of [the former spouse]". The names of [the Complainants] are not identified on this answering machine. Given this fact, why private information would be left on this answering machine is a question. As well, the Representative(s) from Beattie Homes did not follow due diligence to find out who was receiving this private information verbally, being [the former spouse] and not [the Complainants].

Beattie Homes insisted that they were calling a telephone number that was provided to them. As evidenced by the attachments, Beattie Homes Lot Hold Form, Purchase Agreement, dated November 30, 2005, and The Alberta New Home Warranty Program, Deposit Protection Receipt dated November 30, 2005, all evidently show that the phone number of [Complainants' phone number] is the correct contact telephone number for [the Complainants]. During the first meeting with the Beattie Home Representative... she was advised to never contact the number of [the former spouse], which is shown on the Beattie Homes Lot Hold Form, where she corrected the mistake of recording [the phone number of the former spouse]. After signing the documents mentioned above on November 30, 2005, with the Beattie Homes Representative ... there were numerous calls made to us at [the Complainants' phone number], by her to ask various questions prior to the time where private information was shared with [the former spouse].

The Complainants submitted a Lot Hold Form, in which the phone number of the former spouse is crossed out and their own phone number is substituted, as an exhibit. Attached to this record is a cheque from the Complainants to the Organization with their names and address on it. The phone number of the former spouse is listed on the cheque as the Complainants' phone number. The phone number of the former spouse is not crossed out on the cheque. The phone number of the Complainants does not appear on their cheque.

[para 33] The Organization argues the following:

... the Organization submits that it is entitled to rely upon the accuracy of [the phone number printed on the cheques], and to make use of it, because it was provided by the Complainants themselves. The Organization did not expect, nor could it have reasonably foreseen, that [one of the Complainants] would provide the phone number of an ex-spouse on a cheque bearing the name and confirmed address of [the Complainants]. Furthermore, the Organization should not have been expected to question or scrutinize the details provided, particularly given the nature of the document provided. In other words, the Organization was entitled to rely upon the accuracy of details contained within an important banking instrument.

[para 34] As noted above, the Organization supplied three cheques from the Complainants dated October 25, 2005, November 30, 2005 and January 2, 2006 as exhibits. Each cheque lists the phone number of the former spouse as the phone number of the Complainants. In addition, the Organization provided affidavit evidence to establish that change orders AC_1, AC_2, AC_3, and AC_4, which are signed by one of the Complainants, originally contained the phone number of the former spouse as the phone number. This affidavit evidence is uncontested.

[para 35] The Complainants argue that they have experience in the banking industry and state that “just because a client writes a cheque, it does not give consent to use the information on the cheque.” I disagree. The phone number on a cheque is held out by the individual writing the cheque as a number at which the depositor or banking institution may contact the individual should any problems or questions arise in relation to the cheque. In many cases, a phone number on a cheque is the only contact information for a depositor or banking institution in relation to a cheque. The Complainants did not take steps to amend the phone number on any of the cheques they provided to the Organization. Given that the Complainants did not take steps to correct the phone number on the cheques and signed documents that listed the former spouse’s phone number as their phone number, it was reasonable for the Organization to use the former spouse’s phone number to try to contact the Complainants as it did.

[para 36] It is true that the former spouse’s phone number is crossed out on the Lot Hold Form and another phone number is substituted. However, the Lot Hold Form does not indicate that the crossed out number belongs to someone else or should never be called. The email from one of the Complainants indicates that he told the third employee not to call the former spouse’s phone number. However, it is not clear from the email or the submissions of the Complainants that the third employee was told why she should not contact the phone number. In any event, the Complainants subsequently provided two more cheques, each listing the former spouse’s phone number and signed four change orders containing the phone number from the cheque, which could be interpreted as holding out the phone number as one to call now, if not at the time the Lot Hold Form was signed. It would also be reasonable for the Organization to form the opinion from the Complainants’ actions that the phone number on the cheque was an additional way to try to contact the Complainants, in addition to the other phone numbers the Complainants provided.

[para 37] The Complainants were in a better position than the Organization to know that the phone number on their cheques was not a number at which they could be contacted. Section 33 requires an organization only to make reasonable efforts to ensure that the personal information it uses is accurate and complete. Section 33 does not require an organization to assume that all personal information provided to it by individuals is inaccurate and to verify it prior to using it. In this case, reviewing the phone number printed on the cheques by the Complainants’ banking institution was a reasonable effort to ensure that this phone number was accurate and complete. There would be no reason to assume that the phone number on the cheques belonged to someone other than the Complainants unless the Complainants brought that fact to the attention of the Organization. I note that once the Complainants did explain that the phone number on the cheques was that of the former spouse, the Organization immediately took reasonable steps to ensure that this phone number was no longer used.

[para 38] For these reasons, I find that the Organization met its duty to take reasonable steps to ensure that the personal information of the Complainants was accurate and complete.

V. ORDER

[para 39] I make this Order under section 52 of the Act:

[para 40] I confirm that the Organization performed its duties to the Complainants under PIPA.

Teresa Cunningham
Adjudicator