

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2011-003

October 26, 2011

REAL ESTATE COUNCIL OF ALBERTA

Case File Number P1286

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that the Organization contravened the *Personal Information Protection Act* (the “Act”) by failing to inform her that a telephone conversation with her was being recorded and the purpose for the recording.

The Adjudicator found that the Organization had the authority to collect the voice recording, without the Complainant’s consent, as the collection was pursuant to a statute under section 14(b) of the Act, and was also reasonable for the purposes of an investigation under section 14(d). He further found that the Organization collected the voice recording for reasonable purposes under section 11(1), and to the extent reasonable for meeting those purposes under section 11(2). The Adjudicator therefore confirmed the decision of the Organization to collect the voice recording.

The Adjudicator found that the Organization did not fulfill its duty under section 13(1) of the Act, as it did not initially notify the Complainant as to the purposes for which the voice recording was being collected, and did not provide the Complainant with the name of a person who was able to answer her questions about the collection. He ordered the Organization to stop collecting the Complainant’s personal information in circumstances that are not in compliance with the Act.

Statutes Cited: **AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1(f) [now 1(1)(f)], 1(k) [now 1(1)(k)], 4(5)(b), 7(1), 8, 8(1), 8(2), 8(2)(a), 8(2)(b), 8(3), 10, 11, 11(1), 11(2), 13, 13(1), 13(1)(a), 13(1)(b), 13(2) [now repealed], 13(4), 14, 14(b)

[part of which is now 14(b)(i)], 14(d), 52, 52(3)(a), 52(3)(e) and 52(3)(f); *Personal Information Protection Amendment Act, 2009*, S.A. 2009, c. 50; *Real Estate Act*, R.S.A. 2000, c. R-5, ss. 37, 38, 38(1)(a), 38(2), 38(2)(a), 38(2)(b) and 38(2)(d).

Authorities Cited: AB: Orders P2005-001 and P2006-008.

I. BACKGROUND

[para 1] On January 29, 2009, an individual (the “Complainant”) made a complaint to the Real Estate Council of Alberta (the “Organization” or “RECA”) regarding the conduct of one of its industry members. An employee of the Organization spoke to the Complainant by telephone the following month. The telephone conversation was electronically recorded by the Organization.

[para 2] In a complaint form dated April 7, 2009, the Complainant complained to this Office that the Organization had contravened the *Personal Information Protection Act* (the “Act” or “PIPA”) by failing to inform her that the telephone conversation was being recorded and the purpose for the recording.

[para 3] The Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. This was not successful. The Organization requested an inquiry by correspondence dated November 30, 2010, and a written inquiry was set down.

[para 4] On May 1, 2010, amendments to PIPA came into force by virtue of the *Personal Information Protection Amendment Act, 2009*. However, because the Organization’s alleged contravention of the Act occurred prior to the amendments, the legislation applies as it existed previously. For the purpose of cross-reference, I note when there has been an amendment to a section of PIPA that I discuss in this Order.

II. INFORMATION AT ISSUE

[para 5] The information that the Organization allegedly collected in contravention of PIPA is the Complainant’s personal information by way of an electronic recording during a telephone conversation. The Complainant’s request for review indicates that the particular telephone conversation (i.e., the one during which she learned about the electronic recording) occurred on February 10, 2009, while the Organization’s submissions indicate that it occurred subsequently on February 23, 2009. The actual date is not important for the purpose of the discussion in this Order.

[para 6] For clarity, the Complainant does not complain about the substantive content of her personal information being collected during the telephone conversation. She complains about her personal information being recorded electronically.

III. ISSUES

[para 7] The Notice of Inquiry, dated April 13, 2011, set out the following main issue:

Did the Organization collect the Complainant's personal information in contravention of the Act?

[para 8] The Notice of Inquiry indicated that answers to the following sub-issues, to the extent relevant, might assist in determining the main issue:

Did the Organization collect the Complainant's personal information as that term is defined in PIPA? If so,

Did the Organization collect the information contrary to, or in compliance with, section 7(1) of PIPA (no collection without either authority or consent)? In particular,

Did the Organization have the authority to collect the information without consent, as permitted by section 14 of PIPA?

If the Organization did not have the authority to collect the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before collecting the information? In particular,

Did the individual consent in writing or orally? Or

Is the individual deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met? Or

Is the collection permitted by virtue of the conditions in sections 8(3)(a), (b) and (c) having been met?

Did the Organization collect the information contrary to, or in accordance with, section 11(1) of PIPA (collection for purposes that are reasonable)?

Did the Organization collect the information contrary to, or in accordance with, section 11(2) of PIPA (collection to the extent reasonable for meeting the purposes)?

Did the Organization collect the information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide and did it provide notification before or at the time of collecting the information?

[para 9] The Notice of Inquiry invited the parties to raise any other sub-issues that they regard as relevant. The Complainant raised an additional issue that I have framed as follows:

Does section 10 of PIPA (consent obtained by deception) apply to the collection of the information?

[para 10] Finally, the Notice of Inquiry raised the possibility of an issue in relation to section 4(5)(b) of PIPA, which I have rephrased as follows and will discuss last:

Was PIPA applied in accordance with section 4(5)(b) (Act not to be applied so as to limit information available by law)?

IV. DISCUSSION OF ISSUES

A. Did the Organization collect the Complainant's personal information as that term is defined in PIPA?

[para 11] Under section 1(k) of PIPA [renumbered section 1(1)(k) as of May 1, 2010], "personal information" means "information about an identifiable individual". The parties agree that the Complainant's personal information was collected during the telephone conversation. However, they are effectively referring to substantive information that she provided, the collection of which is not the subject of her complaint. The information at issue is the additional information collected by the electronic recording of the telephone conversation.

[para 12] The Organization compares the recording of a telephone conversation to the taking of notes by hand or on computer. There is an important distinction, however. When an employee takes notes in order to record the personal information of an individual, the employee is collecting the substance of the information being provided, and possibly also the employee's opinions or observations of the way in which the substantive information is being conveyed. In this case, when the employee of the Organization collected the information from the Complainant by way of the electronic recording, he collected additional personal information from her, within the meaning of section 1(k), in the form of her voice, tone, inflection, etc. This is the personal information at issue here, which I will refer to as the "Voice Recording".

[para 13] In this inquiry, the initial burden of proof rests with the Complainant, in that she has to have some knowledge, and adduce some evidence, regarding what personal information of hers was collected and regarding the manner in which her personal information was collected; the Organization then has the burden to show that its collection of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 14] As I find that the Organization collected the Complainant's personal information in the form of the Voice Recording, the Organization now has the burden to show that the collection was in accordance with PIPA.

B. Did the Organization collect the information contrary to, or in compliance with, section 7(1) of PIPA (no collection without either authority or consent)?

[para 15] Section 7(1) of PIPA reads, in part, as follows:

7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,

(a) collect that information unless the individual consents to the collection of that information,

...

[para 16] An organization must not collect an individual's personal information unless the individual consents in accordance with section 8(1) or section 8(2), or unless "this Act provides otherwise" – which means with prior notice under section 8(3), or where consent is not required under another section of PIPA, in this case section 14.

[para 17] The Complainant argues that the employee of the Organization improperly recorded the telephone conversation with her because, in a "Complainant's Agreement to Proceed" form that she signed on February 5, 2009, she agreed to accept correspondence and updates from the Organization by mail or e-mail, and there was no reference on the form to telephone conversations. However, the Organization's letter of January 30, 2009, with which the form was enclosed, stated that the Complainant "may be contacted during this process", being the evaluation of her complaint, and that the process "may include preliminary gathering of evidence and statements". There is no reason why such contact, and such gathering of evidence and statements, could not occur by telephone.

[para 18] In any event, the fact that the Complainant agreed to receive correspondence and updates by mail or e-mail has nothing to do with the Organization's collection of her personal information by telephone. The former was for the purpose of the Organization providing particular information to her, whereas the latter was for the purpose of the Complainant providing information to the Organization. In short, the "Agreement to Proceed" form did not preclude the Organization's collection and electronic recording of the Complainant's personal information. The question of whether it did so in compliance with PIPA is answered in reference to other evidence, and bearing in mind the sections of the Act that I discuss below.

1. Did the Organization have the authority to collect the information without consent, as permitted by section 14 of PIPA?

[para 19] The Organization submits that it had the authority to collect the Voice Recording, without the Complainant's consent, under sections 14(b) and 14(d) of PIPA. At the time of the Organization's alleged contravention of PIPA, these read as follows:

14 An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:

...

(b) the collection of the information is pursuant to a statute or regulation of Alberta or Canada that authorizes or requires the collection;

...

(d) the collection of the information is reasonable for the purposes of an investigation or a legal proceeding;

...

[Amendments to section 14 came into force on May 1, 2010.¹]

[para 20] Section 14(b) permits the collection of personal information, without the individual's consent, if the collection is pursuant to a statute of Alberta that authorizes the collection. The statute on which the Organization bases its authority to collect the Voice Recording is the *Real Estate Act* ("REA"), section 38 of which reads as follows:

38(1) The executive director shall,

(a) where a complaint is made under section 37, as soon as practicable after receipt of the complaint, and

(b) in a case where no complaint is made but the executive director believes that any conduct of an industry member constitutes or may constitute conduct that is deserving of sanction,

commence or appoint a person to commence an investigation into the conduct.

(2) A person conducting an investigation may

(a) by notice in writing demand that any person produce to the investigator any books, documents, records and other things in that person's possession or under that person's control that are relevant to the investigation,

¹ These included an amendment to section 14(b), which now permits the collection of personal information without consent if "the collection of the information is authorized or required by (i) a statute of Alberta or of Canada, (ii) a regulation of Alberta or a regulation of Canada, (iii) a bylaw of a local government body, or (iv) a legislative instrument of a professional regulatory organization". This amendment would not have had an impact on the issues in this inquiry even if it had been in force at the time of the Organization's alleged contravention of the Act in February 2009. The Organization argues that its collection of the Voice Recording was pursuant to a statute, which was in reference to section 14(b) in February 2009, and would be in reference to section 14(b)(i) today.

(b) demand that any person answer any questions that are relevant to the investigation,

(c) copy by electronic or other means, and keep copies of, anything produced under clause (a), and

(d) record by audio or video or by other means any answers provided under clause (b).

[para 21] Section 38(2)(d) of REA authorizes a person conducting an investigation to record any answers provided by a person, following a demand that the person answer questions that are relevant to the investigation.

[para 22] When the Complainant and employee of the Organization spoke by telephone, this was in the context of an investigation within the terms of section 38 of REA. I note that, under the Organization's processes, a complaint is first subject to an "evaluation" in order to determine whether it qualifies for an "investigation". Regardless of this procedural distinction and the different terminology used, both parts of the process are part of an "investigation" within the meaning of section 38. Section 38(1)(a) states that, after receiving a complaint made under section 37 – being a complaint about the conduct of an industry member – the executive director shall appoint a person to commence an "investigation". The employee who spoke to the Complainant by telephone was that appointed person. Because REA calls what that employee was doing an "investigation", it means that he was a person conducting an "investigation" within the terms of section 38(2). I will refer to him, from this point onward, as the "investigator".

[para 23] The Complainant submits that, in light of the serious allegations that she had raised in her complaint about the industry member and the Organization's power to take disciplinary action, she expected a face-to-face meeting with the investigator. She says that she would expect such a meeting to be recorded, but that she did not expect the telephone conversation to be recorded. However, section 38(2)(d) of REA authorizes an investigator to record the answers provided by a person, which may be provided during a telephone conversation. There is no restriction that says that a recording may only occur during an in-person interview.

[para 24] Section 38(2)(d) authorizes the recording of answers "provided under section 38(2)(b)". In turn, section 38(2)(b) contemplates a "demand" that a person answer questions. I find that, when the investigator spoke to the Complainant by telephone, he demanded that she answer questions. Unlike section 38(2)(a) of REA, which requires a demand to produce records to be in writing, the demand set out in section 38(2)(d) has no formal requirements. Simply by virtue of asking the Complainant questions, the investigator was demanding that she answer them. In my view, no particular insistence was necessary. Rather, the term "demand" in section 38(2)(b) means to ask while having the legislative authority set out in the section. Even if some form of insistence is necessary, I find that there was such insistence in any event. The Organization's "Agreement to Proceed" form, which was enclosed with its letter of January 30, 2009 to

the Complainant, required the Complainant to “agree to cooperate fully with RECA concerning the evaluation and/or investigation, and to provide any requested documents or information relating to [her] complaint”.

[para 25] Finally, section 38(2)(b) states that the questions must be “relevant to the investigation”. The Complainant does not dispute that the questions asked of her during the telephone conversation were relevant to the investigation of her complaint about the conduct of the industry member. I therefore find that when all answers were provided by her – which is when her personal information in the form of the Voice Recording was collected – those answers fell within the terms of section 38(2)(b) and could be recorded.

[para 26] Given the foregoing, I find that the Organization collected the Voice Recording pursuant to by section 38(2)(b) of REA. It therefore had the authority to collect the Voice Recording without the Complainant’s consent, on the basis that the collection was pursuant to a statute under section 14(b) of PIPA. I conclude that the Organization collected the Voice Recording in compliance with section 7(1) of PIPA.

[para 27] The Organization also argues that it had the authority to collect the Voice Recording, without the Complainant’s consent, on the basis that the collection was reasonable for the purposes of an investigation under section 14(d). I find that it did have such authority.

[para 28] The Organization’s investigation, under REA, of the conduct of the industry member about whom the Complainant complained was an “investigation”, as that term is defined in section 1(f) [now 1(1)(f)] of PIPA.

[para 29] The Organization submits that its collection of the Voice Recording was reasonable for the purposes of the investigation because there was a need to ensure the accuracy of the recorded information, the matter was sufficiently complex and required a level of detail that could not be captured by typed or handwritten notes, there was a need for not only the bare words spoken but also the context of the conversation and the tone of voice, and the nature of the particular complaint required the recording to be taken to the Director of Audit and Investigations in order make a determination of how to proceed with the complaint based on all the evidence.

[para 30] The Organization’s explanation satisfies me that its collection of the Voice Recording was “reasonable” for the purposes of the investigation that it was conducting, as required for a collection under section 14(d). Given that the matter involved, or might later involve, competing assertions and versions of events as between the Complainant and the industry member, collection of the Complainant’s tone of voice and the full conversational context in the Voice Recording was reasonable to permit an assessment of veracity and credibility. Because it appears that the Director was involved in the determination of the complaint and therefore also needed to review the evidence, collection of the Voice Recording was also reasonable to ensure that the information gathered by the investigator was as accurate and complete as possible, and therefore that nothing important or relevant was missing for the Director.

[para 31] I conclude that the Organization also collected the Voice Recording in compliance with section 7(1) of PIPA, on the basis that the collection was reasonable for the purposes of an investigation under section 14(d) and therefore could be collected without the Complainant's consent.

2. Did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before collecting the information?

[para 32] Section 8 of PIPA, reads, in part, as follows:

8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.

(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and

(b) it is reasonable that a person would voluntarily provide that information.

(3) Notwithstanding section 7(1), an organization may collect, use or disclose personal information about an individual for particular purposes if

(a) the organization

(i) provides the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect, use or disclose personal information about the individual for those purposes, and

(ii) with respect to that notice, gives the individual a reasonable opportunity to decline or object to having his or her personal information collected, used or disclosed for those purposes,

(b) the individual does not, within a reasonable time, give to the organization a response to that notice declining or objecting to the proposed collection, use or disclosure, and

(c) having regard to the level of the sensitivity, if any, of the information in the circumstances, it is reasonable to collect, use or disclose the information as permitted under clauses (a) and (b).

(4) Subsections (2) and (3) are not to be construed so as to authorize an organization to collect, use or disclose personal information for any purpose other than the particular purposes for which the information was collected.

...

[Amendments to section 8 came into force on May 1, 2010.²]

[para 33] In the preceding part of this Order, I found that the Organization was authorized to collect the Voice Recording without the Complainant's consent. I therefore do not have to address the issue under section 8 of PIPA for the purpose of deciding whether the Organization complied with section 7(1). I have already concluded that it did.

[para 34] Still, I must decide whether the Complainant is deemed to have consented to the collection of the Voice Recording under section 8(2), as that question is relevant to the issue, which I discuss later in this Order, of whether the Organization collected the Voice Recording contrary to, or in accordance with, section 13. Under section 13(1), an organization must provide certain notification to an individual when collecting his or her personal information, but section 13(4) states that section 13(1) does not apply to the collection of personal information that is carried out pursuant to section 8(2).

(a) Did the individual consent in writing or orally?

[para 35] It is not necessary for me to discuss this sub-issue.

(b) Is the individual deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met?

[para 36] The Complainant explains that when she spoke to the Organization's investigator by telephone, he commenced a discussion of her complaint by asking her questions. She says that about 20 to 25 minutes into the conversation, she began to wonder if it was being recorded and therefore asked whether it was. The investigator replied that it was indeed being recorded. She says that she continued with the conversation, as she assumed that the investigator was in a position to assist with her complaint. The Organization's submissions confirm this general account of what transpired.

[para 37] There are two requirements in order for an individual to be deemed to consent to the collection of his or her personal information under section 8(2) of PIPA. First, section 8(2)(a) requires the individual to voluntarily provide his or her personal information to the organization for a particular purpose.

² In particular, two new subsections 8(2.1) and 8(2.2) were added. They would not have had an impact on the issues in this inquiry even if they had been in force at the time of the Organization's alleged contravention of the Act. They deal with deemed consent in certain cases involving a disclosure of personal information to another organization, and involving a collection, use or disclosure of personal information for the purpose of an individual's enrollment under a benefit plan.

[para 38] The Organization argues that section 8(2)(a) was met in this case, submitting that it was clear that it would be collecting the Complainant's personal information "for the purposes of conducting an investigation into her RECA complaint". This purpose was effectively set out in its letter of January 30, 2009 to the Complainant, and the Organization says that there is no doubt that the Complainant was aware of this.

[para 39] However, the foregoing frames the analysis of whether the Complainant voluntarily provided her personal information for a purpose too generally. The fact that the Complainant was aware she would be providing information for the purpose of the investigation does not, in my view, mean that the Complainant voluntarily provided the Voice Recording, meaning the additional and specific personal information that was collected in the form of her voice, etc. While the Organization's collection of the Voice Recording was also, generally speaking, for the purpose of conducting the investigation, it is necessary for the Complainant to have provided the Voice Recording for a more specific purpose. Section 8(2)(a) requires an individual to have provided his or her personal information for a "particular" purpose.

[para 40] The Organization submits that the Complainant must be taken to have known that her personal information would be collected, not only for the purpose of gathering the content of the evidence and statements given by her, but also for the purpose of assessing their veracity. It also notes that the Complainant acknowledges that she expected that an in-person interview would be electronically recorded. However, these points do not mean that the Complainant voluntarily provided the Voice Recording, at the time of the telephone conversation, for the purpose of assessing veracity. Veracity could also have been assessed by the investigator simply by listening to the telephone conversation and taking notes regarding the way in which the Complainant conveyed the information. An electronic recording during an in-person interview would have been very different, in that the Complainant would have seen the recording equipment and could therefore be said to be knowingly and voluntarily providing her voice, etc. While I make no finding in this regard, as it did not actually happen, the Complainant seeing the recording equipment might also have made it easier to find that she was providing her voice, etc. for a particular purpose, as she could be taken to understand that the electronic recording was for a unique or additional purpose.

[para 41] I am also persuaded, in this particular case, that the Complainant did not voluntarily provide the Voice Recording for any particular purpose given her expression of concern, partway through the conversation, about the fact that it was being recorded. Had she at all times been voluntarily providing the Voice Recording for a particular purpose, she would not have been so surprised to learn that the telephone conversation was being recorded. On learning that the conversation was being recorded without her knowledge, she told the investigator that she thought that this was unfair, sneaky and underhanded. In short, an individual cannot be said to be voluntarily providing personal information if he or she does not know that it is being collected. For these reasons, I also dismiss the Organization's argument that the Complainant was deemed to consent to the collection of her personal information in the form of the Voice Recording because she voluntarily participated in the telephone conversation. Voluntarily participating in the

conversation did not mean voluntarily providing her voice, etc. for the purpose of collection, again because the Complainant was unaware that the Voice Recording was being collected in the first place.

[para 42] The Organization further argues that the Complainant was aware of the purpose for providing the Voice Recording, and therefore provided it for a particular purpose, because of various guides and documentation that were made available to her. I review this material later in the Order, finding that, although one guide set out the particular purposes for collecting the Voice Recording, the information in that guide was not actually provided to the Complainant or adequately drawn to her attention. The existence of the information in that guide therefore does not mean that the Complainant voluntarily provided the Voice Recording for a particular purpose.

[para 43] For the reasons set out above, I find that, up to the point at which the Complainant was told that the telephone conversation was being recorded, she did not voluntarily provide the Voice Recording for a particular purpose (or any other voice recording that may have been collected during prior telephone conversations). There was therefore no deemed consent on her part to the collection up to that point, within the terms of section 8(2) of PIPA.

[para 44] However, after the Complainant was told that the telephone conversation was being recorded, she voluntarily provided the Voice Recording (as well as all other voice recordings during subsequent telephone conversations). I also find that, at this same point occurring partway through the telephone conversation, the Complainant provided the Voice Recording for a particular purpose, as required by section 8(2)(a). The Organization explains that, during the conversation, the Complainant made comments that the industry member whose conduct was being investigated could be untruthful. The investigator then said that this type of issue was one of the reasons that the Organization records interviews, which is the point at which the Complainant asked whether her interview was being recorded and was told that it was. The Complainant does not dispute that the investigator told her about the foregoing reason for recording conversations. His statement that he was collecting the Voice Recording, and not merely the substantive information, in order to verify the truth of statements made during the investigation satisfies me that the Complainant then understood that she was providing the Voice Recording for a particular purpose, and was thereafter voluntarily providing it for that purpose.

[para 45] The Organization argues that, because the Complainant did not object to the recording of the telephone conversation once she was told that it was being recorded, she is deemed to have consented to collection of the entire Voice Recording. This is not so. Her deemed consent began only at the point when she knew that she was providing the Voice Recording and was providing it for a particular purpose. The deemed consent did not become retroactive.

[para 46] Under section 8(2)(b), it must be reasonable that a person would voluntarily provide his or her personal information for the particular purpose. I find that it was

reasonable for the Complainant to voluntarily provide the Voice Recording in order for the Organization to verify the truth of statements made during the investigation of her complaint.

[para 47] I conclude that the Complainant is deemed to have consented, under section 8(2) of PIPA, to the collection of the second portion of the Voice Recording but not the first.

(c) *Is the collection permitted by virtue of the conditions in sections 8(3)(a), (b) and (c) having been met?*

[para 48] It is not necessary for me to discuss this sub-issue.

3. Does section 10 of PIPA (consent obtained by deception) apply to the collection of the information?

[para 49] Section 10 of PIPA reads as follows:

10 If an organization obtains or attempts to obtain consent to the collection, use or disclosure of personal information by

(a) providing false or misleading information respecting the collection, use or disclosure of the information, or

(b) using deceptive or misleading practices,

any consent provided or obtained under those circumstances is negated.

[para 50] The Complainant says that she was left with the feeling that the recording of her telephone conversation with the Organization's investigator was obtained deceitfully, and she attached a copy of section 10 to her submission. She submits that nowhere on the "Agreement to Proceed" form did it state that information would be sought from her by telephone, let alone recorded during the telephone conversation.

[para 51] Section 10 negates consent if it is obtained through the use of false or misleading information, or deceptive or misleading practices. Earlier in this Order, I found that the Organization was authorized to collect the Voice Recording without the Complainant's express consent. There is therefore no express consent to possibly negate under section 10.

[para 52] As for the deemed consent of the Complainant to the collection of the second portion of the Voice Recording, I find that it was not obtained by the Organization through the use of false or misleading information, or deceptive or misleading practices. The Complainant says that the investigator improperly justified the recording on the basis that "he was party to the conversation". While this statement was not relevant to my finding that the Complainant was deemed to consent to the collection of the Voice

Recording, it was not false, misleading or deceptive either. My finding of deemed consent was based, in part, on the investigator's indication that collection of the Voice Recording was for the particular purpose of verifying the truth of statements made during investigations. This indication was also not false, misleading or deceptive.

[para 53] I conclude that section 10 of PIPA does not apply to the collection of the information at issue in this inquiry. The Complainant's deemed consent to the collection of the second portion of the Voice Recording was valid.

C. Did the Organization collect the information contrary to, or in accordance with, section 11(1) of PIPA (collection for purposes that are reasonable)?

D. Did the Organization collect the information contrary to, or in accordance with, section 11(2) of PIPA (collection to the extent reasonable for meeting the purposes)?

[para 54] Section 11 of PIPA reads as follows:

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 55] I have found that the Organization's collection of the Voice Recording was "reasonable" for the purposes of an investigation under section 14(d) of PIPA. It therefore follows that the collection was for purposes that are "reasonable" under section 11(1). As explained earlier in this Order, the collection of the Voice Recording was reasonable for the purposes of an investigation, in this particular case, because it allowed the veracity of information and evidence to be evaluated, allowed credibility to be assessed, and ensured that information and evidence was recorded as accurately and completely as possible, particularly in view of the fact that it would also be reviewed by someone other than the investigator who initially collected it.

[para 56] I have also found that the Organization had the authority to collect the Voice Recording pursuant to a statute under section 14(b). Specifically, section 38(2)(d) of REA authorizes a person conducting an investigation to record any answers provided by a person being asked questions that are relevant to the investigation. The Organization submits that its collection of the Voice Recording was for purposes that are reasonable under section 11(1) of PIPA, as the Legislature has recognized the reasonableness of the recording in section 38(2)(d) of REA.

[para 57] I find that the Organization also collected the Voice Recording for reasonable purposes in reference to section 38(2)(d) of REA and therefore pursuant to a statute under section 14(b) of PIPA. The purpose, as effectively stated in section 38(2)(d) in conjunction with section 38(2)(b) of REA, was to record answers provided by the

Complainant on being asked questions relevant to the investigation being conducted. This was reasonable, essentially for all of the same reasons that I set out in respect of the collection for the purposes of an investigation under section 14(d). Indeed, the purpose under section 38(2)(d) of REA was also in relation to an investigation, given that the authorized collection was by “a person conducting an investigation”.

[para 58] I now turn to section 11(2) of PIPA and the issue of whether the Organization collected the Complainant’s personal information in the Voice Recording only to the extent that is reasonable for meeting the purposes for which the information was collected. It must first be recalled that the information at issue is not the substantive information collected by the Organization, as this was not the subject of the Complainant’s complaint to this Office. The information at issue is her personal information in the form of her voice, tone and inflection.

[para 59] I have identified a few ways in which the collection of the Voice Recording was for purposes that are reasonable. With respect to permitting the substantive information provided by the Complainant to be recorded as accurately and completely as possible, the collection of the Voice Recording was the most expedient and cost-effective means of doing so (as opposed to having a reporter transcribe the conversation, for instance). In the course of collecting all of the substantive information, the additional collection of the Complainant’s voice, etc. was therefore to a reasonable extent. Further, in order to assess veracity and credibility, it was reasonable to collect the Voice Recording rather than resort to taking notes of the way in which the evidence and statements were being conveyed by the Complainant. Collection of the Complainant’s voice, tone and inflection, as well as the full context of the conversation contained in the Voice Recording, enabled a better assessment of veracity and credibility, as well as allowed for a subsequent review by someone other than the investigator who participated in the telephone conversation.

[para 60] I conclude that the Organization collected the Voice Recording for reasonable purposes under section 11(1) of PIPA, and to the extent reasonable for meeting those purposes under section 11(2).

E. Did the Organization collect the information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide and did it provide notification before or at the time of collecting the information?

[para 61] Section 13 of PIPA reads, in part, as follows:

13(1) Before or at the time of collecting personal information about an individual from the individual, an organization must notify that individual in writing or orally

(a) as to the purposes for which the information is collected, and

(b) of the name of a person who is able to answer on behalf of the organization the individual's questions about the collection.

...

(4) Subsection (1) does not apply to the collection of personal information that is carried out pursuant to section 8(2).

[Amendments to section 13 came into force on May 1, 2010.³]

[para 62] Section 13(1) requires an organization, in certain circumstances, to notify an individual as to the purposes for which personal information is being collected, and to provide the name of a person who is able to answer, on behalf of the organization, the individual's questions about the collection.

[para 63] The Organization submits that nothing in section 13 requires notification of the form or manner of collection of personal information. In other words, it submits that section 13 does not require an organization to tell an individual that his or her personal information will be typed in a computer database, written on a piece of paper, or electronically recorded. As I explained at the outset of this Order, there is a unique aspect to an electronic recording, in that it collects additional personal information apart from the substantive information being conveyed by an individual and any opinions or observations of the way in which it is being conveyed. While it is true that section 13 does not require notification of the form or manner of collection, or how an organization intends to record substantive information, it does require notification of the purpose for which the additional personal information in an electronic recording (i.e., the individual's voice, etc.) is being collected.

[para 64] Section 13(4) states that section 13(1) does not apply to the collection of personal information that is carried out pursuant to section 8(2). I found, earlier in this Order, that collection of the Voice Recording was carried out with the deemed consent of the Complainant under section 8(2), but only after she was told that her telephone conversation with the investigator was being recorded. Prior to that point, the Complainant had not provided deemed consent and therefore the collection of the Voice Recording up to that point was not carried out pursuant to section 8(2). It therefore remains possible for section 13(1) to apply to the collection of the first portion of the Voice Recording.

[para 65] The Organization submits that it is not clear that notification is required under section 13 of PIPA where the collection of personal information is permitted without the individual's consent, and particularly where collection without consent is

³ These included the repeal of section 13(2). This amendment would not have had an impact on the issues in this inquiry even if it had been in force at the time of the Organization's alleged contravention of the Act. Section 13(2) is not relevant here, as it deals with notice when collecting personal information from another organization. Section 13(1)(b) was also amended so as to permit an organization to provide a position name or title, rather than the actual name, of a person who can answer questions. This amendment would likewise not have altered my conclusions in this Order.

authorized by a statute under section 14(b). It says that it is not logical to require notification when persons questioned by the Organization's investigators can be compelled to answer questions. The Organization suggests that notification under section 13(1) is for the purpose of ensuring proper consent, so its requirements need only be met where consent is required.

[para 66] I found, earlier in this Order, that the Organization had the authority to collect the Voice Recording, without the complainant's consent, under sections 14(b) and 14(d) of PIPA. In my view, this does not relieve the Organization of its obligations under section 13. Section 13(1) requires notification before or at the time of collecting personal information "about an individual from the individual". The Organization collected the Voice Recording from the Complainant. On the clear wording of section 13(1), it does not matter whether consent was or was not required. Moreover, the Legislature specifically contemplated the exception set out in section 13(4). If it had other exceptions in mind, it presumably would have included those other exceptions.

[para 67] The Organization also argues that it should not be required to give notification under section 13 because doing so could negatively impact its ability to fulfill its statutory mandate of investigating complaints against industry members. In particular, it says that if it is required to tell witnesses that their personal information is being collected by electronic recording, the witnesses may not be as candid and forthright as they would otherwise be. It says that there are occasions where notification would compromise the Organization's ability to use covert investigative techniques, when such techniques are warranted.

[para 68] I find it unnecessary to address the foregoing arguments, as they do not apply in this case. The Organization does not suggest that the Complainant was not candid and forthright, or that it was using covert techniques to investigate her complaint about the industry member. Any arguable exception, by which the Organization would not be required to adhere to section 13(1) because doing so would compromise a specific investigation and be an absurd result on the facts of the particular case, is better left to be decided in such a case. Moreover, any such exception, if there is one, would apply only in the circumstances of that particular case and similar cases. The possibility that the Organization might be relieved of its obligations under section 13 in certain cases does not mean that it would be relieved of its obligations in all other cases including the present one.

[para 69] Given the foregoing, I find that the Organization was required to provide notification to the Complainant before or at the time of collecting the first portion of the Voice Recording.

[para 70] As for whether the Organization did provide proper notification, the Complainant submits that it did not. She says that the Organization could have indicated the possibility of telephone conversations being recorded in the "Agreement to Proceed" form that she received, but failed to do so. However, it was open to the Organization to provide notification in some other fashion.

[para 71] Section 13(1)(a) requires the Organization to notify the Complainant as to the purposes for which the Voice Recording was being collected. The Organization submits that it met this requirement by way of its letter of January 30, 2009 to the Complainant. There, it wrote as follows:

An evaluation of your complaint will be conducted. The evaluation may include preliminary gathering of evidence and statements that will assist RECA in making a decision as to whether a formal investigation will be opened. You may be contacted during this process.

I also note that, in receiving and signing the “Agreement to Proceed”, the Complainant agreed to provide “information relating to [her] complaint” and indicated that she understood as follows:

If the matter proceeds to a disciplinary proceeding that RECA will provide full disclosure of its investigative file and this will include all statements, documents and other information provided to RECA by [the Complainant].

[para 72] I find that the above excerpts did not provide proper notification in relation to collection of the Voice Recording, as they did not indicate the purposes, as required by section 13(1)(a), for which the Organization would be collecting the Complainant’s actual voice, tone and inflection. The references to “statements” and “information” would be understood by most individuals to mean only the substantive information that they provide to the Organization. While the Complainant’s voice, etc. may constitute part of the “evidence” to which the Organization also referred generally in its letter of January 30, 2009, the collection of the Voice Recording was for a unique or at least additional purpose apart from the one stated in the letter, which was to make a decision as to whether a formal investigation of the Complainant’s complaint would be opened. As essentially explained by the investigator partway through his telephone conversation with the Complainant, this unique or additional purpose was to assess the veracity and credibility of the evidence and statements given. The Organization has also explained that it collected the Voice Recording in order to record the information provided by the Complainant as accurately and completely as possible. Neither of these purposes was indicated in the letter of January 30, 2009 or the “Agreement to Proceed” form.

[para 73] The Organization alternatively submits that it met section 13(1)(a) by way of its *Guide to Investigations for Consumers*. That document states the following:

Will my conversations with the investigator be recorded?

RECA electronically records interviews with complainants and other witnesses. This ensures the integrity of the investigation by providing an actual record of what was said rather than relying on an investigator’s interpretation, recollection or notes.

The recording of interviews is also a means of ensuring that an investigation is conducted according with RECA's policies and procedures.

[para 74] I find that the above excerpt sufficiently indicates the purposes for which the Organization collects electronic recordings. The reference to ensuring the integrity of investigations, and providing an actual record of what is said rather than relying on an investigator's notes, is basically another way of explaining that electronic recordings permit a full assessment of the evidence given by an individual (i.e., including veracity and credibility) and allow for statements to be recorded as accurately and completely as possible. An organization is entitled to use whatever wording it chooses in order to notify individuals as to the purposes for collecting their personal information, provided that the purposes are sufficiently indicated.

[para 75] The next question, however, is whether the Organization notified the Complainant of the information in the above excerpt. While the *Guide to Complaints for Consumers* (the "Complaints Guide") was enclosed with the Organization's letter of January 30, 2009 to the Complainant, the *Guide to Investigations for Consumers* (the "Investigations Guide") was not. Despite this, the Organization notes that the Investigations Guide appears on its web site and that the "Agreement to Proceed" form that it provided to the Complainant indicated that she could seek further information on the web site, with the web site address being included. However, the form stated only that further information "regarding the *Real Estate Act*" was available on the web site. There was no specific reference to the Investigations Guide, so the indication on the form was insufficient, in my view, for the purpose of drawing the Complainant's attention to that Guide. If an organization intends to provide notification under section 13 by way of a document on its web site, it must at least specifically refer to that document.

[para 76] I note that the Complaints Guide, which was enclosed with the Organization's letter of January 30, 2009, referred in turn to the Investigations Guide. However, I still find this insufficient for the purpose of meeting the requirement set out in section 13(1)(a). The reference to the Investigations Guide, in the Complaints Guide, was to enable the Complainant to obtain, if she wished, "more information on the investigation process". The Complaints Guide, as well as the letter of January 30, 2009, made it clear that an evaluation of the Complainant's complaint was a different process from investigating it more formally, as the decision on whether to open a formal investigation was yet to be made. Therefore, the reference to the Investigations Guide, in the Complaints Guide, did not purport to be in relation to the preliminary process of evaluating the Complainant's complaint, which is when the Voice Recording was collected. A clearer and more direct notification as to the purposes for collecting the Voice Recording was required, rather than a reference to a document found elsewhere and one in relation to a different part of the process.

[para 77] Given the foregoing, I find that the notification requirement set out in section 13(1)(a) of PIPA was not met by virtue of any correspondence sent to the Complainant, or by virtue of any information appearing on the Organization's web site. As previously

explained in this Order, there was also no oral notification as to the purposes for which the Voice Recording was being collected until partway through the telephone conversation itself. The Organization therefore did not comply with section 13(1)(a) with respect to its collection of the first portion of the Voice Recording.

[para 78] Section 13(1)(b) requires the Organization to provide the Complainant with the name of a person who was able to answer, on behalf of the Organization, her questions about the collection of her personal information.

[para 79] The Organization submits that it met section 13(1)(b) in that the materials provided to the Complainant had contact information. However, this contact information, as on the letterhead of the correspondence of January 30, 2009 and the last page of the Complaints Guide, was merely general contact information for the Organization, and did not provide the name of any particular person [or a position name or title, as is now an option under section 13(1)(b), effective May 1, 2010]. Moreover, the contact information did not purport to be a means for the Complainant to ask questions about the collection of her personal information.

[para 80] The Organization notes that the Complainant was able to ask questions of the investigator to whom she spoke by telephone and that he answered her questions, including about collection of the Voice Recording. In my view, the fact that the investigator answered the Complainant's questions does not mean that the Organization provided notification as to who could answer questions. Even if it might be said that the spirit of section 13(1)(b) is met if questions about the collection of an individual's personal information are, in fact, asked and answered, this occurred in the present case only partway through collection of the Voice Recording.

[para 81] In respect of collection of the first portion of the Voice Recording, PIPA does not presume the Complainant to know that she could ask questions about collection of her personal information. Indeed, the intent behind section 13(1)(b), and an organization's obligation to provide notification, is to ensure that individuals actually know that they can ask questions and can direct them to a particular person, rather than impute that they know this.

[para 82] Finally, the Organization argues that it met the requirement set out in section 13(1)(b) because it displays its Privacy Policy prominently on its web site under the heading "Privacy", and the Privacy Policy contains contact information for the Organization's Privacy Officer. For similar reasons to those I discussed in relation to the Investigation Guide, this was not sufficient for the purpose of providing notification. In order to provide notification by virtue of a document found elsewhere, an organization must, at a minimum, expressly refer or draw attention to that document.

[para 83] Given the foregoing, I find that the Organization did not comply with the notification requirement set out in section 13(1)(b).

[para 84] I conclude that the Organization collected the first portion of the Voice Recording contrary to section 13 of PIPA. It was required to notify the Complainant as to the purposes for collecting the Voice Recording and provide the name of a person who was able to answer her questions about the collection, but it did not do either.

F. Was PIPA applied in accordance with section 4(5)(b) (Act not to be applied so as to information available by law)?

[para 85] Section 4(5)(b) of PIPA reads as follows:

4(5) This Act is not to be applied so as to

...

(b) limit the information available by law to a party to a legal proceeding, or

...

[para 86] Under section 4(5)(b), PIPA must not be applied so as to limit the information available by law to a party to a legal proceeding. Given that I have found that the Organization was authorized to collect the Voice Recording, I have not applied the Act so as to limit the information available to the Organization.

[para 87] However, the Organization submits that, if section 13 of PIPA is interpreted to require it to provide notification before or at the time of collecting personal information even in instances where consent is not required, it will have the effect of limiting information available by law. It argues that notification may result in certain persons not being as candid or truthful as they otherwise would be.

[para 88] The Organization's argument is to the effect that it has authority, by law, to obtain information from complainants, industry members and witnesses without them knowing the purposes for which the information is being obtained, so as to ensure that the Organization obtains the most complete and truthful information possible. I do not have to decide whether the Organization has such authority. While I have interpreted section 13 to require notification to the Complainant in this case, my interpretation has not, in fact, limited any information available to the Organization as a party to a legal proceeding. The Organization has not suggested that the Complainant lacked candour or was untruthful. It chose itself to provide notice of the purpose of collecting the Voice Recording partway through its telephone conversation with the Complainant, further demonstrating that the foregoing concerns about notification were not present in this case. Finally, the Organization did not commence a proceeding against the industry member. A letter of February 26, 2009 to the Complainant advised that the Organization's review of her complaint did not identify any information to suggest a likelihood of conduct deserving of sanction on the part of the industry member.

[para 89] In short, the Organization relies on section 4(5)(b) in order to advance a particular interpretation of section 13(1) for the purpose of future cases. Section 4(5)(b)

states that the Act is not to be *applied* so as to limit the information available by law to a party to a legal proceeding, and I have not applied it to that effect in this particular inquiry.

V. ORDER

[para 90] I make this Order under section 52 of the Act.

[para 91] I find that the Organization had the authority to collect the Voice Recording without the Complainant's consent, as the collection was pursuant to a statute under section 14(b) of the Act, and was also reasonable for the purposes of an investigation under section 14(d). The Organization therefore collected the Voice Recording in compliance with section 7(1). I also find that the Organization collected the Voice Recording for reasonable purposes under section 11(1), and to the extent reasonable for meeting those purposes under section 11(2).

[para 92] Under section 52(3)(f) of the Act, I confirm the decision of the Organization to collect the Voice Recording.

[para 93] I find that, prior to a particular point in the collection of the Voice Recording, the Organization was required to provide notification under section 13(1) of the Act, but it did not properly do so. Specifically, the Organization did not notify the Complainant as to the purposes for which the Voice Recording was being collected, and it did not provide the Complainant with the name of a person who was able to answer her questions about the collection.

[para 94] I find it unnecessary to require the Organization, under section 52(3)(a) of the Act, to perform its duty to provide notification to the Complainant under section 13(1), as it has now done so.

[para 95] The Organization's collection of the Complainant's personal information without proper notification under section 13(1) contravened the Act in this one respect. Under section 52(3)(e) of the Act, I order the Organization to stop collecting the Complainant's personal information in circumstances that are not in compliance with the Act.

[para 96] I further order the Organization to notify me and the Complainant, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order. In this particular inquiry, it is sufficient for the notification to indicate the Organization's acknowledgement of my order in the preceding paragraph.

Wade Riordan Raaflaub
Adjudicator