

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2011-004

November 9, 2011

REAL ESTATE COUNCIL OF ALBERTA

Case File Number P1448

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that the Real Estate Council of Alberta (RECA) requires applicants for licenses to submit to criminal record checks that require the applicant to submit fingerprints to the Royal Canadian Mounted Police (RCMP). These criminal reference checks are referred to by the RCMP as “certified criminal record checks” or “CCRCs”. The RCMP sends the completed criminal record check, including fingerprints, to RECA, which then uses the criminal record check to make licensing decisions. The Complainant complained that this practice contravenes the *Personal Information Protection Act* (PIPA).

The Adjudicator determined that RECA was authorized by the *Real Estate Act* to make rules respecting requirements for a criminal record check. She found that RECA had made a rule requiring a certified criminal record check, which necessitates the collection of fingerprints. The Adjudicator determined that consent was not required for the collection, as the collection was authorized by the *Real Estate Act*. The Adjudicator also found that when a regulatory body, such as RECA, issues licenses, it is not providing a product or service as set out in section 7(2) of PIPA. Rather, section 7(2) applies to products or services offered in a commercial context.

The Adjudicator determined that RECA’s practice of requiring and collecting CCRCs complied with the requirements of PIPA.

Statutes Cited: **AB:** *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 7, 11, 14, 52; *Real Estate Act*, R.S.A. 2000, c. R-5, s. 12; Real Estate Council of Alberta Rules s. 20

I. BACKGROUND

[para 1] On September 11, 2009, the Complainant made a complaint that the Real Estate Council of Alberta (RECA) requires individuals to submit to a certified criminal record check (CCRC) before it will approve a license for that individual to act as a mortgage associate. A CCRC is a specific type of criminal record check performed by the Royal Canadian Mounted Police (RCMP). In this kind of criminal record check, fingerprints are used to confirm the identity of the individual who is the subject of the criminal record check. In order to perform a CCRC, a member of the RCMP requires the fingerprints of the individual in question. The completed CCRC is sent by the RCMP to RECA. The completed CCRC contains fingerprints.

[para 2] The Commissioner authorized an officer to investigate and attempt to mediate the complaint. As mediation was unsuccessful, the matter was scheduled for a written inquiry. Both the Complainant and RECA provided submissions for the inquiry.

[para 3] The Complainant stated the following in her submissions:

...the available processes for obtaining criminal record checks have changed somewhat since the complaint was filed, and the check based on government issued identification and birth date may not be as reliable as first thought. ... on Thursday April 14, 2011, [a constable] advised that the RCMP no longer do criminal record checks by name and date of birth: they now only do fingerprint searches.

As a result, it appears that the process of obtaining a CCRC using fingerprints is the most reliable, particularly where the applicant has a common last name.

The only complaint now is that if an applicant wants to apply for a license and registration prior to the return of his or her CCRC, and has made a paper-based fingerprint submission through a local RCMP detachment, the applicant is required to submit a copy of the applicant's fingerprints (completed Form C-216C) to RECA along with his or her application to RECA...

[para 4] The Complainant's complaint addressed RECA's requirement that applicants for licenses undergo a CCRC. However, for the inquiry, she complained about RECA's practice of collecting C216C forms as a condition for providing a provisional license to an applicant. I understand that a C216C form is the form an individual seeking a CCRC completes and submits to the RCMP. RECA states that it issues "provisional licenses" to applicants before the CCRC is completed, if they submit a C216C form as proof that they have applied for a CCRC.

[para 5] The Complainant's request for an inquiry, like her complaint, states that the issue she seeks this office to address is RECA's requirement that applicants undergo a criminal record check that requires fingerprints as part of the application process for a license.

[para 6] The issue the Complainant raised for the Commissioner is the issue the Commissioner decided would be the subject of this inquiry. I have jurisdiction to review the issue of whether RECA's decision to require CCRCs as a condition of licensing an applicant complies with PIPA. However, a complaint regarding the collection of C216C forms as a condition of supplying a conditional license has not been made to the Commissioner and has not been referred to inquiry by the Commissioner. I will therefore address only the issue of the collection of CCRCs, as this issue is properly before me. However, it remains open to the Applicant to make a complaint to the Commissioner regarding the collection of C216C forms as a condition of obtaining a provisional license.

II. ISSUES

ISSUE A: Is RECA collecting CCRCs that involve the provision of fingerprints from persons who are applying to become licensed mortgage associates in Alberta?

ISSUE B: If RECA is collecting CCRCs that involve the provision of fingerprints, is this done as a prerequisite for becoming a licensed mortgage associate in Alberta?

ISSUE C: If RECA is collecting CCRCs as a prerequisite for becoming a licensed mortgage associate in Alberta, is this a situation of requiring consent as a condition of providing a product or service within the terms of section 7(2)? (In other words, is licensing a mortgage associate 'providing a product or service?')

ISSUE D: If the answer to Issue C is yes, is requiring consent in these circumstances necessary to provide the product or service?

ISSUE E: If the answers to Issues A and B are yes, is the collection being done with consent, or in the absence of consent, within the terms of PIPA?

This question raises the issue of whether provision of the information (a CCRC that involves the provision of fingerprints) as a condition of accepting applications constitutes consent within the terms of the Act.

ISSUE F: Is the collection for a reasonable purpose within the terms of section 11(1), and is it only to the extent reasonable for meeting the purpose within the terms of section 11(2)?

ISSUE G: If the collection of the information is being done without consent, is the Organization authorized to collect the information without consent by reference to section 14(b) of PIPA, and to Rule 20(1)(d) enacted by the Organization pursuant to section 12(k)(ii.1) of the *Real Estate Act*?

III. DISCUSSION OF ISSUES

ISSUE A: Is RECA collecting CCRCs that involve the provision of fingerprints from persons who are applying to become licensed mortgage associates in Alberta?

[para 7] An affidavit sworn by a case presenter / privacy officer of RECA states:

Upon receipt of a CCRC, the document is reviewed and the portion containing fingerprints is removed and shredded. The remainder of the document is scanned into the RECA licensing system and the original is shredded. The RECA staff member reviewing the CCRC swears an affidavit that they reviewed the document and shredded the original, including the portion containing the fingerprints.

[para 8] The evidence of both parties is that RECA requires an applicant to undergo a CCRC as a condition of becoming a licensed mortgage associate. A CCRC requires an applicant to provide fingerprints to the RCMP so that the RCMP may confirm the identity of the applicant. When the CCRC is complete, the RCMP sends the CCRC, including the fingerprints to RECA. An employee of RECA will destroy the portion containing fingerprints, and scan the remainder into RECA's licensing database. The original CCRC is then shredded.

ISSUE B: If RECA is collecting CCRCs that involve the provision of fingerprints, is this done as a prerequisite for becoming a licensed mortgage associate in Alberta?

[para 9] Section 20 of the Real Estate Council of Alberta Rules states:

The application for a licence must be accompanied by the following:

- (a) *the fees established by Council*
- (b) *an affidavit in a form prescribed by the executive director,*
- (c) *proof of identity of the applicant in a form and manner prescribed by the executive director*
- (d) *a current and original certified criminal record check in the legal name of the applicant in a form and manner prescribed by the executive director... [my emphasis]*

The rules also state that real estate appraisers and candidates renewing licences are exempt from the requirement to supply proof of identity and a CCRC. Consequently, the requirement to supply a current and original CCRC applies only to those applying for a license for the first time.

[para 10] As section 20(c) is a mandatory requirement imposed by RECA when applying for a license for the first time, and a CCRC, as discussed in the background, above, requires providing fingerprints to the RCMP, I find that providing fingerprints to the RCMP is a prerequisite of becoming a licensed mortgage associate in Alberta.

ISSUE C: If RECA is collecting CCRCs as a prerequisite for becoming a licensed mortgage associate in Alberta, is this a situation of requiring consent as a

condition of providing a product or service within the terms of section 7(2)? (In other words, is licensing a mortgage associate ‘providing a product or service’?)

[para 11] Section 7(2) of PIPA states:

7(2) An organization shall not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information about an individual beyond what is necessary to provide the product or service.

[para 12] In addressing the question of whether licensing a mortgage associate is “providing a product or service,” RECA states:

The *Canadian Oxford Dictionary* defines “product” as:

A thing that is grown or produced, usually for sale; a thing or substance produced during a natural, chemical, or manufacturing process...

The *Canadian Oxford Dictionary* defines “service” as:

Assistance or benefit given to someone; the provision or system of supplying a public need; the sector of the economy that supplies the needs of the consumer, but produces no tangible goods; the act or process of serving customers in a store.

Using these two definitions as guidelines, it is unlikely that RECA, a statutorily-created professional regulatory body, offers a product. RECA submits it is also unlikely that in the course of fulfilling its function of evaluating applications for authorization of appropriate candidates RECA’s activities would be captured by the definition of “service”.

RECA acknowledges that by virtue of its role as a professional regulatory organization it fulfills an important public protection function, but it submits that this is distinct from offering a service to the public.

[para 13] I take RECA’s point that it is a statutory entity that performs a regulatory function. While it may be said that RECA’s regulation of the licensing of mortgage brokers in the province is a form of public service and in the public interest, it is by no means clear that service of this kind is addressed by section 7(2) of PIPA.

[para 14] Section 7(2) refers to “products” and “services”. I agree with RECA that the better reading of section 7(2) is that it refers to products and services supplied in a commercial context, such as when an organization offers products or services for sale. The term “product,” when it is not used in a mathematical sense, typically refers to an item offered for sale. As RECA points out, “service” can be used to refer to a system of supplying a public need, but it can also refer to supplying consumer needs. Given that the two terms are paired in the phrase “product or service” it follows that they may both be intended to have their commercial meanings.

[para 15] Section 7(2) would be duplicative and could potentially conflict with other enactments of Alberta if it applied to licenses or benefits provided by statutory bodies under their home statutes. If a statutory body were requiring consent to the collection,

use, or disclosure of more personal information than is authorized by its statute, as a condition for providing the license or benefit, the statutory body would be in violation of its own statute, in the sense that it would potentially be imposing requirements on applicants for a license or benefit without authority under its statute to do so. In such a case, the individual could pursue a remedy under that statute. I do not believe that section 7(2) is intended to authorize this office to review decisions made under other statutes, or to review the evidence received by regulatory bodies when they make licensing decisions under their statutes in order to determine whether it was necessary for them to require consent to collect, use or disclose it.

[para 16] In the present case, the *Real Estate Act* creates a right of appeal for an individual to whom RECA has refused to issue a license. If RECA required consent to the collection, use, or disclosure of information not authorized or required by the *Real Estate Act*, then a remedy would be available under the *Real Estate Act* to an individual who did not provide this information and was denied a license for that reason. There is no need for section 7(2) of PIPA to create an additional remedy for that individual.

[para 17] The references to “consent” and “condition” in section 7(2) indicate that this provision likely refers to situations in which an individual is able to decide whether to accept or reject a product or service or the terms under which it is provided, such as when an organization and an individual are bargaining or negotiating. When an organization issues licenses under a statutory scheme, as RECA does, and the statutory scheme under which it operates contains provisions authorizing or requiring personal information to be collected, used, or disclosed, it would be illogical to impose a requirement that the organization first obtain the individual’s consent prior to fulfilling its statutory responsibilities or to impose a requirement that any personal information gathered in the course of fulfilling statutory duties be necessary for fulfilling them.

[para 18] However, if section 7(2) is limited in its application so that it applies to commercial products and services, it would not have the effect of imposing conflicting duties on regulatory bodies, but would, instead, ensure that an individual is not required to bargain away interests in preserving personal information when it is unnecessary to do so. Without the existence of section 7(2) of PIPA, an individual would not have a remedy if an organization required consent to the unnecessary collection, use, or disclosure of personal information when products or services are provided in a commercial context.

[para 19] In my view, section 7(2) is not intended to impose requirements on regulatory bodies in addition to those under which they operate, or to provide an alternate means of challenging a licensing decision made by such a body. Rather, this provision serves the function of ensuring that organizations do not require individuals to consent to the collection, use, or disclosure of more personal information than is necessary for the organization to provide commercial products or services.

[para 20] For these reasons, I find that RECA does not provide a product or service to which section 7(2) of PIPA applies.

ISSUE D: If the answer to Issue C is yes, is requiring consent in these circumstances necessary to provide the product or service?

[para 21] I have already found that the answer to the question raised in Issue C is no. However, if I am wrong, I will consider whether it is necessary for RECA to require an applicant to consent to undergo a CCRC in order to issue a license to that individual.

[para 22] Section 12(k) of the version of the *Real Estate Act* in force at the time of the Complainant's complaint, empowers RECA to make rules respecting applications and the issuance of authorizations, including eligibility requirements. Section 12(k)(ii.1) authorizes RECA to make rules respecting the requirement for a criminal record check.

12 The Council may make rules

- (k) *respecting the issuing of authorizations for the purposes of section 17, including, without limitation, rules*
 - (i) *respecting eligibility requirements for a person to acquire and retain an authorization,*
 - (ii) *respecting the application for and issuing of authorizations,*
 - (ii.1) *respecting the requirement for a criminal record check to accompany an application for an authorization,*
 - (iii) *providing for the issuing of authorizations subject to terms and conditions and authorizing the imposition of terms and conditions on authorizations,*
 - (iv) *respecting the duration of authorizations,*
 - (v) *authorizing and respecting the cancellation and suspension of authorizations in circumstances in addition to the circumstances under which an authorization may be cancelled or suspended under Part 3, and*
 - (vi) *respecting the appeal of a decision to refuse to issue or to cancel or suspend an authorization and the reinstatement of authorizations;*

[para 23] On October 1, 2006, RECA made the following rule:

- 20 The application for a license must be accompanied by the following:
 - (1)
 - (a) the fees established by the Council
 - (b) an affidavit in a form prescribed by the executive director

- (c) proof of identity of the applicant in a form and manner prescribed by the executive director,
- (d) current and original certified criminal record check in the legal name of the applicant in a form and manner prescribed by the executive director... [my emphasis]

[para 24] The *Real Estate Act* empowers RECA to make rules respecting the requirement for a criminal record check. In my view, this power does not limit RECA only to deciding whether or not it requires a criminal record check, but would also authorize it to decide what kind of criminal record check it requires. RECA chose to require a certified criminal record check, which, as discussed in the background above, requires the collection of fingerprints.

[para 25] The effect of Rule 20 of the Real Estate Council of Alberta Rules is to make it necessary to include a current and original certified criminal record check with an application when applying for authorization for the first time. RECA is authorized to make this rule by a statute of Alberta. I find that there is no issue of requiring consent to the collection of more information than is necessary to authorize an applicant who has requested a license, as the information RECA requires in this case is information that it has decided is necessary pursuant to express statutory authority to do so.

ISSUE E: If the answers to Issues A and B, above, are yes, is the collection being done with consent, or in the absence of consent, within the terms of PIPA?

[para 26] RECA argues that consent is not required in relation to its collection of CCRCs, as section 14(b) of PIPA authorizes it to collect CCRCs without consent. I will address this argument under Issue G.

ISSUE F: Is the collection for a reasonable purpose within the terms of section 11(1), and is it only to the extent reasonable for meeting the purpose within the terms of section 11(2)?

[para 27] Section 11 of PIPA states:

11(1) An organization may collect personal information only for purposes that are reasonable.

(2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.

[para 28] RECA states the following:

...the OIPC considered the reasonableness of RECA's collection of personal information in Order P2009-004, in which the Adjudicator found that RECA's responsibilities under REA made it reasonable for RECA to collect information about criminal convictions and criminal pardons under s. 11(1)...

Just as it is reasonable for RECA to collect information on criminal convictions, collecting a CCRC is reasonable pursuant to s. 11(1) because this requirement is consistent with RECA's statutory mandate to protect the public by ensuring that only those individuals who are suitable to be licensed to perform the activities regulated by RECA are authorized to do so.

Real estate professionals regulated by RECA occupy a position of trust. Consequently, in deciding whether it is in the public interest for RECA to grant an authorization to a mortgage broker applicant, or to consider a request for a conditional license, RECA must know whether that individual has been convicted of fraud, theft, or other criminal activities that would undermine the integrity and compromise the reputation of the industries regulated by RECA. The purpose of the CCRC is ... therefore to provide this relevant criminal record information.

[para 29] RECA argues that it collects CCRCs in order to meet its duties and responsibilities under the *Real Estate Act*; in particular, it collects CCRCs in order to meet its responsibilities relating to authorizing members. I agree with RECA that complying with its statutory mandate and duties is a reasonable purpose for collecting personal information. In addition, I find that RECA is not collecting more information than is reasonable for meeting its statutory duties, given that the *Real Estate Act* expressly authorizes RECA to make rules respecting the requirement of a criminal record check, and it collects CCRCs in compliance with its rules.

ISSUE G: If the collection of the information is being done without consent, is the Organization authorized to collect the information without consent by reference to section 14(b) of PIPA, and to Rule 20(1)(d) enacted by the Organization pursuant to section 12(k)(ii.1) of the *Real Estate Act*?

[para 30] Section 14 of PIPA establishes the circumstances in which it is not necessary to obtain consent to collect an individual's personal information. The version of section 14 in force at the time the Complainant made her complaint, states, in part:

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...

[para 31] As discussed above, Rule 20 of the Real Estate Act Rules is made pursuant to section 12(k)(ii.1) of the *Real Estate Act*, which authorizes RECA to make rules respecting a requirement for a criminal record check. Rule 20 authorizes RECA to collect a certified criminal record check prior to issuing a license to an applicant. A certified criminal record check by definition requires fingerprints. When the completed CCRC is sent to RECA by the RCMP, it includes fingerprints, which RECA destroys. The affidavit submitted by RECA establishes that it uses the completed CCRC, including the fingerprint information, to ensure that the CCRC has been completed, and then destroys information it does not need to retain.

[para 32] The effect of section 12(k)(ii.1) of the *Real Estate Act* is to authorize RECA to require a criminal record check, including a certified criminal record check containing fingerprints. I therefore find that the collection of fingerprint information is pursuant to a statute that authorizes the collection. Consequently, PIPA does not require RECA to obtain the consent of applicants for the collection of fingerprints.

IV. ORDER

[para 33] I make this Order under section 52 of the Act.

[para 34] I confirm RECA's decision to collect certified criminal record checks of applicants.

Teresa Cunningham
Adjudicator