

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2012-08

October 15, 2012

ALBERTA NEW HOME WARRANTY PROGRAM

Case File Number P1780

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Summary: The director of a corporation made a complaint to the Commissioner that her personal information had been collected and used in contravention of the *Personal Information Protection Act* (PIPA) when the Alberta New Home Warranty Association contacted references in the course of evaluating an application by her company for membership in its warranty program.

The adjudicator found that the application for membership had been made on behalf of a corporation of which the Complainant was a director and representative. The adjudicator also found that the information that had been gathered to evaluate the membership application was information about the Complainant acting in a commercial capacity. The adjudicator determined that most of the information was about the Complainant as an organization within the terms of section 1(1)(i) of PIPA and was not personal information within the terms of section 1(1)(k).

The adjudicator determined that the Organization had collected personal information in one instance. However, she found that the Complainant had consented to the collection and use of this information, and that it was reasonable for the Organization to collect and use this information. She found that the Organization's collection and use of the Complainant's personal information was in compliance with PIPA.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1, 3, 7, 11, 12, 16, 36, 46, 52, 56

I. BACKGROUND

[para 1] On February 9, 2006, the Alberta New Home Warranty Program (the Organization) received an application from a corporation registered in Alberta to be registered as a “builder member”. The two directors of the corporation, the president and the secretary, signed an authorization to enable the Organization to conduct investigations, including credit reports, to determine the corporation’s ability to meet its obligations under the warranty program.

[para 2] The Organization denied the corporation’s application on February 22, 2006.

[para 3] On June 29, 2010, the secretary of the corporation (the Complainant) made a complaint to the Commissioner under the *Personal Information Protection Act* (PIPA) that the Organization had collected information that she was seeking to have corrected. The Commissioner authorized a portfolio officer to investigate and to attempt to mediate a settlement of the matter under section 49 of PIPA. Following the investigation of the matter, the issues the Complainant requested that the Commissioner review were the following:

- A. If the Organization collected or used the Complainant’s personal information, did it collect or use her personal information contrary to, or in accordance with, section 7(1) of PIPA, (no collection or use without authorization or consent?)
- B. If the Organization collected the Complainant’s personal information, did it collect her personal information contrary to, or in accordance with, section 11 of PIPA?
- C. If the Organization collected the Complainant’s personal information from a source other than the Complainant, was the collection contrary to, or in accordance with section 12 of PIPA?
- D. If the Organization used the Complainant’s personal information, did it use her personal information contrary to, or in accordance with, section 16 of PIPA?

[para 4] As mediation was ultimately unsuccessful, the matter was assigned to me to conduct a written inquiry. I identified the following preliminary issues for the inquiry:

1. Is the information that is the subject of the Complainant’s complaint her personal information within the terms of section 1(1)(k) of the *Personal Information Protection Act* (PIPA)?

2. If the information that is the subject of the Complainant's complaint is not personal information within the terms of section 1(1)(k), does PIPA apply to the complaint?

[para 5] I decided to conduct the inquiry in two parts. The first part of the inquiry would answer the preliminary questions I had raised. If it was determined that PIPA applied to the Complainant's complaint, then the inquiry would proceed to the second part. The Complainant and the Organization both provided initial submissions addressing all the issues for inquiry. The Complainant also provided rebuttal submissions. Once I reviewed the arguments and evidence of the parties, I decided that it was unnecessary for the Organization to provide rebuttal submissions.

[para 6] As both parties have provided detailed submissions addressing all issues for the inquiry, I have decided to dispose of those issues for inquiry in this Order where necessary.

II. ISSUES

Issue A: Is the information that is the subject of the Complainant's complaint her personal information within the terms of section 1(1)(k) of the *Personal Information Protection Act (PIPA)*?

Issue B: If the information that is the subject of the Complainant's complaint is not personal information within the terms of section 1(1)(k), does PIPA apply to the complaint?

Issue C: If the Organization collected or used the Complainant's personal information, did it collect or use her personal information contrary to, or in accordance with, section 7(1) of PIPA, (no collection or use without authorization or consent?)

Issue D: If the Organization collected the Complainant's personal information, did it collect her personal information contrary to, or in accordance with, section 11 of PIPA?

Issue E: If the Organization collected the Complainant's personal information from a source other than the Complainant, was the collection contrary to, or in accordance with section 12 of PIPA?

Issue F: If the Organization used the Complainant's personal information, did it use her personal information contrary to, or in accordance with, section 16 of PIPA?

III. DISCUSSION OF ISSUES

Issue A: Is the information that is the subject of the Complainant’s complaint her personal information within the terms of section 1(1)(k) of the *Personal Information Protection Act* (PIPA)?

[para 7] Section 1(1)(k) of PIPA defines personal information. It states:

1(1) In this Act,

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

[para 8] Section 1(1)(i) of PIPA defines the term “organization”. This provision states, in part:

1(1) In this Act,

(i) “*organization*” includes

- (i) *a corporation,*
- (ii) *an unincorporated association,*
- (iii) *a trade union as defined in the Labour Relations Code,*
- (iv) *a partnership as defined in the Partnership Act, and*
- (v) *an individual acting in a commercial capacity,*

but does not include an individual acting in a personal or domestic capacity...

If an individual acts in a commercial capacity, the individual is, by definition, an organization within the terms of section 1(1)(i) of PIPA. However, the Act is silent as to whether information about such an individual is personal information within the terms of section 1(1)(k).

[para 9] From the evidence supplied by both parties, I am satisfied that the Complainant, acting in her capacity as a director of a corporation, submitted an application to the Organization on behalf of her corporation in order for the corporation to become a member of the Organization’s warranty program. In evaluating the application, the Organization collected information about members of the board of directors, including the Complainant. It is clear from the application form submitted by the Complainant to the Organization that the Complainant and the other director of the corporation sought membership for the corporation and not for themselves. It is also clear from the evidence that when the Organization conducted the investigation that is the subject of the complaint, that it was conducting an investigation of the corporation.

[para 10] The Complainant also provided references regarding her previous commercial ventures in support of the corporation’s application.

[para 11] The Organization argues:

ANHWP submits that the Opinion Information [the results of its investigation] is not personal information of the Complainant within the meaning of PIPA. Section 1(1)(k) of PIPA defines personal information to mean “information about an identifiable individual”. ANHWP submits that it did not collect and use the information about the Complainant as an individual but, rather, as an organization. Section 1(1)(i)(v) specifies that for the purposes of PIPA, “organization” includes an “individual acting in a commercial capacity”. ANHWP submits that the Complainant was acting in a commercial capacity when she made the Application on behalf of the Applicant. Similarly, ANHWP submits that any information collected or used about the Complainant for the purposes of assessing the Applicant’s eligibility for membership and determining the Applicant’s ability to meet membership obligations was information about the Complainant acting in a commercial capacity.

[para 12] From the Complainant’s submissions, I understand that she takes issue with the fact that the Organization contacted businesses, other than those that were listed as references on the corporation’s membership application form, when the Organization conducted its investigation as to the corporation’s suitability for membership. She is of the view that she did not authorize the Organization to contact any parties other than those that were listed on the application and that the Organization contravened PIPA when it gathered information, including information about her, so that it could evaluate the corporation’s application.

[para 13] In Order 96-019, an order made under the *Freedom of Information and Protection of Privacy Act*, (the FOIP Act), former Commissioner Clark found that while corporations are persons, they are not individuals within the terms of the FOIP Act. He reasoned that corporations cannot have personal information for the purposes of the FOIP Act. Like PIPA, the FOIP Act defines personal information as “information about an identifiable individual”.

[para 14] In Order P-721, the former Assistant Commissioner of the Ontario Office of the Information and Privacy Commissioner determined that information about members of a board of directors acting in their capacities as such was not personal information. The former Assistant Commissioner said:

I also find that the information found in the remaining pages (or portions thereof) does not contain the personal information of the appellant or any other individual. In addition, where the identities of employees or members of the Board of Directors are referred to in these records, these passages relate to the responsibilities of these individuals in their employment or professional capacities. Since no other exemption applies to the records in question, they should be disclosed to the original requester.

[para 15] In my view, the above analysis is applicable to information about individuals acting as a director of a corporation, or in a commercial capacity within the scope of PIPA. As noted above, section 1(1)(i) of PIPA defines an organization as including an individual acting in a commercial capacity.

[para 16] The question becomes whether information about an individual acting in a commercial capacity, or an individual acting as a representative of a corporation, such as a director, is personal information within the terms of section 1(1)(k).

[para 17] Section 3 sets out the purpose of PIPA. It states

3 The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

From the foregoing, I conclude that PIPA acknowledges the rights of an individual to have his or her information protected, and the need of organizations to collect, use or disclose personal information. However, section 3 does not acknowledge any rights on behalf of organizations to have information about them protected. Moreover, none of the provisions of PIPA appear intended to have this result.

[para 18] If information about an individual acting solely in a commercial capacity, or solely in a capacity as a representative of an organization, is to be interpreted as personal information, then this interpretation would have the effect of protecting information rights of some, but not all, organizations. An organization collecting the business information of sole proprietors or single shareholder corporations would arguably be required to comply with PIPA when they do so, even though it would not be necessary to do so in the case of a larger organization. Such a result would appear to be entirely arbitrary, given that both small and large organizations may conduct the same business and be required to furnish the same kinds of information to other organizations. In my view, the better approach is to consider that information that is about an individual acting solely in the individual's capacity as a representative of an organization, or in a commercial capacity is not personal information for the purposes of section 1(1)(k).

[para 19] In saying this, I do not mean that information about an individual acting in a commercial capacity is never personal information. If such information appears in the context of information about the individual in a personal capacity, such as the case where an individual is subjected to disciplinary proceedings arising from actions taken in a representative capacity, then the information may be personal information within the terms of section 1(1)(k). However, information that is solely about an individual acting in a commercial or representative capacity in circumstances where the information lacks a personal dimension, will not fall within section 1(1)(k).

[para 20] Record 27 of the Complainant's submissions establishes that the application for membership with the Organization was made on behalf of a corporation. Tab C of the Organization's submissions contains an authorization signed by both directors of the Complainant's corporation authorizing the Organization to conduct an investigation verifying the contents of the application, including credit reports, to determine the corporation's ability to meet its obligations.

[para 21] The evidence submitted by the Complainant (records 95 – 107 of her submissions) to establish that her personal information was collected and used by the Organization without her consent, establishes that the Organization sought only

information about the Complainant's business dealings on behalf of the corporation she represents, or information that would assist it to determine whether the corporation she represents had sufficient financial resources. Moreover, with the exception of one piece of information about the Complainant appearing on record 102 of the Complainant's submissions, the Organization obtained information that was limited to the corporation and only referred to the Complainant in her capacity as a director and shareholder of the corporation.

[para 22] With the exception of record 102, I find that the Organization collected information solely about the Complainant acting in a representative or commercial capacity. With regard to the information collected and used by the Organization other than that appearing on record 102, I find that the Organization did not collect or use the personal information of the Complainant.

[para 23] For these reasons, I find that the information that is the subject of the Complainant's complaint, other than record 102 of her submissions, is not personal information within the terms of section 1(1)(k) of PIPA.

Issue B: If the information that is the subject of the Complainant's complaint is not personal information within the terms of section 1(1)(k), does PIPA apply to the complaint?

[para 24] I have already found that the information that is the subject of the Complainant's complaint (other than that appearing on record 102) is not her personal information within the terms of section 1(1)(k) of PIPA. The collection, use, and disclosure provisions of PIPA apply only to personal information. Moreover, by application of sections 36 and 46 of PIPA, a complainant may only make a complaint to the Commissioner that an organization has collected, used, or disclosed personal information in contravention of PIPA, or that an organization is not in compliance with PIPA with regard to its treatment of personal information. The Complainant's complaint is about the collection of information that is not personal information within the terms of the PIPA. I therefore find that PIPA does not apply to the Complainant's complaint.

Issue C: Issue C: If the Organization collected or used the Complainant's personal information, did it collect or use her personal information contrary to, or in accordance with, section 7(1) of PIPA, (no collection or use without authorization or consent?)

[para 25] Section 7(1) of PIPA states:

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,

- (b) *collect that information from a source other than the individual unless the individual consents to the collection of that information from the other source,*
- (c) *use that information unless the individual consents to the use of that information...*

[para 26] Record 102 of the Complainant's submissions indicates that when the Organization contacted a lumber retailer to obtain information about the corporation, the office manager for the lumber retailer volunteered details about the standing of the Complainant's own account with the lumber retailer. The employee for the Organization then recorded this information.

[para 27] I note that the Complainant signed a document entitled "Certification of the Information and Authorization to the ANHWP to Conduct an Investigation to Verify the Contents of the Application". This authorization, states, in part:

I/We certify that the information contained herein is accurate and complete for the best of our knowledge. I/We acknowledge that any false or misleading statements contained herein may result in refusal by the ANHWP to grant membership, or if it has been granted, termination of membership.

I/We also authorize the ANHWP or its agents or insurers, to conduct investigations, including credit reports, as the ANHWP considers necessary to determine the applicant's ability to meet its obligations under the Program's Agreement with Builder.

[para 28] The Complainant also signed a document entitled: "Consent Re: Personal Information for Application for Builder Membership or Renewal of Builder Membership". This consent states:

The undersigned consent to the collection, use, and disclosure of the personal information provided in the Application for Membership or Renewal of Membership of the Builder by the Program...

The purpose of this consent is to allow the Program to consider the builder's initial application or renewal of membership in the Program.

The undersigned further consent to the Program making inquiries about the financial or other information about the Builder or the undersigned from personal references, credit reporting agencies and financial institutions and this shall be the Program's specific authorization for the release of any such financial information by the personal references, credit reporting agency or financial institution about the Builder or the undersigned to the Program.

The lumber retailer is listed on the sheet of references supplied by the corporation to the Organization in support of the application.

[para 29] The Complainant provided express consent to the Organization to contact the references provided by the corporation and to collect personal information, including financial information, for the purposes of considering the corporation's application for membership. She also gave consent for the Organization to use the information it collected in order to assess the corporation's application. I find that the Complainant's

consent encompasses the information appearing on record 102 and any use that the Organization made of it for the purpose of processing the corporation's application.

[para 30] The Complainant made references in her submissions to the Organization contacting individuals or organizations other than those provided on the corporation's application. I note that the consent and authorization do not limit the Organization to contacting only those parties put forward by the applicant. Moreover, no evidence has been provided to establish that the Organization contacted entities other than those provided on the application or collected information about the Complainant in her personal capacity from such entities.

[para 31] I find that the Organization collected the information on record 102 with the consent of the Complainant. Moreover, I find that the Complainant gave consent to the Organization to use this personal information to evaluate the corporation's application.

Issue D: If the Organization collected the Complainant's personal information, did it collect her personal information contrary to, or in accordance with, section 11 of PIPA?

[para 32] 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.

Section 11 requires an organization to collect personal information for purposes that are reasonable, and to collect it only to the extent that it is necessary to meet its purposes.

[para 33] The Organization states:

As noted above, on certain aspects of the Application, the Complainant was effectively a stand in for the Applicant. For example, in response to queries regarding the Applicant's construction history, ANHWP was only provided with information about the Complainant. ANHWP collected the Opinion Information solely for the purpose of evaluating the Complainant's reputational history as part of its assessment of the Applicant's eligibility for membership and determining the Applicant's ability to meet its obligations as a member.

[para 34] As discussed above, with the exception of record 102, the "opinion information" the Organization collected was not about the Complainant acting in a personal capacity, but in a representative or commercial capacity.

[para 35] With regard to record 102, collecting the information in this record would be consistent with the purpose of determining whether the corporation would be able to

meet its obligations as a member. As the Organization notes, the Complainant supplied net worth statements and her own commercial history in support of the corporation's application. As a result, information about her finances and her business reputation would be relevant to the corporation's finances and reputation.

[para 36] Given that the capitalization of a builder is essential information when determining whether a builder is suitable for membership in a home warranty program, I find that it was reasonable for the Organization to collect the information it did to evaluate the corporation's application. Moreover, I find that it did not collect any personal information that was unnecessary for this purpose.

Issue E: If the Organization collected the Complainant's personal information from a source other than the Complainant, was the collection contrary to, or in accordance with section 12 of PIPA?

[para 37] As I have found that the Organization obtained the Complainant's consent to collect the personal information it did, I need not address section 12, which refers to collection without consent.

Issue F: If the Organization used the Complainant's personal information, did it use her personal information contrary to, or in accordance with, section 16 of PIPA?

[para 38] Section 16 of PIPA states:

16(1) An organization may use personal information only for purposes that are reasonable.

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

[para 39] It is not clear to me the extent to which the information appearing on record 102 was used to make a decision. However, as this information would be relevant to the Complainant's net worth, which was provided in order to support the corporation's application for membership, it follows that it would be reasonable for the Organization to use this information in order to evaluate the corporation's ability to meet its obligations. I also find that the Organization did not use any more personal information from record 102 than was necessary for evaluating the corporation's application.

[para 40] As I have found that the Organization's collection and use of personal information is in compliance with PIPA in any event, I need not address the Organization's arguments in relation to section 56.

IV. ORDER

[para 41] I make this Order under section 52 of the Act.

[para 42] I confirm that the Organization's collection and use of information did not contravene the Act.

Teresa Cunningham
Adjudicator