

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2020-06

September 22, 2020

TWR C MOTORS GP INC.

Case File Number 005057

Office URL: www.oipc.ab.ca

Summary: An individual made a complaint to this Office that TWR C Motors GP Inc. (the Organization) collected and used her personal information to perform a credit check, without her consent and without authorization.

The Adjudicator determined that the Organization collected and used the Complainant's personal information without authority under the Act.

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

Orders Cited: P2005-001, P2006-008

Authorities Cited: David M. Paciocco, Lee Stuesser, *The Law of Evidence*, (Toronto; Irwin Law Inc. 2011)

I. BACKGROUND

[para 1] The Complainant's partner, C, was in the process of purchasing a vehicle from TWR C Motors GP Inc. (the Organization), and applied for financing. According to the complaint, the Organization suggested that the Complainant co-sign for financing but C declined. However, C did provide the Complainant's name, address and basic income information to the Organization. The Complainant states that the Organization used this information to perform a credit check on her, without having spoken to her or obtained her consent to do so.

[para 2] The Complainant requested that the Commissioner investigate the complaint, and the matter has now proceeded to inquiry.

[para 3] The Complainant states that C went to the Organization's premises on June 25, 2016, and discussed the purchase of a new vehicle. The financing could not be completed that day. An employee with the Organization, BE, called C on June 27, 2016 to discuss financing. The Complainant states that BE told C that in order to obtain financing, C would need to provide information about the Complainant to show that both C and the Complainant were responsible for mortgage payments on their residence; this was relevant to whether C qualified for financing. The Complainant further states that BE had requested that C provide a copy of the Complainant's drivers' license but he declined to do so. C provided the Complainant's name, address and basic income to BE, at BE's request. The Complainant states that C provided this information only to verify that there were two individuals with income at his residence to pay the mortgage. The Complainant states that C confirmed with the Organization that this information was not provided for the purpose of listing the Complainant as a co-signer for the vehicle financing. According to the Complainant, this occurred on the morning of June 28, 2016.

[para 4] The Complainant states that later that same day, a financial manager with the Organization, GS, called C and informed him that he did not qualify for financing based on his and the Complainant's credit information. According to the Complainant, C then called BE about the matter; during that call, BE confirmed that the Organization performed a credit check on the Complainant.

[para 5] The Complainant states that she called BE on June 29, 2016. With its initial submission, the Organization provided a recording and a transcript of a voice message left by the Complainant. This recording indicates that the message is from the evening of June 28, 2016 and is from the Complainant BE.

[para 6] The Complainant states that she reached BE on June 30, 2016, and asked why he performed a credit check on her without her permission and without having spoken to her. She states that BE told her he had received permission from C and did not require the Complainant's permission.

[para 7] The Complainant states that she spoke with a manager with the Organization, LA, on June 30, 2016. She states that LA confirmed that the Organization performed a credit check without her permission and without speaking to her. She states that on July 2, 2016, C went to the Organization's premises and spoke with LA. At that time LA apologized for the unauthorized credit check; he indicated that the check had been performed by GS. With her initial submission the Complainant provided a screen shot of a text message exchange, purportedly between C and LA, that states LA needed to speak to GS as GS had performed the credit check.

II. ISSUES

[para 8] The Notice of Inquiry, dated June 25, 2020, states the issues for inquiry as the following:

1. Did the Organization collect and/or use “personal information” of the Complainant as that term is defined in PIPA?

If the Commissioner finds the Organization collected and/or used such “personal information”, she will also decide the following issues:

2. Did the Organization collect and/or use the “personal information” in contravention of, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular, did the Organization have the authority to collect and/or use the information without consent, as permitted by sections 14 and/or 17 of PIPA?

III. DISCUSSION OF ISSUES

Preliminary issue – settlement privilege

[para 9] In its rebuttal submission, the Organization objects to information provided in the Complainant’s rebuttal submission, arguing that “any statements that were made during the course of settlement discussions as between [MS], a former representative of the Respondent, and the Complainant should be subject to settlement privilege and accordingly not admissible in this matter” (rebuttal submission at para. 5).

[para 10] In *The Law of Evidence*, the authors set out three preconditions for the application of settlement privilege:

1. A litigious dispute must be in existence or within contemplation;
2. The communication must be made with the express or implied intention that it would not be disclosed to the Court in the event that negotiations failed.
3. The purpose of the communication must be to attempt to effect a settlement. (David M. Paciocco, Lee Stuesser, *The Law of Evidence*, (Toronto; Irwin Law Inc. 2011) p. 249)

[para 11] With her initial submission, the Complainant provided a copy of an email to her from MS, whose signature line in the email indicates he was the Organization’s general counsel at that time. In its initial submission, the Organization did not object to the Complainant providing this email to me. In fact, with its initial submission the Organization provided a copy of the same email, as well as the further email chain between MS and the Complainant on the same subject.

[para 12] In that same submission, the Organization said (initial submission at para. 2):

The only records that are in the possession of the [Organization] that are relevant to the issues in this Inquiry, other than records received in regards to the Complaint/Inquiry and records subject to settlement privilege, are emails between [the Organization’s general counsel] and the Complainant regarding masking a credit check inquiry (enclosed) and a voicemail dated June 28, 2016 from the Complainant left for a former employee of the Respondent (the “Voicemail”).

[para 13] This indicates that the Organization has communications it considers to be subject to settlement privilege (that were not provided to me), *and* it has the above-described emails it provided to me; i.e. that the settlement communications and the emails are two separate items.

[para 14] I note also that there is no indication in these emails that the communications were intended to be kept confidential; there is no reference to “confidential” or “without prejudice”. In this email chain, MS explains the process to have Equifax mask the credit check inquiry and the Complainant expresses concerns with the process.

[para 15] From the above, I conclude that the Organization’s reference to settlement privilege in its rebuttal submission refers to statements made by the Complainant in her rebuttal submission other than these emails about masking the credit check. I will therefore rely on the email evidence provided to me by both parties.

[para 16] The additional information provided in the Complainant’s rebuttal submission on this point indicates that the Organization may have made a monetary offer to the Complainant. Whether the Organization made any such offer to the Complainant is not relevant to my decision.

1. Did the Organization collect and/or use “personal information” of the Complainant as that term is defined in PIPA?

[para 17] “Personal information” is defined in section 1(1)(k) of the Act as “information about an identifiable individual.”

[para 18] The personal information the Complainant states the Organization collected and/or used without her consent is her name, address, and basic income as provided to the Organization by C. The Complainant also states that the Organization collected her credit information. This is the Complainant’s personal information.

[para 19] In its initial submission, the Organization states that due to the amount of time that has passed since the alleged incident, the Organization “is unable to make any representations or comment on the accuracy of the alleged factual sequence of events set out in the Complainant’s initial submission based on witness recollections” (initial submission at para. 1).

[para 20] As noted above, the Organization further states that the only records it has in relation to this inquiry, other than records subject to settlement privilege, are the emails between the Organization’s general counsel and the Complainant relating to masking the credit check, and a voicemail dated June 28, 2016 left by the Complainant.

[para 21] In its initial and rebuttal submissions, the Organization calls the Complainant’s recollection of events into question. In its initial submission, the Organization argues (at para. 4):

... the Complainant’s initial submission alleges a factual sequence of events that at no point references the Complainant leaving the Voicemail for the Respondent on June 28 and accordingly, the omission of this factual event by the complainant may be cause to question the accuracy of the Complainant’s alleged factual sequence of events.

[para 22] The Organization's argument is not correct. As the Complainant notes in her rebuttal submission, her initial submission included an attachment entitled "Schedule 'A'", which states (at para. 11):

[The Complainant], now aware that her Credit Bureau has been pulled without permission attempted to phone [BE] and was unsuccessful and left a message to have [BE] phone her the next day June 30th 2016.

This Schedule 'A' was also attached to the Complainant's initial complaint.

[para 23] In its rebuttal submission, the Organization states that the Complainant's account in Schedule 'A' contains an inconsistency. It cites the following from Schedule 'A':

[The Complainant] now aware that her Credit Bureau has been pulled without permission attempted to phone [BE] and was unsuccessful and left a message to have [BE] phone her the next day June 30th 2016.

[para 24] In the voicemail the Complainant states "I'm not sure if you guys ran my credit or not...". The Organization points out that the excerpt from Schedule A states the Complainant was aware that her credit had been checked when she left the voicemail, but the voicemail states that she was unclear whether the credit check had occurred.

[para 25] The Organization also points out that the Complainant states this voicemail was left on June 29 and the recording of the voicemail provided by the Organization states that it was left on June 28. It states (rebuttal submission at para. 2):

Accordingly, either the Complainant left multiple voicemails for the Respondent and chose to omit mentioning the one that was left on June 28th or the Complainant's alleged factual sequence of events is not accurately stated. In either event, it appears that the Complainant has misstated or omitted pertinent information in this instance and accordingly it stands to reason that the Complainant may have misstated or omitted pertinent information in her other statements in regard to the allegations that she has made against the Respondent in this Complaint/Inquiry.

[para 26] Regarding the discrepancy in the dates of the voicemail, it seems that the date as stated by the voicemail system is more likely to be accurate than the Complainant's recollection. However, I do not believe this error undermines the credibility of the Complainant's submissions more generally.

[para 27] The Organization has noted the difficulty in providing submissions on the chronology of events since several years have passed. It seems understandable that the Complainant could make an error in recollecting the exact date of one of several calls she made to BE.

[para 28] The Organization has also pointed to the possibility that the Complainant left more voicemails than she has stated in her submissions. The Organization did not provide any support for the possibility that the Complainant left other voicemails and I have no reason to conclude that she did.

[para 29] I also do not give much weight to the apparent discrepancy in Schedule ‘A’ noted by the Organization, where the Complainant states that she was aware that her credit had been checked when she left the voicemail that said she wasn’t sure if that was the case. Possibly the Complainant was not willing to accuse BE of checking her credit in the voicemail; possibly the Complainant wanted to see if BE would admit to checking her credit; possibly the Complainant misstated when she knew that the credit check had been performed (as opposed to when she suspected it might be performed).

[para 30] For the reasons discussed in the next section of this Order, whether the Complainant knew or suspected a credit check had been performed when she left the voicemail is not material to my findings in this inquiry. The precise date of the voicemail is also not relevant to the outcome of this inquiry. In other words, the facts in dispute are not material. As to her credibility more generally, the Complainant’s statement of events is logical, coherent, and supported with evidence. With the exception of the discrepancy in the date of the voicemail, the Organization’s evidence also supports the Complainant’s statement of events.

[para 31] In any event, it seems clear from the submissions and evidence provided by *both* parties that the Organization collected the Complainant’s personal information as alleged. The emails between the Organization and Complainant clearly relate to the Complainant and a credit check performed on the Complainant. The emails discuss the process for having Equifax mask the credit check; this indicates that the credit check was performed as stated by the Complainant.

[para 32] In the emails MS explains the process for the Organization to request the mask; the Complainant expresses discomfort with this approach as she would have to give the Organization additional personal information to pass on to Equifax. MS states (email dated May 30, 2017, attached to Organization’s initial submission):

We will certainly inquire as to whether there is a way for you to provide the information directly to Equifax. We want to do everything to make sure this is as painless a process for you and can accommodate you as much as possible. My concern is that even if you disclose the information directly to Equifax, they might share your personal information with us in the course of the process (in light of the fact that we are the account holder). We obviously don't want this to happen if you haven't given your consent.

[para 33] MS states that the Organization is the ‘account holder’ for the relevant credit check and masking request. This strongly indicates that MS knew the Organization had conducted the credit check.

[para 34] Given the information provided to me by both parties, I conclude that the Organization used the Complainant’s personal information to conduct a credit check. After this credit check was performed, the Organization told C that he did not qualify for financing; therefore it is also logical to conclude that the Organization collected the Complainant’s personal information resulting from the check.

[para 35] In order to conduct the credit check, the Organization must have collected the Complainant’s personal information. The only explanation provided to me as to when or how this happened is the Complainant’s account: that C provided the information to the Organization

in order to verify that the Complainant was a co-payer of the mortgage. I have no reason to expect that account to be in error. I conclude that the Organization collected the Complainant's personal information from C.

[para 36] The remaining question is whether the Organization had authority to collect and/or use the information.

2. Did the Organization collect and/or use the “personal information” in contravention of, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular, did the Organization have the authority to collect and/or use the information without consent, as permitted by sections 14 and/or 17 of PIPA?

[para 37] The Complainant has the initial burden of proof, in that she has to have some knowledge, and adduce some evidence, regarding what personal information was disclosed; the Organization then has the burden to show that its disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 38] Section 7 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, or*
- (d) disclose that information unless the individual consents to the disclosure of that information.*

[para 39] The Complainant states that she called the employee who C had been dealing with, BE, on June 29, 2016. The Organization provided a recording of a voice message left by the Complainant; that recording indicates the call was made on June 28, 2016.

[para 40] I have accepted that the likely date of the voicemail is June 28, 2016, at 6pm (as indicated by the voicemail system). The Complainant states that C provided her information to BE earlier that day.

[para 41] In the voicemail the Complainant states “I’m not sure if you guys ran my credit or not...”. The Organization argues that this shows the Complainant had notice on June 28, 2016 that the Organization might use the Complainant's information to conduct a credit check. It said that the Complainant could have objected to this use of her information but did not. The Organization argues that this satisfies the consent provisions in section 8(3) of the Act.

[para 42] Section 8 states in part:

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), (2.1), (2.2) 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.

[para 43] Section 8(3) is a form of “opt out” consent, where an organization can notify an individual of the manner in which it *intends* to collect, use or disclose personal information and the individual is deemed to consent if they do not decline consent or otherwise object to the identified collection, use or disclosure.

[para 44] In response to the Organization’s initial submission, the Complainant states that the credit check had already been performed by the Organization by the time the Complainant left her voicemail for BE. The Complainant indicates that she became aware of the credit check because BE informed C that C and the Complainant had insufficient credit for a loan approval. According to the Complainant, C then asked BE if a credit check had been conducted on the Complainant and BE confirmed that it had.

[para 45] As I have indicated earlier in this Order, whether the Complainant knew about the credit check before the voicemail and/or whether the credit check occurred before the voicemail is not material to my finding.

[para 46] Even if the Organization conducted the credit check after the Complainant's voicemail, the voicemail does not amount to consent under section 8(3) (or any other subsection). The Complainant's guess that something may have happened or might happen is not the same as the Organization *actively notifying* the Complainant that it *intends* to do that thing. Section 8(3)(a)(i) requires the Organization to clearly notify an individual that it intends to collect, use or disclose personal information. This notice must occur before the personal information is collected, used or disclosed; otherwise, an individual will not have an opportunity to object as required by section 8(3)(a)(ii). The Organization has not shown that any such notice occurred.

[para 47] The Complainant's voicemail message indicates she believed that the credit check already occurred so presumably the Complainant would not have known that she had an opportunity to object to the credit check being conducted, as required under section 8(3)(a)(ii). The Organization has not argued that it alerted the Complainant that she could object to the credit check.

[para 48] Given the above, the apparent error in the Complainant's statement of events regarding the date of her voicemail – whether she left the voicemail on June 28 or June 29 – does not affect my decision. This is because the Organization failed to meet the requirements of section 8(3) regardless of whether the credit check was performed before or after the voicemail.

[para 49] I also note that whether an organization can rely on section 8(3) for consent depends upon the sensitivity of the personal information. A credit check may be too sensitive for an organization to rely on section 8(3), especially given the consequences that credit checks can have on an individual's credit. I do not have to make a finding in this regard, as subsection 8(3)(a) was not satisfied in any event.

[para 50] There is another consent provision that permits consent other than direct written consent and while the Organization has not argued that it applies, I have nevertheless considered it. Section 8(2) states that consent can be deemed to be given where the individual voluntarily provides their personal information to an organization for a purpose that is obvious and where it is reasonable to provide the information for that purpose. This provision applies only where the individual the information is about has provided the information to the organization. In this case, the Organization collected the Complainant's personal information from sources other than the Complainant; therefore, section 8(2) is also not applicable. I note as well that according to the Complainant, when the Complainant's personal information was provided to the Organization by C, the stated purpose was to show that C was not the sole income in the household (i.e. that the Complainant was a co-payer of the mortgage). Therefore, the purpose of conducting a credit check could not be characterized as obvious at the time the personal information was provided.

[para 51] The foregoing focuses primarily on the Organization's use of the Complainant's personal information to conduct a credit check, and the collection of the Complainant's credit information. However, the Organization also collected the Complainant's name, address and basic income from C before it ran the credit check. There is no indication that the Complainant had any prior notice that this was being collected and the Organization has not provided any

argument that this information was collected with her consent. I note as well that section 7(1)(b) requires organizations to collect personal information from the individual the information is about, unless the individual consents to the collection from another source. Again, there is no indication of consent in this case. Therefore I find that the Organization collected the Complainant's name, address and basic income from C without her consent.

[para 52] PIPA authorizes the collection, use and disclosure of personal information without consent in the circumstances listed in sections 14, 17 and 20, respectively. None of those circumstance appear to apply in this case and the Organization has not made any arguments on the applicability of any of these sections.

[para 53] I conclude that the Organization collected and used the Complainant's personal information without authority under the Act.

[para 54] In its initial submission, the Organization states that it has amended its process for conducting credit checks. It states (initial submission at paras. 11-12):

The Respondent's current procedure for the handling of personal information is such that it will not use any personal information of an individual without first receiving a signed Guest Sheet from an individual, which is used very early on in the Respondent's sales process. The Guest Sheet includes language requesting consent to the use of an individual's personal information for certain purposes, which the Respondent asks that all potential customers sign both the front and back of.

Once a potential customer has found a vehicle that they are interested in purchasing, the customer is introduced to the Respondent's Finance & Insurance department. Within this department's process, the Respondent asks that the customer reaffirm their consent by signing another Consent To Use Personal Information form. Using this dual form process, the Respondent attempts to ensure that all individuals are fully aware and consent to the use of their personal information for the purposes disclosed in those forms.

[para 55] I agree that this new process amounts to proper notice of the Organization's intent to collect, use and/or disclose personal information for credit purposes.

[para 56] The Organization also noted that it has had significant changes to its Sales and Finance & Insurance departments. It did not mention whether it had undertaken to train its employees on its obligations under PIPA. Proper forms are an excellent tool but are less useful if employees are not informed of their purpose or significance. Therefore, as a term and condition of this Order under section 52(4), I will order the Organization to train its staff about its obligations with respect to the collection, use and disclosure of personal information under PIPA if it has not already done so.

IV. ORDER

[para 57] I make this Order under section 52 of the Act.

[para 58] I find that the Organization collected and used the Complainant's personal information without authority under the Act.

[para 59] I order the Organization to train its employees regarding the Organization's obligations with respect to the collection, use and disclosure of personal information under the Act. If the Organization has already undertaken such training, it can comply with this Order by describing the training it has undertaken.

[para 60] 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.

Amanda Swanek
Adjudicator