

# ALBERTA

## INFORMATION AND PRIVACY COMMISSIONER

### ORDER 97-004

June 27, 1997

#### CREDIT UNION DEPOSIT GUARANTEE CORPORATION

Review Number 1148

#### **BACKGROUND:**

[1.] The Applicant, the Applicant's spouse, and their companies allegedly owed money to the Credit Union Deposit Guarantee Corporation (the "Public Body"). In 1991, the Public Body obtained two judgments against the Applicant and the companies. The Public Body subsequently sold those two judgments to a third party.

[2.] In 1995, the Applicant discovered that the third party possessed "personal files and information" and "confidential business information" of the Applicant, the Applicant's spouse, and their companies. The Applicant believed that the third party's continued possession of this information was at variance with section 16(1) of the *Credit Union Act* and in contravention of section 15(1) of the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Applicant also alleged that, by giving the third party the personal information in 1991, the Public Body had breached the privacy of the Applicant and the Applicant's spouse, and there was a "continuing breach of privacy" for the purposes of the Act. Consequently, by letter dated August 7, 1996, and received in this office August 13, 1996, the Applicant requested a review under section 63(1) of the Act.

[3.] Mediation was authorized but was not successful. The matter was set down for a written inquiry, which was confined to the breach of privacy issue only. I received the Applicant's and the Public Body's written submissions on November 29, 1996. In the written submission, the Applicant requested an order that the third party return the records and information to the Public Body.

### **RECORDS AT ISSUE:**

[4.] This case involves a request for review of whether the Public Body has disclosed personal information in violation of the Act. Consequently, it was not necessary that I review the records, as I would if this were a request for review concerning access to records.

### **ISSUES:**

[5.] There are three issues in this inquiry:

- A. Did the Public Body disclose personal information in violation of Part 2 of the Act?
- B. Is section 15(1) of the Act applicable to this inquiry?
- C. Do I have the jurisdiction under the Act to order that a third party return records to a public body?

### **DISCUSSION:**

#### **Issue A: Did the Public Body disclose personal information in violation of Part 2 of the Act?**

[6.] The Applicant alleges that the Public Body wrongfully gave "personal files and information" concerning the Applicant and the Applicant's spouse to a third party in 1991. The Applicant alleges that the Public Body thereby breached the privacy of the Applicant and the Applicant's spouse when it disclosed that personal information.

[7.] I believe the Applicant's argument to be that the Public Body has disclosed personal information in violation of Part 2 of the Act. Section 38(1)(e) of the Act appears to be relevant. Section 38(1)(e) reads:

*s. 38(1) A public body may disclose personal information only*

*(e) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure.*

[8.] Under section 38(1)(e) of the Act, the relevant “enactment of Alberta” is section 16(1) of the *Credit Union Act*, S.A. 1989, c. C-31.1. The Applicant appears to be arguing that disclosure of the personal information was not authorized or required under section 16(1) of the *Credit Union Act*, which reads:

*s. 16(1) Subject to this section, where the Minister or the Corporation [defined as the Credit Union Deposit Guarantee Corporation, which is the Public Body in this case] obtains information or documents, other than registered or registrable information or documents, regarding the business or affairs of a body corporate or a person dealing with a body corporate as a result of administering or enforcing this Act, the Minister or the Corporation shall not disclose that information or provide those documents or a copy of them or disclose any information contained in, or allow access to, those documents, to any person other than that body corporate or person.*

[9.] The Applicant says that the words “that body corporate or person” in the last line of section 16(1) of the *Credit Union Act* refer to the Applicant, the Applicant’s spouse and/or their companies. The Applicant also cites section 144(4) of the *Credit Union Act*, which concerns the obligations of directors and officers under that legislation.

[10.] The issue of whether the Public Body has disclosed personal information in violation of Part 2 of the Act requires that I first determine which party to this inquiry has the burden of proof under the Act. Then I must answer two interrelated questions: (i) Can the Act be applied retroactively? and (ii) Can there be a “continuing breach of privacy” under the Act”?

**(a) Which party to this inquiry has the burden of proof under the Act?**

[11.] Section 67 of the Act sets out the burden of proof in cases in which a request for access to information is made under the Act. In this case, the Applicant did not request access to information, but raised the issue that the Public Body disclosed personal information in violation of Part 2 of the Act. The Act is silent as to which party has the burden of proof in such a case.

When the Act is silent, I believe that I may determine who has the burden of proof. To make that determination in this case, I intend to consider the following criteria (although there may be other criteria I will consider in other cases):

(i) Who raised the issue?

(ii) Who is in the best position to meet the burden of proof?

[12.] The Applicant raised not only the issue of disclosure of personal information in violation Part 2 of the Act, but also the related issues of retroactive application of the Act and “continuing breach of privacy”. Since only the Applicant knows the reasons for the Applicant’s concern about these issues, the Applicant is in the best position to meet the burden of proof. Therefore, I believe that the burden of proof should be on the Applicant in this case.

**(b) Can the Act be applied retroactively?**

[13.] The Act came into force on October 1, 1995. The Public Body allegedly disclosed personal information in violation of Part 2 of the Act in 1991, when the Act was not in force.

[14.] Obviously, a complaint that a public body disclosed personal information in violation of Part 2 of the Act presupposes that the Act was in force at the time that the personal information was disclosed. If a public body disclosed personal information at a time the Act was not in force, there would be no breach of the Act unless the Act applied retroactively.

[15.] Although the Applicant acknowledged, in the submission, that the Act does not have retroactive effect, the Applicant’s complaint is nevertheless premised on the Act applying retroactively, that is, applying to the Public Body’s alleged disclosure of personal information in 1991, even though the Act did not come into force until 1995.

[16.] “Retroactivity” is defined by Ruth R. Sullivan in *Driedger on the Construction of Statutes*, 3rd edition (Toronto, Ontario: Butterworths Canada Ltd., 1994), p. 513:

*A retroactive statute or provision is one that applies to facts that were already past when the legislation came into force. It changes the law applicable to past conduct or events; in effect, it deems the law to have been different from what it actually was.*

[17.] There is a presumption that legislation is not intended to apply retroactively unless the legislation says so expressly or, by necessary implication, the language of the legislation requires that interpretation: see *Driedger on the Construction of Statutes*, pp. 512-513; *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271; see also Order 96-007. The reason for the presumption against retroactivity is that a retroactive law changes the law applicable to events at the time those events occurred, and makes compliance with the law impossible. The presumption against retroactivity is especially strong when the facts to which the legislation would apply have already occurred when the legislation came into force: see *Driedger on the Construction of Statutes*, p. 510.

[18.] Does the Act expressly say that either the Act or a provision of the Act applies retroactively? Furthermore, does the Act or a provision of the Act apply retroactively by necessary implication?

[19.] Section 90 of the Act reads:

*s. 90 This Act applies to any record in the custody or under the control of a public body regardless of whether it comes into existence before or after this Act comes into force.*

[20.] I interpret section 90 to mean that the Act applies to a record in existence before the Act came into force, provided that record is in the custody or under the control of a public body. Because section 90 of the Act uses the words “in the custody or under the control of a public body”, I interpret section 90 as applying retroactively only to records that are subject to the access provisions under Part 1 of the Act. Section 90 allows an applicant to apply to a public body for access to a record that existed before the Act came into force. If section 90 did not allow this specified retroactive application of the Act, an applicant would be limited to applying for records that came into existence only after the Act came into force.

[21.] However, the wording of section 90 does not contemplate that the Act is to apply retroactively to facts that occurred entirely in the past, before the Act came into force. The obligations on public bodies respecting personal information did not exist in 1991. The Public Body’s alleged disclosure of personal information in 1991 would be a fact that occurred entirely in the past. If the Act were to be applied retroactively, the Public Body would be in violation of the Act now for a fact that occurred in 1991, even though the Act did not come into force until 1995.

[22.] Furthermore, I find nothing in the language of the Act that makes the application of the Act or a provision of the Act retroactive, by necessary

implication, to facts occurring entirely in the past. The Applicant has not convinced me otherwise, and has not met the burden of proof in this regard.

**(c) Can there be a “continuing breach of privacy” under the Act”?**

[23.] The Applicant says there is a “continuing breach of privacy” by the third party because the third party is still holding and refuses to return the “personal files and information” which it wrongfully received from the Public Body. I understand the Applicant to be saying that the Public Body is responsible for this “continuing breach of privacy” because the Public Body wrongfully gave the records to the third party in the first place. The Applicant contends that the Public Body had a continuing responsibility to keep confidential the information provided to it in 1991. The Applicant is of the view that the personal privacy rights of the Applicant and the Applicant’s spouse continue to be compromised by the third party’s possession of the “personal files and information”.

[24.] I believe the Applicant’s “continuing breach of privacy” argument to be that the Public Body’s disclosure of personal information is not a fact that occurred entirely in the past. Instead, that disclosure is a “continuing fact” begun, but not ended, when the Act came into force. The application of the Act to a “continuing fact” is not considered to be a retroactive application of the Act because “...there is no attempt to reach into the past and alter the law or the rights of persons as of an earlier date”: see *Driedger on the Construction of Statutes*, p. 517. Consequently, a “continuing fact” would be caught by the Act when the Act came into force.

[25.] The Public Body’s answer to this argument is that “disclosure” takes place at the moment of disclosure. Once the personal information was disclosed in 1991, there was nothing remaining to disclose. So disclosure occurred once only. The records disclosed and the knowledge gained from the records remains out there, but they are the result of the original disclosure. There is not a new disclosure every time someone opens the file which was disclosed in 1991 or turns their mind to what they remember from the 1991 disclosure. In any event, the Public Body says that no ongoing disclosure is taking place, nor is the Applicant making any allegation to that effect.

[26.] I believe that the Public Body’s evidence is determinative of the matter. At the time the Act came into force, there was no ongoing disclosure of personal information taking place, nor has the Public Body disclosed any further personal information since the Act came into force. The Public Body has only disclosed once, in 1991, and not since. Consequently, there is no “continuing fact” of disclosure by the Public Body that would be a violation of the Act at any time after the Act came into force. Even if there were a “continuing fact” of disclosure, I would only have authority to order the remedy contained in

section 68(3)(e) of the Act, namely, to order the Public Body to stop disclosing the personal information (for a further discussion of section 68(3), see Issue C in this Order). There would be no other remedy. Assuming that the Public Body could take back the records, it could not take back the third party's knowledge. While it is possible to forget, it is not possible to "unknow" something.

[27.] As I have said, the fact of disclosure in this case occurred in the past. Any attempt to apply Part 2 of the Act would be a retroactive application of the Act. Part 2 of the Act does not apply retroactively.

[28.] The Applicant says there is nevertheless a "continuing breach of privacy" by the third party who continues to use the "personal files and information" of the Applicant and the Applicant's spouse. My answer is that a "continuing breach of privacy" cannot apply to a third party under the Act because that third party is not a public body to whom Part 2 of the Act applies. Moreover, even if there could be a "continuing breach of privacy" by a third party under the Act, that fact would have no bearing on whether there may also be a "continuing breach of privacy" by a public body.

[29.] I find that there is no "continuing breach of privacy" by the Public Body under Part 2 of the Act, nor can there be a "continuing breach of privacy" by the third party, for the reasons stated. The Applicant has not met the burden of proof regarding "continuing breach of privacy".

#### **(d) Conclusion**

[30.] Because the Act does not apply retroactively to facts occurring entirely in the past, I find that the Public Body could not have disclosed personal information in violation of Part 2 of the Act in 1991. Consequently, I do not find it necessary to interpret section 16(1) or section 144(4) of the *Credit Union Act*. I make no finding as to whether the 1991 facts would constitute a breach of the Act today.

#### **Issue B: Is section 15(1) of the Act applicable to this inquiry?**

[31.] The Applicant also says that the Public Body breached section 15(1) of the Act by disclosing "confidential business information" of the Applicant, the Applicant's spouse and their companies. The Applicant says that for the purposes of section 15(1) of the Act, the Applicant, the Applicant's spouse and their companies are "third parties".

[32.] Section 15(1) requires that there be a "third party". Under section 1(1)(r) of the Act, "third party" is defined to mean a person, a group of persons or an

organization other than an applicant or a public body. The Applicant cannot therefore be a third party for the purposes of section 15(1).

[33.] Furthermore, Section 15(1) of the Act appears in Part 1 of the Act, which deals with access to information. Section 15(1) presumes that an applicant has made a request for access to a third party's "confidential business information". As there has been no application for access to a third party's "confidential business information" in this case, section 15(1) is not applicable.

**Issue C: Do I have the jurisdiction under the Act to order that a third party return records to a public body?**

[34.] Section 68 of the Act sets out my jurisdiction with regard to what I may order to be done under the Act. Section 68(3) is relevant to an inquiry concerning a public body's disclosure of personal information. Section 68(3) provides:

*s. 68(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:*

*(a) require that a duty imposed by this Act or the regulations be performed;*

*(b) confirm or reduce the extension of a time limit under section 13;*

*(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*

*(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;*

*(e) require a public body to stop collecting, using or disclosing personal information in violation of Part*

2;

*(f) require the head of a public body to destroy personal information collected in violation of this Act.*

[35.] Assuming that I were to find that a public body disclosed personal information in violation of Part 2 of the Act, which is not the case here, section 68(3)(e) of the Act gives me the authority to require that a public body stop disclosing personal information in violation of Part 2. I do not have jurisdiction to order that anyone who is not subject to the Act return records to a public body. I have no jurisdiction to order what the Applicant has requested.

**ORDER:**

[36.] I find that the Act does not apply retroactively to facts occurring entirely in the past; therefore, the Public Body could not have disclosed personal information in violation of Part 2 of the Act in 1991. I make no finding as to whether the 1991 facts would constitute a breach of the Act today.

[37.] I further find that section 15(1) of the Act is not applicable to this inquiry, and that I have no jurisdiction under the Act to order that a third party return records to a public body.

[38.] Consequently, I make no order under the Act in this case.

Robert C. Clark  
Information and Privacy Commissioner