

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2017-43

April 28, 2017

UNIVERSITY OF CALGARY

Case File Number F7514

Office URL: www.oipc.ab.ca

Summary: The Complainant asserts the University of Calgary (the Public Body) failed to comply with provisions in the *Freedom of Information and Protection of Privacy Act* (the Act). Correspondence was sent by the Public Body to incomplete or incorrect addresses. The adjudicator found section 35 (accuracy and retention of personal information) of the Act did not apply. She was not convinced the Public Body had met its obligations as required by section 38 (protection of personal information) of the Act and ordered the Public Body to implement policies establishing management of risk of disclosure of personal information when addressing mail.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 35, 38, 72; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s. 34

Authorities Cited: **AB: Orders** F2006-019, P2012-02, F2013-06, **BC: Order** F10-31

I. BACKGROUND

[para 1] The Complainant alleges that on two occasions the Public Body, through its counsel, sent legal documents to the Complainant to the wrong address and on another occasion sent registered mail to him at his workplace but did not address the envelope to him personally, so the letter was opened by a secretary. The Complainant complained to

this Office on September 17, 2013 and requested an inquiry on September 8, 2015. The Commissioner agreed to hold an inquiry in this case.

II. INFORMATION AT ISSUE

[para 2] I will deal only with the following three documents in this inquiry:

1. A Bill of Costs dated May 10, 2012 sent to [a department within a particular university in Canada] without the Complainant's name on the envelope.
2. A Fed Ex shipment addressed to the Complainant sent to an incomplete European address on May 13, 2012.
3. A Notice of Interlocutory Motion addressed to the Complainant, sent August 2013 to an incorrect address in Europe.

[para 3] The Complainant, in his original complaint on this matter to this office, referred to the third document listed above and referenced document 2. He did not mention document 1. In his Request for Inquiry, the Complainant refers to document 1.

[para 4] The Complainant, in his submissions to this inquiry, refers me to other documents and other instances where he alleges the Public Body failed to comply with the Act. With respect, the issues before me relate to those circumstances described in the Notice of Inquiry. I have reviewed the foundational documents for this inquiry. As the Complainant's Complaint and Request for Inquiry did not refer to documents other than those listed in para. 2, I decline to expand the scope of this inquiry to include other complaints regarding other records.

III. ISSUES

[para 5] The issues listed in the Notice of Inquiry are as follows:

1. Are the records excluded from the application of the Act by section 4(1)(a)?
2. Did the Public Body make every reasonable effort to ensure the [Complainant's] personal information was accurate and complete, as required by section 35(a) of the Act (accuracy and retention)?
3. Did the Public Body meet its obligations as required by section 38 of the Act (protection of personal information)?

IV. DISCUSSION OF ISSUES

1. Are the records excluded from the application of the Act by section 4(1)(a)?

[para 6] The Public Body indicated it was not applying section 4(1)(a) (information in a court file) to the records and made no submissions regarding this issue. Therefore, this is no longer an issue in this inquiry.

2. Did the Public Body make every reasonable effort to ensure the Applicant's personal information was accurate and complete, as required by section 35(a) of the Act (accuracy and retention)?

- a. Bill of Costs dated May 10, 2012 sent to [a particular department in a university in Canada]

[para 7] Section 35(a) of the Act reads as follows:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete,

...

[para 8] With respect to the Bill of Costs, the Public Body admits it was sent without listing the Complainant's name on the envelope. The Public Body submits the Bill of Costs was a document that was created as a result of a decision of the Supreme Court of Canada.

[para 9] The Complainant submits the Bill of Costs was an invalidly served document and his ability to respond to the Bill of Costs was impeded.

[para 10] Section 35 indicates if the Public Body is to use personal information of an individual in order *to make a decision that directly affects the individual*, it must make every reasonable effort to ensure that the information is accurate and complete.

[para 11] In Order F2006-019 the adjudicator explains the application of section 35. At paras 87 and 88 he states:

While public bodies should certainly always endeavour to use and disclose personal information that is accurate and complete, the Act imposes the duty under section 35(a) on a public body only if it used or will use the information to make a decision that directly affects the individual. Here, I do not believe that the Public Body's disclosure of the Complainant's personal information to the WCB amounts to a decision of the Public Body that directly affected her. At most, a decision to disclose may be a decision that *indirectly*

affects her. With respect to the adjudication of her claim for workers' compensation, it is the WCB that makes the decisions that *directly* affect her.

I recognize that section 35 of the Act incorporates a fundamental principle of fair information practices and emphasizes the importance of data quality because its absence may lead to serious consequences (Order 98-002 at para. 86). I also recognize that in providing information to the WCB, an employer is in a position to influence a decision that the WCB makes. However, when an employer provides information to the WCB in order for the latter to make a decision that directly affects an individual, section 35(a) of the Act imposes the duty regarding accuracy and completeness on the WCB.

[para 12] In this particular instance, the Public Body sent a copy of a Bill of Costs to a university without the Complainant's name on the envelope. Order F10-31 of British Columbia's Office of the Information and Privacy Commissioner used the following definition of "decision" when interpreting a provision similar to section 35:

...the act or process of deciding; determination, as of a question or doubt, by making a judgment; the act of or need for making up one's mind; something that is decided; resolution; a judgment, as one formally pronounced by a court.

[para 13] Keeping accurate address information for parties with whom a public body corresponds may be important, and may fall within its duties to safeguard personal information. However, I cannot see how a failure to transpose a name from one location to an envelope can be considered to be a decision that directly affects an individual within the provisions of section 35.

[para 14] The Complainant's argument his ability to respond to the Bill of Costs was impeded is undermined by his attachments to his Request for Inquiry in this matter. One of the attachments is a faxed letter to the Registry of the Supreme Court of Canada outlining his argument regarding his ability to respond to the Bill of Costs. There was obviously a means of dealing with what the Complainant considered an invalidly served document. Whether or not his argument was accepted by the Supreme Court of Canada does not bear on the issue of whether section 35 applies to this matter.

[para 15] I find the Public Body did not make a decision under the provisions of section 35 when using the Complainant's personal information in this matter. I characterize the Public Body's use as a mailing error, not a decision that affected the Complainant.

[para 16] I find section 35 does not apply to this document.

b. A Fed Ex shipment addressed to the Complainant sent to a [European] address on May 13, 2012.

[para 17] Evidence before me shows this shipment was not delivered to the Complainant, nor to anyone else. In Exhibit V (letter dated October 18, 2013 addressed to the Office of the Information and Privacy Commissioner) of the Complainant's initial submissions, he

attaches the FedEx invoice and tracking records for this shipment. These records show the shipment was not delivered as the address was incomplete.

[para 18] Again, I find the Public Body did not make a decision within the terms of section 35 when it used the Complainant's personal information in this attempted delivery. And again, I characterize this as a mailing error, not a decision that affected the Complainant.

[para 19] I find section 35 does not apply to this document.

- c. A Notice of Interlocutory Motion addressed to the Complainant, sent August 2013 to an incorrect [European] address.

[para 20] In this case, the address was missing a digit. The correct street address was xx-xx-180. The address on the envelope was xx-xx-80.

[para 21] The Complainant points out the incorrect address was reproduced both on the cover page of the Notice of Motion and on the envelope. He argues this "rules out the hypothesis that it was a simple typing error," and suggests the Public Body was acting deliberately.

[para 22] Respectfully, I disagree with the Complainant. There is no evidence before me to suggest that missing a digit in the street address on two documents sent at the same time precludes a typing error. It is more likely the error was transposed from the Notice of Motion to the envelope. This would be a clerical error, rather than a deliberate attempt to mislead. It cannot be said the Public Body used the Complainant's personal information to make a decision under the terms of section 35.

[para 23] I would again characterize this as a mailing error, rather than a decision affecting the Complainant. I find section 35 does not apply.

3. Did the Public Body meet its obligations as required by section 38 of the Act (protection of personal information)?

[para 24] Section 38 of the Act reads as follows:

The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

- a. Bill of Costs dated May 10, 2012 sent to [a particular department in a university in Canada].

[para 25] In this case, the Complainant provided me with a copy of the front of the envelope with handwriting indicating the envelope was being returned to the sender on

May 15, 2012 via express and a signature was required. The handwritten note indicates the Complainant is away until August 31, 2012 and is signed and initialed by an identified individual.

[para 26] As the original envelope did not identify the Complainant in any fashion, it is clear the individual writing, signing and initialing the return of the envelope and contents opened the envelope and determined the contents were meant for the Complainant. This would mean the Complainant's personal information was disclosed by the Public Body without authorization.

[para 27] The Public Body submitted the following in its initial submissions regarding the application of section 38:

The Annotated *Freedom of Information and Protection of Privacy Act* states that reasonable does not have to mean perfect and that reasonable security arrangements should be assessed against the sensitivity of the personal information. The records served on the Complainant were a Bill of Costs and a Notice of Interlocutory Motion which are publically available documents.

...The University has already acknowledged that the third piece of mail sent to the Complainant's [Canadian university] address may not have included the Complainant's name, which if it did not, was due to human error. The court document that was sent to the Complainant's address at [a Canadian university] was the publically available Bill of Costs.

[para 28] In its rebuttal submissions, the Public Body stated the following:

The Bill of Costs were served on the Complainant by registered mail on May 5, 2012. The envelope was addressed to the [department in a Canadian university] and external counsel admitted that the Complainant's name was not on the envelope...The [Public Body] submits that although an unfortunate error, it was not an unreasonable disclosure of personal information.

[para 29] In Order F2013-06, the Adjudicator noted the similarity between section 34 of the *Personal Information Protection Act* and section 38 of the FOIP Act. She referred to Order P2012-02 where that section was interpreted. She wrote the following at paras. 29 and 30:

In Order P2012-02, the Adjudicator determined that sensitivity refers to the potential consequences if the personal information is disclosed. For example, whether the individual whom the information is about could suffer harm as a result of the disclosure, or could become the victim of identity theft, are relevant questions when determining whether information is sensitive.

Like section 34 of PIPA, section 38 imposes a duty on a public body to make reasonable security arrangements to protect personal information. In my view, a public body will have met the duty under section 38 if it demonstrates that deliberate, prudent, and functional measures have been adopted to guard against, or mitigate, a foreseeable risk. The extent to

which security measures are necessary will depend on the sensitivity of the information, as discussed above.

[para 30] The Public Body's submission regarding the sensitivity of the documents refers only to availability of the documents in the public sphere. So while I have submissions that the documents are public documents, the Public Body is not relying on section 4 of the Act which precludes the application of the Act to information in a court file. It appears therefore, the contents of the documents also include information not publically available and would likely contain the Complainant's personal information.

[para 31] I can reasonably assume that a document such as a Bill of Costs sent by a law firm as agent for the Public Body to an opposing party would be accompanied by a covering letter addressed to the opposing party. A copy of the letter would be retained on the client file to document the action taken for billing purposes. I have no indication of what other information this letter would contain; however, I can assume it would contain the personal information of the Complainant as defined by section 1(n) of the Act. This would not be public information.

[para 32] The Public Body contracted with external counsel to deliver the Complainant's personal information. I have no information regarding how foreseeable risks were managed and what reasonable security measures were in place to guard against the risk. While a retainer letter may generally be considered to be protected from disclosure under solicitor client privilege, I daresay a clause in that letter giving instructions to comply with the Act would show the Public Body took its obligations to protect the Complainant's personal information seriously. I have no evidence of that.

[para 33] It may be external counsel has a policy in place to manage risk of disclosure of personal information. Again, without evidence of that policy, it is impossible to determine if the Public Body or its contracted agent protected and managed the risk.

[para 34] I find the Public Body has not established there are reasonable security arrangements to protect personal information against such risks as unauthorized access, collection, use, disclosure or destruction. I will order the Public Body to comply with the Act by putting such arrangements or policies in place for itself and in contracts with services providers to ensure mail is properly addressed.

- b. A Fed Ex shipment addressed to the Complainant sent to an incomplete European address on May 13, 2012.

[para 35] In this instance, the Public Body submits its external counsel noted the Fed Ex shipment did not contain the Complainant's complete address. The Public Body submits it is not clear whether that mistake was made by external counsel or if it was made by Fed Ex.

[para 36] It appears that this shipment was not delivered to anyone (see para.16). It appears there was no disclosure of the Complainant's personal information. However, the Public Body's submission that it was "someone else's fault" does not provide me with any comfort the Public Body is taking its obligations under this provision of the Act seriously.

- c. A Notice of Interlocutory Motion addressed to the Complainant, sent August 2013 to an incorrect address in Europe.

[para 37] In this case, the Complainant provided me with an affidavit that tells me he received the shipment on September 4, 2013 from the resident of the incorrect address. He tells me the shipment was unsealed, with the envelope clearly damaged. The affidavit tells me the envelope was opened by the resident of the incorrect address.

[para 38] The Public Body submits "although an unfortunate error, it was not an unreasonable disclosure of personal information." Further submissions include the following:

The [Public Body] argues there is nothing in the documents at issue that can reasonably be seen to be misused, disclosed to anyone else or that disclosure could reasonably be expected to bring harm to the Complainant.

[para 39] I have evidence the personal information of the Complainant may have been disclosed to another person (October 7, 2016 affidavit of the Complainant in initial submissions). I have evidence the Notice of Motion sought an extension of time and excusing compliance (Exhibit C of the same affidavit). I have evidence the Notice of Motion was brought to the Complainant's attention the order sought was granted (Exhibit C again).

[para 40] I reference paras. 30 and 33 above and suggest similar considerations apply here.

[para 41] I find the Public Body has not established there are reasonable security arrangements to protect personal information against such risks as unauthorized access, collection, use, disclosure or destruction. I will order the Public Body to comply with the Act by putting such arrangements or policies in place for itself and in contracts with services providers to ensure mail is properly addressed.

V. ORDER

[para 42] I make this Order under section 72 of the Act.

[para 43] I order the Public Body to comply with the Act by implementing policies establishing management of risk of disclosure of personal information when addressing mail. These policies should apply to itself and to contracts with service providers to ensure mail is properly addressed.

[para 44] I order the Public Body to notify me and the Complainant within 50 days of receipt of this order that it has complied with the Order.

Neena Ahluwalia Q.C.
Adjudicator