

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER P2005-004

February 16, 2007

CALGARY HERALD GROUP INC.

Case File Number P0143

Office URL: <http://www.oipc.ab.ca>

Summary: The Complainant alleged that the Organization had disclosed the Complainant's personal information when it published a newspaper article. The Organization argued that the disclosure of personal information in the form of a newspaper article was for journalistic purposes only as provided for by section 4(3)(c) of the *Personal Information Protection Act*. As such the Act did not apply to the personal information in question. The Commissioner decided the personal information disclosed were materials written for publication in the media and therefore collected and disclosed for journalistic purposes only in accordance with section 4(3)(c). The Commissioner, having determined that he had no jurisdiction in the matter, further stated that he had no authority to determine the remaining issue of the inquiry, regarding the allocation of a complainant's burden of proof.

Statutes Cited: **AB:** *Alberta Bill of Rights*, R.S.A 2000, c.A.-14, ss.1(b), 2.; *Personal Information Protection Act*, S.A. 2003, c.P-6.5, ss. 3,4(3)(c),4(3)(k), 8, 8(4), 14, 17, 20, 50(1), 52. **CAN:** *Canadian Charter of Rights and Freedoms* [being Schedule B to the *Canada Act 1982* (U.K.) 1982 c.11] ss.1, 2(b).

Authorities Cited: *Privacy Law in Canada* McNairn and Scott, (Markham, Ontario: Butterworths Canada Ltd. 2001); *Sullivan and Driedger on the Construction of Statutes*, 4th edition (Toronto: Butterworths Canada Ltd. 2002); *Webster's New College Dictionary* (Boston: Houghton Mifflin Company, 1995).

Cases Cited: *Re: Rizzo and Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27; *R. v. Sharpe* [2001] 1 S.C.R. 45; *Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038.

Orders Cited: AB: P2005-001.

I. BACKGROUND

[para 1] A complaint was made against the Organization, alleging that it had disclosed the Complainant's personal information when it published a newspaper article. The personal information disclosed related to the location of the Complainant's residence and that the residence was the subject of a police search warrant. The article also included a photograph of the residence in which the house number was visible. Mediation was unsuccessful and the following preliminary issues were referred to inquiry.

II. RECORDS AT ISSUE

[para 2] There are no records directly at issue.

III. ISSUES

[para 3] There are two issues in this inquiry:

- A. Does the Commissioner have the jurisdiction to decide who has the burden of proof in a complaint inquiry?
- B. Who has the burden of proof in an inquiry into a complaint that the collection, use or disclosure of personal information is contrary to PIPA?

IV. DISCUSSION OF THE ISSUES

A. Does the Commissioner have the jurisdiction to decide who has the burden of proof in a complaint inquiry?

[para 4] Both parties agree that I have the jurisdiction to decide the allocation of the burden of proof. Section 50(1) of the *Personal Information Protection Act* (the "Act") reads:

- 50(1) If a matter under review or relating to a complaint
 - (a) is not referred to mediation,
 - (b) is not settled pursuant to mediation under section 49, or
 - (c) is not resolved,the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[para 5] In having the ability to decide all questions of fact and law arising in the course of an inquiry, I am able to determine the allocation of the burden of proof and, with regard to the Act, have subsequently done so in Order P2005-001.

B. Who has the burden of proof in an inquiry into a complaint that the collection, use or disclosure of personal information is contrary to PIPA?

[para 6] At the outset in this inquiry, I must determine whether I have the jurisdiction to consider this issue. The Complainant submits that the Organization published a newspaper article containing the street address of his residence and a photograph of his house in which the house number is clearly visible. The Complainant also takes exception to the disclosure of information pertaining to the execution of a search warrant at that residence. The publication of such personal information, the Complainant alleges, is an unreasonable disclosure of personal information under Part 5 of the Act.

[para 7] However, the Organization submits that the disclosure of the personal information in the form of a newspaper article was for journalistic purposes only, as provided by section 4(3)(c), and accordingly the Act does not apply. While the disclosure of search warrant information is similarly covered by section 4(3)(c), in the alternative, it is excluded from the provisions of the Act by section 4(3)(k)(personal information contained in a court file). The Organization further states that if either sections 4(3)(c) or 4(3)(k) are applicable, I have no jurisdiction to consider the substance of the actual complaint itself.

[para 8] I will discuss the applicability of these subsections subsequently. However, it follows that if it is the case that sections 4(3)(c) or (k) of the Act are applicable, I not only would have no jurisdiction to consider the complaint, but I would also have no authority to consider the issue presently before me, that of the allocation of the burden of proof in this matter.

[para 9] Section 4(3)(c) and (k) of the Act state:

4(3) This Act does not apply to the following:

... (c)the collection, use or disclosure of personal information, other than personal employee information that is collected, used or disclosed pursuant to section 15, 18 or 21, if the collection, use or disclosure, as the case may be, is for journalistic purposes and for no other purpose;

... (k)personal information contained in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen’s Bench of Alberta or the Provincial Court of Alberta, a record of a master in chambers of the Court of Queen’s Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the *Justice of the Peace Act*, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;

[para 10] The Organization submits that I am required to interpret the Act in accordance with the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) and the *Alberta Bill of Rights*. Specifically, that I should interpret the Act having regard to

sections 2(b) (freedom of expression, including freedom of the press) of the *Charter* and section 1(b) (freedom of the press) of the *Alberta Bill of Rights*.

[para 11] The Organization in support of this position cites *Slaight Communications Inc. v. Davidson* [1989] 1 S.C.R. 1038, wherein the Supreme Court of Canada held that it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter* unless that power is expressly conferred or necessarily implied. Even so, such an interpretation would require an examination whether the legislation could be justified under section 1 of the *Charter*.

[para 12] With regard to the applicability of section 1(b) (freedom of the press), section 2 of the *Alberta Bill of Rights* states:

2. Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates withstanding the *Alberta Bill of Rights*, be so construed and applied so not to abrogate, infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared.

[para 13] There is a presumption that legislation is enacted in compliance with the limits on jurisdiction imposed by constitutional law. In examining the Act in its entire context there is nothing expressly conferred or necessary implied that would lead me to conclude that the Legislature did not intend to respect constitutional values. The rationale for an interpretation that respects constitutional values is found in *Dreidger on the Construction of Statutes*, 3rd ed. (Butterworths: Toronto, 1994) at page 323:

The idea here is that constitutional values should be relied on in interpretation because they play a central role in the legal and political culture of Canada and constitute an important part of the context in which legislation is made and applied. Given their importance, legislatures are presumed to respect them and courts, as guardians of the constitution, appropriately rely on them in interpreting legislation.

[para 14] Therefore any interpretation of the Act must follow *Charter* and *Alberta Bill of Rights* principles.

[para 15] In interpreting section 4(3)(c) and 4(3)(k), I must further bear in mind the principles of legislative interpretation. The Supreme Court of Canada in *R. v. Sharpe* [2001] 1 S.C.R. 45 has cited with approval *Re: Rizzo and Rizzo Shoes Ltd* [1998] 1 S.C.R. 27, wherein that court declared its preference for the “modern principle” of statutory interpretation. The principle is set out in *Sullivan and Driedger on the Construction of Statutes* at page 1 as:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[para 16] I therefore must interpret sections 4(3)(c) and 4(3)(k) in light of the modern principle of statutory interpretation.

[para 17] Section 3 states that the two purposes of the Act are to recognize the need of organizations to collect, use or disclose personal information for purposes that are reasonable and the right of an individual to have his personal information protected. Part 2 of the Act establishes rules as to the collection, use and disclosure of personal information. Specifically, section 8 sets out the necessary requirements for an organization to demonstrate that it has obtained valid consent from an individual regarding the collection, use or disclosure of that individual's personal information. Section 8(2) deals with what constitutes deemed consent, while sections 14, 17 and 20 deal with the circumstances in which an organization may collect, use and disclose personal information without consent. When examining the enumerated circumstances in which an organization may collect, use or disclose personal information without consent, one finds it difficult to envisage most journalistic enterprises being able to meet the consent requirements. In these sections the legislative purpose is clearly the protection of personal information.

[para 18] It is due to the protective nature of such sections that McNairn and Scott in *Privacy Law in Canada* (Markham, Ontario: Butterworths Canada Ltd., 2001) have advanced the argument that the express exception for journalistic purposes were motivated by a concern that the requirements of private sector privacy legislation would unduly restrict the activities of journalists and writers and risk infringing the "freedom of expression, including the freedom of the press and other media of communications" that is guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. With this background in mind I now turn to the meaning of "journalistic purposes".

[para 19] *Webster's New College Dictionary* defines "journalistic" as "Of, relating to, or typical of journalists." "Journalism" is defined as:

1. Collection, writing, editing and dissemination of news through the media
2. Material written for publication in the media
3. A style of writing used in newspapers and magazines, characterized by the direct presentation of facts or occurrences with little attempt at analysis or interpretation.

[para 20] The personal information disclosed was in the form of a newspaper article which was published by the Organization. This in itself meets the definition of "material written for publication in the media". Having reviewed the newspaper article itself, the personal information within it is a direct presentation of the facts and is clearly collected and disclosed for journalistic purposes. There is no evidence before me or any evidence from the newspaper article itself that would lead me to conclude that the collection, use and disclosure of the personal information was for any other purpose other than for journalistic purposes.

[para 21] The Complainant has argued that the publication of the newspaper article was neither reasonable as per the Act nor necessary to the integrity of the newspaper article.

[para 22] However, my authority under the Act is to determine whether the collection, use or disclosure of personal information was for journalistic purposes only. Once I have established that the use of personal information was for journalistic purposes only, the Act does not apply and my authority to decide any other issue ceases. Any inquiry into what is a reasonable collection, use and disclosure of personal information, can only come into play if I have jurisdiction to proceed under the Act. In this case, I have determined that the Act does not apply to the matter in question and I can go no further.

[para 23] Having concluded that section 4(3)(c) is applicable, I have no need to examine the applicability of section 4(3)(k).

[para 24] Finally, it follows from my conclusion that I have no jurisdiction that I also have no authority to consider the issue at inquiry regarding the allocation of the burden of proof.

V. ORDER

[para 26] I make the following Order under section 52 of the Act.

[para 27] The collection, use and disclosure of personal information in this matter were for journalistic purposes and for no other purpose. Accordingly, I do not have authority to decide any further issues in this inquiry.

Frank Work, Q.C.
Information and Privacy Commissioner