

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER P2005-005

December 6, 2006

#### THE OWNERS: CONDOMINIUM PLAN No. 7710418

Case File Number P0072

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

**Summary:** The Applicant had a complaint registered against him by a condominium owner within his condominium complex. The complaint concerned the positioning of a flag on the Applicant's condominium balcony. The Owners: Condominium Plan No. 7710418 (the "Organization") asked the Applicant to remove the flag, as erecting the flag was contrary to the condominium bylaws of the Organization.

The Applicant applied under the *Personal Information Protection Act*, (the "Act") for a copy of the complaint letter. The Organization refused to disclose the letter or portion thereof under section 24(2)(d) (disclosure resulting in information no longer being provided to the organization) of the Act and under section 24(3)(c) (information revealing the identity of individual who provided confidential opinion) of the Act.

The Commissioner found that the Organization was governed by the Act and that section 24(3)(c) of the Act required the Organization to refuse to disclose the complaint letter to the Applicant. Given his decision under section 24(3)(c) of the Act, the Commissioner did not find it necessary to also consider section 24(2)(d).

**Statutes Cited:** *Agricultural Societies Act* R.S.A. 2000, c. A-11; *Business Corporations Act* R.S.A. 2000, c. B-9; *Companies Act* R.S.A. 2000 c. C-21, Part 9; *Condominium Property Act* R.S.A. 2000. c. C-22, s. 25; *Interpretation Act* R.S.A. 2000, c. I-8, s. 28(2)(f); *Personal Information Protection Act*, R.S.A. 2003, c. P-6.5, ss. 1(i), 24(2)(d), 24(3)(c), 24(4) and 56; *Societies Act*, R.S.A. 2000, c. S-14.

**Cases Cited:** *CNG Producing Co. v. Alberta (Provincial Treasurer)*, 218 D.L.R. (4<sup>th</sup>) 257 (2002).

**Order Cited:** AB: Order 2001-008.

## **I. BACKGROUND**

[para 1] The Applicant had a complaint registered against him by a condominium owner within his condominium complex. The complaint concerned the positioning of a flag on the Applicant's condominium balcony. The Owners: Condominium Plan No. 7710418 (the "Organization") asked the Applicant to remove the flag, as erecting the flag was contrary to the condominium bylaws of the Organization.

[para 2] In 2003, before the *Personal Information Protection Act* (the "Act") came into force, the Applicant had applied to the Court of Queen's Bench seeking a copy of the complaint letter and was denied access. Upon the Act coming into force on January 1, 2004, the Applicant applied for a copy of the letter of complaint under the Act. The Organization, citing the need to protect the privacy of the author of the letter of complaint, refused to disclose the letter or portion thereof under sections 24(2)(d) (disclosure resulting in information no longer being provided to the organization) and 24(3)(c) (information revealing the identity of individual who provided confidential opinion) of the Act. The Organization also questioned my authority to decide the access issue, since the Court of Queen's Bench had previously decided the issue.

[para 3] Mediation authorized under section 49 of the Act failed and the matter proceeded to a written inquiry under section 50 of the Act.

[para 4] Intervenors were invited to provide written submissions concerning the Issues in this Inquiry. The Canadian Condominium Institute North Alberta Chapter ("CI") joined the Inquiry as an intervenor.

## **II. ISSUES**

[para 5] The issues in this inquiry are:

- A. Is The Owners: Condominium Plan No. 7710418 an "organization" that is subject to the Act?
- B. Is the Commissioner prevented from deciding the issue of the Applicant's access under the Act to a record concerning a complaint about the Applicant?
- C. Did the Organization properly apply section 24(2)(d) of the Act (disclosure resulting in information no longer being provided to the organization) to the records/information?

D. Does section 24(3)(c) of the Act (information revealing identity of individual who provided confidential opinion) apply to the records/information?

[para 6] I note that the Organization is in the best position to address Issues A and B and it therefore was assigned the burden of proof for those Issues. Furthermore, as provided by section 51 of the Act, the Organization has the burden of proof for Issues C and D.

[para 7] In this Order, I intend to reverse the numbering of Issues C and D. Issue D will become Issue C, and vice versa.

### III. RECORD AT ISSUE

[para 8] The record at issue is a copy of the letter of complaint about the Applicant, which the Organization provided to me and I accepted *in camera*. This Order will refer to the record as the “complaint letter”.

### VI. DISCUSSION OF THE ISSUES

#### **ISSUE A: Is The Owners: Condominium Plan No. 7710418 an “organization” that is subject to the Act?**

[para 9] I note that the submission of the Applicant does not specifically address the Act or any of the issues. The submission of the Applicant does reference the condominium bylaws, the *Condominium Property Act* (the “CPA”) and numerous media references. The majority of the arguments of the Applicant focus on the need for him to know the name of the author of the complaint letter so that the Applicant can deal with the issue of the Board’s order to remove his flag, in a fair and productive manner.

[para 10] The Canadian Condominium Institute North Alberta Chapter (“CI”) argued that the Organization is not subject to the Act as it is a non-profit organization that does not engage in a commercial activity as defined in section 56 of the Act. CI noted that condominium corporations deal with the sharing of domain or property, have equivalent membership (through ownership) and are a community founded on shared domain. CI argued that any aspects of condominium life which mirror business type decisions or actions are solely related to that shared domain or community (for matters relating to its affairs), and are not related to a commercial or trade activity.

[para 11] The Organization also argued that section 56 of the Act, does not apply to it. Section 56 of the Act reads:

56(1) In this section,  
(a) "commercial activity" means  
(i) any transaction, act or conduct, or  
(ii) any regular course of conduct,

that is of a commercial character and, without restricting the generality of the foregoing, includes the following:

- (iii) the selling, bartering or leasing of membership lists or of donor or other fund-raising lists;...
- (b) "non-profit organization" means an organization
  - (i) that is incorporated under the Societies Act or the Agricultural Societies Act or that is registered under Part 9 of the Companies Act, or
  - (ii) that meets the criteria established under the regulations to qualify as a non-profit organization.
- (2) Subject to subsection (3), this Act does not apply to a non-profit organization or any personal information that is in the custody of or under the control of a non-profit organization.
- (3) This Act applies to a non-profit organization in the case of personal information that is collected, used or disclosed by the non-profit organization in connection with any commercial activity carried out by the non-profit organization.
- (4) The Lieutenant Governor in Council may make regulations
  - (a) establishing, for the purposes of subsection (1)(b)(ii), the criteria to be met by an organization to qualify as a non-profit organization;
  - (b) establishing the criteria to be met by non-profit organizations to qualify as non-profit organizations that are restricted or otherwise limited in the scope of their operations and exempting those non-profit organizations from the operation of subsection (3);...

[para 12] The Organization submitted that a “non-profit organization” is defined in section 56(1)(b) of the Act as an organization that is either incorporated under the *Societies Act* or the *Agricultural Societies Act*, or is an organization registered under Part 9 of the *Companies Act*.

[para 13] The Organization argued it is a “non-profit corporation” created under section 25 of the *Condominium Property Act* (“CPA”). Section 25(1) and section 25(2) of the CPA read:

25(1) On the registration of a condominium plan, there is constituted a corporation under the name “Condominium Corporation No.           ” and the number to be specified is the number given to the plan on registration.

(2) A corporation consists of all those persons

- (a) who are owners of units in the parcel to which the condominium plan applies, or
- (b) who are entitled to the parcel when the condominium arrangement is terminated pursuant to section 60 or 61.

[para 14] The Organization further argued that the administration, repair and replacement of common property and regulation of the occupation of units by owners are not “commercial activities” as contemplated by section 56(1)(a) and section 56(3) of the Act.

[para 15] I find that the Organization does not meet the definition of “non-profit organization” under section 56(1)(b) of the Act because it is not incorporated under the *Societies Act* or the *Agricultural Societies Act*, and it is not registered under Part 9 of the *Companies Act*. Therefore, it is not necessary to decide whether the Organization

collected, used or disclosed personal information in connection with a “commercial activity”. Section 56 of the Act does not apply.

[para 16] CI argued that the Organization is not otherwise an “organization” as defined by section 1(i) of the Act, which reads:

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;

[para 17] The Organization is not a “trade union”, “partnership” or “individual acting in a commercial capacity”, as provided by sections 1(i)(iii), (iv) and (v), respectively. Since the Organization is constituted as a corporation under section 25(1) of the CPA, it is also not an “unincorporated organization”, as provided by section 1(i)(ii) of the Act. What remains to be considered is whether the Organization is a “corporation” for the purposes of section 1(i)(i) of the Act.

[para 18] CI contends that section 1(i)(i) of the Act contemplates business corporations. Although section 25(1) of the CPA constitutes the Organization as a corporation under the CPA, the Organization is not a business corporation because it was not created for business or trade. Furthermore, CI and the Organization both point to section 25(5) of the CPA, which says that the *Companies Act* and the *Business Corporations Act* do not apply to a corporation that is constituted under the CPA. Instead, the Organization is governed by the CPA, which creates its own scheme and requirements for organizations governed by it.

[para 19] Nothing in the language of section 1(i)(i) of the Act leads me to conclude that section 1(i)(i) includes only corporations to which the *Companies Act* or the *Business Corporations Act* applies. If I compare section 1(i)(i) of the Act, which does not specify a corporation under any legislation, and sections 1(i)(iii) and (iv) of the Act, which specify trade unions and partnerships, respectively, under specific legislation, I conclude that section 1(i)(i) should be interpreted to include any “corporation”. Consequently, under section 1(i)(i) of the Act, I adopt the broad meaning of “corporation”, as set out in the 8<sup>th</sup> Edition of *Black’s Law Dictionary*:

... a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them and has the legal powers that its constitution gives it.

[para 20] On this broad definition, section 25(3) and (4) of the CPA, in conjunction with section 25(1), establish the Organization as a “corporation” for the purposes of section 1(i)(i) of the Act. Sections 25(3) and (4) of the CPA read:

25(3) Without limiting the powers of the corporation under this or any other Act, a corporation may

(a) sue for and in respect of any damage or injury to the common property caused by any person, whether an owner or not, and

(b) be sued in respect of any matter connected with the parcel for which the owners are jointly liable.

(4) Nothing in this Act shall be construed so as to prohibit a corporation from acting by means of agents or its employees.

[para 22] I therefore find that the Organization is an “organization” that is subject to the Act.

**ISSUE B: Is the Commissioner prevented from deciding the issue of the Applicant’s access under the Act to a record concerning a complaint about the Applicant?**

[para 22] The Organization argued that this issue was addressed in 2003 by the Alberta Court of Queen’s Bench (the “Court”). The Organization noted that the Court decision denied the Applicant access to the record currently at issue. The Organization also argued that the Act does not give me retrospective jurisdiction to reconsider that which has already been determined by the Court.

[para 23] The Organization argued that there is a presumption against the retroactive application of statutes. The Organization referenced the Alberta Court of Appeal decision, *CNG Producing Co. v. Alberta (Provincial Treasurer)*, (2002) 218 D.L.R. (4<sup>th</sup>) 257, in support of the argument that statutes are not to be construed retroactively unless they do so expressly or by necessary implication and if it is clear the Legislature intended it to be so.

[para 24] The Organization also argued that if the Act is not retrospective in its application, then the legal maxim of *res judicata* (a matter already judged) applies. The Organization contended that the issue has been adjudicated and the test is:

- (1) That the same question has been decided;
- (2) That the judicial decision which is said to create estoppel (block) was final;  
and
- (3) That the parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies.

[para 25] The Organization concluded that as the question regarding the complaint letter has been dealt with by the Court, the decision is final and therefore this matter, being *res judicata*, is not open for decision by me.

[para 26] CI argued that as the decision was not appealed and as the Complainant had originally chosen the Court for resolving his dispute, he should not be allowed to exhaust each and every venue in search of an answer which satisfies him.

[para 27] I reference FOIP Order 2001-008 where it was decided that I have the power to determine whether the doctrine of *res judicata* applies to the circumstances of a given case. The criteria for *res judicata* or issue estoppel in Order 2001-008 reflect the criteria for *res judicata* presented by the Organization.

[para 28] In these circumstances the first criterion can be distinguished as what I am deciding is not the same question that was decided by the Court in 2003. The Court decision did not address the application of the Act, which was not then in force. Therefore it is not the same question at issue. As not all three of the criteria apply to these circumstances and because this is a separate action, I do not have to address the remaining two criteria for *res judicata*.

[para 29] I find that as the Court did not address the application of the Act, *res judicata* does not apply in this case. I will proceed to review the remaining issues before me.

**ISSUE C: Does section 24(3)(c) of the Act (information revealing identity of individual who provided confidential opinion) apply to the records/information?**

[para 30] Section 24(3)(c) of the Act reads:

24(3) An organization shall not provide access to personal information under subsection (1) if...  
(c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.

[para 31] Section 28(2)(f) of the *Interpretation Act*, says that "shall" is to be interpreted as imperative; that is, mandatory. Section 24(3) of the Act is such a mandatory provision that prohibits an organization from disclosing personal information of an individual who is not the applicant. Section 24(3)(c) sets out particular criteria that must be met when deciding whether or not disclosure is prohibited.

[para 32] The Organization argued that section 24(3)(c) of the Act applies to these circumstances. The Organization argued that the complaint letter at issue contains personal information, such as the name and address of the condominium owner making the complaint, and that disclosure of the complaint letter, in whole or in part, would reveal to the Applicant the identity of the condominium owner making the complaint.

[para 33] The Organization submitted that section 24(3)(c) of the Act applies to the complaint letter as it contains an opinion about the Applicant that was clearly submitted

in confidence. In addition the Organization noted that the author of the complaint letter at no time consented to disclosure of his/her identity or the contents of the complaint letter being disclosed to the Applicant.

[para 34] The Organization argued that the purpose of the Act is to protect individuals, like the condominium owner that submitted the complaint letter, as it is his information and not that of the Applicant.

[para 35] CI argued that section 24(3)(c) of the Act applies because allowing the disclosure of a complaint letter, submitted in confidence, would disrespect the confidentiality of the complaint letter.

[para 36] CI contended that the fundamental purpose of the Act is the protection of an individual's personal information. In determining the right to privacy, there is a need to weigh opposing interests. There is the right of an individual to have his or her personal information protected against the need of the organization to collect, use and disclose that information.

[para 37] CI concluded that it is reasonable for section 24(3)(c) of the Act to apply as disclosure of the information would reveal the identity of an individual who provided an opinion within the complaint about another individual (in this case the Applicant) in confidence and who did not consent to disclosure of his or her identity.

[para 38] I have reviewed the complaint letter and agree with the Organization and CI that section 24(3)(c) of the Act applies to the complaint letter. The evidence supports that the author of the complaint letter submitted the entire record in confidence and that the author has not consented to the record or his identity being disclosed to the Applicant. Disclosure of the information contained in the complaint letter would reveal the identity of the individual who provided an opinion about the Applicant.

[para 39] I note that the application of section 24(4) of the Act applies to section 24(3)(c) of the Act. The Organization did not address the consequential application of section 24(4) of the Act as it relates to section 24(3)(c) of the Act. CI also did not address the application of section 24(4) of the Act as it relates to section 24(3)(c) of the Act.

[para 40] Section 24(4) of the Act reads:

24(4) If, in respect of a record, an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.

[para 41] I have reviewed the complaint letter and find that it could not be reasonably severed without revealing the identity of the condominium owner who registered the complaint with the Organization. I therefore find that the record at issue

could not be reasonably severed in accordance with section 24(4) of the Act. Consequently, the Organization is required to refuse to give the Applicant access to the complaint letter.

**ISSUE D: Did the Organization properly apply section 24(2)(d) (disclosure resulting in information no longer being provided to the organization) of the Act to the records/information?**

[para 42] Section 24(2)(d) of the Act reads:

24(2) An organization may refuse to provide access to personal information under subsection (1) if...  
(d) the disclosure of the information might result in that type of information no longer being provided to the organization when it is reasonable that that type of information would be provided;...

[para 43] As I have found that section 24(3)(c) of the Act applies to the record at issue, I do not find it necessary to also decide whether section 24(2)(d) of the Act applies. In any event, the mandatory prohibition against disclosure of another individual's personal information under section 24(3) would prevent disclosure of the same personal information under a discretionary ("may") provision such as section 24(2)(d).

**V. ORDER**

[para 44] I make the following Order under section 52 of the Act.

[para 45] I find that the Organization is an "organization" under section 1(i)(i) of the Act and that it is subject to the Act.

[para 46] I find that I am not prevented from deciding the issue of access to the complaint letter under the Act concerning a complaint about the Applicant.

[para 47] I find that section 24(3)(c) of the Act (information revealing identity of individual who provided confidential opinion) applies to the complaint letter and that section 24(4) of the Act does not apply, as the Organization could not reasonably sever the complaint letter in accordance with section 24(4) of the Act.

[para 48] As I have found that section 24(3)(c) of the Act applies, I do not find it necessary to also decide whether section 24(2)(d) of the Act (disclosure resulting in information no longer being provided to the organization) applies to the complaint letter.

[para 49] I order the Organization to refuse to give the Applicant access to the complaint letter.

Frank Work, Q.C.  
Information and Privacy Commissioner