

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2007-016

March 20, 2008

HOME DEPOT OF CANADA INC.

Case File Number P0278

Office URL: www.oipc.ab.ca

Summary: The Complainant complained to the Commissioner that Home Depot Canada Inc. had refused to provide a full refund when she did not provide her driver's license.

The Commissioner found that the Organization should not have refused service when the individual refused to provide her driver's license number. The Organization had therefore not complied with s. 7(2) of the *Personal Information Protection Act* (PIPA).

Statutes Cited: **AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 3, 7(1)(2), 8(3), 11(1)(2), 13(1), 14, 36, 46, 52(3)(4)(5),

Authorities Cited: **AB:** F2008-001 **BC:** P05-01 **OPC** and **AB** Investigation Report P2007-IR-006

I. BACKGROUND

[para 1] The Complainant purchased goods from Home Depot of Canada Inc. (the "Organization"). Two days after the purchase, made with her debit card, she took the goods back. She presented her receipt, but did not have her debit card with her. She requested an exchange or store credit. Because she did not have her debit card with her, store personnel, following store policy, asked her to produce driver's license identification. Otherwise, her return would be considered a return without a receipt, and

she would not receive a full refund. When she questioned employees about this policy, she was told that the store's computer systems were controlled by the Organization's U.S. head office, and that they (and she) had no choice but to follow policy.

[para 2] The Complainant did not produce her driver's license and brought a complaint to my Office under the *Personal Information Protection Act* ("PIPA"). Subsequently, she complained that the Organization disclosed customer driver's license numbers to its head office in the United States.

[para 3] I authorized mediation in order to settle the issue. As mediation did not result in a settlement, the matter was scheduled for a written inquiry.

[para 4] Both parties requested extensions of time and their requests were granted. The Organization wanted time because it was responding to similar complaints under Quebec and federal privacy laws. It was reviewing its merchandise return policy identification requirements in view of Canadian privacy laws.

[para 5] I asked the Organization to provide further information about the policy that was in effect at the time of the Complainant's return, which it did. The Organization asked for the opportunity to make oral submissions *in camera*. The Complainant declined to make submissions as to whether the Organization could make *in camera* submissions. I granted the Organization's request. I also accepted three written items from the Organization *in camera*. The *in camera* evidence centered on the fraudulent returns prevention environment in retail stores and in this Organization.

II. RECORDS AT ISSUE

[para 6] This is a complaint about the Organization's attempt to collect personal information. The Complainant did not allow her personal information to be collected. There are no records at issue.

III. ISSUES

[para 7] The Notice of Inquiry set out the issues for this inquiry as follows.

Issue A: Is the Organization collecting, using or disclosing personal information in contravention of, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)?

Issue B: Does the Organization have the authority to collect, use or disclose the personal information without consent, as permitted by sections 14, 17 and 20 of PIPA?

Issue C: If the Organization does not have the authority to collect, use or disclose the personal information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of the Act before collecting, using or disclosing the information?

Issue D: Is the Organization contravening section 7(2) of the Act (as a condition of providing a product or service, requiring consent to collection, use or disclosure of personal information)?

Issue E: Is the Organization collecting, using or disclosing the information contrary to, or in compliance with, sections 11(1), 16(1) and 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?

Issue F: Is the Organization collecting, using or disclosing the information contrary to, or in compliance with, sections 11(2), 16(2) and 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?

Issue G: Is the Organization complying with section 34 of the Act (making reasonable security arrangements to protect the personal information)?

[para 8] The Notice of Inquiry advised the parties that I am not prevented from raising any further issues during the inquiry that I consider appropriate. The Organization argues in its submissions that the issues have been resolved. Given that I would lack jurisdiction to hold the inquiry if the issues are resolved, I will address this issue as a preliminary issue.

IV. DISCUSSION OF ISSUES

Preliminary Issue: Has the dispute between the Complainant and the Organization been resolved?

[para 9] Section 46 allows an individual to make a complaint to the Commissioner with respect to issues referred to in section 36(2). Section 36(2) states:

- (2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that*
- (a) a duty imposed by section 27 has not been performed;*
 - (b) an extension of a time period under section 31 for responding to a request is not justified;*
 - (c) a fee estimated or required by an organization under this Act is inappropriate;*
 - (d) a correction of personal information requested under section 25 has been refused without justification;*
 - (e) personal information has been collected, used or disclosed by an organization in contravention of this Act or in circumstances that are not in compliance with this Act;*
 - (f) an organization is not in compliance with this Act.*

The Complainant's complaint falls under section 36(2)(f), as she complains that the Organization's return policies and procedures, and therefore, the Organization itself, are not in compliance with the Act.

[para 10] In its written submission, the Organization asserted the following:

Home Depot recognizes that the issues raised in the Inquiry relate to Home Depot's personal information practices under the Previous Returns Policy. However, as explained above, Home Depot has substantially revised its merchandise returns policy, such that virtually all of the matters raised by this Inquiry are no longer at issue.

[para 11] The Complainant asks me to decide the matter based on the situation giving rise to the complaint.

[para 12] Section 50 establishes my jurisdiction to conduct an inquiry regarding the Complainant's complaint. Section 50 states, in part:

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 13] I may, at my discretion, hold an inquiry in relation to a complaint, provided that the complaint is not in the process of mediation, has not been settled through mediation, or has not been resolved.

[para 14] In the present case, there is no evidence to suggest that any of the circumstances set out in section 50 apply. Consequently, there is nothing to prevent me from exercising my discretion to hold an inquiry. I do not agree with the Organization that there are no longer any issues between the parties. The Organization provided information about its policy changes only in its submissions during the inquiry process. Further, it submitted all evidence supporting its assertion that it had changed its policies *in camera*, so that the evidence would not be viewed by the Complainant. Consequently, the matter relating to the complaint has not been resolved.

[para 15] In Order F2008-001, the Adjudicator stated:

However, as the Order must address the circumstances leading to the complaint, I will order the Public Body to cease collecting, using and disclosing the Complainant's personal information. Even though the Public Body has already done so voluntarily, the purpose of an order is to confirm that it is required to do so.

[para 16] Similarly, if I determine that the Organization contravened the Act, I will make an order confirming that it is required to stop contravening the Act, even though it has now adopted new policies. If I do not find that the Organization has contravened the Act, I will make an order confirming that the Organization met its obligations under the Act.

Issue A: Is the Organization collecting, using or disclosing personal information in contravention of, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)?

Issue B: Does the Organization have the authority to collect, use or disclose the personal information without consent, as permitted by sections 14, 17 and 20 of PIPA?

Issue C: If the Organization does not have the authority to collect, use or disclose the personal information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of the Act before collecting, using or disclosing the information?

Issue E: Is the Organization collecting, using or disclosing the information contrary to, or in compliance with, sections 11(1), 16(1) and 19(1) of PIPA (collection, use and disclosure for purposes that are reasonable)?

Issue F: Is the Organization collecting, using or disclosing the information contrary to, or in compliance with, sections 11(2), 16(2) and 19(2) of PIPA (collection, use and disclosure to the extent reasonable for meeting the purposes)?

Issue G: Is the Organization complying with section 34 of the Act (making reasonable security arrangements to protect the personal information)?

[para 17] Issues A, B and C were added by my office. However, I note that the Complainant's complaint actually turns on a specific incident in which she refused to provide her driver's license. As a consequence of her refusal, the Organization did not complete the requested transaction and did not collect, use or disclose her personal information. Her complaint is therefore more properly characterized as a complaint that the Organization is not in compliance with section 7(2) of PIPA.

[para 18] A complainant may bring complaints regarding an organization's compliance with sections 7(1), 11, 14, 16, 17, 19, 20, and 34 under section 36(2)(f), even if the complainant's own personal information has not been collected, used or disclosed. However, it would be necessary for the complainant in that case to make a specific complaint to that effect and to point to some evidence indicating that an organization was not in compliance with those sections.

[para 19] In this case, the Complainant has not complained that the Organization has contravened sections 7(1), 11, 14, 16, 17, 19, 20, and 34 in relation to her own personal information or that of others, nor has she pointed to evidence supporting such a complaint. Instead, her complaint has two aspects:

- 1) The Organization would not complete a return transaction unless it collected her driver's license information.

- 2) The Organization would not complete a return transaction unless it entered her driver's license information into a database maintained in the United States by its parent company.

The Complainant has provided a first person account of the circumstances leading to her complaint and has pointed out actions taken by the Organization which she believes contravene section 7(2). Consequently, she has met the evidential burden in relation to Issue D.

[para 20] Rather than addressing all the questions posed in the Notice of Inquiry, I will address issue D only. I am not satisfied that the Complainant made a complaint in relation to sections 7(1), 11, 14, 16, 17, 19, 20, and 34. In addition, there is simply no evidence in relation to the Organization's compliance or lack of compliance with those provisions at the time of the complaint to allow me to make a determination on those Issues.

Issue D: Did the Organization contravene section 7(2) of the Act?

[para 21] Section 7(2) restricts an organization's ability to collect, use and disclose personal information in order to provide a service. It states:

7((2) An organization shall not, as a condition of supplying a product or service, require an individual to consent to the collection, use or disclosure of personal information about an individual beyond what is necessary to provide the product or service.

The Complainant argues that it was unnecessary for the Organization to collect her driver's license information in order to complete the return, as she had produced her receipt and had originally paid by debit, rather than by cheque.

[para 22] The Organization confirms that the Complainant purchased items on August 19, 2005 and returned them on August 21, 2005. It notes that at the time of the return, it was store policy to deem returns for different tender, such as when a customer originally pays by debit but seeks a cash refund or store credit, to be "no-receipt" returns. Under the Organization's policy, "no-receipt" returns require a customer to be refunded the lowest price for a product, rather than the actual purchase price. The Organization argues that failure to produce a debit card, when payment was originally made by debit, is an indicator of potential fraudulent activity. It therefore explains that in such situations, customers were required to provide proof of identity or potentially receive a reduced refund. However, the Organization also notes that store managers did have the authority to approve full returns in circumstances where the returning customer produced a receipt and the sale price of the merchandise could be verified. The Organization also explains that following the incident involving the Complainant, the store employees were provided with mandatory training regarding the Organization's policies and procedures for merchandise returns.

[para 23] In Order P05-01, the Privacy Commissioner of British Columbia considered the meaning of “necessary to provide the product or service” in relation to section 7(2) of the British Columbia *Personal Information Protection Act*, which is equivalent to section 7(2) of PIPA He said:

As for PIPA, the Legislature did not, in my view, intend the word "necessary" in s. 7(2) to mean "indispensable". PIPA's legislative purposes ... the overall statutory context in which the word "necessary" appears and the language of s. 7(2) lead me to conclude that the Legislature did not intend to create a strict standard of indispensability by using the word "necessary".

Personal information may be "necessary" under s. 7(2) even if it is not indispensable. Of course, personal information may, in some cases, be "necessary" in the sense that it is not possible to supply a product or service without the personal information or because it is legally required for the supply... But there will be cases where personal information is "necessary" even though it is not, when considered in a searching yet reasonable manner, indispensable in the sense that it is not possible to supply the product or service without the personal information.

[para 24] I agree with the Commissioner’s reasoning and analysis and find that “necessary” does not mean “indispensable” in the context of section 7(2). Section 3 of PIPA explains the purpose of the legislature in enacting the legislation. It states:

The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

[para 25] PIPA balances the right of an individual to privacy of personal information with the need for an organization to collect, use and disclose personal information. Consequently, if an organization can demonstrate that collection of personal information is necessary to enable it to meet a reasonable purpose relating to a transaction, such as to protect itself against fraud, then the collection may be a necessary condition for the purposes of section 7(2).

[para 26] In Order P05-01, an organization collected the name, address, and telephone phone number of customers returning merchandise. The purpose of collecting this information was to assist the organization to combat fraud. The Commissioner determined that collecting a customer’s name, address and telephone number was necessary to complete the transaction. However, he went on to say:

Similarly, the evidence indicates that the organization in some cases asks for photo identification to confirm identity--one can assume that a driver's licence will typically be produced--but the organization does not record personal information from the identification that is shown. Although a preliminary view, and the circumstances of each case would govern, I have some doubt that an organization is able to compulsorily collect or use personal information from identification such as a driver's licence on the basis that the information is "necessary" within the meaning of s. 7(2). I would think it is enough for the organization to examine the identification, which is what the organization does in this case, and then record the fact that it was produced and examined to the organization's satisfaction

[para 27] The Organization states that its return policy authorized employees to provide a full return without recording driver's license numbers if the customer produced a receipt and the price of the items was confirmed. Because it had a policy in place to enable it to meet its purpose of reducing the potential for fraud without collecting driver's license information, I find that it was unnecessary for the Organization to require the Complainant's driver's license before providing a full refund.

[para 28] In addition, the Organization's intent in requiring the driver's license was to record the driver's license number in a database. While requiring government information to confirm identity can be necessary to prevent fraud, I do not find that recording a driver's license number for entry into a database is necessary to complete a return transaction for the reasons provided in Investigation Report P2007-IR-006, a joint order of my office and the federal Office of the Privacy Commissioner. In that report, we said:

The OPC has found in earlier cases that, for the purposes of deterring fraud during the return of goods, the extent of reasonable collection of personal information was limited to name and address. Thus, the collection of customers' names and addresses for this purpose is reasonable and appropriate in the circumstances, as per subsections 5(3) of PIPEDA and 11(1) of PIPA.

The collection of the drivers' license information, however, is a different matter. In our view, we can draw an analogy between the collection of drivers' license numbers as numeric identifiers and the collection of the Social Insurance Number. The OPC and AB OIPC have stressed that a SIN is not a *de facto* identifier and should only be used for legislated, social benefit purposes, as was intended.

A driver's license is proof that an individual is licensed to operate a motor vehicle; it is not an identifier for conducting analysis of shopping-return habits. Although licenses display a unique number that TJX can use for frequency analysis, the actual number is irrelevant to this purpose. TJX requires only a number—any number—that can be consistently linked to an individual (and one that has more longevity and is more accurate than a name and telephone number).

Moreover, a driver's license number is an extremely valuable piece of data to fraudsters and identity thieves intent on creating false identification with valid information. After drivers' license identity numbers have been compromised, they are difficult or impossible to change. For this reason, retailers and other organizations should ensure that they are not collecting identity information unless it is necessary for the transaction.

We are not suggesting that identifying and investigating frequent returns for loss-prevention purposes is not a legitimate activity. The organization confirmed that the refund-management system could operate with any unique numeric identifier. It does not specifically require a driver's license or other provincial identification number.

[para 29] As noted above, the Complainant also complained that the Organization's return policy required driver's license numbers to be uploaded to the Organization's database, which is maintained by its parent company in the United States.

[para 30] The Organization confirmed, in its submissions, that Home Depot US does maintain a database of personal information collected as part of the merchandise returns process. The information is stored there to track potential fraudulent returns.

[para 31] The Organization explains that it is an affiliate of Home Depot US. Although the Organization did not provide direct evidence regarding the exact nature of the business relationship, affiliates are generally understood to be corporations related to one another through shareholdings. I am satisfied that the Organization and Home Depot US are not the same legal entity. Consequently, when the Organization sends customer driver's license information to Home Depot US, it is also disclosing that information to Home Depot US within the meaning of section 7(2).

[para 32] As I have found that collecting driver's license numbers was unnecessary for completing the return transaction, it follows that I find it was also unnecessary for the Organization to disclose the Complainant's driver's license information to complete the transaction.

[para 33] Employees of the Organization refused to provide the Complainant with a full refund because she did not provide her driver's license number, in a situation where it was unnecessary for the Organization to collect or disclose her driver's license number to complete the transaction. For these reasons, I find that the Organization was not in compliance with section 7(2) of the Act.

V. Order

[para 34] I make the following Order under s. 52 of the Act:

[para 35] I require the Organization to cease collecting and disclosing driver's license numbers as a condition of providing full refunds.

[para 36] I order the Organization to notify me in writing, within 50 days of its receipt of a copy of this Order, that it has complied with my Order.

Frank Work, Q.C.
Information and Privacy Commissioner