

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2009-001

March 11, 2009

MYERS NORRIS PENNY

Case File Number P0777

Office URL: www.oipc.ab.ca

Summary: The Complainant requested his bankruptcy file from Myers Norris Penny (MNP), a trustee in bankruptcy.

MNP wrote the Complainant to the effect that his bankruptcy file was located at its principal office in Edmonton, Alberta. The Complainant was invited to attend at the Edmonton office, to review the file, and to determine which records should be copied. MNP noted that there would be a charge of \$.50 per page and that the documents would be mailed within five working days.

The Complainant made a complaint to the Commissioner that MNP had not met its duty to assist him under the *Personal Information Protection Act* (PIPA).

The Adjudicator determined that the Complainant had not made a request for access to his personal information under PIPA. Rather, the Complainant had made a request for records under section 26 of the *Bankruptcy and Insolvency Act* (BIA) and MNP had responded to the request under the BIA. Consequently, PIPA did not apply to the Complainant's access request or MNP's response to it.

Statutes Cited: **AB:** *Personal Information Protection Act* S.A. 2003, c. P-6.5 s. 1, 24, 27, 39, 52; **CA:** *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ss. 26, 37

Authorities Cited: AB: Order P2006-004

I. BACKGROUND

[para 1] The Complainant left a voicemail message for an employee of MNP on August 20, 2007 requesting a photocopy of his entire bankruptcy file.

[para 2] MNP responded to the voicemail message on August 23, 2007 in a letter that states:

Further to your request for copies of your bankruptcy file... we confirm your files are located at our principal office in Edmonton, Alberta. We would be happy to meet with you at our Edmonton office to go through your file and to determine which documents you would like copies of. Please contact the undersigned to make an appointment.

Please be advised there is a charge of \$.50 per page for photocopies and this charge is required to be paid in full in advance. Payments can be made in cash or money order. Upon receiving the required funds, the Trustee will copy and mail the documents to you within five working days.

If you have any questions please contact the undersigned.

[para 3] On September 11, 2007, the Complainant complained to the Commissioner that MNP had not met its duty to assist him, because it required him to travel to Edmonton to view the records.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry. The parties exchanged initial and rebuttal submissions.

[para 5] Following the exchange of submissions, the Complainant made a complaint that MNP disclosed his personal information in its submissions. However, this new complaint cannot be accepted by virtue of section 39 of PIPA, which states, in part:

39(1) A statement made or an answer given by a person during an investigation or inquiry by the Commissioner is inadmissible in evidence in court or in any other proceeding...

A review of a privacy complaint by the Commissioner is a “proceeding” within the meaning of section 39, and therefore neither the Commissioner nor the Commissioner’s delegate can address a privacy complaint in relation to the statements to which the Complainant refers.

II. RECORDS AT ISSUE

[para 6] There are no records at issue as the issue is whether MNP met its duty to assist the Complainant.

III. ISSUES

Issue A: Did MNP meet its duty to the Applicant, in accordance with section 27 of PIPA?

IV. DISCUSSION OF ISSUES

[para 7] The Complainant argues that he should be entitled to see his entire file and should not have to travel to Edmonton to review the file. He takes the position that section 27 of PIPA requires MNP to grant him access in Grande Prairie.

[para 8] MNP argues that a directive of the Superintendent of Bankruptcy Canada requires it to maintain bankruptcy files in the resident office of the trustee, which is in Edmonton. MNP argues that it would be unfair to copy unwanted documents and to charge the Applicant for them. For this reason, it decided to make copies once the Applicant had personally reviewed the records at its principal address.

[para 9] “Personal information” is defined in section 1(k) of PIPA:

1 In this Act,

(k) “personal information” means information about an identifiable individual;

[para 10] Section 24 of PIPA gives applicants the right to request personal information about them in the custody or under the control of an organization. It states:

24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:

- (a) the individual’s personal information where that information is contained in a record that is in the custody or under the control of the organization;*
- (b) the purposes for which the personal information referred to in clause (a) has been and is being used by the organization;*
- (c) the names of the persons to whom and circumstances in which the personal information referred to in clause (a) has been and is being disclosed.*

(2) An organization may refuse to provide access to personal information under subsection (1) if

- (a) the information is protected by any legal privilege;*

- (b) *the disclosure of the information would reveal confidential information that is of a commercial nature and it is not unreasonable to withhold that information;*
- (c) *the information was collected for an investigation or legal proceeding;*
- (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;*
- (e) *the information was collected by a mediator or arbitrator or was created in the conduct of a mediation or arbitration for which the mediator or arbitrator was appointed to act*
 - (i) *under an agreement,*
 - (ii) *under an enactment, or*
 - (iii) *by a court;*
- (f) *the information relates to or may be used in the exercise of prosecutorial discretion.*

(3) *An organization shall not provide access to personal information under subsection (1) if*

- (a) *the disclosure of the information could reasonably be expected to threaten the life or security of another individual;*
- (b) *the information would reveal personal information about another individual;*
- (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.*

(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 11] Section 27 creates a duty to assist an applicant. It states, in part:

27(1) An organization must

- (a) *make every reasonable effort*
 - (i) *to assist applicants, and*
 - (ii) *to respond to each applicant as accurately and completely as reasonably possible...*

[para 12] In Order P2006-004, the Commissioner noted that information must be “about” an identifiable individual before it is “personal information” within the meaning of PIPA. Information that merely relates to an individual, but is not “about” the

individual, is not personal information. The Commissioner stated at paragraph 12 of that Order:

The Act defines “personal information” as “information about an identifiable individual”. In my view, “about” in the context of this phrase is a highly significant restrictive modifier. “About an applicant” is a much narrower idea than “related to an Applicant”. Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily “about” that person. In this case, only a part of the information that the [Applicant] asked for was information “about” him. Had he relied on PIPA to obtain information, he would not have received much of the information that was made available to him under the *Legal Profession Act* and the Rules created thereunder, or pursuant to the requirements of fairness.

[para 13] The Commissioner also noted in Order P2006-004 that a request for an individual’s file in the control or custody of an organization is not the same as a request for personal information. He said at paragraphs 16 – 17:

Again, in my view, throughout this correspondence the Applicant was not making a request for his “personal information” as this term is found in PIPA, even though some such information was contained in the files, and even though, occasionally, he used the language of either PIPEDA or PIPA – which speak of “personal information” - with reference to his requests. Rather, he was asking for his complaint files and the appeal binders. (In particular, it seems he was seeking access to the parts of these files that had been severed from earlier copies of information he had received, but, he believed, had been provided to the lawyers complained against and the Appeal Panel members.) Further, I believe that the Law Society also ultimately understood the [Applicant’s] requests as requests for the complaint files and binders. This is affirmed by the fact that it provided considerable information to the [Applicant] that was the information of other persons (which would not be responsive relative to a request under PIPA, which is necessarily limited to one’s own information).

In view of this, it is not clear why, in withholding information, the Law Society relied on the exceptions in PIPA. Possibly, it regarded all of the information in the files as the Applicant’s personal information (thus would regard an information request for all complaint files and a request for all personal information as coextensive). However, this theory is not adequate to explain why the Law Society released to the Applicant considerable information about third parties, and other information that was not about him. (In my view, the Law Society was perfectly entitled to do this as a function of its powers under its own processes, but the reliance on the PIPA exceptions does cause confusion about what it was doing.) The confusion about the nature of the information requests and responses is also exacerbated by the fact that in some cases the explanation for withholding in the Law Society’s table of severed and withheld material says that the particular portion at issue is “not the personal information of the applicant”. Information that is not the personal information of the applicant is not responsive to a request under PIPA. PIPA exceptions do not need to be applied to information that is unresponsive to a PIPA request.

[para 14] The issues in the case before me are similar, as the Complainant made a request for access to his entire bankruptcy file, but made no reference to his personal information in his original request.

[para 15] The *Bankruptcy and Insolvency Act* (BIA) contains provisions that grant rights of access to records in bankruptcy files. I note that section 26 of the BIA would give the applicant a right of access to records in a bankruptcy file. Section 26 states:

26. (1) The trustee shall keep proper books and records of the administration of each estate to which he is appointed, in which shall be entered a record of all moneys received or disbursed by him, a list of all creditors filing claims, the amount and disposition of those claims, a copy of all notices sent out, the original signed copy of all minutes, proceedings had, and resolutions passed at any meeting of creditors or inspectors, court orders and all such other matters or proceedings as may be necessary to give a complete account of his administration of the estate.

(2) The estate books, records and documents relating to the administration of an estate are deemed to be the property of the estate, and, in the event of any change of trustee, shall forthwith be delivered to the substituted trustee.

(3) The trustee shall permit the books, records and documents referred to in subsection (2) to be inspected and copies of them made by the Superintendent, the bankrupt or any creditor or their representative at any reasonable time.

[para 16] On receiving the Complainant's voicemail, MNP agreed to provide portions of the bankruptcy file for inspection. The process adopted by MNP appears to reflect the process set out in section 26(3) of the BIA, particularly as it relates to inspection of records and making copies. I do not find that the process followed by MNP was in accordance with PIPA, as MNP did not review the bankruptcy file to determine whether it contained personal information, and there is no evidence that it considered the exceptions to disclosure. Instead, MNP was prepared to grant access to the entire records without severing information.

[para 17] I find that the first reference to PIPA was made in the Complainant's complaint, and then only because this legislation appears on the top of the complaint form template. The Complainant's submissions clarify that he is seeking his entire file, letters written by institutions and individuals that do not necessarily contain his personal information, in addition to information about "improper and secret deals". The Complainant does make one reference to having his personal information returned to him; however, in the context of the other submissions, it appears that by "personal information", the Complainant means "information relating to his file", which is not personal information under PIPA.

[para 18] Section 37 of the BIA creates a right to make a complaint to the Court of Queen's Bench about a decision or act of a trustee. It states:

37. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

Consequently, the Court has jurisdiction to hear complaints about decisions or acts made in relation to section 26 of the BIA.

[para 19] From the Complainant's initial submissions, it appears that the Complainant is aware of the process of making complaints to the Court regarding decisions about access to records made under BIA:

Note I am forced to travel from Grande Prairie to Edmonton. Then I asked bankruptcy court to allow access note bankrupts have no rights and in fact can't sue anybody. Bankruptcy Court will not let me sue MNP and frankly without ability to sue and laws regarding full disclosure I can get nothing [sic].

In his rebuttal submissions, the Complainant made the following arguments:

It is unreasonable to make me go to court to get permission to see file in fact a bankrupt can't sue and has no power to get anything.

The BIA grants a right of access to certain records in the custody of a trustee in bankruptcy, such as a bankruptcy file, and creates the ability to make a complaint about the decisions or acts of a trustee to the Alberta Court of Queen's Bench. PIPA, in contrast, gives an applicant the right of access only to information about the applicant as an identifiable individual that is in the custody or under the control of an organization, subject to exceptions. As an adjudicator, I have the delegated authority of the Commissioner to review decisions about access requests made under PIPA. However, the Commissioner does not have the authority to review decisions made about access to records under the BIA, and therefore, neither do I.

[para 20] A request for records made under the BIA cannot be transformed into a request for personal information under PIPA. By its nature, a request for a bankruptcy file encompasses information that is not the personal information of an applicant, as a file will contain information about claims, amounts, disbursements, notices, minutes, resolutions and proceedings in addition to personal information about an applicant and other individuals. The Complainant would not be entitled to request or receive access to a bankruptcy file under PIPA, only portions of the file that contain information about him to which exceptions do not apply. From the Complainant's arguments, reproduced above, and from the affidavit evidence of MNP, I am satisfied that the Complainant is not seeking his personal information within the meaning of PIPA; he is seeking his entire bankruptcy file.

[para 21] Further, MNP appears to have made a decision under section 26 of BIA to make the file available for inspection and copying, and to have applied a directive of the Superintendent of Bankruptcy to the access request, but did not make a response under PIPA in relation to the Complainant's personal information. Given that the Complainant did not reference PIPA or his personal information in the request, or give any indication that he was seeking his bankruptcy file through any legislation other than the BIA, this approach by MNP does not offend section 27 of PIPA.

[para 22] For these reasons, I find that the duty under section 27 of PIPA to assist an applicant was not engaged, as the Applicant did not make an access request under PIPA.

V. ORDER

[para 23] I make this Order under section 52 of the Act.

[para 24] I confirm that the Act does not create any duties for MNP in relation to the Complainant's request for his bankruptcy file.

Teresa Cunningham
Adjudicator