

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2009-004

November 9, 2009

REAL ESTATE COUNCIL OF ALBERTA

Case File Number P1068

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint under the *Personal Information Protection Act* (PIPA) that the Real Estate Council of Alberta (the Organization) was collecting personal information about pardoned convictions through its brokerage licence application forms. The Organization argued that it did not use information about pardoned convictions in making decisions about issuing brokerage licences and also took the position that there was no evidence that it had collected this kind of information.

The Adjudicator determined that it was likely that the Organization had collected personal information about pardoned convictions, given the wording of its forms. She found that the Organization had a reasonable purpose for collecting this personal information under section 11(1) of PIPA, given its statutory duties. However, she found that in the circumstances, the Organization was collecting more information than was necessary for meeting the purposes for which it collected the information, given its evidence that it did not use information about pardoned convictions to make licencing decisions. She ordered the Organization to comply with section 11(2) by ensuring that it does not collect more personal information through its licencing forms than is reasonable for making decisions about licencing.

Statutes Cited: **AB:** *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 1, 7, 8, 11, 36, 52; *Real Estate Act* R.S.A. 2000 c. R-5, ss. 3, 5 **CA:** *Criminal Records Act* R.S.C. 1985, c. C-47, s. 5 **PQ:** *Charter of human rights and freedoms*, R.S.Q., c. C-12, s. 18.2

Authorities Cited: AB: Order P2006-008

Sopinka, John, et al. *The Law of Evidence in Canada* 2nd ed. Markham: Butterworths, 1999.

Cases Cited: *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, [2008] 2 S.C.R. 698

I. BACKGROUND

[para 1] In 2005, the Complainant made a complaint to this office that the Real Estate Council of Alberta (the Organization) was collecting personal information about pardoned convictions through its brokerage licence application forms. The Organization advised a portfolio officer from this office that it intended to change the wording of the licence application forms. As this resolution was satisfactory to the Complainant, the matter was considered closed.

[para 2] However, on August 21, 2008, the Complainant made a complaint to this office that the Real Estate Council of Alberta (the Organization) continued to collect information regarding pardoned convictions through the 2008/2009 Brokerage Licence Renewal Form.

[para 3] The matter was scheduled for a written inquiry. The organization provided submissions; however, the Complainant did not provide submissions beyond his original complaint.

II. RECORDS AT ISSUE

[para 4] As the issue for the inquiry is a complaint that personal information was collected contrary to PIPA, there are no records at issue.

III. ISSUES

Issue A: Is the Organization collecting personal information for purposes that are reasonable, in compliance with s. 11(1) of PIPA?

Issue B: Is the Organization collecting personal information to the extent that is reasonable, in compliance with s. 11(2) of PIPA.

IV. DISCUSSION OF ISSUES

Issue A: Is the Organization collecting personal information for purposes that are reasonable, in compliance with s. 11(1) of PIPA?

Has the Organization collected personal information about pardoned convictions?

[para 5] The Organization submits that the complaint should be dismissed on the basis that the Complainant has not met the burden of proof that it has collected information in circumstances that are not in compliance with the Act.

[para 6] In Order P2006-008, the Commissioner explained the burden of proof in relation to complaints made under PIPA in the following way:

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information.

This initial burden is what has been termed the “evidential burden”. As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act.

[para 7] The authors of *The Law of Evidence* 2nd Edition describe the evidential burden as follows:

The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

[para 8] A complainant bears the initial burden of adducing or pointing to evidence that establishes information was or is being collected, used or disclosed, depending on the nature of the complaint.

[para 9] In deciding the issues for this inquiry, I must consider whether the evidence establishes that it is more likely than not that the Organization has collected personal information contrary to sections 11(1) or 11(2) of PIPA. These provisions state:

11(1) An organization may collect personal information only for purposes that are reasonable.

(2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.

[para 10] Personal information is defined in section 1(k) of PIPA as:

I In this Act,

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

[para 11] The Organization made the following argument:

The complaint from [the Complainant] discloses no evidence that he provided information about pardoned convictions to RECA or that RECA was requesting he provide such information.

When [the Complainant] asked whether the form at issue was requesting information about pardoned convictions he was advised in very clear terms that it was not in 2005.

[The Complainant's] concern is based on his interpretation of the request for information notwithstanding that he asked for and received a clear statement on RECA policy and on the meaning of the request.

In addition to receiving this information [the Complainant] also received assurance that future forms would clarify this in case others had the same concern as [the Complainant], which has been done.

[para 12] The Complainant's letter dated August 20, 2008 states the following:

In July 2006, I filed a complaint... against RECA due to the change of RECA's forms in 2004. As indicated in [the portfolio officer's] letter of August 3, 2006, RECA changed the forms at that time.

In 2007, I was preparing to submit forms for the 2007/2008 licensing period, and the forms had been changed back to the offending forms. I went to RECA's offices on October 5, 2007 [and was told] that the forms had never been changed the previous year, details that [were] sent to [the portfolio officer] [on] October 5, 2007...

... After some time, with [the portfolio officer's] intervention, [a representative of RECA] had the 2007 forms revised, and I was licensed on October 11, 2007.

Come 2008, and the scenario has repeated itself again. The 2008/2009 Brokerage License Renewal Form (Attachments C & D – question 25) and the Brokerage License Application Form (Attachments E & F – question 21) again invite answers regarding pardoned convictions. Fortunately, [the RECA representative] emailed a properly worded form (Attachments G, H, I, J) that I was able to use. However, the online forms remain unchanged ... as of this letter.

...
I am therefore requesting an investigation of RECA's policy, and RECA's ongoing "oversights."

Additionally, because of principle, I have refused to submit to a request that is wrong. Other persons, though, over the past 4 – 5 years, have likely submitted to RECA's requests.

[para 13] The Complainant provided 13 lettered attachments to support his complaint. He states that he downloaded attachments C – F from the Organization's website. He points to question 25 of Attachment "D" (Brokerage Licence Application for Renewal and / or Corporation Amendments form) and question 21 of Attachment "F" ("Brokerage Licence Application form) to establish that the Organization has collected information beyond what is necessary for authorizing brokers. These questions ask:

Has the sole proprietorship, corporation, or partnership or any of its officials, directors, officers or shareholders (only applicable if a non-publicly traded legal entity) ever been found guilty of, or subject of proceedings, in relation to a criminal or other offence under a federal or provincial enactment or under the law of any foreign jurisdiction?

Both of these forms indicate that they are to be used when applying for in the years 2008 and 2009.

[para 14] The Complainant also provided Attachment “G” (Brokerage Licence Application for Renewal And / Or Corporation Amendments form 2008/2009) which the Organization provided to him once he objected to the wording of question 25 on Attachment “D”. Question 25 on Attachment “G” states:

Has the sole proprietorship, corporation, or partnership or any of its officials, directors, officers or shareholders (only applicable if a non-publicly traded legal entity) ever been found guilty of, or subject of proceedings, in relation to a criminal or other offence under a federal or provincial enactment or under the law of any foreign jurisdiction, excluding offences for which a pardon has been granted or provincial or municipal highway traffic offences resulting in monetary fines only?

[para 15] Information regarding whether a sole proprietorship, corporation, or partnership has been found guilty of criminal or regulatory offence is not personal information under PIPA, but rather, information about an organization. However, information about whether officials, directors, officers or shareholders have been found guilty of criminal or regulatory offences, including information about convictions for which a pardon has been granted, would be personal information about these individuals acting in their personal capacity, and is therefore personal information about them under PIPA.

[para 16] In its submissions, the Organization states:

Section 36(2)(e) sets out the authority to investigate complainants that “personal information has been collected... in circumstances that are not in compliance with this Act. Section 46(2) affords individuals the right to initiate a complaint with respect to an issue described in 36(2)(e).

Where collection is not proven the right to initiate a complaint under section 46(2) becomes an issue.

In the absence of evidence of collection or a policy of collection, an order under section 52(3)(e) to “stop collecting” would not apply.

[para 17] The Complainant had made a complaint under section 36(2)(f) of PIPA that the Organization is not in compliance with the Act. He does not complain that his own personal information was collected by RECA contrary to PIPA. Rather, he states that the Organization has placed forms on its website for industry members to complete when seeking authorization to act as brokers and appraisers under the *Real Estate Act*. He complains that these forms request personal information that he believes the Organization cannot lawfully use. In essence, he complains that the Organization has collected the information of other industry members contrary to section 11 of PIPA. While the Organization has stated in its submissions that the forms to which the Complainant objects were removed from its website and online system on October 1, 2008, this removal was done after the Complainant’s complaint was made. In addition, the Organization has not contested the Complainant’s statement that the forms he was given to complete in 2007 also contained the questions to which he objects.

[para 18] In a letter to this office dated October 1, 2008, the director of legal services for the Organization confirmed that attachments “C – F” were located on its website, its online system, and its internal common drive:

In RECA’s common drive, the folder named “renewal folder” contained licensing forms with accurate language wherein there was no request for information in regard to pardoned convictions. Since 2005, RECA hired new staff in RECA’s licensing unit and it is RECA’s conclusion that unfortunately, the correct forms in the renewal folder were not all successfully uploaded to the RECA website or the RECA on-line licensing system. RECA has now corrected the error.

RECA is aware that PIPA prohibits the collection and use of pardoned conviction information in RECA’s licensing process. We sincerely apologize for errors and expect to continue vigilance in this area.

[para 19] The letter of an executive director of the Organization, attachment “K” of the Complainant’s submissions, and referred to in the Organization’s submissions, is addressed to the Complainant and is dated December 12, 2005. It states:

Thank you for your correspondence of 8 November 2005 in which you outlined your concerns about a question on the brokerage licence application forms requesting information on criminal convictions and charges.

The issue has already been examined by the Real Estate Council of Alberta (RECA), and it is our intention to amend the wording of the current question on the licensing forms within the next two weeks because information on pardoned convictions is simply not used in making licensing decisions.

The evidence of the Organization indicates that it inadvertently created licencing forms that require industry members to supply personal information about convictions for which pardons have been received. However, the Organization does not use this information for making decisions about licencing.

[para 20] In its submissions for the inquiry, the Organization states:

RECA’s policy however, as stated by [an official of RECA] to [the Applicant] in 2005, gives full effect to the objective of the regime for pardons: they are not used in the licensing process.

The basis for the Applicant’s complaint may in fact be that he rejects the veracity of [the official’s] statement from 2005 where it is at odds with his subjective interpretation of the forms... The form is not a statement of RECA policy, the statement of [the official] is.

In its submissions, the Organization states only that it has not collected personal information relating to questions 25 on record “D” and question “21” on attachment “F” from the Complainant. The Organization does not deny that it has collected personal information about pardoned convictions from other industry members.

[para 21] The Organization argues that because it does not have a policy of using information regarding pardoned convictions, a policy of collecting this kind of information is not proven. However, I find that it is likely that other industry members have provided personal information about pardoned convictions to the Organization,

given that attachments “D” and “F” were provided to industry members seeking to apply for authorization online and the questions on these forms do not exclude information relating to pardoned convictions. In addition, the Complainant’s evidence is that he was provided forms with similar questions in 2007. That evidence is uncontested.

Attachments “D” and “F” do not indicate to industry members that they should not provide information about convictions for which pardons have been received. These forms do not explain that the Organization does not use information about pardoned convictions to make licencing decisions. The Organization has not contested that these forms are from its website or that industry members have completed these forms. I therefore conclude that industry members completing these forms would reasonably assume that the Organization expected members to include information about pardoned convictions based on the wording of the provision and that some members likely did provide this information. While the Organization disputes that it *uses* information about pardoned convictions, it has not challenged the Complainant’s contention or evidence that it has *collected* this information.

Has the Organization collected personal information about pardoned convictions for a purpose that is reasonable?

[para 22] I note that the Organization is a statutory corporation created under section 3 of the *Real Estate Act*. The purpose of the Organization is set out in section 5 of that Act. These purposes are:

5 The purposes of the Council are

- (a) *to set and enforce standards of conduct for the industry and the business of industry members as the Council determines necessary in order to promote the integrity of the industry, to protect against, investigate, detect and suppress mortgage fraud as it relates to the industry and to protect consumers affected by the industry;*
- (b) *to provide services and other things that, in the opinion of the Council, enhance and improve the industry and the business of industry members;*
- (c) *to administer this Act as provided in this Act, the regulations, the bylaws and the rules.*

[para 23] If collecting information about convictions, including convictions for which pardons have been granted, is reasonably related to carrying out the Organization’s statutory duties under the *Real Estate Act*, then the Organization would have a reasonable purpose in collecting that information. While the Organization did not provide any evidence or submissions as to its purpose in asking questions about whether industry members have been found guilty of offences, I infer that its purpose is to meet its statutory responsibilities under the *Real Estate Act*; in particular, those responsibilities relating to authorizing members and suppressing mortgage fraud. I therefore find that it is collecting information for purposes that are reasonable under section 11(1).

Has the organization collected personal information to the extent that it is reasonable for meeting the purposes for which the information was collected?

[para 24] The next question to answer is whether the Organization has collected personal information only to the extent necessary to meet the purposes for which the personal information is collected, as required by section 11(2). I have already found that it is likely that in completing the forms with the wording in attachments “D” and “F” that industry members provided personal information about pardoned convictions. However, the evidence of the Organization is that it never uses this information to make licencing decisions. Consequently, I find that the Organization has a practice of collecting more information than is reasonable for meeting its purposes, and is therefore in contravention of section 11(2) of PIPA.

[para 25] I do not make this finding on the basis that collecting information about pardoned convictions is, in and of itself, contrary to PIPA. Rather, collecting information about pardoned convictions, when the Organization has no purpose in collecting this information, is contrary to section 11 of PIPA. In this case, the evidence of the Organization is unequivocal that it does not use information relating to pardoned convictions to make decisions. As a result, when it collects this information in addition to other personal information that it has a reasonable purpose for collecting, it is collecting more personal information than reasonable to meet its purpose.

What is an appropriate order in this case?

[para 26] The Complainant seeks as a remedy the destruction of information collected by the Organization in relation to pardoned convictions.

[para 27] As noted above, both the Organization and the Complainant appear to take the position that collecting information about pardoned convictions in and of itself violates PIPA. In my view, this is not the case.

[para 28] Pardons are granted by the National Parole Board under the authority of the *Criminal Records Act*. Section 5 of that Act explains the effect of a pardon:

5. The pardon

(a) is evidence of the fact

- (i) that, in the case of a pardon for an offence referred to in paragraph 4(a), the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and*
- (ii) that, in the case of any pardon, the conviction in respect of which the pardon is granted or issued should no longer reflect adversely on the applicant’s character; and*

(b) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament, other than section 109, 110, 161, 259, 490.012 or 490.019 of the Criminal Code or subsection 147.1(1) or section 227.01 or 227.06 of the National Defence Act, or of a regulation made under an Act of Parliament.

A pardon is evidence that the National Parole Board considers that an applicant is of good conduct and has decided that a conviction should not reflect adversely on an applicant's character. Further, judicial records of pardoned convictions are to be kept separate from other convictions and a pardon removes disqualifications or obligations arising from the conviction under federal legislation. A pardon does not have the same effect under provincial legislation, such as the *Real Estate Act* or PIPA. A pardon is evidence that the National Parole Board considers an applicant to be of good conduct; however, this evidence would not necessarily satisfy the Organization that an applicant who has been convicted of an offence should be authorized under the *Real Estate Act*. In some cases this evidence may be satisfactory, but in other cases, it may not.

[para 29] The human rights legislation of some provinces prohibits discrimination on the basis of a conviction for which a pardon has been granted. However, Alberta's human rights legislation does not include pardoned convictions as a prohibited ground of discrimination. Even if it did, there are limits as to the effect of a pardon. In *Montréal (City) v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2008 SCC 48, [2008] 2 S.C.R. 698 the Supreme Court of Canada considered whether section 18.2 of Quebec's *Charter of human rights and freedoms* prohibited the City of Montreal from refusing to hire a candidate as a police officer for the sole reason that the candidate had been convicted of an offence for which a pardon was later granted. The majority made the following comments about the effects of a pardon.

As Gonthier J. noted in *Therrien*, the use of the conditional in s. 5(a)(ii) is significant. A pardon does not have an absolute effect and does not erase the past. Neither a discharge nor a pardon allows a person to deny that he or she was found guilty of an offence (*Therrien*, at paras. 116 and 122). The facts surrounding the offence did occur, but the pardon helps obliterate the stigma attached to the finding of guilt. Consequently, when the time period provided for in the CRA elapses or a pardon is granted, the opprobrium that results from prejudice and is attached solely to the finding of guilt must be resisted, and the finding of guilt should no longer reflect adversely on the pardoned person's character. It must be presumed that the person has completely recovered his or her moral integrity.

If the pardoned person is presumed to have recovered his or her moral integrity, can an employer consider the facts that gave rise to the finding of guilt when deciding either to refuse to hire the person or to dismiss him or her?

The Court held that the employer could consider the facts giving rise to the conviction for which a pardon was granted, but could not use those facts as the sole reason for denying an employment application because section 18.2 of Quebec's *Charter* prohibited the information being used for this purpose. In the case before me, the Organization is not

making decisions whether to employ industry members, and Alberta's legislation does not contain a provision parallel to section 18.2 of Quebec's *Charter*. There is no obvious reason why the Organization could not reasonably consider the facts giving rise to a conviction for which a pardon has been granted in making a decision whether to authorize an industry member, and consequently, collect that information, if it considered it relevant.

[para 30] In my view, it would be inappropriate to order the destruction of personal information in this case. I say this because the Organization's statements that it does not use information about pardoned convictions to make decisions appears based on its erroneous view that to do so would be contrary to PIPA. The Organization is a statutory corporation empowered by the Legislature to enforce standards of conduct in the real estate industry and to detect and suppress mortgage fraud. Ordering the Organization to destroy personal information that could potentially be necessary for it to discharge its public duties would limit its ability to perform those duties, even though it has taken the position that it cannot consider this information. As an example, it seems unlikely that the Organization would consider a conviction for mortgage fraud to be irrelevant to a decision to authorize an industry member, even though the National Parole Board had granted a pardon in relation to the offence. Rather, it seems more likely that it would consider the facts leading to the conviction relevant to its decision whether to authorize the industry member.

[para 31] That said, I find that the questions to which the Complainant objects, and even the redrafted versions to which he does not object, likely have the effect of inviting applicants to provide personal information about criminal or regulatory offences that the Organization does not use in its decision making process. For example, the newly worded questions do not seek information about municipal or provincial traffic offences resulting in fines, but do not exclude information about foreign traffic offences. The potential for collecting more personal information than is necessary could be remedied by the Organization clarifying on the form which offences it considers relevant to a determination as to whether an industry member should be authorized or licenced and asking for information about those offences only.

[para 32] I intend to order the Organization to comply with its duty under section 11(2) of the Act to ensure that it does not collect more personal information than is necessary through its licencing forms. However, I will not provide specific directions as to what it should or should not collect, as the Organization is in a better position than I am to determine what information regarding offences it requires to assist it to carry out its statutory duties.

[para 33] In addition, I note that the questions on the forms invite a corporation, partnership, or sole proprietorship to provide personal information about findings of guilt in relation to officials, directors, officers or shareholders. These questions create the impression that the Organization is asking industry members to provide the personal information of individuals, in situations where the industry member completing the form and the official, director, officer or shareholder are not necessarily the same. However,

section 7(1)(b) prohibits an organization from collecting information from a source other than the individual unless the individual consents to the collection of that information from the other source. The Organization should therefore consider redesigning its form to ensure that the consent of officials, directors, officers or shareholders to collect their personal information from an industry member is obtained, in compliance with section 7(1)(c). As this is not an issue for the inquiry, I will not make an order to this effect but rather draw it to the Organization's attention.

V. ORDER

[para 34] I make this Order under section 52 of the Act.

[para 35] I order the Organization to comply with its duty under section 11(2) by ensuring that it does not collect more personal information through its licencing forms than is reasonable for meeting the purposes of making decisions about licencing.

[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.

Teresa Cunningham
Adjudicator