

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2014-02

April 29, 2014

CONSUMER CHOICE AWARDS

Case File Number P1892

Office URL: www.oipc.ab.ca

Summary: An individual sent a complaint via email to the Consumer Choice Awards (the Organization) regarding a company that had received a 2011 Consumer Choice award. The Organization replied to the Complainant that it would “make sure [the company] is aware of your concerns.” The Organization then sent an email to the company asking the company to address the complaint; the Organization also forwarded to the company the chain of emails between the Organization and the Complainant.

The company responded to the Organization via email, copying the Complainant and others, informing the Organization of an unsatisfactory past working relationship with the Complainant.

The Complainant then sent two emails to the Organization, asking why it had forwarded his personal information to the company. The Organization responded that it provides all award winners with feedback it receives unless specifically told not to do so.

The Complainant made a complaint to this office regarding the disclosure of his personal information by the Organization to the company.

The Adjudicator determined that the Organization did not have authority to disclose the Complainant’s personal information to the company.

Statutes Cited: **AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 4, 7, 8, 19, 20, 52.

Authorities Cited: AB: Orders P2005-001, P2006-008, P2007-002.

I. BACKGROUND

[para 1] An individual communicated via email with the Consumer Choice Awards (the Organization) regarding 2011 recipients of the Consumer Choice award in the Calgary area (emails dated February 2011- March 2011). When the list of recipients was announced, the Complainant sent further emails (March 14, 2011 and March 16, 2011) to the Organization, expressing surprise that a particular company was a recent recipient of a Consumer Choice award. In one email, the Complainant stated that the company had been found in breach of the code of ethics of the Canadian Home Builders' Association.

[para 2] On March 22, 2011, the Organization replied that it would "make sure [the company] is aware of your concerns." The Organization then sent an email to the company on April 5, 2011, stating:

Please see below, we recently received the following emails from [the Complainant]. Kindly give this matter your immediate attention in order to uphold the positive image of Consumer Choice Award for the benefit of all other award-recipients and consumers alike.

We do not mediate, but we would appreciate if you can advise us when this matter has been rectified.

[para 3] The Organization also forwarded to the company the chain of emails between the Organization and the Complainant, which included emails that were not related to the company or the Complainant's complaint about the company.

[para 4] The company responded to the Organization via email on April 5, 2011, copying the Complainant and others, informing the Organization of an unsatisfactory past working relationship with the Complainant.

[para 5] On May 5, 2011, the Complainant sent two emails to the Organization, asking why it had forwarded his personal information to the company. The Organization responded the same day, stating:

You proactively pursued giving us information stating how unhappy you were with one of the winners of our award. In order to encourage "Business Excellence" with all of our winners, we provide them with any feedback we get concerning their business.... unless specifically told not to do so.

[para 6] The Complainant made a complaint to this office regarding the disclosure of his personal information by the Organization to the company. The Commissioner authorized an investigation of this complaint. This did not resolve the matter and it was set down for a written inquiry.

II. ISSUES

[para 7] The Notice of Inquiry, dated December 6, 2013, states the issues for inquiry as the following:

Did the Organization disclose the Complainant's personal information, as that term is defined in section 1(1) of PIPA? If so,

Did the Organization disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no disclosure without either authority or consent)? In particular,

Did the Organization have the authority to disclose the information without consent, as permitted by section 20 of PIPA?

If the Organization did not have the authority to disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before disclosing the information? In particular,

Did the Complainant consent in writing or orally? Or

Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met? Or

Were the conditions in sections 8(3)(a), (b) and (c) met?

Did the Organization disclose the information contrary to, or in accordance with, section 19 of PIPA (disclosure for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

III. DISCUSSION OF ISSUES

Did the Organization disclose the Complainant's personal information, as that term is defined in section 1(1) of PIPA?

[para 8] "Personal information" is defined in section 1(1)(k) of the Act as "information about an identifiable individual."

[para 9] The information at issue is information about the Complainant contained in the emails forwarded by the Organization to the company, specifically the Complainant's name, work email address, and his opinion of the company. The email chain between the Complainant and the Organization, forwarded by the Organization to the company, also included communications from the Complainant about his interest in the 2011 award recipient list and the reasons for his interest (which do not relate to the company).

[para 10] The Complainant's name is clearly his personal information. An individual's opinion may also be his or her personal information; in Order P2007-002, the Director of Adjudication commented on the varying degrees of personal connection an opinion may have to the holder of the opinion:

... it is counter-intuitive that a person's statement that he or she thinks something (even if it is about someone else) can never be said to be a statement they are making about themselves (hence is their own personal information). The same is true of the very fact that a person gives an opinion about someone else – there will be circumstances in which this information has an element that is personal to the giver of the opinion.

That the fact a person holds or gives an opinion about another conveys something personal about the maker will not be true for all opinions. In some circumstances, an opinion held by a person may be abstracted from their personal life to such a degree that it does not seem to have the quality of personal information. An example is where the opinion is a professional one – for example, a psychologist's opinion from interpreting a psychological test that B has a particular personality disorder. However, for situations where the opinion that is held, or the fact it is given, does reflect something personal, and especially something sensitive, about the person making it, it is, in my view, commonly and quite properly regarded as also being information about that person.

[para 11] In the context of the emails, the Complainant's views about the company are his personal information. The information relating to the Complainant's interest in the 2011 award recipient list is also his personal information.

[para 12] Regarding the Complainant's work email address, (which includes both his first and last name in full), section 4(1)(d) of PIPA states that the Act does not apply to business contact information in certain circumstances; it states:

4(1) Except as provided in this Act and subject to the regulations, this Act applies to every organization and in respect of all personal information.

...

(d) the collection, use or disclosure of an individual's business contact information if the collection, use or disclosure, as the case may be, is for the purposes of enabling the individual to be contacted in relation to the individual's business responsibilities and for no other purpose;

[para 13] "Business contact information" is defined in section 1(1)(a) of the Act, as follows:

1(1) In this Act,

(a) "business contact information" means an individual's name, position name or title, business telephone number, business address, business e-mail address, business fax number and other similar business information;

[para 14] An individual's work email address may not be personal information about that individual in the context of the performance of that individual's job duties (provided there is no personal dimension to the information in that context). In this case, although the Complainant

used his work email to communicate with the Organization, it is clear from the emails that he was acting in a personal capacity, and not in the performance of his job duties.

[para 15] Since the Complainant was not communicating with the Organization as part of his job duties, the Complainant's work email is his personal information. Therefore, the disclosure of the Complainant's email address is not excluded from the scope of the Act.

Did the Organization disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no disclosure without either authority or consent)? In particular,

Did the Organization have the authority to disclose the information without consent, as permitted by section 20 of PIPA?

[para 16] For complaints relative to disclosure of personal information, the Complainant has the initial burden of proof, in that he has to have some knowledge, and adduce some evidence, regarding what personal information was disclosed; the Organization then has the burden to show that its disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 17] The Organization and Complainant have both provided me with a copy of the email the Organization sent to the company. It is clear from the email that the Organization disclosed the Complainant's personal information to the company.

[para 18] Section 20 permits an organization to disclose personal information without consent in a list of specified listed circumstances. The Organization states that it had consent from the Complainant to do this; it does not make any arguments regarding whether it had authority to disclose the personal information without consent.

[para 19] In my view, none of the exceptions to consent in section 20 apply in the circumstances. Absent any explanation from the Organization, I cannot find that the Organization had authority to disclose the Complainant's personal information without his consent.

If the Organization did not have the authority to disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before disclosing the information?

Did the Complainant consent in writing or orally?

[para 20] Section 8(1) of PIPA states:

8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.

[para 21] The Organization argues that it informed the Complainant it would be passing on the Complainant's concerns to the company, and that since the Complainant did not object to

this, he effectively provided his consent to the disclosure of his personal information. Even if this is the case (which I will discuss below), the evidence provided by the Organization does not indicate that the Complainant provided express consent, orally or in writing, to this disclosure such that section 8(1) would be fulfilled.

Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met?

[para 22] Section 8(2) states:

8(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and

(b) it is reasonable that a person would voluntarily provide that information.

[para 23] In order for the Organization to rely on this provision for the disclosure of the Complainant's personal information to the company, it must have been obvious in the circumstances that the Organization would disclose the information to the company. The Complainant states:

... [the Organization] contacted me to let me know that he would be getting in touch with the owner of [the company] to discuss. What I did not expect was for [the Organization] to share my name and work email address with any 3rd parties – including [the company].

[para 24] It is clear that it was not obvious to the Complainant that the Organization would disclose his personal information to the company (although he acknowledged that the substance of his complaint was to be disclosed). When the Organization told the Complainant that it would contact the company regarding his concerns, the Complainant presumably thought that the Organization would share his statements about the company without sharing his name and contact information. In my view, this is a reasonable interpretation of the Organization's statement. (In this case, removing the Complainant's name and contact information from his complaint would likely mean that the Complainant's opinion would no longer be associated with the Complainant and would therefore not be information about an identifiable individual; i.e. it would not be personal information under the Act.)

[para 25] I acknowledge that at the same time as the Complainant did not understand that the Organization intended to disclose his name to the company, the Organization did not understand that he did not want this to happen. In other words, it appears likely that there was a miscommunication or misunderstanding as to whether the information was to be and would be disclosed, in contrast to a situation in which the Organization decided to disclose the information in the knowledge it was doing so without the Complainant's consent.

[para 26] However, the burden in this case is on the Organization to show either that it had another source of authority under the Act, or that it had the Complainant's consent. In the absence of express consent such as "you may disclose this information", if the Organization

wishes to rely on deemed consent under section 8 of the Act, it must establish that the individual “voluntarily provided the information [his name and contact information] to the organization *for that purpose* [the purpose of disclosing it to the company].” Before the section is triggered, the Complainant must know the purpose.

[para 27] In this regard, as noted, the Organization appears to have interpreted the Complainant’s acquiescence to its stated intention to “contact the company regarding his concerns” as an indication that the Complainant was in fact consenting to the Organization’s purpose of sharing both the concern and the name of the person who had it. If this were the only reasonable interpretation of the Complainant’s failure to object, one might accept the Organization’s position that it was fair to take this as implicit consent under section 8(2)(a). However, though this was a possible interpretation, and was arguably not an unreasonable interpretation, it was *not the only reasonable interpretation*. It would have been equally reasonable to interpret the Complainant’s failure to object as acquiescence to the Organization’s conveying the concern, but not the name of the individual who had expressed it. Given there was room for misinterpretation, it was incumbent on the Organization to clarify before relying on the Complainant’s failure to object to its stated plan.

[para 28] To put this another way, the test under section 8(2)(a) of the Act is an objective one. Showing that it was not unreasonable for the Organization to think it had consent is not the same thing as showing that it did have consent. Since the Organization has failed to show that it had clearly established its purpose to the Complainant (and that he nevertheless provided the information), it has failed to establish the circumstances for a deemed consent, and, therefore, has failed to meet its burden.

Were the conditions in sections 8(3)(a), (b) and (c) met?

[para 29] Section 8(3) provides a process for “opt-out” consent. It states:

8(3) Notwithstanding section 7(1), an organization may collect, use or disclose personal information about an individual for particular purposes if

(a) the organization

(i) provides the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect, use or disclose personal information about the individual for those purposes, and

(ii) with respect to that notice, gives the individual a reasonable opportunity to decline or object to having his or her personal information collected, used or disclosed for those purposes,

(b) the individual does not, within a reasonable time, give to the organization a response to that notice declining or objecting to the proposed collection, use or disclosure, and

(c) having regard to the level of the sensitivity, if any, of the information in the circumstances, it is reasonable to collect, use or disclose the information as permitted under clauses (a) and (b).

[para 30] The Organization states that it did not disclose the Complainant's emails to the company until two weeks after it had informed the Complainant that it would do so. It argues that the Complainant could have objected to the disclosure of his complaint, but did not.

[para 31] As discussed above, it was reasonable for the Complainant to have interpreted the Organization to mean that it would disclose the Complainant's statements about the company without his name or contact information. If the Organization wished to rely on section 8(3), it would have had to express its purpose to the Complainant more clearly. I find that the Organization's notice to the Complainant that his concerns would be disclosed to the company does not meet the requirements for notice under section 8(3)(a)(i). A notice that is subject to different interpretations is not one that the Complainant could "reasonably [have been] expected to understand." Therefore, the Organization cannot rely on section 8(3) to argue that the Complainant consented to the disclosure of his personal information to the company.

Did the Organization disclose the information contrary to, or in accordance with, section 19 of PIPA (disclosure for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

[para 32] Since I have found that the Organization did not have authority to disclose the Complainant's personal information, it is not necessary for me to address section 19.

V. ORDER

[para 33] I make this Order under section 52 of the Act.

[para 34] I find that the Organization did not have authority to disclose the Complainant's personal information. I order the Organization to stop disclosing the Complainant's personal information in this manner.

[para 35] I order the Organization to train its staff regarding the handling of personal information when dealing with complaints or other feedback from individuals.

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

Amanda Swanek
Adjudicator