

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2014-03

May 15, 2014

MORPHEUS THEATRE SOCIETY & STORYBOOK THEATRE SOCIETY

Case File Numbers P2067 & P2368

Office URL: www.oipc.ab.ca

Summary: An individual received a marketing email from StoryBook Theatre Society (StoryBook). He made a complaint to StoryBook about the email, apparently because he believed StoryBook ought not to have had his information. StoryBook responded by email, stating that an error in its database, which it shared with Morpheus Theatre Society (Morpheus) at the time, caused StoryBook to have access to the patron information of Morpheus.

Under the *Personal Information Protection Act* (PIPA), the Complainant requested a review of Morpheus' disclosure of his personal information to StoryBook, arguing that Morpheus did not have his consent for the disclosure. The Complainant also requested a review of StoryBook's collection and use of his information, arguing that StoryBook ought not to have collected and used his information. In the course of the inquiry, the Complainant withdrew his complaint regarding Morpheus.

The Adjudicator determined that StoryBook did not collect the Complainant's personal information from Morpheus, but rather had collected it from the Complainant at some prior time.

The Adjudicator determined that the use of the Complainant's personal information was in connection with a commercial activity such that PIPA applies to StoryBook's use of the Complainant's personal information. The Adjudicator found that StoryBook did not have authority to use the Complainant's information, and ordered StoryBook to delete the Complainant's personal information if it has not already done so.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 7, 8, 16, 17, 52, 56, *Societies Act*, R.S.A. 2000, c. S-14.

Authorities Cited: AB: Decision P2013-D-01; Orders P2005-001, P2006-008.

I. BACKGROUND

[para 1] On May 24, 2011, an individual received a marketing email from StoryBook Theatre Society (StoryBook). He made a complaint to StoryBook about the email, apparently because he believed StoryBook ought not to have had and/or used his information. StoryBook responded by email on May 25, 2014, stating that an error in its database, which it shared with Morpheus Theatre Society (Morpheus) at the time, caused StoryBook to have access to the patron information of Morpheus. StoryBook also apologized for the error, and informed the Complainant that it had discussed the problem with the president of the company that makes the relevant software and that the problem was being fixed.

[para 2] Under the *Personal Information Protection Act* (PIPA), the Complainant requested a review of Morpheus' disclosure of his personal information to StoryBook, arguing that Morpheus did not have his consent for the disclosure. The Complainant also requested a review of StoryBook's collection and use of his information, arguing that StoryBook ought not to have collected and used his information.

[para 3] File P2067 was opened in response to the Complainant's request for review of Morpheus' disclosure of his personal information to StoryBook. File P2368 was opened in response to the Complainant's request for review of StoryBook's collection and use of the Complainant's personal information. Both files proceeded separately to inquiry.

[para 4] StoryBook initially failed to provide submissions to its inquiry; however, it subsequently provided some minimal information in response to questions I sent to StoryBook and the Complainant. As I had minimal information upon which to make a decision in the StoryBook inquiry (P2368), and as the issues in that inquiry arise from the same set of facts as those in the Morpheus inquiry (P2067), by letter dated March 27, 2014, I contacted the parties to both inquiries to propose combining the evidence from both inquiries. I said:

Each Organization has provided a single submission in its respective inquiry, and the Complainant has elected to rely on the information previously provided to this Office, specifically, information provided with his Complaint form and his Request for Inquiry form. ...

When considered separately, the evidence from the two inquiries seems to be inconsistent. However, if the evidence from both inquiries is combined, a more coherent picture emerges.

In order to enable me to make findings that are not contradictory as between the two inquiries, it would be useful to combine the inquiries, so as to permit each party to see and comment on the submissions of the other, and then to consider the totality of evidence for each of the separate matters.

[para 5] My letter also provided the parties with an opportunity to object to this proposal; both the Complainant and Morpheus responded that they did not object. StoryBook did not respond to the letter. As my letter gave notice that the absence of a response would be taken as indicating the absence of an objection, I concluded that StoryBook does not object to the combining of evidence from both inquiries.

[para 6] In his response to this letter, the Complainant also indicated that he was withdrawing his request for inquiry regarding Morpheus. He states “I have spoken to [Morpheus Theatre Society] and am confident that [the] organization did nothing to release any information to a third party voiding my privacy.” As the issues between the Complainant and Morpheus have been resolved, this Order will address only the issues between the Complainant and StoryBook.

II. ISSUES

[para 7] The Notice of Inquiry for the StoryBook inquiry (P2368), dated December 10, 2013, states the issues for inquiry as the following:

Issue A: Did StoryBook collect and/or use the Complainant’s “personal information”, as that term is defined in PIPA?

Issue B: If yes, is the theatre school an organization within the terms of section 1(i) of the Act?

Issue C: If yes, is StoryBook a “non-profit organization” as defined in section 56(1)(b) of the Act?

Issue D: If yes, was StoryBook’s collection and/or use of the Complainant’s personal information “in connection with a commercial activity”, within the terms of sections 56(1)(a) and 56(3) of the Act?

Issue E: Did StoryBook collect and/or use the Complainant’s information contrary to, or in compliance with, section 7(1) of PIPA (no collection or use without either authorization or consent)? In particular,

Did StoryBook have the authority to collect and/or use the Complainant’s information without consent, as permitted by sections 14 and 17 of PIPA?

If StoryBook did not have the authority to collect and/or use the Complainant’s information without consent, did StoryBook obtain the Complainant’s consent in accordance with section 8 of PIPA before collecting and/or using the information? In particular,

- i. Did the Complainant consent in writing or orally? Or
- ii. Is the Complainant deemed to have consented by virtue of the conditions in section 8(2)(a) and (b) having been met? Or
- iii. Is the collection and/or use permitted by virtue of the conditions in sections 8(3)(a), (b) and (c) having been met?

Issue F: Did StoryBook collect and/or use the information contrary to, or in accordance with, sections 11 and 16 of PIPA (collection and/or use for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

Issue G: If StoryBook collected the Complainant's personal information other than directly from the Complainant, was the collection contrary to, or in accordance with, section 12 (sources for collection)?

Collection of the Complainant's personal information by StoryBook

[para 8] The Complainant's original complaint related to the "sharing" of his personal information between Morpheus and StoryBook. However, by email dated April 3, 2014, the Complainant informed me that he no longer believed that Morpheus disclosed his personal information to StoryBook. The Complainant also asked that I specifically consider Morpheus' submission for inquiry P2067 in this inquiry; in that submission, Morpheus stated that during its initial review of this situation, it discovered that the Complainant was a past sponsor of StoryBook, which is why StoryBook had the Complainant's personal information.

[para 9] In its submission, StoryBook states that it cannot say for certain how it accessed the Complainant's personal information but that it seemed to have been an internal error.

[para 10] The Complainant has not directly stated whether or not he had a prior relationship with StoryBook; however, his request that I consider Morpheus' submission is possibly a suggestion that he agrees with the content of the submission, including the statement that he had a prior relationship with StoryBook. In any event, I have no reason to discount this part of Morpheus' evidence, as the Complainant provides no evidence to contradict it.

[para 11] Given the following:

- the prior relationship between StoryBook and the Complainant
- the fact StoryBook says it does not know how it acquired the Complainant's personal information, and
- the fact that Morpheus seems to believe that the prior relationship was the reason StoryBook had the information,

I conclude it is more likely StoryBook acquired the information as a function of its prior relationship with the Complainant, rather than from Morpheus as a function of some unexplained "internal error" relating to a shared database.

[para 12] The Complainant's concerns regarding StoryBook's collection of his personal information was that StoryBook had collected the information from Morpheus without authority to do so; as this no longer appears to be the case, the collection of the Complainant's personal information by StoryBook is no longer an issue in this inquiry.

[para 13] Issues A, D, E, and F will focus only on the use of the Complainant's personal information by StoryBook. Issue G no longer arises.

III. DISCUSSION OF ISSUES

Issue A: Did StoryBook use the Complainant’s “personal information”, as that term is defined in PIPA?

[para 14] “Personal information” is defined in section 1(1)(k) of the Act as “information about an identifiable individual.”

[para 15] The personal information at issue is the Complainant’s name and email address; this is personal information about the Complainant.

Issue B: If yes, is the theatre school an organization within the terms of section 1(i) of the Act?

[para 16] PIPA defines “organization” in section 1(1)(i):

1(1)(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] StoryBook states that it is a non-profit organization incorporated under the *Societies Act*. Therefore, StoryBook is an organization for the purposes of PIPA.

Issue C: If yes, is StoryBook a “non-profit organization” as defined in section 56(1)(b) of the Act?

[para 18] Section 56(1)(c) defines “non-profit organization” as follows:

56(1) In this section,

...

(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.*

[para 19] As noted above, StoryBook is incorporated under the *Societies Act*; therefore it meets the definition of “non-profit organization” under section 56(1)(b)(i) of PIPA.

Issue D: If yes, was StoryBook’s use of the Complainant’s personal information “in connection with a commercial activity”, within the terms of sections 56(1)(a) and 56(3) of the Act?

Did StoryBook use the Complainant’s personal information?

[para 20] StoryBook sent the Complainant an email advertising a program run by StoryBook; StoryBook used the Complainant’s name and contact information in sending this email.

Did StoryBook use the Complainant’s personal information in connection with a commercial activity?

[para 21] PIPA applies to non-profit organizations only to the extent that personal information is collected, used and/or disclosed in connection with a commercial activity. Sections 56(1)(a), (2), and (3) delineate the application of PIPA to non-profit organizations; these provisions read as follows:

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;*
- (iv) the operation of a private school or an early childhood services program as defined in the School Act;*
- (v) the operation of a private college as defined in the Post-secondary Learning Act;*

...

(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.

[para 22] StoryBook argues that it does not carry on commercial activities; it states that “the cost of our programming at the time were offset by government funding and therefore no profit derived of the programming.”

[para 23] Decision P2013-D-01 includes a thorough analysis of the interpretation of “commercial activity” in past orders and case law. The adjudicator concluded that the term “commercial activity” should be interpreted broadly; he stated (at paragraph 23):

My interpretation that there is a relatively broad test for determining what constitutes a commercial activity is consistent with the definition that is set out in section 56(1)(a) of PIPA itself. A commercial activity is any transaction, act, conduct, or regular course of conduct that is of a commercial character. While admittedly somewhat circular, the definition does not say that a commercial activity is an activity that is “commercial”. Rather, an activity must have a commercial “character”. To me, the definition is meant to capture activities that are more or less commercial, or appear to be commercial by most accounts. To adapt a colloquial phrase, if it looks like a commercial activity, and walks like a commercial activity, then it is a commercial activity. In short, PIPA is meant to apply to non-profit organizations that are carrying out activities as though they are a business. Moreover, the idea that profit is not determinative or even relevant, when deciding whether an organization is carrying out a commercial activity, is even clearer under PIPA, given that the organization in question is already a “non-profit” organization (unlike the organizations in question under PIPEDA, which refers to the notion of “commercial activity” to decide whether *any* organization is subject to that legislation). Virtually all non-profit organizations under PIPA do not have the objective of making an overall profit that is distributed to individuals associated with the organization.

[para 24] I agree with this conclusion. StoryBook sells tickets for its programs; the fact that StoryBook does not recover its costs through ticket sales does not mean that selling tickets is not a commercial activity. In my view, selling tickets or registration for theatre programs, whether the tickets bring in a profit or cover costs, has a commercial nature and is a commercial activity under PIPA.

[para 25] I further find that the use of personal information to market StoryBook’s programming is a commercial activity. Therefore I conclude that PIPA applies to StoryBook’s use of the Complainant’s personal information.

Issue E: Did StoryBook use the Complainant’s information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)?

Did StoryBook have authority to use the Complainant’s information without consent, as permitted by section 17 of PIPA?

[para 26] 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; StoryBook 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 27] Section 17 permits an organization to use personal information without consent in a list of specified listed circumstances. StoryBook does not argue that it had authority to use the Complainant’s personal information; rather, it says it did so inadvertently, in the sense that StoryBook was unaware that it had the Complainant’s information in its possession and was using it for marketing purposes. In my view, none of the exceptions to consent in section 17 apply in the circumstances.

Did StoryBook obtain the Complainant's consent in accordance with section 8 of PIPA before disclosing the information?

[para 28] Section 8 of PIPA provides the rules for obtaining consent from individuals. The arguments from StoryBook indicate that it did not realize that it had the Complainant's personal information and did not intend to collect it, or subsequently use it. However, I have concluded that StoryBook likely collected the Complainant's personal information in the course of a previous transaction.

[para 29] It is possible that StoryBook obtained the Complainant's consent to use his personal information for marketing purposes at the time his information was collected. With respect to the collection of patron information, StoryBook states:

Information is entered into our database when a patron purchases a ticket, donates to the organization, volunteers for the organizations or requests a donation of the organization.

The information is used for multiple reasons:

- a) Validation of credit card purchases
- b) Future Marketing
- c) Donation tracking and monitoring
- d) Volunteer tracking and rewarding

[para 30] This description does not mention whether StoryBook obtains consent from individuals when their information is collected. While this does not necessarily indicate that StoryBook did not obtain the Complainant's consent, I have no reason to conclude that it did. StoryBook has not otherwise argued that it obtained consent, in any form, from the Complainant to use his personal information; therefore, I find that StoryBook did not have the Complainant's consent to use his personal information.

[para 31] As StoryBook did not have the Complainant's consent to use his personal information, and the use was not authorized without consent, I find that StoryBook did not have authority to use the Complainant's information to email him marketing materials.

[para 32] The submissions of Morpheus state that "at the end of 2011, Morpheus Theatre moved locations, and went on to a separate database of Theatre Manager. All of the old shared data in both systems were removed." It further states that both it and StoryBook have removed the Complainant's personal information from their databases. It is not clear how Morpheus knows whether StoryBook removed the Complainant's personal information from its database; StoryBook has not addressed this in its submissions.

[para 33] StoryBook's email to the Complainant (sent May 25, 2011, the day after the marketing email was sent to the Complainant) states that the error likely occurred due to an update of its database system, and that it was working with the company that created the database software to fix the error that led to StoryBook's inadvertently accessing the Complainant's information. StoryBook also told the Complainant in this email that "we are definitely not interested in sending our newsletters to people who don't need or want them."

[para 34] It seems likely that StoryBook has already deleted the Complainant's personal information from its database; however, I do not know this with certainty. Therefore I will order StoryBook to delete the Complainant's information if it has not already done so.

Issue F: Did StoryBook use the information contrary to, or in accordance with, section 16 of PIPA (use for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

[para 35] Since I have found that StoryBook did not have authority to use the Complainant's personal information, it is not necessary for me to address section 16.

V. ORDER

[para 36] I make this Order under section 52 of the Act.

[para 37] I find that PIPA applies to StoryBook's use of the Complainant's personal information. I further find that StoryBook did not have authority to use the Complainant's personal information. I order StoryBook to delete the Complainant's personal information from its files, if it has not already done so.

[para 38] I further order StoryBook Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator