

**ALBERTA
INFORMATION AND PRIVACY COMMISSIONER**

**Report of an Investigation into Disclosure of Customer Information
without Consent**

October 15, 2004

**Melrose Rural Electrification Association, ATCO Electric and Direct
Energy Marketing Limited**

Investigation Report P2004-IR-002

I. INTRODUCTION

[1] On July 29, 2004, Information and Privacy Commissioner Frank Work assigned me to investigate a complaint under section 36(2)(e) of the *Personal Information Protection Act* (“PIPA”). Specifically, I have investigated whether disclosure of personal information from the Melrose Rural Electrification Association’s service provider ATCO Electric Limited (“ATCO Electric”) to Direct Energy Marketing Limited (“DEML”) was in contravention of the provisions of PIPA.

II. BACKGROUND

[2] In May 2004, a member of the Melrose Rural Electrification Association (“REA”) complained to the Board of the REA that customers’ personal information had been disclosed to DEML without the consent of the individual REA members. The complainant provided me with a document that had allegedly been presented to the Melrose REA Board on May 5, 2004. This document was signed by 26 REA members, informing the Board that as of January 1, 2004, consent must be obtained from these individuals prior to disclosure of their names to DEML.

[3] The Melrose REA asserted to the complainant that the disclosure of the customers/members’ personal information to DEML was done in accordance with the Code of Conduct Regulation under the *Electric Utilities Act* and with the PIPA.

[4] In investigating this complaint, I reviewed the mandate of the organizations (Melrose REA, ATCO Electric (formerly Alberta Power Ltd.), and DEML), the relationship among these parties, and the legislation governing the electric utilities industry.

[5] I have found the following:

- The Melrose REA is one of 64 REAs in Alberta. The REAs operate according to the Alberta *Rural Utilities Act* and the *Electric Utilities Act* to develop and deliver electricity services to members. In the case of the Melrose REA, the Association has the principal mandate of supplying electricity services to farmers in the area. The Directors of the Board of each REA have the power to direct and supervise the affairs and business of the Association on behalf of the members.¹ The Directors have the power to purchase, take on leases, enter into agreements with third parties, etc. The REA is the “owner of an electric distribution system” in terms of the *Electric Utilities Act*.
- The Melrose REA entered into electric service contracts with its individual members. These contracts outline the responsibilities and authorities of the parties; including the authority of the REA. Within the current version of the electric service contract, Section 10 states that the Association is entitled to assign any part of the contract.²
- The Melrose REA, as an owner of an electric distribution system, may make arrangements under which other persons perform any or all of the duties and function of the owner.³ These duties include providing distribution access service, operating and maintaining the system, maintaining information systems relating to the consumption of electricity by consumers, and providing to a retailer or the owner’s regulated rate provider sufficient, accurate and timely information about the retailer’s or the regulated rate provider’s customers, including metering information about the electricity consumed by those customers, in order to enable the retailer or regulated rate provider to bill and to respond to inquiries and complaints from customers concerning billing for

¹ Section 15(1) and Section 16(1) of the Rural Utilities Act, S.A. 2004, Ch R-21.

² Section 10, Electric Service Contract. Note that older versions of this contract have similar wording to Section 10, but appear as Section 20 (circa 1950) or Section 22 (circa 1991). Those sections in previous version of the contract are labeled “Association Agents”. Some, if not all of the members of the Melrose REA will have older versions of the contract.

³ See *Electric Utilities Act*, Part 7, Section 104(1)

electricity services, and to act as a regulated rate provider to eligible customers who pay a regulated rate for electricity.⁴ In such a case, the *Electric Utilities Act* provides that the body assuming this assigned duty similarly becomes an “owner”.

- In 1991 the Melrose REA contracted with Alberta Power Limited (now ATCO Electric) to supply electrical service to the Association and its members, to maintain and operate the Association’s electrical distribution system, and to perform other related services.⁵ “Services” in this agreement mean the services required to perform and satisfy the Association’s duties as an Owner of an electrical distribution system pursuant to section 105 of the *Electric Utilities Act*. Section 1906 of this agreement allows the parties to assign any of the services to third parties. The agreement states that it is binding upon the parties and their respective successors and assigns.⁶
- On June 1, 2004 the Melrose REA, ATCO Electric, and DEML entered into an agreement.⁷ In this agreement, the Melrose REA, as Owner, consented to its Wire Services Provider – ATCO Electric - assigning a contractual obligation for the provision of the REA’s Regulated Rate Tariff and billing services to DEML. DEML agreed to accept this obligation assignment. This Consent Agreement was part of a larger transaction/ purchase and sale agreement between ATCO and DEML, wherein ATCO transferred to DEML its retail energy supply and customer billing business.
- The Alberta Energy and Utilities Board (“AEUB”) approved the transfer of assets and services from ATCO Electric to DEML on December 4, 2003. The terms of this approval, including the type of personal information transferred, are outlined in the AEUB decision #2003-098⁸.
- The transfer of personal information from ATCO Electric to DEML began on June 11, 2004 and was completed on June 23, 2004.

⁴ See *Electric Utilities Act*, Part 7, Section 105(1)

⁵ An agreement signed in 2002 extends this agreement until 2010.

⁶ Melrose Rural Electrification Association Limited and Alberta Power Limited Agreement, July 1991 (Amended April 29, 2002).

⁷ Acknowledgement and Consent Agreement, ATCO Electric LTD. and Melrose Rural Electrification Association Ltd. and Direct Energy Marketing Limited, June 1, 2004

⁸ EUB Decision 2003-098, Dec. 4, 2003. 13 Sept. 2004

<http://www.eub.gov.ab.ca/bbs/documents/decisions/2003/2003-098.pdf> Note that the AEUB decision was related to the “larger transaction” between ATCO Electric and DEML, not to the transfer of the REA Regulated Rate Tariff function

III. JURISDICTION

[6] As of January 1, 2004, the *Personal Information Protection Act* (“PIPA” or “the Act”) applies to provincially-regulated organizations in Alberta. The Commissioner has jurisdiction in this case, because the Melrose REA, ATCO Electric, and DEML are “organizations” under the Act operating in the province of Alberta. Although the Alberta Energy and Utilities Board decision regarding the transfer of personal information pre-dates PIPA, the disclosure of personal information took place in June 2004; therefore, the Commissioner has jurisdiction in this matter.

[7] The complaint concerns the authority of the Melrose REA to disclose personal information of customers/members. However, the investigation involves ATCO Electric and DEML as service providers to the REA.

IV. QUESTIONS

[8] **1. What is the nature of the personal information disclosed to Direct Energy?**

2. Was customer consent necessary for this disclosure?

V. ANALYSIS

1. What is the nature of the personal information disclosed to Direct Energy?

[9] The personal information of ATCO Electric customers (including members of the Melrose REA) that was transferred to DEML included the following:

- Customer ID – a unique identification number for the Customer generated by ATCO
- Customer Name – may be either the name of business, or the name of the individual
- Customer telephone number, address, name of primary or secondary contacts

- Customer identification – additional information used to identify a Customer (such as Social Insurance Number, Driver’s License Number, Treaty number, Native Band ID or Native Band Name).
- Customer credit information – includes a code to identify the credit rating assigned to a customer. This rating is a summary assessment based on a numbering strategy, taking into account the customer’s payment practices, established credit history, credit risk exposure and security deposit requirements, which are combined to establish an overall credit profile. The ATCO system automatically upgraded or downgraded the credit rating based on collection policies. Note: the details of the credit event history (individual credit actions occurring on the account) were NOT transferred to DEML, because ATCO Electric accounts receivables were not transferred.
- Deposit information – details including deposits held, interest paid to date, deposit requested date, deposit paid, etc.
- Statement Account – including a unique statement account identifier generated by the ATCO system, the cycle on which the statement is to be produced for the customer, and the frequency for producing a customer statement (e.g. monthly).
- Automatic Payment Method – describes the method to establish an ongoing method of paying for statements (such as automatic withdrawal from a customer’s bank account, Customer Payment Account numbers, and Customer Bank Account information).

2. Was customer consent necessary for this disclosure?

[10] Section 22 of PIPA allows disclosure of personal information without consent for the purpose of business transactions. “Business transaction” means:

“a transaction consisting of the purchase, sale, lease, merger or amalgamation or any other type of acquisition or disposal of, or the taking of a security interest in respect of, an organization or a portion of an organization or any business or activity or business asset of an organization...” (section 22(1)(a)).

[11] In the present case, the transaction consisted of the transfer by ATCO Electric to DEML of all of ATCO Electric’s retail electricity business. I find that the nature of the transaction and the actions of the Melrose REA, ATCO Electric, and DEML meet the definition of a “business transaction” according to PIPA.

[12] Section 22(3) of PIPA allows organizations that are parties to such a business transaction to:

“...collect, use and disclose personal information about individuals without the consent of individuals if

- i. the parties have entered into an agreement under which the parties undertake to use and disclose the information only for those purposes for which the information was initially collected from or in respect of the individuals, and*
- ii. the information related solely to the carrying on of the business or activity or the carrying on of the objects for which the business transaction took place.” [section 22(3)(b)(i) and (ii)]*

[13] I will deal with each of these subsections in turn.

Section 22(3)(b)(i) - The existence of an agreement

[14] ATCO Electric and DEML entered into a purchase and sale agreement (the “Transaction Agreement”) on April 25, 2004. As previously noted, the subject of the Transaction Agreement was the transfer by ATCO Electric to DEML of all of ATCO Electric’s retail electricity business. Through the Transaction Agreement, DEML undertook a number of covenants. Most notably, DEML agreed generally to perform the assumed obligations outlined in the Transaction Agreement in accordance with good industry practice and all applicable laws and specifically, not to use customer information in a manner that would result in ATCO Electric breaching its obligations under law as wires owner in the REA service territory. In other words, since ATCO was always required to handle customer information in a lawful and proper manner, DEML would have similar obligation as its retail successor.

[15] Subsequently, ATCO, DEML, and the Melrose REA entered into a tri-party agreement (the “Tri-Party Agreement”) on June 1, 2004. This Tri-Party Agreement defines the terms of the transfer of assets and the responsibilities of the parties. While the Tri-Party Agreement does not specifically address the use of personal information post-transaction, in section 4.1(d) of that Agreement, all parties agree to use all reasonable commercial efforts to ensure continued compliance with all legislation affecting the electric industry.

[16] PIPA is one such piece of legislation, as it affects all private sector business in Alberta, including the electric industry. By agreeing to comply with all legislation affecting the electric industry, the parties have in essence agreed to comply with the provisions of PIPA that require that

customer personal information be used only for the same purposes for which ATCO Electric originally collected it.

[17] The Code of Conduct Regulation (the “Code”) under the *Electric Utilities Act* is another piece of legislation governing the treatment of customer personal information. The Code has as its primary objective the establishment and maintenance of fair competition in the electric industry by creating rules to prevent “wires owners” (owner of the physical assets) from unfairly benefiting their affiliated retailers and regulated rate providers. To this end, the Code specifically allows the sharing of certain types of information for certain purposes and disallows the use of information for other purposes. For example, while wires owners may not collect, use or disclose customer information for the sales and marketing activities of their affiliated retailers without active customer consent, they are permitted to disclose customer information without customer consent to the customer’s own retailer, to the customer’s regulated rate provider, or for the purposes of billing.

[18] The Code of Conduct further requires that all wires owners and affiliated retailers file a Compliance Plan to detail all the processes and mechanisms in place to ensure compliance with the Code. In addition, the Code prescribes that an organization may be in breach for failure to comply with its Compliance Plan and subjected to all of the penalties and sanctions prescribed by the *Electric Utilities Act*. I have reviewed Direct Energy Regulated Services compliance plan and find that it describes appropriate mechanisms to ensure the protection of customer information. DEML’s Compliance Plan effectively limits the use of the customer information transferred to DEML to the provision of services and billing of regulated rate customers of the REA. DEML is prohibited from use of the customer information acquired through the transfer of assets for sales and marketing of its unregulated affiliate offerings.

[19] As such, I am satisfied that the requirements of subsection 22(3)(b)(i) have been met in light of the Code, which specifically addresses personal information issues, and the language of the Tri-Party Agreement. I should note, however, that s. 22(3)(b)(i) contemplates an agreement with reference to PIPA’s special requirements regarding personal information issues. Without deciding the matter, it remains to be seen whether a general boilerplate clause requiring parties to “comply with all applicable laws” would meet the s. 22(3)(b)(i) requirement for an agreement that restricts the use and disclosure of personal information for the purposes for which “the information was initially collected”. In my view, parties to business transactions involving personal information should specifically address personal information issues in light of s. 22(3)(b)(i).

Section 22(3)(b)(ii) - The information relates solely to carrying out the objects for which the business transaction took place

[20] I reviewed the extent of personal information disclosed in terms of whether or not each information element was necessary for DEML to carry out the energy and billing services.

[21] Most of the information disclosed (such as customer name, contact information, billing information, alternate contacts and bank account information) is reasonable for DEML's business purposes; its connection and relevance to the ongoing business transactions is obvious. However, I was concerned about two information elements – the customer credit rating, and the customer identification (such as birth date, Social Insurance Numbers (SIN) and driver's license numbers). I sought an explanation as to why ATCO Electric would disclose the credit rating to DEML, and also why the new service provider would require customer identification information.

[22] ATCO Electric asserted that DEML required the customer credit rating because it is a score based on the customer's payment history. If a customer (now a DEML customer) falls into arrears, DEML could use the credit rating to determine if a security deposit would be required. Furthermore, with DEML becoming a Regulated Rate Tariff provider, the credit rating was provided so that DEML could continue to provide that service to the customer in as seamless a manner as possible. ATCO Electric asserted that credit profiles, if obtained from third party credit reporting agencies, may not be as relevant as existing in-house data. Data accumulated by ATCO Electric in its provision of the RRT, would be of assistance to DEML by avoiding disruptions to customers and their utility credit ratings.

[23] ATCO Electric advised that the customer identification (SIN, etc.) was collected from a customer on an "exception" basis. The ATCO Electric system had the ability to contain, but not to require, this identification information. ATCO Electric's policy was to give the customer the option of providing identification when similar names existed in customer record, when a new applicant applied for an account that had been disconnected through collection actions, and when a customer requested a tax exemption. The Treaty number, Native Bank ID and Native Band Name were used for documenting the customers that have GST exempt status; this is a Canada Revenue Agency Requirement.

[24] I find that it is reasonable for ATCO/DEML to collect this information given their business; however, with the exception of the Canada Revenue Agency requirements, alternative types of information should be collected for authentication purposes. The collection of SINs

should always be optional (see Investigation Report #P2004-IR-001). Further, proof of customer consent to collect and use SINs should be maintained in the customer's file.

[25] I find that the information elements transferred to DEML relate solely to carrying on of the business activity for which the business transaction took place. As such, I am satisfied that the parties have met the requirements of subsection 22(3)(b)(ii).⁹

VI. CONCLUSION

[26] I am satisfied that the requirements of section 22(3) of PIPA have been met, and that the disclosure of customers' personal information without consent to Direct Energy was done in compliance with PIPA. While the parties in this instance do not appear to have specifically addressed the proper uses of the ATCO Electric customer information post-transaction, I find that, taken together, the wording of the Transaction Agreement, the Tri-Party Agreement and the mechanisms described in Direct Energy's Compliance Plan, are evidence of the fact that data and information protection were live issues in this transaction. I also find that reasonable measures were taken to ensure compliance with PIPA as well as the Code of Conduct Regulation. Equally important, it is evident to me that DEML met PIPA's spirit and intent, in these circumstances.

[27] Although the disclosure of personal information between the parties was done in accordance with the PIPA, the future use and disclosure of customer information are limited to the provision of services originally undertaken by ATCO Electric. Any other use or disclosure of the customer information (for example – marketing) would require the express consent of the customer. This office will accept complaints from individuals who believe that their information has been used or disclosed for purposes unrelated to the original purposes for which it was collected.

⁹ DEML's Compliance Plan enumerates several policies and mechanisms to ensure that customer information is used only in accordance with applicable law. For example, customer information is protected electronically through the use of secure customer information repositories and password-protected files. Work premises that house regulated customer information are protected through restricted physical access. In both cases, a Customer Information Access Personnel List is maintained to ensure the restricted access, and this list is subject to quarterly internal audit and annual external audit. In this way, DEML ensures that customer information is not used for sales and marketing activity, which would violate the Code of Conduct, and implicitly ensures that the information is not used for any other improper purpose, which would violate PIPA.

VII. RECOMMENDATIONS

[28] I make the following recommendations:

(a) That Direct Energy Marketing Limited ensure that the future use of personal information transferred to them from ATCO Electric be limited to the purposes described in this report (i.e. serving the purposes of providing electricity and billing for these services to the regulated rate customers of the Melrose REA).

(b) That future transactions of this nature specifically address, by way of an agreement, the anticipated use of the transferred personal information. For greater certainty, parties should unequivocally undertake to only use transferred personal information for the same purposes for which it was originally collected, subject to the PIPA and all applicable laws.

[29] All parties should be commended for the degree of assistance and cooperation that I was given in my investigation of this matter.

[30] This file is now closed.

Submitted by:

Elizabeth Denham
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Office of the Information and Privacy Commissioner of Alberta