

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

Request for Authorization to Disregard an Access Request
under section 37 of the
Personal Information Protection Act

Manulife
(OIPC File Reference P0197)

November 29, 2005

INTRODUCTION

[1] On June 10, 2005, I received a letter from the Manufacturers Life Insurance Company (“Manulife”) requesting authorization to disregard an access request made by a named individual (“the Applicant”).

JURISDICTION

[2] Section 37 of the *Personal Information Protection Act* (“PIPA” or “the Act”) gives me a discretionary (“may”) power to authorize an organization to disregard certain requests under PIPA. Section 37 provides as follows:

37 If an organization asks, the Commissioner may authorize the organization to disregard one or more requests made under section 24 or 25 if

(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the organization or amount to an abuse of the right to make those requests, or

(b) one or more of the requests are frivolous or vexatious.

[3] I have jurisdiction in this matter because Manulife is an “organization” as defined by subsection 1(i) of the Act.

[4] In considering Manulife’s submission under section 37, I am mindful of PIPA’s purpose and legislative principles and the relevant

circumstances surrounding their submission. I do not take a decision to grant a section 37 request lightly. To be successful in this application, Manulife must establish that the request meets the requirements of PIPA subsection 37(a) or (b).

STATEMENT OF FACTS

[5] The Applicant was the sole beneficiary and executrix of her late husband's estate. He was a physician in Edmonton, Alberta. He had a Manufacturers' Life Insurance Company ("Manulife") group life insurance policy through his employer.

[6] In 1991, 43 days before his accidental death, the Applicant's late husband signed up for an additional excess life insurance policy, through the same group benefits provider. When the Applicant was settling the estate, Manulife did not disclose to her the application for excess coverage. The Applicant settled the basic portion of the claim. Many years later, after she had remarried and moved to British Columbia, she learned from the benefits administrator at her late husband's employer of the existence of this excess policy. She confirmed its existence with Manulife, sought to make a claim against it, and was told she was statute-barred from such a claim. She then commenced an action against Manulife in the Court of Queen's Bench of Alberta.

[7] Litigation ensued, which continued over the course of the next seven years. During the trial, copies of 332 documents were provided to the Applicant and her legal counsel as disclosed in four sworn Affidavits of Records. In addition, three Manulife representatives were examined under oath with respect to all matters at issue and written responses were provided by those representatives to approximately 290 undertakings given during those examinations.

[8] Ultimately the Applicant was successful in the litigation in the Court of Queen's Bench of Alberta. In her reasons dated December 23, 2002, Madam Justice Bielby concluded that Manulife had "acted unconscionably" toward the Applicant by failing to advise her that her late husband had completed an application for excess insurance and had "fraudulently concealed her cause of action" in this matter.

[9] Manulife appealed. In the context of that appeal, the Applicant made another request to re-open the discovery process. She alleged that Manulife had failed to produce records in the course of discovery, including a file folder cover and other records. In his ruling dated June 13, 2003, Mr. Justice Cote of the Alberta Court of Appeal dismissed the application on the grounds that, procedurally, the Alberta Rules of Court

do not allow for discovery post-trial and that, substantively, Manulife had repeatedly sworn that there were no more records to produce. At paragraph 41 of his reasons, Justice Cote said:

“I do not attribute any particular significance to the choice of the word “declined” jotted on the cover of the file folder. Its meaning and timing have been explained under oath by the defendant insurer’s Director of Life Claims. It is the plaintiff who makes a dramatic distinction between declining an application and not processing it. Nor do I see anything sinister in someone’s failure to include the cover of a file folder as a producible document. I am confident that at least 75% of all Alberta affidavits of records forget to include covers of file folders. The insurer’s Director of Life and Disability Claims swears that there are no other records. She confirms that the ex-employee cross-examined at trial cannot positively state that she created any memo or report. Others familiar with the files recall none, and none can be found.”

[10] Later, at paragraph 46, he stated:

“This motion attempts two things. First, to find a document which the insurer has repeatedly sworn does not exist. And second, to have some more oral questioning which I judge would be of quaternary relevance at best.”

[11] The application for discovery post-trial was dismissed. Ultimately, the appeal itself was also dismissed, meaning the Applicant succeeded against Manulife.

[12] The Applicant then sought disclosure of her personal information under the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”). She first wrote to Manulife on October 21, 2003, seeking access to any documents that bore her name or that related to the insurance claim on the life of her late husband, including:

- “Any and all interoffice email, interoffice memorandum, correspondence, personal notes, telephone logs, electronic data between Medical Underwriting, Claims, Group Underwriting Head Office, Group Underwriting Edmonton Field Office, any and all Paramedical Service Providers, Canadian Client Services, Contract Administration, Certificate Administration, Billing department and Manulife’s Legal Services Division.

- Any and all data entries into the Bulletin Board, LCS (Life Claims System) and P.O.P. notes/GRID notes/GIPSY notes. Material is provided from Manulife's Group Life Claims Instruction Manual regarding the "Life Claims System", "POP" notes and "Review of Claim and "Large Claim Reporting" for your reference. This material substantiates a policy &/or a procedure whereby relevant information would have been entered into these systems. References to the above have been highlighted to facilitate your review for documents.
- The "worksheet" as specified under "Review of Claim" on page s5.2 from Manulife's Group Life Claims. Reference has been highlighted to facilitate your review of documents.
- Explanation of what the Cryptic numbers indicate on the "Claims Jacket cover" that was provided by Manulife after trial. The document is provided and numbers referred to have been highlighted.
- What position of authority did L.N. and I.B. hold in February and March 1991, as the individuals who signed their approval of the Cheque Requisition for payment of Life Benefits and Accidental Death & Dismemberment Benefit? Copies included for your reference and highlighted accordingly.
- Any and all information related to "Report Number" 91084 – as indicated on the Cheque requisition. This is also referred to as the "Claim number". The Report number/Claim number is highlighted for your reference.
- In addition to the material that is specific to my late husband, I request the following Disclosure: Copy of Manulife Financial (...) Policy on Storage/Retention and Destruction of Documentation regarding Life Insurance applications, Claims and Billing – from 1990 to present."

[13] The Applicant did not wait for a response from Manulife. Instead, two days later, she submitted a request for review to the Office of the Privacy Commissioner of Canada, indicating that she was doing so because she had "little faith that Manulife will comply with my request".

[14] On November 11, 2003, Manulife responded to her request, and indicated to her that they were satisfied "that through the written and

oral discovery process in the litigation, you have been provided with full and complete disclosure about the existence of, use of and disclosure of your personal information by Manulife Financial and the existence of, use of and disclosure of the personal information of (your late husband) by Manulife Financial.” Unhappy with this response, correspondence among the Applicant, the Office of the Privacy Commissioner of Canada and Manulife continued. Manulife responded in writing on two further occasions: on January 12, 2004, Manulife reiterated that full and complete disclosure had already been provided to the Applicant. Then, on April 12, 2004, Manulife again responded in writing, and stated that although “most of the information requested by (the Applicant) in her letter of February 20, 2004 would not, in our view, constitute requests for personal information as defined under PIPEDA (...) we have chosen to respond to the balance of the numbered paragraphs in (her) letter as follows...” Manulife specifically stated that no personal information existed outside of the Life Claims File and that no personal information had been gathered by Manulife in relation to the Applicant’s letter to Manulife’s C.E.O. and provided answers to some of the Applicant’s procedural questions about Manulife’s systems and processes.

[15] Ultimately, without making a finding on the adequacy of the response to the Applicant’s access request, the Office of the Privacy Commissioner of Canada referred this matter to my Office.

[16] On April 12, 2005, my Office received the Applicant’s request under section 24 of the Act for a review of Manulife’s refusal to allow her access to her personal information in the custody or under the control of Manulife. It was agreed by both parties and my investigator on the file that the Applicant’s initial access request under PIPEDA would now serve as the access request under Alberta’s PIPA.

[17] On June 10, 2005, Manulife wrote to this Office, asking for authorization to disregard her access request on the basis that it is frivolous or vexatious and that responding to her request would unreasonably interfere with Manulife’s operations. The Applicant was provided with Manulife’s request and submitted a written response on June 21, 2005. Manulife then provided additional detail in a further letter dated June 29, 2005.

1. The Applicant’s Position

[18] The Applicant indicated that she made the access request based on a suspicion that Manulife had not provided full and complete disclosure during the course of the litigation. This suspicion was based, she said, upon Manulife’s failure to initially disclose a “Claims Jacket Cover”,

apparently on the basis that Manulife did not believe a file jacket cover was a “document” within the meaning of PIPA. When this item was subsequently disclosed to her, the Applicant took this as confirmation that Manulife was not being forthright in its disclosure to her. The Applicant now questions the thoroughness of Manulife’s search for records, saying that she had sent two documents to Manulife – an email that she had sent to the Canadian Actuaries seeking information about the manner in which insurers process life claims generally, and a letter she sent to Manulife’s Chief Executive Officer — and these two documents were not disclosed to her in the litigation. She says this is an indication that Manulife is hiding documents.

[19] The Applicant adds that her request for access is a means for “providing closure to (her) life”.

2. Manulife’s Position

[20] Manulife states that most of the information sought by the Applicant does not constitute “personal information” as contemplated by PIPA. Manulife believes it has gone beyond its statutory obligations and has provided information to the Applicant that PIPEDA did not require it to provide and that PIPA does not cover. Manulife further contends that any documents or records that were not produced to the Applicant for reasons of relevance during the litigation were in fact provided to her in her access request made under PIPEDA.

[21] Manulife states that there is no additional personal information of the Applicant. Manulife’s Chief Legal Officer, Canadian Division states that the only personal information of the Applicant that currently exists anywhere in Manulife’s systems is her correspondence with Manulife about this access request. Manulife states in its June 29, 2005 letter that it:

“...has provided more than reasonable disclosure of all relevant documents and records relating to (the Applicant’s) late husband’s relations with Manulife, as well as personal information collected and held in relation to (the Applicant).”

[22] Manulife states that the only search that can be made now for further records is a forensic audit of all electronically archived data from over a decade ago, which data may reveal personal information as contemplated by the Act, or may not. Manulife asserts that this would be an extremely difficult and costly undertaking that would unreasonably interfere with Manulife’s operations.

DECISION

[23] After careful consideration of the circumstances, the principles and applicable sections of PIPA, I have decided to authorize Manulife to disregard the Applicant's access request pursuant to section 37 of the Act.

[24] Section 37 of PIPA provides as follows:

37 If an organization asks, the Commissioner may authorize the organization to disregard one or more requests made under section 24 or 25 if

(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the organization or amount to an abuse of the right to make those requests, or

(b) one or more of the requests are frivolous or vexatious.

[25] This is the first time that I have considered s. 37 of PIPA, although I have considered section 55 of Alberta's *Freedom of Information and Protection of Privacy Act* ("FOIP Act") in a number of decisions. The two sections are identical in all material respects. While I have been assisted by previous decisions under section 55 of the FOIP Act, I have nonetheless been guided by PIPA's legislative purposes and intent, which are different from those set out in the FOIP Act. The FOIP Act applies to Alberta public bodies, and was intended to foster open and transparent government. Through the FOIP Act, individuals are granted a right of access to records in the custody or under the control of a public body. The ability to gain access can be a means of subjecting public bodies to public scrutiny. The access provisions of PIPA allow individuals to know what personal information of theirs is in the custody or under the control of an organization, and to ensure it is accurate and complete. Importantly, however, PIPA seeks to balance an individual's right to have his or her information protected and the need of organizations to collect, use and disclose personal information for purposes that are reasonable. Indeed, reasonableness is at the heart of this statute. It is important to keep the reasonableness and balancing goals of PIPA in mind when interpreting the components of section 37.

1. PIPA subsection 37(a) – Repetitious or systematic in nature

[26] In this case, the Applicant has made only one request under section 24 of PIPA. Granted, she has sought information previously through litigation, and through an access request to the Office of the Privacy Commissioner of Canada, but she has only applied for access to

information under PIPA one time. Subsection 37(a) refers to requests for access under section 24 of PIPA. It is the PIPA access request that must be repetitious or systematic. I do not agree that her one access request is repetitious or systematic in nature as required by PIPA subsection 37(a).

[27] As I have found that the request is not “repetitious or systematic in nature”, it is not necessary to decide whether the request would unreasonably interfere with Manulife’s operations or amount to an abuse of the right to make the request.

2. PIPA subsection 37(b) – Frivolous or Vexatious

[28] Subsection 37(b) allows me to authorize an organization to disregard an access request if the request is “frivolous” or “vexatious”.

[29] Black’s Law Dictionary (7th Edition) defines “frivolous” as “lacking a legal basis or legal merit; not serious; not reasonably purposeful” and “vexatious” as “without reasonable or probable cause or excuse; harassing; annoying”. The Concise Oxford Dictionary (9th Edition) defines “frivolous” as “1. Paltry, trifling, trumpery. 2. lacking seriousness; given to trifling; silly” and “vexatious” as “1. such as to cause vexation. 2. *Law* not having sufficient grounds for action and seeking only to annoy the defendant”.

[30] In Authorization 02-02 [2002] B.C.I.P.C.D. No. 57 under British Columbia’s *Freedom of Information and Protection of Privacy Act* (the B.C. FOIP Act) and again in Decision P05-01 [2005] B.C.I.P.C.D. No. 23 under British Columbia’s *Personal Information Protection Act* (the B.C. PIPA), the British Columbia Information and Privacy Commissioner said:

“The following discussion does not exhaust the meaning of the words “frivolous or vexatious”, since other factors may be relevant in the circumstances of a given case. For present purposes, one or more of the following factors may be relevant in determining whether a request is frivolous or vexatious:

...

- A “frivolous” request is one that is made primarily for a purpose other than gaining access to information. It will usually not be enough that a request appears on the surface to be for an ulterior purpose – other facts will usually have to exist before one can conclude that the request is made for some purpose other than gaining access to information.

...

- The class of “vexatious” requests includes requests made in “bad faith”, i.e., for a malicious or oblique motive. Such requests may be made for the purpose of harassing or obstructing the public body.”

[31] In Authorization 02-02 and Decision P05-01, the British Columbia Information and Privacy Commissioner further said that one of the factors that may be relevant in determining whether a request is frivolous or vexatious is that a frivolous or vexatious request is one that is an abuse of the rights conferred under the B.C. FOIP Act and the B.C. PIPA, respectively.

[32] The B.C. FOIP Act and the B.C. PIPA do not contain any reference to either a repetitious or systematic request or a frivolous or vexatious request amounting to an abuse of the rights conferred by that legislation. However, the Alberta FOIP Act and the Alberta PIPA (section 37(a)) include in the repetitious or systematic request provision the wording “or amount to an abuse of the right to make those requests”. That wording is not included in the frivolous or vexatious request provision of the Alberta FOIP Act or the Alberta PIPA (section 37(b)).

[33] Therefore, I believe that it is open to the British Columbia Information and Privacy Commissioner to consider as a factor in his decisions that either a repetitious or systematic request or a frivolous or vexatious request is an abuse of the rights conferred under the B.C. PIPA. I believe that I can consider as a factor only whether a repetitious or systematic request is an abuse of the rights conferred by the Alberta PIPA to make a request, as set out specifically in the wording of section 37(a). I cannot consider whether a frivolous or vexatious request is an abuse of the right to make the request, as section 37(b) omits that wording.

[34] This dispute between the Applicant and Manulife has been alive in some fashion for almost 15 years. During that time, the Applicant has repeatedly sought and obtained various pieces of information through many different applications and processes. She suggests that Manulife is being dishonest in respect of the personal information it has been able to locate. It is clear to me that this distrust stems from a long, hard-fought legal battle between the parties. Without commenting on the merits of the underlying dispute one way or the other, the experience has left the Applicant angry and sceptical. I am not persuaded that her motives are simply to gain closure for her life.

[35] Through PIPA, the Applicant has the right to know what information Manulife has about her. I find that, at this late stage in her

dealings with Manulife, she is aware of what information Manulife has or had, having regard to the seven years of litigation between these parties and the extensive discovery that accompanied the litigation.

[36] I further find that it is not reasonable to force Manulife to continue their search, given Manulife's evidence and argument that no personal information exists or can reasonably be located.

[37] For all of these reasons, I am persuaded that the Applicant's access request is vexatious for the purposes of PIPA subsection 37(b). It is therefore not necessary that I also decide whether the Applicant's access request is frivolous.

[38] This decision should not be interpreted as suggesting that, because litigation has taken place, an access request under PIPA would on that basis alone be found to be frivolous or vexatious. In Decision P05-01, the British Columbia Information and Privacy Commissioner said:

“This decision should not be interpreted as suggesting that an access request will be found vexatious merely because litigation has taken place, is under way, or is possible, and disclosure of the same information or documents has occurred or may occur.”¹

[39] As in the British Columbia case, my findings herein relate specifically to these particular circumstances.

CONCLUSION

[40] I authorize Manulife to disregard the Applicant's access request in its entirety.

Frank J. Work, Q.C.
Information & Privacy Commissioner

¹ [2005] B.C.I.P.C.D. No. 23, at paragraph 24