

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2010-021

April 21, 2011

FAIRWAYS VILLAS SOUTH HOMEOWNERS' ASSOCIATION

Case File Number P1298

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that the Organization contravened the *Personal Information Protection Act* (the "Act") by using and/or disclosing her personal information, without her consent, when it sent certain e-mails. She also complained about the Organization's distribution of a contact list, but the Adjudicator found that it did not contain her personal information, as her name and telephone number had already been removed.

Under section 56, the Act has a limited application to certain non-profit organizations, in that it applies in the case of personal information that is used and/or disclosed by them in connection with a commercial activity. The Adjudicator found that the Organization was a non-profit organization that was carrying out a commercial activity when it used and/or disclosed the Complainant's personal information in the e-mails.

The Organization either conceded that the Act did not permit it to use and/or disclose the Complainant's personal information in the e-mails, or the Adjudicator found that the Organization did not establish that the Act permitted it to do so. The Adjudicator therefore concluded that the Organization used and/or disclosed the Complainant's personal information in contravention of the Act or in circumstances that were not in compliance with the Act. He ordered the Organization to stop doing so.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1(f)(i) [now 1(1)(f)(i)], 1(k) [now 1(1)(k)], 3, 4(1), 4(3), 7(1), 8, 8(1), 8(2), 8(3), 16, 16(1),

16(2), 17, 19, 19(1), 19(2), 20, 52, 52(3)(e), 52(4), 56, 56(1)(a), 56(1)(b), 56(1)(b)(i), 56(2) and 56(3); *Personal Information Protection Amendment Act, 2009*, S.A. 2009, c. 50; *Companies Act*, R.S.A. 2000, c. C-21, s. 2.1, 2.1(a)(i), 15(1), 26(1), 200(1), 202(1). **CAN:** *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, ss. 2(1) and 4(1)(a).

Authorities Cited: **AB:** Orders P2005-001, P2006-008 and P2007-007; PIPA Case Summary P2009-CS-001. **ON:** *Rodgers v. Calvert*, 2004 CanLII 22082 (Ont. S.C.).

I. BACKGROUND

[para 1] The Complainant is a homeowner in Fairways Villas South. In a complaint form dated April 21, 2009, she complained that Fairways Villas South Homeowners' Association (the "Organization") contravened the *Personal Information Protection Act* (the "Act" or "PIPA") by using and/or disclosing her personal information without her consent.

[para 2] The Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. This was not successful. The Complainant requested an inquiry by letter dated July 4, 2009, and a written inquiry was set down.

[para 3] On May 1, 2010, amendments to PIPA came into force by virtue of the *Personal Information Protection Amendment Act, 2009*. However, because the Organization's alleged contravention of the Act occurred prior to the amendments, the legislation applies as it existed previously. For the purpose of cross-reference, I note below when there has been an amendment to a section of PIPA that I discuss in this Order.

II. INFORMATION AT ISSUE

[para 4] The information that the Organization allegedly used and/or disclosed in contravention of PIPA is the Complainant's e-mail address, her e-mail user name, the contents of an e-mail that she sent to the Board of the Organization, and her home address. She did not mention all of these uses and/or disclosures in her complaint form of April 21, 2009, but instead mentioned some of them in her request for inquiry, or her inquiry submissions.

[para 5] In her initial complaint form, the Complainant complained, generally, about the use and/or disclosure of her personal information by the Organization. She attached one specific e-mail dated April 15, 2009, as well as attached a Spring Newsletter and Annual General Meeting Notice. She also mentioned a homeowners list, with which she had concerns at the time of a previous complaint to this Office. In her request for inquiry, the Complainant expressed a concern about an e-mail dated June 14, 2008, which attached the Newsletter and Notice. In her inquiry submissions, she indicated that she still had concerns about the homeowners list.

[para 6] All of the foregoing concerns fall within the scope of the general complaint that the Complainant initially made on April 21, 2009, and the concerns are closely related to those that she first identified. Moreover, the Organization responded to the additional concerns of the Complainant that she raised in her request for inquiry and her inquiry submissions, and it has not objected to responding. I have therefore decided to address the Complainant's additional concerns in this Order.

[para 7] However, one of the Complainant's concerns relates to an e-mail that was sent on April 29, 2009 (reminder about the Annual General Meeting). I have no jurisdiction in this inquiry to address a matter that arose after the Complainant's initial complaint to this Office on April 21, 2009. The timing is such that the matter does not fall within the scope of the initial complaint.

[para 8] The Complainant stated in her initial complaint form that "my phone number has been given to contractors", but she does not pursue this during the inquiry. At one point in her inquiry submissions, she also says that the Organization "used my private phone to call me at home". As the Complainant provides no additional information to enable me to understand how these alleged uses and/or disclosures might have been contrary to PIPA, I will not discuss the use and/or disclosure of the Complainant's telephone number further in this Order.

[para 9] For the purposes of this Order, I do not need to decide whether a particular act of the Organization was a "use" of the Complainant's personal information in particular, or a "disclosure" in particular. My conclusions would be the same, regardless of whether the act involved a use, a disclosure, or both. I will therefore use phrases like "use and/or disclosure" throughout.

III. ISSUES

[para 10] The Notice of Inquiry, dated November 8, 2010, framed the issues as follows, although I have rephrased them somewhat:

Is the Organization a "non-profit organization" as defined in section 56 of the Act?

Did the Organization use and/or disclose personal information in connection with a commercial activity within the terms of section 56(3) of the Act?

If the Organization used and/or disclosed personal information in connection with a commercial activity, is the use and/or disclosure excluded from the Act by virtue of section 4(3)?

If the use and/or disclosure is not excluded from the Act by virtue of section 4(3), did the Organization use and/or disclose the Complainant's personal information contrary to, or in compliance with, section 7(1) of the Act (no use and/or disclosure without either authority or consent)? In particular,

Did the Organization have the authority to use and/or disclose the information without consent, as permitted by sections 17 or 20 of the Act?

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

Did the Complainant consent in writing or orally under section 8(1)?

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

Is the use and/or disclosure permitted by virtue of the conditions in section 8(3) having been met?

Did the Organization use and/or disclose the Complainant's personal information contrary to, or in accordance with, sections 16(1) and/or 19(1) of the Act (use and/or disclosure for purposes that are reasonable)?

Did the Organization use and/or disclose the Complainant's personal information contrary to, or in accordance with, sections 16(2) and/or 19(2) of the Act (use and/or disclosure to the extent reasonable for meeting the purposes)?

[para 11] Some of the Complainant's submissions and accompanying material are regarding disputes with the Organization over matters such as fencing, yard control, irrigation, a sprinkler system, weeds and flower beds, alleged breaches of restrictive covenants, alleged use of maintenance fees for unauthorized purposes, and an alleged failure to properly insure workers and volunteers in relation to possible workers' compensation claims when they perform maintenance services. Most of these submissions and material have nothing to do with the Organization's compliance with PIPA. I will discuss them in this Order only to the extent that they are relevant to the inquiry.

[para 12] Noting that section 1(f)(i) of PIPA says that "investigation" can relate to a breach of agreement, the Complainant requests that this Office investigate alleged breaches of agreements between the Organization and her. This Office has no jurisdiction to do so. If something is an "investigation" within the meaning of PIPA, it means that an organization has the authority to collect, use and disclose personal information for the purpose of that investigation. It does not mean that this Office can undertake the investigation in question.

IV. DISCUSSION OF ISSUES

A. Is the Organization a “non-profit organization” as defined in section 56 of the Act?

[para 13] Under section 4(1), PIPA applies to every organization and in respect of all personal information, except as provided elsewhere in the Act and subject to the regulations. Under section 56(2), PIPA does not apply, generally-speaking, to certain non-profit organizations, which are defined in section 56(1)(b). However, under section 56(3), PIPA has a limited application to these non-profit organizations, in that the Act applies in the case of personal information that is collected, used or disclosed by them in connection with a commercial activity.

[para 14] The relevant parts of section 56 of PIPA 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;

(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.

(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 15] Under section 56(1)(b)(i), an organization is a non-profit organization, for the purposes of PIPA, if it was registered under Part 9 of the *Companies Act*. In the material before me, there is a Certificate of Incorporation indicating that the Organization was incorporated under the *Companies Act* on December 21, 1987, but the Certificate does not specifically reference “Part 9”.

[para 16] However, section 2.1 of the *Companies Act* reads:

2.1 Notwithstanding anything in this Act, on and after February 1, 1982

(a) no company shall

(i) be incorporated or registered under this Act except under Part 9,

(ii) be continued into Alberta under section 174, or

(iii) be continued out of Alberta under section 175, and

(b) no extra-provincial company shall be registered under this Act.

[para 17] Section 2.1(a)(i) effectively means that, as of February 1, 1982, no companies have been incorporated or registered under the *Companies Act*, except under Part 9. Given that the Organization was incorporated under the *Companies Act* on December 21, 1987, it was necessarily incorporated under Part 9. I therefore find that the Organization is a non-profit organization under section 56(1)(b)(i) of PIPA.

[para 18] I considered the fact that section 56(1)(b)(i) of PIPA refers to an organization that was “registered” under Part 9, whereas the material before me says that the Organization in this case was “incorporated”. I find that the distinction has no bearing on whether an organization falls within the terms of section 56(1)(b)(i). Part 9 of the *Companies Act* refers only to an entity being registered, but the registration applies to an entity about to be formed as a limited company, meaning that it is about to be incorporated [see, e.g., sections 15(1) and 26(1) of the *Companies Act*]. An entity that has been registered under Part 9 is therefore also one that has been incorporated. In short, if an entity became an entity under the *Companies Act* on or after February 1, 1982, it

necessarily became such an entity under Part 9 and meets the definition set out in section 56(1)(b)(i) of PIPA, regardless of whether the term “registered” or “incorporated” appears in the organization’s constituent documents.

[para 19] I also note that article 55 of the Organization’s Articles of Incorporation, filed December 21, 1987, states that “it is the intention of the Company to apply the profits, if any, or any other income of the Company in promoting its objects and as the Company is not formed with gain for its object no dividend whatsoever and no part of the income of the Company shall be divided among, payable to or be available for the personal benefit of any Member of the Company”. This wording is very similar to the wording set out in section 200(1) and 202(1) of Part 9 of the *Companies Act*, under which an entity may be registered. Article 5 of the Organization’s Memorandum of Association, filed December 21, 1987, likewise consists of analogous wording, which again reinforces that the Organization was registered under Part 9 of the *Companies Act*.

[para 20] The Complainant raises the possibility that the Organization has been struck from the registry for failing to comply with certain requirements and responsibilities, but there is no evidence of this. The Organization says that its annual returns continue to show that it is registered under the category of a “non-profit”.

[para 21] The Complainant alleges that a member of the Board of the Organization improperly derived a personal benefit by using his personal credit card to make purchases on behalf of the Organization (e.g., he may have accumulated points for a program such as “Air Miles”). She also notes that some homeowners for whom the Organization provides yard maintenance enjoy larger stretches of fencing than other owners. She questions whether these forms of “profit-taking” (in her words) and various other actions of the Organization alter its status as a non-profit organization. I find that they do not. The Organization is a non-profit organization for the purposes of PIPA, given that it falls within the definition set out in section 56(1)(b)(i).

B. Did the Organization use and/or disclose personal information in connection with a commercial activity within the terms of section 56(3) of the Act?

[para 22] In this part of the Order, I will first discuss whether the Organization used and/or disclosed the Complainant’s “personal information”, as that term is defined in PIPA. I will then discuss whether the use and/or disclosure was in connection with a “commercial activity”, as that term is defined.

1. Did the Organization use and/or disclose the Complainant’s personal information?

[para 23] Under section 1(k) of PIPA [renumbered section 1(1)(k) as of May 1, 2010], “personal information” means “information about an identifiable individual”. I find that the Complainant’s e-mail address and her e-mail user name (i.e., the name that is sometimes indicated just prior to her e-mail address when an e-mail is sent out) are her personal information. Neither party argues the contrary. I discuss below whether the

contents of an e-mail that the Complainant sent, and her home address in this particular case, constitute her personal information.

[para 24] One of the uses and/or disclosures of the Complainant's e-mail address and e-mail user name allegedly occurred when a member of the Board of the Organization sent an e-mail to the Complainant and other homeowners on April 15, 2009, regarding "Annual Sprinkler System Backflow Testing". The Complainant submitted a copy of that e-mail with her complaint form. I find that there was a use and/or disclosure of her personal information by the Organization, as her e-mail address and e-mail user name are revealed in the e-mail.

[para 25] Another use and/or disclosure of the Complainant's personal information allegedly occurred when a member of the Board forwarded, to other members of the Organization, an e-mail from the Complainant on June 14, 2008, which she had written to the Board earlier that day. The Complainant submitted a copy of that set of e-mails. The Complainant's e-mail contains her e-mail address and e-mail user name, which again is her personal information. The e-mail also describes concerns that the Complainant had about lawn care. I find that some of this content also constitutes or reveals her personal information, such as the fact that she had the particular concerns. Other content of the e-mail is not the Complainant's personal information, as it is instead about the lawn, the Organization, or a third party contractor responsible for the lawn care.

[para 26] Another use and/or disclosure of the Complainant's e-mail address and e-mail user name allegedly occurred when the Organization sent an e-mail on April 20, 2009, attaching a Spring Newsletter and Annual General Meeting Notice. In her initial submissions (at page 10), the Complainant says that the Organization "distributed it to all community e-mail users". However, on the e-mail of April 20, 2009 itself, the Complainant is indicated to be the only recipient of it. I considered the possibility that third parties were blind copied ("bcc'd") on the e-mail, but the Complainant does not say this. She has the initial burden of adducing sufficient evidence that her personal information was used and/or disclosed, as alleged (Order P2005-001 at para. 8; Order P2006-008 at para. 11). She has not met the burden in this instance. I also note that the Organization says that a "first e-mail was sent to the Complainant only and was not sent to any other recipient". Given the context and the Organization's subsequent reference to the Annual General Meeting, I take this "first e-mail" to be the one of April 20, 2009.

[para 27] Because I understand the Complainant's concerns in this inquiry to be about the Organization's uses and/or disclosures of her personal information in relation to third parties, yet I find no such use and/or disclosure in the e-mail of April 20, 2009, I will not discuss the e-mail of April 20, 2009 further.

[para 28] The use and/or disclosure of the Complainant's home address allegedly occurred when the Organization distributed a contact list of homeowners, consisting of their addresses, names and telephone numbers. However, I find that the homeowners list does not consist of the Complainant's personal information. It does not include her name and telephone number, as these were removed following the Complainant's previous

complaint to this Office about the Organization. Because there is no name associated with the address, the address is not, or is no longer, about an “identifiable” individual within the meaning of section 1(k) of PIPA. The address is one in a numerical sequence of all addresses comprising Fairways Villas South, and the Organization presumably kept the address in the list so that a reader would not think that one of the addresses was inadvertently missed. This was acceptable, despite the fact that the Complainant wished not to be included in the list in any way. The Organization “de-identified” her by removing her name and telephone number, which was all that was required of it.

[para 29] Given the foregoing, I find that the Organization used and/or disclosed the Complainant’s personal information in the e-mails of June 14, 2008 and April 15, 2009.

2. Was the use and/or disclosure of the Complainant’s personal information in connection with a commercial activity?

[para 30] I have found that the Organization is a non-profit organization within the terms of section 56(1)(b). Under section 56(3), PIPA applies to such a non-profit organization in the case of personal information that is used or disclosed by it in connection with any commercial activity carried out by it. Under section 56(1)(a), “commercial activity” means any transaction, act or conduct, or any regular course of conduct, that is of a commercial character.

[para 31] The Complainant submits that the Organization carries out commercial activities. The Organization states that it accepts the findings of this Office set out in PIPA Case Summary P2009-CS-001, which was in the context of the previous complaint by the Complainant against the Organization. There, a portfolio officer found that the Organization is engaged in a commercial activity when it provides property maintenance services in exchange for a monthly fee.

[para 32] Order P2007-007 (at para. 40) noted that the question of whether a non-profit organization is carrying out a commercial activity must be considered in the circumstances of every case and the answer must be determined on a case-by-case basis. That Order (at para. 39) also noted the following comments that have been made regarding the phrase “commercial activity” under sections 2(1) and 4(1)(a) of the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”):

The phrase, “commercial activity” has been considered in the case law in a variety of statutory contexts. Courts have commented on the difficulty of assigning a precise meaning to this phrase, often citing lengthy and varied definitions from dictionaries. [...]

[...] Although these cases may be of some general interest in outlining the potential scope of the phrase “commercial activity”, they provide little direct guidance in interpreting the phrase for the purposes of PIPEDA. The theme that emerges from these cases is that the phrase is capable of a broad range of meanings that may vary from one statute to another, and

that it is necessary to consider the phrase in the overall statutory context and in light of the purpose of the statute in which the phrase is found (Priscilla Platt and Jeffrey Kaufman, *Privacy Law in the Private Sector: An Annotation of the Legislation in Canada* (Aurora, Ontario: Canada Law Book, 2002, pp. PIP-7, 8, 8.1).

[para 33] The purpose of PIPA, as set out in section 3, is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable. This purpose of PIPA is not particularly helpful in determining the scope of the term “commercial activity” under section 56(3), given that PIPA and therefore section 3 do not apply, in the first place, if a non-profit organization is not carrying out a commercial activity. To put it differently, the purpose of the legislation is to govern certain acts of certain organizations, yet the question here is whether the Organization, by engaging in a particular activity, is even subject to the legislation.

[para 34] I will now turn to the facts of this particular case. Article 2 of the Organization’s Memorandum of Association reads, in part, as follows:

2. *The objects for which the Company is established are:*

(a) *To maintain the lands in the City of Calgary legally described as:*

[legal land description]

together with reserves and the sidewalks and boulevard immediately adjacent thereto

(hereinafter referred to as the “Lands”),

the fences and the exteriors of the homes constructed on the Lands not for profit or gain; and

...

(c) *To enter into an agreement with the Owners of the Lands for the provision of maintenance for the Lands and the exteriors of the homes constructed thereon; and*

(d) *To assist the owner of the Lands in maintaining the controls established for the Lands from time to time; and*

...

[para 35] Article 7(b) of the Memorandum of Association refers to moneys received from Encumbrances in order to carry out the maintenance of the Lands and exteriors of

the homes. There is accordingly an “Encumbrance to Secure Monthly Rent Charge of \$55.00”, dated October 1988, in relation to the Complainant and her property.

[para 36] With her submissions, the Complainant included a copy of an affidavit sworn by a member of the Board of the Organization, on March 25, 2010, in the context of an underlying dispute between the parties. Paragraph 6 provides the following additional background:

The Villas have no common property per se. The owners own the lots themselves. Instead, the Homeowners’ Association was granted by the original developer various easements and covenants to allow for the maintenance of various portions of the Villas, and the Homeowners’ Association is empowered to collect a monthly rent to pay for its obligations to maintain the land at the Villas. This obligation is secured by way of an encumbrance registered against Title to the Respondent’s property. ...

[para 37] The Organization’s Privacy Policy, dated April 26, 2004, further explains:

Fairways Villas South Homeowners Association provides a range of services and products to our Residents. ... The types of services and products that we provide our Homeowners and their families are:

- *to provide general exterior maintenance, landscaping and snow removal of Homeowners’ residences,*
- *To perform administration of the Association on Homeowners’ behalf to ensure that monthly fees are collected and applied to the services and products above, which includes the collection of fees from Homeowners,*

...

[para 38] In short, the foregoing excerpts indicate that homeowners pay the Organization a monthly fee in exchange for the maintenance services provided or arranged by the Organization. I find that this constitutes a regular course of conduct, on the part of the Organization, that is of a “commercial character” under section 56(1)(a), and that the Organization is therefore carrying out a “commercial activity” when it provides the maintenance services. In addition to the monthly rent charge under the Encumbrance, the Complainant says that she is charged \$95.00 “for the monthly cost of lawn maintenance, flower bed maintenance, and snow removal”, and that she has been charged for other services arranged by the Organization, such as services provided by Green Drop.

[para 39] Section 56(3) states that PIPA applies to a non-profit organization in the case of personal information that is collected, used or disclosed “in connection with” any commercial activity. Here, the e-mails of June 14, 2008 and April 15, 2009 were in connection with the Organization’s commercial activity of providing maintenance

services. One e-mail was about lawn care and the other was about sprinkler system testing.

[para 40] I am aware that, in *Rodgers v. Calvert* (at para. 55), the Ontario Superior Court of Justice found that a particular organization was not engaged in a commercial activity for the purpose of PIPEDA when it produced a membership list. The judge relied heavily on the following commentary from the website of the federal Privacy Commissioner (at para. 42):

[...] Most non-profits are not subject to [PIPEDA] because they do not engage in commercial activities. This is typically the case with most charities, minor hockey associations, clubs, community groups and advocacy organizations. Collecting membership fees, organizing club activities, compiling a list of members' names and addresses and mailing out newsletters are not considered commercial activities. [...]

[para 41] The above commentary refers to charities, minor hockey associations, clubs, community groups and advocacy organizations. The organization in *Rodgers v. Calvert* was a recreational shooting club. I regard the commentary of the federal Privacy Commissioner and the conclusion in *Rodgers v. Calvert* as inapplicable to this inquiry. The activities in question here are not charitable, social, recreational or the like. Rather, the Organization in this case is essentially engaged in the “business” of providing maintenance services. There appear to be some social and community-related aspects to the Organization’s activities (e.g., organizing barbecues and liaising with police about safety issues), but the Organization was carrying out the commercial activity of providing maintenance services when it distributed the e-mails that the Complainant has complained about.

[para 42] I also realize that the homeowners of Fairways Villas South are “members” of the Organization (although the Complainant says that there is no legal requirement that she be a member of the Organization, and use its maintenance services, as she says that necessary documentation is not registered against her property). Even though homeowners are charged monthly as members of the Organization (and especially if the Complainant is, in fact, not a member), the monthly rent charge that homeowners pay to the Organization is not akin to the membership fee that individuals paid to the organization in *Rodgers v. Calvert*. There, the membership fees were paid in order to enjoy social and recreational benefits. Here, the monthly charge is paid for the purpose of receiving maintenance services of a commercial character.

[para 43] I conclude that, when the Organization used and/or disclosed the Complainant’s e-mail address, e mail user name and concerns in the e mail forwarded on June 14, 2008, and when it used and/or disclosed the Complainant’s e-mail address and e-mail user name in the e-mail sent on April 15, 2009, it did so in connection with a commercial activity that it was carrying out. PIPA therefore applies, under section 56(3), to those uses and/or disclosures (subject to section 4(3) of PIPA, which is discussed next).

C. If the Organization used and/or disclosed personal information in connection with a commercial activity, is the use and/or disclosure excluded from the Act by virtue of section 4(3)?

[para 44] Under section 4(3) [amendments to which came into force on May 1, 2010], PIPA does not apply to certain information, or to the use or disclosure of certain information. Neither party argues that any of the circumstances set out in section 4(3) exist in this case, and I find that none of them exist.

[para 45] I conclude that PIPA applies to the uses and/or disclosures of the Complainant's personal information by the Organization in the e-mails of June 14, 2008 and April 15, 2009.

D. If the use and/or disclosure is not excluded from the Act by virtue of section 4(3), did the Organization use and/or disclose the Complainant's personal information contrary to, or in compliance with, section 7(1) of the Act (no use and/or disclosure without either authorization or consent)? In particular,

Did the Organization have the authority to use and/or disclose the information without consent, as permitted by sections 17 or 20 of the Act?

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

Did the Complainant consent in writing or orally under section 8(1)?

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

Is the use and/or disclosure permitted by virtue of the conditions in section 8(3) having been met?

[para 46] Sections 7(1), 8, 17 and 20 of PIPA read, in part, as follows:

7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,

...

(c) use that information unless the individual consents to the use of that information, or

(d) disclose that information unless the individual consents to the disclosure of that information.

...

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.

(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.

...

(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).

...

17 An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

[various circumstances, none of which the Organization argues to apply here]

...

20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

...

[various circumstances, none of which the Organization argues to apply here]

[Amendments to sections 17 and 20 came into force on May 1, 2010.]

[para 47] The Complainant has alleged improper uses and/or disclosures of her personal information. The initial burden of proof rests with the Complainant, in that she has to have some knowledge, and adduce some evidence, regarding what personal information was used and/or disclosed, and the manner in which the personal information was used and/or disclosed. I found, earlier in this Order, that the Complainant has adduced sufficient evidence regarding the uses and/or disclosures of her personal information in the e-mails that the Organization sent on June 14, 2008 and April 15, 2009. The Organization now has the burden to show that these uses and/or disclosures of the Complainant's personal information were in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 48] In the e-mail of June 14, 2008, the Organization forwarded the Complainant's e-mail address, e-mail user name and concerns about lawn care to other homeowners. The Organization concedes that PIPA did not permit it to use and/or disclose the Complainant's personal information in the e-mail of June 14, 2008, whether on the basis of written consent, oral consent, deemed consent or prior notice under section 8, or on the basis that any of the provisions of section 17 or 20 authorized it to do so. It says that a Board member intended to forward the Complainant's e-mail to other members of the Board only, but mistakenly selected the wrong distribution list on his computer.

[para 49] In the e-mail of April 15, 2009, the Organization advised the Complainant, along with four other individuals or couples, that the Organization had engaged a particular contractor to perform the Annual Sprinkler System Backflow Testing, and the Organization asked each homeowner to provide his or her preferred date for the testing. In sending the e-mail, the Organization disclosed the Complainant's e-mail address and e-mail user name to the other homeowners.

[para 50] The Organization does not specifically address the e mail of April 15, 2009 in its submissions. Whether this is because it similarly concedes that the use and/or disclosure of the Complainant's personal information in that e-mail was not in compliance with PIPA, or because it forgot to make specific submissions, it has not

established that the uses and/or disclosures of the Complainant's personal information in the e-mail of April 15, 2009 were in accordance with PIPA.

[para 51] Moreover, the Complainant effectively submits that she did not consent to the use and/or disclosure of her e-mail address or other personal information under section 8(1) or 8(2) of PIPA. As for section 8(3), under which an organization has the authority to use and disclose personal information about an individual for particular purposes if it provides the individual with notice and gives him or her a reasonable period of time to decline or object, I considered the uses and disclosures contemplated in the Organization's Privacy Policy, to which I referred earlier in this Order. I find that the uses and/or disclosures of the Complainant's personal information in the e-mail of April 15, 2009 are not contemplated there. Finally, I considered whether the Organization had authority to use and/or disclose the Complainant's personal information, without her consent, under section 17 and/or 20, but found that none of the circumstances enumerated in those provisions were present.

[para 52] I conclude that the Organization used and/or disclosed the Complainant's personal information in the e-mails of June 14, 2008 and April 15, 2009 contrary to section 7(1) of PIPA.

- E. Did the Organization use and/or disclose the Complainant's personal information contrary to, or in accordance with, sections 16(1) and/or 19(1) of the Act (use and/or disclosure for purposes that are reasonable)?**

- F. Did the Organization use and/or disclose the Complainant's personal information contrary to, or in accordance with, sections 16(2) and/or 19(2) of the Act (use and/or disclosure to the extent reasonable for meeting the purposes)?**

[para 53] Sections 16 and 19 of PIPA read as follows:

16(1) An organization may use personal information only for purposes that are reasonable.

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

...

19(1) An organization may disclose personal information only for purposes that are reasonable.

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

[para 54] As discussed in the preceding part of this Order, the Organization has not established that PIPA permitted it to use and/or disclose the Complainant's personal information in the e-mails of June 14, 2008 and April 15, 2009, whether on the basis of consent or prior notice, or on that basis of any of the other authorizing provisions in the Act. If an organization does not establish that it used and/or disclosed personal information with consent or prior notice, or in circumstances where consent is not required, it follows that the organization did not use and/or disclose the personal information for a reasonable purpose or to a reasonable extent.

[para 55] I accordingly conclude that the Organization used and/or disclosed the Complainant's personal information in the e-mails of June 14, 2008 and April 15, 2009 contrary to sections 16 and/or 19 of PIPA.

V. ORDER

[para 56] I make this Order under section 52 of the Act.

[para 57] I find that the Organization used and/or disclosed some of the Complainant's personal information in contravention of the Act or in circumstances that were not in compliance with the Act.

[para 58] Under section 52(3)(e) of the Act, I order the Organization to stop disclosing the Complainant's personal information in contravention of the Act or in circumstances that are not in compliance with the Act.

[para 59] Under section 52(4), I specify, as a term of this Order, that the Organization ensure that the members of its Board are made aware of the Organization's obligations under the Act. Compliance with this portion of the Order can be achieved by communicating the requirements of the Act to the members of the Board in a way that the Organization considers appropriate.

[para 60] 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. The notification should include a description of what the Organization did to comply with the preceding paragraph of this Order.

Wade Riordan Raaflaub
Adjudicator