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Privacy Edition

Privacy Decision Cautions on Use of Documents in Litigation

In other privacy news, a recent decision out of Alberta entitled *Calgary Board of Education v. Alberta (Office of the Information and Privacy Commissioner)*, 2014 ABQB 189, comments on the use of personal information held by a university, and the use of that personal information in an unrelated lawsuit.

Harold McBain was an employee of the Calgary Board of Education (the "School Board"). In 2003, McBain was the subject of several harassment complaints. During the course of investigating these complaints, information about the matters was collected and retained, despite the fact that these complaints were subsequently settled between the parties.

In 2007, McBain was called as a witness in an unrelated proceeding at a Board of Reference hearing that addresses teacher terminations and suspensions. He was not originally a party to this proceeding. During the Board of Reference hearing however, the School Board attempted to use information collected and obtained in respect of the earlier 2003 harassment complaints to undermine McBain's credibility. The Board of Reference ordered disclosure of all such documents to the parties involved at the Board of Reference hearing.

Following the Board of Reference's decision, McBain sought to prevent the use of the documents by initiating a complaint with the Office of the Information and Privacy Commissioner ("IPC") on the basis that the School Board had wrongfully used and disclosed his personal information and, further, that the School Board failed to protect his personal information contrary to Alberta's *Freedom of Information and Protection of Privacy Act* (the "*Act*"). The IPC Adjudicator agreed with McBain that the School Board's use and disclosure of his personal information was contrary to the *Act*, but ruled that the School Board had not failed to protect his information.

The School Board then applied to the Alberta Court of Queen's Bench to judicially review the Adjudicator's decision, arguing that the IPC did not have jurisdiction to rule on the broad scope of cross-examination to which a party is legally entitled at either common law or under the Act. The IPC made submissions on the standard of review, the record, the IPC's jurisdiction and the IPC's specialized expertise. After hearing submissions from the IPC and McBain, the Court held that the appropriate standard of review of the IPC Adjudicator's decision was reasonableness given that the *Act* superseded other general statutes and that the IPC Adjudicator's decision regarding disclosure and protection of information was well within the Adjudicator's sphere of expertise. Although the Court held that the IPC Adjudicator did not have jurisdiction to rule on the broad scope of cross-examination, it also held that the Adjudicator's decision did not impact this issue,

but instead focussed on the use, disclosure and failure to protect Mr. McBain's information by the School Board.

Ultimately, the Court held that the Adjudicator was reasonable in concluding that the School Board had used Mr. McBain's personal information in contravention of the Act. The School Board used the information to challenge Mr. McBain's credibility; this was not a purpose, or a consistent use, for which McBain's personal information was collected.

Although the language in Alberta's *Freedom of Information and Protection of Privacy Act* is not the same as in other provinces, this decision discusses use of information where non-parties are involved. Recall that McBain was not a party to the 2007 hearing. Whereas parties to the hearing are normally required to disclose relevant information, there was no such requirement in this case regarding McBain; indeed, the School Board wished to use McBain's previously collected, and otherwise unrelated, personal information to discredit McBain and bolster its case. This isn't to say that such information may never be used; in fact, the Court commented that the proper procedure would have been for the School Board to apply to the IPC to allow disclosure. In our view, the important message coming from this decision is that school administrators should consult with individuals thoroughly versed in privacy law prior to using documents containing personal information.

Trustee emails may not be subject to the *Municipal Freedom of Information and Protection of Privacy Act*

School Boards are often targets for freedom of information requests; however, a recent decision the Office of the Information and Privacy Commissioner ("IPC") entitled *Re York Region District School Board*, [2014] O.I.P.C. No. 77, held that some records, created and held by School Board trustees, are not subject to the access to information provisions pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the "*Act*").

In March 2012, the York Region District School Board (the "School Board") brought a motion to appoint a replacement trustee for a former trustee pursuant to the *Education Act*. The School Board created a selection process and provided potential candidates with an information package and invited candidates to make a short presentations. During the selection process, existing trustees sent email correspondence to one another, lobbying each other for support regarding the potential candidates. This lobbying was never intended to be part of the selection process; indeed the email communications were sent directly between trustees and were political in nature.

Subsequent to the selection of the replacement trustee, the School Board received a request for access to the emails sent as between the individual trustees. Although the School Board did collect the emails so that it could administer respond to the request, it refused to produce the correspondence on the basis that the email messages were not within the School Board's custody or control. The appellant appealed the School Board's decision not to produce the trustees' email messages..

In reviewing the circumstances of the email communications and ultimately denying the appeal, the IPC made several important findings. The IPC agreed with the School Board's position that the trustees in question were not employed by the School Board, nor did any of them hold a statutory position with the School Board. Because the trustees were not acting as officers or employees of the School Board, and were not discharging a "special duty" assigned by the School Board, it was found that the School Board did not regulate the content, use or disposal of the communications.

The IPC further held that the communications were provided to the School Board voluntarily by the trustees for the purposes of responding to the request; the emails were not integrated with other records held by the School Board, despite the fact that the email records existed on the School Board's server.

Finally, although the IPC found that discussions about the selection of a new trustee engaged School Board interests, this did not necessarily mean that the email communications in question were within the School Board's custody or control. The IPC held that private communications related to trustees' personal views and not to the selection process; that is, the content of the email communications did not engage a matter related to the School Board's mandate and instead related to the trustees acting in their political roles, which records are not covered by the *Act*.

In our view this decision is significant as it provides some insight regarding the requirement to disclose records created by school board trustees engaging in "political discussions" via email. That said however, and as indicated by the IPC Adjudicator, the context in which records are created will need to be assessed on a case by case basis in order to determine whether the right of access under the *Act* applies.

We welcome your comments and questions. Send them, and any updated contact information, to bryce.chandler@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to christen.broadbent@shibleyrighton.com