



Privacy Laws and “Public” Information

In Canada, private sector privacy legislation regulates how an organization may collect, use and disclose personal information about individuals. In assessing what is and is not considered “personal information”, organizations have generally believed that if the information is otherwise publicly available, there are no further privacy duties to the individual about that information, as it has entered the public domain.

Recently, the Privacy Commissioner of Canada issued a finding (Case # 2009-002) which casts doubt on this generally-held belief. The Commissioner found that it is not enough for the information to be otherwise available from a public source for an organization to lawfully disclose it without the individual’s consent. The information must also have been actually collected from that public source for the purpose of making that disclosure. In other words, actual organizational conduct may still matter.

In this particular case, the purchase price of a property was found to be personal information about the vendor. Post-closing, the price and address of the property were included in an advertisement placed by the real estate agent. While all that information was otherwise accessible through public property registries, in the case at hand the agent simply took the information from the purchase agreements to which the agent was privy.

In those circumstances the Commissioner found the agent could not rely on the “publicly available” exemption, and still owed privacy duties to the vendor to seek consent before publishing the information. The reasoning is based on the course of conduct taken by the agent, not on the nature of the information itself.

This result will be somewhat surprising for many. Most organizations assume that if they are confident that personal information has indeed entered the public domain via other valid means, then the information itself is no longer protected, despite the fact that the organization may have previously acquired it under private and confidential circumstances. If the federal Commissioner’s finding is correct, that assumption may no longer be valid.

Federal Privacy Commissioner findings are not formal adjudicated rulings and do not have the force of law. This matter has not been placed before the courts. However, the Commissioner’s findings are given high regard by industry observers in interpreting privacy legislation.

For more information, please contact Robert Pakrul of our information and privacy practice group at rpakrul@ahbl.ca. The Commissioner’s finding is on her website at www.priv.gc.ca.