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JUL 0 8 2008

Our File: 7100-03808

Ms. Philippa Lawson
Director
Canadian Internet Policy & Public Interest Clinic
Faculty of Law
University of Ottawa
37 Louis Pasteur, Rm 506
Ottawa, ON K1N 6N5

Dear Ms. Lawson:

I am writing to inform you of the results of our investigation of your complaint. Specifically, you advised that Service Canada (Office of the Umpire) is publishing CUB decisions on the Internet which contain personal information about individuals.

On August 17, 2007 I provided Service Canada with my Office's preliminary assessment of the matter to enable Service Canada to provide representations in response. My Office received additional written representations from Service Canada in a letter dated March 7, 2008.

Service Canada indicated that it was satisfied, following consultations with the Department of Justice, that the *Privacy Act* permits the publication of CUB decisions on the Internet. It also expressed Service Canada's belief that there are sufficient measures in place to protect personal information. No information or substantive representations were provided in support of either of these conclusions.

On March 27, 2008 after receiving Service Canada's response to my preliminary views, I provided Service Canada with a report pursuant to s. 35(1) of the *Privacy Act*. Service Canada responded in writing in a letter dated May 6, 2008. I have incorporated my comments on Service Canada's response to my report dated March 27, 2008 into this report to you, which represents the findings I have reached in respect to this complaint.

Open Court Principle

Service Canada originally argued the open court principle. The open court principle manifests as a presumption in favour of public and media access to judicial and quasi-judicial proceedings. I am of the opinion that the open court principle does not require or justify the electronic publication of the personal information in CUB decisions on the Internet.

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The open court principle can co-exist effectively with Service Canada's statutory obligations under the *Privacy Act* through reasonable efforts to depersonalize any CUB decisions posted online by replacing names with random initials. Where there is a compelling public interest in disclosure of identifying information that clearly outweighs the resultant invasion of privacy, Service Canada may exercise its discretion under subparagraph 8(2)(m)(i) to disclose personal information in identifiable form in CUB decisions. Thus, there is no intractable conflict between the rights and interests protected by the open court principle and compliance with the *Privacy Act*.

Paragraph 8(2)(a)

Section 8(2)(a) states that "[s]ubject to any other Act of Parliament, personal information under the control of a government institution may be disclosed for the purpose for which it was obtained or compiled or for a use consistent with that purpose".

In my letter of August 17, 2007 I advised Service Canada that I was of the view that paragraph 8(2)(a) does not authorize the disclosure of personal information in CUB decisions on the Internet.

As I indicated previously to Service Canada, the electronic disclosure of CUB decisions on the Internet is not the purpose for which the information was obtained. Moreover, such a disclosure is not, in my view, consistent with the reasonable expectations of individuals who participate in the CUB process. As such, it fails to satisfy the guidelines for identifying a consistent use promulgated by the Treasury Board Secretariat.

Disclosing CUB decisions *in identifiable form* on the Internet as a matter of course is not reasonably necessary for the accomplishment of Service Canada's mandate. There is no obvious, necessary or direct connection between publication on the Internet of CUB decisions *in identifiable form* and the discharge of Service Canada's mandate, particularly in each and every case as a matter of course. I have not been presented with any evidence that would suggest that the successful discharge of Service Canada's mandate would be hindered by the publication on the Internet of CUB decisions that utilizes random initials in place of parties' and witnesses' names.

Moreover, the actual uses to which personal information in the CUB decisions disclosed on the Internet may be put are unascertainable, virtually limitless and have considerable potential to be *in*consistent with or totally unrelated to the purpose for which Service Canada originally collected the personal information.

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Thus, it is difficult to see how the disclosure of CUB decisions on the Internet *in identifiable form* relying on the open court principle could be a disclosure for a use that is itself consistent with or sufficiently related to the purpose for which personal information was obtained.

It is also noteworthy that the posting of CUB decisions on the Internet does not appear to be listed as a consistent use in the Personal Information Index Service Canada is obliged to maintain under subparagraph 11(1)(a)(iv) of the *Privacy Act*.

Subparagraph 8(2)(m)(i)

While Service Canada did not cite or rely on paragraph 8(2)(m)(i) of the *Privacy Act* in its representations to my Office, other government institutions, in related complaint investigations, have. I include my analysis on this issue since it is relevant to my conclusions.

In my opinion, subparagraph 8(2)(m)(i) is not properly invoked where there are more minimally impairing options like depersonalizing and anonymizing decisions available. Moreover, subparagraph 8(2)(m)(i) cannot apply to authorize bulk disclosures of personal information via the Internet as a matter of practice in every case.

Only in exceptional circumstances that pass the very high threshold expressed in this provision of the *Privacy Act* could s. 8(2)(m)(i) apply to authorize the disclosure of personal information in CUB decisions on the Internet.

In my view, subparagraph 8(2)(m)(i) requires Service Canada to observe the following guidelines when exercising discretion under subparagraph 8(2)(m)(i) to disclose, in electronic form on the Internet, personal information in CUB decisions:

- When contemplating exercising its discretion under subparagraph 8(2)(m)(i), a government institution should identify the specific and *bona fide* public interest(s) that disclosure of the personal information in a decision will further. The public interest(s) in disclosure that a government institution identifies should be considered in light of, and weighed against the fact that it is in the public interest to prevent unnecessary invasions of privacy;

- A government institution should ensure that the contemplated disclosure of personal information is reasonably necessary to the accomplishment of the specific and *bona fide* public interest(s) in question by demonstrating that it is impossible to adequately further the public interest(s) in disclosure without disclosing personal information in an identifiable form;

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- If it is determined by a government institution that the specific and *bona fide* public interest(s) in disclosure it has identified actually requires the disclosure of personal information in an identifiable form, it must assess the nature and severity of the invasion of privacy that any reasonably identifiable individual discussed in its reasons for decision could suffer, considering the following list of non-exhaustive decision-making criteria:

    - whether advance notice of the potential for public disclosure of personal information in electronic form on the Internet was provided to individuals;

    - the degree to which personal information was provided under compulsion, in order to access a government benefit or service normally of a personal or private character;

    - the sensitivity and accuracy of the personal information being considered for disclosure;

    - the extent to which an individual maintains a reasonable expectation of privacy in the personal information in issue;

    - the possibility that the individual to whom the information relates will be unfairly exposed to monetary, irreparable reputational or any other harm as a result of the disclosure;

    - the possibility that the individual to whom the information relates could suffer discrimination as a result of the disclosure;

    - the privacy-invasive uses that could be made of the personal information, the likelihood and severity of which increase where personal information is disclosed in electronic form for publication on the Internet;

    - any special circumstances or privacy interests specific to individual cases.

- There should be a clear record setting out the institution head's assessment of why the disclosure is in the public interest and clearly outweighs any invasion of privacy for the individual(s) affected in order to facilitate judicial review;

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- Only where the specific and bona fide public interest(s) in disclosure of personal information "clearly outweighs" the competing privacy interests in non-disclosure may s. 8(2)(m)(i) properly be relied on to justify a disclosure of personal information; and

- Where the government institution, following this analysis, is satisfied that the invasion of privacy necessarily inherent in the non-consensual publication of personal information on the Internet is authorized by s. 8(2)(m)(i), it should provide the Privacy Commissioner with meaningful notice under s. 8(5) sufficient to enable the Privacy Commissioner to contact the individual(s) affected in advance of the intended disclosure, particularly in cases where the decision maker has not notified the individual(s) directly.

Conclusion

In view of the foregoing, I have therefore concluded that your complaint is well-founded.

Absent a legislative instrument that satisfies the requirements of s. 8(2)(b), I have concluded that compliance with s. 8(2)(m)(i) of the *Privacy Act* is required before personal information in personally identifiable CUB decisions may be disclosed in electronic form on the Internet. Where, however, CUB decisions are reasonably depersonalized through the use of randomly assigned initials in place of individuals' names, they may be posted on Service Canada's website in compliance with the *Privacy Act* absent the provision of notice under s. 8(5).

Recommendations

In accordance with s. 35(1)(a) of the *Privacy Act*, I recommended that Service Canada:

- Reasonably depersonalize future CUB decisions that will be posted on the Internet through the use of randomly assigned initials in place of individuals' names OR post on the Internet only a summary of the decision with no identifying personal information.

- Observe the guidelines respecting the application of subparagraph 8(2)(m)(i), set out above, in any case where Service Canada proposes to disclose personal information in CUB decisions in electronic form on the Internet.

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- Remove the CUB decisions that form the basis of these complaints from the Service Canada website on a priority basis until they can be reasonably depersonalized through the use of randomly assigned initials and re-posted in compliance with the *Privacy Act*.

- Restrict the indexing by name of past CUB decisions by global search engines through the use of an appropriate "web robot exclusion protocol" OR remove from or reasonably depersonalize all past CUB decisions on the Service Canada website through the use of randomly assigned initials, within a reasonable amount of time.

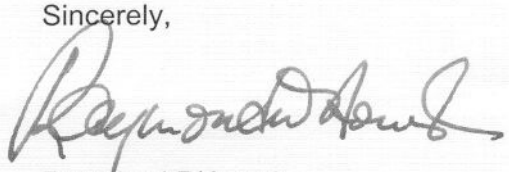
I also advised that the Office of the Privacy Commissioner of Canada would report these findings in its next *Privacy* Act annual report.

Service Canada's response to my report and recommendations

On May 12, 2008 I received Service Canada's response to my report and recommendations. I am pleased to advise you that Service Canada has agreed to implement all of my recommendations. Therefore, I now find your complaint resolved.

This concludes our Office's investigation into your complaint. If you have any questions about this letter, please do not hesitate to contact Jocelyne Rodrigue, the senior privacy investigator of record, at (613) 947-2701.

Sincerely,



Raymond D'Aoust
Assistant Privacy Commissioner