

We Know Where You Live – BC Privacy Commissioner Provides Guidance to Producers on How to Collect Residency Information from Cast and Crew

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Summary

There may be situations where film and television producers who rely on the federal and provincial tax credit programs to finance a portion of their production budgets are required to collect some personal information in order to verify that the individuals they are hiring as cast and/or crew on their productions are residents of Canada and/or the province in which the production is taking place. On October 26, 2006, the Office of the Information & Privacy Commissioner for British Columbia released Order P06-04, which arose from a complaint under the *Personal Information Protection Act* (British Columbia), which was filed by an individual who had been hired by a production services company owned by Twentieth Century Fox Film Corporation. The case provides some guidance to producers when collecting personal information.

Introduction

The Invisible Woman, a character from the Marvel Comics comic-book series and feature film *Fantastic Four*, possesses, among other abilities, the power to render herself invisible to on-lookers. It's a power many people probably wish they had: to avoid detection, not necessarily for nefarious purposes, but simply to stem the rush of personal information about ourselves which seems to inevitably end up in the hands of the government, business and those @#\$%!& telemarketers. There remain, however, a multitude of circumstances in which entities require certain personal information from others – for film and television producers who rely on the federal and provincial tax credit programs to finance a portion of their production budgets, one of the most important is the need to verify that the individuals they are hiring as cast and/or crew on their productions are residents of Canada and/or the province in which the production is taking place.

On October 26, 2006, the Office of the Information & Privacy Commissioner for British Columbia (the “**BC Privacy Commissioner**”) released Order P06-04 (the “**Order**”) (available in

.pdf format here: <http://www.oipc.bc.ca/PIPAOrders/2006/OrderP06-04.pdf>¹, which arose from a complaint under the *Personal Information Protection Act* (British Columbia)² (“**BCPIPA**”). The complaint was filed by an individual who had been hired by a production services company owned by Twentieth Century Fox Film Corporation (“**Fox**”); the production services company, Fantastic Four Ltd., had been incorporated in British Columbia to produce the aforementioned motion picture. The individual objected to being required to provide Fox with materials which Fox claimed it needed in order to establish the residency of the individual. One important component of the decision by Fox to film the movie in British Columbia was to be able to access the lucrative tax credit programs available to corporations producing films in Canada. In particular, because this film was not a “Canadian content” production, Fox was looking to access the tax credits pursuant to the federal Film or Video Production Services Tax Credit Program (the “**Federal Tax Credit**”) and the British Columbia Production Services Tax Credit (the “**BC Tax Credit**”).³

Production companies are entitled to receive tax credits in respect of certain eligible labour expenditures (*i.e.*, salary or wages paid in respect of services rendered to the production company) – one of the primary criteria which must be met in order for the labour expenditures to be eligible for treatment under the tax credit programs is that the expenditures must be paid to individuals who meet certain residency requirements. In the case of the Federal Tax Credit, the expenditures must be paid to a person “resident in Canada at the time the payments were made”.⁴ In the case of the BC Tax Credit, the expenditures must be paid to a person who was resident in British Columbia in the tax year preceding the year in which they are hired to perform services for the production company.⁵ Both the British Columbia Ministry of Small Business and Revenue (the “**BC Ministry**”), which administers the BC Tax Credit, and the Canada Revenue Agency (“**CRA**”), which administers the Federal Tax Credit, require certification by an officer of the production company that the amounts being claimed were paid to individuals who meet

¹ [2006] BCIPCD No. 35.

² *Personal Information Protection Act* (BC), SBC 2003, c. 63.

³ The Federal Tax Credit is administered pursuant to the *Income Tax Act* (Canada), and the BC Tax Credit is administered pursuant to the *Income Tax Act* (British Columbia). Further details about the Federal Tax Credit are available at http://www.canadianheritage.gc.ca/progs/ac-ca/progs/bcpac-cavco/index_e.cfm. Further details about the BC Tax Credit are available at <http://www.bcfilm.bc.ca>.

⁴ See subsection 125.5 (1) of the *Income Tax Act* (Canada), under the definition of “Canadian labour expenditure”.

⁵ See definition of “BC-based individual” in section 79(1) of the *Income Tax Act* (British Columbia) and section 2(1)(a) of the *Income Tax Act* (British Columbia).

the relevant residency requirements. The onus is thus on the production company to obtain materials which evidence to its satisfaction that an employed individual is a “resident” (within the statutory meaning) of Canada and British Columbia. Both the BC Ministry and CRA allow that various documents can be used to establish residency (such as government-issued photo identification and municipal tax statements), but both recommend that a Notice of Assessment (“**NOA**”) issued by CRA be obtained, and the Union of BC Performers (“**UBCP**”) has also confirmed that it is comfortable with its members being required to provide a copy of their NOA. Because the NOA contains financial information in addition to the identifying information (*i.e.*, name, address and Social Insurance Number), most individuals supplying it prefer to redact the financial information, since it is not required to establish residency.⁶

As alluded to above, the complainant objected to being obliged to provide Fox with documentation establishing residency as a prerequisite to being hired by Fox to perform services for the production company, and also expressed concern that the security measures implemented by Fox were below what was required of them pursuant to the BCPIPA. The complaint required the BC Privacy Commissioner to consider a number of issues, the most salient of which were:

- (1) did Fox’s practices for collecting personal information comply with Fox’s obligations pursuant to the BCPIPA?
- (2) did Fox have sufficient security arrangements in place with respect to the personal information collected by Fox?

The BC Privacy Commissioner answered both questions in the affirmative. Reviewing Fox’s practices in respect of both issues offers producers in other provinces, including Ontario, guidance on how they can collect, store and use personal information in compliance with their obligations pursuant to applicable privacy legislation. While Ontario does not have a comprehensive provincial privacy statute similar to the BCPIPA, the federal *Personal Information Protection and Electronic Documents Act* (“**PIPEDA**”),⁷ is in effect in Ontario, and contains language and imposes obligations which are broadly similar to those contained in the BCPIPA. While the BC Privacy Commissioner’s Order is not an interpretation of PIPEDA and thus is not binding authority in Ontario, the conclusions reached in the Order are instructive for producers wishing to comply with PIPEDA.

⁶ Such redaction is also encouraged by the UBCP and appears to be accepted practice by most production companies.

⁷ *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

Issue: Did Fox's Practices for Collecting Personal Information Comply with Their Privacy Obligations?

As threshold matters, the BC Privacy Commissioner confirmed that information establishing residency is indeed “personal information” for purposes of the BCPIPA,⁸ and that Fox’s collection and use of the information was “reasonable for the purposes” – namely, managing its employee relationships such that only individuals who were residents of Canada (and specifically British Columbia) and who would thereby enable Fox to maximize its rebates in connection with the Federal Tax Credit and the BC Tax Credit. The BC Privacy Commissioner concluded that Fox did abide by its obligations under the BCPIPA when collecting personal information.

Disclosure. A fundamental obligation under both the British Columbia and federal privacy regimes is that the purposes for which personal information is collected must be identified by the collecting organization at or before the time when the information is collected. Fox accomplished this in a number of ways:

- (a) all employees of the production company were provided with a “start package”, which included a memorandum which stated:

“Fox requires as a condition of employment that each Canadian must sign a Declaration of Personal Residency form and attach the required documents proving their residency. This information is necessary to establish and maintain the employment relationship. If the Declaration of Personal Residency form and requisite documents are not returned to the Production Accountant within the first 5 days of employment, Fox will be forced to terminate your services”;

- (b) the hiring documents provided to cast and crew included a “Declaration of Personal Residency” form, which had to be signed by the employee and included the following language:

“I understand that Fox will rely on this declaration for its application for the Federal and Provincial Tax Credits which may be subject to government audit. Accordingly I hereby represent and warrant that the above information is true and correct, and at any time (including after my services have been completed) should CRA require additional information with respect to proof of my residence, I agree

⁸ The defined term used in the BCPIPA and which was considered in detail by the BC Privacy Commissioner is “employee personal information”. However, the BC Privacy Commissioner confirmed at para. 39 of the Order that “information about an individual’s place of residency” is “personal information” for purposes of the BCPIPA, and the defined term “personal information” is largely congruent under both the BCPIPA and PIPEDA.

to cooperate with Fox in a timely manner and provide such requested information”.

Limitation. An additional fundamental obligation under both privacy regimes is that information which is collected be limited to that information which is reasonably necessary to accomplish the purpose for which the information is being collected. Fox only required the submission of an NOA, and had indicated in internal memos that information contained in an NOA which was not required for the purposes of establishing residency could be redacted or obscured. The BC Privacy Commissioner, in approving the procedures of Fox in this regard, noted that a producer must “make a reasonable effort to ensure that individuals ... *are given the opportunity, and the means*, to remove or obscure other personal information [*i.e.*, other than information required to prove residency] unless they consent to handing that information over” [emphasis added].⁹

Issue: Did Fox have sufficient security arrangements in place with respect to the personal information they collected?

Producers who collect personal information from cast and crew are under statutory obligations to protect such information from unauthorized disclosure. Under PIPEDA, personal information is to be protected against loss, theft, unauthorized access, disclosure and use by security safeguards appropriate to the sensitivity of the information.¹⁰ Similarly, under the BCPIPA, Fox was obliged to make “reasonable security arrangements to prevent unauthorized access, collection, use, disclosure, copying, modification or disposal or similar risks”.¹¹ Although the complainant in the Fox case was unable to provide any evidence of lax security, the BC Privacy Commissioner considered the issue in some detail.

The Fox security arrangements consisted of the following: personal information about employees was collected by the BC-based production accountant, which was forwarded to Fox offices in Los Angeles, where it was retained in secure, locked filing cabinets. Only a limited number of authorized individuals had access to the files, including certain Fox executives, tax authorities and Fox’s accountants on an “as needed” basis. Once CRA had completed its audit of

⁹ Para. 65 of the Order.

¹⁰ See PIPEDA, Schedule I, Section 5, Para. 4.7, which sets out Principle 7 – Safeguards.

¹¹ Section 34, BCPIPA.

the production (standard procedure on tax credit filings), the files containing the personal information were shredded. The BC Privacy Commissioner concluded that Fox's security arrangements were adequate and complied with Fox's statutory privacy obligations.

In assessing whether the security arrangements were reasonable, the BC Privacy Commissioner considered the following criteria: (i) the sensitivity of the information; (ii) the foreseeability of a privacy breach and any resulting harm; (iii) generally accepted or common practices in a particular industry; (iv) the nature (*i.e.*, format and storage medium) of the record containing the personal information; (v) the prospect of intentional wrongdoing relating to the personal information; and (vi) the cost of implementing security measures.¹²

While the Fox security arrangements were deemed to be sufficient, it is worth quoting in full the BC Privacy Commissioner's thoughts in the nature of the security obligation:

“... film production companies and other organizations must implement reasonable security arrangements for the on-site security at production locations, whether on-set or in the production office, and in transit to secure storage. Allowing personal information in documents to lie around exposed on tables or to otherwise be accessible would not be acceptable. As soon as an individual provides copies of documents, they must be accepted under conditions of reasonable security that guard against their unauthorized use, disclosure or disposal and they should be conveyed in a secure manner to safekeeping, and later for secure disposal when no longer required for tax credit program audit purposes.”

Conclusions

The Order contains a number of recommendations which, while not earth-shattering, are important for producers and production companies to keep in mind in order to ensure that statutory privacy obligations are observed:

- *Disclosure* – Producers should be sure to provide a written explanation to prospective employees about the reason why residency information is being collected.
- *Limitation* – Producers should make clear to employees that they have the right to “black out” or redact any information which is not pertinent to establishing residency (*e.g.*, if providing an NOA, all financial information can be obscured). Producers should also provide employees with the means to do this, such as providing employees with the time to review the documents and consider which

¹² Para. 80 of the Order.

information to obscure, along with any materials they may require in order to do so, such as access to photocopiers, markers or redacting tape.

- *Security* – Security arrangements must be implemented at all stages and in all locations: on-set, in the production office, during transit and in the final storage location. The nature of such arrangements should include, at a minimum, secured locations for storage (whether in a locked office or locked cabinets), limitations on authorized access, and procedures for the destruction of the records once they are no longer required for tax credit audit purposes.