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PRIVACY COMPLAINT REPORT

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County of Hastings

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October 19, 2001

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**PRIVACY COMPLAINT NO. MC-010001**

**MEDIATOR: Warren Morris**

**INSTITUTION: County of Hastings (the County)**

**SUMMARY OF COMPLAINT:**

The Complainant was a recipient of social assistance. As a property owner, under the *Ontario Works Act, 1997 (OWA)*, she was required to sign a document "Consent to Application of Lien"(Consent to Lien). The Complainant refused to sign the document on the grounds that she believed her privacy rights would be violated. Assistance was refused. The Complainant claimed she was not given an opportunity to obtain legal advice with respect to signing the Consent to Lien. A copy of the "Form 4 - Document General - Notice of Lien under the *Land Registry Reform Act*" (Certificate of Lien) which would eventually be publicly registered was not provided to her at that time. Upon receiving legal advice, the Complainant requested from the County a copy of the Consent to Lien and the Certificate of Lien that was intended to be filed. The Complainant alleges that she did not receive the printed form of the Certificate of Lien until a much later date and was advised that the actual Certificate of Lien itself would not be provided until such time as the Consent was signed. In the meantime, the Appellant appealed the decision to deny assistance to the Social Benefits Tribunal, which granted interim assistance.

A copy of the Certificate of Lien (titled "Document General") used by the County has pre-printed in box 5 the words "Consideration - Basic Financial Assistance". Further, box 8 states:

This Document provides as follows: \_\_\_\_ has consented to \_\_\_\_\_ having a lien against the lands described in box number 6 for the costs of basic financial assistance as determined under O. Reg. 134/98 made under the *Ontario Works Act, 1997 c.25* Schedule A.

This document is intended to be publicly registered. The Complainant believes this to be an inappropriate disclosure of personal information in breach of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The Complainant claims that the County informed her that the information in boxes 5 and 8 of the Document General comes to the County in a pre-printed form from the Ministry and that the County is not in a position to make amendments to the lien document.

The Complainant requested that her identity not be disclosed.

During the investigation stage of the complaint process, I sent the County a letter of investigation and asked it to respond to a number of questions in regards to its practices/policies and its authority for carrying out such practices/policies. The County responded by identifying its practices/policies that were, for the most part, consistent with the Complainant's experience. Section 12 of the *OWA*, sections 39(1)14, 39(1)15 and 66 of the *OWA Regulation*, and Policy Directives were cited as the authority. The relevant sections read as follows:

12(1) An administrator shall in prescribed circumstances, as a condition of eligibility for basic financial assistance, require an applicant, recipient, spouse, same-sex partner or dependent adult who owns or has an interest in property to consent to the delivery agent having a lien against the property, in accordance with the regulations. 1997, c. 25, Sched. A, s. 12 (1); 1999, c. 6, s. 50 (1).

66(1) An administrator shall, as a condition of eligibility for basic financial assistance, require a person who owns or has an interest inland in Ontario and to whom section 12 of the Act applies to consent to the delivery agent having a lien against the land. O. Reg. 134/98, s. 66(1); O. Reg. 170/99, s. 7, part.

(2) If the person has consented to the delivery agent having a lien against the land, the delivery agent may register a notice of lien in the appropriate registry or land titles office. O. Reg. 134/98, s. 66(2); O. Reg. 170/99, s. 7, part.

The County also maintains that the use and disclosure of personal information is in compliance with sections 28 through 32 (Protection of Individual Privacy - Collection and Retention of Personal Information) of the *Act*.

The County indicated that a Consent to Lien is taken by a caseworker on a participant's principal residence when the participant receives assistance for more than twelve continuous months. Pursuant to the Ontario Works Policy Directive 12.2, all participants affected by this policy are advised that they have fourteen days to review the Consent to Lien and consult with legal counsel if they desire. The County confirmed that the Certificate of Lien is not provided when the Consent to Lien is completed and that the Certificate of Lien is only sent to the recipient if

and when it is registered in the Land Registry or Land Titles Office. The County confirmed the wording on the Certificate of Lien as accurate, and described it as a "prescribed" pre-printed document. Section 12(1) of the *OWA* obligates the County to have the Consent to Lien signed in all the prescribed circumstances and refusal to sign would make an applicant ineligible. The County claimed that it has no discretion with respect to the requirement of the consent to lien being signed nor do they have discretion with respect to registering the lien itself, in the circumstances such as the Complainant's.

## **DISCUSSION:**

### **Issue A: Is the information in question "personal information" as defined in section 2(1) of the *Act*?**

Section 2(1) of the *Act* states in part that "personal information" means recorded information about an identifiable individual, including

(b) information relating to... financial transactions in which the individual has been involved,

(d) the address ... of the individual,

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The information collected for the purpose of appearing in the Document General - Notice of Lien includes the Complainant's name, address as well as the fact she is receiving basic financial assistance through the *OWA*. I find that the information collected by the County is the Complainant's personal information as defined in paragraphs (b), (d) and (h) of the definition of personal information in the *Act*.

**Conclusion: The information in question is personal information as defined in section 2(1) of the *Act*.**

### **Issue B: Did the County disclose the Complainant's personal information?**

It is clear from the information provided by the Complainant, that her personal information has not been disclosed at this time. The personal information contained in the Certificate of Lien in regards to the Complainant has not been registered with the land registry office nor has this personal information been disclosed publicly or otherwise released in anyway by the County. Accordingly, I find that the County has not acted in contravention of the *Act*.

**Conclusion: The County did not disclose the personal information of the Complainant, and the County has not acted in contravention of the *Act* in this regard.**

Although it is clear that the County has not disclosed the Complainant's personal information, it would be trite to dismiss this complaint on that basis alone, given that there is every indication that the County would have registered the lien had the Consent to Lien been signed. For the purposes of investigating whether the County's practices/policies contravene the *Act*, it will be assumed that the Complainant did sign the Consent to Lien, and that the lien was registered in the Land Registry Office in the form described above. The County indicated that it would have registered the lien publicly in the template form described above. As such, the County to had given a clear indication of an intention to disclose the Complainant's personal information.

**Issue C: Does Part II of the *Act* apply, and if so was the collection and the intended disclosure of the complainant's personal information in compliance with Part II (sections 27-32) of the *Act*?**

Section 27 of the *Act* reads as follows:

This Part does not apply to personal information that is maintained for the purpose of creating a record that is available to the general public.

"This part" refers to Part II of the *Act* which sets out provisions for the protection of individual privacy.

In Privacy Investigation Report PC-980049-1, Commissioner Ann Cavoukian stated:

In order to satisfy the requirements of section 37 [the section of the provincial *Freedom of Information and Protection of Privacy Act* is identical to s.27 of the *Act*], the Ministry must establish that the information in question is "personal information", that the personal information is being maintained by the institution, and that the purpose of maintaining the personal information is to create a record that is available to the general public.

...

It is our view that under section 37 of the *Act*, personal information that is maintained by an institution may be excluded from the application of Part III of the *Act* [this part of the provincial *Freedom of Information and Protection of Privacy Act* is identical to Part II of the *Act*] only if the personal information is maintained by that institution specifically for the purpose of creating a record which is available to the general public. Other institutions cannot claim the exclusion unless they also maintain the personal information for this purpose.

The Ministry submits that section 37 applies to the information within the land registry records. The Ministry indicates that it collects the personal information in question in order to fulfill its obligations in providing a land registration system for Ontario, and that the Registry Act, the Land Titles Act and the Land Registration Reform Act provide the statutory authority for the collection and disclosure of this information. The Ministry submits that the information that is

collected forms part of a public record, which is available to any member of the public, including lenders, on an individual record-by-record basis.

Having reviewed the above-mentioned legislation we concur that they contain a number of provisions which make it clear that the Ministry has a duty to make land registration records available to the public. One example of such a provision is section 15(1) of the Registry Act which reads as follows:

Upon receipt of a request in writing and the prescribed fee, a land registrar,

(a) shall produce for inspection in his or her office during office hours any instrument registered in the land registrar's office or any book of the office relating to any such instrument; and

(b) shall supply a copy of the whole or a part of any instrument registered in his or her office.

Section 166 of the Land Titles Act also contains similar provisions.

The above-mentioned legislation also places no restrictions on who may have access to this information or in what manner. The only requirements are to pay a prescribed fee, make a written request in some cases, and obtain access during office hours. Thus, because there is a legal duty to make certain records available to the general public, a demonstrated practice of actually making these records available, and a standardized price applied to all users of the land registration system, it is our view that the personal information in question is maintained at the Land Registry Offices specifically for the purpose of creating a record that is available to the general public.

The only remaining issue is the definition of "record" for the purposes of this finding.

The term "record" is defined in section 2(1) of the Act as follows:

"record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

(a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of

physical form or characteristics, and any copy thereof, and

(b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

The information in question is found in "instruments" and other "documents" registered under the various land registration statutes. The term "instrument" is defined in the Registry Act as:

"Instrument" includes every instrument whereby title to land in Ontario may be transferred, disposed of, charged, encumbered or affected in any other way...".

The Registry Act definition of "instrument" does not state how the information in instruments must be recorded. However, the Registry Act makes it clear in section 16 that registered instruments, documents deposited under Part II (called "deposits"), and "written records" may all be "recorded electronically or on a magnetic medium". There is a similar provision (s. 166) in the Land Titles Act. Therefore, these documents do not lose their character as instruments, deposits or written records because they are recorded electronically. That is, even though they are not defined as such, instruments, records and documents in these registry systems include electronic records.

...

Therefore, it is our view that all individual land registration documents constitute "records" for the purposes of paragraph (a) of the definition of "record" contained in section 2(1) of the Act, regardless of whether they exist on paper, microfilm or electronically, and regardless of whether they are retrieved manually or electronically.

...

Application of section 37 of the Act

**Conclusion:** The personal information contained in individual land registration records, either in paper, microfilm or electronic format, are maintained at the Land Registry Offices for the purposes of creating a record that is available to the general public, thus falling under section 37 of the Act. Accordingly, Part III of the Act does not apply to these individual records.

In view of the above, it is not necessary to consider whether the personal information was disclosed in compliance with section 42 of the Act.

I concur with the reasoning in Privacy Investigation Report PC-980049-1. The fact that the County is not actually maintaining the public registry does not remove the applicability of the exclusion. Assuming the County had disclosed the Complainant's personal information by registering the Certificate of Lien, the personal information on that document would be "maintained for the purpose of creating a record that is available to the general public" through the Land Registry system. In such circumstances, section 27 of the *Act* clearly states that Part II of the *Act* does not apply. As such, it is not necessary for me to address the issue of whether the collection and disclosure of the complainant's personal information was made in compliance with sections 28- 32 of the *Act*.

**Conclusion: The personal information placed in the Document General - Notice of Lien by the County is maintained for the purpose of creating a record that is available to the general public, thus falling within the scope of section 27 of the Act. Accordingly, Part II of the Act does not apply to these records.**

## SUMMARY OF CONCLUSIONS

- The information in question is the Complainant's "personal information" as defined by section 2(1) of the *Act*.
- The County has not made any disclosure at this time, of the Complainant's personal information, and has not contravened the *Act*.
- Even if the County had disclosed the Complainant's personal information via the land registry system, the County would not be in contravention of the *Act* for the reason that the personal information would be maintained for the purpose of creating a record that is available to the general public.
- The County has not acted in contravention of the *Act*.

## OTHER MATTERS

Although the County has not acted in contravention of the *Act*, the County may wish to reconsider its policies and procedures surrounding the collection and disclosure of personal information. I have found that Part II of the *Act* would not have applied to this situation, however the *Act*, and Part II in particular, does provide some helpful guidelines in terms of the collection and disclosure of personal information.

### Disclosure of Personal Information

Had it not been for the application of section 27, the personal information in issue could only be disclosed in accordance with section 32 of the *Act*. Of particular application to the circumstances of this investigation is section 32(e), which reads as follows:

An institution shall not disclose personal information in its custody or under its control except,

(e) for the purpose of complying with an Act of the Legislature ...;

The relevant Act of the Legislature is the *OWA*. The specific provision is section 12(1), which reads as follows:

An administrator shall in prescribed circumstances, as a condition of eligibility for basic financial assistance, require an applicant, recipient, spouse, same-sex partner or dependent adult who owns or has an interest in property to consent to the delivery agent having a lien against the property, in accordance with the regulations. 1997, c. 25, Sched. A, s. 12 (1); 1999, c. 6, s. 50 (1).

This provision requires the Complainant to consent to the County ("delivery agent") having a lien against the property in accordance with the regulations.

### **Exercising Discretion to Register Lien**

The County was required to have the Complainant sign the Consent to Lien as a condition of eligibility for basic financial assistance. The County has no discretion in this regard. Section 12(1) of the *Ontario Works Act*, cited above, is clear in this regard given that the word "shall" is used.

However, contrary to the County's submissions, it appears that the County does have discretion as to whether the lien itself is registered. Subsection 66(2) of O. Reg. 134/98 the *OWA* states:

If the person has consented to the delivery agent having a lien against the land, the delivery agent **may** register a notice of lien in the appropriate registry or land titles office. [Emphasis mine]

Once having received the required Consent to Lien, the County then has discretion as to whether it registers the Document General - Notice of Lien. Discretion necessarily requires a decision maker to apply their judgment to the situation in each matter and make an evaluation based on established guidelines or criteria, on a case-by-case basis. The County may wish to consider establishing guidelines or criteria to put in place to address the making of decisions as to whether or not it is appropriate to register the lien.

**Recommendation: that the County consider whether to create guidelines/criteria for the exercise of discretion in deciding when to register liens.**

### **Informed Consent**

The County had confirmed its practice of not providing a copy of the Certificate of Lien when the Consent to Lien is completed and that the Certificate of Lien is only sent to the recipient if



and when it is registered in the Land Registry or Land Titles Office. This practice does not appear to contravene the provisions of the *OWA*. However, this practice does not provide applicants, such as the Complainant, with full disclosure of what will be registered on title at the time they are consenting to the lien. The information that is contained in the Document General is personal information of a sensitive nature. To be acting more within the spirit of the *Act*, the County may consider providing a copy of the pre-printed Ministry form of Document General at the time an applicant is completing the Consent to Lien.

**Recommendation: that the County provide a copy or sample of the template or pre-printed Ministry form of Certificate of Lien intended to be registered, to applicants at the same time as the Consent to Lien is presented.**

**Wording on Certificate of Lien: Must there be reference to "Basic Financial Assistance under the *OWA*"?**

A primary concern to the Complainant is the wording on the Certificate of Lien. If she were to sign the Consent to Lien, the fact that she was in receipt of social assistance under the *OWA* would become publicly available information via the land registration system. The Complainant believes that such a disclosure would constitute an unjustified invasion of personal privacy under section 14 of the *Act*.

Section 14(3)(c) of the *Act* states:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

...

(c) relates to eligibility for social service or welfare benefits or to the determination of benefit levels;

Section 14 of the *Act* relates to exemptions from requests for access to records under Part I of the *Act*, and clearly would not apply to the context of this complaint. Nonetheless, the fact that personal information relating to the eligibility for social service is presumed to be an unjustified invasion of personal privacy is an indication that the drafters of the *Act* believe Social Assistance information is sensitive and that such information should not unnecessarily be made available to the public.

Subsection 66(9) of the *Ontario Works Act, Regulation*, states:

(9) A notice of lien and a discharge of lien under this section shall be in a form approved by the Director. O. Reg. 134/98, s. 66(9); O. Reg. 227/98, s.36(4); O. Reg. 170/99, s. 7, part.

The Director (of Ontario Works appointed by the Minister of Community and Social Services) has provided the County with the approved form for the notice of lien. It appears that it is the

Director, not the County, which has the authority/jurisdiction, subject to other legislation, to determine what wording is placed in the notice of lien form.

Thus the question now becomes, is the Director legally able to direct that the notice of lien be in the form different from the form it currently approves? In other words, is there anything in the land registration protocol that requires reference to basic financial assistance under the *OWA*, be contained in the notice of lien?

Inquiries have been made to the Ministry of Consumer and Business Services (MCBS), which is the Ministry responsible for the operation of the land registry system. When asked as to whether a notice of lien could be worded so that there is no reference to the *OWA*, in order to be valid and accepted for registration, the MCBS response was as follows:

"...one of the principles underlying the land titles system is the mirror principle. The register is a mirror of the state of title. The system by its very nature is public. Upon presentation of a document for registration, the Registrar considers whether the document deals with an interest in land and whether the interest is derived from the owner.... A notice of lien cannot be registered without specific reference to the authority under which it is being registered. As indicated above, upon receiving an instrument for registration, the Registrar considers whether it deals with an interest in land. Specific statutory reference is required in order to make that assessment. That being said, it is not necessary to provide detail beyond the statutory reference (i.e. "for basic financial assistance" as contained in the sample you provided for my review)...

The MCBS further stated that the exact monetary amount claimed under the lien need not be specified in the registered document. Reference to the section of the *OWA* under which the claim for lien arises is sufficient.

From the perspective of the requirements of the land registration system, it does not appear necessary that the form of lien approved by the Director of the Ministry of Community and Social Services refer to "basic financial assistance" in either box 5 or box 8 of the Document General - Notice of Lien. However, in order for the Land Registrar to ensure that the lien properly pertains to an interest in land, MCBS has indicated that it is necessary for there to be a reference to the legal authority for the lien, i.e. O. Reg. 134/98 made under the *OWA*.

In order to be consistent with the spirit of the *Act*, the publicly registered document should make reference to as little of the Complainant's personal information as is legally and practically permissible. Subject to what we may hear from the Complainant and later, from the Ministry of Community and Social Services, it would appear that while the reference to the regulation under the *OWA* will have to be maintained, references to "basic financial assistance" in boxes 5 and 8 of the Document General - Notice of Lien should be deleted.

Despite the fact that the *Act* does not apply to the disclosure of personal information by way of Documents General - Notices of Lien under the *OWA*, the IPC's Policy and Compliance

Department will be contacting the Ministry of Community and Social Services to discuss the outcome of this report.

Original signed by: Warren Morris, Mediator  
October 19, 2001