



## Report of Findings

File 6100-03231

### Complaint under the *Personal Information Protection and Electronic Documents Act (the Act)*

1. The complainant alleges that Allstate Insurance Company of Canada (Allstate) collected her personal information via covert video surveillance in 2003 and 2007 without her consent. She also alleges that Allstate then used that information without her consent in its preparation for an arbitration hearing relating to her insurance claim.

### Summary of Investigation

2. The complainant was involved in a motor vehicle accident in June 2002. Allstate was the insurer of her husband, who was driving the vehicle in which she was a passenger at the time. As a result of injuries she sustained from the accident, the complainant applied for and ultimately received payment from Allstate under the Statutory Accident Benefits Schedule (SABS) of the *Ontario Automobile Insurance Act*. The various benefits that the complainant received under SABS (e.g., income replacement, housekeeping, medical and rehabilitation) were not permanent.
3. In February 2006, the complainant applied to Allstate for the determination of catastrophic impairment, which, if conferred, would entitle her to extended benefits, and also increase the coverage for some of these. This Office examined a copy of the complainant's signed *Application for Determination of Catastrophic Impairment*, dated February 28, 2006.
4. According to s.2 (1.1)(g) of the SABS schedule, to have the catastrophic impairment status conferred on her, the complainant would have to be recognized as having "... an impairment or combination of impairments that, in accordance with the *American Medical Association's Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> edition [AMA Guides], attain certain prescribed standards." Specifically, the impairment or impairments must be either a class 4 (marked impairment) or a class 5 (extreme impairment).



5. Pursuant to Section 42 of SABS, Allstate requested that the complainant be assessed to determine if her condition met the set criteria for catastrophic impairment. The report of that assessment concluded in June 2006 that the complainant did not meet the criteria for a catastrophic impairment determination. Subsequently, Allstate denied payment of the extended benefits that the complainant was seeking.
6. As a result of the denial, the complainant applied for mediation to the Financial Services Commission of Ontario (FSCO) in September 2006. She also obtained another medical assessment of her condition in November 2006, at her own expense. This assessment determined that she did meet the criteria for catastrophic impairment.
7. The mediation concluded in December 2006 and failed to resolve whether the complainant suffered from a catastrophic impairment as well as other disputed benefit issues between Allstate and the complainant.
8. In February 2007, the complainant filed for arbitration through the FSCO. The determination of catastrophic impairment is cited as one of the issues in dispute, as are the conclusions of Allstate's first assessment of the complainant's condition, and non-payment of various transportation and medically related costs. The complainant also asserted that she suffered a Class 4 mental or behavioural impairment (i.e., marked impairment) as defined by the *AMA Guides*.
9. These guides describe a Class 4 impairment as one where "impairment levels *significantly impede* useful functioning". [original italics] There are four areas or aspects of daily functioning affected: 1) Activities of daily living; 2) Social functioning; 3) Concentration, and; 4) Adaptation.
10. A pre-arbitration hearing was held in July 2007 and an arbitration date was set for May 2008. On December 5, 2007, in the course of preparing its case for the scheduled arbitration, Allstate requested that its contractor carry out covert surveillance on the complainant. Allstate's emailed request stated that the complainant's benefits claim concerned soft tissue injuries that had evolved into pain disorder, as well as psychological/psychiatric issues affecting activities of daily living. Allstate's request suggested surveillance during social activities and Christmas shopping. Allstate followed up the email request with a memo to the contractor.



11. Covert surveillance occurred on four separate days in December 2007. After the surveillance operation, the contractor submitted a written report and video images to Allstate. That information (along with the video surveillance information about the complainant collected by another contractor in 2003) was provided to FSCO and to the complainant in April 2008 as part of Allstate's brief that included all documents Allstate intended to rely on at the future arbitration hearing.
12. (The issue of the collection of the complainant's personal information from video surveillance in 2003 was not investigated by this Office because the collection occurred prior to January 1, 2004. Before this date, the respondent organization was not subject to the *Act*. However, the issue of the future *use* of that information by Allstate will be addressed later in this report.)
13. Allstate had, at the time of the surveillance, a standing contract with the private investigation contractor who conducted the surveillance on the complainant in 2007. This Office examined a copy of the contract, which includes specific provisions relating to the protection of personal information, including one that requires that activities be carried out in accordance with the *Act*.
14. Our investigation established that this private investigation contractor meets the requirements of a designated "investigative body" under Section 1(w)(i) of the *Act*: Regulations Specifying Investigative Bodies.

### Application

15. In making our determinations, we applied Principle 4.3, which stipulates that the knowledge and consent of the individual are required for the collection, use or disclosure of personal information, except where inappropriate.
16. Paragraph 7(1)(b) provides an exception to knowledge and consent of the individual only if it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.
17. We also applied Principle 4.3.4, which states that the form of consent sought by an organization may vary depending on the circumstances and the type of information. Principle 4.3.5 stipulates that the reasonable expectations of the individual are relevant in determining the form of consent to be used.



18. We also considered Principle 4.4, which states that the collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.

### Findings

19. At issue is whether Allstate required the complainant's consent to collect her personal information via the video surveillance operation of her in December 2007, and to use this information and other gathered in 2003 in preparation for a FSCO arbitration, a process which the complainant had initiated.

### Collection

20. Principle 4.3 of the *Act* stipulates that knowledge and consent are necessary for collection, use or disclosure of personal information, unless an allowable exception can be applied.
21. After reviewing the facts revealed by our investigation, it is my view that the exception provided by paragraph 7(1)(b) can be applied in this case to exempt the consent normally required for a collection under Principle 4.3.
22. Paragraph 7(1)(b) provides for collection of information without the consent of the individual if it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province.
23. In cases of investigating suspected exaggeration of injuries for insurance claim purposes, it is reasonable to assume that if subjects are aware of the collection of their medical information (e.g., by means of video surveillance), the type of information sought, if it exists, would either be unavailable or compromised. Therefore, in the complainant's case, it is reasonable to expect that any relevant information gathered with a view to ascertain her level of disability would not have been reliable had the complainant known of the surveillance beforehand. Thus, the first requirement of paragraph 7(1)(b) was met in this case.
24. Regarding the second requirement of paragraph 7(1)(b), our investigation determined that when the complainant signed her *Application for Determination of Catastrophic Impairment* in February 2006 (i.e., prior to the video surveillance),



she thereby acknowledged that "... it is an offence under the federal Criminal Code for anyone, by deceit, falsehood, or other dishonest act, to defraud or attempt to defraud an insurance company."

25. In my view, Allstate's collection without consent of the complainant's personal information was reasonable to investigate her compliance with federal law that prohibits insurance fraud. A core business function of insurance companies is to investigate claims to determine their validity. In so doing, insurers are able to reveal and deny claims that can turn out to be fraudulent (and are therefore unlawful). Thus, since the second requirement of paragraph 7(1)(b) was met, the complainant's consent for the collection was not required under Principle 4.3 of the Act.
26. Further, in previous insurance cases investigated by this Office where covert video surveillance of a claimant without their consent was the issue, we have stated that such surveillance is justifiable when other means of collecting the necessary information have not been conclusive, and that it must be limited and for reasonable purposes. I note that, in the complainant's case, the considerable body of medical evidence accumulated over several years from numerous experts did not consistently support a determination either for or against catastrophic impairment. A previous mediation process with FSCO was also unsuccessful in resolving the conflict. I am satisfied that in this case Allstate undertook video surveillance only after other measures failed to resolve the dispute.
27. Our investigation reviewed the instructions provided to the private investigation firm and the firm's investigation report. I am satisfied that the scope of the requested video surveillance and the type of information requested—as well as that ultimately collected—do not exceed what one would reasonably expect in order to assess the complainant's four areas of daily functioning contained in the definition of the Class 4 impairment that was specifically in dispute.
28. Although the complainant specifically expressed her concern to this Office about the private investigator's noting of her lawyer's address on an envelope of documents she was mailing while under surveillance, in my view, documenting an individual's ability to carry out legal challenges is relevant in a case that is claiming a marked mental and behavioural impairment.
29. Thus, it is my opinion that, since the collection of the claimant's personal information was limited to the purposes identified by the organization, Principle 4.4 was upheld.



### Use

30. With regard to Allstate's use of the complainant's personal information in preparation of the FSCO arbitration hearing, in my view, the complainant's explicit consent was not necessary. Although organizations should generally strive to obtain an individual's express consent to collect, use or disclose that individual's personal information, there are circumstances in which an individual's consent to the collection, use or disclosure of the information may be implied, pursuant to Principle 4.3.4.
31. By initiating an arbitration proceeding before the FSCO in which she put her personal medical information and her level of disability in issue, the complainant gave her implied consent for the collection, use, and disclosure of her personal information by the insurer for the specific purpose of defending itself in the context of the arbitration proceeding.
32. The personal information at issue here was collected via covert video surveillance operations of the complainant in 2003 and 2007. Our investigation confirmed that the information Allstate provided to FSCO in a brief in April 2008 was limited to that necessary for the insurer to defend itself against the complainant's specific issues. In my view, information about the complainant's physical and mental capabilities that had been collected in 2003 was necessary for a comprehensive description of her post-accident condition over time. Moreover, in order to assess the complainant's injuries and evaluate her eligibility for the determination of catastrophic impairment under the SABS, information contributing to an independent and objective corroboration of the complainant's claimed level of impairment—such as information obtained legally via covert surveillance—would have been needed in this case.
33. Thus, under these circumstances and for this limited purpose, I would deem it reasonable for an individual not to expect the insurer to seek her express consent to use her medical information. For these reasons, Principles 4.3.4 and 4.3.5 were not violated.

### Conclusion

34. Accordingly, the complaint is not well-founded.