

“Litigation Privilege And The Protection Of Personal Information”

Reported Case:	<i>State Farm Mutual Automobile Insurance Company v. Privacy Commissioner of Canada</i>
Citation:	2010 FC 736
At Issue:	Does the <i>Personal Information Protection and Electronic Documents Act</i> , S.C. 2000, c.5 (“PIPEDA”) apply to evidence collected by an insurer on behalf of an insured in order to defend that insured in a tort action?
The Court:	Federal Court of Canada
Judgment Rendered:	July 9, 2010
Factual Summary:	<p>A tort action was commenced in New Brunswick as a result of a motor vehicle accident in that province. The defendant’s insurer retained counsel to defend the claim. On advice of counsel, the insurer hired private investigators to inquire about the plaintiff’s activities and obtained video surveillance of the plaintiff. The defendant claimed litigation privilege and solicitor-client privilege over the videotapes and narrative surveillance reports.</p> <p>The plaintiff complained to the Privacy Commissioner alleging violations of PIPEDA, <i>inter alia</i>, that the insurer had denied him access to his personal information, disclosed his personal information to a third party without his consent, and had not provided adequate safeguards to protect his personal information.</p>
Disposition:	<p>The investigation reports and related documents and videos concerning the plaintiff and prepared by or for the insurer or its lawyers to defend the civil tort action are not subject to PIPEDA.</p> <p>PIPEDA applies to every organization in respect of personal information that it collects, uses or discloses in the course of “commercial activities”. The purpose of PIPEDA is to support and promote electronic commerce by protecting personal information collected, used or disclosed in certain circumstances. The collection of evidence in order to properly defend a civil tort action has little or nothing to do with such purpose.</p> <p>If an individual defendant collects evidence herself to defend a civil tort action, there is no “commercial character” associated to that activity. The fact that the defendant utilizes the services of her insurer in collecting information does not change the character of the activity.</p> <p>If the primary activity or conduct at hand is not a commercial activity contemplated by PIPEDA, then that activity remains exempt from PIPEDA even if third parties are retained by an individual to carry out it on her behalf. The primary characterization of the activity in issue is the dominant factor in assessing the commercial character of that activity under PIPEDA, not the incidental relationship between the one who seeks to carry out the activity and third parties.</p> <p>The collection of evidence by the defendant’s insurer in order to defend the civil tort action brought against her by the plaintiff was not a “commercial activity” within the meaning of PIPEDA. The insurer-insured and solicitor-client relationships were merely incidental to the primary non-commercial activity at issue: the collection of evidence to defend a tort action.</p> <p>Further, in the spirit of judicial comity, and where the tort action was still pending before the provincial superior court, the Privacy Commissioner had no authority to demand justifications from the insurer with regard to its claims of privilege vis-à-vis that evidence.</p> <p>See: http://www.canlii.org/en/ca/fct/doc/2010/2010fc736/2010fc736.html</p>

