

DECISION OF THE DIRECTOR [AMENDED]

In the Matter of: *Business Practices and Consumer Protection Act, S.B.C. 2004, c.2
Home Inspector Regulation*

Respondent: Daniel Funk (Sun City Home Inspections)

Licence: 82994 [closed]

Case Number: 31525

Adjudicator: Tegan Scardillo

Date of Decision: May 2, 2023

A. INTRODUCTION

1. Under statutory delegation, Consumer Protection BC (Business Practices and Consumer Protection BC Authority) is responsible for the administration of the *Business Practices and Consumer Protection Act* (“BPCPA”) and the Regulations associated with the BPCPA.
2. The Respondent is an individual who was conducting business in BC as a home inspector under a home inspector licence granted by Consumer Protection BC. The Respondent was licensed from approximately October 2021 to February 2023. The Respondent notified Consumer Protection BC of their decision to close their home inspection business by submitting a business closure form on February 13, 2023. The Respondent’s home inspector license is now “closed”, and the Respondent is no longer licensed to conduct home inspections in the Province of BC.
3. On January 18, 2023, a Consumer Protection BC Inspector (“the Inspector”) issued the Respondent a ‘Report to the Director’ (“the Report”) alleging the Respondent violated section 189(5) of the BPCPA when they refused to provide information required under the Act.
4. I have been delegated the authority of the Director to decide if a contravention to the BPCPA has taken place. This delegated authority allows me to exercise the powers of the Director under Part 9 and 10 of the BPCPA. A copy of the Report has been provided to me to perform these delegated adjudicative functions.

5. With a few exceptions, the BPCPA requires the Respondent be given an opportunity to be heard to any allegation before a determination is made and any potential statutory action is taken.
6. In an email dated February 3, 2023, a hearing notice (or “opportunity to be heard”) on the allegation advanced in the Report was provided to the Respondent. The hearing notice invited the Respondent to formally respond to the allegation by presenting written submissions on evidence, explanations, interpretations of legislation and policies of Consumer Protection BC. The hearing notice outlined several possible consequences for the Respondent should the allegation be confirmed, including licensing action, an undertaking, an administrative monetary penalty and/or a Compliance Order. The Respondent was given until March 5, 2023 to provide a written response.
7. The Respondent provided a written response to the hearing notice on February 8 and 9, 2023. The response did not question the sufficiency of the notice (i.e., being adequately informed of the specifics of the allegation) and did not request any further disclosure of evidence, clarification, or time to respond. The written response demonstrated the Respondent was afforded the rights required under the BPCPA prior to the Director exercising statutory decision making and licensing or enforcement powers.

B. ALLEGED CONTRAVENTION

8. The allegation against the Respondent is stated as:

The Respondent violated section 189(5) of the BPCPA when they refused to provide information required under the Act.

C. LEGISLATION

9. Section 189(5) of the BPCPA is cited as the basis for the allegation. Additional relevant legislation may be found in the Appendix.

Offences

189(5) *A person must not do any of the following:*

[...]

(b) refuse or fail to provide information as required under this Act;

D. EVIDENCE IN THE REPORT TO DIRECTOR

10. The Report establishes the Respondent was licensed with Consumer Protection BC as a home inspector for Sun City Home Inspections.

11. The Inspector initiated an inspection of the Respondent's licensed business by providing the Respondent with a Notice of Inspection via email on September 22, 2023. The notice of inspection outlined the records requested by the inspector and the date the records were to be emailed to the inspector.
12. Section 150 of the BPCPA states for the purposes of an inspection, an inspector may require any person who has control of records to produce the records.
13. The respondent did not provide the records to the inspector by the due date listed in the Notice of Inspection.
14. After the due date had passed, the Inspector phoned the Respondent to ask if they had received the emailed Notice of Inspection. The Respondent replied, "Yes I did, and I deleted it" and also stated "I'm not going to give anything to Consumer Protection BC" and claimed that Consumer Protection BC was "a scam".
15. After the Inspector advised the Respondent of the potential breach to BPCPA 189, the Respondent replied, "I don't care, don't call me anymore" and ended the phone call.
16. The Inspector concludes the Respondent refused to provide them with the records requested for the purposes of an inspection.

E. EVIDENCE FROM THE RESPONDENT

17. The Respondent provided an emailed response to the notice on February 8, 2023 which stated:
 - *"I am grateful for the opportunity to be heard and respond to the false accusations that I have contravened the Business Practices and Consumer Protection Act section 189(5)(b) by refusing to provide information as required under the Act".*
 - *"Around September 22 2022, [an inspector] phoned me and from what I understood he wanted to perform an inspection of my business immediately, the word remotely was not used and it sounded like he wanted to come to my house to look through my documents. [The Inspector] was very abrupt over the phone and started to mention fines, penalties and how he had the authority to enforce the inspection."*
 - *"...my intention was to change direction in my career and give up on the inspections for the time being."*
 - *"[The inspector] took me off guard and I did not get a chance to say that Sun City Home Inspections was closing. If [the Inspector] had said the inspection was remote I would have sent whatever [the Inspector] asked for but with his tone and him bragging about his authority I basically did not want to speak with him as my business was about to close."*
 - *"According to [the Inspector] during our phone conversation he asked if I had received an email that contained the notice he thought I said 'yes I did and I deleted it' when I really said 'I think I did and I think I deleted it by accident'".*

- *“As [the Inspector] was flexing [their] authority and was demanding documentation I did say I'm not going to give anything to consumer Protection because of the fact I was closing my doors not thinking I will need to send documents.”*
- *“I was accused of saying ‘consumer Protection is a scam’ and what I really said was that ‘consumer Protection of British Columbia should be run through the building department.’”*
- *“Before we hung up I did say ‘don't call me anymore’ because [the Inspector] was unprofessional at best...”*
- *“I am willing to send whatever documents you require for your inspection even though at this time, Sun City home inspections has closed its doors for the time being.”*

18. The Respondent provided an additional email on February 9, 2023 advising Consumer Protection BC of their decision to close Sun City Home Inspections. Consumer Protection advised the Respondent the hearing would be proceeding and asked if the Respondent had anything further to contribute. Nothing further was provided by the Respondent.

F. ANALYSIS

19. The Respondent states the Inspector phoned to initiate the inspection and it was the Respondent's understanding during the call that the inspection was to occur imminently at the residence of the Respondent. The Respondent states if they were aware the inspection would have been conducted remotely, they would have complied with the Inspector's request for records. In this case, the Inspector establishes they emailed a Notice of Inspection to the Respondent which listed the records required to be produced and clearly directed the Respondent to *“submit the following documents via email within five (5) business days...”* If the Respondent understood something differently from a phone conversation, it's my expectation that would have been clarified by the Notice of Inspection.

20. While this inspection was not intended to be an “in person” inspection, I will point out that before a Home Inspector license is issued, the applicant must sign a Statutory Declaration as part of the license application when their place of residence is also used as their place of business. This declaration states *“I/We give an undertaking to give the Director or their authorized representative prompt physical access to the identified location for lawful purposes related to the administration and enforcement of the Business Practices and Consumer Protection Act.”* To be clear, if the Inspector's intent is to attend the residence of a licensee for the purposes of an inspection, access to the residence (for the purposes of conducting an inspection) must be provided.

21. Whether an inspection is conducted remotely, in person (including in person at the residence of a licensee operating from their residence) is irrelevant to the requirement of the licensee to produce records requested for an inspection.

22. In their written response, the Respondent notes they thought they received the Notice of Inspection and states *"I think I deleted it by accident"*, whereas the Inspector states the Respondent said *"Yes, I did [receive the notice of inspection], and I deleted it"*. Also in their response, the Respondent notes the Inspector was *"demanding documentation"* and confirms they told the Inspector they were not going to provide the documents to Consumer Protection BC, which is consistent with the information provided by the Inspector. From this, I can confirm the Respondent was aware that a Consumer Protection BC Inspector was requesting records for the purposes of an inspection, and communicated to the inspector that they would not provide the records.
23. The intention of a licensee to continue operating their business is not a relevant factor to whether they are required to comply with a request for records made by a Consumer Protection BC Inspector for the purposes of an inspection.
24. The Inspector states the Respondent did not provide the requested records to Consumer Protection BC by the due date and also states the Respondent communicated they had no intention to comply with the request for records. The Respondent does not refute this and only after receiving the Report, offered to provide the records to Consumer Protection BC. From the evidence put forth, I can conclude the Respondent refused to provide the records to the Inspector for the purposes of an inspection.

G. DUE DILIGENCE

27. Due diligence can serve as full defence to the contravention if the Respondent can demonstrate that it took all reasonable efforts to prevent the contravention. I have not been presented with any evidence to illustrate the Respondent has made any efforts to prevent the contravention from taking place.

H. CONCLUSION

28. I find the Respondent did commit a contravention of Section 189(5) of the BPCPA when they refused to provide information to an Inspector as required under the Act.

I. ENFORCEMENT AND REMEDY

29. As the Director's delegate, and having determined that a contravention has occurred, I may take one or more of the following actions:
- i. Suspend, cancel, or impose conditions on a license, pursuant to section 146 of the BPCPA;
 - ii. Accept an Undertaking, pursuant to section 154 of the BPCPA;

- iii. Issue a Compliance Order, pursuant to section 155 of the BPCPA directing the Respondent to:
 - Stop a specified act or practice and take actions to correct the issue;
 - Pay Consumer Protection BC the costs of the relevant inspection.
- iv. Impose an administrative monetary penalty of up to \$5,000 on an individual or up to \$50,000 on a corporation, pursuant to section 164 of the BPCPA. A contravention to section 189 of the BPCPA is prescribed for the purpose of administrative penalty under the Business Practices and Consumer Protection Regulation.

30. For the contravention of refusing to provide information required under the Act, I have decided to impose an administrative monetary penalty and issue a Compliance Order, both of which can be imposed on a person, regardless of their license status. Further details are outlined below.

Administrative Monetary Penalty

31. A contravention to section 189 of the BPCPA is prescribed for the purpose of an administrative monetary penalty (“AMP”) under the Business Practices and Consumer Protection Regulation. The BPCPA authorizes the imposition of a penalty of up to \$5,000 on an individual or up to \$50,000 on a corporation (section 165 of the BPCPA).

32. In the context of the factors under section 164(2) of the BPCPA, I have decided that an AMP is warranted for the contravention. The purpose is to effect deterrence and to promote the Respondent’s compliance in the future.

33. Section 164(2) of the BPCPA sets out the following factors that must be considered before imposing an AMP:

- a. Previous enforcement actions for contraventions of a similar nature by the person.
- b. The gravity and magnitude of the contravention.
- c. The extent of the harm to others resulting from the contravention.
- d. Whether the contravention was repeated or continuous.
- e. Whether the contravention was deliberate.
- f. Any economic benefit derived by the person from the contravention.
- g. The person’s efforts to correct the contravention.

34. For the contravention at issue, I considered all these factors to decide whether an AMP should be imposed. If imposing an AMP and in determining the *amount* that should be imposed, I consider the section 164(2) of the BPCPA factors together with the Consumer Protection BC policy, “Calculation of Administrative Monetary Penalties Policy and Procedures” (“the Policy”). The Policy model and rationale are discussed below.

35. The Policy, normally applied by Consumer Protection BC, sets out how an AMP amount is calculated, starting with a base penalty amount. The Policy is a guidance document that helps to

ensure the calculation of AMP amounts are consistent, transparent, flexible, and proportionate to the contraventions at issue. The Policy allows suppliers subject to AMPs to know how Consumer Protection BC interprets the legislation and analyses the criteria when determining AMP amounts. Consumer Protection BC has developed the Policy from its experience and expertise in providing consumer protection services, and from its mandate to administer the legislation in the public interest.

36. According to the Policy, contraventions for which AMPs are imposed are first categorized into Type A, Type B or Type C. Consumer Protection BC makes these assignments based on its purposes and experience in delivering consumer protection services in the public interest, and the consideration of two factors: 1) the inherent severity of harm specific to the contravention; and 2) the probability that a person will experience harm from the contravention.
37. After categorization of the contravention, the decision maker considers a set of “adjustment factors” that are laid out in the Policy. These “adjustment factors” are based on section 164(2) of the BPCPA, plus one additional criterion consistent with the legislation. The Policy requires the decision maker to choose a “gravity” value for each adjustment factor based on consideration of the relevant aggravating or mitigating circumstances.
38. When applying the Policy, the decision maker considers all the factors under section 164(2) of the BPCPA in their calculation or analysis of the AMP amount that should be imposed. The decision maker continues by exercising their discretion on whether the amounts in the Policy should be used or whether different amounts should be imposed based on consideration of the factors under section 164(2) of BPCPA (and one additional related criterion) and any other relevant circumstances.
39. In the Respondent’s notice of hearing, I identified the Policy and advised that it would be applied as part of any decision that may impose an AMP. This notice further stated that the Policy can be viewed on Consumer Protection BC’s website and would be otherwise provided to the Respondent in paper form upon request. Therefore, in this hearing the Respondent had an opportunity to respond to the Policy by making submissions on the appropriateness of its application or its consistency with criteria in the BPCPA. The Respondent’s submission did not make any mention of the Policy.
40. I have determined that an AMP should be imposed for the Respondent’s contravention to Section 189(5) of the BPCPA for refusing to provide information required under the Act.

Calculation of the AMP amount

41. I first apply the Policy to calculate an AMP amount. I then decide whether that amount, or a different amount, should be imposed based on consideration of the factors under section 164(2) of the BPCPA, one additional criterion and any other relevant circumstances.

42. A breach to section 189(5)(b) of the BPCPA is a Type C contravention under the Policy (page 17 Appendix A, line 115). I agree with this categorization, given the circumstances of this violation. It represents the appropriate level of severity and potential harm for prescribed contraventions according to the Policy.

43. According to the AMP Matrix in part 4.3 of the Policy (page 5), the “base” amount for an AMP is \$3250.00 for an individual.

44. My assessment of the adjustment factors applicable to these contraventions under the Policy’s AMP Matrix is set out in the table below.

Adjustment Factor	Effect on Gravity	Analysis
1. Previous enforcement actions for contraventions of a similar nature	0	There is no previous enforcement action for contraventions of a similar nature. I maintain the gravity level at zero.
2. Gravity and magnitude of the contravention	0	While the gravity of this contravention is substantial, I feel it has been accurately captured by the base penalty amount; therefore, I maintain the gravity level at zero. Refusing to provide records to an inspector makes it impossible for the Director to assess the compliance of a home inspector.
3. Extent of the harm to others resulting from the contravention	0	There is no apparent harm identified to others resulting from this contravention. I maintain the gravity level at zero.
4. Whether the contravention was repeated or continuous	0	The contravention is not repeated or continuous. I maintain the gravity level at zero.

5. <i>Whether the contravention was deliberate</i>	1	Evidence from both the Inspector and the Respondent show the Respondent was deliberate in their decision to refuse to provide documents to the Inspector for the purposes of an inspection; therefore, I increase the gravity level by 1.
6. <i>Economic benefit derived by the person from the contraventions</i>	0	There is no apparent economic benefit derived from the contravention. I maintain the gravity level at zero.
7. <i>Whether the person made reasonable efforts to mitigate or reverse the effects of the contravention</i>	0	I have not been provided with any evidence to show the Respondent has taken steps to reverse the effects of the contravention. I maintain the gravity level at zero.
8. <i>The person's efforts to correct the contraventions & prevent recurrence</i>	0	While I note the Respondent offered to provide the requested documents to Consumer Protection BC, this was done after the Respondent received the Report to Director. I have not been presented with any information showing the Respondent has done anything to prevent recurrence. I maintain the gravity level at zero.

Final Calculation of AMP

45. According to my application of the Policy and its AMP Matrix, the overall adjustment for the contravention to section 189 of the BPCPA involves an overall score of "1."

46. The Policy determines that a violation of section 189(5)(b) of the BPCPA to be a Type C contravention under the policy with a base penalty amount of \$3,250.00. In this case, having found a gravity level of "1", the Matrix calls for an AMP of \$3,500.00. In this hearing, no additional relevant circumstances have been brought to bear on my analysis and calculation of penalty as to vary it from the Policy amount.

47. I have considered the \$3,500.00 AMP under the Matrix and the guidance provided under the Policy, mindful that I am not bound to the Policy, or the amounts calculated under it. Exercising my discretion to apply a penalty amount of up to \$5,000.00 for an individual, I believe \$3,500.00 to be an appropriate amount given the reasons I have discussed above. Attached to these reasons is a Notice of Administrative Penalty in the amount of **\$3,500.00**.

Compliance Order

48. My delegated functions give me the authority to issue a Compliance Order following a determination that a contravention has occurred. The Compliance Order may, amongst other things, require the Respondent to:

- Stop a specified act or practice;
- Take actions to correct the issue; and,
- Reimburse Consumer Protection BC the costs of inspection in the matter.

49. I have decided to issue a Compliance Order, which orders the Respondent to reimburse Consumer Protection BC partial inspection costs. Recognizing the extent of inspection resources allocated to the contravention of refusing to provide information to an inspector, I believe it appropriate to order the Respondent reimburse Consumer Protection the costs of the associated inspection in the amount of \$250.00. Specific terms are described within the Compliance Order.


J. RECONSIDERATION

50. A Notice of Administrative Monetary Penalty and/or the Compliance Order may be reconsidered in accordance with sections 181 and 182 of the BPCPA. A request for reconsideration must be submitted within 30 days of receipt of the Notice of Administrative Monetary Penalty and the Compliance Order. The request for reconsideration needs to be presented in writing and must satisfy the “new evidence” requirements under section 182(2) of the BPCPA. A reconsideration fee in the amount of \$272 must accompany the written request for reconsideration.

51. A request for reconsideration should be addressed to:

Consumer Protection BC
Attention: Director
200 – 4946 Canada Way, Burnaby, BC V5G 4H7

Decided on May 2, 2023, in Burnaby, BC.



Tegan Scardillo, Director of Compliance and Classification

Appendix

Business Practices and Consumer Protection Act

Inspections

Actions by director respecting licence

146 (1) *The director may*

- (a) refuse to issue or renew a licence,*
- (b) suspend or cancel a licence, or*
- (c) amend, impose or rescind conditions on a licence.*

(2) Without limiting the authority of the director under subsection (1), the director may make a decision under subsection (1) if the applicant or licensee does any of the following:

- (a) contravenes this Act or the regulations;*
- (b) fails to meet or no longer meets the minimum requirements for a licence as specified in the regulations;*
- (c) contravenes a condition of a licence;*
- (d) engages in a pattern of conduct that shows, in the director's opinion, that the person is unfit to have a licence;*
- (e) is convicted of an offence under*
 - (i) this Act or any other enactment, or*
 - (ii) a law enacted by the government of Canada, another province of Canada or a foreign jurisdiction*

for conduct that shows, in the director's opinion, that the person is unfit to have a licence.

(3) Without limiting the authority of the director under subsection (1), the director may make a decision under subsection (1) if the applicant or licensee is an employer, employee, officer, director or agent of a licensee against whom the director has made a decision under subsection (1).

149 *An inspector may conduct an inspection for the following purposes:*

- (a) determining compliance with*
 - (i) this Act and the regulations,*
 - (ii) the conditions of a licence, or*
 - (iii) a compliance order, direct sales prohibition order, property freezing order, undertaking or court order made under this Act;*
- (b) assessing an applicant for a licence.*

Inspection powers

150 (1) *For the purposes of an inspection, an inspector may do any of the following:*

- (a) enter the business premises of a person at any reasonable time;*
- (b) inquire into any business, affairs or conduct of a person;*
- (c) inspect, audit or examine any record, goods or other thing or the provision of services in the premises;*
- (d) inspect a vehicle or vessel that is being used for business purposes;*
- (e) require any person who has possession or control of any of the records, goods or other things in the premises, vehicle or vessel to produce the records, goods or things;*
- (f) make a record, including a record on film, audio tape, video tape or otherwise, of the premises, vehicle or vessel and any thing in or on the premises, vehicle or vessel;*
- (g) remove any record from the premises, vehicle or vessel for the purpose of making copies;*
- (h) remove and retain any record, good or other thing that may be required as evidence from the premises, vehicle or vessel.*

Offences

189(5) *A person must not do any of the following:*

- (b) refuse or fail to provide information as required under this Act;*