

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDERS P2006-006 and P2006-007

January 2, 2008

**GEORGE BYMA, OPERATING AS
GEORGE BYMA REAL ESTATE TEAM
and
BURNSWEST CORPORATION**

Case File Numbers P0249, P0250

Office URL: www.oipc.ab.ca

Summary: The Complainant complained to the Commissioner that a former employer had disclosed her personal information to a prospective employer in contravention of the *Personal Information Protection Act (PIPA)* during a reference check and that the prospective employer had collected this information in contravention of PIPA. She also complained that the former employer had not responded to her request for her personal information.

The Commissioner found that the definition of “personal employee information” in PIPA applies not only to the personal employee information of individuals who are employees or potential employees of an organization, but former employees of an organization as well. The Commissioner found that the former employer and the prospective employer had complied with PIPA in relation to information disclosed during the reference check.

The Commissioner found that the former employer had not met its duties under PIPA with respect to the access request.

Statutes Cited: **AB:** *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1, 15, 21, 24, 26, 27, 33, 52; *Workers Compensation Act* R.S.A 2000, c. W-15, s. 1(1)(z)

Order Cited: AB: P2005-001, P2006-001

Cases Cited: *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499; *Homes by Avi Ltd. v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2007 ABQB 203;

I. BACKGROUND

[para 1] On August 5, 2005, the Complainant complained to my office that George Byma Real Estate Team (Byma) had disclosed her personal information to Burnswest Corporation (Burnswest), contrary to the *Personal Information Protection Act* (the Act). She noted that Byma had not responded to an access request she had made. Case file P0249 was opened to address these issues.

[para 2] The Complainant also complained that Burnswest had collected her personal information contrary to the Act. She made further complaint that when she had requested her personal information from Burnswest, Burnswest had not provided notes from telephone conversations containing her personal information. Case file P0250 was opened to address this complaint.

[para 3] Mediation was authorized, but did not resolve the issues. Both matters were then set down for a written inquiry.

[para 4] As the matters are interrelated and arise from the same event, I have decided to combine Order P2006-006 (Byma) and Order P2006-007 (Burnswest) into one written decision.

II. RECORDS AT ISSUE

[para 5] There are no records at issue.

III. ISSUES

Case File P0249

Issue A: At the relevant time, was the Complainant an “employee”, as defined by section 1(e) of the Act?

Issue B: If the Complainant was an employee, did Byma disclose “personal employee information”, as defined by section 1(j) of the Act?

Issue C: If Byma disclosed personal employee information, did Byma comply with section 21 of the Act (disclosure of personal employee information)?

Issue D: If Byma did not disclose personal employee information, did Byma disclose “personal information” as defined by section 1(k) of the Act?

Issue E: If Byma disclosed personal information, did Byma comply with section 19 of the Act (limitations on disclosure)?

Issue F: Did Byma comply with section 33 of the Act (accurate and complete personal information)?

Issue G: Did Byma comply with section 24(1) of the Act (access to information)?

Issue H: Did Byma meet its duty to the Complainant, as required by section 27(1) of the Act?

Case File P0250

Issue I: At the relevant time, was the Complainant an “employee”, as defined by section 1(e) of the Act?

Issue J: If the Complainant was an employee, did Burnswest collect “personal employee information” as defined by section 1(j) of the Act?

Issue K: If Burnswest collected personal employee information, did Burnswest comply with section 15 of the Act(collection of personal employee information)?

Issue L: If Burnswest did not collect personal employee information, did Burnswest collect “personal information”, as defined by section 1(k) of the Act?

Issue M: If Burnswest collected personal information, did Burnswest comply with section 11 of the Act (limitations on collection)?

Issue N: Did Burnswest comply with section 33 of the Act (accurate and complete personal information)?

Issue O: Did Burnswest conduct an adequate search for the Complainant’s personal information?

DISCUSSION OF ISSUES

Claim File P-0249

Issue A: At the relevant time, was the Complainant an “employee”, as defined by section 1(e) of the Act?

Issue B: If the Complainant was an employee, did Byma disclose “personal employee information”, as defined by section 1(j) of the Act?

Issue C: If Byma disclosed personal employee information, did Byma comply with section 21 of the Act (disclosure of personal employee information)?

Issue D: If Byma did not disclose personal employee information, did Byma disclose “personal information” as defined by section 1(k) of the Act?

Issue E: If Byma disclosed personal information, did Byma comply with section 19 of the Act (limitations on disclosure)?

[para 6] The essential question to answer is whether Byma disclosed the Complainant’s personal information to Burnswest in accordance with PIPA. I will consider questions A – E in answering that question.

[para 7] The Complainant alleges that as part of an employment reference check, a Byma employee disclosed to a Burnswest employee the following:

1. She left him in the lurch
2. She wiped out a database
3. She was a liar and a thief
4. He has evidence that she stole from the company
5. She schemed and plotted to undermine his success
6. She single handedly destroyed any chance he had of building a strong team
7. She had been married three times which proved her lack of commitment
8. She had had countless jobs since living in Calgary
9. He would not hire her again under any circumstances.

She states that the Byma employee told her that he had provided this personal information to Burnswest when they called to check her references.

[para 8] Byma provided the following submission in response to this allegation:

One evening as I was heading into an appointment I received a phone call from (an employee) at Burnswest Corporation asking if I would mind answering a few questions regarding (the Complainant) who had been working as a temp for a few weeks in their office. They were considering hiring her on as a full time employee but had some reservations.

I filled him in on some of the concerns we had in working with (the Complainant). I told him that I felt she was a very capable person and had done a good job for us earlier on but that things totally changed once our team dynamics changed... That she had not lived up to our expectations and commitment in being the strong administrative assistant I believed she could have been. I also advised him on the screwups (sic) she was responsible for and the “time” she stole or wasted while under my employ. At no time do I recall ever mentioning in reference to her personal life (sic). As I was about to arrive at my next appointment I indicated to (an employee of Burnswest) that if he were to ask me the question “Would I ever hire (the Complainant) again if she applied for a job with me? My answer would be “not in a million years”...

It was a few days later (the Complainant) called me back to see if we could talk and in particular why did I have to undermine her opportunity to be hired on with a company she wanted to work for. She indicated that I had nothing but bad to say about her and why had I not discussed the good things she had brought to our team. I indicated to her first of all I had discussed some of the positive attributes she had displayed earlier on but really focused on what happened in the last few months... I was very busy and no longer wanted to discuss the matter. At this point she stated no wonder your wife left you and you can't keep an assistant. I shot back "you are one to talk. You've been married 2 or 3 times and have bounced around on several different jobs the past few years..."

[para 9] Burnswest submits that it asked the following questions about the Complainant as part of the reference check:

- The position employed in?
- Reporting structure?
- On time?
- Dependable/Reliable?
- Conscientious?
- Quality of work?
- Skill level on computer?
- Skill level communicating?
- Skill level filing?
- Skill level decision making?
- How does the individual get along with co-workers?
- Would you rehire?

Burnswest argues that this information is relevant to personal technical skills of the position for which the Complainant was being considered.

[para 10] All parties are in agreement that a telephone conversation took place between an employee of Byma and an employee of Burnswest in which the Complainant's personal information was discussed. All parties are in agreement that this telephone conversation was initiated to check employment references. The parties disagree as to what was said during the telephone conversation. The Complainant takes the position that her marital status was discussed and that she was referred to as a thief. Byma and Burnswest take the position that only the information necessary to assess suitability for an employment position was discussed. Byma denies discussing the Complainant's personal life in the conversation with Burnswest. He admits discussing the Complainant's marital status in a conversation with the Complainant and advises that any reference to "stealing" was in relation to time, as opposed to property.

[para 11] Burnswest provided the employee's notes of the telephone conversation *in camera*, as it has withheld this record from the Complainant under section 24(3)(c). (Whether Burnswest withheld this information in accordance with PIPA is an issue that I will address at the end of this Order.) The notes of the conversation support Byma's and Burnswest's contention that the Complainant's work history, habits and skills were discussed, but there is nothing to indicate that family status or accusations of criminal behavior were raised.

[para 12] Both Byma and the Complainant agree that their telephone conversation, which took place following the reference check, contained references to the marital status of each. The Complainant alleges that Byma told her that he had disclosed the information that is the subject of this complaint to Burnswest during this telephone conversation. The evidence of the Byma employee is that he did not tell the Complainant that he had said these things to Burnswest. He admits discussing the Complainant's family status in his telephone conversation with her, but only after she had first referred to his family status.

[para 13] As the Complainant was not a party to the telephone conversation that took place between the Byma and Burnswest employees, I find that she was not in a position to know what was said. The notes taken by the Burnswest employee who did take part in the telephone conversation support the Byma employee's version of events and do not indicate that anything other than job skills and performance were discussed during the reference check.

[para 14] While it is possible that the Byma and Burnswest employees discussed more than the Complainant's job skills and performance, the notes of the Burnswest employee establish that it is more probable that they did not. For these reasons, I find that the conversation between the Byma and Burnswest employees was limited to a discussion of the Complainant's job skills and performance.

[para 15] The Act provides the following definition of "personal employee information":

1(j) "personal employee information" means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating

- (i) an employment relationship, or*
- (ii) a volunteer work relationship between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship;*

[para 16] Section 21 of the Act explains when an organization may disclose personal employee information. It states in part:

21(1) Notwithstanding anything in this Act other than subsection (2), an organization may disclose personal employee information about an individual without the consent of the individual if

- (a) the individual is or was an employee of the organization, or*
- (b) the disclosure of the information is for the purpose of recruiting a potential employee.*

(2) An organization shall not disclose personal information about an individual under subsection (1) without the consent of the individual unless

- (a) *the disclosure is reasonable for the purposes for which the information is being disclosed,*
- (b) *the information consists only of information that is related to the employment or volunteer work relationship of the individual, and*
- (c) *in the case of an individual who is an employee of the organization, the organization has, before disclosing the information, provided the individual with reasonable notification that the information is going to be disclosed and of the purposes for which the information is going to be disclosed.*

[para 17] In Order P2005-001, I said:

The definition of *personal employee information* in section 1(j) of the Act specifically refers to “an individual who is an employee or a potential employee”. It does not refer to former employees of an organization. Furthermore, the words “establishing, managing or terminating” an employment or volunteer work relationship in section 1(j) make it clear that section 1(j) only applies to present employees and recruitment of employees...

I believe that the Legislature’s intent was that collection and use of the *personal information* of former employees would no longer be solely for the purposes of establishing, managing or terminating the employment or volunteer work relationship, as required by section 1(j). Therefore, those provisions do not apply to former employees. However, I believe that the Legislature envisioned situations that would require disclosure of *personal employee information* of former employees, such as to pay pensions or to provide other post-employment benefits, or for tax reasons, as examples. Therefore, the Legislature decided to dispose with rules respecting the collection and use of employee information after someone ceases to be an employee, but kept the disclosure of employee information of former employees under section 21 of the Act, provided that an organization met the requirements for disclosure of *personal employee information* under section 21(2).

Since the Complainants are former employees of the Organization, as provided by section 21(1)(a) of the Act, I find that section 21 is applicable to the Organization’s disclosure of the Complainants’ *personal information*. I must now consider whether the Organization met the requirements under section 21(2) which would allow it to disclose this information.

[para 18] In Order P2006-001, I said:

The definition of “personal employee information” in section 1(j) of the Act specifically refers to “an individual who is an employee or a potential employee”. The words “establishing, managing or terminating” an employment or volunteer work relationship in section 1(j) of the Act make it clear that section 1(j) only applies to present employees and the “recruitment of potential employees”.

The last part of section 1(j) of the Act also allows that personal employee information does not include personal information that is unrelated to the employment or volunteer work relationship. Thus, under this definition, only personal information that is related to the employee or volunteer work relationship is personal employee information.

In these particular circumstances, because the Applicant was an employee of the Organization when she applied for another position with the Organization, she wears two separate and distinct hats for the purposes of the application of the Act. One hat is worn in the category of an “employee” of the Organization and the other hat is in the category as a “potential employee” of the Organization. I find that the Organization collected “personal employee information”, as defined in section 1(j) of the Act, for the purpose of recruiting a “potential employee” in

accordance with section 15(1)(b) of the Act. Under section 15(1)(b) of the Act, the consent of the Applicant, even though she was an employee at the time, is not required as the purpose for collecting the personal employee information was strictly related to the recruiting of a “potential employee”. As noted in these particular circumstances the Applicant was wearing the “potential employee” hat. The information relates to the employment application of the Applicant. In this circumstance she is a potential employee. The status of the Applicant therefore does not fall within the section 1(e) definition of “employee”. I find that, for the purposes of applying section 15 of the Act, the Applicant must be considered only as a “potential employee” and not an “employee” under section 15(1)(a) of the Act. I am satisfied that the evidence before me allows me to find that there was a collection within the meaning of the Act and that the collection was for recruiting the Applicant as a potential employee.

[para 19] Following the release of Orders P2005-001 and P2006-001, the Court of Queen’s Bench issued *Homes by Avi Ltd. v. Alberta (Workers’ Compensation Board, Appeals Commission)*, 2007 ABQB 203. Commenting on a situation in which the definition of “worker” in the *Workers’ Compensation Act* appeared to contradict specific provisions of that Act addressing when directors are to be considered workers, the Court said:

In my view, it was reasonable for the Commission to interpret s. 1(1)(z) in the context of the Act as a whole and to conclude that, just as s.14 limits the application of the definition of worker under that section to workers in industries that are not designated as exempt, s.15(1), which specifically provides that (subject to s. 16) a director of a corporation is not a worker for purposes of the Act unless he or she applies to the Board to have the Act apply to them as a worker, serves as another limitation on the general definition of worker in s. 1(1)(z). As stated in *Sullivan and Driedger on the Construction of Statutes* at p. 273, to the extent there is any conflict between two sections, the “specific provision implicitly carves out an exception to the general one.

[para 20] The Act recognizes that organizations must be able to collect, use and disclose specific personal information relating to potential, current and former employees in order to meet staffing needs. In the present case, the Complainant was a former employee of Byma and a potential employee of Burnswest.

[para 21] The definition of “personal employee information” does not indicate that it is intended to include the employee information of former employees. However, section 21 clearly contemplates that personal employee information may be about an individual who “was an employee of the organization”. Using the approach adopted by Moreau J., the definition of “personal employee information” should be interpreted in the context of section 21 of the Act, which clearly contemplates that an organization may disclose the personal employee information of former employees, as well as current employees. In this way, the purpose of section 21 of the Act is not undermined by a definition of “personal employee information” that does not include the employment information of former employees. As a result, it does not matter whether the Complainant is a current or a former employee of Byma. Her personal employee information may be disclosed to a prospective employer pursuant to section 21 of the Act.

[para 22] Consequently, information collected by Byma about the Complainant for the purpose of establishing, managing or terminating the employment relationship is

personal employee information, as is information reasonably required by Burnswest in order to establish an employment relationship with the Complainant.

[para 23] I have already found that Byma and Burnswest discussed the Complainant's job skills and performance during the telephone conversation in question. I find that job skills and performance are personal employee information and that this information was collected by Burnswest for the purpose of recruiting a potential employee. In addition, the consent of the Complainant was not required, as the disclosure of information about job skills and performance is reasonable for the purpose for which it was being disclosed and relates to the employment of the individual, for the purposes of section 21(2)(a) and (b). I do not find that section 21(2)(c) applies, as the Complainant was not an employee of either Burnswest or Byma at the time of the reference check.

[para 24] For these reasons, I find that Byma disclosed to Burnswest the Complainant's personal employee information in accordance with section 21 of the Act. I therefore find that Byma complied with the Act in relation to that disclosure. As I have found that the definition of "personal employee information" applies to the information of former employees for the purposes of section 21, I do not need to address issues D and E.

Issue F: Did Byma comply with section 33 of the Act (accurate and complete personal information)?

[para 25] Section 33 requires an organization to ensure that personal information is accurate and complete. It states:

33 An organization must make a reasonable effort to ensure that any personal information collected, used or disclosed by or on behalf of an organization is accurate and complete.

[para 26] I have found that Byma did not disclose to Burnswest anything other than the Complainant's personal employee information in the form of an assessment of job skills and performance. There is nothing in the evidence to suggest that Byma disclosed an assessment of the Complainant's job skills and performance that was not an accurate reflection of the organization's assessment of her performance.

[para 27] For these reasons, I find that Byma complied with section 33 of the Act when it disclosed the Complainant's personal employee information to Burnswest.

Issue G: Did Byma comply with section 24(1) of the Act (access to information)?

Issue H: Did Byma meet its duty to the Complainant, as required by section 27(1) of the Act?

[para 28] I will address these issues together, as they are interrelated.

[para 29] The Complainant submitted a request for her personal information to the Organization on February 24, 2005. In her request, she stated:

Under the provisions of the Privacy Act I have been instructed to request all of the personal records pertaining to myself, (the Complainant). Any notes on telephone conversations, in-office correspondence or other, any files, folders or documents; anything whatsoever pertaining to (the Complainant), or dealings with the (Complainant).

[para 30] Byma did not respond to this request and has provided no submissions in relation to this issue.

[para 31] Section 26 explains how an individual may request the individual's personal information from an organization. It states:

26(1) For an individual to obtain access to personal information about that individual or make a request for a correction to personal information about that individual, the individual must make a written request to the organization setting out sufficient detail to enable the organization, with a reasonable effort, to identify the information in respect of which the written request is made.

(2) The applicant may ask for a copy of the record, or ask to examine the record, that contains personal information about the applicant.

[para 32] While I note that the Complainant was unclear as to the legal authority for her personal information request, I find that she met the requirements of section 26 of the Act. She clearly identified the personal information she sought in such a way that Byma could also identify the information requested. The Act does not require a complainant to correctly identify the statutory provision relied upon to make an access request. In any event, organizations are expected to know their obligations and duties under the Act.

[para 33] Section 24 explains what an organization must do when it receives a request for access to personal information. It states in part:

24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:

(a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization;

(b) the purposes for which the personal information referred to in clause (a) has been and is being used by the organization;

(c) *the names of the persons to whom and circumstances in which the personal information referred to in clause (a) has been and is being disclosed.*

[para 34] Section 27 of the Act creates a duty for an organization to make every reasonable effort to assist applicants, and to respond to an applicant as accurately and completely as reasonably possible. Byma did not respond to the Complainant at all. Consequently, I find that Byma did not comply with its obligations under section 24 and failed to meet its duty under section 27.

Case File P0250

Issue I: At the relevant time, was the Complainant an “employee”, as defined by section 1(e) of the Act?

Issue J: If the Complainant was an employee, did the Burnswest collect “personal employee information” as defined by section 1(j) of the Act?

Issue K: If Burnswest collected personal employee information, did Burnswest comply with section 15 of the Act (collection of personal employee information)?

Issue L: If Burnswest did not collect personal employee information, did Burnswest collect “personal information”, as defined by section 1(k) of the Act?

Issue M: If Burnswest collected personal information, did Burnswest comply with section 11 of the Act (limitations on collection)?

[para 35] The essential question to answer is whether Burnswest collected the Complainant’s personal information from Byma in accordance with PIPA. I will consider questions I – M in answering that question.

[para 36] I have already found, in the analysis above, that the Burnswest employee collected information from Byma relating to the Complainant’s job skills and performance. I have already found that this information is the Complainant’s personal employee information and that Burnswest collected it because it was considering recruiting the Complainant as an employee.

[para 37] Section 15 explains the circumstances in which an organization may collect personal employee information. It states in part:

15(1) Notwithstanding anything in this Act other than subsection (2), an organization may collect personal employee information about an individual without the consent of the individual if

- (a) *the individual is an employee of the organization, or*
- (b) *the collection of the information is for the purpose of recruiting a potential employee.*

(2) An organization shall not collect personal information about an individual under subsection (1) without the consent of the individual unless

- (a) the collection is reasonable for the purposes for which the information is being collected,*
- (b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and*
- (c) in the case of an individual who is an employee of the organization, the organization has, before collecting the information, provided the individual with reasonable notification that the information is going to be collected and of the purposes for which the information is going to be collected.*

(3) An organization may disclose personal employee information about an individual without the consent of the individual where that information is being disclosed to an organization that is collecting that information under subsection (1).

[para 38] I find that Burnswest’s collection of information from Byma was pursuant to section 15(1)(b) of the Act and did not require the consent of the Complainant pursuant to section 15(2), as the collection was reasonable for the purpose of determining the Complainant’s suitability for a position, was related to the employment relationship with Byma, and the Complainant was not an employee of Burnswest at the time of the collection.

[para 39] As I have found that the definition of “personal employee information” applies to the information of potential employees for the purposes of section 15, I do not need to address issues L and M.

[para 40] For these reasons, I find that Burnswest collected the Complainant’s personal employee information from Byma in accordance with PIPA.

Issue N: Did Burnswest comply with section 33 of the Act (accurate and complete personal information)?

[para 41] Burnswest argues that it complied with section 33 because it sought information from the Complainant’s other employers and did not simply rely on the opinion of Byma. However, the complaint turns on whether Byma disclosed inaccurate personal information and whether Burnswest collected inaccurate personal information from Byma.

[para 42] I have already found that the information in question is personal employee information. I have also found that it consisted of Byma’s evaluation of the Complainant’s job skills and performance. I have also found that the evidence does not establish that Byma disclosed an assessment of the Complainant’s job skills and

performance that was not an accurate reflection of the organization's assessment. Consequently, I find that in collecting and using this information, Burnswest has complied with section 33 of the Act.

Issue O: Did Burnswest conduct an adequate search for the Complainant's personal information?

[para 43] My office originally stated this issue as, "Did the Organization conduct an adequate search for the Complainant's personal information, and thereby meet its duty to the Complainant, as required by section 27(1) of the Act?" This question suggests that all an organization need do to comply with section 27 is to search for records adequately. However, section 27 states:

27(1) An organization must

- (a) make every reasonable effort*
 - (i) to assist applicants, and*
 - (ii) to respond to each applicant as accurately and completely as reasonably possible,*
- and*
- (b) at the request of an applicant provide, if it is reasonable to do so, an explanation of any term, code or abbreviation used in any record provided to the applicant or that is referred*

[para 44] Section 29 explains what a response under section 27 must include:

29 In a response to a request made under section 24, the organization must inform the applicant

- (a) as to whether or not the applicant is entitled to or will be given access to all or part of his or her personal information,*
- (b) if the applicant is entitled to or will be given access, when access will be given, and*
- (c) if access to all or part of the applicant's personal information is refused,*
 - (i) of the reasons for the refusal and the provision of this Act on which the refusal is based,*
 - (ii) of the name of the person who can answer on behalf of the organization the applicant's questions about the refusal, and*
 - (iii) that the applicant may ask for a review under section 46.*

As a result, the duty under section 27 not only includes assisting an applicant, but also responding accurately and completely to an applicant under section 29.

[para 45] I note that the Complainant's issue in relation to section 27 was:

I did receive a package from (an employee of Burnswest) but there is not one note detailing his long, extensive telephone interviews, not only with (an employee of Byma) but with the other references as well.

The Complainant's concern may be broader than whether Burnswest failed to conduct an adequate search. However, the Notice of Inquiry limited the scope of the issue to whether Burnswest conducted an adequate search for records. Consequently, the principles of procedural fairness prevent me from expanding the issue to include all aspects of section 27(1) without providing the parties with notice and the opportunity to make submissions. I am therefore limited in this inquiry to addressing the issue of whether Burnswest conducted an adequate search for the Complainant's personal information.

[para 46] Burnswest provided submissions describing the search it conducted for records, but did not provide evidence in support of these submissions. It submitted:

Because the Organization's office is very small, and because (the Complainant) had not worked in the Organization for a long period of time, and because her desk ha(d) been cleaned out and her computer reorganized previously, it was a relatively simple to process (sic) the access request and comply with the requirements of Section 27 of the Act.

(An employee) maintained paper personnel files in his office credenza regarding the complainant, and each of the Organization's other employees. This file contained most of the records in the Organization's possession, containing any personal information relating to the Complainant. He also inquired of the Organization's accountant regarding any financial records relating to the Complainant.

Once the Organization was satisfied that it had gathered all of the records in its possession containing the Complainant's personal information, all of the records were reviewed and sorted distinguishing between what documents the Organization would copy and provide, and those records where there was any question of entitlement to access or obligation to disclose.

Because the Organization was unfamiliar with the process, they retained corporate counsel to provide them with some assistance. A written response enclosing copies of listed records was delivered to the Complainant's home within the statutory time period.

[para 47] "FOIP" Practice Note 10 offers a helpful distinction between evidence and arguments. It explains:

"Evidence" is the material that public bodies must submit in inquiries to establish the facts upon which the Commissioner makes decisions. "Arguments" are the interpretation of the law based on the facts... Public Bodies do not meet the burden of proof if they do not provide evidence to support written or oral arguments made in inquiries. Providing arguments alone is not sufficient. Arguments are not a substitute for evidence. It is also not sufficient to provide the Commissioner with records, and leave it up to the Commissioner to figure out from the records the facts upon which he will base his decisions. The Commissioner requires that persons within the Public Bodies provide evidence by speaking to the contents of records. Affidavit evidence is preferred. Public Bodies that do not provide evidence for inquiries risk having decisions go against them for lack of evidence to support their arguments.

The same holds true for organizations under the Act. Even though a hearing is conducted through written submissions, it is still necessary to provide evidence to support the organization's position. This can be done by submitting affidavit evidence, or the direct evidence of the employees involved.

[para 48] In the present case, I am prepared to accept counsel's submissions as direct evidence, as counsel was retained to assist Burnswest to meet its statutory obligations under section 27, which includes a duty to conduct an adequate search for personal information. However, had there been nothing to indicate that counsel had supervised or taken part in the Organization's response I would not have accepted counsel's submissions relating to the search as evidence.

[para 49] For these reasons, I find that Burnswest conducted an adequate search for the complainant's personal information

Additional Issue

[para 50] On April 12, 2005, Burnswest informed the Complainant that it was withholding additional files because "the information contained in them was given in confidence and would give the identity of those providing the information and/ or the information is confidential Burnswest information."

[para 51] In her letter to my office of April 12, 2005, the Complainant requested review of Burnswest's decision to withhold this information. Regrettably, this issue was omitted from the Notice of Inquiry. Consequently, I am unable to address this issue during this inquiry as Burnswest has not been given notice of the issue or the opportunity to make representations.

[para 52] I have decided to conduct a new written inquiry following the conclusion of this inquiry to address this outstanding issue. My office will issue a notice of inquiry and the Order will be issued in due course.

Subsequent Issue

[para 53] On September 27, 2007, counsel for Burnswest asked me to refrain from issuing an Order and to advise the parties that this matter is now at an end. Counsel relies on *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499 to make this request.

[para 54] Counsel from my office advised counsel for Burnswest that I disagree that I have lost jurisdiction in relation to this matter and the decision will be issued in due course.

[para 55] Counsel for Burnswest has not objected to this proposed course of action and I infer from this that counsel does not object to my proceeding.

V. ORDER

[para 56] I make this Order under section 52 of the Act.

Case File P0249

[para 57] I confirm that Byma disclosed the Complainant's personal employee information in accordance with PIPA.

[para 58] I confirm that Byma complied with section 33.

[para 59] I require Byma to respond to the Complainant's request for her personal information.

[para 60] I order Byma to notify me in writing, within 50 days of its receipt of a copy of this Order, that Byma has complied with my Order.

Case File P0250

[para 61] I confirm that Burnswest collected the Complainant's personal employee information in accordance with PIPA.

[para 62] I confirm that Burnswest complied with section 33.

[para 63] I confirm that Burnswest conducted an adequate search for the Complainant's personal information.

Frank Work Q.C.
Information and Privacy Commissioner