ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2006-009

January 31, 2008

IRON MOUNTAIN CANADA CORPORATION

Case File Number P0273

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request for her personal information, in particular, personal information relating to the termination of her employment, to her former employer, Iron Mountain Canada Corporation (the Organization) under the *Personal Information Protection Act* (the Act). The Organization decided to withhold some records on the basis of section 24 of the Act and provided some records in French. Later, the Organization provided the Applicant with English translations of the records it originally provided in French.

The Applicant requested review of the Organization's decision to withhold records and to provide some records in French.

The Commissioner decided that the issue relating to the language of the records was moot, as the Organization had provided translations. However, the Commissioner considered it appropriate to comment on whether the Act requires Organizations to translate records. The Commissioner ordered the Organization to provide the Applicant with records it had withheld, except in situations where the personal information of third parties could not be reasonably severed from the records.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5

Authorities Cited: AB: Orders 99-005, 2001-011, F2006-002, P2007-002 **CA:** *PIPED Act* Case Summary #84

Cases Cited: *Slavutych v. Baker* (1976) 1 SCR 254; *Re: British Columbia (Ministry of Transportation & Highways) and BCGEU, Local 1103* (1990) 13 LAC (4th) 190

I. BACKGROUND

[para 1] On July 5, 2005, the Applicant requested her personal information from the Organization, her former employer.

[para 2] On December 20, 2005, the Organization advised the Applicant that it was providing some records to her containing her personal information, but that it was withholding other records on the basis of section 24 of the Act.

[para 3] The Applicant requested review by my office of the following issues:

1. She requested translation of all documents, as some of the documents contained French.
2. She sought copies of all records that had been withheld.

[para 4] Mediation was authorized, but did not resolve all the issues between the parties. Consequently, this matter was scheduled for a written inquiry.

II. RECORDS AT ISSUE

[para 5] The Records at issue are those records that the Organization seeks to withhold from the Applicant. These records are described in greater detail in the Discussion of Issues portion of this decision, below.

III. ISSUES

Issue A: Does section 24(3)(b) of the Act (information revealing personal information about another individual) apply to the records/information?

Issue B: Is the Organization reasonably able to sever any information to which section 24(2)(b) and 24(3)(b) apply, as provided by section 24(4)?

Issue C: Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the records/information?

Issue D: Did the Organization properly apply section 24(2)(b) of the Act (confidential information of a commercial nature) to the records/information?

Issue E: Did the Organization properly apply section 24(2)(c) of the Act (investigation or legal proceeding) to the records/information?

Issue F: Did the Organization properly apply section 24(2)(d) of the Act (information no longer being provided to the organization) to the records/information?

Issue G: Does the Act require the Organization to provide an English translation of the records?

IV. DISCUSSION OF ISSUES

Issue A: Does section 24(3)(b) of the Act (information revealing personal information about another individual) apply to the records/information?
Issue B: Is the Organization reasonably able to sever any information to which section 24(3)(b) applies, as provided by section 24(4)?

[para 6] I have decided to address these issues together.

[para 7] In its decision of December 20, 2005, the Organization advised the Applicant that it was withholding records 43, 55, 91, 130 and 168 on the basis of section 24(3)(b) of the Act. Section 24(3)(b) is a mandatory exception to disclosure and states:

> *24(3) An organization shall not provide access to personal information under subsection (1) if*
>
> > *(b) the information would reveal personal information about another individual;*

[para 8] Section 24(4) explains when information may be severed from a record. It states:

> *24(4) If, in respect of a record, an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.*

[para 9] In its submissions, the Organization noted that records 23, 25 – 27, and 31 – 38 must also be withheld under section 24(3)(b). As section 24(3)(b) is a mandatory provision, that is, the Organization may not release the information under any circumstances if section 24(3)(b) applies, I will consider whether it applies to those records as well as to those to which the Organization originally applied it. I will also consider whether information may be severed from those records in accordance with section 24(4).

Record 23

[para 10] Record 23 contains two emails from employees of the Organization

[para 11] It is unclear why the Organization views this email as containing the Applicant's personal information. While the email contains her name in the subject line, the body of the email does not contain information that could be construed as "about" her. At best, the Record 23 contains information "related" to the Applicant.

[para 12] In Order P2006-004, I considered the meaning of "personal information about an individual" within the meaning of the Act. I said:

> The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily "about" that person.

[para 13] Section 24 of the Act allows an applicant to request access to personal information about the applicant. 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 14] The Act creates a right of access to personal information contained in records, as opposed to the records themselves. The Act does not prevent an Organization from providing an applicant with information, other than the personal information of third parties, if it so chooses. However, the Act does not require an Organization to do so.

[para 15] It is permissible for the Organization to withhold Record 23, as it does not contain information that can be classified as personal information about the Applicant.

Records 25 – 27

[para 16] These records are part of the same email chain as Record 23. For the reasons provided above, I find that these Records do not contain the personal information of the Applicant.

Records 31 - 38

[para 17] These records are an email chain containing the names and identifying information of third parties. I find that these Records contain the personal information of the Applicant. I also find that these Records contain the personal information of third parties and that this information cannot be reasonably severed from these records. Parties would continue to be identifiable if their names are severed, and the email would be meaningless if all the identifying information were removed. I therefore find that the records contain information that is subject to section 24(3)(b) that cannot be reasonably severed under section 24(4).

[para 18] For these reasons, I find that the Organization must not provide these records to the Applicant.

Records 43, 55, 91, 130, and 168

[para 19] The Organization advises in its submissions that it has determined that it was able to sever third party information from the Applicant's personal information in relation to these records. However, the Organization did not provide a sample of how it proposed to sever information. I will therefore consider whether the Organization can reasonably sever third party personal information under section 24(4) of the Act in relation to these Records.

Record 43

[para 20] Record 43 contains two emails. The email sent December 31, 2004 at 10:05 AM, with the exception of the subject line, does not contain the personal information of the Applicant. The second email contains personal information of the Applicant, but also contains the information of a third party. Were the Organization to sever the information that is not the Applicant's personal information and is not the information of the third party, the only information left would be the subject line of the email. Consequently, I find that the information in this record cannot be reasonably severed under section 24(4).

Record 55

[para 21] Record 55 contains payroll information of the Applicant and other employees. I find that the Organization may reasonably sever the payroll information of the other employees from the Record within the meaning of section 24(4), and give the Applicant her personal information.

Record 91

[para 22] Record 91 contains a third party opinion about the Applicant and another third party. It is clear from the email that the opinion is not being submitted in confidence, as the email is addressed to the Applicant. I find that the Organization may reasonably sever the information of the other employee who is the subject of the email under section 24(4), and give the Applicant her personal information.

Record 130

[para 23] Record 130 contains two emails. The first email contains the salary information of the Applicant and another employee. I find that the Organization may reasonably sever the information of the other employee under section 24(4), and give the Applicant her personal information.
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[para 24] I find that the second email does not contain the personal information of the Applicant and therefore, the Organization need not provide it to the Applicant.

Record 168

[para 25] Record 168 contains the employment information of the Applicant and that of other employees of the Organization. I find that the Organization can reasonably sever the information of the employees under section 24(4) and give the Applicant her personal information.

Record 47

[para 26] Record 47 contains two emails. The Organization made no argument in relation to the application of section 24(3) to Record 47. However, I find that the second email, which is dated December 6, 2004 8:42 AM, contains information about an identifiable individual who is a third party. I also find that this information cannot be severed from the Applicant's personal information under section 24(4). Consequently, as section 24(3) is a mandatory provision, I order the Organization to sever the second email from Record 47.

[para 27] I will consider whether the Organization was right to withhold the first email in this record on the basis of legal privilege under Issue C.

Issue C: Did the Organization properly apply section 24(2)(a) of the Act (legal privilege) to the records/information?

[para 28] The Organization relies on section 24(2)(a) of the Act to withhold records 23-29, 31-38, and 47 – 50 from the Applicant. Section 24(2)(a) states:

(2) An organization may refuse to provide access to personal information under subsection (1) if

(a) the information is protected by any legal privilege;

[para 29] Section 51 explains which party bears the burden of proof in an inquiry. It states:

51 At an inquiry into a decision under which an individual was refused

(a) access to all or part of the personal information about the individual or a record relating to the information, or

(b) information respecting the collection, use or disclosure of personal information about the individual,

it is up to the organization to establish to the satisfaction of the Commissioner that the individual has no right of access to the personal information about the individual or no right to the information requested respecting the collection, use or disclosure of the personal information about the individual.

The Organization therefore bears the burden of proof to establish that the Applicant has no right of access to her personal information in the records it withheld.

Records 23 – 29

[para 30] Records 23 – 29 are emails between employees of the Organization. The Organization argues that these emails are the subject of qualified privilege through application of the Wigmore criteria. The Organization relies on *Slavutych v. Baker* (1976) 1 SCR 254 and *Re: British Columbia (Ministry of Transportation & Highways) and BCGEU, Local 1103* (1990) 13 LAC (4th) 190 in support of this position. Alternatively, the Organization argues that these emails are subject to litigation privilege.

[para 31] The Applicant did not make any arguments specifically relating to privilege.

[para 32] I found above that Record 23 and Records 25 – 29 do not contain the personal information of the Applicant, except the subject line and the attachment. (The attachment is Record 30. The Organization released Record 30 to the Applicant.) Record 24 is part of the email chain to which Records 23 and 25 – 29 form part. The analysis above applies equally to Record 24.

[para 33] An Organization is not required to provide information to an Applicant unless the information is the applicant's personal information. It appears from the Organization's arguments that it does not wish to provide Records 23 – 29 to the Applicant. As these Records do not contain information about the Applicant, the Act does

not require the Organization to provide them to the Applicant. Therefore, the Organization does not have to establish that they are subject to legal privilege or any of the other exceptions in section 24(2) in order to withhold them. As I have found that Records 23 – 29 do not contain the personal information of the Applicant, I will not consider whether they are subject to legal privilege.

Records 31 - 38

[para 34] Given that I have found that Records 31 – 38 must not be disclosed as they contain the personal information of the third party, there is no need to consider whether these records are subject to legal privilege.

Records 47 – 50

[para 35] Record 47 is an email containing personal information of the Applicant received from a third party. As I have ordered the Organization to sever the email dated December 6, 2004 8:42 AM, I will consider only whether the email sent December 6, 2004 at 13:14:40 is subject to privilege.

[para 36] Record 48 is a termination letter addressed to the Applicant. Records 49 and 50 are a settlement agreement.

[para 37] The Organization argues that these records are privileged by application of the Wigmore criteria.

[para 38] In *Slavutych*, the Supreme Court of Canada applied the Wigmore criteria to a "tenure form sheet" and determined that the document was privileged. The Wigmore criteria are:

> (1) The communications must originate in a confidence that they will not be disclosed.
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[para 39] A key element in *Slavutych* was the fact that a professor had been advised that a tenure form sheet he was required to complete would be kept confidential and would be destroyed. As a result, the Court found that the communication originated in confidence. In the present case, the evidence does not support that the email originated in confidence. While counsel for the Organization argues that the contents of the email and the drafts give rise to an expectation of confidentiality, I do not agree. Some organizations and employees might treat this information as confidential while others might not. Evidence of an organization's practices relating to keeping records confidential is therefore crucial to establishing that the email is by its nature confidential.

[para 40] However, the affidavits of the authors of the emails do not support that any confidentiality relating to the emails or letters was protected. The affidavit evidence of the authors of the emails and letters does not establish that they turned their minds to confidentiality or held a reasonable belief that these Records would be kept confidential. The affidavits do not establish that any steps were taken to protect confidentiality or establish that the Organization had a practice of keeping emails or draft letters between managers confidential. Certainly, the Records do not contain confidentiality warnings or instructions. As a result, I am unable to find that Records 47 – 50 meet the Wigmore criteria for qualified privilege as the evidence does not support that they originated in confidence.

[para 41] As stated in Order 96-015 litigation privilege applies to papers and materials created or obtained by the client for a lawyer's use in existing or contemplated litigation, or created by a third party on behalf of the client for a lawyer's use in existing or contemplated litigation.

[para 42] In Order F2006-002, I reviewed the case law regarding litigation privilege. I said:

> In Order 97-009 Commissioner Clark stated that for litigation privilege to apply a party must show that:
>
> 1. There is a third party communication; this communication may include:
>
> I. communications between the client (or the client's agent) and third parties for the purpose of obtaining information to be given to the client's solicitors to obtain legal advice;
>
> II. communications between the solicitor (or the solicitor's agents) and third parties to assist with the giving of legal advice; or
>
> III. communications which are created at their inception by the client, including reports, schedules, briefs, documentation, etc.,
>
> 2. The maker of the document or the person under whose authority the document was made intended the document to be confidential: Opron Construction Co. v. Alberta (1989), 71 Alta L.R. (2nd) 183 (C.A.).
>
> 3. The "dominant purpose" for which the documents were prepared was to submit them to legal counsel for advice and use in litigation, whether existing or contemplated: Waugh *v. British Railway Board, supra; Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta L.R. (2nd).
>
> Order 97-009 also cites Manes and Silver, Solicitor-Client Privilege in Canadian Law, which sets out three requirements of the "dominant purpose" test:
>
> 1. the documents must have been produced with existing or contemplated litigation in mind,
>
> 2. the documents must have been produced for the dominant purpose of existing or contemplated litigation, and
>
> 3. if litigation is contemplated, the prospect of litigation must be reasonable.
>
> Further, in determining the "dominant purpose" for which documents were prepared, consideration must be given of the intent of the author when the document was created: *Opron Construction Co. v. Alberta, supra*.

> I agree with the observation of Conrad J.A. in *Moseley v. Spray Lakes Sawmills* (1980) Ltd., supra, that the rationale for litigation privilege provides an essential guide for determining the scope of its application. In that case Conrad J.A. stated that the purpose of litigation privilege:
>
> > … is to protect from disclosure the statements and documents which are obtained or created particularly to prepare one's case for litigation or anticipated litigation. It is intended to permit a party to freely investigate the facts at issue and determine the optimum manner in which to prepare and present the case for litigation… Thus at the time of creation, preparation for litigation must be the dominant purpose.
>
> In *Opron Construction, supra,* the Alberta Court of Appeal deprecated the practice in some cases to find rules of privilege for specific fact situations. The court in that instance stated that the extent of privilege will depend on the facts of a particular case…
>
> In addition, there is no indication in either party's submissions that litigation was, in fact, ever initiated. The Supreme Court of Canada in Blank v. Canada (Minister of Justice), supra, gave endorsement to a pre-existing line of authorities that state litigation privilege is finite in duration and comes to an end upon termination of the litigation, absent closely related proceedings, that gave rise to the privilege: *Wujuda v. Smith* (1974), 49 D.L.R. (3d) 476 (Man. Q.B.); *Meaney v. Busby* (1977),15 O.R. (2d) 71 (H.C.J.); *Canada Southern Petroleum Ltd. v. Amoco Canada Petroleum Co.* (1995), 176 A.R. 134 (Q.B.). This Office has also followed this line of authority in Orders F2003-015, 2001-025 and 98-017.

[para 43] The affidavits of the employees who created the emails and letters, and the Records themselves, do not establish that litigation was ever initiated or reasonably contemplated by the Organization. Consequently, the Organization has not established that litigation privilege applies to Records 47-50.

[para 44] For the reasons above, I find that the Organization did not properly apply section 24(2)(a) to Records 47 - 50.

Issue D: Did the Organization properly apply section 24(2)(b) of the Act (confidential information of a commercial nature) to the records/information?

[para 45] The Organization severed information from Records 105 – 107, 128, 131 – 150, 153 – 154 pursuant to section 24(2)(b) of the Act. Section 24(2)(b) states:

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> > *(b) the disclosure of the information would reveal confidential information that is of a commercial nature and it is not unreasonable to withhold that information;*

[para 46] In her submissions, the Applicant agreed that the commercial information of the Organization should be severed in accordance with section 24(2)(b).

[para 47] As the Applicant agrees with the position of the Organization in relation to commercial information, I will not address this issue.

Issue E: Did the Organization properly apply section 24(2)(c) of the Act (investigation or legal proceeding) to the records/information?

[para 48] The Organization withheld Records 23 – 29 and 31 – 38 under section 24(2)(c) of the Act. Given that I have found that Records 23 – 29 do not contain the personal information of the Applicant and that Records 31 – 38 must not be disclosed as they contain the personal information of the third party, there is no need to consider whether these records are also subject to section 24(2)(c).

Issue F: Did the Organization properly apply section 24(2)(d) of the Act (information no longer being provided to the organization) to the records/information?

[para 49] The Organization also withheld Records 23 – 29 and 31 – 38 on the basis of section 24(2)(d). Given that I have found that Records 23 – 29 do not contain the personal information of the Applicant and that Records 31 – 38 must not be disclosed as they contain the personal information of the third party, there is no need to consider whether these records are also subject to 24(2)(d).

Issue G: Does the Act require the Organization to provide an English translation of the records?

[para 50] Although the Organization did not provide English translations of French documents to the Applicant, it subsequently did so.

[para 51] The Applicant argues that she is entitled to receive the personal information she requested from the Organization in English, rather than French.

[para 52] The Organization argues that it is not obligated under PIPA to provide translations to applicants upon request. Citing the British Columbia "Policy and Procedures Manual", it further submits that if public bodies in British Columbia are not required to translate documents, a private company in Alberta should not be required to translate documents.

[para 53] In Order 99-005, the former Commissioner considered the case law regarding mootness.

> The Supreme Court of Canada discusses "mootness" in *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.). In that case, Justice Sopinka stated:
>
> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events

> occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.
>
> [para 29.] In *Grimble v. Edmonton (City)* (February 26, 1996), Edmonton Appeal No. 9403-0661-AC (Alta. C.A.), the Alberta Court of Appeal said that a case is moot if some event occurs after proceedings were commenced, which eliminates the controversy between the parties. The Court of Appeal then followed the two-step analysis in *Borowski v.Canada (Attorney General)* in considering (i) whether the dispute had disappeared and the issues had become academic (moot), and (ii) whether the court should nevertheless exercise its discretion to hear the case even if the issue had become moot.
>
> As discussed in *Borowski v. Canada (Attorney General)*, I accept that an issue is "moot" when no present live controversy exists, which affects the rights of the parties.

[para 54] As the Organization has provided English translations of the records at issue, no "live controversy" exists affecting the rights of the parties. The issue of whether the Organization is required to provide translations of records to the Applicant is therefore moot.

[para 55] As the issue is moot, I have decided not to hear the issue. However, given that there is confusion regarding this issue, I have decided to comment on translation and the duty to assist applicants generally.

[para 56] Section 27 of the Act creates a duty for organizations to assist applicants. It states, in part:

> *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 to.*

[para 57] I do not agree with the Organization's position that if translation is not required under freedom of information legislation, it cannot be required under the Act. Freedom of information legislation serves a very different purpose than personal privacy protection legislation. In addition, neither British Columbia's nor Alberta's freedom of information legislation contains the equivalent of section 27(1)(b) of the Act.

[para 58] Section 24(1), discussed above, gives an individual the right to have access to "personal information about the individual". If, for some reason, the information about the individual is in another language, the individual would be unable to know what that personal information is without translation. In some such cases, the right of access to information could be defeated.

[para 59] Section 27(1)(b) requires an organization to explain terms, code, or abbreviations in records provided to applicants when it is reasonable to do so. In my view, section 27(1)(b) requires an organization to provide a translation of terms in other languages, in circumstances where it is reasonable to so. For example, in situations where an English speaking employee requests employment records and the language of both the employment contract and the workplace is English, the duty to assist may require the employer organization to provide employment information to the employee in English, or at the very least, an explanation of each term used in a record, if the organization had decided to record the employee's employment information in another language. This does not mean that an applicant has the right to have personal information translated into the language of their choice. Rather, in every case, the reasonableness of requiring translation will depend on all the circumstances.

V. ORDER

[para 60] I make this Order under section 52 of the Act.

[para 61] I confirm the decision of the Organization to withhold Records 23 – 29.

[para 62] I order the Organization to withhold Records 31 – 38, 43 and the second email contained in Record 47, as set out in paragraph 26 of this Order, from the Applicant.

[para 63] I order the Organization to provide the first email contained in Record 47, and Records 48 – 50 in their entirety to the Applicant.

[para 64] As the Applicant conceded that the Organization is entitled to withhold commercial information contained in Records 105-107, 128, 131 – 150 and 153 – 154, I confirm the Organization's decision to withhold that information

[para 65] I further order that the Organization notify me in writing within 50 days of being given a copy of this Order, that the Organization has complied with this Order.

Frank Work Q.C.
Information and Privacy Commissioner