

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2009-010

March 24, 2010

CALIAN LTD.

Case File Number P0999

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant made an access request to Calian Ltd. under the *Personal Information Protection Act* (“PIPA”) for all personal information about him in the possession of Calian Ltd. Calian Ltd. responded to the request by providing the Applicant with a copy of the records, severing some information as either not responsive or pursuant to sections 24(2)(b) (reveals confidential information of a commercial nature) and 24(3)(b) (reveals personal information about another individual) of PIPA.

The Adjudicator confirmed the decision of Calian Ltd. to withhold the severed information within the records as either not responsive or pursuant to section 24(2)(b). The Adjudicator also found that, at the date of the inquiry, Calian Ltd. had conducted an adequate search under section 27(1)(a) of that Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25 s. 16(1)(a); *Personal Information Protection Act*, S.A. 2003, c.P-6.5, ss. 1(i), 1(i)(i), 1(k), 24, 24(1), 24(2), 24(2)(b), 24(3), 24(3)(a), 24(3)(b), 24(3)(c), 24(4), 27(1)(a), 51, 52

Authorities Cited: AB: Orders: 96-013, 97-013, 2000-005, P2006-005, P2006-012, P2007-002, P2008-001

I. BACKGROUND

[para 1] In July 2007, the Applicant entered into a contract to provide services to Calian Ltd. (“Calian”). In August 2007, Calian terminated that contract.

[para 2] On March 13, 2008, the Applicant made an access request to Calian under PIPA. The Applicant requested all personal information about him in the possession of Calian including:

“security investigation agencies and results, credit check results, employer checks results and any and all information collected in processing and/or managing my application for the position and subsequent termination of the contract including the reasons for the termination, and contents and sources of information regarding the termination of the contract”.

[para 3] As part of that access request, the Applicant identified specific individuals that he believed would have personal information regarding the Applicant. The Applicant specifically requested “all forms of communication”, including “ e-mails, memorandums, letters, notes, minutes of meetings, unrecorded telephone conversations, telephone call recordings, telexes, etc.” The Applicant also requested his “personnel file and all documents and notes related to his contract.

[para 4] On March 24, 2008, Calian responded to the Applicant’s access request by providing the Applicant with records from the Applicant’s “business file”.

[para 5] On April 25, 2008, the Applicant wrote to Calian, questioning the content of the information he had received in response to the access request. The Applicant stated that the following information was missing from Calian’s response:

- information about the security clearances and reference checks conducted by Calian; and
- information communicated, shared or possessed by Edmonton Calian employees, contractors and the Canadian Forces Base and Health and Mental health clinics at “1Fd Amb”.

[para 6] On May 8, 2008, Calian responded to the Applicant’s April 25, 2008 letter providing him with a record containing his personal Security Screening information.

[para 7] On May 30, 2008, the Applicant requested a review of Calian’s decision. Mediation was authorized but did not resolve the issues.

[para 8] On March 6, 2009, the Applicant requested that the Information and Privacy Commissioner conduct an inquiry into the matter.

[para 9] On January 4, 2010, the Information and Privacy Commissioner gave me the delegated authority to conduct an inquiry and issue an order regarding this matter.

[para 10] During the inquiry, Calian and the Applicant each submitted an initial submission and a rebuttal submission. The Applicant also submitted an addendum to his initial submission.

II. RECORDS AT ISSUE

[para 11] There are 13 records at issue. They are numbered 1, 2, 5-12, 17-19.

III. ISSUES

[para 12] There were 7 issues outlined in the inquiry notice:

- A) Is the Organization an active organization?
- B) Is the access request for the Applicant's personal information?
- C) Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?
- D) Is the Applicant's personal information in the Organization's custody or control?
- E) If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)?
- F) If the withheld records contain the personal information of the Applicant and if section 24(2)(b), 24(3)(a), 24(3)(b) or 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?
- G) Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?

[para 13] I note that in this inquiry I will address Issue B as part of Issue C. Under Issue B and Issue C I will address whether the records identified by Calian as responsive to the access request contain the Applicant's personal information. In addition, as Calian did not apply sections 24(3)(a) or 24(3)(c) to the records, I have rephrased Issue F to read as follows:

- F) If the withheld records contain the personal information of the Applicant and if section 24(2)(b) or 24(3)(b) applies to these records, is the Organization

reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

IV. DISCUSSION

A) Is the Organization an active organization?

[para 14] Section 1(i) of PIPA defines an organization as follows:

I In this Act,

...

(i) “organization” includes

(i) a corporation,

(ii) an unincorporated association,

(iii) a trade union as defined in the Labour Relations Code,

(iv) a partnership as defined in the Partnership Act, and

(v) an individual acting in a commercial capacity,

but does not include an individual acting in a personal or domestic capacity;

[para 15] Calian states that it fulfills the definition of corporation found within section 1(i)(i) of PIPA. I accept Calian’s submission on this issue and find that Calian is an organization as defined within section 1(i)(i) of PIPA.

B) Is the access request for the Applicant’s personal information?

C) Was the information in the withheld records, or any of it, responsive to the Applicant’s request for his personal information?

[para 16] Section 24(1) of PIPA gives an applicant the right to request personal information about the applicant in the custody or under the control of the organization.

[para 17] “Personal information” is defined in section 1(k) of PIPA:

I In this Act,

(k) “personal information” means information about an identifiable individual;

[para 18] In response to the Applicant’s access request, Calian identified 13 records that contained the information requested by the Applicant. These records are numbered

1, 2, 5-12, 17-19. However, Calian states that a portion of those records, the severed information within records 1, 2, 5, 8, 9, 10 and 12, are not responsive to the access request as they do not contain the Applicant's personal information.

[para 19] After a review of the submissions and the records at issue, I find that the information severed from records 6, 7 (except for a third party's name), 11, 17, 18 and 19 is the Applicant's personal information and is, therefore, responsive to the access request.

[para 20] However, I find that the severed information within records 1 and 2 is not responsive to the Applicant's access request. This information consists of a third party's name as well as revenue and cost information, proposed compensation and pricing issues for the Applicant's position all of which was generated approximately 10 months before Calian entered into a contract with the Applicant. In addition, I find that the severed information within records 5, 8, 9, 10, and 12 is not responsive to the access request as it does not consist of the Applicant's personal information. This information consists of the names and personal information of other individuals. I also find that a third party's name on record 7 is not responsive to the access request, as that name is not the Applicant's personal information.

[para 21] As I have found that the severed information within records 1, 2, 5, 7 (name of a third party), 8, 9, 10 and 12 is not responsive, Calian does not need to disclose this information to the Applicant. I note, however, that PIPA does not prevent an organization from providing an applicant with the non-responsive information as long as the mandatory exceptions under section 24, such as section 24(3)(b) (reveal personal information of another individual) do not apply. In this inquiry, Calian states that it does not intend to disclose the severed information within records 1, 2, 5, 7(name of a third party) 8, 9, 10 and 12. As such, I do not need to address whether the mandatory exceptions under section 24 apply to this information.

D) Is the Applicant's personal information in the Organization's custody or control?

[para 22] Calian states that it has custody and control of all the records requested by the Applicant except for the records in the custody and/or control of the Department of National Defence. Specifically, Calian states that it does not have custody and/or control of the email accounts of three individuals who were named in the Applicant's access request. Calian states that one of these individuals is employed by the Department of National Defence while two others were placed by Calian at the Department of National Defence Clinic. Calian states that these individuals have Department of National Defence email accounts. Calian states that these individuals are subject to the day to day direction of the Department of National Defence and communicate using those email accounts. Calian states that these individuals do not have Calian email accounts.

[para 23] I accept Calian's submission on this issue. I find that the email accounts of these individuals and information within these accounts are within the custody and control of the Department of National Defence. These records are not within the custody

and/or control of Calian except to the extent that copies may exist within the paper or electronic records of Calian itself.

E) If the Organization refused to provide access to the Applicant’s personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)?

[para 24] 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 of to the information requested respecting the collection, use or disclosure of the personal information about the individual.

[para 25] In this inquiry, Calian bears the burden of proof to establish that the Applicant has no right of access to his personal information in the records it withheld.

(1) Section 24(2)(b) - reveal confidential information of a commercial nature

[para 26] Section 24(2)(b) reads:

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 27] There are three criteria under section 24(2)(b):

- (a) the disclosure of the information must reveal confidential information;
- (b) the information must be of a commercial nature; and
- (c) it must not be unreasonable to withhold that information.

[para 28] In prior orders, this Office has interpreted the meaning of the term “commercial information” under section 16(1)(a) of the *Freedom of Information and Protection of Privacy Act* (“FOIP Act”) to include a contract price and information that relates to the buying, selling, or exchange of merchandise or services (Orders 96-013, 97-013, 2000-005). I find that this definition is also applicable to the term “commercial” within section 24(2)(b) of PIPA.

[para 29] Calian states that the severed information within records 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 17-19 fulfill the requirements of section 24(2)(b). As I have already found that the severed information within records 1, 2, 5, 7 (name of third party) 8, 9, 10 and 12 are not responsive to the access request, I do not need to address whether section 24(2)(b) applies to this information. The only information that remains at issue is the severed information within records 6, 7 (portion), 11, 17, 18 and 19.

[para 30] After a review of the severed information within records 6, 7 (portion), 11, 17, 18 and 19, I find that this information fulfills the three criteria under section 24(2)(b).

[para 31] Calian entered into contracts with the Department of National Defence to provide a service to the Department of National Defence. As part of these contracts, the Department of National Defence provided Calian with funding for those services. Calian then entered into individual contracts with its employees to provide those services. Calian compensated those employees by providing them with a portion of the funding it had received for their positions. The severed information within records 7 (portion), 11, 17, 18 and 19 contain the rate of pay it was proposed that Calian would receive from the Department of National Defence for the Applicant’s position as well as the amounts that Calian would receive or had contracted to receive from the Department of National Defence for the Applicant’s position over approximately a two and half year period. The severed information within record 6 consists of the rate of pay that it considered paying the Applicant prior to hiring the Applicant. I note that record 6 specifically mentions the proposed compensation for the Applicant and not simply for the Applicant’s position.

[para 32] I find that the disclosure of this severed information would reveal information of a commercial nature as it includes “a contract price and information that relates to the buying, selling, or exchange of merchandise or services”. In addition, I also find that the disclosure of the information would reveal confidential information. As part of its submission, Calian provided this Office with an affidavit. Calian deposed that the severed information is confidential and provided reasons for its claim of confidentiality including factors related to the competitiveness of the industry. Calian deposed that it is in the health services staffing business which recruits and manages qualified health services professionals for organizations. Calian deposed that the business is highly competitive and that it competes in part on price. It deposes that information regarding its prices, costs and margins could be used by its competitors and is considered very sensitive and confidential. Calian also attached to its affidavit additional information publicly available from its website that describes its business and the competitive environment in which it operates. After a review of the information and affidavit evidence provided by Calian, the severed information and the submissions of the parties

before me, I agree with Calian and find that the disclosure of the severed information within the records that remains at issue would reveal confidential information. Given the nature of this information, I also find that it would not be unreasonable to withhold this information.

[para 33] In Order P2007-002, the Adjudicator held that section 24(2)(b) is a discretionary provision. An organization may only withhold information under this section if it properly exercises its discretion. In doing so, it must take into account relevant considerations, including the broad general purpose of the Act, and, under the particular circumstances of the case, the purpose of a particular exception. In addition, an organization must not take into account irrelevant considerations.

[para 34] After a review of the submissions and affidavit of Calian which addresses the confidential nature of the information and after a review of the limited amount of the Applicant's personal information that Calian severed and withheld from the Applicant, I find that Calian properly exercised its discretion under section 24(2)(b).

(2) Section 24(3)(b) - reveal personal information about another individual

[para 35] Section 24(3)(b) reads:

(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 36] As I have found that the severed information at issue is either non-responsive or properly withheld under section 24(2)(b), I do not find it necessary to address whether that information fulfills the criteria under section 24(3)(b).

F) If the withheld records contain the personal information of the Applicant and if section 24(2)(b) or 24(3)(b) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

[para 37] Section 24(4) reads:

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 38] After a review of the records at issue, I find that Calian has reasonably severed the information that was withheld from the Applicant pursuant to section 24(2)(b). I do not find that Calian could reasonably sever further information from the records at issue.

G) Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?

[para 39] Section 27(1)(a) of PIPA reads:

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

[para 40] An organization has an obligation to conduct a reasonable search for records in its custody or under its control that are subject to an access request under PIPA (Orders P2006-005, P2008-001).

[para 41] In Order P2006-012, the Adjudicator addressed the burden of proof regarding an adequacy of a search. The Adjudicator held that the burden first lies on an applicant to show “some basis” as to why an organization is or may be in possession of a particular record that it failed to locate, or failed to provide. The burden then shifts to the organization to show that an adequate search was completed.

[para 42] I find that the Applicant has fulfilled his burden of proof in regard to section 27(1)(a). In the Applicant’s initial submission, and in addition to his other arguments, the Applicant provided this Office with a copy of an email which refers to two additional emails (attachment 4 of the Applicant’s initial submission) which he did not receive in response to his access request. The Applicant also provided a copy of one of those emails that he obtained outside of the PIPA process (attachment 9 of the Applicant’s initial submission). After a review of all of the documentation provided by the Applicant, I find that the Applicant has fulfilled his burden to show that Calian may be in possession of additional records. The burden of proof now shifts to Calian to show that it conducted an adequate search in regards to the records.

[para 43] I agree with the Applicant that Calian did not, in its initial searches for responsive information, make every reasonable effort to assist the Applicant and to

respond to the Applicant as accurately and completely as reasonably possible. I find that Calian's initial searches did not, therefore, comply with section 27(1)(a) of PIPA. However, after a review of all of the information and evidence before me I find that, at the date of the inquiry, Calian has made every reasonable effort to search for and locate the records in its custody or under its control that are responsive to the Applicant's access request. Calian has now searched and disclosed records to the Applicant on four different occasions. In Calian's rebuttal submission, Calian satisfactorily outlined the steps its employees took to find records responsive to the Applicant's access request including retrieval of Applicant's security clearance file, searches of email accounts, a search of physical records, and a search of its deskflow databases. Given the number of searches performed, and the scope of the searches performed, presumably the records the Applicant states exist, including the two emails identified by the Applicant in his attachment #4, either no longer exist or are no longer in the possession of Calian. After reviewing the affidavit and the information before me, I do not find that ordering Calian to complete yet another search for the same information within the same sets of records would be reasonably likely to locate further responsive records.

[para 44] I also note that the Applicant alleges in his submission that further written explanations or comments by Calian employees should exist. In particular, the Applicant alleges that records should exist regarding the Applicant's alleged dissatisfaction with test and library materials or other records of conversations or phone calls. There is however, insufficient evidence that explanations or comments from these individuals, if they occurred, were in written as opposed to verbal form. Further, I find that if these records did exist in a written form at some point in time, given the number of searches performed and the scope of the searches performed, presumably these records either no longer exist or are no longer in the possession of Calian. I do not find that another search for this information about the Applicant, within the same set of records, would be reasonably likely to locate further responsive records.

[para 45] I find that, at the date of inquiry, Calian has complied with its duty under section 27(1)(a) of PIPA.

V. ORDER

[para 46] I make the following order under section 52 of PIPA:

A) Is the Organization an active organization?

[para 47] I find that Calian is an organization as defined within section 1(i)(i) of PIPA.

B) Is the access request for the Applicant's personal information?

C) Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?

[para 48] I find that the severed information within records 1, 2, 5, 8, 9, 10, and 12 is not responsive to the access request because it does not contain the Applicant's personal information. I also find that a third party name within record 7 is not responsive to the access request, as it is not the Applicant's personal information. I confirm the decision of Calian to withhold this information.

[para 49] I find that the information severed from records 6, 7 (portion), 11, 17, 18 and 19 is the Applicant's personal information and, therefore, responsive to the access request.

D) Is the Applicant's personal information in the Organization's custody or control?

[para 50] I find that Calian has custody and/or control of the records requested by the Applicant except for those email records that are within the custody and/or under the control of the Department of National Defence. These records are not within the custody and/or control of Calian except to the extent that copies may exist within paper or electronic records of Calian itself.

E) If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)?

Section 24(2)(b)

[para 51] I confirm Calian's decision to withhold the severed information within records 6, 7 (portion), 11, 17, 18 and 19 pursuant to section 24(2)(b).

Section 24(3)(b)

[para 52] As I have found that the severed information at issue is either not responsive or I have confirmed the decision of Calian to withhold the severed information under section 24(2)(b), I do not find it necessary to address section 24(3)(b).

F) If the withheld records contain the personal information of the Applicant and if section 24(2)(b) or 24(3)(b) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

[para 53] I find that Calian reasonably severed the information pursuant to section 24(4).

G) Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?

[para 54] I find that Calian, in its initial searches for information, did not conduct an adequate search for responsive records and did not fulfill the requirements of section 27(1)(a). However, at the date of inquiry, I find that Calian has conducted an adequate search as required by section 27(1)(a).

Lisa McAmmond
Adjudicator