ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2010-018

January 12, 2011

EXXONMOBIL CANADA LTD.

Case File Number P1213

Office URL: www.oipc.ab.ca

Summary: The Complainant alleged that the Organization contravened the *Personal Information Protection Act* (the "Act") by collecting, using and disclosing a document containing his personal information.

The document was a draft agreement relating to a surface lease and access right-of-way. The Adjudicator found that it consisted of the Complainant's personal information, such as his surname, the fact that he had negotiated the agreement, and his views and opinions about the provisions in the agreement.

The Organization admitted that it collected the document, but it did not know how the document came into its possession, as it had never had any dealings with the Complainant. The Organization speculated that it obtained the document from a third party individual or his agent in the course of litigation or prior lease negotiations involving those parties. The agent, who participated in the inquiry, denied providing the document to the Organization. The Complainant explained that the third party individual likewise did not provide the document to the Organization.

The Adjudicator found that the evidence that the agent and third party individual did not provide the document to the Organization outweighed the Organization's speculations that they did. He therefore found that the Organization did not collect the document containing the Complainant's personal information from the third parties in the course of the litigation or lease negotiations with them. In the absence of any other suggestion as

to how the Organization may have had authority to collect the Complainant's personal information in the document, the Adjudicator found that it did not have authority. He accordingly ordered the Organization to stop collecting the Complainant's personal information in contravention of the Act or in circumstances that are not in compliance with the Act. He also ordered the Organization to destroy the Complainant's personal information in the document, subject to a particular condition.

As the Organization merely reviewed the document and determined that it was not relevant to the litigation with the third party individual, the Adjudicator found that the Organization did not use the Complainant's personal information.

The Organization produced the document to the third party individual, in the course of the litigation with him, because the trial judge directed the Organization to do so. The Adjudicator therefore found that the Organization was authorized to disclose the Complainant's personal information in the document, without the Complainant's consent, on the basis that disclosure was for the purpose of complying with an order made by a court under section 20(e) of the Act and/or was reasonable for the purposes of a legal proceeding under section 20(m). The Adjudicator confirmed the decision of the Organization to disclose the Complainant's personal information.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1(k) [now 1(1)(k)], 4(2), 4(3), 4(4), 4(4)(a), 4(4)(b), 4(4)(c), 4(5), 4(5)(a), 4(5)(b), 4(5)(c), 7(1), 8, 8(1), 8(2), 8(3), 11, 11(1), 11(2), 12, 13, 13(1), 13(2), 13(3), 13(4), 14, 14(d), 15, 16(1), 16(2), 17, 19, 19(1), 19(2), 20, 20(e), 20(m), 22, 35, 41(3.1), 52, 52(3)(e), 52(3)(f), 52(3)(g), 52(4), 54(2), 59 and 75; *Personal Information Protection Amendment Act, 2009*, S.A. 2009, c. 50; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 1(n); *Provincial Offences Procedure Act*, R.S.A. 2000, c. P-34.

Authorities Cited: AB: Orders F2007-026, F2010-009, P2005-001, P2006-005, P2006-008, P2008-007 and P2009-008; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112.

I. BACKGROUND

[para 1] In correspondence received by this Office on January 21, 2009, the Complainant complained that ExxonMobil Canada Ltd. (the "Organization") contravened the *Personal Information Protection Act* (the "Act" or "PIPA") by collecting, using and disclosing his personal information contained in a document entitled *Schedule A Surface Lease and Access Right-of-Way For Applicant Review* (the "Schedule A document" or "Schedule A"). Around the same time that the Complainant made his complaint, a copy of Schedule A was provided to this Office by a third party individual ("Mr. X"), who had alerted the Complainant to the existence of the document.

[para 2] The Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. This was not successful, and the Complainant requested an inquiry by correspondence dated July 14, 2009. A written inquiry was set down.

[para 3] In the course of the inquiry, a third party organization, Landcore International Corp. ("Landcore"), asked to participate because the Organization said that it may have obtained the Schedule A document from Landcore. Each page of the document is on Landcore's letterhead, but Landcore denies that it gave it to the Organization. I permitted Landcore to participate, as a witness, by way of the written representations that it had made.

[para 4] The Complainant and Landcore requested that I hold an oral hearing as part of the inquiry, so that the particular representatives of the Organization who may have dealt with the Schedule A document – being its land agent and in-house counsel – would be obliged to testify as to how it came into their possession. In response, the Organization submitted that an oral hearing would add no further value to the written submissions already exchanged, and that its land agent and counsel would testify, as already set out in the written submissions, that they have no specific knowledge as to how Schedule A came into the possession of the Organization.

[para 5] As explained in a letter dated January 10, 2011, I decided not to hold an oral hearing, as I agreed that the written submissions of the main parties, and of Landcore as witness, were sufficient. I concluded that an oral hearing would not help me decide the issues in the inquiry.

[para 6] On May 1, 2010, amendments to PIPA came into force by virtue of the *Personal Information Protection Amendment Act, 2009*. However, because the Organization's alleged contravention of the Act occurred prior to the amendments, I will generally refer to the legislation as it existed previously. For the purpose of cross-reference, I note below when there has been an amendment to a section of PIPA that I discuss in the Order.

II. INFORMATION AT ISSUE

[para 7] The information that the Organization allegedly collected, used and disclosed in contravention of PIPA is the Complainant's personal information contained in the Schedule A document.

III. ISSUE

[para 8] The Notice of Inquiry, dated August 11, 2010, set out the issue of whether the Organization collected, used and/or disclosed the Complainant's personal information in contravention of the Act or in circumstances that are not in compliance with the Act.

[para 9] To assist the parties in making their submissions, the Notice of Inquiry raised questions, or sub-issues, that the parties were invited to address if they considered them to be relevant. I identify these questions as they arise in the course of the discussion below – in a different sequence than set out in the Notice of Inquiry – considering them to the extent necessary.

[para 10] In the course of the inquiry, I also added the following issues:

> Did the collection, use and/or disclosure of the Complainant's personal information by the Organization occur prior to the coming into force of the Act?
>
> Did the Organization collect, use and/or disclose the "personal information" of the Complainant, as that term is defined in the Act?

[para 11] In his complaint, the Complainant requested that charges be brought and penalties be imposed against the Organization. PIPA sets out offences and fines under section 59. However, section 59 does not give this Office jurisdiction to convict persons for offences under the Act or to assess penalties; rather, the *Provincial Offences Procedure Act* gives jurisdiction to the Provincial Court of Alberta to decide whether a person has committed an offence under section 59 of PIPA and to assess an appropriate penalty (Order P2006-005 at paras. 100 and 101).

[para 12] Under section 41(3.1), which was enacted in 2009 and came into force on May 1, 2010, the Commissioner may disclose to the Minister of Justice and Attorney General information relating to the commission of an offence under an enactment of Alberta or Canada if the Commissioner considers that there is evidence of an offence.

[para 13] The Commissioner has delegated to me the authority to hear this inquiry, but I have no authority to exercise discretion, on the Commissioner's behalf, under section 41(3.1). Having said this, I have drawn the Commissioner's attention to the Complainant's allegations that offences may have been committed by the Organization, so that he can decide whether there is evidence of an offence and whether to exercise his discretion to disclose information to the Minister of Justice and Attorney General.

IV. DISCUSSION

Did the Organization collect, use and/or disclose the Complainant's personal information in contravention of the Act or in circumstances that are not in compliance with the Act?

[para 14] The initial burden of proof rests with the Complainant, in that he has to have some knowledge, and adduce some evidence, regarding what personal information of his was collected, used and/or disclosed by the Organization, and regarding the manner in which his personal information was collected, used and/or disclosed; the Organization then has the burden to show that its collection, use and/or disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

1. Did the collection, use and/or disclosure of the Complainant's personal information by the Organization occur prior to the coming into force of the Act?

[para 15] I added this issue because it was unclear whether the alleged collection, use and disclosure of the Schedule A document occurred before or after PIPA came into force. PIPA came into force on January 1, 2004, as stated in section 75. Further, section 4(4) reads as follows:

> *4(4) If an organization has under its control personal information about an individual that was acquired prior to January 1, 2004, that information, for the purposes of this Act,*
>
> > *(a) is deemed to have been collected pursuant to consent given by that individual,*
> >
> > *(b) may be used and disclosed by the organization for the purposes for which the information was collected, and*
> >
> > *(c) after the coming into force of this Act, is to be treated in the same manner as information collected under this Act.*

[para 16] If the Organization acquired the Schedule A document prior to January 1, 2004, any of the Complainant's personal information in it would be deemed to have been collected with his consent under section 4(4)(a). Any subsequent use or disclosure of the Complainant's personal information in the document would then be authorized if the use or disclosure was for the purposes for which the personal information was collected, as set out in section 4(4)(b), or if the use or disclosure was in compliance with a provision elsewhere in the Act, as effectively set out in section 4(4)(c). If neither a collection nor use nor disclosure of the Complainant's personal information occurred subsequent to PIPA coming into force on January 1, 2004, I would have no jurisdiction to address the Complainant's complaint, as the Act would not have been in effect at the time of any of the events giving rise to the complaint.

[para 17] The Organization speculates that it obtained the Schedule A document in the course of litigation with the third party individual, Mr. X, or in the course of prior lease negotiations with Mr. X and his agent, Landcore. The Organization admits that it acquired Schedule A, but it does not know when it did, as it had no contact or relationship with the Complainant prior to his complaint to this Office. However, it knows that its business dealings with Mr. X "were ongoing from 2002 through some or all of 2004" and that the litigation with him "was settled in 2005". Based on the Organization's best guess as to when it obtained the Schedule A document, it would have been sometime in 2002, 2003, 2004 or 2005. January 1, 2004 is effectively the mid-point.

[para 18] A date at the bottom of the Schedule A document reads "3/12/03", but I do not whether this refers to March 12, 2003 or December 3, 2003. I presume the date to be the date that the document was created or printed, meaning that the document could not have been acquired by the Organization prior to that date. Whether the date is March 12, 2003 or December 3, 2003, the period during which Schedule A was acquired by the Organization is narrowed down to a portion of 2003 through to 2005.

[para 19] Given the overall timeframe in which the Organization might have obtained the Schedule A document, I find, on a balance of probabilities, that it was acquired, and therefore collected, by the Organization after January 1, 2004.

[para 20] The Complainant and Landcore submit that the Schedule A document was not given to the Organization by Landcore or Mr. X. While I have found that the document was collected by the Organization after January 1, 2004, in part because of its indication that it may have obtained it during the litigation or lease negotiations, my finding regarding the timing of the collection is not a finding regarding the manner of the collection – which is a question I address later in this Order. To the best of the Organization's knowledge, it collected the Schedule A document within a particular period, but I have also relied on the date at the bottom of the document. Even if Schedule A was not collected by the Organization in the course of the litigation or lease negotiations, I would still find that it was collected after January 1, 2004. If the document was created on March 12, 2003 – and even more so if it was created on December 3, 2003 – the likelihood that the document was acquired by the Organization after January 1, 2004 is high enough for me to find, on a balance of probabilities, that the collection occurred after January 1, 2004. This is because there would have to be some lapse of time between the creation of the document and its acquisition by the Organization, which was allegedly never intended to receive it.

[para 21] The Complainant's personal information was allegedly used and/or disclosed by the Organization during the aforementioned litigation with Mr. X. As I have found that the Organization's collection of the Schedule A document was after PIPA came into force, the alleged use and disclosure, if they occurred, would necessarily have occurred after the Act came into force.

[para 22] Even without reference to the timing of the collection, I find that the alleged use and disclosure of the Complainant's personal information occurred after January 1, 2004. While the Complainant does not know when the Organization collected his personal information, he writes that "it is known that they used and disclosed of [sic] my personal information after January 1, 2004". In his complaint, the Complainant explains that Mr. X advised him that he, Mr. X, had come into possession of a copy of the Schedule A document in the course of the litigation. I take the Complainant's certainty that the document was used and disclosed after January 1, 2004 to be the result of the fact, which I presume, that Mr. X obtained a copy of it after that date, and then proceeded to alert the Complainant to its existence. Because Mr. X obtained Schedule A after PIPA came into force, the Organization's corresponding use and disclosure, as alleged, also occurred after PIPA came into force.

[para 23] Finally, in a letter of November 16, 2010, I asked the Organization to tell me the date that the litigation with Mr. X began, so that I could be more certain that its alleged use and disclosure of Schedule A in the course of that litigation was after January 1, 2004. As I have already indicated, the Organization responded that it had business dealings with Mr. X through some or all of 2004, and that the litigation was settled in 2005. The Organization did not explicitly tell me when the litigation began, but I take it to be saying that the litigation arose some time after the conclusion of the business dealings in 2004.

[para 24] Given the foregoing, I conclude that the alleged collection, use and disclosure of the Complainant's personal information all occurred after PIPA came into force, and that section 4(4) of PIPA does not apply in this inquiry.

2. Did the Organization collect, use and/or disclose the "personal information" of the Complainant, as that term is defined in the Act?

[para 25] I will address this question in two parts, as set out in the headings that follow.

a) Does the Schedule A document consist of the Complainant's personal information?

[para 26] Under section 1(k) of PIPA [renumbered section 1(1)(k) as of May 1, 2010], "personal information" means "information about an identifiable individual". I find that the Schedule A document contains or reveals the Complainant's personal information.

[para 27] The Complainant's surname, which is his personal information, appears in a footer at the bottom of each page of Schedule A. I note that Order F2007-026, which dealt with a document similar to Schedule A, likewise said that a surname alone constituted an individual's personal information (at para. 12).

[para 28] In his initial complaint, the Complainant says that the Schedule A document pertains to his own lease negotiations and contracts. The document consists of information about a surface lease and access right-of-way, and in particular, "Additional terms and Conditions". The fact of the existence of the lease and right-of-way and the fact that the Complainant was negotiating these things constitute his personal information. The document also reveals the Complainant's personal views and opinions about the lease and right-of-way that he was negotiating, or at least the topics about which his personal views and opinion were sought, which is his personal information. A similar conclusion was reached in Order F2007-026, which said that an individual's personal views and opinions regarding several proposed amendments to a surface lease agreement was his personal information (at paras. 11 and 13). While that Order dealt with the meaning of "personal information" under section 1(n) of the *Freedom of Information and Protection of Privacy Act*, an individual's views and opinions can also

be his or her personal information under PIPA (Order P2008-007 at para. 18; Order P2009-008 at para. 26).

[para 29] To explain further, Schedule A is a draft document. Two numbered provisions – which I presume to be typical or at least possible in a surface lease or access right-of-way agreement and the content of which would be ascertainable by referring to the content of the numbered provisions elsewhere – are noted as being "removed". The Complainant either asked for those provisions to be removed, in which case the belief that they should be removed was the Complainant's personal view or opinion, or the person preparing the document recommended that they be removed, in which case the topic of the Complainant's personal view or opinion is revealed (i.e., his view or opinion on whether the content of the provisions should be removed). Elsewhere in the Schedule A document, there is a provision in which a dollar figure to calculate a particular form of compensation was left blank, presumably so that the Complainant could provide his view or opinion about what figure should be inserted. My finding that the document contains or reveals the personal views or opinions of the Complainant is supported by an indication from Landcore, which created the document, that "a client's name is not placed into the footer of a Schedule A until it identifies their specific concerns or requirements". The Complainant's specific concerns or requirements constitute his personal information.

[para 30] Even if the Schedule A document does not contain or reveal the Complainant's personal views or opinions, or his specific concerns or requirements, in such a way as to constitute his personal information, the document nonetheless consists of his personal information, as it reveals the fact that he was negotiating the surface lease and access right-of-way. This is sufficient for a finding that the document contains his personal information. Assuming that there was a collection, use and disclosure of Schedule A by the Organization – which I discuss next – this is also sufficient for a finding that the Complainant's personal information was collected, used and disclosed by the Organization. It does not matter whether the document also contains information that is not the Complainant's personal information.

[para 31] The Organization argues that Order F2007-026 is not relevant to this inquiry, as it is not clear from that Order whether there was any other information in the document at issue in that case to connect it to the complainant there, and it is not clear how the Adjudicator in that inquiry concluded that the surname was, in fact, a reference to the particular complainant.

[para 32] While I note that the conclusions in Order F2007-026 are similar to mine here, I am not relying on that Order in order to make my conclusions. I find that the Schedule A document contains or reveals the Complainant's personal information on the basis of my review of the document itself. The Organization says that, until the Complainant's complaint to this Office, it was not aware that the surname in the footer of Schedule A was that of the Complainant, as it had never had any contact or relationship with him. However, the surname is, in fact, the Complainant's. The Organization submits that Schedule A contains no information that would link the surname to the

Complainant, such as a first name, address or legal land description. However, the Complainant's surname was sufficient for a third party, Mr. X, to know that Schedule A related to the Complainant, which resulted in Mr. X alerting the Complainant to the document's existence.

[para 33] In short, the Schedule A document consists of the Complainant's personal information, regardless of whether the Organization was aware of his identity. Section 1(k) of PIPA states that personal information is information about an "identifiable" individual, not one who has been "identified" by the particular organization.

[para 34] Finally, I considered whether the Complainant's last name, the fact of the existence of his surface lease and access right-of-way agreement, and his views and opinions in the Schedule A document, are not his personal information on the basis that the information is instead about a business (see, e.g., Order F2010-009 at paras. 15 to 17, explaining that information about a business, or about an individual's business-related activities, is normally not "personal information" under section 1(n) of the *Freedom of Information and Protection of Privacy Act*). However, there is no suggestion in this inquiry that the Complainant had a business that was the party negotiating the lease and right-of-way set out in the Schedule A document. I therefore presume that the Complainant was negotiating in his personal or individual capacity.

b) Did the Organization collect, use and/or disclose the Schedule A document consisting of the Complainant's personal information?

[para 35] The Organization admits that it collected the Schedule A document, although it does not know the circumstances.

[para 36] The Complainant complained that the Organization used and disclosed his personal information in that "they were flaunting my documents in a court case that had absolutely nothing to do with me". The Organization admits that it disclosed Schedule A, in that it was in a box of documents inspected by Mr. X, in the course of the litigation with him. The Complainant says that the Schedule A document was in a binder, rather than a box, but this makes no difference. There was nonetheless a disclosure in the course of the litigation, given that Mr. X received a copy of Schedule A, which he then drew to the attention of the Complainant and forwarded to this Office. The Organization explains that it had previously given Mr. X a binder of documents for the purpose of the litigation – which did not include Schedule A because it was considered to be irrelevant to the lawsuit – but that it was subsequently directed by the trial judge to permit Mr. X to review the additional documents in the box. Mr. X obviously then received a copy of Schedule A, whether it was made directly from the copy in the box or received in a second binder.

[para 37] While the Organization writes that it did not "use" Schedule A other than in relation to the litigation, I find that it did not actually use the Complainant's personal information. The Organization indicates that it reviewed Schedule A, but that it determined that the document was not relevant to the lawsuit involving Mr. X. As the

Organization did not actually do anything with the information in the document, it did not use any of it in the course of the litigation.

[para 38] I conclude that the Organization collected and disclosed the Complainant's personal information in the Schedule A document, but that it did not use his personal information in it.

3. Is the collection, use and/or disclosure excluded from the Act by virtue of section 4(2) or 4(3)?

[para 39] Section 4(2) of PIPA states that, subject to the regulations, the Act does not apply to any personal information that is in the custody or under the control of a public body. Under section 4(3) [amendments to which came into force on May 1, 2010], the Act does not apply to certain information, or to the collection, use or disclosure of certain information.

[para 40] The parties do not argue that section 4(2) or section 4(3) applies so as to exclude the application of the Act. My review of those sections and understanding of the facts in this case do not lead me to conclude that either section applies. I therefore find that the Act applies to the collection and disclosure of the Complainant's personal information contained in the Schedule A document.

4. Did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)?

[para 41] Section 7(1) of PIPA reads as follows:

> *7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,*
>
> *(a) collect that information unless the individual consents to the collection of that information,*
>
> *(b) collect that information from a source other than the individual unless the individual consents to the collection of that information from the other source,*
>
> *(c) use that information unless the individual consents to the use of that information, or*
>
> *(d) disclose that information unless the individual consents to the disclosure of that information.*

[para 42] As set out above, an organization must not collect, use or disclose an individual's personal information unless the individual consents, or unless "this Act

provides otherwise" – which means with prior notice under section 8(3), or where consent is not required under a particular section of PIPA. The Notice of Inquiry accordingly included the following questions for the parties to address to the extent that they found relevant:

> Did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 14, 17 or 20 of PIPA?
>
> If the Organization did not have the authority to collect, use and/or disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before collecting, using or disclosing the information?

[para 43] PIPA contemplates the collection, use and disclosure of personal information with written or oral consent under section 8(1), with deemed consent under section 8(2), or with proper prior notice under section 8(3). The Organization does not argue that it was authorized to collect or disclose the Complainant's personal information on any of these grounds. I find that none of them apply.

[para 44] Sections 14, 17 and 20 of PIPA permit the collection, use and disclosure of personal information, without an individual's consent, in various circumstances. [Amendments to each of these sections came into force on May 1, 2010, but no amendments were made to the parts of the sections that I reproduce below.] As I have found only a collection and disclosure of the Complainant's personal information by the Organization, section 17 is not relevant. Sections 14 and 20 read, in part, as follows:

> *14 An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:*
>
> *…*
>
> *(d) the collection of the information is reasonable for the purposes of an investigation or a legal proceeding;*
>
> *…*
>
> *20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*
>
> *…*
>
> *(e) the disclosure of the information is for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body having jurisdiction to compel the production of information or with a rule of court that relates to the production of information;*
>
> *…*

> *(m) the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding;*
> …

[para 45] The Complainant has met the evidential burden of establishing a collection and disclosure of his personal information in the Schedule A document by the Organization. As articulated in previous Orders of this Office and repeated above, the Organization therefore now has the burden of establishing that the collection and disclosure were in compliance with PIPA. This allocation of the burden of proof was upheld by the Court of Queen's Bench, under the analogous regime regarding privacy complaints under the *Freedom of Information and Protection of Privacy Act*, when the Court stated, "Once the complainant satisfies the evidential burden, the burden shifts to the public body to show 'that it has the authority ... to collect, use or disclose personal information'" [*University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112 at para. 108].

[para 46] I will now review whether the Organization has shown that it had the authority to collect, and then whether it had the authority to disclose, the Complainant personal information in the Schedule A document.

a) Did the Organization have the authority to collect the Complainant's personal information without his consent, as permitted by section 14?

[para 47] The Organization (referenced in the excerpt below as "EMC") does not know how it collected the Schedule A document, but it has two theories. It writes:

> *In response to the initial Complaint, this matter was reviewed with two individuals involved in the [Mr. X] litigation on behalf of EMC – [a named] land agent and [a named] in-house counsel. From that review, it is clear that uncertainty exists as to how Schedule A came into the possession of EMC. Prior to this Complaint, EMC has no record of ever having contact with [the Complainant]. EMC does not and has never had a business relationship with [the Complainant].*
>
> *It appears most likely that Schedule A was provided to EMC in one of two possible scenarios:*
>
> > *(i) by [Mr. X] or by his agent Landcore International ("Landcore") during the course of the [Mr. X] litigation; or*
> >
> > *(ii) by [Mr. X] or Landcore during lease negotiations related to an EMC well site, which was proposed for an area germane to [Mr. X's] property.*

> *To be clear, Schedule A was not created by EMC. Any collection of Schedule A by EMC was either inadvertent, or, in the alternative, incidental to litigation and subject to the implied undertaking of confidentiality and restricted use. Schedule A has no meaning to EMC other than being a form that might have been provided by [Mr. X] and/or Landcore during lease negotiations or in the course of litigation. Beyond its inclusion in a box of documents potentially relevant to the [Mr. X] litigation, EMC has not used nor disclosed Schedule A to any other person.*

[para 48] For his part, the Complainant writes:

> *I still find it incredible that both an ExxonMobil Canada Ltd. Lawyer and Licensed Land Agent have no concept of what documents they have or where those documents came from. Yet they can casually make unsupported accusation about the source to your office. I also find it exceptionally hard to believe that two professional representatives for ExxonMobil Ltd. could either have or have used my personal information in their negotiations or litigation with [Mr. X], yet still not remember the documents, why they had them or where they got them from. I also believe that if [Mr. X]/Landcore would have been supplying or using my personal information in negotiations or litigation with ExxonMobil Canada Ltd. it would not have been a surprise for [Mr. X] to find my personal information with his documents and [he] would not have subsequently voiced concern and forwarded those documents to your office.*

[para 49] In its representations, Landcore denies providing the Schedule A document to the Organization, and takes issue with being implicated by the Organization. Landcore calls its alleged provision of Schedule A, which it considers to be the Complainant's confidential material, a "slanderous accusation" and an "unfounded accusation".

[para 50] The Organization first theorizes that Schedule A was given to it by Mr. X or Landcore in the course of the litigation involving Mr. X. I agree with the Complainant that it is unlikely that Mr. X gave the document to the Organization during the litigation if Mr. X was surprised to see it in the set of documents that he inspected during the litigation. While I realize that the Organization's in-house counsel and land agent have no recollection in relation to Schedule A – meaning that they could have received the document during the litigation, placed it in the box, forgotten all about it, and then neglected to tell the judge that Schedule A had originated from Mr. X himself – it would be very odd for a judge to direct the Organization to allow Mr. X to inspect a document that he himself initially provided to the Organization earlier in the litigation. As for Landcore, its express denial that it gave Schedule A to the Organization weighs against a finding that the Organization obtained it from Landcore during the litigation. On a balance of probabilities, I find that the Schedule A document was not collected by the Organization in the course of the litigation.

[para 51] I also find, on a balance of probabilities, that the Schedule A document was not collected by the Organization in the course of the lease negotiations with Mr. X and Landcore. There is insufficient evidence to support this. The representatives of the Organization have no recollection of how they obtained the document, and the Organization itself says that it has "speculated" as to how Schedule A came into its possession. I note that the Organization further theorizes that Landcore provided the Schedule A document to it, during the lease negotiations, as an example of the terms that would be acceptable to Mr. X, but that Landcore forgot to remove the Complainant's name from the footer. Again, however, the Organization writes that this is "pure speculation".

[para 52] Conversely, Landcore is certain that it did not give the Schedule A document to the Organization. As for whether Mr. X gave Schedule A to the Organization during the lease negotiations, the Complainant says that he did not, again given that Mr. X was surprised to see the document in the hands of the Organization. While the submission that Mr. X did not provide the document to the Organization is hearsay or an attributed fact, it is corroborated by Landcore's direct statement in the inquiry. Landcore and Mr. X were acting together, in that Landcore was Mr. X's agent, for the purpose of the lease negotiations. In my view, the representations that neither Mr. X nor Landcore gave Schedule A to the Organization outweigh the Organization's pure speculation that one of them did.

[para 53] Based on the evidence before me, I find that the Organization did not collect the Complainant's personal information in the Schedule A document from Mr. X or Landcore in the course of, and therefore for the purpose of, the litigation or lease negotiations involving those parties.

[para 54] As for whether it had authority to collect the Complainant's personal information, the Organization submits that it did not violate the Act if it collected the information in the course of the litigation with Mr. X. The Organization refers to section 14(d) of PIPA, which permits the collection of personal information, without consent, if the information is reasonable for the purposes of a legal proceeding. However, because the Organization has not established that the Schedule A document was, in fact, collected for the purpose of the legal proceeding with Mr. X, I also find that the Organization has not established that it had authority to collect the Complainant's personal information under section 14(d).

[para 55] The Organization itself states that section 14 of PIPA does not apply to the extent that it collected Schedule A during the lease negotiations. Regardless, the Organization has not established that it had authority to collect the Complainant's personal information for the purpose of the lease negotiations with Mr. X and Landcore, as it has not established that the Schedule A document was, in fact, collected in the course of the lease negotiations.

[para 56] In summary, the Organization relies on alternative facts to justify its collection of the Complainant's personal information – being that it collected Schedule A

from Mr. X or Landcore in the course of the litigation or lease negotiations involving those parties. As it has not established any of the alternative facts on which it relies, it has failed to justify the collection on any of those grounds.

[para 57] No other basis on which the Organization was authorized to collect the Complainant's personal information, without his consent, has been drawn to my attention. I considered whether there was authority under any of the other provisions of section 14, under any of the provisions of section 20, to which section 14 refers, or under any of the provisions of section 22 (disclosure respecting certain business transactions). I fail to see how any of them apply. The provisions are either obviously inapplicable, or if they were possibly applicable, the Organization would have raised them. Instead, the Organization says, in the further alternative, that its collection of the Schedule A document was "inadvertent". I take this to mean that, if the document was not collected in the course of the litigation or lease negotiations, the Organization acknowledges that it had no reason to collect it.

[para 58] In the absence of any other suggestion as to how the Organization had authority to collect the Complainant's personal information in the Schedule A document, I find that it did not have authority. I conclude that it collected the Complainant's personal information contrary to section 7(1) of PIPA, in that it did not obtain his consent and it was not permitted to collect his personal information in Schedule A without his consent.

[para 59] In his initial complaint and elsewhere, the Complainant makes it clear that he wishes to get to the truth of how the Organization obtained his personal information. He writes: "Industry has constantly abused our confidentiality as landowners simply because nothing ever happens and they never suffer any repercussions for doing it." I am not in a position to determine how the Schedule A document actually came into the possession of the Organization, nor do I have to determine that fact. The Organization has the burden of establishing that it collected the Complainant's personal information in circumstances that were in compliance with PIPA, and if it does not meet that burden, I can find that it did not comply with PIPA, as I have done here. I do not need to go on to determine how, in fact, the Organization collected the Complainant's personal information in the Schedule A document.

b) Did the Organization have the authority to disclose the Complainant's personal information without his consent, as permitted by section 20?

[para 60] The Organization explains that, at the trial of the action involving Mr. X, Mr. X asked to inspect a box of documents in the possession of the Organization that were related to its dealings with Mr. X. The judge adjourned the trial and permitted Mr. X to inspect the documents. One of those documents was Schedule A containing the Complainant's personal information.

[para 61] I find that the disclosure of the Complainant's personal information was authorized, without his consent, under section 20(e) of PIPA, on the basis that the disclosure of the Schedule A document to Mr. X was for the purpose of complying with an order issued by a court. Specifically, I take the judge in the action between the Organization and Mr. X to have ordered the Organization to produce Schedule A to Mr. X. Additionally or alternatively, the disclosure of the Complainant's personal information was authorized under section 20(m), on the basis that it was reasonable for the purposes of a legal proceeding. The Organization's disclosure of Schedule A to Mr. X was reasonable, and for the purposes of a legal proceeding, given that it was directed by the judge to make the disclosure during the court action. Regardless of how the Organization collected the Schedule A document in the first place, or why it happened to be in the box that Mr. X was permitted by the judge to inspect, the Organization was authorized to disclose the Complainant's personal information in the document to Mr. X once the judge told it to do so.

[para 62] I conclude that the Organization disclosed the Complainant's personal information in compliance with section 7(1) of PIPA, as it was permitted to do so without his consent.

5. Did the Organization collect the information directly from the Complainant? If the Organization collected the information other than directly from the Complainant, was the collection contrary to, or in accordance with, section 12 of PIPA (sources for collection)?

6. Did the Organization collect the information contrary to, or in accordance with, section 13 of PIPA? In particular, was it required to provide, and did it provide, notification before or at the time of collecting the information, in accordance with section 13?

[para 63] At the time of the Organization's alleged non-compliance with PIPA, sections 12 and 13 read as follows:

> *12 An organization may without the consent of the individual collect personal information about an individual from a source other than that individual if the information that is to be collected is information that may be collected without the consent of the individual under section 14, 15 or 22.*
>
> *13(1) Before or at the time of collecting personal information about an individual from the individual, an organization must notify that individual in writing or orally*
>
> *(a) as to the purposes for which the information is collected, and*
>
> *(b) of the name of a person who is able to answer on behalf of the organization the individual's questions about the collection.*

> *(2) Before or at the time personal information about an individual is collected from another organization with the consent of the individual, the organization collecting the information must notify the organization that is disclosing the information that the individual has consented to the collection of the information.*
>
> *(3) Before or at the time personal information about an individual is collected from another organization without the consent of the individual, the organization collecting the personal information must provide the organization that is disclosing the personal information with sufficient information regarding the purpose for which the personal information is being collected in order to allow the organization that is disclosing the personal information to make a determination as to whether that disclosure of the personal information would be in accordance with this Act.*
>
> *(4) Subsection (1) does not apply to the collection of personal information that is carried out pursuant to section 8(2).*
>
> [As of May 1, 2010, an amendment to section 13(1) came into force, and section 13(2) was repealed.]

[para 64] The Organization admits that it did not collect the Complainant's personal information directly from him, or with his consent, so sections 13(1) and 13(4) are not relevant.

[para 65] The Organization argues that its collection of the Complainant's personal information in Schedule A was in accordance with section 12, to the extent that it collected the document from Mr. X or Landcore in the course of the litigation involving those parties. However, I have found that the collection did not, in fact, occur in this way, and the Organization has not otherwise established that its collection of the Complainant's personal information was authorized under any of the sections listed in section 12 – being section 14 (collection of personal information without consent), section 15 (collection of personal employee information without consent) and section 22 (disclosure respecting certain business transactions). I accordingly conclude that the collection of the Complainant's personal information from a source other than him was not permitted by section 12.

[para 66] Section 13(2) and 13(3) deal with the collection of personal information by an organization when it is being disclosed by another organization. The Organization in this inquiry does not suggest that these provisions are relevant. I find that they are not relevant, as I have not found any disclosure of the Complainant's personal information to the Organization from another organization, including Landcore.

[para 67] I conclude that the Organization's collection of the Complainant's personal information in the Schedule A document was not in accordance with section 12 or 13 of PIPA.

7. Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, sections 11(1), 16(1) and 19(1) of PIPA (collection, use and/or disclosure for purposes that are reasonable)?

8. Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, sections 11(2), 16(2) and 19(2) of PIPA (collection, use and/or disclosure to the extent reasonable for meeting the purposes)?

[para 68] As I have found no use of the Complainant's personal information by the Organization, only sections 11 and 19 of PIPA are relevant. They read as follows:

> *11(1) An organization may collect personal information only for purposes that are reasonable.*
>
> *(2) Where an organization collects personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is collected.*
> …
>
> *19(1) An organization may disclose personal information only for purposes that are reasonable.*
>
> *(2) Where an organization discloses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is disclosed.*

[para 69] A judge directed the Organization to allow the third party individual, Mr. X, to inspect a set of documents, one of which was Schedule A. I found above that the Organization was therefore authorized to disclose the Complainant's personal information in the document under sections 20(e) and/or (m), which means that the disclosure was for purposes that were reasonable under section 19(1). As the Organization could not have complied with the judge's direction other than by giving the entire document to Mr. X, I also find that the Organization disclosed the Complainant's personal information in Schedule A to an extent that was reasonable under section 19(2).

[para 70] I have found that the Organization did not have authority to collect the Complainant's personal information in the Schedule A document. It follows that the Organization did not collect the Complainant's personal information for a reasonable purpose or to a reasonable extent. I therefore find that the Organization did not collect the Complainant's personal information in accordance with section 11(1) or 11(2) of PIPA.

[para 71] In this inquiry, I have concluded that the Organization contravened, or did not comply with, various provisions of PIPA regarding the collection of the

Complainant's personal information. In its submissions, the Organization states that it is willing to destroy all copies of the Schedule A document or return all copies to the Complainant. Under section 52(3)(g), I may order an organization to destroy personal information collected in contravention of the Act or in circumstances that are not in compliance with the Act.

[para 72] Under section 35, amendments to which came into force on May 1, 2010, an organization may retain personal information only for as long as the organization reasonably requires the information for legal or business purposes. I take the Organization's willingness to destroy Schedule A or return it to the Complainant to mean that it does not require the document for further legal or business purposes. I also suspect that all appeal and limitation periods have expired in respect of the Organization's litigation and other dealings with Mr. X, so that the Schedule A document is not required for some future legal purpose. However, I cannot confirm for myself whether Schedule A might be required for legal purposes at a later date. It is also possible that the document, having been part of a litigation file, is required to be retained by the Organization or its legal counsel for a particular period of time, based on provisions or directives elsewhere.

[para 73] Therefore, I intend to order the Organization to destroy the Complainant's personal information in the Schedule A document, if and when it confirms for itself that the document is no longer required for any legal purposes. I also remind the Organization that, under section 54(2), it should not take any steps to comply with my order until the period for bringing an application for judicial reviews ends.

[para 74] I do not instead order the Organization to return all copies of Schedule A to the Complainant, as I arranged for the Complainant to be given a copy of it in the course of the inquiry, and my order-making powers under PIPA do not expressly include an order to return records to a complainant.

9. Is section 4(5) of PIPA relevant to the collection, use and/or disclosure of the information (Act not to be applied so as to affect or limit certain legal concepts)?

[para 75] Section 4(5) of PIPA reads as follows:

> *4(5) This Act is not to be applied so as to*
>
> *(a) affect any legal privilege,*
>
> *(b) limit the information available by law to a party to a legal proceeding, or*
>
> *(c) limit or affect the collection, use or disclosure of information that is the subject of trust conditions or undertakings to which a lawyer is subject.*

[para 76] Under section 4(5), the Act must not be applied so as to affect or limit certain legal concepts. In this inquiry, I have not applied the Act in such a way as to contravene section 4(5). First, there is no suggestion that legal privilege under section 4(5)(a) or that trust conditions or undertakings under section 4(5)(c) are at stake. Second, I have found an authorized disclosure of the Complainant's personal information from the Organization to Mr. X, and therefore I have not applied the Act in a way that would have limited the information available to Mr. X as a party to a legal proceeding under section 4(5)(b).

[para 77] The Organization submits that section 4(5) permitted the collection of the Complainant's personal information, to the extent that Schedule A was collected from Mr. X or Landcore in the course of the litigation. However, although the Organization disclosed Schedule A to Mr. X for the purpose of the litigation, the Organization did not collect the document from Mr. X or Landcore for the purpose of the litigation, given my factual findings earlier in this Order. As there was no collection by the Organization that can be characterized as one for the purpose of making information available to the Organization as a party to a legal proceeding, section 4(5)(b) is not relevant to the Organization's collection of the Complainant's personal information.

[para 78] As explained above, I intend to order the Organization to destroy the Complainant's personal information in the Schedule A document, provided that the Organization satisfies itself that the document is no longer required by it for any further legal purposes. I have not ordered the Organization to necessarily destroy the information, as I have attached a condition, and therefore I am not applying the Act in a manner that might be contrary to section 4(5). In making its determination as to whether to destroy the Complainant's personal information in Schedule A, the Organization should itself consider all of the provisions of section 4(5), so that it does not destroy the information, and therefore apply the Act itself, in a manner that contravenes section 4(5).

V. ORDER

[para 79] I make this Order under section 52 of PIPA.

[para 80] I find that the Organization did not use the Complainant's personal information.

[para 81] I find that the Organization disclosed the Complainant's personal information in circumstances that were in compliance with PIPA, as it was authorized to disclose the information, without the Complainant's consent, on the basis that disclosure was for the purpose of complying with an order made by a court under section 20(e) and/or was reasonable for the purposes of a legal proceeding under section 20(m). Under section 52(3)(f), I confirm the decision of the Organization to disclose the Complainant's personal information.

[para 82] I find that the Organization collected the Complainant's personal information in contravention of the Act or in circumstances that were not in compliance with the Act. Under section 52(3)(e), I order the Organization to stop doing so.

[para 83] Further, under section 52(3)(g), I require the Organization to destroy the Complainant's personal information in the Schedule A document. However, this is subject to a condition that I specify under section 52(4), which is that the Organization first confirm for itself that it does not reasonably require the document for legal purposes. Until the condition is met, the Complainant's personal information in the Schedule A document should not be destroyed.

[para 84] Under section 52(4), I also specify, as a term of this Order, that the Organization ensure that its officers and employees – and, in particular, its land agent and in-house counsel – are made aware of the Organization's obligations under PIPA. Compliance with this portion of the Order can be achieved by communicating the requirements of PIPA to the officers and employees of the Organization generally – and to the land agent and in-house counsel specifically – in a way that the Organization considers appropriate.

[para 85] I further order the Organization to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order. The notice to me should include a description of what the Organization did to comply with the preceding paragraph of this Order.

Wade Riordan Raaflaub
Adjudicator