ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2011-001

September 15, 2011

ALBIAN SANDS ENERGY INC.

Case File Number P1230

Office URL: www.oipc.ab.ca

Summary: The Applicant requested information relating to himself from his former employer. He requested a review of the employer's response to his request, on the basis of his belief that records existed at the time of his request, in the form of e-mails, that the employer had not provided to him.

The Adjudicator held that the arguments and materials provided by the Applicant did not establish that the employer organization had failed to provide e-mail records in its possession, or had failed to conduct an adequate search. She accepted the evidence of the organization that it had met its duty to assist the Applicant.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5, ss. 1(i)(i), 27(1)(a), 52.

Orders Cited: AB: Orders P2006-006, P2006-007, P2006-012, F2007-029, P2009-005.

I. BACKGROUND

[para 1] On October 17, 2008, the Applicant sent an e-mail message to Albian Sands Energy Inc. ("the Organization" or "Albian"), in which he said: "Under PIPA, I would like please to submit my request to provide me all information that is related to me including the e-mails." When the Applicant did not receive a response from Albian, he

requested a review under the *Personal Information Protection Act* ("PIPA" or "the Act"). This office received that request on February 17, 2009.

[para 2] This office then contacted Albian, which is a corporation and therefore an "organization" that is subject to PIPA (section 1(i)(i) of PIPA, as that section read before the amendments to PIPA came into force on May 1, 2010). Albian said that it had not received the Applicant's e-mail access request until February 12, 2009, and Albian's Privacy Officer did not receive it until February 25, 2009. Albian then commenced processing the Applicant's access request and provided records to the Applicant, with some information withheld under section 24(2) and section 24(3) of PIPA.

[para 3] The Applicant was not satisfied that he had received all the information about him and sought the assistance of this office in getting the remaining information. The Applicant was not satisfied with the subsequent results of the review under PIPA. On December 29, 2009, the Applicant submitted his request for inquiry, in which he said that he did not believe Albian's statement that "…there is no outstanding personal information of [the Applicant]."

[para 4] In view of these events and in accordance with the practice of this office when the only issue is the adequacy of a search for records, the Commissioner requested that Albian provide an affidavit as to the nature of the search it had conducted in response to the request. This affidavit, dated January 22, 2010, was received on January 27, 2010. In it, Albian's Privacy Officer (Ms. M.) declared the following:

> 1. I am the Privacy Officer for Shell Canada Limited ("SCL") and Albian Sands Energy Inc., ("Albian") and as such have knowledge of the matters hereinafter deposed to, except where stated to be based upon information and belief, in which case I verily believe the same to be true.
>
> 2. In response to a request for access to information pursuant to the *Personal Information Protection Act*, from the Applicant, [name of Applicant] for "all information that is related to me", I sent out a "Document Request Notice" to the following individuals:
>
> (a) Applicant's direct supervisor
> (b) HR Records and HR personnel in Albian and SCL
> (c) HR Manager, Albian
> (d) VP HR Oil Sands
> (e) Maintenance Manager, Plant Maintenance, Albian
> (f) Oil Sands Information & Security Manager
> (g) Oil Sands Security Specialist
> (h) GSAP Team Lead
> (i) General Manager, Oil Sands
> (j) Manager, Reliability & Inspection, Albian
>
> 3. All individuals listed above were directed to forward to me any documents in their custody and control, whether electronic or hard copy, containing any information pertaining to the Applicant.

> 4. I have been informed that searches consisted of electronic search by key word "[name of Applicant]", search of e-mail accounts, and hard copy documents. No off site searches were conducted as no documents were stored off-site.
>
> 5. The Applicant received 140 pages of responsive records, with some information withheld pursuant to sections 24(2) and (3).
>
> 6. Several communications occurred between the individuals listed above and myself and I verily believe that no more responsive records exist other than what has been produced.

[para 5] After receiving Albian's affidavit about the search it had conducted, the Commissioner gave the Applicant an opportunity to comment. On February 17, 2010, the Applicant provided copies of eight pages containing e-mail messages (plus one blank page), which he says Albian had not disclosed to him on his access request. The Applicant's view was that, since Albian had not provided those e-mail messages, he had not received all of his personal information from Albian.

[para 6] This office subsequently required that the Applicant send copies of those e-mail messages to Albian. The Commissioner then asked Albian for a response about whether it had provided those e-mail messages to the Applicant when it responded to his access request.

[para 7] Albian responded (copying its response to the Applicant) on May 7, 2010, as follows:

> E-mail message dated May 16, 2008 from [a named employee] to [the Applicant] was disclosed to [the Applicant] on page 82 & 83 of Albian's response to his access request. Please see attached. This e-mail was included in a string of e-mails on which [the Applicant's Supervisor] was copied and was provided by [the Applicant's Supervisor] to me in response to a request for documents.
>
> No other e-mails were disclosed to [the Applicant] for the following reasons:
>
> - One employee had deleted all e-mails referring to [the Applicant] before the access to information request was received. The e-mails in question were of a temporary nature and not a "record" as per Shell policy.
>
> - Other employees had left Shell prior to the access request by [the Applicant]. When an employee leaves Shell, e-mail data can be harvested for a limited period of time before the employee's e-mail accounts is [sic] deleted.
>
> - E-mails sent by [a named employee] on May 1, 2008: This individual had not been identified as someone who may have documents relating to [the Applicant].
>
> On September 16, 2009 a letter (attached) was sent to [the Applicant] asking him to contact me if he believed that there were additional documents relating to his request for a transfer of employment that had not been disclosed to him and to provide me with specific information so that I can conduct a further search for such records. [The Applicant] did not respond.

[para 8] The Commissioner then gave the Applicant the opportunity to respond to what Albian had said. The Applicant responded on May 18, 2010 (copying his response to Albian), relying as well on further records that he attached to this response, including pages numbered 82 and 83, 84 and 127 (which are e-mail records that Albian had numbered and provided to the Applicant on his access request). He stated:

> 1. – Ms. [M.] stated the following: "E-mail message dated May 16, 2008 from [a named employee] to [the Applicant] was disclosed to [the Applicant] on pages 82 & 83 of Albian's response to his access request."
>
> > This is not true. I am attaching these pages. As you see, these e-mails are not in full there.
>
> 2. – Ms. [M.] stated the following: "One employee had deleted all e-mails referring to [the Applicant] before the access to information request was received. The e-mails in question were of a temporary nature and not a "record" as per Shell policy."
>
> > This is not true. A request was made to Albian Sands Energy (ASE) on Oct. 17, 2008. Please see the attachment #1. [Name of individual] is ASE CEO. As you can see, ASE provided e-mails from Dec. 19, 2007, to June 17, 2008. Please see attachment #2 & 3. Termination communication is not a temporary nature. There was a communication between [the Applicant's Supervisor] and his management about my termination and transfer. I have been terminated on May 22, 2008, without proper notice.
>
> 3 – Ms. [M.] stated the following: "Other employees had left Shell prior to the access request by [the Applicant]. When an employee leaves Shell, e-mail data can be harvested for a limited period of time before the employee's e-mail account is deleted."
>
> > This is not true. The key person for my termination, [name of individual] is still working for ASE until this moment. He is my former supervisor. I am afraid of using this claim of deleting of important documents and termination communication not to cooperate with you about document release.
>
> 4. – Ms. [M.] stated the following: "On September 16, 2009, letter (attached) was sent to [the Applicant] asking him to contact me if he believed that there were additional documents relating to his request for a transfer of employment that had not been disclosed to him and to provide me with specific information so that I can conduct a further search for such records. [The Applicant] did not respond."
>
> > Due to my trip to out of Calgary, I did not have an immediate access to my files. When I back from my trip, I contacted the privacy officer about missing documents and I provided samples. I was expecting ASE to release what they have instead of waiting to provide them the samples I provided. Beside the transfer documents, ASE is still resisting to release ASE communication about my termination.

[para 9] At this point, the Commissioner decided that it would be necessary to conduct an inquiry to review the records that had been provided to the Applicant and to hear full

arguments from the parties. I was delegated to hear that inquiry. A Notice of Inquiry was accordingly issued on November 15, 2010.

[para 10] The Applicant provided both an initial and a rebuttal submission. His initial submission was in essence a response to the Organization's letter of May 7, 2010, and largely reflected his letter of May 18, 2010, quoted above. The Organization provided only an initial submission. As well, it provided additional records to the Applicant on April 8, 2011, explaining that these records had not been located and provided earlier because the Privacy Officer had been unaware that they had been in the possession of a law firm that had been providing legal services to the Organization concerning the Applicant's termination. As well, on August 2, 2011, I asked the Organization a number of questions further to its submission, to which it replied. The Applicant provided an unsolicited response to these answers. This has been provided to the Organization, but no further submission was requested.

II. RECORDS AT ISSUE

[para 11] The Applicant believes that there are records that are or were in the possession of Albian that were not provided to him. Albian denies that this is so.

III. ISSUE

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)?

IV. DISCUSSION OF ISSUE

[para 12] Section 27(1)(a) of the Act provides:

> *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 13] An organization's duty to assist an applicant under section 27(1)(a) of PIPA includes the obligation to conduct an adequate search (Orders P2006-006 and P2006-007

at para. 48). An organization has the burden of proving that it conducted an adequate search (Order P2006-012 at para. 11).

[para 14] In general, evidence as to the adequacy of a search should cover the following points: who conducted the search; the specific steps taken to identify and locate records responsive to the applicant's access request; the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.); the steps taken to identify and locate all possible repositories of records relevant to the access request (e.g., keyword searches, records retention and disposition schedules, etc.); and why it is believed that no more responsive records exist than what has been found or produced [Order P2009-005 at para. 60, citing F2007-029 at para. 66, discussing the obligation to conduct an adequate search under section 10(1) of the *Freedom of Information and Protection of Privacy Act*].

[para 15] The first set of materials presented by the Applicant as evidence that he was not given all responsive records consists of e-mails between himself and employees of Shell Canada Limited ("Shell"). It is these e-mails on which the Privacy Officer comments in her letter of May 7, 2010. Her explanation as to why these e-mails were not provided to the Applicant are that the e-mails were deleted, either because the employees in question had left the company and their e-mails were no longer retrievable, or that the e-mails had been deleted because they were not records to which the company's records retention policy applied.

[para 16] The Applicant tries to demonstrate that these statements were untrue by pointing out the following:

- That the e-mail chain relating to the potential transfer to Shell which the Privacy Officer said was provided to her as part of a chain that was copied to the Applicant's Supervisor did not include e-mails that pre-dated the May 16, 2008 e-mail (as demonstrated by the first four of the pages he presented on February 17, 2010).
- That e-mails existed that were sent between Dec. 19, 2007 and June 17, 2008, prior to the date of the access request of October 17, 2008 (which presumably is meant to contradict the statement that e-mails had been deleted by one employee before the access to information request was received (on the basis that they had been of a temporary nature and not a "record" as per Shell policy).
- That the Applicant's Supervisor still worked for Albian (which presumably is meant to contradict the statement that employees who had or may have had e-mails concerning the Applicant had left the company and their e-mails were no longer retrievable).

[para 17] In my view, none of these points made by the Applicant demonstrate that the Privacy Officer's statements are not true.

[para 18] With regard to the first one, the Applicant points out that pages 82 and 83 do not contain the full chain of e-mails of which the May 16, 2008 e-mail is a part (there

appear to have been additional e-mails in the chain sent both before and after the ones provided by the Organization on pages 82 and 83). On this basis, the Applicant contends that the Privacy Officer's statement that the May 16, 2008 message was provided in pages 82 and 83 is false.

[para 19] However, the Privacy Officer's letter of May 7, 2010 refers only to the message that was sent by an e Shell employee to the Applicant on May 16, 2008, and explains that it was part of a string of e-mails on which the Applicant's Supervisor had been copied (apparently by the Applicant at a later point in the e-mail chain), and which was consequently provided by the Supervisor to the Privacy Officer. The Applicant provides nothing to establish, nor does he suggest, that the Supervisor was copied on the parts of the e-mail chain (which he provided in the attachment to his Feb 17, 2010 response) that were originally sent on dates prior to the May 16, 2008 e-mail. Just because the Applicant's Supervisor is shown as being copied on part of the chain of Shell employees' e-mails does not mean that he received the entire e-mail chain. Further, even if the Supervisor had received (by being copied on) some or all of the earlier parts of the chain, it is conceivable that the Supervisor had deleted those earlier portions (as well as, possibly, any parts he received that had been sent subsequently) and consequently was able to provide to the Privacy Officer only the parts contained on pages 82 and 83. The additional materials provided by the Applicant (the parts of the e-mail chain that were originally sent before May 16, 2008) do not constitute evidence that contradicts the Privacy Officer's statements that the Applicant was given all the results of the search of records of the Supervisor. In other words, there is nothing in what the Applicant has brought forward to establish that the Privacy Officer's statement regarding the May 16, 2008 e-mail was, as the Applicant contends, an untrue statement.

[para 20] Moreover, there is nothing in the nature of the portions of the e-mail chain that were not provided that suggests they would have been withheld deliberately. I accept the Organization's assertion that the e-mails as they existed in the possession of the Shell employees were deleted on the basis that they were of temporary value. I also agree with the Privacy Officer's observation that parts of this e-mail chain – in particular the job description – were not the Applicant's personal information in any event, and that he is not entitled to such information under PIPA.

[para 21] I turn to the Applicant's point that he has e-mails that were provided to him by Albian that were created between December, 2007 and June, 2008 – prior to the date on which he made his access request. I take this to be a suggestion that because some e-mails concerning him had been retained, all e-mails concerning him should still have been in existence at the time of his request. In this regard, it does not follow from the fact that Albian had and provided e-mails in the possession of some employees from this time period that other e-mails which had been in the possession of particular employees had not been deleted before the Applicant's access request was received. The content of the different e-mails may have been such as to require different treatment under the retention policies of the Organization. Furthermore, it is quite conceivable that retention policies would be applied by different employees in a somewhat inconsistent fashion.

[para 22] The Applicant's third point relates to the Applicant's former Supervisor. He refers to the Privacy Officer's statement that other employees had left their employment prior to the access request, and their e-mails had been deleted and could no longer be retrieved. The Applicant states that this is not true, by reference to the fact that his Supervisor is still an Albian employee. Again, the Privacy Officer is not suggesting that the Supervisor had left Albian's employ. She said only that some employees (presumably those who may have had e-mails concerning the Applicant) had left and that their e-mails would have been routinely deleted before the access request was received. As to the Supervisor, the Privacy Officer declares that a search was conducted of the e-mail account of this person, and that this Supervisor forwarded the results of this search to the Privacy Officer. As well, on May 18, 2010, the Applicant himself provided me with pages of e-mails that the Applicant's Supervisor sent or received, numbered by Albian as pages 84 and 127. The headers on pages 84 and 127 indicate that those e-mails had been forwarded to the Privacy Officer by the Supervisor, as the Privacy Officer declared in her Affidavit. Thus, the Privacy Officer's reference to an employee who had left and whose e-mails had been deleted could not have been the Supervisor, and I cannot conclude, on the basis that the Supervisor continues to be employed by the Organization, that these statements of the Privacy Officer are untrue.

[para 23] I turn to e-mail communications provided by the Applicant concerning a further employment opportunity that the Applicant was pursuing with Shell. The e-mails appear to be to and from a Shell employee (D.R.). I accept as reasonable the Organization's explanation that this person was not identified as one who might have had responsive records in his possession.

[para 24] Finally, I turn to the Applicant's assertion that pages 1 to 18 in his attachment A were not provided to him. I make the following observations:

- Pages 1 to 2 in this attachment were provided with the exception only of the first of the series of messages. No explanation was given regarding the first message.
- I agree with the Organization that pages 3 to 4 are not the Applicant's personal information and he has no entitlement to them under PIPA.
- Page 5, which was authored by the Applicant, was not recovered according to the Organization, and was not provided; I accept the Organization's explanation that it was deleted.
- Pages 6 to 8 were released on pages 80 to 81 and pages 112 to 113 of the Organization's response.
- Page 9, which was authored by the Applicant, was not recovered according to the Organization, and was not provided. No explanation was given.
- Pages 10 to 13, which are communications between the Applicant and a Shell Scotford employee, were not recovered according to the Organization. I accept the Organization's explanation that they were deleted, and as well that the job description they contain is not personal information.
- Page 14 was not recovered according to the Organization. I accept the Organization's explanation that it was deleted, and that as work product, it is not personal information. The same characterization applies to pages 15 to 16 in that they consist of a discussion of work-related rather than personal matters.

- Pages 17 to 18 were disclosed to the Applicant on pages 39 to 40 of the Organization's response.

[para 25] Based on this review, I acknowledge that the Applicant has shown that there are a small number of e-mail messages that consist of the Applicant's personal information that were not provided to him. The Organization has explained, for almost all of these, that the e-mails were deleted, and I accept this explanation. No explanation was provided in two instances, as mentioned in the list above, but I do not regard these as sufficiently significant to draw any adverse conclusions – given the nature and content of the e-mails, I believe the same explanation applies. Furthermore, a search needs only to be adequate, it does not need to be perfect, so that even if these records existed in the Organization's computer system at the time of the search, I do not regard the failure to find them as constituting a breach of the duty to conduct an adequate search. As well, I see no reason for concluding that the e-mails were found but were deliberately withheld.

[para 26] Before concluding this section I note that the Applicant has repeatedly stated his view that it would be wrong to delete or destroy e-mails that relate to a termination since that is not a matter of a temporary nature and would infringe the records retention policies provided by the Organization itself. I note that the records the Applicant has presented that the Organization did not provide to him do not appear to relate to his termination, but, rather, concern his transfer request. Moreover, I must stress that it is not within the jurisdiction of this office to impose requirements on an organization as to how long it must retain records. My mandate is limited to considering whether the Organization did or did not properly search for and provide records that were in its possession at the time of the request. Even if the Organization failed to retain records that it should have retained, either because it would have been appropriate to do so in the circumstances, or as a function of its existing policies, that is a matter I have no power to address or remedy.

[para 27] As discussed above, it appears from the Applicant's arguments that he is trying to establish that at the time of his access request, Albian or Shell employees were in possession of e-mails that Albian did not provide to him in response to his request. It is not clear to me whether his concern is only that e-mail records that he already has were not provided to him by Albian even though Albian (or Shell) had them, or that because he believes he has demonstrated this to be so, I should infer that Albian also has or had e-mail communications concerning him that he does not already have and to which he was not a party. It is also not clear whether he is suggesting that records were not found that should have been found, or that records were found but not given to him.

[para 28] Regardless which is the case, I find nothing in the information and arguments presented by the Applicant that establishes that the Privacy Officer's explanations as to why additional e-mails were not provided to the Applicant in Albian's response to the access request are untrue. As I have explained above, none of the information the Applicant presents either directly contradicts or is inconsistent with the Privacy Officer's statements.

[para 29] I have noted the Applicant's assertion in his request for inquiry that he has proof that there was a communication "with the Scotford" prior to his termination. Possibly, he means a communication between another Albian employee and a Scotford Shell employee. If that is the case, I have not been able to find proof in the Applicant's arguments, or the materials he has presented, that such a communication exists or existed that was not provided to him. Alternatively, he is referring to his own communications with the Shell Scotford employee about a possible transfer (of which he has his own copy), which has already been discussed above (the parts of the e-mail chain that preceded the May16, 2008 communication). If that is the case, I have already accepted the explanation of the Privacy Officer that the probable reason this record was not found is that the portions of the e-mail chain that he was not given had been deleted before the access request was made.

[para 30] I also note the Applicant's assertion that there was a communication between his Supervisor and his Supervisor's management about the Applicant's termination and transfer prior to his access request. The Applicant has told me nothing which could lead me to infer that such a communication exists or existed but was not provided to him by the Organization.

[para 31] Consequently, I have no basis on which to conclude that at the time of his access request, either Albian or Shell were in possession of any e-mails – either to which the Applicant was a party, or which were between other employees but which concerned him – that it failed to provide to him.

[para 32] I have noted that some of the records that were provided to the Applicant were severed to some degree. However, the Applicant has not raised any objection to this severing, and therefore I have no jurisdiction to review it. My jurisdiction in this inquiry is limited to determining if the Organization met its duty to assist the Applicant and to conduct an adequate search.

[para 33] As well, the Applicant raised a number of other points in his rebuttal submission. He stated his opinion that Albian management in Fort McMurray did not want the Calgary office to know what was happening, that Albian has distorted certain facts regarding his transfer request, and that he does not see how e-mails from a date later than ones which were recovered cannot have been recovered. None of these points change my conclusions.

[para 34] I turn to the question of the relationship between Albian and Shell Canada Limited. In a letter dated August 2, 2011, I sent a number of questions to Albian, in order to try to ascertain why Shell Scotford employees were contacted to provide records responsive to the request when the access request had been made to Albian rather than to Shell. My thinking was that if Albian and Shell were separate companies and separate employers, only the information repositories of Albian would need to be searched, even if the records involved communications concerning the Applicant by Albian employees with Shell employees.

[para 35] The Organization's reply was to the effect that before 2010, Albian was a separate employer. At the same time, however, it referred to a transfer from one company to the other at the time as an "internal" transfer, and its search covered both companies. Thus I remain uncertain about the relationship between the organizations at the relevant time and the implications of that relationship for access requests. Regardless, Albian has reiterated that it searched the relevant repositories of records of both companies and that at the time of the request there were no records concerning the Applicant – either that were in the possession of Albian employees or of Shell employees – that have not been provided to the Applicant. I have reviewed the Applicant's arguments and materials and find no reason to disbelieve this assertion. I think it may be assumed from this that an access request directly to Shell would yield the same result.

[para 36] I conclude that Albian has established that it has conducted an adequate search for records in response to the Applicant's request, in accordance with the requirements quoted at paras 12 and 13 above. Its affidavit covers the requirements for demonstrating an adequate search, as set out, and it has explained why records do not exist which the Applicant believes do or should exist. Thus I find the Organization has met its duties under section 27(1)(a) of the Act.

V. ORDER

[para 37] I make this Order under section 52 of the Act.

[para 38] I confirm that the Organization has met its duties under section 27(1)(a) of the Act.

Christina Gauk, Ph.D.
Director of Adjudication