ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2012-04

June 22, 2012

TALISMAN ENERGY INC.

Case File Number P1494

Office URL: www.oipc.ab.ca

Summary: The Applicant was employed by the Organization from April 2005 to April 2009, whereupon the Organization terminated his employment. By letter dated August 25, 2009, the Applicant made a request for his personal information from the Organization. The Organization provided two large binders of documents in response to this request. The Applicant submitted a second and third access request to the Organization on October 13 and 14, 2009, in which the Applicant asked to see everything from the day he started, including all of his emails (including deleted emails), all payroll information, all electronic records, and all information given to various insurance companies and other organizations and individuals that had been involved in matters relating to the Applicant.

This inquiry deals with only the Organization's response to the Applicant's second and third requests. In response to these requests (which the Organization responded to as one request), the Organization also included its legal and security departments in the scope of its search for information, in addition to the personnel and payroll records searched in response to the Applicant's first request. The Organization responded to the Applicant on December 22, 2009, providing some further information and withholding other information pursuant to exceptions for legal privilege, information collected for an investigation or legal proceeding, and third party privacy. The Organization did not conduct a search for deleted emails or other deleted electronic records.

The Adjudicator found that the Organization properly applied the exception to access for personal information about another individual, and agreed with the Organization that the personal information of the third party could not reasonably be severed from the Applicant's own personal information. The Adjudicator also found that the Organization properly applied the exception to access for information protected by solicitor-client privilege.

The Adjudicator accepted the Organization's reasons for not conducting a search for deleted electronic records, as such a search would go beyond what the Organization is required to do under section 27(1)(a) of PIPA. The Adjudicator was satisfied that the Organization met the requirements of an adequate search for records under the Act.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 24, 27, 52.

Authorities Cited: AB: Orders 96-017, P2006-006, P2006-007, P2007-002, F2009-023, F2010-022.

Cases Cited: *Solosky* v. *The Queen*, [1980] 1. S.C.R. 821.

I. BACKGROUND

[para 1] The Applicant was employed by the Organization from April 2005 to April 2009, whereupon the Organization terminated his employment. By letter dated August 25, 2009, the Applicant made a request for his personal information from the Organization. The Organization provided two large binders of documents in response to this request. The Applicant submitted a second and third access request to the Organization on October 13 and 14, 2009, in which the Applicant asked to see everything from the day he started, including all of his emails (including deleted emails), all payroll information, all electronic records (he suggested he get access to the Organization's network for his information), and all information given to various insurance companies and other organizations and individuals that had been involved in matters relating to the Applicant.

[para 2] The Organization had, in responding to the Applicant's first access request, searched for his personal information in its personnel and payroll records. In response to the Applicant's second and third requests (which the Organization responded to as one request), the Organization also included its legal and security departments in the scope of its search for information. The Organization responded to the Applicant on December 22, 2009, providing some further information and withholding other information pursuant to exceptions for legal privilege, information collected for an investigation or legal proceeding, and third party privacy. The Organization noted in its response that it did not conduct a search for deleted emails or other electronic records as requested, as such a search exceeded the Organization's obligations under section 27 of the Act.

[para 3] The Applicant requested a review of the Organization's response with respect to his first request, and later with respect to his second and third requests. This inquiry deals with only the latter requests.

II. INFORMATION AT ISSUE

[para 4] The information at issue involves the following: 4 pages of records, withheld under section 24(3)(a), (b) and (c), which consist of two email chains; 176 pages of records, withheld under sections 24(2)(a) and (c), which consist of email communications and letters between the Organization's in-house counsel, HR group and external counsel, as well as file notes written by in-house counsel.

III. ISSUES

[para 5] The Notice of Inquiry, dated October 5, 2011, states the issues for inquiry as the following:

1. **Is the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?**

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

    a. **Did the Organization properly apply section 24(2)(a) (legal privilege) to the information?**
    b. **Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to the information?**
    c. **Does section 24(3)(a) (threat to life or security) apply to the information?**
    d. **Does section 24(3)(b) (information revealing personal information about another individual) apply to the information?**
    e. **Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to the information**

3. **If the withheld records consist of the personal information of the Applicant, and if sections 24(2)(b), 24(3)(a), 24(3)(b) or 24(3)(c) apply 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)?**

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

IV. DISCUSSION OF ISSUES

[para 6] Amendments to PIPA came into force on May 1, 2010. As the Applicant's access requests were made prior to the amendments, the previous version (i.e. the version in force immediately prior to the May 2010 amendments) will apply. However, the provisions at issue in this inquiry were not affected by the amendments.

1. Is the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?

[para 7] With respect to the four pages to which the Organization applied the exceptions in section 24(3), three of those pages contain the Applicant's personal information. One page consists only of the last signature line of an email chain and contains only the personal information of a third party. The remaining three pages contain the Applicant's name and opinions of third parties about him.

[para 8] The Organization withheld these pages in their entirety under sections 24(3)(a), (b) and (c).

[para 9] The Organization chose not to submit the records for which it has claimed solicitor-client privilege for my review in the inquiry, but rather relied on the office's Solicitor-Client Protocol in connection with those records. Following the Protocol, the Organization made arguments about the basis on which it was claiming solicitor-client privilege.

[para 10] In a letter sent to both parties, I indicated that based on the Organization's arguments, some of the pages withheld under section 24(2)(a) may not contain the Applicant's personal information. For example, the Organization indicated that some email attachments include copies of legislative provisions. However, the Organization continues to apply the exception to every page, and as I have not had an opportunity to review the pages, I can only conclude that each page contains the Applicant's personal information.

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

[para 11] The relevant provisions of section 24 are as follows:

> *24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:*
>
> > *(a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization;*

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

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

…

(c) the information was collected for an investigation or legal proceeding;

…

(3) An organization shall not provide access to personal information under subsection (1) if

(a) the disclosure of the information could reasonably be expected to threaten the life or security of another individual;

(b) the information would reveal personal information about another individual;

(c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.

(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.

4 pages of employee emails

[para 12] The four pages of emails provided to me contain the Applicant's personal information in the form of another individual's opinions about him. Previous orders from this office have found that while opinions are the personal information of the individual who is the subject of the opinion, they can also be the personal information of the individual giving the opinion, if there is a personal dimension to the opinion.

[para 13] In Order P2007-002, the Director of Adjudication commented on the varying degree of personal connection to the holder of the opinion:

> That the fact a person holds or gives an opinion about another conveys something personal about the maker will not be true for all opinions. In some circumstances, an opinion held by a person may be abstracted from their personal life to such a degree that it does not seem to have the quality of personal information. An example is where the opinion is a professional one – for example, a psychologist's opinion from interpreting a psychological test that B has a particular personality disorder. However, for situations where the opinion that is held, or the fact it is given, does reflect something personal, and especially something sensitive, about the person making it, it is, in my view, commonly and quite properly regarded as also being information about that person.

[Order P2007-002, at para. 22]

[para 14] The Director of Adjudication also noted that purely factual statements about the actions of the Applicant are personal information about the Applicant (at para. 25). With respect to the records at issue, some statements made in the emails are clearly opinions and some are presented by the third party as factual. However, I conclude from the context of the entire email that the third party was relaying his own interpretation of a state of affairs, rather than providing purely factual statements; in my view, the statements are more accurately characterized as the third party's opinion.

[para 15] Although the third party's opinion is given in an employment context, it is not a professional opinion. Both the content of the opinion and the fact that the third party gave the opinion indicates a personal connection between the information and the third party such that it is the third party's personal information.

[para 16] From the content of the emails, it seems likely that the opinions themselves, even with the third party's name severed, might reasonably serve to identify the third party.

[para 17] Section 24(3)(b) is a mandatory exception to access, which permits no balancing or exercise of discretion. As I have found that the information in the email chains, to the extent that it contains the Applicant's personal information, also contains personal information of third parties, section 24(3)(b) requires the Organization to withhold it. For reasons I discuss below, I find that the personal information of the third party in these pages cannot reasonably be severed from the Applicant's personal information per section 24(4).

Information for which solicitor-client privilege is claimed

[para 18] The Organization made arguments claiming both solicitor-client privilege and litigation privilege with respect to the 176 pages of records for which legal privilege was claimed. The Applicant argued that the Organization did not properly distinguish in its arguments the information to which solicitor-client privilege was claimed from the information to which litigation privilege was claimed. The Organization confirmed that it was claiming solicitor-client privilege with respect to all 176 pages.

[para 19] The Organization categorized the records into three categories:

> (1) email communications and letters between the Organization's in-house counsel and HR employees regarding the Applicant's termination;
>
> (2) email communications and letters between in-house and external counsel, as well as the Organization's payroll employees, regarding the Applicant's two garnishee summons; and
>
> (3) file notes written by in-house counsel.

[para 20] The Supreme Court of Canada stated in *Solosky* v. *The Queen* [1980] 1. S.C.R. 821 that in order to correctly apply solicitor-client privilege, the following criteria must be met:

a. the document must be a communication between a solicitor and client;
b. which entails the seeking or giving of legal advice; and
c. which is intended to be confidential by the parties.

[para 21] As part of the our office's Solicitor-Client Protocol, the Organization provided an affidavit from a member of the Organization's in-house counsel. The affiant states that for all of the records, the Organization is the client that was seeking or receiving legal advice from its in-house and/or external counsel, and that the communications were not subsequently forwarded to individuals other than the intended recipients.

[para 22] With respect to the email communications concerning the Applicant's termination, the affiant states that there are 61 pages of records between in-house counsel and HR employees involving the seeking or giving of legal advice. The Organization describes the email attachments as including draft letters to the Applicant in response to correspondence from him, draft termination letters and instructions for the termination meeting. The dates of the records range from February 5, 2009 to September 11, 2009.

[para 23] The emails and letters between in-house and external counsel and payroll employees regarding the Applicant's garnishee summons included 85 pages of records; the Organization states that these emails and letters include communications about specific payroll deductions, the application of certain exemptions claimed by the Applicant, and the administration of the garnishee summons upon termination. The Applicant had argued that there was a length of time between the attachment of his two garnishee summons, raising a question about the involvement of legal counsel for the full period of time as claimed (October 15, 2007 to August 12, 2009). However, the Organization confirmed that the garnishee summons were issued within 3 weeks of each other (August 29, 2007 and September 18, 2007).

[para 24] With respect to the file notes, there are 30 pages of records of handwritten notes of in-house counsel, from March 18, 2008 to September 1, 2009. Although the dates begin a year before the Applicant's employment was terminated, I note that the emails provided to me indicate that there were concerns about the Applicant's behaviour at work during this time frame.

[para 25] I am satisfied based on the Organization's submission and affidavit, that the communications between the Organization's HR employees or payroll employees, and in-house and external counsel, entailed the seeking and giving of advice regarding the Applicant's termination and garnishee summons, and that they were intended to be confidential.

[para 26] Past orders of this office have considered a similar exception to access for information protected by solicitor-client under the FOIP Act and have concluded that working papers of counsel that are directly related to the giving or seeking of legal advice meet the criteria for solicitor-client privilege (see Order 96-017, at para. 30). In this case, I accept that the file notes of the in-house counsel were created as part of giving legal advice and meet the test for solicitor-client privilege such that section 24(2)(a) applies to these records.

3. **If the withheld records consist of the personal information of the Applicant, and if sections 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)?**

[para 27] The requirement to reasonably sever properly-withheld information from an applicant's personal information under section 24(4) does not apply to information withheld under section 24(2)(a). However, I can consider whether severing could reasonably have been done by the Organization with respect to the information withheld under section 24(3) so as to provide the Applicant with any remaining personal information.

[para 28] The Applicant argued that the employee emails should be severable, "even if to an extreme degree to simply limit the information to the substance describing the employee opinion and identifying [the Applicant] in the communication."

[para 29] I found that the opinions of the third party in the emails are that third party's personal information. In my view, it is not possible to extricate the third party's personal information from the opinion such that any information can be provided to the Applicant without also disclosing the third party's personal information.

[para 30] It would be possible for the Organization to sever out all information from the records except for the Applicant's name. However, in my view, the remaining information would not be sufficiently meaningful so as to properly balance the Applicant's right to have his personal information protected and the need of the Organization to collect, use and disclose personal information for reasonable purposes, as set out in section 3 of the Act. This is not to say that there may not be circumstances in which the presence of an individual's name alone in a record could reveal personal information about that individual; however, this is not such a circumstance.

[para 31] For these reasons, I find that the Organization was not reasonably able to sever the information properly withheld under section 24(3) from the Applicant's personal information.

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

[para 32] Section 27(1)(a) of the Act states the following:

> *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 33] The duty to assist under section 27(1)(a) includes an obligation to conduct an adequate search (Orders P2006-006 and P2006-007).

[para 34] The Organization, in its response to the Applicant, informed him that that any documents, notes or electronic communications sent to or by the Applicant were located and provided to him, with the exception of the information at issue. The Organization also noted that many of the records provided to the Applicant were likely provided to him previously, in response to his first request but that the Organization would provide them a second time in response to the second and third requests. The Organization informed the Applicant that it would not perform a search for deleted electronic records.

[para 35] The Applicant stated in his initial submission that the Organization was not responsive to his requests, but did not provide further detail. I can only assume that he is alleging the Organization did not meet its obligation to make every reasonable effort to assist him and respond accurately and completely because it did not conduct a search for deleted electronic records or give him access to its network.

[para 36] PIPA permits access to information in the custody or control of an organization, subject to exceptions. Nothing in the Act obligates an organization to provide an applicant with access to its network systems, even if only to allow the applicant to view his or her own personal information.

[para 37] With respect to deleted information, the Organization clarified that the "deleted items" folder of employees' email accounts were searched, but the Organization did not attempt to search for items deleted from those "deleted items" folders. Past orders of this office indicate that in some circumstances, searching deleted files is required by a public body for the performance of an adequate search under the *Freedom of Information and Protection of Privacy Act* (FOIP Act):

> If the Public Body determines that a record existed and was deleted, then the Public Body must determine whether it is possible to retrieve and reproduce the record to the Applicant.

[Order F2009-023, at para. 67]

> If responsive e-mails had been permanently deleted or were otherwise not retrievable by the Vice-Provost, the Public Body should then have considered whether they could be retrieved from a backup system or from the "snapshot" of the contents of the computers replaced in the summer of 2008. If the Public Body could make reasonable efforts to retrieve them, the e-mails should either have been produced to the Applicant or withheld pursuant to an exception to disclosure.

[Order F2010-022, at para. 71]

[para 38] The Organization stated that restoring deleted emails would require the retrieval of backup tapes stored off-site. To find deleted emails relevant to the Applicant's request, the date and time of the email would have to be known, and that

> [i]f the date and time of the desired email correspondence is unknown (as would be the case in searching for records sent to [the Applicant], from [the Applicant] or about [the Applicant]), a re-creation of the entire email system and subsequent search of such system would be required. [The Organization's] IT department has estimated that this process would take approximately 1 to 2 months and would cost between $50,000 and $100,000 for the required resources and hardware.

[para 39] I agree that the search described by the Organization for deleted emails or other electronic records would go beyond what the Organization is required to do under section 27(1)(a) of PIPA. I am satisfied that the Organization's search for the Applicant's personal information in its personnel and payroll records, as well as its legal and security departments, meet the requirements of an adequate search for records.

V. ORDER

[para 40] I make this Order under section 52 of the Act.

[para 41] I confirm the decision of the Organization to refuse access to the information at issue pursuant to sections 24(2)(a) and 24(3)(b).

[para 42] I find that the Organization met its duty to assist the Applicant under section 27(1)(a) of the Act.

Amanda Swanek
Adjudicator