

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2013-03

September 13, 2013

PROJECT PORCHLIGHT

Case File Number P1073

Office URL: www.oipc.ab.ca

Summary: The Complainant alleged that the Organization, his employer, contravened the *Personal Information Protection Act* (the “Act”) by tracing personal telephone calls that he had made using a Blackberry device provided to him by the Organization, and by failing to secure his personal information contained in his employment offer letter and tax forms.

A preliminary issue was whether the Organization was subject to the Act. Under section 56, the Act has a limited application to a “non-profit organization”, which is defined as an organization registered or incorporated under any of three specified pieces of Alberta legislation. The Organization argued that it was incorporated under equivalent legislation in Ontario. However, as that piece of legislation was not listed in the definition of “non-profit organization”, the Adjudicator found that the Organization was subject to the Act.

The Adjudicator found that the Organization had collected and used the Complainant’s personal information when it traced his personal calls, as the tracing revealed the recipients and the nature of the calls. The Adjudicator further found that the Organization was not authorized to collect and use the information. The Organization argued that it had collected and used the information for the purposes of an investigation under sections 14(d) and 17(d) of the Act. An “investigation”, as defined in the Act, can be one related to a breach of agreement, and the Organization submitted that there was an

unwritten “acceptable use” policy regarding the Complainant’s usage of the Blackberry device, which policy formed a term of his employment agreement.

However, the Adjudicator found that there was, in fact, no policy in place that restricted the ability of the Complainant to make personal calls using the Blackberry, and there was therefore no such policy incorporated into his employment agreement. This meant, in turn, that there could be no possible breach of the Complainant’s employment agreement, no investigation, and no ability for the Organization to rely on section 14(d) and 17(d) in order to collect and use the Complainant’s personal information. The Adjudicator also found that the Organization did not have the authority to collect and use the Complainant’s personal information on the basis that he had consented to the collection and use, or that the Organization had given him prior notice of its intention to collect and use his personal information. Neither consent nor prior notice had occurred in this case. The Adjudicator ordered the Organization to stop collecting and using personal information in contravention of the Act.

The Complainant alleged that the Organization had failed to protect his personal information, as found in the letter that had offered him employment with the Organization, and in tax forms that he had completed after being hired. Although the Complainant believed that the Organization may have misplaced this documentation, the Organization satisfied the Adjudicator that the documentation was maintained in a secure file location. He therefore found that the Organization had made reasonable security arrangements to protect the Complainant’s information, as required by section 34 of the Act, and confirmed that the Organization had performed its duty in this regard.

Statutes Cited: **AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 1(1)(f) [numbered 1(f) in 2008], 1(1)(f)(i) [numbered 1(f)(i) in 2008], 1(1)(i) [numbered 1(i) in 2008], 1(1)(k) [numbered 1(k) in 2008], 1(1)(j) [numbered 1(j) in 2008, and as it read in 2008], 1(1)(i)(i) [numbered 1(i)(i) in 2008], 2, 6(1) [numbered 6(a) in 2008], 4(1), 7(1), 8, 8(1), 8(2), 8(2)(a), 8(2)(b), 8(3), 8(3)(a), 8(3)(b), 8(3)(c), 11, 13, 13(1), 13(3), 14, 14(d), 15 [as it read in 2008], 16, 17, 17(d), 18 [as it read in 2008], 19, 20, 21, 34, 50(1), 52, 52(3)(a), 52(3)(e), 52(4), 56, 56(1)(b), 56(1)(b)(i), 56(1)(b)(ii), 56(3) and 56(4)(a); *Personal Information Protection Amendment Act*, 2009, S.A. 2009, c. 50; *Societies Act*, R.S.A. 2000, c. S-14; *Agricultural Societies Act*, R.S.A. 2000, c. A-11; *Companies Act*, R.S.A. 2000, c. C-21, Part 9. **ON:** *Corporations Act*, R.S.O. 1990, c. C.38, Part III.

Authorities Cited: **AB:** Orders P2005-001, P2006-008, P2008-007, P2009-013/ P2009-014, P2010-001 and P2011-003.

I. BACKGROUND

[para 1] An individual (the “Complainant”) was employed in Calgary, Alberta by Project Porchlight (the “Organization”)¹ from August 2007 to July 2008. In October

¹ The Notice of Inquiry referred to the Organization as “Project Porchlight – One Change”. However, the Organization submitted documentation showing that its proper corporate name is simply “Project Porchlight”, having carried on operations under the style “One Change” only informally.

2007, the Organization provided him with a Blackberry communications device. On approximately May 27, 2008, the Complainant was asked to attend a meeting at which he was chastised for what the Organization considered to be his inappropriate use of the Blackberry by making personal telephone calls with it.

[para 2] In a form and attached letter, both dated August 18, 2008, the Complainant complained that the Organization contravened the *Personal Information Protection Act* (the “Act” or “PIPA”) by tracing his personal calls. He also alleged that the Organization had failed to secure his personal information in his employment offer letter and in tax forms that he had completed.

[para 3] The former Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. The Complainant requested an inquiry in a form dated December 5, 2011. The Commissioner decided to conduct a written inquiry.

[para 4] The Organization argues that this inquiry is not authorized, as an inquiry is available, under section 50(1) of PIPA, only if a matter relating to a complaint is not referred to mediation, is not settled pursuant to mediation, or is not resolved (or is not the subject of the Commissioner’s refusal to continue the review, which is not relevant here). The Organization takes the position that, when the Complainant requested an inquiry, the matter had been referred to mediation, was still in the process of being possibly settled, and had therefore not yet reached the point of being definitively “not settled” or “not resolved”. However, until such time as a matter is actually settled or resolved, it necessarily remains not settled and not resolved. In such circumstances, an individual may request an inquiry, and the Commissioner may decide that one will be conducted. The Organization further argues that the Commissioner never actually dispensed with mediation or settlement so as to give rise to the matter being unresolved. However, the Commissioner implicitly dispensed with the possibility of mediation or settlement on accepting the Complainant’s request for an inquiry and deciding to hold one. I therefore have the authority to conduct this inquiry, as delegated to me by the Commissioner.

[para 5] On May 1, 2010, several amendments to PIPA came into force by virtue of the *Personal Information Protection Amendment Act, 2009*. However, the Organization’s alleged contravention of the Act occurred in 2008, which was prior to these amendments, as well as earlier ones. Accordingly, in this inquiry, the Organization’s authority and responsibilities under PIPA are as they existed in 2008, and I will reproduce the relevant sections as they existed at that time. For the purpose of cross-reference, I note in this Order any differences between the relevant sections as they existed in 2008 and exist today, with respect to their numbering and/or substantive content.

II. INFORMATION AT ISSUE

[para 6] With respect to the Organization’s alleged unauthorized collection, use and/or disclosure of the Complainant’s information, the information at issue in this inquiry consists of the identities of the recipients of personal telephone calls that the Complainant made using a Blackberry device provided to him by the Organization, and the nature of

the personal telephone calls made. With respect to the Organization's alleged failure to protect the Complainant's information, the information consists of that appearing in the letter that offered him employment with the Organization, and in tax forms that he completed after being hired.

III. ISSUES AND SUB-ISSUES

[para 7] The Notice of Inquiry, dated June 18, 2012, set out the following three main issues, the last two of which would need to be determined only if the first issue were answered in the affirmative:

Is the Organization subject to PIPA?

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

Did the Organization make reasonable security arrangements to protect the Complainant's personal information, as required by section 34 of PIPA?

[para 8] The Notice of Inquiry indicated that answers to the following sub-issues, to the extent relevant, might assist in determining the second of the main issues above:

Did the Organization collect, use and/or disclose the Complainant's personal information and/or personal employee information, as those terms are defined in section 1 of PIPA? If so,

Did the Organization collect, use and/or disclose the Complainant's information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authority or consent)? In particular,

Did the Organization have the authority to collect, use and/or disclose the Complainant's information without consent, as permitted by sections 14, 15, 17, 18, 20 and/or 21 of PIPA?

If the Organization did not have the authority to collect, use and/or disclose the Complainant's information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before collecting, using and/or disclosing the information? In particular,

Did the Complainant consent in writing or orally? Or

Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met? Or

Were the conditions in sections 8(3)(a), (b) and (c) met?

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

Did the Organization collect the Complainant's information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide and did it provide notification before or at the time of collecting the information?

[para 9] Parts of the above sub-issues do not need to be addressed in this inquiry. The Complainant's inquiry submissions indicate that he is essentially concerned only with the collection and use, and not the disclosure, of his information by the Organization. For example, he says that he "will not speculate on whether his personal information was shared". While he notes that five individuals within the Organization learned about his personal calls – being the corporate comptroller who reviewed his call record, a human resources coordinator, the Complainant's immediate supervisor and two individuals to whom that supervisor reported – he does so in passing and toward the end of his rebuttal submission. In short, the Complainant does not squarely allege any unauthorized disclosure of his personal information and/or personal employee information by the Organization. Given this, I need discuss only the collection and use of the Complainant's information, and therefore need refer only to the particular sections of the Act dealing with the collection and use of information. In other words, I do not have to address any issue in relation to sections 19, 20 or 21, as these sections deal with disclosure.

[para 10] In the sub-headings of this Order that follow, I revise the sub-issues set out above to reflect that only the collection and use of the Complainant's personal information or personal employee information is at issue in this inquiry.

IV. DISCUSSION OF ISSUES

A. Is the Organization subject to PIPA?

[para 11] Section 1(i) of PIPA [which was renumbered 1(1)(i), effective May 1, 2010] defines "organization" as follows:

1(i) "organization" includes

(i) a corporation,

(ii) an unincorporated association,

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

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

(v) *an individual acting in a commercial capacity,*

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

The Organization in this inquiry is a “corporation” under Part III of Ontario’s *Corporation Act*. It is therefore as “organization”, as set out in section 1(i)(i) above.

[para 12] Section 4(1) of PIPA reads as follows:

4(1) Except as provided in this Act and subject to the regulations, this Act applies to every organization and in respect of all personal information.

One of the exceptions regarding the application of the Act is set out in section 56, the relevant portions of which read as follows:

56(1) In this section,

...

(b) *“non-profit organization” means an organization*

(i) *that is incorporated under the Societies Act or the Agricultural Societies Act or that is registered under Part 9 of the Companies Act, or*

(ii) *that meets the criteria established under the regulations to qualify as a non-profit organization.*

(2) *Subject to subsection (3), this Act does not apply to a non-profit organization or any personal information that is in the custody of or under the control of a non-profit organization.*

(3) *This Act applies to a non-profit organization in the case of personal information that is collected, used or disclosed by the non-profit organization in connection with any commercial activity carried out by the non-profit organization.*

(4) *The Lieutenant Governor in Council may make regulations*

(a) *establishing, for the purposes of subsection (1)(b)(ii), the criteria to be met by an organization to qualify as a non-profit organization;*

...

[para 13] Under section 56(3), PIPA has a limited application to non-profit organizations in that it applies only in the case of personal information that is collected, used or disclosed by such organizations in connection with a commercial activity. The definition of “non-profit organization” is set out in section 56(1)(b)(i). The Organization argues that it is not subject to PIPA because it is incorporated in Ontario under legislative provisions equivalent to those found in the statutes listed in section 56(1)(b)(i). It further submits that it was not carrying out a commercial activity when it collected and used the Complainant’s personal information.

[para 14] The Organization is registered as a not-for-profit non-share capital corporation under Part III (Corporations without Share Capital) of Ontario’s *Corporations Act*. The Organization submits that it is similar to non-profit organizations, within the meaning of PIPA, as it carries on without purpose of gain for its members and any profits are used only to promote the objects of environmental enhancement through consumer changes to energy use. It argues that the policy rationale behind section 56 of PIPA is to limit the Act’s application to the non-profit sector, regardless of where the particular organization might be registered or incorporated. It submits that a finding that it is not subject to PIPA would be consistent with the purpose of section 56.

[para 15] While I am sympathetic to the Organization’s argument, and acknowledge that it might make sense to extend the status of non-profit organization, for the purposes of PIPA, to certain entities registered or incorporated outside Alberta, the definition of “non-profit organization” set out in section 56(1)(b) is clear and unambiguous. I find that there is no latitude to expand its scope on the basis of arguable policy rationale or purpose. The Organization in this inquiry is not incorporated under Alberta’s *Societies Act* or Alberta’s *Agricultural Societies Act*, and is not registered under Part 9 of Alberta’s *Companies Act*. Moreover, as indicated by sections 56(1)(b)(ii) and 56(4)(a), the Legislature expressly contemplated that other entities might qualify as non-profit organizations by virtue of criteria established under regulations. Criteria could very readily have been established in order to qualify particular extra-provincial entities as non-profit organizations for the purposes of PIPA, but no such criteria have been established. I therefore find that the Organization is not a non-profit organization for the purposes of PIPA. It is unnecessary to consider whether or not it was carrying out a commercial activity when it collected and used the Complainant’s personal information.

[para 16] At the same time, as already noted, the Organization is an “organization”, as that term is defined in PIPA. It is a “corporation” within the terms of section 1(i)(i), albeit one incorporated in Ontario. Unlike section 56(1)(b)(i), section 1(i)(i) does not list specific pieces of legislation under which an entity must be incorporated in order to be an organization for the purposes of PIPA. As the Organization in this inquiry is an organization as defined in PIPA, and is not subject to the exception or limitation regarding the Act’s application to non-profit organizations, PIPA applies to the Organization in respect of all personal information that is collected, used and disclosed by it, as set out in section 4(1).

[para 17] I conclude that the Organization is subject to PIPA.

B. Did the Organization collect and use the Complainant’s personal information in contravention of PIPA, or in circumstances that were not in compliance with PIPA?

[para 18] I will decide the above main issue by discussing the sub-issues that follow below.

1. Did the Organization collect and/or use the Complainant’s personal information and/or personal employee information, as those terms are defined in section 1 of PIPA?

[para 19] The above sub-issue addresses whether the Organization collected and/or used information in relation to the Complainant that is subject to PIPA. Assuming so, the sub-issue also involves a determination of whether the information was the Complainant’s personal information generally, or his personal employee information specifically. If the information consisted of the Complainant’s personal employee information, there are additional grounds on which the Organization may have been authorized to collect and use it, namely those set out in sections 15 and 18.

[para 20] Under section 1(k) of PIPA [which was renumbered 1(1)(k), effective May 1, 2010], “personal information” is defined as follows:

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

[para 21] “Personal employee information” is a subset of “personal information”. At the time of the Organization’s alleged contravention of PIPA, “personal employee information” was defined as follows in section 1(j):²

² Section 1(j) is now numbered 1(1)(j), and “personal employee information” is now defined as follows:

1(1)(j) “personal employee information” means, in respect of an individual who is a potential, current or former employee of an organization, personal information reasonably required by the organization for the purposes of

(i) establishing, managing or terminating an employment or volunteer-work relationship, or

(ii) managing a post-employment or post-volunteer-work relationship

between the organization and the individual, but does not include personal information about the individual that is unrelated to that relationship;

The change to the definition of “personal employment information” would not have had an impact on the issues in this inquiry even if the new definition had been in force at the time of the Organization’s alleged contravention of the Act. The substantive change refers to the management of a post-employment relationship with a former employee, which is not the case here.

1(j) *“personal employee information” means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating*

(i) an employment relationship, or

(ii) a volunteer work relationship

between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship;

[para 22] The Complainant alleges that the Organization improperly collected and used his personal information by tracing the telephone numbers that he had dialed using the Blackberry device, so as to learn the identities of the recipients of his personal calls and the nature of those calls. For clarity, the Complainant is not concerned about the collection of the telephone numbers *per se*, the length of the calls made or the associated charges, as he was aware that these would appear on the invoices sent to the Organization, and was aware that the Organization would be monitoring his Blackberry usage for the purpose of notifying him when he had exceeded his allotted local and long-distance air time.

[para 23] At this juncture, I explain what steps I believe that the Organization took in order to trace the Complainant’s personal calls. The officer of the Organization who reviewed the Complainant’s call record does not fully explain in her affidavit. She says that, on reviewing the invoice showing the telephone calls made by the Complainant, she believed that there may have been a breach of his employment agreement and therefore “undertook an investigation, on behalf of the Organization, to ascertain whether the breach did in fact occur”. She does not indicate the nature of that further “investigation”. The Complainant says that he was not contacted in the course of it, and his understanding is that certain of the telephone numbers on the invoice were dialed so as to ascertain the recipients of the calls and the nature of the calls. I find that this is indeed what occurred.

[para 24] At times in her affidavit, the officer of the Organization suggests that she reached her conclusion as to whether the Complainant was making personal telephone calls based on area codes alone, given that the Complainant was assigned to work in the local Calgary region only. In other words, the Organization apparently presumed and determined that the Complainant’s calls to numbers with local area codes were work-related, and that calls to long distance area codes were not work-related. However, I fail to see how the Organization could have ascertained whether the telephone calls made by the Complainant were work-related without actually calling the numbers. A long distance area code can nonetheless be associated with a mobile telephone being used in the local calling area, making it possible for that call to be a local work-related call. The Complainant also says that a particular personal call that he made was to a number with a

local area code, yet the Organization intimated, at its meeting with him, that it knew about the nature of the call, which revealed one of his personal interests. This means, to me, that someone must have dialed the number in question, despite the fact that it had a local area code and should not have been suspicious, according to the officer's aforementioned distinction between local area codes and long distance area codes.

[para 25] Apart from this, I note that the officer of the Organization says that the purpose of her review of the Complainant's call record "was not to uncover the content of the calls or what the calls revealed about the Complainant, but to determine whether or not the calls were work related". I take from this that the officer did uncover the content of the calls. Although it was not her intent to learn about the nature of the calls in question, she necessarily learned about their nature in her determination of whether they were work-related. I find that she could only have done so by actually dialing the numbers.

[para 26] Having concluded that the Organization learned information about the recipients and nature of the Complainant's personal calls, I find that it collected that information. I also find that the Organization used the information when it arranged the meeting with the Complainant so as to chastise him for making the telephone calls in question. I now turn to whether the information at issue is the Complainant's personal information and/or personal employee information.

[para 27] I find that the identities of the recipients of the non-work-related calls made by the Complainant, and the nature of those calls, constitute his personal information, as defined above. The identities of certain recipients revealed who his friends and/or family members were, and the nature of at least one call revealed one of his interests of a highly personal nature. The foregoing is information "about" the Complainant as an identifiable individual.

[para 28] The Complainant argues that the foregoing information is not his personal employee information because there was no policy in place to permit the Organization to ascertain the recipients and nature of his personal telephone calls. He accordingly submits that the information was not "reasonably required" by the Organization for the purposes of managing his employment relationship with it, and that it was information "unrelated to that relationship", as mentioned in the definition of "personal employee information" reproduced above. Conversely, the Organization submits that the information at issue is the Complainant's personal employee information. This would result in its potential authority to collect and use it on the basis of a reasonable purpose and reasonable notification under sections 15 and 18 of PIPA.

[para 29] The identities of the recipients of non-work-related telephone calls made by an employee, and the nature of those calls, can hypothetically constitute personal employee information, for instance where there is a policy that makes it clear that certain types of calls are impermissible. However, for reasons discussed more fully in this Order below, I find that there was no employment policy governing the Complainant's use of the BlackBerry device, and he was not otherwise told, in the absence of a policy, that the

Organization was going to trace his personal calls. The information collected and used by the Organization was therefore not the Complainant's personal employee information, essentially for the reasons articulated by the Complainant and summarized in the preceding paragraph.

[para 30] Nonetheless, I will still discuss the ability of the Organization to collect and use the Complainant's information in reliance on sections 15 and 18, which govern the collection and use of personal employee information. This will give guidance to other organizations who might decide to trace personal telephone calls made by an employee on an employer-issued communications device, further to an established policy or prior notification.

[para 31] Because the collection and use of the Complainant's personal information has been established, the Organization has the burden to show that its collection and use of the information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 17).

2. Did the Organization collect and use the Complainant's information contrary to, or in compliance with, section 7(1) of PIPA (no collection or use without either authority or consent)?

[para 32] Section 7(1) of PIPA reads, in part, 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

...

[para 33] The foregoing indicates that the Organization was not authorized to collect or use the Complainant's personal information (which includes his personal employee information) unless he consented, meaning in accordance with section 8(1) or section 8(2) of PIPA, or unless "this Act provides otherwise". The latter means, in the context of this inquiry, that the Organization potentially had the authority to collect and use the Complainant's personal information by providing him with prior notice of the intention to collect and use it and giving him a reasonable opportunity to decline or object under section 8(3), by having a reasonable purpose and providing him with prior notification that his personal employee information was going to be collected and used under sections

15 and 18, or on the basis that his consent, and therefore also notice to him, was not required at all before collecting and using his personal information under sections 14 and 17.

[para 34] I will discuss the above sub-issue in two separate parts, the first dealing with the collection and use of personal information generally, under sections 14 and 17, and the second dealing with the collection and use of personal employee information more specifically, under sections 15 and 18.

- a) *Did the Organization have the authority to collect and use the Complainant's information without consent, as permitted by sections 14 and 17 of PIPA?*

[para 35] The Organization argues that it had the authority to collect and use the Complainant's information under sections 14(d) and 17(d) of PIPA, on the basis that it was reasonable for the purposes of an investigation. These sections read as follows:

14 An organization may collect personal information about an individual without the consent of the 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;*

...

17 An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

...

- (d) the use of the information is reasonable for the purposes of an investigation or a legal proceeding;*

[para 36] Because the term "investigation" is defined in PIPA, the definition must be met in the circumstances of this case, in order for the Organization to rely on sections 14(d) and 17(d). Section 1(f) [which was renumbered 1(1)(f), effective May 1, 2010] reads as follows:

1(f) "investigation" means an investigation related to

(i) a breach of agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) *circumstances or conduct that may result in a remedy or relief being available at law,*

if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;

[para 37] An investigation can be an investigation of possible misconduct or non-compliance in relation to a rule or policy incorporated into an employment agreement (see, e.g., Order P2008-007 at para. 29). In this case, the Organization notes that the employment offer letter that it wrote to the Complainant expressly referred, albeit in general fashion, to the Organization's employment policies and procedures. As for the particular policy in question, the Organization says that it was investigating the Complainant's possible breach of its policy governing personal calls made on Blackberry devices, which policy it submits formed part of his employment agreement just like any of the Organization's other policies and procedures. It accordingly takes the position that it was investigating a breach of agreement, as contemplated by section 1(f)(i) above [which was renumbered 1(1)(f)(i), effective May 1, 2010]. The Organization does not argue that it was investigating any possible contravention of an enactment, or any possible circumstances or conduct that might otherwise result in a remedy or relief being available at law.

[para 38] The parties dispute whether there was a policy regarding the Complainant's use of the Blackberry device to make personal telephone calls. The Organization explains that there was an unwritten "acceptable use" policy under which the device could only be used for work-related purposes, which policy it says was communicated verbally to each employee when they were provided with the Blackberry. The Complainant says that the only information conveyed to him was that the calling plan included a given amount of local and long distance air time per month, and that he would be notified if and when he exceeded his allotted air time, so as to adjust his usage and limit the Organization's communications costs. He says that he was never provided with such notification, so assumed that he had been restricting his calls to the allotted air time. He submits that he was never told that he could not use the Blackberry for personal reasons, let alone that his call record would be reviewed by the Organization to determine the destinations of the calls placed. He adds that it is typical for employees to use work equipment, such as photocopiers and telephones, for personal purposes, provided that the use is limited and within reason, which he submits was the case here.

[para 39] I prefer the Complainant's version of events, which is to the effect that the Organization had no policy restricting or prohibiting the use of the Blackberry device in order to make personal telephone calls. The Organization provided an affidavit sworn by an officer who says that the policy under which Blackberries were to be used for work-related purposes only was "customarily communicated to the employees at the time they received the Blackberry devices". However, the officer was neither present when the Complainant received the device nor even employed by the Organization at the time. Conversely, the Complainant was directly and personally involved in the underlying

matter and says that an acceptable use policy governing personal calls was never communicated to him. I have no reason to disbelieve him, particularly in view of the following observations.

[para 40] First, the Complainant says that some employees disconnected their personal mobile telephones on receipt of the Blackberry device from the Organization, meaning that they too were never told that they could not use the Blackberry for personal reasons. Second, the Complainant sent an e-mail to the Organization shortly after the meeting on May 27, 2008, which e-mail indicates his understanding, at the time that the underlying events in this matter occurred, that there had been no restriction on his ability to make personal calls with the Blackberry. Third, an e-mail from the Organization, which sets out the agenda for a staff meeting on May 28, 2008, refers to a “new” policy on the usage of cell phones and Blackberries, as opposed to a pre-existing policy. The staff meeting on May 28, 2008 occurred after the Organization’s alleged unauthorized collection and use of the Complainant’s personal information, and it would therefore appear that the acceptable use policy governing personal calls was created afterwards. Finally, the Complainant placed a telephone call of a highly personal nature, and I accept his statement that he would never have placed the call had he been told that he could not use the Blackberry device for personal reasons, or that his call record might be investigated to ensure compliance with a policy.

[para 41] The Organization argues that policies and procedures in order to meet obligations under PIPA, as required by section 6(a) [renumbered section 6(1) in May 2010], do not necessarily have to be formally set down in writing (Order P2010-001 at para. 14). However, the policy in question here is not one to assist the Organization in its compliance with PIPA, but rather a policy setting out a term of the Complainant’s employment. In any event, I find that there was no generally understood policy, and certainly not one that was communicated to the Complainant, restricting use of the Blackberry devices to work-related telephone calls, whether that policy were written or unwritten. Before there can be an investigation into a possible breach of an employment agreement, insofar as the usage of employer-issued communications devices are concerned, there must be a communicated policy in relation to such usage.

[para 42] Alternatively, as also set out in the definition of “investigation” reproduced above, there may be a possible contravention of an enactment, but the personal calls made by the Complainant did not contravene any law. Still alternatively, there may be circumstances or conduct that may result in a remedy or relief being available at law, such as the ability to discipline or terminate an employee. For example, an employee’s telephone calls may allegedly have harassed or threatened others, or tarnished the reputation of the employer. In such instances, it may not be necessary to have an express policy against such behaviour, either because the prohibition against such behaviour may be considered an implied term of the employment agreement, or the behaviour would otherwise warrant disciplining or terminating the employee. However, as noted earlier, the Organization bases its submissions on the existence of a policy and does not argue that the Complainant’s use of the Blackberry device was so egregious that a policy was

not required in order to permit its investigation of his call record. I would not find that his behaviour was so egregious, in any event.

[para 43] To summarize, I find that there was no policy that restricted or prohibited the ability of the Complainant to make personal calls using the Blackberry, and there was therefore no such policy incorporated into his employment agreement. This means, in turn, that there could be no possible breach of the Complainant's employment agreement, no investigation as that term is defined in PIPA, and no ability for the Organization to rely on section 14(d) and 17(d) in order to collect and use the Complainant's personal information. In this particular case, because there was no applicable policy, there was nothing to investigate.

[para 44] I conclude that the Organization did not have the authority to collect or use the Complainant's personal information, without his consent, under sections 14 or 17 of PIPA.

- b) Did the Organization have the authority to collect and use the Complainant's information without consent, as permitted by sections 15 and 18 of PIPA?*

[para 45] I now turn to whether the Organization would have had the authority to collect and use the Complainant's personal employee information under sections 15 and 18, if the information at issue was, in fact, his personal employee information, contrary to my finding earlier in this Order. At the time of the Organization's alleged contravention of PIPA, sections 15 and 18 read as follows:³

15(1) Notwithstanding anything in this Act other than subsection (2), an organization may collect personal employee information about an individual without the consent of the individual if

- (a) the individual is an employee of the organization, or*
- (b) the collection of the information is for the purpose of recruiting a potential employee.*

(2) An organization shall not collect personal information about an individual under subsection (1) without the consent of the individual unless

- (a) the collection is reasonable for the purposes for which the information is being collected,*
- (b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and*

³ Effective May 1, 2010, parts of sections 15 and 18 have been restructured and amended, but the provisions remains substantially similar to the previous versions.

(c) *in the case of an individual who is an employee of the organization, the organization has, before collecting the information, provided the individual with reasonable notification that the information is going to be collected and of the purposes for which the information is going to be collected.*

...

(4) *Nothing in this section is to be construed so as to restrict or otherwise affect an organization's ability to collect personal information under section 14.*

18(1) *Notwithstanding anything in this Act other than subsection (2), an organization may use personal employee information about an individual without the consent of the individual if*

(a) *the individual is an employee of the organization, or*

(b) *the use of the information is for the purpose of recruiting a potential employee.*

(2) *An organization shall not use personal information about an individual under subsection (1) without the consent of the individual unless*

(a) *the use is reasonable for the purposes for which the information is being used,*

(b) *the information consists only of information that is related to the employment or volunteer work relationship of the individual, and*

(c) *in the case of an individual who is an employee of the organization, the organization has, before using the information, provided the individual with reasonable notification that the information is going to be used and of the purposes for which the information is going to be used.*

(3) *Nothing in this section is to be construed so as to restrict or otherwise affect an organization's ability to use personal information under section 17.*

[para 46] Even without investigating any alleged misconduct and therefore without having to rely on sections 14(d) and 17(d) of PIPA, an organization might be able to collect and use information regarding the recipients and nature of telephone calls made by an employee using an employer-issued communications device, in reliance on sections 15 and 18. That ability would depend, first, on whether it is reasonable for the organization to collect and use the information for the particular purpose, such as to ensure that employees did not make personal calls even where they are not suspected of such (e.g., random checks, or periodic monitoring). Secondly, the collection and use of the information in question would have to relate to the employment relationship or, as the

provisions of sections 15 and 18 are now worded, be for the purposes of managing the employment relationship.

[para 47] In this case, even if the information about the recipients and nature of the personal calls made by the Complainant constituted his personal employee information, I would find that the Organization's collection and use of that information was not reasonable for the particular purpose of monitoring his call record, and did not relate to the employment relationship. Again, there was no policy in place governing personal calls made by employees, and by which the Organization might have been entitled to monitor the recipients and the nature of the calls made by the Complainant. The fact that an employer unilaterally chooses to do something vis-à-vis an employee does not automatically make the employer's act something that relates to the employment relationship, or something that is for the purpose of managing that relationship. Further, sections 15 and 18 require that, before collecting or using personal employee information, an organization must provide the individual with reasonable notification that the information is going to be collected and used, and indicate the purposes for which the information is going to be collected and used. This did not occur in the present case.

[para 48] I conclude that the Organization would not have had the authority to collect and use the Complainant's personal employee information, without his consent, under sections 15 and 18 of PIPA.

[para 49] Because I find that there was no policy restricting or prohibiting the personal calls made by the Complainant using the Blackberry device provided by the Organization, and he was not otherwise notified that his calls might be traced, I do not need to determine whether tracing personal calls would amount to a reasonable collection and use of an employee's information in instances where there is, in fact, an applicable policy or prior notice. I note, however, that whether something is reasonable is determined in reference to section 2 of PIPA, which reads as follows:

2 Where in this Act anything or any matter

(a) is described, characterized or referred to as reasonable or unreasonable, or

(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,

the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

Bearing in mind the above provision, I would suggest that a determination of whether an employer would be reasonable in tracing calls made by an employee on an employer-issued communications would depend, for instance, on the nature of the organization, the

importance of its reputation insofar as the personal calls of employees are concerned, the job functions of the particular employee, the believed nature of the personal calls, and the cost of the calls to the organization.

- c) *If the Organization did not have the authority to collect and use the Complainant's information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before collecting and using the information? In particular,*

Did the Complainant consent in writing or orally? Or

*Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met?
Or*

Were the conditions in sections 8(3)(a), (b) and (c) met?

[para 50] Section 8 of PIPA reads, in part, as follows:

8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.

(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and

(b) it is reasonable that a person would voluntarily provide that information.

(3) Notwithstanding section 7(1), an organization may collect, use or disclose personal information about an individual for particular purposes if

(a) the organization

(i) provides the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect, use or disclose personal information about the individual for those purposes, and

(ii) with respect to that notice, gives the individual a reasonable opportunity to decline or object to having his or her personal information collected, used or disclosed for those purposes,

- (b) *the individual does not, within a reasonable time, give to the organization a response to that notice declining or objecting to the proposed collection, use or disclosure, and*
- (c) *having regard to the level of the sensitivity, if any, of the information in the circumstances, it is reasonable to collect, use or disclose the information as permitted under clauses (a) and (b).*

...

[para 51] Section 8 provided alternative grounds on which the Organization could have collected and used the Complainant's personal information. I will now review them in turn.

- (i) *Did the Complainant consent in writing or orally?*

[para 52] Neither party suggests that the Complainant may have expressly consented, whether in writing or orally, to the collection or use of his personal information revealed by the identities of the recipients of the personal telephone calls that he made, and by the nature of those calls.

- (ii) *Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met?*

[para 53] Section 8(2) of PIPA contemplates the possibility of "deemed consent" on the part of the Complainant with respect to the collection and use of his personal information by the Organization. In order for an individual to be deemed to consent to the collection and use of his or her personal information, section 8(2)(a) states that he or she must voluntarily provide the information for a "particular" purpose. This means that the individual must understand the purpose in a specific, not general, sense (see Order P2011-003 at paras. 39-40).

[para 54] Here, it might be argued that the Complainant (as opposed to the telephone mobility company) voluntarily provided the telephone numbers that he dialed using the Blackberry device, as he was aware that they would appear on the invoices sent to the Organization. However, the Complainant did not provide, voluntarily or otherwise, the personal information about the recipients and nature of the calls in question, as that information was collected and used by the Organization only after it took additional steps to trace the telephone numbers. Apart from this, it cannot be said that the Complainant voluntarily provided the telephone numbers for the particular purpose of enabling the Organization to ascertain the identities of the recipients of the telephone calls or the nature of the calls, within the terms of section 8(2)(a). While he was aware of the Organization's particular purpose of monitoring air time usage, he was not aware of the particular purpose of tracing the telephone calls so as to ascertain whether they were personal or work-related. I would go so far as to say that, in the absence of prior notice of this latter purpose, employees of most organizations would not suspect that their

telephone calls might be traced, and therefore cannot be said to voluntarily provide the telephone numbers that they dial for that particular purpose.

[para 55] I conclude that the Complainant is not deemed to have consented to the collection or use of his personal information that is at issue in this inquiry.

(iii) *Were the conditions in sections 8(3)(a), (b) and (c) met?*

[para 56] An organization may collect and use an individual's personal information if the organization provides the individual with prior notice in accordance with section 8(3) of PIPA. Section 8(3) requires the organization to provide the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect or use personal information about the individual for the particular purposes, as well as requires the organization to give the individual a reasonable opportunity to decline or object. For reasons set out earlier in this Order, I find that the Organization did not give the Complainant notice that his call record would be reviewed for the purpose of ascertaining the identities of the recipients of the Complainant's personal calls and the nature of those calls.

[para 57] I conclude that the conditions set out in section 8(3) were not met so as to permit the Organization to collect and use the Complainant's personal information on that basis.

3. Did the Organization collect and use the Complainant's information contrary to, or in accordance with, sections 11 and 16 of PIPA (collection and use for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

[para 58] Sections 11 and 16 of PIPA 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.

16(1) An organization may use personal information only for purposes that are reasonable.

(2) Where an organization uses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is used.

[para 59] Sections 11 and 16 require an organization to collect and use personal information only for purposes that are reasonable, and only to the extent that is

reasonable for meeting those purposes. As discussed in the preceding parts of this Order, the Organization has not established that PIPA permitted it to collect and use the Complainant's personal information, without his consent, for the purposes of an investigation under sections 14(d) and 17(d), on the basis of actual or deemed consent under section 8(1) or 8(2), or on the basis that it gave the Complainant prior notice under section 8(3) (or on the basis of a reasonable purpose and prior notification under sections 15 and 18, if the information at issue had been personal employee information). In my view, if an organization does not have the authority to collect and use particular personal information, it necessarily collects and uses the information for purposes that are not reasonable, and there can be no possibility of collection and use to a reasonable extent.

[para 60] I accordingly conclude that the Organization collected and used the Complainant's personal information contrary to sections 11 and 16 of PIPA when it traced the personal calls that he had made using the Blackberry device.

4. Did the Organization collect the Complainant's information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide and did it provide notification before or at the time of collecting the information?

[para 61] The possibly relevant portions of section 13 of PIPA read as follows:

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.

...

(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).

[para 62] The Organization collected the identities of the recipients of the personal telephone calls made by the Complainant, along with the information regarding the nature of those calls, not from the Complainant but from the recipients of the calls after the Organization presumably dialed their numbers, as found by me earlier in this Order. It is therefore section 13(3), as opposed to section 13(1), that might be applicable in this case.

[para 63] Some of the recipients of the personal calls made by the Complainant were his friends and/or family members, who are not organizations for the purpose of section 13(3). The Organization in this inquiry was therefore not required to provide those individuals with sufficient information regarding the purpose for which the Complainant's personal information was being collected.

[para 64] However, at least one of the recipients of a personal telephone call made by the Complainant was another organization situated in Calgary, the identity of which revealed a personal interest of the Complainant. Because the Organization would have collected the identity of this other organization, which also revealed the nature of the call made by the Complainant, immediately on connecting the call with the other organization, the Organization in this inquiry could not have, *before* collecting the Complainant's personal information, provided the other organization with sufficient information, or any information at all, regarding the purpose for which the Complainant's personal information was being collected in order to allow the other organization to make a determination as to whether the disclosure of the Complainant's personal information would be in accordance with PIPA.

[para 65] I accordingly conclude that the Organization collected the Complainant's information contrary to section 13 of PIPA. It was required to provide certain notification to another organization but it did not do so.

5. Overall Conclusion

[para 66] Given all of my findings in this Order, I conclude that the Organization collected and used the Complainant's personal information in contravention of the Act, or in circumstances that were not in compliance with PIPA.

C. Did the Organization make reasonable security arrangement to protect the Complainant's personal information, as required by section 34 of PIPA?

[para 67] Section 34 of PIPA reads as follows:

34 An organization must protect personal information that is in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction.

[para 68] An organization has the burden of proving that it made reasonable security arrangements to protect the personal information that is in its custody or under its control, as it is in the best position to provide evidence of the steps that it has taken (Orders P2009-013/ P2009-014 at para. 109).

[para 69] As noted earlier in this Order, the information at issue regarding the Organization's alleged failure to protect the Complainant's information consists of that appearing in the letter that offered him employment with the Organization, and in tax forms that he completed after being hired. I first find that the foregoing documentation contained the Complainant's personal information, as defined in the Act, for the purposes of section 34.

[para 70] The Complainant argues that the Organization failed to protect his personal information because he was asked to complete forms regarding federal and provincial taxes and credits in January 2008, whereas he had already completed such forms when he was hired months earlier. He is concerned that the Organization may have lost the original forms, which included particularly confidential information such as his address, date of birth and social insurance number. The Organization responds that the Complainant was asked to complete the forms for the 2007 tax year on hiring, and to complete them again for the 2008 tax year, so that the Organization would have the latest annual information for accurate payroll processing. It says that it maintains personnel records in a secure file location at its head office in Ottawa, and that the records are only accessible by authorized staff. I accept the Organization's response. It is reasonable for an employer to ask its employees to complete tax forms annually, and I find that the Complainant is merely speculating, without a proper basis, that the original forms that he completed have gone missing.

[para 71] The Complainant also alleges that, when he asked for his employment offer letter, along with the 2007 tax forms that he completed, the Organization could not produce them. He again suggests that this means that the Organization has misplaced the documents, and has therefore failed to protect his personal information in them. The Organization acknowledges that the Complainant requested his employment records but says that he withdrew that request. The Complainant does not dispute this in his rebuttal submission. I again accept the Organization's indication that it is in possession of the Complainant's employment offer letter and tax forms, and that they are stored securely and confidentially.

[para 72] I conclude that the Organization made reasonable security arrangements to protect the Complainant's personal information, as required by section 34 of PIPA.

V. ORDER

[para 73] I make this Order under section 52 of PIPA.

[para 74] I find that the Organization is subject to PIPA.

[para 75] I find that the Organization collected and used the Complainant's personal information in contravention of PIPA, or in circumstances that were not in compliance with PIPA. Under section 52(3)(e), I order the Organization to stop collecting and using personal information in contravention of PIPA, or in circumstances that are not in compliance with PIPA.

[para 76] Under section 52(4), I specify, as a term of this Order, that the Organization ensure that its officers and employees 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 in a way that the Organization considers appropriate.

[para 77] I further order the Organization to notify me and the Complainant, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order. The notice should include a description of what the Organization did to comply with the preceding paragraph of this Order.

[para 78] I find that the Organization made reasonable security arrangements to protect the Complainant's personal information, as required by section 34 of PIPA. Under section 52(3)(a), I confirm that the Organization performed its duty in this regard.

Wade Raaflaub
Adjudicator