

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2013-05

October 24, 2013

CONTOUR EARTHMOVING LTD.

Case File Number P1926

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Personal Information Protection Act* (the Act), the Applicant made two separate but similar requests of her former employer, Contour Earthmoving Ltd. (the Organization) for her employment file, including information about a complaint made about her. Initially, the Organization refused to allow access to any records but eventually, following the Applicant's second request, it provided the Applicant with some of the information she requested. However, it withheld some log and inspection reports, her time sheets and the name and phone number of the individual who complained about her. In addition, in the Applicant's rebuttal submissions, she complained that the information the Organization had collected about her was not accurate.

The Adjudicator found that the Organization complied with section 25 of the Act when it appended a copy of the Applicant's corrections to her personnel file. The Adjudicator also found that the Organization complied with section 33 of the Act, as it had ensured that the information it collected was accurate.

The Adjudicator found that the Organization was not obligated to provide the Applicant with her driving logs or maintenance reports because this information was not the Applicant's personal information. The Adjudicator found that the Applicant's time sheets did contain her personal information but it was not reasonable to require the Organization to provide those to the Applicant. The Adjudicator also found that the Organization had

failed to meet its timeline in responding to the Applicant's second request. The Organization's responses to the Applicant also had not met its obligations under section 29 of the Act regarding the required contents of a response.

Finally, the Adjudicator found that the Organization had properly severed information pursuant to section 24(3)(b) of the Act about the individual who had complained about the Applicant because disclosing the information to the Applicant would reveal personal information about another individual.

Statutes Cited: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1, 24, 25, 27, 28, 29, 31, 33, 46, and 52.

Authorities Cited: AB Orders: P2006-005 and P2012-09.

I. BACKGROUND

[para 1] The Applicant is a former employee of Contour Earthmoving Ltd. (the Organization). Pursuant to the *Personal Information Protection Act* (the Act), on June 1, 2011, the Applicant requested from the Organization:

...a copy of [her] employee file that contains all information as well as all notes kept or provided by all supervisors that [the Organization] has in their possession about [herself].

[para 2] The Organization responded by way of a letter dated June 2, 2011 which stated:

We are in receipt of a letter dated June 1, 2011. At this time, we do not feel we are obligated to provide this information. If you wish to pursue this matter, have your lawyer contact us with the pertinent act that states our obligations.

[para 3] On July 7, 2011, the Applicant requested that the Office of the Information and Privacy Commissioner (this Office) review the Organization's response to her access request.

[para 4] On December 19, 2011, the Applicant made a second access request to the Organization for her employee file. On the same day, she requested that this Office hold an inquiry. The Applicant made a second request for an inquiry on January 18, 2012. On March 7, 2012, the parties were advised that this matter would proceed through an expedited process to address the issue of the Organization's response to the Applicant's access request.

[para 5] On March 13, 2012, the Organization sent a letter to the Applicant explaining that it would not be disclosing her employee file to her and citing sections of the Act on which it relied. On April 23, 2012, the Organization revised its response and provided the

Applicant with some of the contents of her employee file, but severed the name of an individual who had made a complaint about her. The Applicant request a review of the Organization's response.

[para 6] On April 11, 2012, the Commissioner authorized an inquiry into the outstanding matters between the parties. On April 23, 2012, the Organization revised its response but continued to withhold the name of the individual who had made a complaint about her.

[para 7] On July 15, 2012, the Applicant requested a review by this Office again, adding that she would also like access to any information about the complaint made about her. This request was denied by the Organization on July 26, 2012, and the Applicant submitted another request for review on September 8, 2012.

[para 8] This Office issued a Notice of Inquiry on March 25, 2013. I received initial and rebuttal submissions from both the Applicant and the Organization.

II. INFORMATION AT ISSUE

[para 9] The information at issue consists of the severed and withheld portions of the Applicant's employee file, including information about the complaint made about her.

III. ISSUES

[para 10] The Notice of Inquiry sets out the issues as follows:

Issue A: Is the access request for the Applicant's personal information?

Issue B: 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)?

Issue C: Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?

Issue D: Did the Organization comply with section 29(1)(c) of the Act (contents of response)?

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

- a. Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?**

b. Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?

[para 11] In her rebuttal submissions, the Applicant argued that the Organization has records with incorrect information in them, contrary to the Act. She provided details as to how the information is incorrect including her disagreement with how her actions were portrayed by those who complained about her. As well, she stated that she was not shown the complaint forms even though it is noted on the complaint forms that she refused to sign the forms. Finally, the Applicant complained about the Organizations non-adherence to its own policies and safety procedures.

[para 12] The Organization's policies regarding safety procedures have no connection to the Act and I have no jurisdiction to comment on its adherence to such policies. As the issue regarding the accuracy of the records is within my jurisdiction, I will comment on it as a preliminary issue.

Preliminary Issue: Right to request a correction

[para 13] The Applicant has never made a request to the Organization to correct her information; therefore whether the Organization responded appropriately under section 25 of the Act was not stated as an issue in this inquiry. However, when the Organization reviewed the Applicant's rebuttal submissions, it treated them as a request for a correction, which I believe was reasonable for the Organization to do. It responded to her request stating:

[The Organization] is satisfied as to the accuracy and correctness of all other documents on [the Applicant's] personnel file that have already been provided to her and disputes the corrections suggested by [the Applicant]. Nonetheless, in accordance with section 25(3) of [the Act], the documents she has included with her June 28, 2013 submission will be added to [the Applicant's] personnel file.

[para 14] Section 25 of the Act states:

25(1) An individual may, in accordance with section 26, request an organization to correct an error or omission in the personal information about the individual that is under the control of the organization.

(2) If there is an error or omission in personal information in respect of which a request for a correction is received by an organization under subsection (1), the organization must, subject to subsection (3),

(a) *correct the information as soon as reasonably possible, and*

...

(3) If an organization makes a determination not to make the correction under subsection (2)(a), the organization must annotate the personal information under its control with the correction that was requested but not made.

...

[para 15] According to the submissions before me, the Organization reviewed the Applicant's request and determined that there was no error or omission in the records. As a result, it opted not to make a correction but to append the information provided by the Applicant to the records. I have reviewed the records and agree that there was no error or omission, because the Organization was simply recording individuals' versions of events as part of an investigation. In recording the information, the Organization was making no assertions as to the accuracy of what the individual claimed had happened. Therefore, I find that the Organization adhered to section 25 of the Act in appending the correction request.

[para 16] However, arguably the Applicant was not requesting a correction, but was arguing that the Organization was not complying with section 33 of the Act. If that is so, I still find that the Organization complied with the Act for the following reasons.

[para 17] Section 33 of the Act states:

33 An organization must make a reasonable effort to ensure that any personal information collected, used or disclosed by or on behalf of an organization is accurate and complete to the extent that is reasonable for the organization's purposes in collecting, using or disclosing the information.

[para 18] The information that the Applicant argues is incorrect is information in complaints made about her by other individuals. The Organization wrote down the substance of the other individuals' complaints. As I understand the Applicant's rebuttal submission, with the exception of one of the records, she was not shown a copy of any of the complaint forms until she received them in response to her access request. However, she seems to indicate that she was verbally told of at least some of the complaints.

[para 19] In any event, the Organization simply collected the other individuals' versions of events, as they were told to the Organization. The Organization's purpose in collecting the information was to learn about and record the substance of the complaint, whether the complaint was accurate or not. In these circumstances, the Organization was simply recording the information, which was reasonable for its purpose. Therefore, there was no obligation under section 33 of the Act for it to ensure that the version of events it recorded was what had happened in fact. While the Applicant's version of these events differs from the information that was collected from the individuals, it does not mean that the

information collected by the Organization (the individuals' versions of events) called for correction. On this basis, I find that the Organization complied with section 33 of the Act.

IV. DISCUSSION OF ISSUES

Issue A: Is the access request for the Applicant's personal information?

[para 20] Section 24(1) of the Act allows an applicant to request access to his or her own personal information. Section 24(1) of the Act states:

24(1) An individual may, in accordance with section 26, request an organization

(a) to provide the individual with access to personal information about the individual, or

(b) to provide the individual with information about the use or disclosure of personal information about the individual.

[para 21] The Applicant first made a request on June 1, 2001, for her employee file as well as notes, "...kept or provided by all supervisors that [the Organization] has in their possession about myself." She then made a request for the name of the individual who complained about an incident involving the Applicant and for, "...all notes taken and held by any supervisor and from [a named employee of the Organization]" on July 15, 2012.

[para 22] While the Applicant technically requested her "employment file" it is not clear that any physical file titled "employment file" actually exists in one place. In any event, the Organization appears to have instead interpreted the Applicant's request to be for any personal information in the custody and control of the Organization. Given the Applicant's submissions, this certainly seems to be how she interprets her request. Therefore, for the remainder of this Order, I will interpret the Applicant's request as a request for her personal information in the custody and control of the Organization.

[para 23] Personal information is defined in section 1(k) of the Act as follows:

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

[para 24] Although the Applicant's second request does not specify that the notes to which she is seeking access are notes about the Applicant, given the context of the request, I believe this can be inferred.

[para 25] The Applicant requested her employment file and correspondence related to her and to an incident that involved her. In general, this is information about the Applicant and therefore, her personal information. However, contained in her employment file may be

information that is actually work product and therefore, depending on the context, not the Applicant's personal information.

[para 26] The Organization noted in its submissions that time sheets also exist, offsite. Those records were not provided to the Applicant. In Order P2006-005, the former Commissioner stated:

In Order P2006-004, I considered the meaning of "personal information about an individual" within the meaning of the Act:

The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant - and that is therefore connected to them in some way - is not necessarily "about" that person.

This reasoning applies equally to an individual's work, which may be associated with an individual, but is not necessarily about the individual who performed the work.

...

I agree with the Organization's position that the "work product" or records produced by an employee in the course of employment is generally not the personal information of the employee. Pipeline reports, asset allocation reports, client agreements, tapes of calls, customer satisfaction and referrals are records created by employees as a part of their employment duties. These records are not about the employee as an individual, but about the task at hand.

(Order P2006-005 at paras 46-47 and 50)

[para 27] In Order P2012-09, the Adjudicator found that work manuals and training materials were not the applicant's personal information even though the applicant had signed an acknowledgement that he had read them.

[para 28] The Applicant believes that the Organization ought to have provided her Driver's Daily Logs and Driver's Daily Vehicle Inspection Reports in response to her access request. The Organization explained that it no longer has these records. The Department of Transport requires the Organization to keep these records for a specified period of time, after which the Organization routinely destroys them. Therefore, these records are not in the custody and control of the Organization.

[para 29] In any event, these records are not the personal information of the Applicant. The Applicant provided a copy of these records as part of her submissions. The Driver's Daily Vehicle Inspection is a form filled out and signed by the driver noting the physical condition of the unit and trailer that driver is operating that day. The Driver's Daily Log notes the time, hours and locations the driver drove on a particular day. As the Applicant's

work was to drive a truck to certain locations during a day, I believe that in the present context the Driver's Daily Log is work product, or about a "task at hand", and not personal information (though I recognize that in other circumstances a person's location could be their personal information). I believe that the reasoning in Order P2012-09 is applicable to the Driver's Daily Log and Driver's Daily Vehicle Inspection Reports and that in the circumstances these records are not information about the Applicant but are information about the vehicles, and work schedules, and are work product.

[para 30] The Organization also noted that it does have copies of the Applicant's time sheets but stated that these are kept off-site and the cost and time to retrieve them would be unreasonable and prohibitive. Instead, it provided the Applicant with a summary of hours she worked.

[para 31] I note that the Organization did not argue that the Applicant's time sheets are not her personal information or did not form part of her access request. I believe that they did form part of her access request and are her personal information. As well, time sheets are not work product in the way the Driver's Daily Log Reports are, but have a personal aspect such that the time sheets are "information about an identifiable individual". To put this another way, the time sheets were not created as part of her fulfillment of her work responsibilities.

[para 32] The Applicant's right of access is governed by section 24 of the Act which states:

24(1) An individual may, in accordance with section 26, request an organization

(a) to provide the individual with access to personal information about the individual, or

(b) to provide the individual with information about the use or disclosure of personal information about the individual.

(1.1) Subject to subsections (2) to (4), on the request of an applicant made under subsection (1)(a) and taking into consideration what is reasonable, an organization must provide the applicant with access to the applicant's personal information where that information is contained in a record that is in the custody or under the control of the organization.

(1.2) On the request of an applicant made under subsection (1)(b), and taking into consideration what is reasonable, an organization must, if the organization has in its custody or under its control a record containing personal information about the applicant described in the request, provide the applicant with

(a) information about the purposes for which the personal

*information has been and is being used by the organization,
and*

*(b) the names of the persons to whom and circumstances in
which the personal information has been and is being
disclosed.*

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

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

*(b) the disclosure of the information would reveal confidential
information that is of a commercial nature and it is not
unreasonable to withhold that information;*

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

*(d) the disclosure of the information might result in that type of
information no longer being provided to the organization
when it is reasonable that that type of information would be
provided;*

*(e) the information was collected by a mediator or arbitrator or
was created in the conduct of a mediation or arbitration for
which the mediator or arbitrator was appointed to act*

(i) under an agreement,

*(ii) under a statute of Alberta or of Canada or of another
province of Canada,*

*(iii) under a regulation of Alberta, a regulation of Canada or
similar subordinate legislation of another province of
Canada that, if enacted in Alberta, would constitute a
regulation of Alberta,*

*(iv) under a legislative instrument of a professional
regulatory organization, or*

(v) by a court;

*(f) the information relates to or may be used in the exercise of
prosecutorial discretion.*

*(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 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 applicant, the organization must provide the applicant with access to the part of the record containing the personal information after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.

[para 33] The Applicant's time sheets are in the custody and control of the Organization and none of the exclusions from access apply. Therefore, I asked the Organization to provide me with a cost and time breakdown to assess if the Applicant's request was "reasonable" within the terms of section 24(1.2) of the Act.

[para 34] The Organization responded, explaining that the Applicant's daily time tickets (or time sheets) are stored offsite and filed by job and date, not by the employee name. Therefore, in order to retrieve the Applicant's time sheets, the Organization would have to manually search each box containing time tickets for the period that the Applicant was working for the Organization. The Organization estimates that this would take 2 employees 5 hours to do, and would cost the Organization \$420.70 based on what the employees are paid hourly. The Organization also notes that the Applicant was provided with a summary of her hours, and should already have this information since a copy of the time tickets is left for the employee after the foreman signs them.

[para 35] I agree with the Organization that it is not reasonable for it to provide the Applicant with copies of her time sheets, given the expense involved, and the fact that the Applicant was previously provided with a copy of the time sheets and has been provided with a copy of a printout of the hours she worked.

[para 36] To conclude, though the Applicant's access request was generally for her personal information, the Organization has no obligation to provide the Applicant with her Driver's Daily Log Reports and Driver's Daily Vehicle Inspection Reports (which are work product). The Organization is also not required to provide the Applicant with copies of her time sheets even though they do contain her personal information.

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

[para 37] Section 27(1)(a) of the Act states:

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 38] The Organization submits that it provided the Applicant with the entire contents of her employee file. As well, it also contacted the President, the Safety Officer (who is the employee named by the Applicant in her second access request), the Payroll employee, and the Shop Manager, to ascertain if any of them had or knew of any other records relating to the Applicant. The only other records these individuals knew of were the time sheets, which I dealt with above. The Organization also provided a signed statement by the Safety Officer stating that she did not take notes about the Applicant other than what is in the Applicant's employee file. On the basis of the argument and evidence before me, I find that the Organization performed an adequate search for records responsive to the Applicant's access request.

[para 39] The Organization's response of March 13, 2012 to the Applicant's second request was late (which I will explain in detail below) but did meet its obligations under section 27(1)(a) of the Act.

Issue C: Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?

[para 40] Section 28(1) of the Act states:

28(1) Subject to this section, an organization must respond to an applicant not later than

(a) 45 days from the day that the organization receives the applicant's written request referred to in section 26, or

(b) the end of an extended time period if the time period is extended under section 31.

[para 41] The Applicant's first access request was made June 1, 2011. The Organization responded on June 2, 2011. The Organization's response (though inadequate as I will

discuss below) was done within the 45 day timeline set out in section 28(1)(a) of the Act. Therefore, I find that the Organization responded to the Applicant within the timelines set out in section 28(1) of the Act.

[para 42] The Applicant's second access request was made December 19, 2011. The Organization did not respond to this access request until March 13, 2012. This was well beyond the 45 day time period within which the Organization had to respond according to section 28(1)(a) of the Act. The Organization did not extend the time period for responding by taking the steps set out in section 31 of the Act. Therefore, I find that the Organization failed to meet its obligations under section 28 of the Act when it responded to the Applicant's access request of December 19, 2011.

Issue D: Did the Organization comply with section 29(1)(c) of the Act (contents of response)?

[para 43] Section 29(1)(c) of the Act states:

29(1) In a response to a request made under section 24(1)(a), the organization must inform the applicant

...

(c) if access to all or part of the applicant's personal information is refused,

(i) of the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) of the name of the person who can answer on behalf of the organization the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review under section 46.

[para 44] The Organization's initial response to the Applicant's access request, dated June 2, 2011, was:

We are in receipt of a letter dated June 1, 2011. At this time, we do not feel we are obligated to provide this information. If you wish to pursue this matter, have your lawyer contact us with the pertinent act that states our obligations.

[para 45] The Organization explains that its response was, "based on a lack of understanding of requirements under the Act". This may be true, but a lack of understanding of the Act does not excuse an organization from its obligations under the Act. The Organization's response of June 2, 2011 does not meet its obligations under section 29 of the Act, because it does not explain the reasons for refusal, the provisions on which it is relying, the name of a person that could be contacted with questions about the refusal, nor the Applicant's right to ask for a review under section 46 of the Act.

[para 46] The Organization's second response, dated March 13, 2012, states the provisions on which the Organization is relying for its refusal to provide the information to the Applicant, but does not state who can be contacted if she has any questions, nor does it advise the Applicant of her right for review under section 46 of the Act (however, I note the Applicant had already requested a review by this Office and so, presumably, knew of her right under section 46 of the Act).

[para 47] The Organization's third response, dated April 23, 2012 does provide the Applicant with most of the information which the Organization had previously withheld, but does not state which section it is relying on to withhold the information it did sever. It also does not advise who the Applicant could contact with any questions nor does it provide the Applicant with the information that she could request a review pursuant to section 46 of the Act.

[para 48] On the basis of the foregoing, I find that the Organization did eventually meet some, but not all, of its obligations under section 29 of the Act.

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

- a. Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?**
- b. Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?**

[para 49] Section 24(3) of the Act states:

24(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.

1. Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?

[para 50] Section 24(3)(b) of the Act prohibits the provision of personal information of individuals other than the Applicant. The only information severed from the responsive records as a third party's personal information is the first name and phone number of an individual who contacted the Organization to complain about the Applicant.

[para 51] According to the definition of "personal information" found in section 1(k) of the Act, quoted above, an individual's name and phone number would be personal information if it identified the individual. It is possible that the complainant's first name alone would not identify the third party; however, given that this person's name was provided along with a description of an incident allegedly involving the Applicant, I believe that it is information that does identify the third party. As well, the complainant's phone number could easily be used to identify the third party, either by doing an internet search or simply by phoning the number.

[para 52] I find that the information severed would reveal personal information about an individual other than the Applicant – the person who complained about her. As a result, I find that the Organization properly severed this information from the responsive records.

2. Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?

[para 53] The Organization conceded that this section is not applicable because the complainant did not provide an opinion but rather gave a statement of facts. I agree that section 24(3)(c) of the Act does not apply to the information severed not only because it may be considered a statement of facts, but also because there is no indication that the information was provided in confidence.

V. ORDER

[para 54] I make this Order under section 52 of the Act.

[para 55] I find that the Organization complied with sections 25 and 33 of the Act.

[para 56] I find that the Organization has no obligation to provide the Applicant with her Driver's Daily Log Reports and Driver's Daily Vehicle Inspection Reports, which are not her personal information.

[para 57] I find that the Applicant's time sheets do contain her personal information but that it is not reasonable to require the Organization to provide copies of those to the Applicant.

[para 58] I find that the Organization did perform an adequate search for records responsive to the Applicant's request.

[para 59] I find that the Organization responded to the Applicant's June 1, 2011 access request within the time period set out in section 28 of the Act but failed to meet the time period in responding to the Applicant's December 19, 2011 access request.

[para 60] I find that the Organization failed to meet its obligations under section 29 of the Act in its responses to the Applicant.

[para 61] I find that the Organization properly severed information that would reveal personal information about another individual pursuant to section 24(3)(b) of the Act.

[para 62] I impose the following term on the Organization:

The Organization is to ensure that its employees fully understand the Organization's obligations under the Act.

[para 63] I further order the Organization to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Keri H. Ridley
Adjudicator