

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2017-02

March 14, 2017

CLFN SAWMILL & TRAINING CENTRE LTD.

Case File Number P2778

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to CLFN Sawmill & Training Centre Ltd. for a copy of his personnel record. The Organization responded but withheld some records pursuant to sections 24(2) and 24(3) of the *Personal Information Protection Act* (“the Act”).

The Adjudicator found that the Organization conducted an adequate search for responsive records but did not meet its requirements under section 29(1)(c) of the Act. The Adjudicator also found that the Organization properly applied sections 24(2)(a) and 24(2)(c) of the Act to the records at issue.

Statutes Cited: AB: *Personal Information Protection Act*, R.S.A. 2000, c. P-6.5, ss. 1, 24, 27, 29 and 52.

Authorities Cited: AB: Orders P2006-012, P2007-002, and P2015-05.

Cases Cited: *Canada v. Solosky* [1980] 1 S.C.R. 821.

I. BACKGROUND

[para 1] The Applicant was an employee of CLFN Sawmill & Training Centre Ltd. (the Organization) until his termination. Pursuant to the *Personal Information Protection Act* (the Act) on October 3, 2013, the Applicant requested a copy of his personnel file,

including his medical files, payroll files, investigation files, supervisory notes and documentation, private notes pertaining to his work history and termination from the Organization and other (presumably) related companies.

[para 2] On November 6, 2013, the Organization responded to his request and provided him a redacted copy of his personnel file. The Organization did not provide a copy of the Applicant's termination letters as it believed that the Applicant already had a copy of these letters in his possession. These termination letters were provided to the Applicant on August 10, 2015. In September of 2014, the Organization located an additional eight pages of records which it released to the Applicant. On August 7, 2015, the Organization provided the Applicant with further responsive records it had found as the result of another search for records. The information redacted from the records at issue were copies of statements made by the Applicant's co-workers as well as an email from the Organization's lawyer. In its response, the Organization did not state which exception applied to the redacted records, but according to the Organization's submissions, the information was withheld pursuant to sections 24(2) and 24(3) of the Act.

[para 3] On May 20, 2014 and August 26, 2015, the Applicant submitted a Request for Review to this Office. On August 31, 2015, the Applicant requested an Inquiry. In his Request for Inquiry, the Applicant mentioned several issues he had with his termination and also mismanagement of his employee files. I received initial submissions from both the Applicant and Organization.

II. ISSUES

[para 4] The Notice of Inquiry dated August 19, 2016 sets out the issues in this inquiry. For ease, I will deal with the issues set out in the Notice in a different order, starting with a preliminary issue, followed by the adequacy of the Organization's search and its response, then dealing with if the Organization properly applied exceptions to disclosure to the information at issue. Therefore the issues in this inquiry are as follows:

1. 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)?

When the issues at inquiry include adequacy of search, it is helpful for the Organization to include a sworn document regarding the search conducted for records responsive to the Applicant's access request. In preparing the sworn document, the Organization may wish to consider addressing the following:

- The specific steps taken by the Organization to identify and locate records responsive to the Applicant's access request.
- The scope of the search conducted, such as physical sites, program areas, specific databases, off-site storage areas, etc.

- The steps taken to identify and locate all possible repositories where there may be records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
 - Who did the search? (Note: that person or persons is the best person to provide the direct evidence).
 - Why the Organization believes no more responsive records exist other than what has been found or produced.
 - Any other relevant information.
2. Did the Organization comply with section 29(1)(c) of the Act (contents of response)?
 3. Was the information in the withheld records, or any of it, the Applicant's personal information?

In an access request under PIPA, an Applicant may ask only for information that consists of his or her personal information as defined by the Act; the Organization does not need to provide, or claim exceptions for, information that relates to the Applicant if it is not "about him" within the terms of the definition. In addressing this issue, the parties may wish to refer to decisions of this office about what constitutes personal information under PIPA, including, among others, Order P2011-006, paras 17 to 22; Order P2015-05, paras 27 to 34.

4. 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(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)? In particular,
 - a. Did the Organization properly apply section 24(2)(a) (legal privilege)?
 - b. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?
 - c. Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to certain requested records or parts thereof?
 - d. Does section 24(3)(a) (threat to life or security) apply to certain requested records or parts thereof?
 - e. Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?
 - f. Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?

5. If the withheld records contain or consist of personal information of the Applicant, and if section 24(2)(b), 24(3)(a), 24(3)(b) or 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

III. RECORDS/INFORMATION AT ISSUE:

[para 5] The information at issue consists of 16 pages of responsive records including documents 1 to 6 which are statements written by the Applicant's former co-workers; document 7, an email from the Organization's counsel; and document 8, minutes of a meeting with the Applicant.

IV. DISCUSSION OF ISSUES

Preliminary Issue:

[para 6] The materials that the Applicant has provided to this Office in support of his Request for Review, Request for Inquiry and the inquiry itself focus largely on his issues with how and why he was terminated by the Organization. He also makes mention of a Charter issue but does not give details.

[para 7] It is beyond my jurisdiction to determine if the Organization was correct in how or why it terminated the Applicant's employment. It is also beyond my jurisdiction to determine if a Charter violation occurred.

[para 8] This Order will deal solely with Applicant's access request and the issues directly related to it which were set out in the Notice of Inquiry.

1. 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 9] 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 10] As part of its duty to assist an applicant, an organization must conduct an adequate search for responsive records. The initial or evidentiary burden of proof lies with the Applicant to provide some evidence that the Organization has failed to provide

records that are in its custody or control. Once this burden is met, the Organization must prove on a balance of probabilities that it made every reasonable effort to search for responsive records (Order P2006-012 at para 12).

[para 11] The Applicant submits, and the Organization does not dispute, that he was an employee of the Organization since 2006 but did not receive any records for the time period between 2006 and 2011. The Organization explains that there was different management in place during that time and its belief is that records were not kept as a result of operational issues. As it seems probable that records would exist during this time, the Applicant has met his evidential burden.

[para 12] Therefore, the Organization must prove that it performed an adequate search for responsive records. In order to meet this burden, the Organization provided an affidavit sworn by its General Manager which states:

- On receiving the Applicant's request, the Chief Operating Officer, searched the Organization's office for the Applicant's employee file;
- He does not believe that records between 2006 and 2011 exist due to the operational issues;
- After the Applicant submitted his request for review, another employee searched for responsive records and found 8 additional pages;
- The Applicant's termination letter was not initially provided to him because it was believed that he already had a copy but has subsequently been provided to the Applicant;
- He does not believe that any other responsive records exist.

[para 13] The Applicant's main argument is that there ought to be records dating back to 2006. He has provided me with copies of pages of a day planner, I assume from his own personal files, detailing what I assume are work related activities. The Organization does not dispute the length of the Applicant's employment. It simply states that these records are not in its custody and control likely due to the fact that they were not kept by the previous management. In 2011, the record keeping system was improved.

[para 14] While more detailed information about the actual search would have been helpful, I understand that the employees who performed that search are no longer employed by the Organization so some specific information may be difficult to obtain. On the evidence and argument I have before me, I believe that the Organization did perform an adequate search for responsive records and met its duty in this regard pursuant to section 27(1)(a) of the Act.

2. Did the Organization comply with section 29(1)(c) of the Act (contents of response)?

[para 15] 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 16] The Organization's response did not state the reasons for the refusal of the records at issue. The Organization does not dispute this but states that it has since remedied this inadequacy. I, therefore, find that the Organization did not initially meet its duty to the Applicant under section 29(1)(c) but has done so since.

3. Was the information in the withheld records, or any of it, the Applicant's personal information?

[para 17] Under section 24 of the Act, the Applicant is entitled to access only his own personal information. Personal information is defined by section 1(1)(k) of the Act as follows:

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

[para 18] Relying on Order P2015-05, the Organization argues that the information in the records at issue is not the Applicant's personal information.

[para 19] I believe that the records at issue do contain information about the Applicant (an identifiable individual) such as his name, employment history and opinions about him.

[para 20] However, I also believe that this information is also the personal information of other individuals who provided the statements found in records 1 to 6 of the records at issue. These statements reveal these third parties' names and employment histories. As well, and perhaps most pertinent to this inquiry, these statements contain the third parties' opinions about the Applicant and situations they found themselves in involving the Applicant. These opinions, while detailing events that occurred at work, are not professional opinions and clearly have a personal dimension to them and are not just a mere re-telling of facts of an incident. As such, I find that records 1 to 6 of the information at issue contain both the Applicant and third parties' personal information (see Order P2007-002 at para 22).

4. 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(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)?

a. Did the Organization properly apply section 24(2)(a) (legal privilege)?

[para 21] The Organization applied section 24(2)(a) of the Act to record 7 of the information at issue and states that it is subject to solicitor-client privilege. It provided me with a copy of the record and I have examined it. It consists of an email from the Organization's legal counsel in which he provides his advice on a legal matter.

[para 22] Section 24(2)(a) of the Act states:

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

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

[para 23] The test to determine if solicitor-client privilege applies to a record was set out in *Canada v. Solosky* [1980] 1 S.C.R. 821. The test states that the evidence must establish the record is:

1. A communication between a lawyer and the lawyer's client;
2. The communication entails the giving or seeking of legal advice; and
3. The communication is intended to be confidential.

[para 24] Confidentiality can be implied, it does not need to be express and I find that it can be implied in these circumstances. Therefore, I find that all three parts of the test were met and that record 7 is subject to solicitor-client privilege and therefore section 24(2)(a) of the Act was properly applied.

b. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?

[para 25] The Organization states that it applied section 24(2)(c) of the Act to records 1 to 6 and 9 of the records at issue. These records contain the statements of the Applicant's co-workers detailing incidents involving the Applicant and a summary of a meeting between the Applicant and employees of the Organization wherein the Applicant's termination was discussed. The Organization submits that this information was collected for an investigation or legal proceeding.

[para 26] Section 24(2)(c) of the Act states:

24(2) An organization may refuse to provide access to personal information under subsection (1) if

...

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

[para 27] Investigation is defined by section 1(1)(f) of the Act as follows:

1(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 28] Regarding records 1 to 6, according to the evidence provided by the Organization, the Organization’s management team was advised verbally that there was an issue with the Applicant. As a result, the Organization asked the employees involved to provide written statements detailing the incidents as part of the investigation of these allegations. The allegations were serious, involving claims of harassment and could have led to human rights complaints, employment standards complaints and/or civil actions. In fact the investigation did lead to the termination of the Applicant’s employment contract.

[para 29] It is clear that the Organization was investigating a breach of the employment agreement. As well, the records show that the potential breach of the employment contract may have occurred and it was reasonable to conduct the investigation.

[para 30] Regarding record 9 of the records at issue, the notes detail a meeting wherein the Applicant was terminated, in the Organization’s opinion, for cause. The Organization submits that the record was created for the purpose of a legal proceeding, the legal proceeding being a potential wrongful dismissal claim, or employment standards complaint. In the meeting the Applicant threatened legal action.

[para 31] Therefore, I find that the Organization properly applied section 24(2)(c) to the records 1 to 6 and 9.

c. Exercise of Discretion:

[para 32] Even though I have found that the records fall within the discretionary exceptions found in sections 24(2)(a) and 24(2)(c) of the Act, the Organization must still prove that it properly exercised its discretion in applying these exceptions.

[para 33] Regarding its application of section 24(2)(a) of the Act, the Organization stated that:

...the Organization's decision not to disclose was based upon the importance the Organization places upon solicitor client privilege and the need to preserve its own confidentiality with legal counsel for the purposes of seeking legal advice.

(Organization's submissions at para 33)

[para 34] Regarding section 24(2)(c) of the Act, the Organization stated that its decision not to disclose was based on needing to:

- a. Protect the integrity of investigation and legal processes;
- b. Protect the legitimate concerns of the employees who provided written complaints on the condition that they not be disclosed; and
- c. The belief that the records could not be disclosed in accordance with the mandatory grounds...

(Organization's submissions at para 32)

[para 35] I find that the Organization's rationale for exercising its discretion took into account the provisions of the Act and the balancing of the interests of the Applicant with those of other third parties. Therefore, I find that the Organization properly exercised its discretion and properly applied sections 24(2)(a) and 24(2)(c) of the Act to the records at issue.

[para 36] Given my findings above, it is not necessary for me to consider the remaining issues in this inquiry and, therefore, I will not.

V. ORDER

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

[para 38] I find that the Organization conducted an adequate search for responsive records.

[para 39] I find that the Organization did not meet the requirements set out in section 29(1)(c) of the Act and order it to familiarize its employees with respect to the requirements of the Act when responding to access requests.

[para 40] I find that the Organization properly applied sections 24(2)(a) and 24(2)(c) of the Act to the records at issue.

[para 41] 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