

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2018-01/F2018-06

February 1, 2018

KROLL ASSOCIATES

Case File Numbers P2355 and 005381

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Personal Information Protection Act* (PIPA) to Kroll Associates (the Organization) for records relating to an investigation conducted by the Organization for the University of Calgary (the University). She also indicated that if records had been destroyed she wanted to know when that had happened. The Organization responded that there were no responsive records. The Applicant requested a review of the Organization's response, and subsequently an inquiry.

The Commissioner identified a jurisdictional issue regarding whether the *Freedom of Information and Protection of Privacy Act* (FOIP Act) or PIPA applied to the records requested by the Applicant from the Organization. The Commissioner decided to hold an inquiry on the jurisdictional issue as a preliminary step for deciding whether to conduct an inquiry.

The records requested by the Applicant related to an investigation conducted by the Organization on behalf of the University, under contract. The Adjudicator determined that any responsive records would be under the control of the University by virtue of the contract. As such, the FOIP Act would apply to any responsive records.

As the Applicant had previously made an access request to the University for records related to the investigation (Order F2003-005), the Adjudicator surmised that another

access request would be unlikely to yield the records sought by the Applicant. The Adjudicator noted that the Applicant had come to a similar conclusion.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 72, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 4, 52.

Orders Cited: AB: Orders F2003-005, F2010-022, P2015-08.

I. BACKGROUND

[para 1] The Applicant made an access request under the *Personal Information Protection Act* (PIPA) to Kroll Associates (the Organization) in October of 2012 for records relating to an investigation conducted by the Organization on behalf of the University of Calgary (the University). She also indicated that if records had been destroyed she wanted to know when that had happened. On June 3, 2013, the Organization responded that there were no responsive records. On June 12, 2013, the Applicant requested a review of the Organization's response to her access request. On January 15, 2015 the Applicant requested an Inquiry.

[para 2] On June 21, 2016 the Commissioner wrote to the Organization identifying a jurisdictional issue regarding whether the *Freedom of Information and Protection of Privacy Act* (FOIP Act) or PIPA applied to the records to which the Applicant had requested access from the Organization. The Commissioner asked the Organization for further information in this regard; this letter was copied to the Applicant. The Organization did not provide a written response. The Commissioner decided to hold an inquiry on the jurisdictional issue as a preliminary step for deciding whether to conduct an inquiry.

[para 3] The University was invited to participate as an affected party for the inquiry. It agreed to participate and provided two submissions to the inquiry, as did the Applicant. The Organization provided one submission.

[para 4] File number P2355 refers to the file initially opened up by this Office under PIPA. During the inquiry, this Office created file number 005381 to track any decisions made in this inquiry under the FOIP Act. This new file number was not previously brought to the attention of the parties as it affects only the internal record keeping of this Office.

II. ISSUE

[para 5] The Notice of Inquiry dated April 18, 2017, states the issue for inquiry as follows:

Does the *Personal Information Protection Act* apply to any existing records that are responsive to the Applicant's access request?

The answer to this question depends in part on whether the University of Calgary would have custody or control of any existing records responsive to the request, which may be the case depending on the terms of any contract between the University of Calgary and the Organization with respect to the investigation to which the records relate.

In preparing their submissions, the parties may wish to refer to sections 4(2) and 4(3)(e) of PIPA.

III. DISCUSSION OF ISSUES

[para 6] Information in the custody or control of the Organization will generally be governed by PIPA (section 4(1)) and records in the custody or control of the University are governed by the FOIP Act (section 4(1)).

[para 7] Sections 4(2) and 4(3)(e) of PIPA sets out the rules where PIPA and the FOIP Act interact:

4(2) Subject to the regulations, this Act does not apply to a public body or any personal information that is in the custody of or under the control of a public body.

...

4(3) This Act does not apply to the following:

...

(e) personal information that is in the custody of an organization if the Freedom of Information and Protection of Privacy Act applies to that information;

[para 8] In Order P2015-08, the adjudicator discussed these provisions with respect to an access request made to an organization acting under contract with a public body. She said (at paras. 21-28):

Section 4(2) speaks of FOIP (rather than PIPA) applying to information over which a public body has *custody or control*, whereas section 4(3)(e) speaks only of information to which FOIP applies that is in the *custody* of an organization. Presumably, the absence of the word “control” in section 4(3)(e) is meant to signify that this provision applies where the organization has custody of the information, but the public body, rather than the organization, has control.

This makes sense given how many public bodies operate. Public bodies are responsible for administering and governing a vast number of programs that affect the lives of Albertans. Sometimes, in order to perform their functions, public bodies will contract with organizations, who are not in themselves governed by FOIP. I believe that this section was drafted as it was to ensure that information that is in essence a public body’s information is still afforded all the same protections as it would be were the information in the custody of a public body.

It is not uncommon for both a public body and an organization to have rights, interests or duties relative to the same information, which might be thought of as types of “control” in the way that term is commonly used. Therefore, the type of control referred to in

section 4(2) of PIPA should be interpreted such that the provision can be said to apply only where, despite the fact the organization has custody, the public body, but not the organization, has this type of control over the information.

Whether the public body has the requisite type of control, or not, will be easy to determine in some circumstances.

For example, where the information that has been provided to the organization by the public body, or collected by the organization on the public body's behalf, it might well be reasonable to conclude that this is in essence the public body's information. In such circumstances, if an access request were made to the public body, it would be reasonable to require it to produce the records, whereas this might not be true if the request were made to an organization with custody of the record.

The opposite end of the spectrum is also easy to identify. There are many circumstances in which the fact that a public body has the ability to demand a copy of a record in the custody of an organization for a particular purpose would not mean it would have the requisite degree of control for section 4(2) to oust PIPA.

For instance, section 64 of the *Alberta Corporate Tax Act* gives the Minister the authority to demand that a corporation (who could be an organization under PIPA), or any other person, produce "any document" which could include employment records of employees. This authority could be thought of as a type of control, yet, if section 4(2) of PIPA were interpreted to mean that because the organization was under a duty to produce it to the Minister for regulatory purposes, under FOIP, but not PIPA, an organization would not have to disclose employee records to an employee asking for them. This would mean that individuals could not ask for their employment records from their employers simply because the public body was in the midst of a tax audit or an investigation under the *Alberta Corporate Tax Act*. This would be an absurd result.

It is harder to make the determination in circumstances where both a public body and an organization have the same or similar rights, interests, or duties relative to the information. For instance, in the present case, the reasons for collecting and retaining information may be said to be not only to enable the public body (and its agency) to monitor the proper working of day homes, but arguably equally serves the need and interests of day home providers themselves.

Submissions of the parties

[para 9] The Organization was retained in February 2001 by the University to assist with an internal investigation. The investigation was completed in August 2002. The Organization states that it is unable to locate a contract, statement of work, or other document setting out the roles and responsibilities of the Organization or University with respect to the investigation, or records relating to it.

[para 10] The Organization further states that under its Record Retention Policy and Schedule, case records are maintained for seven years. As the investigation concluded fifteen years ago, the Organization states that any related records were likely destroyed.

[para 11] The Organization provided me with information about its general practices. It states that it conducts investigations on behalf of clients, and that information collected by the Organization in connection with an investigation is collected on behalf of the client. The Organization further states that it does not use or retain this information for its own purposes.

[para 12] The Organization argues that when it conducted the investigation for the University, it would have been acting as an “employee” of the University within the terms of the FOIP Act. As such, the information collected in the course of the investigation would have been under the control of the University. Therefore, the FOIP Act would apply to the records requested by the Applicant.

[para 13] The University provided me with a copy of the letter of engagement it sent to the Organization, signed by the University’s General Counsel (at the time). The University also argues that the Organization was acting as an employee of the University, as defined in the FOIP Act, in conducting the investigation and that therefore the FOIP Act applies to any responsive records.

[para 14] The University acknowledges that the letter of engagement “does not touch on the issues of custody or control.” However, its general practice is to “[treat] any records created or collected in the course of the investigation as within the University’s custody or control. The only exception to that rule would be any administrative records that the Organization may have created, such as invoices. The University would not expect to have custody or control of such records.”

[para 15] In a letter attached to her Request for Inquiry, the Applicant states that

... the Applicant would like to clarify that she did request this information from the University of Calgary and it was determined that [the investigator] did not disclose the personal information in question to the University (ORDER F2003-005). He either kept the documents at Kroll or in his personal possession.

[para 16] She further points out that her access request made in 2001 to the University under the FOIP Act would have encompassed the records she has requested from the Organization.

[para 17] The Applicant stated (in her Request for Inquiry):

In conclusion, it is true that the personal information was provided to [the investigator] of Kroll associates over ten years ago. However, at that time, it was the Applicant’s understanding that she could only request Personal information from Public Body’s (ie the University of Calgary), which she did. However, [the investigator] did not disclose the said documents to the University. It has only been recently (2012) that the Applicant learnt that she could access this information through PIPA. Due to the devastating consequences of [the investigator’s] “handling” of the Applicant’s sexual harassment complaint and his lack of [openness] regarding the Personal Information in question (withholding it from the University) and his [subsequent] disclosure of the Applicant’s Personal information to a third party, the Applicant [believes] that this Request should proceed to an Inquiry.

Analysis

[para 18] Both the Organization and the University argue that the Organization was acting as an employee of the University when conducting the investigation. Section 1(e) of the FOIP Act defines “employee” for the purposes of that Act:

1(e) “employee”, in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body

[para 19] In Order F2010-022, the adjudicator stated:

I note that previous orders of this Office have found that, where a service provider is deemed to be an employee of a public body under section 1(e), the first of the ten criteria for determining custody and control, which I reproduced above, is fulfilled (Order F2002-006 at paras. 30 to 34; Order F2006-028 at paras. 22 to 24). In my view, however, it is more correct to say that it is the fact itself that the third party provides services for the public body -- rather than the application of section 1(e) -- that weighs in favour of a finding that the public body has custody or control of records held by that service provider. The definition of “employee” in section 1(e) is for the purpose of interpreting other provisions of the Act, in that it applies wherever the term “employee” appears, but there is no provision in the Act that speaks of information “in the custody and control of an employee”. (At para. 30)

[para 20] I agree with the above analysis, that falling within the definition of “employee” in the FOIP Act does not answer the question of custody and/or control of records.

[para 21] This Office conducted an inquiry into the University’s response to the Applicant’s access request made under the FOIP Act, for similar information at issue here; that inquiry resulted in Order F2003-005. The Applicant concluded, from that Order, that “[the investigator] did not disclose the personal information in question to the University. He either kept the documents at Kroll or in his personal possession” (rebuttal submission, at pages 1-2). However, the adjudicator’s description of the records at issue in Order F2003-005, which the University located as responsive records, includes the investigator’s notes (see paragraphs 97 and 109).

[para 22] I am aware that in some cases an investigator will retain control over working notes and only a final report will be provided to the contracting organization (the University in this case). However, the University has stated that its usual practice is to retain control over records relating to an investigation carried out by a third party under contract. The Organization also argues that it does not retain investigation records. Further, Order F2003-005 includes descriptions of records relating to the investigation, over and above the final investigation report. I find, on a balance of probabilities, that the University retained control over all records relating to the investigation, such that they were located in response to the Applicant’s 2001 FOIP request.

[para 23] The University addressed the Applicant's argument that the investigator's notes should have been responsive to her 2001 request. It said:

It is possible that the documents were destroyed when the Investigator finished his final report, in compliance with the University's retention rule #98.0011 – Draft Documents & Working Materials. The retention rules states that drafts and working materials need only be retained for as long as required for administrative or reference purposes. It addresses the retention of temporary documents created in order to prepare original documents, eg: an investigation report. Given the passage of time, I can present no evidence to prove or disprove this possibility. (Rebuttal submission of the University, at page 4)

[para 24] The fact that the Applicant believes some notes of the investigator were not located in response to her FOIP request does not mean that such notes exist in the custody and control of the Organization. Order F2003-005 indicates that some notes of the investigator *were* located in response to the Applicant's FOIP request, and the University has provided a reasonable explanation for why working notes might not have been located.

[para 25] In any event, I find that the University, and not the Organization, has control over the records requested by the Applicant under PIPA, and that those records are therefore excluded from PIPA under section 4 of that Act.

Request for information about the destruction of information

[para 26] The Applicant's request to the Organization included questions about how her personal information was used and disclosed. This part of the request falls within section 24(1)(b) of PIPA; however, an organization is required to provide this information to an applicant only if the organization has custody or control of the record containing the applicant's personal information (section 24(1.2)). I have determined that the Organization does not have custody or control over any record responsive to the Applicant's request.

[para 27] Neither PIPA nor the FOIP Act require an organization or a public body (respectively) to find out and inform an applicant when records were destroyed.

V. ORDER

[para 28] I make this Order under section 52 of PIPA and section 72 of the FOIP Act.

[para 29] I find that the records responsive to the Applicant's access request are subject to the FOIP Act and excluded from PIPA under section 4 of that Act.

Amanda Swanek
Adjudicator