ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2021-08

September 9, 2021

CANADIAN NATURAL RESOURCES LIMITED

Case File Number 007980

Office URL: www.oipc.ab.ca

Summary: The Applicant was an employee of Canadian Natural Resources Limited (the Organization). He made an access request to the Organization under the *Personal Information Protection Act* (PIPA) for his personnel file, notes about phone conversations, email correspondence, and correspondence between managers, VPs and HR related to him.

The Organization provided some responsive records but withheld others under sections 24(2)(a) (legal privilege) and 24(2)(c) (information collected for an investigation or legal proceeding).

The Applicant requested an inquiry into the Organization's response to the access request, including its search for records.

The Adjudicator found that the Organization conducted an adequate search for records.

The Adjudicator concluded that much of the information in the records was not the Applicant's personal information, or contained only small snippets of personal information such that it was not reasonable to require the Organization to provide that information to the Applicant.

Regarding the Applicant's personal information that the Organization was required to provide to the Applicant, subject to exceptions, the Adjudicator found that the Organization properly claimed solicitor-client privilege (section 24(2)(a)). The Adjudicator found that the Organization did not properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to information in the three records to which it was applied. However, the

Adjudicator found that the information to which section 24(2)(c) had been applied must be withheld by the Organization under section 24(3)(c) (information that would reveal the identity of the individual who provided the information in confidence).

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 24, 27, 52.

Authorities Cited: AB: Orders F2004-026, F2015-22, P2006-004, P2006-006, P2006-007, P2006-012, P2007-002, P2008-007, P2012-04, P2012-09, P2013-13, P2015-05

Cases Cited: *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10

I. BACKGROUND

[para 1] The Applicant was an employee of Canadian Natural Resources Limited (the Organization). On December 5, 2017, he made an access request under the *Personal Information Protection Act* (PIPA) to the Organization for "performance appraisals, contents of personnel file, handwritten notes about telephone conversations, and email correspondence". He also requested "internal correspondence related to me among managers, VPs or HR". The timeframe for the request was November 2011 to December 5, 2017.

[para 2] The Organization responded on February 6, 2018, providing some responsive records and withholding others under sections 24(2)(a) and (c) of the Act.

[para 3] The Applicant requested a review by the Commissioner of the Organization's response to the access request, including its search for responsive records. The Commissioner authorized an investigation into the matter; subsequently, the Applicant requested an inquiry.

II. ISSUES

[para 4] The Notice of Inquiry, dated April 15, 2021, states the issues for inquiry as the following:

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)?

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

3. Did the Organization properly apply section 24(2)(a) (legal privilege) to the records withheld in their entirety that contain the Applicant's personal information?

4. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to the records withheld in their entirety that contain the Applicant's personal information?

[para 5] I will address issues 2-4 first, then issue 1.

III. DISCUSSION OF ISSUES

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

[para 6] The Organization located 223 records, comprising 608 pages in total. It provided records 8-14, 16, 18-24, 26, 28, 30, 32, 34, 36, 38-40, 44-64, 66, 74, and 76-150 to the Applicant in their entirety. Records 1-7, 15, 17, 25, 27, 29, 31, 33, 35, 37, 41-43, 65, 67-73, 75, and 219-221 were provided with some information withheld as non-responsive. The remaining records were withheld in their entirety as non-responsive, and/or under sections 24(2)(a) and (c).

[para 7] Section 24(1) and (1.1) of the Act require an organization to provide access to an applicant's personal information; these provisions state:

> *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.*

[para 8] The Applicant was provided with records 8-14, 16, 18-24, 26, 28, 30, 32, 34, 36, 38-40, 44-64, 66, 74, and 76-150 in their entirety. These records included performance evaluations, employee phone listings, and information about the Applicant's position. For the reasons discussed below, some of these records contain information that is not the Applicant's personal information; however, as they have already been provided by the Organization in full, they are not at issue in this inquiry.

[para 9] Records 219, 220 and 221 were provided to the Applicant, with some information withheld as non-responsive.

[para 10] Personal information is defined in section 1(1)(k), as information about an identifiable individual. Information about employees acting in the course of their job duties is normally not considered information *about* those individuals; however, there may be circumstances that give that information a "personal dimension", such as disciplinary issues or performance evaluations (see Orders F2004-026 and P2012-09).

[para 11] In Order P2006-004, former Commissioner Work stated (at paras. 46-47, 50).

> 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.

[para 12] Order P2012-09 found that the fact that information is located in an employee's personnel file does not necessarily indicate that it contains the employee's personal information. Examples of records that were found not to contain an employee's personal information included training materials of the organization, including forms with the employee's signature indicating that the training had been completed; copies of office-wide memos; records of work-related meetings and attendance at meetings; and shift-related information.

[para 13] In Order P2006-004, former Commissioner Work considered whether information generated or collected to address a complaint was the personal information of the individual who made the complaint (the applicant). He found that information about the persons named in the complaint, information about other third parties and their dealings with the applicant, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process, were not personal information of the applicant. This was so, even though this information was generated as a result of the applicant's complaints (see para. 18).

[para 14] In Decision P2011-D-003, former Commissioner Work considered a similar matter: an access request made to a law firm for the applicants' personal information contained in a client file by the firm in the course of representing a party who was opposed in interest to the applicants. Commissioner Work said (at paras. 30, 32):

> The fact the file contains information related to one of the Applicants because he was the opposing party in the legal matters does not of itself make the information "about him". What is "about him" is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number. This is not meant to be an exhaustive list, but is provided to illustrate the type of information that is personal information, in contrast to information other than this type of information, that was generated or gathered by the law firm or its client for the purpose of

> pursuing the litigation. The point is that much or most of the latter may well not be the first Applicant's personal information even though it relates to a legal matter that involved him. An obvious example would be legal opinions given to the law firm's client as to how to deal with the litigation with the Applicant or associated legal matters. The way in which the law firm was advising its client and dealing with the legal matters may have affected the Applicants, but it was not "about" them in the sense meant by the definition of personal information in the Act. (This information would also be privileged, but the point here is that much or most of it would likely not be the Applicant's personal information within the definition of the term contained in the Act.)
>
> …
>
> These observations are made to point out that if, which seems likely, there is information in the "client file" of the law firm's client that is not covered by solicitor-client privilege, or that is no longer covered by litigation privilege, it seems equally likely that much of it need not be disclosed to the Applicants in this access request because it is not their personal information. (I say this despite the fact that the Law Society seems to concede the converse in its third bullet in para 19 of its submission.)

[para 15] In Order P2015-05, the Director of Adjudication considered the above decision in the context similar to the one at hand. A former employee had made an access request to an Organization for his personnel file. She found (at paras. 31-33):

> The greatest part of the withheld information consists of discussions about the Applicant and his job-related issues amongst other employees of the Organization whose role it was to deal with these issues, as well as statements of other employees who recounted events involving the Applicant. To a large extent, these discussions include ideas or intentions as to how his employment issues should be dealt with. The records also include descriptions of how the Applicant behaved or reacted in certain situations, that are value-laden in that they reveal the speakers' opinions about the Applicant and the way these persons interpreted events concerning him. (Because the discussions are work-related rather than personal, most of the 'opinion' information in this category does not appear to be – though some of it may be – the personal information of the employees engaged in these discussions and making these statements.)
>
> With respect to such information, I agree with the reasoning in the decision of Commissioner Work, cited above, as well as the reasoning of the Adjudicator in Order P2012-04. Insofar as this withheld information consists of the intentions, ideas and opinions of the other employees, it does not consist *solely* of the Applicant's personal information, nor does some of it consist of his personal information at all.
>
> To illustrate the latter point, X's statement that "I believe we should take steps a, b and c to deal with Y's employment complaint" is not Y's personal information. While the fact Y has made an employment complaint is Y's personal information, the steps X believes should be taken to address it, though related to Y, are not. Ultimately, if the steps are taken and affect Y's situation, this may, at that point, be Y's personal information, for example, that Y accepted a new position. However, the intervening considerations or discussions by others about the merits of the complaint and how to resolve it, are not. Most certainly they are not if the suggested steps are never effected. Even if they are, only the way Y's situation is affected by the outcome, and not why and by whom this was effected, is personal information in the sense of being "about Y" within the terms of the Act.

[para 16] Lastly, an organization's duty in section 24(1.1) to provide requested personal information is subject to considerations of what is reasonable. As stated in Order P2008-007, the phrase "taking into consideration what is reasonable" under section 24(1.1) of the Act is informed by section 2, which states:

> *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.*

[para 17] Former Commissioner Work discussed this limitation with respect to records containing only small 'snippets' of an applicant's personal information. He said (at para. 131):

> I note as well that on the basis of the ability of organizations to take into account what is reasonable in responding to access requests under section 24 of the Act, it is open to an organization to argue, in appropriate circumstances, that it is not reasonable to provide access to an applicant's personal information, or parts of this information. This may apply for information that consists of meaningless or insignificant snippets, particularly if it reveals nothing of substance to an applicant. It may also apply where providing information would require an organization to review a large volume of information only to provide an applicant with minor items of information of which he is already well aware, especially where there is an indication that the access request for such information is not being made for a *bona fide* purpose.

Application to the records at issue

[para 18] Much of the information in the records 1-75 consists of information described in the Orders cited above, as information that is not an applicant's personal information and which needn't be provided in response to an access under PIPA. For example, much of records 1-75 at issue contain organizational charts, records of attendance at work-related conferences and meetings, discussions about how bonuses are to be applied in within the Organization, descriptions of employee benefits packages, lists of employee positions and vacant positions, the business contact information of the Applicant while he was an employee, budget-related documents, work plans and assignments of staff to particular projects, forms and instructions for performance appraisals (unfilled), and similar information. None of this information is personal information about the Applicant. Some of the information in records 151-223 is not about the Applicant for the same reasons.

[para 19] Some of the information in records 151-223 consists of information about how the Organization approached its decision to terminate the Applicant's employment. While this

information relates to the Applicant in a broad sense, following past Orders of this Office cited above, it is not 'about' him. Rather, it is information about the Organization's processes.

[para 20] Some of the information in these records consists of the Organization's response to various complaints made by the Applicant about the Organization, including a complaint made to Employment Standards, and a complaint made to APEGA. I agree with the Orders cited above, that while a complaint may have been initiated by the Applicant, the Organization's response to the complaint is not necessarily "about" the Applicant such that the information is the Applicant's personal information.

[para 21] Some of the information relates to the Organization's approach to distributing raises among employees, including recommendations from direct managers; discussions relating to succession planning; discussions relating to employee assignments, etc. These discussions sometimes include personal information of employees, such as their relative strengths and weaknesses, their past performance, their fit within their teams, and so on. While the latter is personal information of the employees, these records are primarily about the Organization's plans and approaches to HR matters.

[para 22] In some cases, the records contain a small 'snippet' of the Applicant's personal information; because the Organization is not required to provide the remaining information, in most cases, these snippets of information will be void of context, and be effectively meaningless. In other cases, the discrete items of information consist of personal information the Applicant has already been given in full, in other records. As the Organization is not required to provide the remainder of the record containing only the discrete items of information, the context in which this information appears would not be revealed, such that it is of no additional value to the Applicant.

[para 23] Given that the right of access is subject to what is reasonable, and following former Commissioner Work in Decision P2011-D-003, it is not reasonable to require the Organization to review hundreds of pages of records that contain only small snippets of the Applicant's personal information, where those snippets would be meaningless, or where the Applicant already has that information.

[para 24] Lastly, the records contain submissions made by the Applicant in another proceeding, in which the Organization was involved and opposed in interest. In my view, to the extent that these submissions contain the Applicant's personal information, it is not reasonable to require the Organization to provide the Applicant's submissions back to him, in response to an access request under PIPA. As above, the context in which these submissions appear in the Organization's records – such as who may have discussed the submissions, or how the Organization intends to respond - is not information that the Organization is required to provide to the Applicant under the Act.

Conclusion regarding the responsiveness of information in the records

[para 25] Only a small amount of information in the records withheld from the Applicant contain his personal information such that the Organization is required to provide access, subject

to the exceptions set out in sections 24(2) and (3). The Organization has applied sections 24(2)(a) and (c) to the information in these records, which I will discuss below.

Did the Organization properly apply section 24(2)(a) (legal privilege) to the records withheld in their entirety that contain the Applicant's personal information?

[para 26] Section 24(2) sets out circumstances in which an organization may refuse to provide access to requested information. The Organization has applied section 24(2)(a) to information in records 153-223, except records 216 and 218 – 221 (records 219-221 were provided by the Organization to the Applicant, with non-responsive information redacted). For the reasons given above, most of the information in these records is not responsive, as it does not contain the Applicant's personal information. I will consider the application of section 24(2)(a) only to the information that is the Applicant's personal information.

[para 27] Section 24(2)(a) 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 28] The Organization has cited both solicitor-client privilege and litigation privilege.

Solicitor-client privilege

[para 29] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. The Court said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 30] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 31] Solicitor-client privilege can also extend past the immediate communication between a solicitor and client.

[para 32] In Order F2015-22, the adjudicator summarized the discussion of a continuum of communication in *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII); the adjudicator concluded that "communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege" (at para. 76). I believe this is a well-established extension of the privilege.

[para 33] The Organization has not provided detailed submissions regarding its claim of solicitor-client privilege, other than to argue that the communications fulfill the *Solosky* test. However, as the Organization elected to provide me with unredacted copies of all the records at issue, I can make a determination based on the information in the records themselves. Most of the information in the records is not responsive, and my decision relates only to the information that *is* responsive (i.e. the information about the Applicant).

[para 34] Many of the responsive records consist of emails between employees of the Organization, discussing the Organization's response to various complaints made by the Applicant about the Organization. Some of the communications also related to the Applicant's termination.

[para 35] Counsel for the Organization was often involved in these emails; that counsel was involved in many of the communications is not sufficient to show that the communications are privileged. However, some of the records show that counsel was clearly providing legal advice regarding steps the Organization was taking or that were in contemplation. Many emails explicitly state that that are privileged and confidential. These records meet the test for solicitor-client privilege.

[para 36] In other records, counsel was seeking information from other Organization employees. Again, as I have the benefit of reviewing all the records at issue, I can ascertain from the context of these requests for information from counsel, that they form part of the continuum of communications between solicitor and client.

[para 37] Some of the privileged emails contain attachments; some of these attachments consist of information that would not, by itself, be protected by solicitor-client privilege. Attachments to privileged emails were discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, where the Court concluded (at paras. 245-248):

> ***TransAlta*** does not stand for the proposition that all case law attached to otherwise privileged records is not privileged just because the case law is publicly available. The relevant part of the reasons in ***TransAlta*** began with Justice O'Brien's observation that "an attachment to a privileged e-mail may be extraneous to the content of that e-mail which means it is still necessary to review the attachment to determine its connection to the e-mail before deciding whether it is also privileged:" at para 59 [emphasis added]. At para 62, Justice O'Brien stated that "I am satisfied there is substance in the e-mails that could attract solicitor-client privilege, as the chambers judge found. The attachment in each case, however, is a copy of a decision by FERC, which is available on-line to the public and does not, therefore, attract privilege."
>
> Justice O'Brien did not elaborate on the "connection to the e-mail:" I infer that the attached cases did not have a sufficient connection to the e-mails such that the cases formed part of the privileged communication.
>
> In the present circumstances, however, the case is expressly referred to in and attached to a legal opinion. It is an illustration of a legal conclusion found in the opinion. The opinion does not have other case attachments. The writer evidently considered this particular decision to be important

> enough to warrant communication (and review by the reader(s)) along with the opinion. The case is not merely legal information provided by ACPS to EPS. It is a constituent of the opinion. The case is not a mere fact, in the sense of being in fact available to the public, like any other publicly reported record (to the extent that the fact/legal advice distinction may be safely deployed). Rather, the case was selected out of the library of potentially applicable cases. That selection and the subsequent communication of that case show that it forms part of the provision of legal advice. As part of the opinion, the case law, like other elements of the opinion, was supported by a presumption that it was privileged. I see no basis for rebuttal of that presumptive privilege.
>
> In my opinion, the case law, records 753-755 and 984-986 are also privileged and should not be disclosed as the case law would reveal aspects of the legal opinion provided by ACPS to EPS.

[para 38] In this case, some of the attachments may be considered 'publicly available' but not all. As stated earlier in this Order, I am only reviewing the Organization's claim of privilege over information consisting of the Applicant's personal information such that it is arguable that the Organization is required to consider granting the Applicant access to that information under section 24(1)(a). In the emails and/or attachment containing such information, it is my view that the attachments are a "constituent of the legal opinion". Given this, because the emails are protected by privilege, the attachments are presumptively privileged as well. There is nothing before me that would rebut that privilege.

[para 39] Lastly, some records are comprised of counsel's notes. Past Orders of this Office have concluded that working papers of counsel that are directly related to the giving or seeking of legal advice meet the criteria for solicitor-client privilege (see Order P2012-04). In this case, the notes are clearly related to counsel's provision of legal advice. I accept that they are protected by solicitor-client privilege.

Litigation privilege

[para 40] The Organization and the Applicant both made detailed submissions regarding the Organization's application of litigation privilege. The Applicant has argued that all legal proceedings involving him and the Organization have ended, such that litigation privilege no longer applies.

[para 41] On August 31, 2021, the Organization asked to provide an additional submission to this inquiry. The Organization states that it had recently received communications from the Applicant indicating that the Applicant intended to continue pursuing the legal actions he had argued were finished.

[para 42] I decided not to allow the Organization to provide the recent communication from the Applicant as an additional submission, as I do not have to make a determination on the claim of litigation privilege.

[para 43] I have found that much of the information in the records at issue is not information the Applicant has a right to under the Act, as it is not information about him. Any information over which the Organization has claimed privilege, that *is* the Applicant's personal information, I

have found to be protected by solicitor-client privilege. As such, I do not need to make a decision regarding the Organization's claim of litigation privilege.

Conclusions regarding section 24(2)(a)

[para 44] Only a small amount of information in the records withheld under section 24(2)(a) is information the Organization is required to provide to the Applicant, subject to exceptions in the Act. In my view, the Organization properly applied section 24(2)(a).

Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to the records withheld in their entirety that contain the Applicant's personal information?

[para 45] The Organization has withheld information in the responsive records under section 24(2)(c), in records 152, 216, and 218. This provision 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 46] Section 24(2)(c) of the Act permits an organization to withhold personal information that was collected for an investigation or legal proceeding. Section 1(1)(f) of PIPA defines "investigation", in part, 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 47] "Legal proceeding" is defined at section 1(1)(g) of the Act as:

> *(g) "legal proceeding" means a civil, criminal or administrative proceeding that is related to*
>
> *(i) a breach of an agreement,*
>
> *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
>
> *(iii) a remedy available at law;*

[para 48] Regarding information collected for an investigation, the Organization argues (July 14, 2021 submission, at page 2):

> The Organization carried out an investigation related to: whether the Applicant may have breached his obligations under his employment agreement (Section 1(1)(f)(i) of the Act); and, whether there were circumstances or conduct that might result in the termination of the Applicant's employment or another remedy or relief being available at law (Section 1(1)(f)(iii) of the Act), because the Organization reasonably believed such breach, circumstances or conduct had or may have occurred or was likely to occur.

[para 49] Regarding information collected for a legal proceeding, the Organization argues (July 14, 2021 submission, at page 2):

> Aspects of the Organization's investigation considered whether or how the breach, circumstances or conduct referred to above may have related to the actions the Applicant brought against the Organization and APEGA as described in detail in these submissions under the heading "Litigation privilege".

[para 50] The information withheld by the Organization in records 152, 216 and 218 does not appear to relate to complaints brought by the Applicant against the Organization. Therefore, none of the information in those records appears to have been collected for a legal proceeding.

[para 51] Past Orders of this Office have found that an employer can conduct an investigation, within the definition in PIPA, of a possible breach of an employment agreement. Order P2013-13 discusses this point (at paras. 28, 42-43):

> 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.
> …
> 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.
>
> 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 52] Other Orders, such as Order P2008-007, referred to in the quote above, relate to particular conduct, such as an allegation of harassment, being investigated as a possible breach of an employment agreement. In this case, the Organization has not said what obligations or duties in his employment agreement the Applicant may have breached.

[para 53] It may be that the Organization is arguing that making a determination about, or recommendations regarding, an employee's performance and whether or not the performance meets the organization's standards, is an investigation related to a breach of an employment contract. It is not clear to me that this falls within the scope of what is an investigation for the purposes of section 24(2)(c). Without more detailed submissions on this point, including what explicit or implicit terms of the employment agreement were possibly breached by the Applicant such that an investigation was conducted, I cannot conclude that section 24(2)(c) applies to the personal information on pages 152, 216 or 218.

[para 54] That said, it is my view that the personal information of the Applicant contained in these records falls within the scope of section 24(3)(c). This provision applies to certain information provided in confidence; section 24(4) is also applicable. These provisions state:

> *24(3) An organization shall not provide access to personal information under subsection (1) if*
>
> *...*
>
> *(c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.*
>
> *(4) If, in respect of a record, an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.*

[para 55] While the Organization has not applied this provision itself, section 24(3)(c) is a mandatory provision. This means that the Organization is prohibited from disclosing information to the Applicant, to which this provision applies. As such, it is appropriate for me to consider

whether this provision applies to the Applicant's personal information on pages 152, 216 and 218.

[para 56] The application of this provision was explained by the Director of Adjudication, in Order P2007-002 (at paras. 21-24, footnotes omitted):

> In my view, the more significant point in considering FOIP and PIPA together is that each statute contains a different definition. The definition in PIPA encompasses information about an identifiable individual *without restriction.* The definition in FOIP is more restrictive in that it excludes from the category of information about an individual the opinions that individual expresses *about someone else*. Furthermore, it is not clear the two statutes treat subject matter that is sufficiently similar to import the principle. Even if they do, it would be wrong to try to force consistency upon these distinct definitions for the sake of the interpretive principle. I do not think it proper to adopt a definition from another, albeit related, statute, that legislates a meaning for a term that is contrary to common perception.
>
> That the fact a person holds or gives an opinion about another conveys something personal about the maker will not be true for all opinions. In some circumstances, an opinion held by a person may be abstracted from their personal life to such a degree that it does not seem to have the quality of personal information. An example is where the opinion is a professional one – for example, a psychologist's opinion from interpreting a psychological test that B has a particular personality disorder. However, for situations where the opinion that is held, or the fact it is given, does reflect something personal, and especially something sensitive, about the person making it, it is, in my view, commonly and quite properly regarded as also being information about that person. The fact A is able to give an opinion about B because they have a personal relationship may be an indicator that the opinion is also the personal information of A. The same may be true where the fact A gives a particular opinion about B has the potential to significantly affect A's personal relationship with B.
>
> Adopting this more intuitive approach to opinions under PIPA, assuming the 'given in confidence' and 'no consent' conditions of section 24(3)(c) are met, this provision can be treated as applying to those opinions given by others in which there is no personal element. If such opinions meet the conditions in the provision, they are to be withheld even in the absence of a personal element relative to the maker.
>
> I adopt this interpretation of the combined provisions. In the result, to the extent opinions convey personal information about the giver of the opinion, they must be withheld under 24(3)(b). Whether or not they have such a personal element, if they were given by an individual (whom they necessarily identify) in confidence, and the giver does not consent to disclosure of their identity, opinions must also be withheld under section 24(3)(c).

[para 57] Regarding the requirement of section 24(3)(c), that information was provided in confidence and the person providing the information has not consented to its disclosure, the Director of Adjudication said in Order P2015-05 (at para. 53):

> I accept that the discussions in which the Applicant did not participate were of the sort that would normally be held in confidence, and the recordings of the discussions, including some of those in which the Applicant participated, were such as were created and provided in confidence. I have no direct evidence that the persons giving the opinions have not consented (or whether they were asked if they did so), but given their nature (including the fact, as revealed in the statements, that

some of the individuals did express concerns about being intimidated and about their safety) I may assume the personnel involved in resolving the issues, and the people asked to provide opinions and accounts of events given from their own perspectives, would refuse their consent.

[para 58] Order P2012-09 rejected an organization's application of section 24(3)(c) to the name of an individual who had provided comments about the applicant in the applicant's performance evaluations. In that context, it was clear that the performance evaluations were to be provided to the applicant, as evidenced by the indication that they were to be signed by the applicant after her review. Some of the performance evaluations had already been signed by the applicant.

[para 59] I agree with the above analyses. In this case, the Applicant's personal information in records 152, 216 and 218 consists of opinions about the Applicant, given by an individual acting in their professional capacity. The content of the opinions, and the context in which they appear, would allow the Applicant to identify the individual who provided them. Therefore, the Organization could not provide any of the Applicant's personal information in these records to the Applicant, without identifying who provided the opinions.

[para 60] In its submissions regarding the applicability of section 24(2)(c) to the Applicant's personal information in records 152, 216 and 218, the Organization indicated that it considers this information to be confidential. Unlike in Order P2012-04, the information in records 152, 216 and 218 does not appear to have been intended to be reviewed by the Applicant. Given the content and context of the records, I accept that this type of information is usually provided in confidence and treated confidentially.

[para 61] I do not have any direct submissions regarding whether the individual who provided the opinions would consent to the disclosure of the information. However, given the litigious relationship between the Applicant and the Organization, and that the individual who provided the opinion was directly or indirectly involved in one or more of the disputes between the Applicant and the Organization, it is reasonable to assume that consent would not be granted.

Conclusions regarding section 24(2)(c)

[para 62] I find that section 24(2)(c) does not apply to the Applicant's personal information on pages 152, 216 and 218. However, I find that the Organization is required to withhold that information from the Applicant under section 24(3)(c).

Did the Respondent meet its obligations required by section 27(1) of the Act (duty to assist applicants)?

[para 63] Section 27(1)(a) of the Act states the following:

27(1) An organization must

(a) make every reasonable effort

(i) to assist applicants, and

(ii) to respond to each applicant as accurately and completely as reasonably possible,

…

[para 64] The duty to assist under section 27(1)(a) includes an obligation to conduct an adequate search (Orders P2006-006 and P2006-007).

[para 65] The Notice of Inquiry directs the Organization to provide its submission in the form of a sworn document describing the search it conducted in response to the Applicant's request. It directs the Organization to consider addressing the following:

- The specific steps taken by the Respondent 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 Respondent believes no more responsive records exist other than what has been found or produced. (In answering this question the Respondent should have regard to the reasons the Applicant gave for believing more records exist than were located/provided to him/her **or** in answering this question the Respondent should have regard to the Applicant's description of the records/kinds or records he/she believes should have been provided to him/her.)
- Any other relevant information.

[para 66] With respect to the burden of proof, an applicant must show some basis that an organization failed to locate or provide a record in its custody or control; the burden then shifts to the organization to show that it conducted an adequate search (Order P2006-012 at para. 12).

[para 67] The Organization provided an affidavit sworn by the employee who conducted the search for responsive records. The employee states that he had conducted a search for records in response to an earlier request from the Applicant for his personal information, with the date range of November 2014 to January 2015.

[para 68] The employee also conducted an additional search after the Organization received the Applicant's access request at issue in this inquiry, with the date range of November 2011 to December 5, 2017. The employee conducted electronic searches of email records of the Applicant's manager at the time, as well as the VP of the area in which the Applicant worked. The employee also searched the email records of the HR Advisor at the relevant time. The search terms included the Applicant's first name, last name and variations of the terms "terminate", "dismiss", "performance" or "let go". 2077 records were located, which the employee provided to counsel for the Organization.

[para 69] The employee states that he believes no further records exist.

[para 70] The Applicant's submissions indicate that he believes the Organization is obligated to provide him with "methodology, numbers, and nature of communications" (request for inquiry attachment, at page 1).

[para 71] As discussed earlier, applicants have a right of access only to their personal information under PIPA. It is not entirely clear what type of information the Applicant is referring to as methodology, numbers or the nature of communications; however, if this information is not the Applicant's personal information, there is no right of access to it under PIPA.

[para 72] The responsive records include records where the Applicant's name appears in organizational charts, various employee listings, attendance at conferences and meetings and so on. Much of this is not the Applicant's personal information, for the reasons already discussed.

[para 73] The records also include performance appraisals, records relating to the Applicant's hiring and termination, and similar records usually found in a personnel file, which is personal information.

[para 74] In his rebuttal submission, the Applicant argues that the Organization's affidavit indicates that it did not use the keywords the Applicant had identified in his request for inquiry, such as "UofA" or "APEGA".

[para 75] I agree that the affidavit describing the Organization's search does not include these keywords. The Organization points out that the Applicant's access request was for "performance appraisals, contents of personnel file, handwritten notes about telephone conversations, and email correspondence", as well as internal correspondence related to him, between his managers, VPs or HR. The Organization also points to the Applicant's request for inquiry, where he states:

> I believe a large number of documents are omitted from CNRL's submission. [While] in my Access Request of December 5, 2017 I had mistakenly asked for internal communication only, I corrected that in my Access Request of April 16, 2019 by including external communication as well. This inquiry should cover all communication, internal, or external.

[para 76] The Organization argues that this inquiry is restricted to the Applicant's December 5, 2017 access request. I agree. The Applicant's request for a review of the Organization's response to his 2017 access request was submitted to this Office in February 2018, prior to his subsequent 2019 access request. The Applicant was not satisfied with that review and requested an inquiry; the inquiry is into the same matter: the Organization's response to his 2017 access request. It does not address the Organization's response to a 2019 access request.

[para 77] Regarding the search terms used by the Organization in response to the 2017 access request, it is my view that the Organization was reasonable to use the search terms it did. Having reviewed the responsive records, it is not clear what other records containing the Applicant's personal information the Organization may have in its custody or control.

[para 78] The Applicant has also raised a concern that some records were destroyed by the Organization. The index of records from the Organization indicates that there are no records numbered 151, 183-185, 212, or 213. The Applicant argues that records that had been numbered by the previous counsel are now missing and may have been destroyed.

[para 79] The Organization states that its previous counsel worked with the Organization to process the Applicant's request. New counsel took over the file shortly before the inquiry. This counsel has said that that he "maintained the same numbering system [previous counsel] used for the records he provided in response to the Request and in the mediation/investigation process" (initial submission at page 1).

[para 80] The Organization further states that these gaps in the numbering system are not new and were present during the mediation/review stage. I can confirm that the records I have before me for the inquiry are the same records provided by the previous counsel for the mediation/review stage of this file and that were numbered at the request of this Office for that mediation/review. There is no reason to believe that previous counsel numbered the records and then excluded certain records without explanation. Having reviewed all of the records before me, there are no apparent missing records. There are other reasonable explanations based on the numbering system used for the records. Previous counsel used a numbering system that bundled some pages but not others (for example, I have records 217, 218-1, 218-2, 218-3 and so on). It may be that a page was numbered 151, but was later included with the bundle of pages numbered as record 150. Or it may be that the numbering system became confused and certain numbers were missed. In any event, the Applicant has not provided any reason to believe that the Organization numbered some records but then destroyed them before providing them to this Office.

[para 81] The Applicant has not described any specific personal information that he did believes the Organization ought to have provided to him, other than records responsive to a subsequent request, which does not fall within the scope of this inquiry. Other information the Applicant states he expected to receive, such as information about the Organization's methodology, is not the Applicant's personal information, and is therefore not information the Organization is required to provide to the Applicant under PIPA. The search described in the affidavit provided by the Organization appears thorough, and a review of the responsive records does not indicate that any additional information exists, to which the Applicant has a right of access under the Act.

Conclusions regarding the adequacy of the Organization's search for records

[para 82] Given the above, I accept that the Organization conducted an adequate search for responsive information as required by section 27(1).

IV. ORDER

[para 83] I make this Order under section 52 of the Act.

[para 84] I find that much of the information in the records is not personal information of the Applicant.

[para 85] I find that the Organization properly applied section 24(2)(a) to information that does consist of the Applicant's personal information.

[para 86] I find that the Organization did not properly apply section 24(2)(c) to information that does consist of the Applicant's personal information. However, I also find that the Organization is required to withhold that information from the Applicant under section 24(3)(c).

[para 87] I find that the Organization met its duty to assist the Applicant as required under section 27(1)(a) of the Act.

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Amanda Swanek
Adjudicator