

**ALBERTA
OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER**

**Report of an Investigation into the
Collection and Use of Personal Information**

April 10, 2008

**TransAlta Corporation
and Kelly, Luttmer & Associates Ltd.**

Investigation Report P2008-IR-003

I. INTRODUCTION

[1] An individual (“the Complainant”) submitted a complaint to the Office of the Information and Privacy Commissioner (“OIPC”) alleging that his employer, TransAlta Corporation (“TransAlta”), and the employer’s contracted service provider, Kelly, Luttmer and Associates Ltd. (“KLA”), contravened the *Personal Information Protection Act* (“PIPA” or “the Act”).

II. JURISDICTION

[2] PIPA applies to provincially-regulated private sector organizations operating in Alberta, including TransAlta and KLA. PIPA sets out the provisions under which organizations may *collect, use, or disclose* personal information. The Commissioner has jurisdiction in this case because TransAlta and KLA are both “organizations”, as defined in section 1(i) of PIPA, operating in Alberta.

[3] KLA is contracted by TransAlta to provide Employee and Family Assistance Program (“EFAP”) services to TransAlta employees. KLA is also contracted to provide Occupational Health Services (“OHS”) to TransAlta employees.

[4] Section 5 of PIPA states:

5(2) For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization is, with respect to those services, responsible for that person’s compliance with this Act.

...

(6) Nothing in subsection (2) is to be construed so as to relieve any person from that person's responsibilities or obligations under this Act.

[5] Pursuant to section 5(2) of PIPA, when TransAlta engages KLA to provide services, by contract or otherwise, TransAlta is responsible for KLA's compliance with PIPA with respect to personal information collected, used or disclosed in the course of providing those services. However, pursuant to section 5(6), KLA also has responsibilities and obligations as set out in PIPA. Therefore, both TransAlta and KLA are accountable under PIPA to ensure that personal information is collected, used and disclosed in compliance with the Act.

[6] Section 36(1) of PIPA empowers the Commissioner to conduct investigations to ensure compliance with any provision of the Act and make recommendations to organizations regarding their obligations.

[7] Pursuant to section 49 of PIPA, the Commissioner authorized me to investigate and attempt to resolve this matter. This report outlines my findings and recommendations, which may be made public according to section 38(6) of PIPA.

III. INVESTIGATION AND BACKGROUND

[8] In conducting this investigation, I spoke with the Complainant's legal counsel, as well as Privacy Officers for TransAlta, KLA, and Sykes Assistance Services Corporation (which organization acquired KLA during the course of this investigation). I examined the complaint letter, and reviewed written responses provided by TransAlta and KLA respecting the Complainant's allegations. I reviewed the service agreement between KLA and TransAlta, the privacy policies of both organizations, TransAlta's Disability Management policy, and its Drug and Alcohol Policy and Standard. I also spoke with the President of the Communications, Energy and Paperworkers Union of Canada, Local 707 ("the Union"), of which the Complainant is a member.

[9] The Complainant, who is an employee of TransAlta, reported that on April 18, 2006, he consulted with a physician in Fort McMurray, Alberta, and obtained a medical note advising his employer that he required a three-month leave from work. He initially provided this to an Occupational Health Nurse at the client work-site to which he reported. That Nurse referred the Complainant to "TransAlta's Occupational Health Nurse."

[10] The Complainant reported that he contacted "TransAlta's Occupational Health Nurse," who "referred" the Complainant to a KLA EFAP Counsellor.¹

¹ As already noted, KLA is contracted by TransAlta to provide EFAP services to TransAlta employees. KLA is also contracted to provide OHS to TransAlta employees (a service that is provided at TransAlta offices). When the Complainant reports that he contacted TransAlta's OHS department and spoke with "TransAlta's Occupational Health Nurse," he is referring to a service provided by KLA and a KLA employee. Accordingly, I will hereafter refer to the service as "KLA OHS" or "OHS," and the employee as the "KLA Nurse."

[11] The Complainant worked until May 8, 2006, “without any problems or incidents at work.”

[12] The Complainant’s understanding (based on information he claims was told to him by the KLA Nurse and KLA EFAP) was that his interactions with OHS would be confidential from TransAlta Management, and that services provided by KLA through the EFAP would be confidential between the Complainant and KLA. The Complainant reported that he was told KLA ...

... was a medical monitoring agency with whom Occupational Health sometimes contracts and that ... [the KLA Nurse] would no longer need to be involved in the matter and that [the Complainant] was to discuss future matters with [KLA EFAP].

[13] The Complainant reported he “did not provide any consent for KLA, TransAlta, or Occupational Health, to disclose information between those organizations.”

[14] The Complainant was declared medically fit to return to work on August 15, 2006.

[15] Just prior to this date, the President of the Complainant’s Union contacted the KLA Nurse to make general inquiries about TransAlta’s Disability Management processes. The Complainant reported, and the President confirmed, that although aware of the Complainant’s situation, the President did not identify the Complainant during this discussion.

[16] The KLA Nurse, however, followed up with the Union President in an email sent August 8, 2006, naming the Complainant in the subject line and indicating that he:

- was involved in a “voluntary drug and alcohol program,”
- was required by KLA EFAP and apparently OHS to sign a Recovery Maintenance and Monitoring Contract (“RMC”),
- would be subject to requirements of “abstinence” and “random testing for alcohol and drugs” for a two year period,
- had been seeking counselling /treatment from KLA.

[17] The email was sent to the Union President, as well as a Senior Human Resources Advisor with TransAlta.

[18] After becoming aware of this email, on August 11, 2006, the Complainant faxed a letter to KLA EFAP revoking “any and all consents for release of information” and stressing his requirement that his treatment information be kept confidential.

[19] On August 15, 2006, the KLA Nurse again emailed the Union President and the TransAlta Senior Human Resources Advisor regarding the Complainant’s follow-up care.

[20] On August 29, 2006, by letter to the Complainant, the TransAlta Senior Human Resources Advisor informed the Complainant that the Advisor was aware:

- that the Complainant remains “non-compliant with TransAlta Policies,”
- that the KLA Nurse has previously outlined documentation required for the complainant to be in compliance,
- that the documents include a “signed contract for continued care when receiving STD [Short Term Disability] benefits” and “evidence of care when on STD benefits.”

[21] The letter was copied to:

- the Union President,
- the Complainant’s immediate Supervisor at TransAlta,
- the Director, TransAlta Disability Management,
- TransAlta’s Director of Operations,
- the KLA Nurse,
- TransAlta’s Production Manager, and
- the Manager of the Complainant’s Department at TransAlta

[22] On September 1, 2006 the Complainant signed an RMC, although he noted under his signature that he signed “under threat of discontinuance of wages and termination of employment.” On the same date, he signed a consent authorizing KLA EFAP to disclose his personal information to OHS.

[23] The Complainant subsequently submitted a complaint to the OIPC alleging that he ...

... was not at the outset clearly advised of what Occupational Health’s and KLA’s roles and relationships were with TransAlta. [The Complainant] had been led to believe by each of [the KLA Nurse] and [KLA EFAP] that the Complainant’s diagnosis, care and treatment would be kept confidential from TransAlta Management as well as not being disclosed between KLA and Occupational Health unless released under [the Complainant’s] written consent. [The Complainant], at least until after August 8, 2006, did not grant KLA or Occupational Health consent to disclose information to each other or to TransAlta. All consents signed after that date have been coerced.

It is clear ... that [KLA EFAP Counsellor] has disclosed private and confidential information to at least [the KLA Nurse] of Occupational Health and that [the KLA Nurse], if not also [KLA EFAP Counsellor], have released private and confidential information to [TransAlta’s Senior Human Resources Advisor] who is a member of TransAlta Management. Further, [TransAlta’s Senior Human Resources Advisor] has breached [the Complainant’s] right to privacy and confidentiality with virtually every senior manager at TransAlta at the [Client] site.

IV. ISSUES

[24] 1. Is the personal information at issue personal employee information as defined in section 1(j) of PIPA?

2. Did KLA EFAP use the Complainant's personal information with consent, or was use without consent authorized?
3. Did KLA OHS collect and use the Complainant's personal information in compliance with PIPA?
4. Did TransAlta Management collect and use the Complainant's personal information in compliance with PIPA?

V. ANALYSIS

1. Is the personal information at issue personal employee information as defined in section 1(j) of PIPA?

[25] I reviewed documents from the KLA EFAP Counsellor's file, submitted by KLA for this investigation, and including copies of email correspondence and notes made by the KLA Counsellor. It is clear from these documents that from the middle of May 2006 to September 2006, the KLA EFAP Counsellor and the KLA OHS Nurse exchanged information concerning the Complainant's treatment and particularly whether or not he was making and attending appointments with his treatment counsellors.

[26] I also reviewed documents from the KLA Nurse's file, including copies of email correspondence between the KLA Counsellor and the Complainant (copied to the KLA Nurse), and directly between the KLA Counsellor and KLA Nurse. Again, this correspondence is mainly concerned with whether or not the Complainant was making and attending appointments with his treatment counsellors, as well as efforts that were made by the KLA Counsellor and the KLA Nurse to have the Complainant sign various consent forms as well as an RMC.

[27] Section 1(k) of PIPA defines "personal information" to mean "information about an identifiable individual." Having reviewed the above materials, and considering the specific information that was shared between KLA EFAP and OHS, and OHS and TransAlta Management, I find the information at issue to be clearly about the Complainant, his leave, treatment, and return to work, thereby qualifying as "personal information" under section 1(k) of PIPA.

[28] I next considered whether or not the personal information provided by KLA EFAP to OHS also qualified as "personal employee information" under section 1(j) of PIPA, which defines personal employee information as follows:

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

- (i) an employment relationship, ...

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

[29] Pursuant to section 1(j) of the Act, to qualify as personal employee information, personal information must be:

- in respect of an employee,
- reasonably required by an organization, and
- collected, used or disclosed solely for the purposes of establishing, managing or terminating an employment relationship.

[30] As noted already, the Complainant was an employee of TransAlta. He was proposing to take a three-month medical leave of absence from work, which leave was being managed through his employer's contracted OHS provider. OHS referred the Complainant to KLA EFAP for treatment and counselling, which services were also provided through the service contract between TransAlta and KLA.

[31] KLA submitted that ...

... the information disclosed [by the EFAP Counsellor] to [the KLA Nurse] was "reasonable" for the purposes of monitoring and communicating the employee's access of treatment, treatment recommendations, and fitness for work as part of a mutually agreed upon post-treatment program as part of the company's duty to accommodate program. The [KLA Nurse] needed this information to in turn advise TransAlta whether [the Complainant] is fit for work.

[32] Given that the Complainant was proposing to take a three-month medical leave of absence from work, it is my opinion that, depending on the circumstances of the leave, it would be reasonable for TransAlta, through its contracted OHS provider, to require some personal information to verify that the Complainant was participating in a treatment program and eventually to confirm his fitness to return to work. Fitness to return to work in this case meant that the Complainant had completed his treatment program and agreed to comply with certain return to work conditions.

[33] My opinion is supported by Case Summary #233, issued by the Office of the Privacy Commissioner of Canada and concerning a complaint made under the federal *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). Case Summary #233 states:

The Office of the Privacy Commissioner has long recognized that every employer has the right to ensure that its employees' absences are justified, and the obligation to determine whether its employees are fit to return to work after a period of illness or whether other measures must be taken.²

[34] Similarly, in Case Summary #284, the Assistant Privacy Commissioner said:

² Available online at www.privcom.gc.ca

The company collects, uses and discloses employee personal information for the purpose of determining the employee's ability to work (or return to work), the employee's eligibility for employment benefits and the company's obligations to accommodate the employee under human rights legislation. A reasonable person would likely consider such purposes to be appropriate in the circumstances.³

[35] Given this, it is also my opinion that this limited information qualifies as personal employee information under PIPA. The Complainant was an employee of TransAlta. He was on a three-month medical leave of absence. He was referred by his employer's contracted OHS provider to KLA EFAP for treatment and management of his leave. In these circumstances, it would be reasonable for KLA EFAP to provide some information back to OHS to verify the Complainant's participation in the treatment program and willingness to comply with return to work conditions, such that he could return to work. This limited information is what was provided by KLA EFAP to OHS.

[36] *Information Sheet 5: Personal Employee Information*, produced by Access and Privacy Branch, Service Alberta, supports this finding:

Certain medical information about employees may be regarded as personal employee information which an organization may collect, use or disclose without consent for purposes of managing its employment relationship. ...

While it is generally reasonable for an employer to know what accommodations are needed for an employee to be able to return to work, an employer would rarely need to know the medical diagnosis and treatment. ⁴

2. Did KLA EFAP obtain consent to use the Complainant's personal information, or was use without consent authorized?

[37] The Complainant believed that his "... diagnosis, care and treatment would be kept confidential from TransAlta Management as well as not being disclosed between KLA and Occupational Health unless released under [the Complainant's] written consent."

[38] Generally, PIPA requires organizations to obtain consent for the collection, use and disclosure of personal information. Section 7 of the Act says:

7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,

- (a) collect that information unless the individual consents to the collection of that information,
- (b) collect that information from a source other than the individual unless the individual consents to the collection of that information from the other source,

³ Available online at www.privcom.gc.ca

⁴ Available online at <http://www.psp.gov.ab.ca/index.cfm?page=resources/index.html>

- (c) use that information unless the individual consents to the use of that information, or
- (d) disclose that information unless the individual consents to the disclosure of that information.

[39] Despite section 7, there are some exceptions to the requirement to obtain consent. For example, section 18 of PIPA allows for the use of personal employee information without consent in certain circumstances. Section 18 reads:

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

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

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

- (a) the use is reasonable for the purposes for which the information is being used,
- (b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and
- (c) in the case of an individual who is an employee of the organization, the organization has, before using the information, provided the individual with reasonable notification that the information is going to be used and of the purposes for which the information is going to be used.

[40] I have already found the information provided by KLA EFAP to OHS qualifies as personal employee information. As such, section 18 applies, allowing the use of the Complainant's personal employee information without consent provided:

- the use is reasonable for the purposes,
- the information consists only of information that is related to the employment relationship, and
- the organization has provided the individual with reasonable notification that the information is going to be used and of the purposes for which the information is going to be used.

[41] I have found that KLA EFAP's use of the Complainant's personal employee information to advise OHS of the Complainant's participation in and attendance at his treatment program and willingness to comply with return to work conditions was reasonable. This information is related to managing the Complainant's medical leave of absence from his employment. Accordingly, I find that the first two of the three conditions set out in section 18(2) of PIPA were met by KLA EFAP.

[42] However, the third condition to be met before an organization may use personal employee information without consent requires that an organization first provide the individual with “reasonable notification that the information is going to be used and the purposes for which the information is going to be used.” I am not satisfied that in this case the Complainant was provided with reasonable notification.

[43] The Complainant said that it was his understanding (based on information he claims was told to him by the KLA Nurse and KLA EFAP) that his interactions with OHS would be confidential, and that services provided by KLA through the EFAP would be confidential between the Complainant and KLA. The Complainant also reported that he was told KLA ...

... was a medical monitoring agency with whom Occupational Health sometimes contracts and that ... [the KLA Nurse] would no longer need to be involved in the matter and that [the Complainant] was to discuss future matters with [KLA EFAP].

[44] The Complainant’s belief that he was participating in a confidential EFAP program was based on a number of factors.

[45] First, for some months prior to going on medical leave from TransAlta, the Complainant had been seeing another employer-sponsored EFAP provider in Fort McMurray (not KLA EFAP) “on his own and without the knowledge of the management of TransAlta.” It was on the advice of this EFAP provider that the Complainant made the appointment with his physician that resulted in the physician recommendation that the Complainant take a three-month leave of absence from work. Until the time the Complainant provided the physician’s assessment to OHS, TransAlta was unaware that the Complainant was undergoing counselling or that the Complainant had any issues with alcohol or anything else. The Complainant reports he “had not made TransAlta aware of these issues nor was he interested in doing so.” No issues of alcohol use in the workplace had ever been raised at any time by TransAlta with respect to the Complainant.

[46] From the Complainant’s point of view, he had been seeing an employer-sponsored EFAP provider for some months, in complete confidence from his employer. He was now beginning a short-term medical leave of absence for similar issues, and was “referred” by OHS to another employer-sponsored EFAP provider. The Complainant believed that his interactions with this new EFAP provider (KLA) would again be kept confidential.

[47] In his written complaint, the Complainant provided copies of two letters, dated October 14, 2005 and January 24, 2006, and sent “To all employees” by TransAlta’s Executive Vice-President, Legal (the former letter was also co-signed by TransAlta’s Senior Vice-President, Human Resources & Communications). Both letters refer to an upcoming roll-out of TransAlta’s “updated and strengthened” alcohol and drug policy. The January 24 letter also enclosed a handbook providing answers to frequently asked questions about the policy.

[48] The October 14 letter in part reads as follows:

If you know of someone who might have a substance abuse problem, please encourage him/her to seek assistance. That assistance is available through community agencies in most of our operating locations or through the company's employee assistance program (EAP). Treatment programs are available and are confidential when entered into voluntarily. (emphasis added)

[49] The January 24 letter included a statement that was almost exactly the same, and also enclosed a brochure produced by TransAlta, entitled "Your Employee Assistance Program," and which described services provided by KLA. The brochure states "The Employee Assistance Program provides confidential and professional assistance, for personal or employment problems which may include: ... alcohol, drug abuse and gambling." It also states "All information shared with the EAP is kept in strictest confidence. A signed consent is required before any personal information is released to anyone."

[50] As already noted, KLA provides additional contracted services to TransAlta employees over and above EFAP, including OHS. While various services offered by KLA (confidential EFAP services, EFAP Substance Use Assessment when "an employee's work performance [has been] identified as a problem", and OHS Disability Management) are identified and described on KLA's website, the TransAlta brochure distributed to TransAlta employees and referenced by the Complainant does not make any mention of "formal referrals" of an employee by TransAlta to KLA EFAP for substance use assessments, or that personal information may be provided by KLA EFAP to OHS or TransAlta Management for disability management purposes. Instead, the brochure describes KLA's EFAP services, and states that all information is kept in strictest confidence and will not be released without signed consent.

[51] Despite the October 14 and January 24 letters and the TransAlta EFAP brochure, the TransAlta Alcohol and Drug Standard that came into effect on February 1, 2006, does make reference to "employees who come forward voluntarily for help with an alcohol or drug problem" and states that they will be referred for assessment with a substance abuse professional/addictions specialist. The Standard also states that:

Confidentiality will be maintained, except where limited disclosure is necessary for related health, safety and performance concerns ... only the information strictly limited to the level of functionality of a worker (e.g. fitness for work and any restrictions that may apply, and performance concerns) may be shared with management for purposes of determining fitness for work, appropriate work accommodation, dealing with performance issues and/or work re-entry initiatives.

[52] In my view, however, the usefulness of the information included in this Standard is contradicted by the previous and accompanying correspondence and brochure which state instead that treatment programs "are confidential when entered into voluntarily," and that information "will not be released without signed consent."

[53] Given the above, it is easy to understand why the Complainant could have thought that his attendance at KLA was voluntary participation in an EFAP program that would be confidential from his employer. In such circumstances, it would not be

reasonable for any identifiable personal information to be reported back to OHS or his employer.

[54] Further, there is no clear evidence in the materials submitted by KLA EFAP and OHS that the Complainant was clearly informed of the purpose for which he was referred to KLA EFAP by OHS or that his referral was *not* voluntary participation in a confidential EFAP.

[55] For example, TransAlta developed a “Physician Fitness Assessment” form (“PFAF”), which is entitled “TransAlta Occupational Health,” and which is a consent for disclosure of certain medical information to OHS. According to TransAlta’s Short Term Disability (“STD”) Procedure, the PFAF must be completed by an employee’s physician or health practitioner and returned to OHS. Both the form and the STD Procedure are widely available to TransAlta employees, and indicate that some basic information related to fitness for work and eligibility for disability benefits will be required by OHS and the employer. The STD Procedure states:

The employee is required to maintain contact with the [Occupational Health Advisor] and obtain updated fitness for work information as required. The OHA may confirm with the [employee’s] Supervisor and the [area Human Resources Advisor] whether the employee is compliant with treatment recommendations to the extent that the information provided does not breach medical confidentiality. Non-compliance with treatment recommendations will be forwarded to the Supervisor and HR Advisor.

[56] The PFAF also serves to notify individuals that some personal information will be collected by OHS and the purposes for that collection. The PFAF authorizes “the Physician or health practitioner identified on the bottom of this form, to disclose to Occupational Health Services ... personal information pertaining to my current medical condition.” The form acknowledges that “Occupational Health Services may request further clarification from my practitioner regarding fitness to work to establish my fitness to work and/or level of disability.” It also states that “personal information received by this department will be kept in strict confidence in my medical file and that only fitness to work and/or eligibility for short term disability benefits will be shared with my employer.”

[57] With respect to notifying the Complainant of the purposes for which his personal information would be collected, TransAlta reported that “Notification was provided in the consent form signed by [the Complainant].” However, the only consent form signed by the Complainant at the time he began his leave was the PFAF completed by the Complainant’s physician and which was provided to OHS. It was, therefore, known to the Complainant that some personal information collected by his physician would be provided to OHS for “fitness to work and/or eligibility for short term disability benefits.” However, no such form or similar form was completed regarding KLA EFAP. Had there been such a form, the purpose for which the Complainant was required to attend at KLA EFAP would have been clear.

[58] Another factor I considered in assessing whether the individual was notified that the information was going to be used by KLA EFAP and the purposes for which it was going to be used (to report to OHS and subsequently TransAlta Management),

such that use without consent would have been authorized under section 18(2) of PIPA, was that the KLA Counsellor's file includes a number of consent forms that the Counsellor requested the Complainant complete and return to her. The Complainant did not sign any of these KLA consent forms. Instead, during the time the Complainant was on leave, while he was attending counselling at an out of province treatment centre (and reporting back to KLA), the KLA Counsellor faxed to that treatment centre a number of documents for the Complainant to sign and return to KLA EFAP (the documents were faxed on June 26, 2006). One of the documents was a KLA "Consent for Collection of Information for Employee and Family Assistance Program." This consent form states "No identifiable personal information is shared with the client's company." Some weeks prior, the KLA Counsellor had also faxed a similar form to the other EFAP service provider the Complainant had been seeing voluntarily in the months before he went on leave.

[59] In the course of reviewing these forms and deciding whether or not to sign them, the Complainant could have reasonably believed that his participation in KLA's EFAP was voluntary, and completely confidential from his employer.

[60] On the other hand, I note that along with the KLA consent form, the KLA Counsellor faxed a copy of an RMC to the same out of province treatment centre, requesting that the Complainant sign and return it to KLA. The RMC sets out a "Plan of Action" that, among other things, includes total abstinence from alcohol, active involvement in a recovery group, attendance at counselling sessions, and unannounced drug and alcohol testing. The RMC states:

Since your referral for treatment has been a part of a Formal Referral Process [emphasis in original] the following expectations need to be understood and agreed to. I understand that:

1. *Regular reports regarding my progress will be provided to TransAlta's Disability Management Department.*
2. *Non-compliance with the terms of this contract will result in the EFAP program informing TransAlta's Disability Management Department.*
3. *A breach of the terms of this contract may result in further disciplinary action to be determined by TransAlta which could possibly include termination of employment.*
4. *This contract will be in effect from June 26, 2006 to Jun 26, 2008.*

[61] Contrary to the accompanying KLA consent form, this faxed document suggests that the Complainant was participating in the KLA EFAP having been formally referred by his employer, such that it would be reasonable to report some information back to OHS and thereafter to TransAlta Management. However, even this is not determinative, as the form was faxed after information had already been provided by KLA EFAP to OHS (subsection 18(2)(c) of PIPA requires notification *before* personal employee information is used), and further, the Complainant did not sign and return the RMC to KLA. Instead the KLA Counsellor's notes from approximately two weeks later state ...

... [the Complainant is] needing time to read/look over RMC. Want to run it by labor lawyers. Let [the Complainant] know that it is more of a guideline for recovery. [The Complainant] still unsure who EFAP is – let him know our role and role of [the other EFAP service provider he had seen earlier] – [the Complainant] seemed agitated and a bit uncooperative. Let him know to contact me when he is ready to look at process. [emphasis added]

[62] The Counsellor’s comment that the RMC was “more of a guideline” is open to a number of interpretations, including that the RMC was not actually a required condition of the Complainant’s treatment program or return to work, and/or that the Complainant’s attendance at KLA EFAP was not part of a “formal referral process.” Further, the Counsellor notes that the Complainant is “still unsure who EFAP is.” This was more than a month after the Complainant first contacted KLA EFAP.

[63] In later conversations between the KLA Counsellor and the Complainant, the Complainant indicated his willingness to sign the contract, although in email correspondence he stated he was “skeptical of some of the clauses contained therein.”

[64] The Complainant did not, in fact, sign that version of the RMC. Instead, on August 11, 2006, he wrote to KLA stating:

I have always been unclear about Kelly, Luttmer & Associates roles and agenda. The recent attempts to coerce me to sign the Recovery Maintenance and Monitoring Contract has caused me great concern and is adding to my stress.

I have just become aware that KLA may have breached my right to confidentiality when it advised TransAlta Disability Management about my case. I have never agreed to the release of any information to TransAlta Disability Management by KLA.

This will serve as written notice of my withdrawal of any and all consents for release of information by Kelly, Luttmer & Associates from or to any party be they individual or an organization.

[65] In my opinion, the Complainant’s actions are consistent with those of an individual who believed he was participating in a confidential EFAP program, but who subsequently discovered that might not be the case.

[66] On September 1, 2006 and September 22, 2006 respectively, at the time the Complainant was returning to work, he did sign two consent forms (reportedly against his will).

[67] The September 1, 2006 form is a TransAlta “Consent for Release of Health Information to TransAlta Occupational Health” form. It authorizes KLA EFAP to “disclose personal information pertaining to my current medical disability and adherence to the TransAlta Alcohol and Drug Standard”. The “information to be released” includes “information regarding my compliance with the treatment program as per the TransAlta’s [sic] Alcohol and Drug Treatment Policy.” The consent states that:

The personal information disclosed will be used for the following purposes:

- *To establish my level of disability*
- *To support my medical absence*
- *To ensure compliance with recommended treatment for the purpose of maintaining disability benefits*
- *To ensure maintenance of ongoing recovery.*

[68] Another form, which the Complainant signed on September 22, 2006, authorizes another EFAP service provider the Complainant was continuing treatment with (subsequent to KLA) to “release to and/or discuss with Occupational Health Advisors at TransAlta Corporation ... any relevant information regarding my current Recovery Maintenance Contract signed September 1, 2006.” The form states that:

This information will be used for the following purpose:

- *to confirm ongoing compliance with the signed Recovery Maintenance Contract*
- *to inform [TransAlta’s Senior Human Resources Advisor] re. continued compliance with the Recovery Maintenance Contract including compliance with ongoing unannounced Alcohol and Drug testing.*

[69] The top of the form states that “This form is used when information on an employee is requested by Occupational Health. This information is needed to access your fitness to work and compliance with your Recovery Maintenance Contract agreement.”

[70] These forms are quite clear that some personal information will be reported by the EFAP provider to OHS and TransAlta as part of establishing fitness for work and confirming the Complainant’s compliance with return to work conditions. However, to my mind, it is significant that no similar forms were signed at the time the Complainant first went on leave, some four months prior, nor is there any evidence that attempts were made to have the Complainant sign these or similar forms. If they had been signed at the time the Complainant began his leave, or if attempts were made to have the Complainant sign them, I would likely have been persuaded that the Complainant was aware that he had been formally referred to KLA EFAP for disability management purposes, such that his attendance at treatment, completion of the treatment program, and ongoing compliance with return to work conditions would have been reported back to OHS.

[71] Finally, with respect to the issue of notification under subsection 18(2)(c) of PIPA (which would have authorized KLA EFAP to use the complainant’s personal employee information without consent), I note that TransAlta reported that:

... examples of personal employee information are discussed in TransAlta’s privacy policy including information related to disability and return to work.

[72] I assume from TransAlta’s submission that the Privacy Policy is made available to all employees, and serves to notify them as to what personal information about them might be collected, the purposes for which it will be used, and possible disclosures of that information. Given this, I reviewed the document to determine

whether or not it would have provided reasonable notification of the purposes for which the Complainant's personal information would be collected and used by KLA EFAP.

[73] The Policy does indicate that some personal information of employees will be collected to "verify time away from workplace due to illness and/or injury" and for "Disability case management." It also states that some "need to know" health and medical information could be collected to "facilitate accommodation of disability on employee return to work." The Policy also indicates that "Name, employee number, gender, relevant return to work/health information" could be collected for the Employee Assistance Program, but "only if release of information form is signed."

[74] In my opinion, the Policy does serve to advise TransAlta employees as to what personal information about them will be collected and for what purposes – e.g. formal referral for treatment related to disability management versus EFAP. However, in this case, as I have already described, it was not made clear to the Complainant that he was attending at KLA EFAP as part of a formal referral for treatment and there is in fact some evidence that would have led the Complainant to think he was attending a confidential EFAP. Given this, I cannot find that the TransAlta Privacy Policy would have informed the Complainant as to what information would be collected about him by KLA EFAP or how that information would be used in the circumstances.

[75] Again, section 18(2) of PIPA authorizes an organization to use personal employee information without consent, provided certain criteria are met. One of the criteria is that employees must be notified in advance that the information is going to be used and of the purposes for which it is going to be used (subsection 18(2)(c)).

[76] In this case, the evidence submitted by all parties regarding this issue is contradictory and to my mind does not establish that there was any clear notification to the Complainant of the purposes for which he was attending at KLA EFAP, or for which KLA EFAP would be using his personal information. The Complainant believed he was participating in a confidential EFAP program; KLA EFAP and OHS, on the other hand, for the most part, although not consistently, managed the Complainant's leave as though it was part of a "mutually agreed upon post-treatment program following an addiction treatment program, as part of the company's duty to accommodate program." As the evidence is contradictory and not conclusive, I cannot find that the Complainant was notified of the purposes for which his personal information would be used. I therefore find that KLA EFAP was not authorized by section 18(2) of PIPA to use the Complainant's personal employee information without consent.

[77] Given my finding, the full consent provisions as set out in section 7 of the Act apply. That is, KLA EFAP was required to obtain the Complainant's consent to use his personal information, including his personal employee information, in its reports to OHS.

[78] The Complainant maintains that he did not give consent to this use of his personal information, at least until after August 8, 2006 (some months after he first contacted KLA EFAP). In my review of documents from the KLA Counsellor's file, I did

not find any written consent. However, with respect to the issue of consent, KLA reported:

KLA EFAP did collect, use and disclose personal information with consent in compliance with section 7 of PIPA ... Since personal information gathered through the Employee & Family Assistance Program may very well not be considered "personal employee information," even for a mandatory recovery and maintenance program, KLA uses a higher standard and requires explicit consent for the collection, use and disclosure of personal information for EFAP purposes.

Because of the distances involved, consent for the collection, use, and subsequent disclosure of personal information between KLA EFAP ... and [the] Occupational Health Nurse at TransAlta ... was obtained verbally and explicitly over the phone and was documented on the "Authorization for the Release of Privileged Information" form on May 17, 2006. ... This was done, following standard procedure at KLA, to allow the counsellor to begin the program immediately for the benefit of the employee.

[79] I reviewed the "Authorization for the Release of Privileged Information" form referenced by KLA. The form names the Complainant, and authorizes "the release of privileged information" to/from KLA and to/from "OHN @ TransAlta". The "purpose" for the release of information is identified as "access, treatment recommendations, fitness for work." The "Information to be provided" is identified as "attendance, assessment, diagnosis, recommendations, ongoing progress."⁵ The form indicates the release is valid for the period May 17, 2006 to May 17, 2007. In the space where the Complainant would have signed the form, the KLA Counsellor has indicated that consent was "verbal".

[80] KLA's "Privacy Policies and Practices" document states:

Where personal information from a client is collected before the written consent can be signed, the counsellor will explain the elements of the consent and note verbal consent in the appropriate documentation.

[81] Section 8(1) of PIPA states that "An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual." Pursuant to section 8(1), verbal consent is an acceptable form of consent under PIPA.

[82] Despite the KLA Counsellor's notation on the form indicating that she had obtained the Complainant's verbal consent, I do not agree this was the case. While I have no reason to doubt the KLA Counsellor's notation, or that she discussed with the Complainant that some of his personal information would be provided to OHS, I have already described at length the apparent confusion concerning the circumstances surrounding the Complainant's referral to, and attendance at, KLA EFAP. Given this confusion, I concluded that the Complainant was not notified of the purposes for

⁵ I note these types of information are part of the form itself and are followed by instructions to "specify any limitations, or additions, to the information to be released." No such limitations or additions are specified in this case.

which he was attending at KLA EFAP, or for which KLA EFAP would be using his personal information.

[83] In response to my question about how the Complainant was notified, KLA said that ...

... all personal information was collected, used and disclosed with the explicit verbal and written consent of the employee, as well as with the expressed acknowledgement of the employee as indicated in the medical chart.

[84] Although the form on which the verbal consent is documented states that the “purpose” for the release of information is “access, treatment recommendations, fitness for work,” there is no way for me to know exactly what was discussed with the Complainant. While section 8(1) of PIPA does recognize verbal consent, I cannot overlook the contradictory evidence in the submissions of all parties concerning the purpose for which the Complainant was referred to KLA EFAP. The KLA Counsellor’s notes themselves, from some time after the Complainant first attended at KLA EFAP, state that the Complainant was unsure as to the role of KLA EFAP. Although there is evidence that the Complainant was aware some of his personal information was being reported by KLA EFAP to OHS, and he in fact provided some information directly to OHS himself, I have nonetheless concluded it was not made clear to him exactly what the purpose was for his attendance at KLA EFAP nor, therefore, the purpose for which KLA EFAP collected and used his personal information.

[85] I do not believe that a consent provided when the circumstances and roles of the various parties are so unclear amounts to a proper consent as contemplated by PIPA. The Complainant may have verbally agreed to have some of his personal information provided to OHS. However, without his understanding of the purposes for which he was attending at KLA EFAP, or the purposes for which KLA EFAP was collecting and using his personal information, I cannot find this to be an informed consent. Accordingly, I find that KLA EFAP contravened section 7(1)(c) of PIPA by using the Complainant’s personal information without consent.

3. Did KLA OHS collect and use the Complainant’s personal information in compliance with PIPA?

[86] In his submission to this Office, the Complainant alleged:

It is clear ... that [the KLA Nurse], if not also [KLA EFAP], have released private and confidential information to [TransAlta’s Senior Human Resources Advisor] who is a member of TransAlta Management.

[87] As already noted, just prior to the Complainant’s return to work on August 15, 2006, the President of the Complainant’s Union contacted the KLA Nurse to make general inquiries about TransAlta’s Disability Management processes. The Complainant reports, and the President confirms, that while aware of the Complainant’s situation, the President did not identify the Complainant during this discussion.

[88] The KLA Nurse nonetheless responded to the Union President in an email sent August 8, 2006, naming the Complainant in the subject line, and indicating that he:

- was involved in a “voluntary drug and alcohol program,”
- was being required by KLA EFAP and apparently OHS to sign an RMC,
- would be subject to requirements of “abstinence” and “random testing for alcohol and drugs” for a 2 year period,
- had been seeking counselling/treatment from KLA.

[89] This email was sent to the Union President, as well as a Senior Human Resources Advisor with TransAlta. On August 15, 2006, the KLA Nurse again emailed the Union President and the TransAlta Senior Human Resources Advisor regarding the Complainant’s follow-up care.

[90] Earlier, I established that as the Complainant was proposing to take a three-month medical leave of absence from work, it was reasonable for TransAlta, through its contracted OHS provider, to require some personal information to confirm the Complainant’s completion of a required treatment program, and to establish his fitness to return to work. I noted this finding was consistent with previous decisions made under the federal PIPEDA.

[91] I found the information exchanged between the KLA EFAP Counsellor and the KLA OHS Nurse qualified as personal employee information under section 1(j) of PIPA.

[92] I am similarly persuaded that some of the information provided by OHS to TransAlta Management qualifies as personal employee information. That is, the KLA Nurse’s confirmation that the Complainant was or was not fit to return to work, or had agreed to comply with return to work conditions, is information that would reasonably be required by TransAlta Management. To the extent the information reported by the KLA Nurse to the TransAlta Senior Human Resources Advisor consisted of this basic information, I am satisfied that it qualifies as personal employee information.

[93] In reviewing the email, however, I note that it named the Complainant and also indicated that he was participating in a “voluntary drug and alcohol program” and that he had been seeking counselling/treatment from KLA. It also indicated that the Complainant was required to sign an RMC, which agreement in and of itself identified the nature of the Complainant’s absence to be related to issues with alcohol and/or drugs. Additional email correspondence from the KLA Nurse’s file, between the KLA Nurse and the TransAlta Senior Human Resources Advisor, is mainly about whether or not the Complainant has completed his treatment and efforts to have the Complainant sign the RMC.

[94] While I am satisfied that OHS reasonably required this information in order to ensure the Complainant was referred to an appropriate specialist for treatment and to establish return to work conditions, I am not convinced that the information was reasonably required by TransAlta Management. The Complainant’s leave was being managed by health specialists who knew enough about his situation to recommend treatment and establish conditions for his return to work. In my view, all TransAlta

Management needed to know was whether or not the Complainant had successfully completed treatment and would comply with return to work conditions.

[95] As I do not believe this additional information was reasonably required by TransAlta Management to manage the organization's employment relationship with the Complainant, I cannot find that it was "personal employee information" in this context. However, it still qualifies as personal information under PIPA.

[96] Given this, I next considered whether or not KLA OHS complied with the provisions in PIPA with respect to using first the Complainant's *personal employee information* (basic, limited fitness for work information), and then his *personal information* – the additional information over and above whether he had completed treatment and would comply with return to work conditions.

[97] I have noted above that section 18(1) of PIPA authorizes an organization to use *personal employee information* without consent, provided certain conditions set out in section 18(2) of the Act are met. Sections 15(1) and (2) of PIPA read the same, but address an organization's collection of personal employee information without consent. The information must be reasonable for the purposes for which it is collected/used, related to the employment relationship, and the individual must be provided with reasonable notification that the information is going to be collected and used and the purposes for doing so.

[98] I am satisfied that it was reasonable for the KLA Nurse to use the Complainant's *personal employee information* to report to TransAlta Management regarding his fitness to return to work. This information is also clearly related to TransAlta's employment relationship with the Complainant. However, again, I am troubled that there does not appear to have been any clear notification to the Complainant at the start of his leave as to the purposes for which he was referred to KLA EFAP, or that certain personal information would be reported by KLA EFAP to OHS, and subsequently to TransAlta Management.

[99] There was notification that certain limited information provided by the Complainant's physician to OHS would be collected and used to report fitness to work and/or eligibility for short term disability benefits to his employer. However, this was not the case with respect to information that was collected by OHS from KLA EFAP, or at least until some four months after the Complainant had started his leave. TransAlta's Privacy Policy does describe personal information that might be collected about employees, and the purposes for that collection. However, without clearly advising the employee of the purpose for which he was referred to KLA EFAP, the Policy is not of much help as a vehicle of notification.

[100] Because there does not appear to have been reasonable notification to the Complainant of the purposes for which his personal employee information would be collected and used, I cannot find that sections 15(2) and 18(2) of PIPA authorized OHS to collect and use the Complainant's personal employee information without consent. Instead, the consent provisions set out in section 7 of the Act apply. However, as has already been noted, the Complainant did not provide any such consent, at least until September 2006 - some four months after he first went on leave. Accordingly, I find that OHS's collection of the Complainant's personal employee information and use of it

to report to TransAlta Management was without consent and in contravention of section 7(1)(a) and (c) of PIPA.

[101] My findings are the same with respect to the additional, more detailed information that I have characterized as the Complainant's *personal information* (that he was participating in a "voluntary drug and alcohol program," had been seeking counselling/treatment from KLA, was required to sign an RMC). That is, OHS contravened section 7(1)(a) and (c) of PIPA by collecting the Complainant's personal information and using it to report to TransAlta Management, without obtaining consent.

[102] As I have already determined that this additional information was also not reasonably required by TransAlta Management, I find that OHS contravened section 16(2) of PIPA, which states:

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

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

[103] Similarly, I find that TransAlta Management collected this information in contravention of section 11(2) of PIPA which requires organizations to collect personal information "only to the extent reasonable for meeting the purposes" for which the information was collected. While it was reasonable for TransAlta Management to collect some of the Complainant's personal information to verify his fitness to return to work (i.e. that he had completed treatment, and agreed to comply with return to work conditions), it was not reasonable to collect additional information that revealed the nature of treatment and that the Complainant had been attending at KLA EFAP.

4. Did TransAlta Management use the Complainant's personal information in compliance with PIPA?

[104] The Complainant's last allegation in this case relates to TransAlta Management's use of his personal information. Specifically, the Complainant's submission reported ...

... [TransAlta's Senior Human Resources Advisor] has breached the Complainant's right to privacy and confidentiality with virtually every senior manager at TransAlta at the [Client] site.

[105] The Complainant is concerned with a letter dated August 29, 2006, which was sent to him by the TransAlta Senior Human Resources Advisor. In that letter, the Advisor informed the Complainant that the Advisor was aware:

- that the Complainant remains "non-compliant with TransAlta Policies,"
- that the KLA OHS Nurse has previously outlined documentation required for the Complainant to be in compliance,
- that the documents include a "signed contract for continued care when receiving STD benefits" and "evidence of care when on STD benefits."

[106] The letter was copied to:

- the Union President,
- the Complainant's immediate Supervisor at TransAlta,
- the Director, TransAlta Disability Management,
- TransAlta's Director of Operations,
- the KLA OHS Nurse,
- TransAlta's Production Manager, and
- the Manager of the Complainant's Department at TransAlta.

[107] TransAlta reported that:

The personal information of [the Complainant] provided by [the Senior Human Resources Advisor] to others at TransAlta was of a similar but less detailed nature than what had been provided to [the Senior Human Resources Advisor] by [the KLA Nurse]. The other individuals who received the information were TransAlta employees who were either responsible for the administration of the short term disability program (or in the case of [the TransAlta Occupational Health and Hygiene Specialist] the drug and alcohol program) or direct or indirect supervisors of [the Complainant] of the TransAlta ... site. If [the Complainant] was not compliant he would not be allowed back on the ... site

[108] The Complainant is concerned that the letter's mention of his non-compliance with TransAlta policies was a reference to TransAlta's Alcohol and Drug Policy and therefore revealed the nature of his treatment. While there is evidence that the Senior Human Resources Advisor had knowledge such that he could have been referring to this Policy, there is nothing in the letter itself that would have informed the other recipients that this was the case. Given the letter's additional references to the KLA Nurse, a "signed contract for continued care when receiving STD benefits," and "evidence of care when on STD benefits," the "Policies" in question could just as easily have been TransAlta's Disability Management policy. This, in fact, might have been a more reasonable conclusion.

[109] Nonetheless, it is these possible inferences that are of concern with respect to the contents and distribution of the letter. I grant that the Complainant's direct and indirect supervisors would have a reasonable purpose for knowing that the Complainant might not be allowed to return to the work site. I also acknowledge that the Complainant's direct supervisor might have a reasonable need to know that this was due to the Complainant's non-compliance with TransAlta Policies. It would also be reasonable that individuals responsible for administration of TransAlta's short term disability program would need to know that the Complainant was no longer eligible to receive STD benefits. In each of these situations, I would consider the information that was reasonably required by each recipient to be personal employee information under PIPA.

[110] What I am not persuaded of, however, is that all of these individuals reasonably required all of this information. For example, the Complainant's indirect supervisors would not reasonably need to know that the Complainant was not allowed back on-

site because he had not completed documentation confirming that he would seek continued care relative to his medical leave, and providing evidence of that care. All they needed to know was that the Complainant was not yet eligible to return to work and therefore should not be on-site. The additional information provided to each of the recipients of the letter, over and above the information they reasonably required, does not qualify as personal employee information.

[111] Given this, I find that while there might have been reasonable purposes for the Senior Human Resources Advisor to use the Complainant's personal information to report some information to the various recipients of the August 29 letter, I am not persuaded that the extent of personal information used was reasonable for each of those purposes.

[112] Section 16 of PIPA states:

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

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

[113] In my opinion, TransAlta Management contravened section 16(2) of PIPA by providing the same information to all the recipients of the August 29 letter. A more reasonable course of action would have been to report specific information directly to each of the recipients, considering the specific purpose for doing so in each case.

VI. SUMMARY OF FINDINGS

[114] The limited information provided by KLA EFAP to OHS concerning the Complainant's participation and attendance at treatment, and compliance with return to work conditions, qualifies as personal employee information under section 1(j) of PIPA.

[115] The Complainant was not clearly notified of the purposes for which he was attending at KLA EFAP, or for which KLA EFAP would be using his personal information. As such, KLA EFAP was not authorized by section 18(2) of PIPA to use the Complainant's personal employee information without consent to report to OHS. Instead, consent was required.

[116] KLA EFAP contravened section 7(1)(c) of PIPA by using the Complainant's personal employee information without consent. Although KLA EFAP maintained verbal consent was obtained, I do not believe this qualified as a proper consent as contemplated by PIPA because of the lack of clarity surrounding the Complainant's referral to KLA EFAP.

[117] The personal information collected by OHS regarding the Complainant's attendance at KLA EFAP, treatment, and return to work conditions qualifies as personal employee information. Basic personal information used by OHS to report to TransAlta Management regarding the Complainant's fitness to return to work and

compliance with return to work conditions also qualifies as personal employee information.

[118] Because there was not reasonable notification to the Complainant of the purposes for which his personal employee information would be collected and used by OHS, the collection and use of this information without consent was not authorized under sections 15(2) and 18(2) of PIPA. Therefore consent was required.

[119] As the Complainant did not provide consent, OHS's collection and use of the Complainant's personal employee information to report to TransAlta Management was in contravention of sections 7(1)(a) and (c) of PIPA.

[120] The additional information provided by OHS to TransAlta Management that indicated the Complainant was participating in a "voluntary drug and alcohol program," that he had been seeking counselling/treatment from KLA and that he was required to sign an RMC was not reasonably required by TransAlta Management and does not qualify as personal employee information. However, this information is still the Complainant's personal information.

[121] As this additional information was not reasonably required by TransAlta Management, OHS contravened section 16(2) of PIPA by providing it to TransAlta Management. While it was reasonable for OHS to use some of the Complainant's personal information to report his fitness to return to work (i.e. completion of treatment, compliance with return to work conditions), it was not reasonable to report additional information that revealed the nature of treatment and that the Complainant had been attending at KLA.

[122] It was also not reasonable for TransAlta Management to have collected this additional information. Therefore, TransAlta Management collected the Complainant's personal information in contravention of section 11(2) of the Act which requires organizations to collect personal information only to the extent reasonable for meeting its purposes.

[123] While there might have been reasonable purposes for TransAlta Management to report some of the Complainant's personal information to the various recipients of the August 29 letter, TransAlta Management contravened section 16(2) of PIPA by providing the same information to all of the recipients. It would have been more reasonable to report limited information directly to each of the recipients, considering the specific purpose for doing so in each case.

VII. RECOMMENDATIONS

[124] I made the following recommendations to TransAlta and KLA:

1. TransAlta to review and revise as necessary its Disability Management policies, procedures and consent forms to ensure that employees are fully notified as to what personal information and/or personal employee information will be collected, used and disclosed in the course of managing medical leave, particularly when employees are referred to specialists for assessment and/or treatment.

2. TransAlta to review and revise as necessary its policies, procedures and consent forms concerning EFAP. Again, it should be made very clear to employees as to what personal information and/or personal employee information will be collected, used and disclosed when an employee attends at the EFAP. If the EFAP provides a variety of services, such that collection, use and disclosure practices may vary, documentation provided to employees should explain that this is the case.
3. KLA to review and revise as necessary its policies, procedures and consent forms respecting the various services it provides. As with the recommendations made to TransAlta (above), KLA needs to distinguish between the types of services offered, and the collection, use and disclosure practices associated with each service.
4. Both TransAlta and KLA to communicate the revised protocols to employees and staff, and confirm to this Office when this has been done.

[125] TransAlta informed me that a new Disability Management Department has been created within Human Resources such that all claims are now managed by TransAlta employees, and not contracted occupational health nurses. The new Department has two full time staff.

[126] TransAlta also agreed to:

- Revise its consent forms for EFAP (service now provided by Sykes Assistance Services Corporation), as well as consents for its insurance provider. Copies of signed consents will be given to all parties involved for review and confirmation.
- Review and revise as necessary all disability management and EFAP policies and practices with recommended changes regarding collection, use and disclosure of personal medical information managed in a medical disability claim to be forwarded for senior management approval. Revised policies and procedures will be reviewed with the Office of the Information and Privacy Commissioner before roll-out and implementation.
- Communicate and provide education of revisions and practice changes to all employees through a range of communications methods including 'Heads Up', training sessions, and a one stop icon on TransAlta's intranet portal.
- Report progress on implementing these changes to the Office of the Information and Privacy Commissioner by April 30, 2008.

[127] On behalf of KLA, Sykes Assistance Services Corporation agreed to:

- Update KLA policies and procedures including:
 - consent policy and procedures for obtaining consent(s),
 - consent forms,

- review of the Recovery, Maintenance & Monitoring Contracts,
- ensuring that there are clear contracted reporting requirements.
- Report progress on implementing these changes to the Office of the Information and Privacy Commissioner by April 30, 2008.

[128] In addition to the above, Sykes Assistance Services Corporation also retained a privacy consultant to ensure the organization is rigorous in supporting legislative requirements.

[129] At the request of the Complainant, I note in this report that section 58 of PIPA states that an organization shall not take any adverse employment action against an employee, or deny an employee a benefit where an employee has made a complaint to the Commissioner.

VIII. CONCLUSION

[130] To some extent, my findings in this case – that TransAlta and KLA contravened PIPA – are the result of unique circumstances, myriad players, the sensitive nature of the personal information at issue, and a general lack of clarity with regard to process. Nonetheless, this case points to a need for organizations to carefully consider and set out how they will collect, use and disclose personal information, and personal employee information, in these kinds of situations. In particular, it is important for organizations to identify the roles and responsibilities of various parties in the process, and the nature and extent of information that will be collected, used and possibly disclosed at various stages of that process. A particular challenge that this case raises is the need to ensure that all printed materials (correspondence, forms, policies, brochures), as well as all staff involved in the process, provide a consistent message so as to avoid confusion and misunderstandings. Drug and alcohol testing programs (especially where an employee has voluntarily chosen to enter a treatment program), as well as general medical disability management, will invariably involve sensitive personal information of employees, such that failing to ensure the protection of privacy can have far reaching consequences to both individuals and organizations.

[131] This case also serves to point out that, while PIPA authorizes organizations to collect, use and disclose personal employee information without consent, this authorization first requires that certain criteria set out in the Act are met. Where current employees are concerned, the organization must ensure that *before* collecting, using or disclosing the information without consent, the individual is provided with reasonable notification that the information is going to be collected, used or disclosed, and of the purposes for doing so. Particularly in cases of medical leave/disability management, it may be incumbent on organizations to provide this notification, or reiterate it (if it already appears in various policy documents), at the time the employee goes on leave, rather than rely on notification through policy documents communicated to employees at the time of hire, as is commonly done.

[132] All parties in this investigation were cooperative and helpful. As the parties have accepted the findings as set out herein, and have already undertaken to begin implementing the recommendations, I consider this matter resolved.

Jill Clayton, Director
Personal Information Protection Act
Office of the Information and Privacy Commissioner