ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2022-02

March 8, 2022

COLLEGE OF PHYSICIANS AND SURGEONS OF ALBERTA

Case File Number 008475

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access to information request under the *Personal Information Protection Act* (PIPA) to the College of Physicians and Surgeons of Alberta (the Organization). The Applicant alleged that the Organization deliberately withheld records in response to the access request and otherwise failed to meet its duty to assist under section 27(1)(a) of PIPA.

The Adjudicator did not have jurisdiction to consider whether the Organization committed an offence under section 59(1) of PIPA for deliberately withholding responsive records without authority to do so. The Adjudicator's authority is set by section 52 of PIPA, which does not include addressing offences. The Adjudicator noted, however, that deliberately withholding records without authority under PIPA would be a failure to meet the duty to assist under section 27(1)(a).

The Adjudicator found that the Organization failed to meet the duty under section 27(1)(a) in two ways. First, it failed to search for records from one e-mail account using all the variations of the Applicant's name and initials specified in the access request. Second, it did not search for records in the possession of its legal counsel despite that there was high probability that legal counsel would have responsive records. The Adjudicator found that the Organization did not deliberately withhold information without authorization under PIPA.

The Adjudicator ordered the Organization to ask its legal counsel if it had any responsive records and to search one e-mail account for responsive records using the variations of the Applicant's name and initials specified in the access request.

Statutes Cited: AB: *Health Professions Act*, R.S.A. 2000 c. H-7 s. 121; *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 24(1); 24(2)(a), (c), (d); 24(3)(b); 27(1), 27(1)(a), 27(1)(b); 52; 59(1), 59(1)(c), 59(1)(d), 59(1)(e).

Authorities Cited: AB: Orders P2006-004, P2006-006, P2006-007, P2016-05, P2019-05; Decision P2011-D-003. **BC:** Orders 04-25, P05-02, P05-03.

Cases Cited: *Makis v. Alberta Health Services*, 2018 ABQB 976.

I. BACKGROUND

[para 1] In October, 2016 the Applicant commenced a lawsuit against a third party. On December 1, 2017, the Applicant added the College of Physicians and Surgeons of Alberta (the Organization) as a defendant in the lawsuit.

[para 2] On December 6, 2017, under section 24(1) of the *Personal Information Protection Act* S.A. 2003, c. P-6.5 (PIPA), the Applicant made an access to information request to the Organization. The Applicant's request sought records from five named employees, and as well as a Hearing Director. The wording of the access request was the same in respect of records from each individual and the Hearing Director. In each case, the Applicant sought "handwritten notes about telephone conversations," "e-mail correspondence" and,

> Any emails sent/received by **[name/Hearing Director]** from [e-mail address associated with the name/Hearing Director] which reference me or my personal information and contain keywords [variations of the Applicant's name], [variations of the Applicant's initials] in the subject line or body of emails sent or received.

[para 3] The Applicant specified that the time period for the records sought was December 1, 2015 to December 5, 2017.

[para 4] On January 19, 2018, the Organization responded to the access request by letter. In the letter, the Organization explained what information would be available in response to the access request in light of exceptions to disclosure under PIPA under sections 24(2)(a), (c), (d); and 24(3)(b).[1] The Organization also highlighted that under section 24(1) of PIPA, the Applicant was entitled only to his personal information, and not to any other information. As well, the Organization informed the Applicant that it withheld some records where the only personal information available to the Applicant was his name and e-mail address.

[1] In its letter of January 19, 2018, the Organization erroneously refers to section 24(2)(a) of PIPA as section 24(2)(b).

[para 5] There was further discussion between the Applicant and the Organization after the January 9, 2018 letter. The end result was that the Organization agreed to provide some information that was not the Applicant's personal information, in response to the access request.

[para 6] The Applicant was not satisfied with the response to his access request and sought a review of it from this Office.

[para 7] Investigation and mediation were authorized to try to resolve the issues but did not resolve all of them. While the Applicant no longer raises the issues of whether the Organization properly applied exceptions to disclosure under PIPA, he remains concerned that the Organization failed to conduct a proper search for records. In particular, the Applicant questions whether the Organization could have lost records that were responsive to his access request, that he has reason to believe exist.

II. ISSUES

Issue A: Did the Respondent meet its obligations required by section 27(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

III. DISCUSSION OF ISSUES

Preliminary Matter – Allegations in the Applicant's Submission

[para 8] The Applicant's submission contains various serious allegations, without providing a foundation for them, against several individuals associated with the Organization. Among the allegations is an assertion that these individuals are involved in a conspiracy to intentionally kill or seriously harm Albertans who engage certain parts of the health care system. As such allegations are inflammatory, and without foundation, I have disregarded them, save to the extent that is necessary to mention them in order to set out the Applicant's argument on the Issue.

Preliminary Matter – Scope of Inquiry

[para 9] At various points in his submission, the Applicant alleges that the Organization has lied to or obstructed the Office of the Information and Privacy Commissioner and has deliberately withheld information in response to his access request. These are allegations that the Organization has committed offences contrary to sections 59(1)(c), (d), and (e) of PIPA. I do not have the authority to determine whether the Organization has committed an offence. While I have authority under the Act to refer evidence that an offence may have been committed to the Minister of Justice, my authority to dispose of an Inquiry is set under section 52 of PIPA, and does not include the ability to address offences.

Issue A: Did the Respondent meet its obligations required by section 27(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

[para 10] The Applicant's access request was made under section 24(1) of PIPA.

> *24(1) An individual may, in accordance with section 26, request an organization*
>
> *(a) to provide the individual with access to personal information about the individual, or*
>
> *(b) to provide the individual with information about the use or disclosure of personal information about the individual.*

[para 11] The Organization's duty to properly respond to the access request is set out in section 27(1) of PIPA.

> *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,*
>
> *and*
>
> *(b) at the request of an applicant making a request under section 24(1)(a) provide, if it is reasonable to do so, an explanation of any term, code or abbreviation used in any record provided to the applicant or that is referred to.*

[para 12] The focus of this Issue is whether the Organization met the duty under section 27(1)(a). The Applicant has not raised any concern that the Organization failed to explain terms as required by section 27(1)(b). The duty under section 27(1)(a) includes a duty to properly search for records (Orders P2006-006 and P2006-007).

[para 13] I note that while I do not consider whether the Organization has committed an offence under section 59(1) of PIPA, in the event that an organization did deliberately, and without authority under PIPA, withhold records in response to an access request it could not be said to have met its duty to properly respond to an access request. Deliberately refusing to provide records would be a failure to respond as accurately and completely as is reasonably possible.

[para 14] The records that the Applicant asserts are missing in response to his access request are communications between the five employees and the Hearings Director, with officials with Alberta Health Services (AHS). I understand the Applicant to be asserting

that these records would have come into existence as the Organization addressed two professional complaints about him under the *Health Professions Act*, R.S.A. 2000 c. H-7 (the HPA). The Applicant believes these records exist since the Organization is required to preserve them under the HPA.

[para 15] The Applicant's contention that the Organization failed to conduct a proper search for records (or deliberately withheld them) rests on two arguments. The first is that he possesses copies of several e-mails from February, 2016 (the February 2016 e-mails) and a letter of December, 2016 that fit within the parameters of the access request, which were not provided in response to it. Here, I find that the Applicant has succeeded in establishing a basis to question the propriety of the Organization's search for responsive records. The e-mails and letter originated from the Organization; as such the Organization bears the burden of explaining their absence from its response to the access request.

[para 16] The Applicant's second argument is his assertion that the Organization was motivated to withhold records in response to the access request in order to conceal its employees' involvement in covering up a conspiracy to murder Albertans who engage certain parts of the health care system.

[para 17] As evidence of such motive, the Applicant asserts that the Organization "illegally solicited" an "entirely fraudulent" complaint about him in order to discredit him after he refused a settlement offer to resolve what the Applicant describes as a "13.5 million lawsuit" against the Organization. I understand the lawsuit to be an action in the Court of Queen's Bench in which the Organization was added as a defendant on December 1, 2017. The Applicant also argues that an attempt by the Organization to have him declared a vexatious litigant, and thereby bring an end to the review of his access request, evidences a motive on the part of the Organization to withhold information in response to his access request. The Organization was one of several applicants in a motion before the Alberta Court of Queen's Bench to have the Applicant declared a vexatious litigant.

[para 18] As stated earlier, the Applicant's allegations against the Organization and its employees are presented without foundation. As such, I do not consider them, and cannot find that the Organization failed to properly respond to the access request in relation to those allegations. I consider though, that the Applicant is also arguing generally that the presence of litigation between him and the Organization provides incentive for the Organization to deny him any information that might harm its interests in that litigation.

[para 19] While it is conceivable that an organization may find itself in an uncomfortable position when faced with an access request from an adverse litigant, absent any evidence that an organization curtailed a search for responsive records in light of the litigation, the mere presence of litigation provides no basis to conclude that an organization improperly responded to an access request. There is no such evidence in this case.

[para 20] I now consider whether the Organization has established that it conducted a proper search for records, including whether it adequately explains the absence of the February 2016 e-mails and the letter of December, 2016 from its response to the access request.

[para 21] The Organization provided a detailed explanation of the method it used to search for records, as well as it efforts to determine why the Applicant did not receive the records he already had in possession. The explanation is set out in an affidavit sworn by its Chief Information and Privacy Officer (the CIPO).

[para 22] As for the general parameters of the Organization's search for responsive records, the CIPO explains that the search was organized by the Organization's Privacy Coordinator. The Privacy Coordinator, and others involved in the search including the five employees and the Hearing Director, searched for records using the variations of the Applicant's name and initials given in the access request. The search included the following databases:

- The Applicant's profile on the Quest database, which contains correspondence from most of the Organization's departments as well as some e-mails;
- All complaint files involving the Applicant as either the complainant or the subject of the complaint;
- The Organization's Health Monitoring records;
- The Organization's shared drive;
- The Organization's general files; and,
- E-mail boxes (inbox, sent, deleted), including those of the 5 individuals and the hearings director.

[para 23] I note that the Organization did not "search the network or premises of its legal counsel." Additionally, one of the five employees (initials SM) appears to have only searched for records using one version of the Applicant's first and last name, and did not search using any of the variations of the Applicant's name or initials.

[para 24] The CIPO explained why some e-mails may be absent from the responsive records: at the time of the access request, the Organization's practice was to upload e-mails to designated databases, while unneeded e-mails were deleted. The choice to discard e-mails was left to each individual e-mail user since there was no general retention policy in place.

[para 25] As for hand-written notes (whether recording details of telephone conversations or otherwise), such notes were considered transitory. Once the notes were transcribed and uploaded to a database, the handwritten versions were discarded. Accordingly, no hand-written notes were found in response to the access request.

[para 26] Regarding the February 2016 e-mails, the Organization conducted a further search for these records upon learning of the Applicant's concern about them. The Organization searched for them by using the last name of the recipient of these e-mails,

and the date of the e-mails, as search terms. The Organization still did not locate these e-mails. It notes however that it only began using the Quest database in January 2016, and had trouble migrating existing e-mails to that database. The Organization states that some e-mails were lost in the transfer, likely including the e-mails from February 2016.

[para 27] Regarding communication between the Organization's members and AHS Officials, the Organization does not deny that such communications exist. The Organization states that the Applicant has been told why all records were not provided in response to the access request as described in its letter of January 19, 2018. That letter explained that records were withheld under sections 24(2)(a), (c), (d), and 24(3)(b). Those sections state:

> *(2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> > *(a) the information is protected by any legal privilege;*
> >
> > *...*
> >
> > *(c) the information was collected for an investigation or legal proceeding;*
> >
> > *(d) the disclosure of the information might result in that type of information no longer being provided to the organization when it is reasonable that that type of information would be provided;*
> >
> > *...*
>
> *(3) An organization shall not provide access to personal information under subsection (1) if*
>
> *...*
>
> > *(b) the information would reveal personal information about another individual;*

[para 28] The Organization further explained to the Applicant that it withheld records where the only personal information available to the Applicant was his name and e-mail address. Releasing these records to the Applicant would thus be meaningless. An organization is permitted to withhold records under those circumstances (Order P2019-05 at paras. 15 and 16.)

[para 29] In its submission in this Inquiry, the Organization expanded its explanation of the scope of third party personal information that it withheld. The Organization withheld information that would reveal the identity of a person holding an opinion about the Applicant. Such information is the personal information of the person holding the opinion (Order P2016-05 at paras. 12 to 14). The result appears to have been that opinions about the Applicant were withheld, even though the opinions themselves are his

personal information. Because these opinions would reveal the identity of the opinion-holder, withholding them is permissible.

[para 30] Regarding the Applicant's assertion that the Organization had a duty under the HPA to preserve communications between it and AHS Officials, the Organization notes that there is a requirement under the HPA to preserve records of complaints regarding professional conduct. Section 121 of the HPA states,

> *121 A college must keep, for at least 10 years,*
>
> *(a) a copy of ratified settlements and admissions of unprofessional conduct,*
>
> *(b) records of investigations and hearings, and*
>
> *(c) records of complete registration applications and reviews.*

[para 31] The Organization explains, however, that section 121 of the HPA does not apply to every record and it provides its Complaint Director discretion to determine what documents need to be saved; it stated,

> Not every email or handwritten note qualifies as a record of investigation or hearing and it is up to the CPSA Investigator and the Complaints Director to determine what documents need to be saved to the file as a formal record, as opposed to a transitory record.

[para 32] The Organization explained that it concluded that no further responsive records exist since it has had all the appropriate staff search all possible locations for responsive information, and has further conducted a second search.

[para 33] With the exception of two aspects of the Organization's search for records, I am satisfied that the Organization met its duty under section 27(1) of PIPA. It conducted a broad search, involving the key employees named in the access request, using the search terms suggested by the Applicant. It has also adequately explained why the Applicant would not have received the February 2016 e-mails. The Organization has also clarified why the Applicant did not receive copies of communications with AHS officials: such records exist but were withheld under exceptions to disclosure under PIPA.

[para 34] While the Organization did not squarely address the letter of December, 2016 which was also not provided in response to the access request, I do not find the lack of an explanation indicative of a failure to meet the duty under section 27(1). The standard under section 27(1) is that an organization must respond as accurately and completely as reasonably possibly; the standard is not one of perfection. The breadth and specificity of the Organization's search indicates that the search for responsive records was as accurate and complete as reasonably possible.

[para 35] Notwithstanding the generally proper search, I find that the Organization failed to meet its duty under section 27(1)(a) in two ways, described below.

[para 36] The Organization failed to meet the duty to assist under section 27(1)(a) by failing to ensure that one of the five individuals (SM) named in the access request searched for e-mails using all of the variants of the Applicant's name and initials given in the access request. By searching for only one version of the Applicant's name, SM unduly narrowed the search. The Applicant sought records with various spellings of his name and initials, not just those containing one particular version of his name.

[para 37] Under the circumstances of this case, I find that the Organization also failed to meet its duty to assist the Applicant by excluding records which may be in the possession of its legal counsel, and that by virtue of the nature of its engagement of legal counsel, may be within the Organization's control, from the scope of search.

[para 38] Orders P05-02 and P05-03 from the British Columbia Office of the Information and Privacy Commissioner canvassed whether records from a client in the possession of legal counsel remain under the control of the client for the purposes of an access request. The conclusion reached in those Orders is that where information is provided to legal counsel under the terms of retainer agreement, the client retains control. Additionally, British Columbia Order 04-25, at para. 59, expressly found a responsibility to search for responsive records in the possession of external legal counsel, where it was reasonable to conclude that external legal counsel may have responsive records. I see no reason that the same reasoning would not apply in Alberta. As described below, there appears to be a high probability that the Organization's legal counsel had responsive records at the time of the access request in this case.

[para 39] The decision from the Court of Queen's Bench addressing the Organization's application to have the Applicant declared a vexatious litigant contains an itemized list of complaints and actions taken by the Applicant that covers the time period for responsive records specified in the access request (see 2018 ABQB 976 at para. 19). Items 74, 75, and 76 specifically mention e-mails and letters between the Applicant and legal counsel for the Organization within the period of time specified in the access request. It seems that the Organization's legal counsel would likely have these records.

[para 40] I also note that itemized list at para. 19 of 2018 ABQB 976 indicates that the Applicant had extensive communication with the Organization regarding professional complaints, calls for reviews and appeals of the Organization's decisions on professional complaints, and numerous accusations of illegal and improper conduct on the part of the Organization's employees. Item 81 states that the Applicant filed a police report regarding the Organization's legal counsel, also within the time period of the access request. In these circumstances it seems possible the Organization's legal counsel became involved in or commented upon the numerous legal challenges brought by the Applicant during the time period captured by the access request. In light of the preceding, it stands to reason that the Organization's legal counsel may have responsive records. Accordingly, the Organization had a duty to ask legal counsel to provide any such records in their possession that it would be reasonable to regard as being in the Organization's control by reference to the nature of the relationship; for example, records provided to legal counsel by the Organization in the course of dealing with the Applicant.

[para 41] In reaching the above conclusion, I note that other orders of this Office have made the observation that it is likely that very little information in a lawyer's client files will be available to an applicant making an access request under PIPA, either because of legal privilege or the fact that access under PIPA is limited to personal information about the applicant (See, for example, Decision P2011-D-003 at paras. 30 and 129, and Order P2006-004 at para. 18). The low prospect of the Applicant receiving any substantial information does not, however, relieve the duty to conduct a proper search for records. Even if little information is provided to the Applicant, the Organization must establish exceptions for any responsive information that it withheld.

IV. ORDER

[para 42] I make this Order under section 52 of PIPA.

[para 43] I order the Organization to search for further responsive records by asking its legal counsel if it has any records that are responsive to the access request.

[para 44] I order the Organization to search for e-mails in SM's e-mail boxes using the variations of the Applicant's name and initials omitted from its initial search.

[para 45] I order the Organization to provide to the Applicant any further responsive information it finds upon conducting the above ordered searches, subject to exceptions to disclosure under PIPA. In event that the Organization does not locate any further responsive information, I order it to inform the Applicant of the same.

[para 46] I order the Organization to confirm to me and the Applicant, in writing that it has complied with this Order within 50 days of receiving it.

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John Gabriele
Adjudicator
/an