

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2008-006

February 26, 2009

ALBERTA SCHOOL EMPLOYEE BENEFIT PLAN

Case File Number P0716

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for his personal information from the Alberta School Employee Benefit Plan (the Organization) under the *Personal Information Protection Act* (PIPA). The Organization provided his personal information, but withheld a neuropsychological report and a follow up letter, as well as notes of telephone conversations and voicemail messages. The Organization withheld this information under section 24(2)(d) and 24(3)(a) of PIPA.

The Applicant requested review of the decision to withhold his personal information. The Adjudicator found that sections 24(2)(d) and 24(3)(a) did not apply to the information in the records. The Adjudicator ordered the Organization to disclose the neuropsychological report and the follow up letter. However, as she found that section 24(3)(b) (personal information of another individual) applied to the notes, and that the personal information could not be severed, she confirmed the decision of the Organization to withhold the notes.

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

Authorities Cited: **AB:** Order P2007-002

I. BACKGROUND

[para 1] The Alberta School Employee Benefits Plan (the Organization) arranged for a neuropsychological assessment for the Applicant. The neuropsychologist who conducted the assessment created a report dated February 22, 2007 (the Report) of his findings and conclusions and provided it to the Organization.

[para 2] The Applicant made a request to the Organization under PIPA for his personal information. The Organization responded to the Applicant's request on May 15, 2007, but withheld the Report, a letter from the neuropsychologist dated March 9, 2007 (the follow up letter) and the notes of an employee of the Organization that were created in relation to the Report. The Organization withheld this information under sections 24(2)(d) and 24(3)(a) of the PIPA.

[para 3] On May 28, 2007, the Applicant requested review by this Office of the Organization's decision to withhold his personal information.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was set down for a written inquiry.

[para 5] As part of his submissions, the Applicant provided pages from the Report and the follow up letter. In addition, he provided a letter from the neuropsychologist dated March 29, 2007, advising the Applicant that he was pleased to provide the Applicant with a copy of the Report. The Applicant noted that his treating psychiatrist had also given him access to the Report and the follow up letter.

II. RECORDS AT ISSUE

[para 6] The following records are at issue: a neuropsychological assessment dated February 22, 2007 (the Report), a letter written by the neuropsychologist to the Organization dated March 9, 2007 (the follow up letter), and notes of an employee of the Organization.

III. ISSUES

Issue A: Is the information withheld by the Organization the Applicant's personal information?

For the reasons set out in this order, I have decided to add the following issue:

Issue B: Do sections 24(3)(b) or (c) apply to the Applicant's personal information in the records at issue?

Issue C: If the information withheld by the Organization is the Applicant's personal information:

1. **Did the Organization properly apply section 24(2)(d) to the information it withheld?**
2. **Did the Organization properly apply section 24(3)(a) to the information it withheld?**
3. **If section 24(3)(a) applies to the severed information, can the Organization reasonably sever the information that is subject to section 24(3)(a) under section 24(4)?**

IV. DISCUSSION OF ISSUES

Issue A: Is the information withheld by the Organization the Applicant's personal information?

[para 7] Section 1(k) of PIPA defines "personal information" as "information about an identifiable individual". All of the information in the records withheld by the Organization is information about the Applicant as an identifiable individual. I therefore find that the information withheld by the Organization is the Applicant's personal information.

Issue B: Do sections 24(3)(b) or (c) apply to the Applicant's personal information?

[para 8] Section 24(3)(b) and (c) of PIPA require an Organization to refuse to provide access to personal information to an Applicant if the Applicant's personal information would reveal personal information about another individual, or the identity of an individual who provided a confidential opinion. These provisions state:

- (3) An organization shall not provide access to personal information under subsection (1) if*
- (b) the information would reveal personal information about another individual;*
 - (c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.*

Section 24(4) requires an Organization to sever information falling under sections 24(3)(b) or (c) if the Organization is reasonably able to do so.

[para 9] As sections 24(3)(b) and (c) are mandatory, I must consider whether these provisions apply to the information in the records at issue, even though the Organization did not raise the application of these provisions in its arguments. Otherwise, I would run the risk of making an order with which it would be illegal for the Organization to comply.

I will therefore consider whether the Report, the follow up letter and the notes contain the personal information or confidential opinions of individuals other than the Applicant.

[para 10] Both the Report and the follow up letter contain opinions about the Applicant. In Order P2007-002, the Director of Adjudication noted that an opinion may be the personal information of the subject of the opinion, as well as the holder of the opinion:

... it is counter-intuitive that a person's statement that he or she thinks something (even if it is about someone else) can never be said to be a statement they are making about themselves (hence is their own personal information). The same is true of the very fact that a person gives an opinion about someone else – there will be circumstances in which this information has an element that is personal to the giver of the opinion. The following scenario illustrates these points. A consulting firm is hired to evaluate the performance of the director of an organization, to help determine if her appointment should be continued. The employees are asked about their views. The director's appointment is approved, and she makes an access request to the consulting firm for her personal information. In such a case, the content of the opinions given by the employees may be information about the director and is thus her personal information. However, the views the employees expressed about her, and the very fact that they expressed views, give the director significant information about the employees, and thus they may be, both from the perspective of the director and of the employees, as much about them as about her.

As well, the part of the opinion giver's (A's) statement that reveals why he or she holds an opinion about B – for example, that it arises from their observations, relationship, or experience with B, or that some third person shared information with them about B, is personal information about A. Such information may be inextricably interwoven with the opinion itself.

[para 11] As the Director of Adjudication noted in that Order, there are circumstances when an opinion may reveal as much information about the individual who provided the opinion, as about the individual who is the subject of the opinion. However, in the present case, the opinions of the neuropsychologist presented in the Report and the follow up letter represent an impartial, expert opinion about the Applicant based on testing and evaluation. As a result, the opinions in the Report and the follow up letter constitute information about the Applicant, but not information about the expert who provided the opinion.

[para 12] That the neuropsychologist wrote the Report and follow up letter, in conjunction with the neuropsychologist's name, is arguably personal information about the neuropsychologist as an identifiable individual. However, the Organization disclosed to the Applicant that the neuropsychologist had created the Report and a follow up letter in its response to the Applicant of May 15, 2007. In addition, it advised the Applicant that the neuropsychologist would provide an opinion when it booked the appointment for him. Consequently, I find that providing the Report and follow up letter to the Applicant would not have the effect of revealing, disclosing, or "making known" to the Applicant that the neuropsychologist had created these records, as it has already revealed this information to the Applicant in its initial response.

[para 13] I find that the notes of telephone conversations contain the personal information of those individuals who made telephone calls to an employee of the

Organization. These notes document that individuals made telephone calls or left messages and record the contents of calls and messages. I find that the fact that an individual called the Organization and spoke with an employee or left a message is personal information about an individual. It is also personal information that would be revealed to the Applicant if the notes were disclosed to the Applicant.

[para 14] In addition to containing information about individuals who had conversations or left voicemail messages, the notes of February 23, 2007, March 1, 2007 and March 14, 2007 contain opinions. I find that these notes reveal personal information about the provider of the opinions, as opposed to impartial, professional opinions that are not intended to convey information about the person providing the opinion. As a result, I find that section 24(3)(b) applies to these opinions.

[para 15] I agree with the distinction made by the Director of Adjudication between the application of subsections 24(1)(b) and (c) in Order P2007-002:

Adopting this more intuitive approach to opinions under PIPA, assuming the ‘given in confidence’ and ‘no consent’ conditions of section 24(3)(c) are met, this provision can be treated as applying to those opinions given by others in which there is no personal element. If such opinions meet the conditions in the provision, they are to be withheld even in the absence of a personal element relative to the maker.

I adopt this interpretation of the combined provisions. In the result, to the extent opinions convey personal information about the giver of the opinion, they must be withheld under 24(3)(b). Whether or not they have such a personal element, if they were given by an individual (whom they necessarily identify) in confidence, and the giver does not consent to disclosure of their identity, opinions must also be withheld under section 24(3)(c).

[para 16] I find that section 24(3)(c) does not apply to either the Report or the follow up letter, as the necessary element of confidence is lacking. To put it another way, disclosure of these records would not have the effect of revealing or “making known” the identity of their author. The identity of the neuropsychologist was provided to the Applicant, as was the fact that he would provide a Report to the Organization about the Applicant.

[para 17] As I have found that section 24(3)(b) applies to the notes, I will not consider whether section 24(3)(c) also applies to them.

[para 18] As I have found that section 24(3)(b) applies to the notes, I will consider whether the personal information of the individuals can be severed from the notes under section 24(4). Section 24(4) states:

If, in respect of a record, an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.

I find that the information of the individuals contained in the notes cannot be severed under section 24(4) of PIPA, as the contents of the notes would reveal the identity of the individuals to the Applicant, and consequently, personal information about them.

Issue B: If the information withheld by the Organization is the Applicant's personal information:

1. Did the Organization properly apply section 24(2)(d) to the information it withheld?

[para 19] Section 24(2)(d) authorizes an Organization to refuse to provide access to an applicant's personal information. It states:

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

(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;

[para 20] The Organization contends that section 24(2)(d) applies to the personal information in the Report and follow up letter, as well as the notes, as it takes the position that the neuropsychologist will not continue to provide services to the Organization if the Applicant is provided access to the Report and the follow up letter.

[para 21] The Applicant argues that the neuropsychologist is bound by contract to provide this type of information to the Organization.

[para 22] I find that disclosure of the Report and the follow up letter would not result in experts, such as the neuropsychologist, choosing not to provide opinions to the Organization. The opinion of the expert in this case is a medical legal opinion; the opinion is from an expert given for the purpose of assisting the Organization to decide whether the Applicant meets legal compensation requirements. Medical legal opinions are obtained by private and public insurers, litigants, employers, and any other body that must determine whether a medical condition meets legal requirements or has legal consequences.

[para 23] From its arguments, I gather that the Organization anticipates that the neuropsychologist will cease providing medical legal opinions to it, but will continue to provide these opinions to other clients, if the Report, follow up letter and notes are disclosed. However, if an expert wishes to continue in the business of providing medical legal opinions about individuals, he or she must provide the opinion to clients even though the clients may be subject to a statutory scheme or common law principle that requires disclosure of the information to the individual who is the subject of the opinion. In addition, the expert may also be subject to statutory schemes or common law principles requiring disclosure of the information.

[para 24] I find it very unlikely that the neuropsychologist would cease providing his medical legal opinions to the Organization if the information at issue were disclosed, any more than he is likely to cease providing his medical legal opinions to any other clients that are subject to PIPA, the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), or other legislative or common law schemes that may require disclosure of medical legal opinions about individuals to the individuals they are about. The information in the records establishes that acting as an expert witness and independent medical expert is an integral part of the neuropsychologist's business. While the Organization projects that the neuropsychologist will no longer provide services to it if the Report and the follow up letter are disclosed, all private organizations in Alberta, including the business of the neuropsychologist, are subject to PIPA and may be required by PIPA to disclose this type of information. Further, public sector clients who retain independent experts are subject to the FOIP Act, which arguably contains fewer bars to providing personal information to the individual who is the subject of the information than PIPA.

[para 25] I also note that there is no evidence before me from the neuropsychologist to support the argument that he will cease to provide his professional opinion to the Organization if the Report and the follow up letter are disclosed.

[para 26] For these reasons, I find that it is unlikely that disclosure of the information in the Report and the follow up letter is likely to result in information of this type no longer being provided. I therefore find that section 24(2)(d) does not apply to the information in the Report and the follow up letter.

2. Did the Organization properly apply section 24(3)(a) to the information it withheld?

[para 27] Section 24(3)(a) prohibits an organization from providing access to an applicant's personal information if disclosure could harm another individual. It states:

24(3) An organization shall not provide access to personal information under subsection (1) if

(a) the disclosure of the information could reasonably be expected to threaten the life or security of another individual;

[para 28] The Organization provided *in camera* arguments to the effect that giving access to the Report, the follow up letter and the notes to the Applicant would result in harm to another individual.

[para 29] The Applicant notes in his submissions that he received copies of the Report and the follow up letter from his treating psychiatrist. In addition, he received a copy of the Report from the neuropsychologist. Having read the files in their entirety, he is at a loss to know how their contents would result in harm to another individual.

[para 30] As the Applicant has already been given access to the information in the Report and the follow up letter, and harm to other individuals has not resulted, I find that it is highly unlikely that harm would result if the Organization now provided the Applicant access to the information in these same records.

[para 31] For these reasons, I find that section 24(3)(a) does not apply to the information withheld by the Organization.

3. If section 24(3)(a) applies to the severed information, can the Organization reasonably sever the information that is subject to section 24(3)(a) under section 24(4)?

[para 32] As I have found that section 24(3)(a) does not apply, there is no need to answer this question.

V. ORDER

[para 33] I make this Order under section 52 of the PIPA.

[para 34] I direct the Organization to give the Applicant access to all his personal information in the Report and the follow up letter.

[para 35] I confirm the decision of the Organization to deny access to the notes.

[para 36] I further order the Organization to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Teresa Cunningham
Adjudicator