

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2010-006

November 17, 2010

ALBERTA DISTILLERS LTD.

Case File Number P1176

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant made three access requests to Alberta Distillers Ltd. (the “Organization”) under the *Personal Information Protection Act* (“PIPA”). In those requests, the Applicant requested access to various pieces of information including a request for information regarding the Organization’s pension payments to her plan and for her medical information. The Organization responded to these requests by providing the Applicant with only a portion of the information requested. The Applicant requested a review of the Organization’s response.

The Adjudicator found that the Organization did not, in its initial response to the access requests, conduct an adequate search for the information under section 27(1)(a). The Adjudicator held that the Organization did not make a reasonable effort to search for the records nor did the Organization inform the Applicant in a timely way about what was done to search for the records. The Adjudicator also found that the Organization did not fulfill its duty under section 29(c) to provide an adequate response to the access requests.

Statutes Cited: **AB:** *Personal Information Protection Act*, S.A. 2003, c.P-6.5, ss. 1(k), 5(1), 5(2), 25, 27(1)(a), 29(c), 33, 46, 52, 52(3)(a).

Authorities Cited: **AB:** Orders: 98-003, 2001-016, F2007-029, P2006-005, P2006-012, P2008-001, P2008-007, P2009-005.

I. BACKGROUND

[para 1] On August 17, 2008, the Applicant requested from the Organization, a copy of all of the pension payments made by the Organization to her pension plan between December 18, 2004 and June 4, 2007 (the “first access request”).

[para 2] On August 19, 2008, the Organization responded to the request, informing the Applicant that the Organization would have credited her pension with one year of service during the specified time period. In that response the Organization also referred the Applicant to page 3 of the “Pension booklet”. The Applicant subsequently responded to the Organization by once again requesting information regarding the Organization’s pension payments.

[para 3] On September 12, 2008, the Applicant requested a copy of her last 12 years of “vacation entitlement” (the “second access request”).

[para 4] On September 16, 2008, an employee of the Organization responded to the Applicant informing the Applicant that the employee was busy with other matters and could not tell the Applicant when she would be able to respond to the request for vacation entitlement information. In that response, the employee also told the Applicant that she did not have access to the pension information.

[para 5] On October 2, 2008, the Applicant contacted the Organization questioning the Organization’s refusal to give her information regarding her vacation entitlement and pension.

[para 6] On December 1, 2008, the Applicant made another access request to the Organization (the “third access request”). The Applicant requested the following:

“all records containing my personal information from my second file that was not presented to me for my viewing along with copies of all my medical records.”

[para 7] On December 3, 2008, the Organization responded to this access request by informing the Applicant that her medical records were available from her doctor and that the Organization had already provided her with copies of the other records through previous requests. The Organization also requested that the Applicant contact the Organization only through her union representative.

[para 8] On December 14, 2008, the Applicant requested a review of the Organization’s decision. In particular, the Applicant reiterated her request for the following information:

- a) the Applicant’s “second file”;
- b) the vacation pay entitlement formula that the company used to calculate the Applicant’s vacation pay for the last 12 years;

- c) the Applicant's medical information; and
- d) the payments made by the Organization to the Applicant's pension plan between December 18, 2004 and June 4, 2007 and dates that those payments were made.

[para 9] Mediation was authorized but did not resolve the issues.

[para 10] On July 22, 2009, the Applicant requested that the Information and Privacy Commissioner conduct an inquiry into the matter.

[para 11] During the inquiry, the Organization and the Applicant each submitted an initial submission and a rebuttal submission.

II. INFORMATION AT ISSUE

[para 12] On August 17, 2008, September 12, 2008 and on December 1, 2008, the Applicant made an access request for information. On December 14, 2008, the Applicant requested a review of the Organization's response to her access requests. In particular, the Applicant requested that this Office review the Organization's response to her request for the following information:

- a) the Applicant's "second file";
- b) the vacation pay formula that the company used to calculate the Applicant's vacation pay for the last 12 years (to the date of the access request, September 12, 2008);
- c) the Applicant's medical information; and
- d) the payments made by the Organization to the Applicant's pension plan between December 18, 2004 and June 4, 2007 and dates that those payments were made.

[para 13] As such, I will only address this information as this is the only information properly at issue in this inquiry.

[para 14] In the Applicant's submissions, the Applicant requested access to additional information which was not identified in the request for review such as:

- vacation pay calculations (other than the vacation pay formula);
- information regarding the Applicant's pay and deductions;
- the test results on the blood found at the worksite on March 17, 2010;
- the hotline investigation report;
- the packaging and safety meeting minutes from August 2009 onward;
- a union grievance allegedly filed by the Applicant on November 17, 2004;
- investigation into asbestos exposure at the worksite in November, 2009;
- the recommended cleanup procedure report for the asbestos exposure; and
- investigation into the Applicant's exposure to blood at the work site on February 10, 2010.

[para 15] I will not address this information in this inquiry. The Applicant has not requested a review for this information. In addition, there is insufficient evidence that the Applicant made an access request for much of this information. I cannot review whether the Organization conducted an adequate search for this information under section 27(1)(a) or whether the Organization properly responded to an access request under section 29(c) when there is insufficient evidence before me that the Applicant made an access request for that information.

III. ISSUES

[para 16] There were 4 issues outlined in the inquiry notice:

- A) Is the access request for the Applicant's personal information?
- B) Is the Applicant's personal information in the Organization's custody or control?
- C) Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?
- D) Did the Organization comply with section 29(c) of the Act (contents of response)?

[para 17] In the Applicant's submissions, the Applicant also states that some of the records in the custody and/or control of the Organization are inaccurate. She states that she would like those records corrected. Section 25 of the Act addresses the right of an individual to request a correction while section 33 addresses an organization's duty to make reasonable efforts to ensure personal information that is collected, used and disclosed is accurate and complete. However, neither of these sections were identified as an issue in the inquiry notice. These sections are therefore not an issue in this inquiry and I will not make a determination in that regard.

[para 18] In addition, the Applicant states that the Organization did not have the authority to collect her "medical diagnostic information". The Organization's collection of the Applicant's personal information was also not identified as an issue in the inquiry notice. Therefore, I will not make a determination regarding this issue.

IV. DISCUSSION

A) **Is the access request for the Applicant's personal information?**

[para 19] "Personal information" is defined in section 1(k) of PIPA:

I In this Act,

...

(k) “personal information” means information about an identifiable individual;

[para 20] In Order P2006-005, the Commissioner held that in order for information to be considered personal information, the information must be “about” the individual, as opposed to “by” the individual or associated with the individual.

[para 21] As previously mentioned, in this inquiry, the Applicant requested the following information:

- a) her “second file”;
- b) the vacation pay entitlement formula that the company used to calculate her vacation pay for the last 12 years;
- c) her medical information; and
- d) the payments made by the Organization to her pension plan between December 18, 2004 and June 4, 2007 and the dates that those payments were made.

[para 22] The Organization states that the only “second file” that it maintains is a file that contains medical information, such as disability claim documents, WCB claim documents and related doctors’ notes. This file could also contain documentation regarding the nature of modified duties that an employee may be capable of performing as a result of an injury or disability claim of some kind. I find that this information would be considered the Applicant’s personal information to the extent that the information is about the Applicant.

[para 23] I find that the formula that the Organization used to calculate the Applicant’s vacation pay is the Applicant’s personal information as the outcome of the application of that formula is personal to the Applicant. I also find that the Applicant’s medical information and information regarding the Organization’s payments to the Applicant’s pension plan is the Applicant’s personal information. What the Applicant’s pension entitlement will be and information related to the calculation of that entitlement is personal information. I find that all of this information is about the Applicant.

B) Is the Applicant’s personal information in the Organization’s custody or control?

[para 24] Sections 5(1) and 5(2) of PIPA read:

5(1) An organization is responsible for personal information that is in its custody or under its control.

(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.

[para 25] In Order P2008-007, the Adjudicator held that the principles under the FOIP Act regarding custody and control are applicable to the issue of custody and control under PIPA.

[para 26] In its submissions, the Applicant specifically requested a copy of the 2004 and 2008 Pre-Placement Health Assessments Testing Results by LifeMark. The Applicant stated that she would like the copy of this report that “is being received by the Organization”, which I interpret to mean is in the possession of the Organization.

[para 27] In the Organization’s submissions the Organization states that although it did not initially have custody of this record, it has now obtained a copy of the record (pages 536-542) from LifeMark. In addition, the Organization states that it does not object to providing this record to the Applicant. As such, I find that the custody and/or control of this record is no longer an issue in this inquiry and I will not make a determination in that regard.

C) Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?

[para 28] Section 27(1)(a) of PIPA reads:

27(1) An organization must

(a) make every reasonable effort

(i) to assist applicants, and

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

[para 29] An organization has an obligation to conduct a reasonable search for records in its custody and/or under its control that are subject to an access request under PIPA (Orders P2006-005, P2008-001).

[para 30] In Order P2006-012, the Adjudicator addressed the burden of proof regarding an adequacy of a search. The Adjudicator held that the burden first lies on an applicant to show “some basis” as to why an organization is or may be in possession of a particular record that it failed to locate, or failed to provide. The burden then shifts to the organization to show that an adequate search was completed.

[para 31] An adequate search has two components. First, an organization must make every reasonable effort to search for the records requested. Second, the organization must inform the applicant, in a timely manner, about what has been done to search for the requested record (Orders P2009-005, 2001-016, F2007-029). Further, the

decision as to whether an adequate search was conducted must be based on the facts relating to how a search was conducted in a particular case (Orders P2009-005, 98-003).

Did the Organization make a reasonable effort to search for the records?

[para 32] After a review of the information before me, I find that the Organization did not make a reasonable effort to search for records responsive to the Applicant's first access request. In that access request, the Applicant requested a copy of the pension payments made by the Organization to her pension plan between December 18, 2004 and June 4, 2007 and the dates on which those payments were made. Although the Organization informed the Applicant that she would have received one year credited service, the Organization did not respond to the Applicant's request for information regarding the monetary amount that the Organization contributed to her pension. There is also insufficient evidence that the Organization searched for this specific information at the time of the access request and, if so, who conducted the search, the steps taken and the scope of the search. The Organization also did not address whether these records exist and, if not, why the Organization believes they do not exist.

[para 33] The Organization states that, prior to the inquiry, it requested that the plan administrator generate a statement, record 535, "showing more detailed calculations forming the basis of the figures set out in the pension statements". However, record 535 once again appears to only contain information regarding the Applicant's credited service. Although the record contains numerical information under a number of headings entitled "hours", it does not contain information regarding the Organization's monetary contribution to the Applicant's pension plan and the dates those contributions were made.

[para 34] I find that the Organization did not make a reasonable effort to search for records in response to the first access request. I note that my determination in this regard only concerns the Organization's failure to make a reasonable effort to search for the requested records. I am not making a decision as to whether these records exist or whether the Organization made and/or was required to make a payment(s) to the Applicant's pension plan.

[para 35] In addition, I find that the Organization did not make a reasonable effort to search for the vacation formula which the Applicant requested as part of her second access request. The information and evidence before me shows that in the Organization's initial response to the access request, an employee of the Organization informed the Applicant that the employee was busy with other matters and could not tell the Applicant when she would be able to respond. I find that there is insufficient evidence and information before me that a search was conducted at the time of the request or that specific steps were taken to identify and locate the records. However, I note that at the inquiry, the Organization included a copy of the collective bargaining agreement as an attachment to its affidavit which outlines the vacation pay formula.

[para 36] Lastly, I find that the Organization did not make a reasonable effort to search for the records in response to the Applicant's third access request for her "second

file” and her medical information. The information and evidence before me shows that in the Organization’s initial response to the request, the Organization informed the Applicant that her medical records were available from her doctor and that the Organization had already provided her with copies of the other records through previous requests. I find that there is insufficient information and evidence before me that the Organization conducted a search at the time of the request or that specific steps were taken to identify and locate records. The information and evidence before me shows that the Organization did not provide the Applicant with the bulk of the responsive records until the inquiry, at which time the Organization identified an additional 378 records numbered 1-378.

[para 37] However, notwithstanding the Organization’s initial response, I find that at the date of the inquiry, the Organization has fulfilled its obligation to conduct a reasonable search for records in response to the second and third access requests. In the Organization’s submissions and affidavit, the Organization provided information and evidence regarding the adequacy of its search for the records that it took prior to the inquiry. Upon review of this information I am satisfied that the Organization has now fulfilled its obligation to conduct a reasonable search in regard to these two access requests.

[para 38] I also note that in the Applicant’s submission, the Applicant claims that the Organization should be in possession of additional information which includes:

- a) Minutes allegedly taken at meetings on February 24, 2010, February 26, 2010, November 18, 2004, August 15, 2008, August 22, 2008 and September 12, 2008;
- b) Memo allegedly written by the Production Services Manager on June 16, 2005;
- c) Medical information about the Applicant (other than records 1-378 that were provided to the Applicant);
- d) A record of phone conversation between Applicant and the Human Resources Manager on June 15, 2005 (other than memos numbered 112, 138 and 159); and
- e) Memo from the former Director of Human Resources regarding the Applicant’s medical notes.

[para 39] However, after a review of the Applicant’s submission, I do not find that the Applicant has fulfilled its burden of proof as to why the Organization may be in possession of these records. I accept the Applicant’s assertions that she believes that these records exist. However, as Adjudicator, I cannot simply assume that the Applicant has fulfilled her burden of proof in regard to these records, the Applicant must provide sufficient evidence to that effect.

Did the Organization inform the Applicant, in a timely manner, about what has been done to search for the requested records?

[para 40] I find that the Organization did not inform the Applicant, in a timely manner, about what had been done to search for the requested records in response to the three access requests. As previously mentioned, there is insufficient evidence and information before me that, in the Organization's initial response, that the Organization conducted a search for the information requested in the Applicant's access requests or that steps were taken to locate the records. There is also insufficient evidence and information that the Organization informed the Applicant in a timely manner about what was done to search for the requested records.

D) Did the Organization comply with section 29(c) of the Act (contents of response)?

[para 41] Section 29(c) reads:

29 In response to a request made under section 24, the organization must inform the applicant

...

(c) if access to all or part of the applicant's personal information is refused,

(i) of the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) of the name of the person who can answer on behalf of the organization the applicant's questions about the refusal, and

(iii) that the applicant may ask for review under section 46.

[para 42] Section 29(c) states that if an organization refuses to give an applicant access to her personal information, the organization must provide the applicant with reasons for the refusal and the provisions of the Act on which it is based, the name a person who can answer questions regarding the refusal, and that the applicant may ask for review under section 46.

[para 43] After a review of all of the information and evidence before me, I find that the Organization did not comply with section 29(c). In particular, I find that the Organization did not properly respond to the Applicant's first access request for information regarding the organization's pension payments. For the reasons previously given, I find that, in its initial response, there is insufficient evidence that the Organization searched for this information or took steps to find the information. I further find that the Organization's failure to respond to the request for information was,

in essence, a refusal under the Act. I also find that the Organization did not provide the reasons for the refusal, nor the provision of the Act on which the refusal was based. In addition, I find that the Organization did not specifically identify an individual that could answer questions about the refusal. There is also no evidence before me that the Organization informed the Applicant that she could ask for a review under section 46 of PIPA.

[para 44] In addition, I find that the Organization also did not comply with section 29(c) in its initial response to the Applicant's second access request for the vacation entitlement formula. In response to this access request, an employee of the Organization informed the Applicant that the employee was busy with other matters and could not tell the Applicant when she would be able to respond. I find that this response was, in essence, a refusal under the Act. I also find that the Organization did not refer to a provision of the Act on which the refusal was based nor did the Organization specifically identify an individual who could answer questions about the refusal. There is also no evidence before me that the Organization informed the Applicant that she could ask for a review under section 46 of PIPA.

[para 45] Lastly, I find that the Organization did not fulfill the section 29(c) criteria in its initial response to the Applicant's third access request on December 1, 2008 for access to her medical records and to her "second file". The Organization responded to the request by sending an email to the Applicant informing her that her medical records were available from her doctor and the Organization had already provided her with copies of the other records, notwithstanding that the Organization later identified, at the inquiry stage, records 1-378 as responsive to the request. I find that the Organization's response was, in essence, also a refusal under the Act. I also find that the Organization did not refer to a provision of PIPA on which the refusal was based. Furthermore, the Organization did not specifically identify an individual within the Organization that could answer questions about the refusal nor did it inform the Applicant that she could ask for a review under section 46 of PIPA.

V. ORDER

[para 46] I make the following order under section 52 of PIPA:

A) Is the access request for the Applicant's personal information?

[para 47] I find that the information in the Applicant's "second file" is the Applicant's personal information to the extent that the information is about the Applicant. I also find that the formula that the Organization used to calculate the Applicant's vacation pay, the Applicant's medical information and information regarding the Organization's payments to the Applicant's pension plan is the Applicant's personal information.

B) Is the Applicant's personal information in the Organization's custody or control?

[para 48] For the reasons provided in this Order, I find that the Organization's custody and/or control over the records at issue is no longer an issue in this inquiry. As such, I have not made a determination regarding this issue.

C) Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?

[para 49] I find that the Organization did not conduct an adequate search for responsive records and did not fulfill the requirements of section 27(1)(a) in regard to the first access request. As such, I order the Organization to take steps to meet its duty under section 27(1)(a) and to conduct an adequate search for the information requested in the first access request which was made on August 17, 2008.

[para 50] I also find that the Organization, in its initial searches for information, did not conduct an adequate search for responsive records and did not fulfill the requirements of section 27(1)(a) in regard to the second and third access requests. However, at the date of inquiry, I find that the Organization had conducted an adequate search as required by section 27(1)(a). Under section 52(3)(a) I now confirm that the Organization has performed its duty under section 27(1)(a) in regard to the second and third access requests.

D) Did the Organization comply with section 29(c) of the Act (contents of response)?

[para 51] I find that the Organization did not comply with section 29(c) of the Act in response to the Applicant's first access request. I therefore order the Organization to provide an adequate response to the Applicant in regard to this access request.

[para 52] However, I find that as of the date of the inquiry, the Organization has provided the Applicant with information in response to the second and third access requests. As such I do not find that it is necessary to order the Organization to provide an adequate response under section 29(c) to the Applicant in regard to those access requests.

[para 53] I further order the Organization to notify me in writing, within 50 days of its receipt of this Order, that the Organization has complied with this Order.

Lisa McAmmond
Adjudicator