

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2010-010

December 14, 2010

**ANTHONY CLARK INTERNATIONAL INSURANCE BROKERS
LTD.**

Case File Number P1106

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

Summary: The Applicant made an access request to Anthony Clark International Insurance Brokers Ltd. (the “Organization”) under the *Personal Information Protection Act* (“PIPA”). In those requests, the Applicant requested access to all information related to him. The Organization responded to these requests by providing the Applicant with copies of some information responsive to his request. The Applicant requested a review of the Organization’s response.

The Adjudicator found that the Organization did not, in its response to the access request, 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.

Statutes Cited: **AB:** *Personal Information Protection Act*, S.A. 2003, c.P-6.5, ss. 1(k), 27, 29, 33, 34, 52, 59, 60; *Provincial Offences Procedure Act*, R.S.A. 2000, c.P-34.

Authorities Cited: **AB: PIPA Orders:** P2006-005, P2006-012, P2008-001, P2009-005, P2010-006; **FOIP Orders:** 98-003, 2001-016, F2007-029.

I. BACKGROUND

[para 1] On May 5, 2008, the Applicant requested, from the Organization, a copy of all information related to him. As part of that access request, the Applicant requested the calculations the Organization used to determine his auto insurance rate.

[para 2] On August 21, 2008, the Organization responded to the request, providing the Applicant with copies of some information responsive to the request.

[para 3] On September 17, 2008, the Applicant requested a review of the Organization's decision. The Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. This was not successful and the Applicant requested an inquiry on March 16, 2009. A written inquiry was set down.

[para 4] During the inquiry, the Organization and the Applicant each submitted an initial submission and a rebuttal submission. In addition, the Applicant and the Organization each made an additional submission.

II. INFORMATION AT ISSUE

[para 5] The information at issue consists of all information in the custody and/or control of the Organization that relates to the Applicant.

[para 6] In the Applicant's submissions, the Applicant stated that he would also like a copy of the information that the Organization supplied to the Alberta Insurance Council on July 29, 2008. As this information postdates the Applicant's access request of May 5, 2008, I will not address this information in this inquiry. I find that this information is not properly at issue in this inquiry.

III. ISSUES

[para 7] There were 3 issues outlined in the inquiry notice:

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

[para 8] In the Applicant's submissions, the Applicant questions the security of the information that was sent and received by one of the Organization's brokers. 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 while section 34 addresses an organization's duty to make reasonable security arrangements against risks such as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction. Neither of these sections were identified as an issue in the inquiry notice. These sections are therefore not at issue in this inquiry and I will not make a determination in that regard.

IV. DISCUSSION

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

[para 9] "Personal information" is defined in section 1(k) of PIPA:

In this Act,

...

(k) "personal information" means information about an identifiable individual;

[para 10] 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 11] In the Applicant's access request, the Applicant requested copies of all information related to him. I find that this information is the Applicant's personal information to the extent that it is "about" the Applicant. In the Applicant's access request, the Applicant also specifically requested the calculations the Organization used to determine the Applicant's auto insurance rate. I find that this information is also the Applicant's personal information as some of the information used in the calculations and the outcome of those calculations is personal to the Applicant. I find this information is about the Applicant.

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

[para 12] Section 27 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,

and

(b) at the request of an applicant 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.

(2) An organization must, with respect to an applicant's personal information, create a record for the applicant if

(a) the record can be created from a record that is in electronic form and that is under the control of the organization, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not reasonably interfere with the operations of the organization.

[para 13] 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 14] 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 P2010-006, 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 P2010-006, 98-003).

[para 15] 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 16] After a review of all of the Applicant’s submissions, I find that the Applicant has fulfilled his burden to show that the Organization may be in possession of additional records. In the Applicant’s initial submission, the Applicant provided this Office with copies of several pieces of correspondence that he did not receive in response to this access request. This correspondence consisted of seven emails that he either sent to the Organization or received from the Organization and two letters that he sent to the Organization’s CEO and the Privacy Officer. Although the Organization provided a letter from the Internet Service Provider which states that the emails identified by the Applicant no longer exist in electronic form, it is unclear whether those records exist in paper form. In addition, although the Organization states that it did not receive the two letters identified by the Applicant, I accept the Applicant’s assertions that they were sent to the Organization. Although I would have preferred affidavit evidence from the Applicant on this point, I find that the Applicant, in providing this Office with his copy of the emails and letters, has fulfilled his initial burden to show “some basis” as to why the Organization may be in possession of additional records. The burden of proof now shifts to the Organization to show that it conducted an adequate search for the records.

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

[para 17] Prior orders of this Office have held that, in general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Organization to identify and locate records responsive to the Applicant’s access request;
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.;

- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search; and
- Why the Organization believes no more responsive records exist than what has been found or produced (see Orders F2007-029, P2009-005).

[para 18] After a review of the Organization's submissions, I find that the Organization did not make a reasonable effort to search for the requested records. In its submissions, the Organization did not provide sufficient evidence regarding the steps it took to identify and locate the records nor did it provide sufficient evidence regarding the scope of its search. Although the Organization states that it contacted its broker and, in preparation for the inquiry contacted the CEO and Privacy Officer of the Organization, the Organization did not provide further information in this regard. In particular, the Organization did not state which individuals it contacted before it responded to the access request, including other individuals within the Organization that may also have copies of the responsive records.

[para 19] In addition, although the Organization stated that its files are kept on a server and that some of its files are stored off-site, the Organization did not provide any other evidence as to the physical site of the searches, the databases searched nor the extent of the search for paper records either within the Organization's filing system or within individual files.

[para 20] I also find that the Organization did not provide sufficient evidence regarding the steps it took to identify and locate records. For example, the Organization did not provide evidence as to whether it performed a keyword search and, if so, what searches were conducted. In addition, the Organization did not state whether it reviewed its records retention and disposition schedules nor did it provide evidence regarding the identity of the person who performed the search. Although the Organization's August 21, 2008 response to the access request was signed by the Organization's Privacy Officer, the Organization did not confirm whether this individual and/or other individuals were involved in the search.

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

[para 21] 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 Applicant's access request. Although the Applicant made an access request on May 5, 2008, the Organization did not respond to the Applicant until August 21, 2008, which was over three months after the access request was made. Furthermore, in the Organization's response, the Organization did not sufficiently inform the Applicant as to what had been done to search for the records. In the Organization's response, the Organization informed the Applicant that some of the responsive information had been stored off-site, however, the Organization did not provide the Applicant with further information as to what had been done to search for the records.

Offences and penalties under PIPA / damages for breach of PIPA

[para 22] In the Applicant's submissions, the Applicant asked the Information and Privacy Commissioner to impose penalties on the Organization for breaching the Act. Section 59 lists the actions that constitute an offence under PIPA and the penalties that could be awarded if a person is found to have committed an offence, while section 60 sets out the cause of action an individual may have against an organization.

[para 23] I do not have the jurisdiction to convict an organization for an offence or assess penalties under section 59 of PIPA. Section 52 of PIPA gives me the power to make an order under PIPA. This section does not, however, give me the power to make a finding of guilt or innocence, to convict persons for offences under PIPA, or to assess penalties. Instead, the *Provincial Offences Procedure Act* gives jurisdiction to the Provincial Court of Alberta to decide whether a person has committed an offence under section 59 of PIPA and to assess an appropriate penalty (Order P2006-005). Furthermore, although section 60 sets out the cause of action an individual may have against an organization, an individual who wishes to pursue such a cause of action must pursue it through the Courts and not through this Office.

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

[para 24] Section 29 reads:

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

(a) as to whether or not the applicant is entitled to or will be given access to all or part of his or her personal information,

(b) if the applicant is entitled to or will be given access, when access will be given, and

(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 25] After a review of all of the information and evidence before me, I find that the Organization complied with the requirements of section 29. I find that in the Organization's August 21, 2008 letter, the Organization informed the Applicant that it would provide the Applicant with a copy of all of his personal information and that this information was attached to the letter. Although the Applicant later questioned whether the Organization had conducted an adequate search for the responsive information, I find

that the August 21, 2008 letter nevertheless fulfilled the requirements of section 29 in regard to the records that were provided to the Applicant.

V. ORDER

[para 26] I make the following order under section 52 of PIPA:

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

[para 27] I find that the information requested in the Applicant's access request is the Applicant's personal information to the extent that the information is about the Applicant. In particular, I find that the calculations that the Organization used to determine the Applicant's auto insurance rate is the Applicant's personal information.

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

[para 28] I find that the Organization did not conduct an adequate search for responsive records. I find that the Organization did not fulfill the requirements of section 27(1)(a). I order the Organization to take steps to meet its duty under section 27(1)(a).

[para 29] I order the Organization to make a reasonable effort to search for the information responsive to the access request and to inform the Applicant about the steps it took to locate the records and the results of the search. The Organization must also provide the Applicant with another response under section 29, including whether the Applicant will be given access to additional responsive information and, if not, the reasons for the refusal and the provision of PIPA on which the refusal is based.

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

[para 30] I find that the Organization's August 21, 2008 response to the Applicant's access request complied with section 29 of PIPA.

[para 31] 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