

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER P2010-011

November 24, 2010

#### CLEAN HARBORS LODGING SERVICES

Case File Number P1257

Office URL: [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Complainant, a former employee of the Organization, alleged that the Organization contravened the *Personal Information Protection Act* (the “Act”) by telling other employees that he was terminated from the Organization, and telling the Complainant’s potential employer that he had requested his personnel file from the Organization.

The Adjudicator found that some of the alleged uses and/or disclosures did not occur.

The Organization admitted that it disclosed the fact that the Complainant had requested his personnel file, but it argued that it had the authority to do so under section 15(3) of the Act. Section 15(3) permits a disclosure of personal information to another organization if the other organization is collecting the information for the purpose of recruiting a potential employee, and the collection is reasonable.

Because the Organization failed to demonstrate why the Complainant’s potential employer needed to know that the Complainant had requested his personnel file from the Organization, the Adjudicator found that the collection and disclosure of that information was not reasonable for the purpose of recruiting the Complainant. The Adjudicator therefore concluded that the Organization did not have the authority to disclose the information, and ordered it to stop disclosing the Complainant’s personal information in contravention of the Act or in circumstances that are not in compliance with the Act.

**Statutes Cited: AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1(k) [now 1(1)(k)], 1(j) [now 1(1)(j)], 4(3), 7, 7(1), 7(1)(d), 8, 8(1), 8(2), 8(3), 15, 15(1)(b), 15(2)(a), 15(3), 16, 17, 18, 19, 20, 21, 33, 52, 52(3)(e) and 52(4); *Personal Information Protection Amendment Act, 2009*, S.A. 2009, c. 50.

**Authorities Cited: AB:** Orders P2005-001, P2006-006/P2006-007, P2006-008 and P2007-002; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112.

## **I. BACKGROUND**

[para 1] The Complainant was an employee of a company formerly known as Denman Industrial Trailers Ltd. and now known as Clean Harbors Lodging Services (the “Organization”). In a form received by this Office on March 12, 2009, the Complainant complained that the Organization contravened the *Personal Information Protection Act* (the “Act” or “PIPA”) by improperly revealing his personal information to potential employers. He subsequently also alleged that employees of the Organization improperly revealed his personal information to other employees of the Organization.

[para 2] The Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. This was not successful, and the Complainant requested an inquiry on June 24, 2009. A written inquiry was set down.

[para 3] On May 1, 2010, amendments to PIPA came into force by virtue of the *Personal Information Protection Amendment Act, 2009*. However, because the Organization’s alleged contravention of the Act occurred prior to the amendments, the legislation applies as it existed previously. For the purpose of cross-reference, I note below when there has been an amendment to a section of PIPA that I discuss in the Order.

## **II. INFORMATION AT ISSUE**

[para 4] The information that the Organization allegedly used and/or disclosed in contravention of PIPA is information about the Complainant being terminated from the Organization, and information about him requesting his personnel file from the Organization.

## **III. ISSUE**

[para 5] The Notice of Inquiry, dated July 20, 2010, set out the issue of whether the Organization used and/or disclosed the Complainant’s personal information in contravention of the Act or in circumstances that are not in compliance with the Act.

#### IV. DISCUSSION

##### **Did the Organization use and/or disclose the Complainant's personal information in contravention of the Act or in circumstances that are not in compliance with the Act?**

[para 6] The initial burden of proof rests with the Complainant, in that he has to have some knowledge, and adduce some evidence, regarding what personal information was used and/or disclosed, and the manner in which the personal information was used and/or disclosed; the Organization then has the burden of establishing that its use and/or disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 7] To assist the parties in making their submissions on the issue set out above, the Notice of Inquiry raised questions, or sub-issues, that the parties were invited to address if they considered them to be relevant. I identify these questions as they arise below, discussing them to the extent necessary.

Did the Organization use and/or disclose the "personal information" and/or "personal employee information" of the Complainant, as those terms are defined in the Act?

[para 8] In his rebuttal submissions, the Complainant says that he is concerned only with three incidents of alleged uses and/or disclosures, which he describes as follows:

*[An identified] Safety Coordinator [of the Organization] and [an identified] Project Manager revealed personal information to new hires. One person I am aware of was [an identified] Safety Supervisor... He was told inaccurate information which was malicious and defamatory. This should not have been mentioned as it caused und[ue] personal hardship on me. There are probably others who were told this insulting information.*

*[An identified] Vice-President ... provided personal information to Guardian Person[nel]. He stated to this agency that I had asked for my file. He has admitted to doing this. The result was not being hired.*

*[The] Vice-President ... told [an identified] Wastewater Coordinator [that] I was terminated from the company. This is not true and this information should not be conveyed. The information is slanderous. A second point on this issue [is that] there was no mention of this in the file material obtained from Clean Harbors.*

[para 9] In the first paragraph above, the Complainant says that representatives of the Organization told a Safety Supervisor and "probably others" certain information, but

he does not elaborate on what that information consisted of. However, given his allegation in the third paragraph, I am prepared to assume that the information that was allegedly told to the Safety Supervisor and probably others was that the Complainant was terminated from the Organization. Accordingly, on my review of the Complainant's submissions, I characterize the alleged uses and/or disclosures by the Organization as follows:

- alleged uses and/or disclosures when the Safety Supervisor, the Wastewater Coordinator and probably others within the Organization were told that the Complainant was terminated from the Organization; and
- an alleged disclosure to Guardian Personnel, an outside organization, that the Complainant had requested his personnel file from the Organization.

[para 10] In an e-mail dated February 25, 2009 to a representative of the Organization, which the Complainant attached to his initial complaint form sent to this office, the Complainant also wrote that someone within the Organization told potential employers about "personality conflicts". I will not address this, given the Complainant's indication in his rebuttal submissions that he is concerned only with the incidents described above.

(a) *Alleged uses and/or disclosures involving the Wastewater Coordinator, Safety Supervisor and probably others*

[para 11] The Complainant alleges that the Organization told various individuals within the Organization that he was terminated. In his rebuttal submissions, the Complainant stated that he "can prove Issue 1 and Issue 3" – being these alleged uses and/or disclosures – but he did not actually provide any proof at that time. He stated that the Organization had not responded to the two issues, and that he was "still expecting an explanation on these issues; either a denial or acceptance of the facts". However, in its initial submissions to which the Complainant had an opportunity to respond, the Organization effectively denied that the foregoing alleged uses and/or disclosures occurred. It said that the "only" personal information of the Complainant that it used and/or disclosed, as alleged, is the information that it disclosed to Guardian Personnel, which I discuss below.

[para 12] In its rebuttal submissions, the Organization says that it conducted investigations into the alleged uses and/or disclosures involving the Wastewater Coordinator, the Safety Supervisor and a third individual, being a newly hired employee identified by the Complainant in his request for inquiry dated June 24, 2009. Two of the individuals who allegedly revealed or learned the Complainant's personal information no longer work for the Organization and could not be reached. The Organization says that another two of its representatives, being the Project Manager and the Vice-President, denied using and/or disclosing the Complainant's information as alleged. It also says that the newly hired employee denied learning information about the Complainant.

[para 13] After the close of submissions in the inquiry, the Complainant provided a copy of an e-mail exchange between himself and the Wastewater Coordinator. The e-mail exchange occurred on September 20 and 21, 2010, which was after the Complainant received the Organization's initial submissions and before the deadline for his rebuttal submissions. However, I accepted the late evidence because the e-mail was relevant and the Complainant appeared to have misunderstood that he should have provided all of his evidence with his previous submissions.

[para 14] In the e-mail exchange, the Complainant asks the Wastewater Coordinator:

*Did [the Vice-President of the Organization] tell you I was fired and that was the reason he couldn't rehire me[?]*

The Wastewater Coordinator replies:

*[Y]es you'r righth [sic] that was the reason he told me.*

[para 15] I gave the Organization an opportunity to respond to the Complainant's late evidence. It submitted a letter from the Vice-President, in which he writes:

*After agreeing to [the Wastewater Coordinator's] insistence at the end of January 2010 to hire back [the Complainant] and not being sure about the procedure to do this, I conducted a consultation early February 2010 with the Human Resources and Legal teams down in Boston MA.*

*My recollection from that meeting was that Clean Harbors' preference was to advertise for the position rather than automatically re-hire former Clean Harbors' staff.*

*Coming back to Edmonton I stopped the hiring process and verbally communicated to [the Wastewater Coordinator] that I could not hire back [the Complainant] because of this reason. I never mentioned anything about the situation around [the Complainant's] dismissal; this had nothing to do with the conversation at all!!*

*[The Wastewater Coordinator] was very aware of the circumstances surrounding [the Complainant's] release from the company because of his close relationship with him and his multiple conversations with [the Complainant] after [the Complainant's] dismissal. He may have assumed this reasoning but it was no part of any conversation I had with [the Wastewater Coordinator].*

*At one point in the past I had to ask [the Wastewater Coordinator] to be careful on his communication with [the Complainant] because [the Complainant] was still very interested [i]n the company's affairs.*

[para 16] The initial burden that the Complainant is required to meet has been termed the “evidential” burden, in that he must adduce some evidence that his personal information has been used and/or disclosed by the Organization and some evidence about the manner in which it was used and/or disclosed by the Organization (Order P2006-008 at para. 11). Although the threshold for the evidential burden is low, and not as stringent as a “legal” burden, the Complainant must meet the evidential burden regarding the uses and/or disclosures that he has alleged in order for the burden to then shift to the Organization to justify the disclosures [Order P2006-008 at paras. 12 and 19, affirmed in *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112 at para. 108].

[para 17] The Complainant has adduced some evidence regarding the alleged use and/or disclosure of his personal information involving the Vice-President of the Organization and the Wastewater Coordinator. He has provided an e-mail, in which the alleged recipient of the Complainant’s personal information says that he received it. In response, the Organization has provided correspondence from the individual alleged to have used and/or disclosed the information, in which that individual says that he did not communicate the information to the alleged recipient.

[para 18] In the face of the conflicting evidence, I find that the Complainant has not met the evidential burden of proving that the Vice-President of the Organization used and/or disclosed the Complainant’s personal information by telling the Wastewater Coordinator that the Complainant was terminated from the Organization. The Organization refutes the Complainant’s evidence by saying that the Complainant had multiple conversations with the Wastewater Coordinator, and suggesting that the Wastewater Coordinator learned the circumstances of how the Complainant ceased employment with the Organization from the Complainant himself. The Vice-President of the Organization says that, during his conversation with the Wastewater Coordinator, the latter may have assumed something about the Complainant’s personal information, but did not actually hear it from the Vice-President. The Vice-President says that the Organization decided to advertise for the Complainant’s previous position rather than automatically re-hire him. He says that this different reason for not re-hiring the Complainant, rather than not re-hiring him because he had been terminated, is what he disclosed to the Wastewater Coordinator.

[para 19] In my view, the evidence adduced by the Complainant, regarding the alleged use and/or disclosure of his personal information involving the Vice-President and the Wastewater Coordinator, has been satisfactorily rebutted by the Organization. I therefore find that, on a balance of probabilities, the alleged use and/or disclosure of the Complainant’s personal information did not occur.

[para 20] In the above e-mail exchange between the Complainant and the Wastewater Coordinator, the Complainant might also be alleging that the Vice-President of the Organization improperly used his personal information – being the information about him being terminated from the Organization – to make a decision not to re-hire him. The Complainant did not clearly raise this alleged use earlier in the inquiry. In any

event, for similar reasons to those just discussed, I find that the Complainant has not adduced sufficient evidence to show that the Vice-President used information about the Complainant's termination in this respect. Again, the Vice-President explains that the reason that the Complainant was not re-hired was due to a preference to advertise for the position rather than automatically re-hire former staff.

[para 21] As for the alleged uses and/or disclosures involving the Safety Supervisor and probably others, all that the Complainant essentially says in his submissions is that he is "aware" of the alleged uses and/or disclosures. He provided no supporting information. The allegations remain unattributed assertions, in that there is no evidence to suggest the truth of the alleged facts. The Complainant effectively wants me to find that the alleged uses and/or disclosures involving the Safety Supervisor and others occurred because he says that they occurred. The Complainant's submissions are insufficient for me to make such findings. I therefore find that the foregoing alleged uses and/or disclosures did not occur.

[para 22] In his submissions, the Complainant says that new employees of the Organization were told inaccurate, malicious and defamatory information about him, and that the Wastewater Coordinator was told that the Complainant was terminated, which he says is not true. The Complainant also notes that there was no mention of "this" in his file obtained from the Organization. I take him to be submitting that his file contained no information about any termination, and that the allegedly used and/or disclosed information about the termination was therefore inaccurate.

[para 23] Given the foregoing, I considered whether an issue under section 33 of PIPA should be added to the inquiry. Section 33 [amendments to which came into force on May 1, 2010] requires an organization to make every reasonable effort to ensure that any personal information used and/or disclosed by it, or on its behalf, is accurate and complete. However, I find it unnecessary to add the issue. The allegedly incomplete or inaccurate information is about the Complainant's termination, but I have found that the Complainant has not established the alleged uses and/or disclosures involving this information.

*(b) Alleged disclosure to Guardian Personnel*

[para 24] The Organization admits that it told another organization, Guardian Personnel, that the Complainant had requested his personnel file from the Organization. I find that this was a disclosure of the Complainant's personal information. It was also a disclosure of his personal employment information.

[para 25] Under section 1(k) of PIPA [renumbered section 1(1)(k) as of May 1, 2010], "personal information" means "information about an identifiable individual". I find the fact that the Complainant requested his personnel file from the Organization to be about him as an identifiable individual. I considered whether the Complainant's request for his personnel file was a work-related act that was about his work, as opposed to about him personally. What an organization's employee has done in his or her

professional or official capacity is not personal or about the person, unless the information is evaluative or is otherwise of a “human resources” nature, or there is some other factor that gives it a personal dimension (Order P2007-002 at para. 50). Here, I find that the Complainant’s request for his personnel file is of a “human resources” nature, and has the additional personal dimension of having occurred after the Complainant had ceased employment with the Organization. The request cannot be construed as a work-related act, or an act in the Complainant’s professional or official capacity. The fact that the Complainant requested his personnel file is therefore his “personal information” within the meaning set out in PIPA.

[para 26] At the time of the Organization’s alleged contravention of PIPA, section 1(j) [which was amended and renumbered section 1(1)(j) as of May 1, 2010] defined “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, or*

*(ii) a volunteer work relationship*

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

[para 27] The above definition does not say that it applies in respect of a former employee [the definition of “personal employee information” now does, as of May 1, 2010]. However, section 21 of PIPA authorizes certain disclosures if an individual “was an employee of the organization”, and section 15(3) authorizes the same types of disclosures where an organization is providing information to another organization that is “recruiting a potential employee” – which will often occur when the individual being discussed is no longer employed by the organization providing the information. The definition of “personal employee information” should be interpreted in the context of sections 15(3) and 21, which clearly contemplate that an organization may disclose the personal employee information of former employees (Orders P2006-006/P2006-007 at para. 21).

[para 28] The Complainant’s personnel file was created by virtue of his employment with the Organization. The fact that he requested a copy of that file was a fact collected by the Organization solely for the purposes of managing, and possibly terminating, the employment relationship. I therefore find that the fact that the Complainant requested his personnel file from the Organization is also his “personal employee information” within the meaning set out in PIPA.

If the Organization used and/or disclosed the “personal information” and/or “personal employee information” of the Complainant, was the use and/or disclosure excluded from the Act by virtue of section 4(3)?

[para 29] I have found a disclosure of information about the Complainant. Under section 4(3) [amendments to which came into force on May 1, 2010], PIPA does not apply to certain information, or to the disclosure of certain information. The Complainant and the Organization both submit that the disclosure to Guardian Personnel is not excluded from the application Act.

[para 30] I find that PIPA applies to the Organization’s disclosure to Guardian Personnel that the Complainant had requested his personnel file from the Organization. None of the provisions of section 4(3) are relevant so as to exclude the Act’s application.

If the use and/or disclosure is not excluded from the Act by virtue of section 4(3), did the Organization use and/or disclose the information contrary to, or in compliance with, section 7(1) of the Act?

[para 31] I have found a disclosure of the Complainant’s personal information by the Organization. Section 7(1)(d) of PIPA is therefore the relevant section here. It reads as follows:

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

...

*(d) disclose that information unless the individual consents to the disclosure of that information.*

[para 32] As just set out, an organization must not disclose an individual’s personal information (which includes his or her personal employee information) unless the individual consents, or unless “this Act provides otherwise” – which means with prior notice under section 8(3), or where consent is not required under sections 15(3), 20 or 21. The Notice of Inquiry accordingly included the following questions for the parties to address to the extent that they found relevant:

Did the Organization have the authority to use and/or disclose the information without consent, as permitted by sections [15(3),] 17, 18, 20 or 21 of the Act?

If the Organization did not have the authority to use and/or disclose the information without consent, did the Organization obtain the Complainant’s consent in accordance with section 8 of the Act before using or disclosing the information?

Did the Organization have the authority to use and/or disclose the information under section 8(3) of the Act?

[para 33] PIPA contemplates the disclosure of personal information with written or oral consent under section 8(1), with deemed consent under section 8(2), or with proper prior notice under section 8(3). The Organization does not argue that it disclosed the Complainant's information on any of these grounds.

[para 34] Sections 17 and 18 are not relevant here, as they deal with the use rather than the disclosure of personal information. Section 20 [amendments to which came into force on May 1, 2010] permits the disclosure of personal information, without an individual's consent, in various circumstances, but the Organization does not argue that section 20 applies in this case. I reviewed the various circumstances under that section and find that none of them exist in this case.

[para 35] The Organization instead argues that it had the authority to disclose the fact that the Complainant requested his personnel file, without the Complainant's consent, under section 15(3) of PIPA. For this reason, I have now included a reference to section 15(3) in the first sub-question above. At the same time, I note that the content of section 15(3) [which no longer appears in PIPA as of May 1, 2010] is essentially the same as section 21. Section 15(3) permits a disclosure where a particular collection is permitted, and that same type of disclosure is also permitted under section 21 [amendments to which also came into force on May 1, 2010].

[para 36] At the time of the Organization's alleged contravention of PIPA, section 15 read, in part, as follows:

*15(1) Notwithstanding anything in this Act other than subsection (2), an organization may collect 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 collection of the information is for the purpose of recruiting a potential employee.*

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

- (a) the collection is reasonable for the purposes for which the information is being collected,*
- (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 collecting the information, provided the individual with reasonable notification that the*

*information is going to be collected and of the purposes for which the information is going to be collected.*

*(3) An organization may disclose personal employee information about an individual without the consent of the individual where that information is being disclosed to an organization that is collecting that information under subsection (1).*

...

[para 37] Section 15(3) authorizes a disclosure of personal employee information to another organization without an individual's consent if, among other things, the other organization is collecting the information for the purpose of recruiting the individual as a potential employee under section 15(1)(b), and the collection is reasonable for the purpose for which the information is being collected under section 15(2)(a).

[para 38] The Organization says that Guardian Personnel contacted it to obtain an employment reference regarding the Complainant. The Organization argues that Guardian Personnel was collecting information for the purpose of recruiting the Complainant to a new position, and that the Organization therefore had the authority to disclose the fact that the Complainant had requested his personnel file.

[para 39] The Complainant submits that the disclosure to Guardian Personnel was not authorized by section 15, as the fact that he had requested his personnel file was not relevant to Guardian Personnel's potential recruitment of him.

[para 40] Section 15 authorizes the collection and disclosure of information only where the particular information is being collected and disclosed for the purpose of recruiting a potential employee, and it is reasonable to collect and disclose the particular information for that purpose. The fact that the collection and disclosure occurred during a reference check is not sufficient. Here, the Organization does not demonstrate why Guardian Personnel required the information about the Complainant's request for his file in order for Guardian Personnel to recruit him. The Organization states that the disclosure was following a reference question posed by Guardian Personnel, when the Vice-President of the Organization responded that he did not feel comfortable releasing any information without the Complainant's consent. However, the Organization does not explain why it had to disclose the fact of the Complainant's request for his personnel file in order to convey to Guardian Personnel that it wished to obtain the Complainant's consent before answering the reference questions. The Organization itself says that the disclosure was "inadvertent".

[para 41] On review of the Organization's submissions, I fail to see how the Complainant's request for his personnel file from the Organization had anything to do with Guardian Personnel potentially recruiting him. The collection of the information by Guardian Personnel was not reasonable under section 15(2)(a), which is required in order for the disclosure by the Organization to be permitted under section 15(3). I therefore

find that the Organization did not have the authority to disclose the Complainant's personal employee information under section 15(3).

[para 42] Because the Organization has not established that it was authorized to disclose to Guardian Personnel that the Complainant had requested his personnel file, I conclude that it disclosed the Complainant's personal information contrary to section 7(1) of PIPA.

Did the Organization use and/or disclose the information only for purposes that are reasonable, and only to the extent that was reasonable, as permitted by sections 16 or 19 of the Act?

[para 43] I have found a disclosure of the Complainant's personal information by the Organization. Section 19 is therefore the relevant section here. It reads as follows:

*19(1) An organization may disclose personal information only for purposes that are reasonable.*

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

[para 44] As discussed in the preceding part of this Order, the Organization has not established that it had the authority to disclose to Guardian Personnel that the Complainant had requested his personnel file from the Organization. Because the Organization has not established that it had such authority, it follows that the Organization did not disclose the Complainant's personal information for a reasonable purpose or to a reasonable extent.

[para 45] I conclude that the Organization did not disclose the Complainant's personal information in accordance with section 19 of PIPA.

## **V. ORDER**

[para 46] I make this Order under section 52 of PIPA.

[para 47] I find that the Organization disclosed to the Complainant's potential employer that the Complainant had requested his personnel file from the Organization. I also find that this was in contravention of PIPA or in circumstances that were not in compliance with PIPA.

[para 48] Under section 52(3)(e), I order the Organization to stop disclosing the Complainant's personal information in contravention of the Act or in circumstances that are not in compliance with the Act.

[para 49] Under section 52(4), I specify, as a term of this Order, that the Organization ensure that its officers and employees are made aware of the Organization's obligations under PIPA. Compliance with this portion of the Order can be achieved by communicating the requirements of PIPA to the officers and employees in a way that the Organization considers appropriate.

[para 50] 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. The notice to me should include a description of what the Organization did to comply with the preceding paragraph of this Order.

Wade Riordan Raaflaub  
Adjudicator