

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2010-015

December 22, 2010

STUART OLSON CONSTRUCTORS INC.

Case File Number P1152

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Personal Information Protection Act* (“the Act”), the Applicant requested all records containing his personal information from his former employer, Stuart Olson Constructors Inc. (“the Organization”). The Organization responded to the Applicant’s request and provided him with his personal information but withheld records which it believed related to an investigation or to which legal privilege applied.

The Applicant asked that the Office of the Information and Privacy Commissioner (“this office”) review the response of the Organization. As well, the Applicant complained that the Organization did not have proper procedures regarding collection, use, and disclosure of personal information in place, as required by the Act.

The Adjudicator found that most of the information in the records withheld by the Organization was not the Applicant’s personal information. Therefore, those records did not need to be disclosed by the Organization.

As well, the Adjudicator found that the Organization had not performed an adequate search, nor provided the Applicant with an adequate response to his access request.

Finally, the Adjudicator found that the Organization had proper procedures in place for the collection, use, and disclosure of personal information and that it had not destroyed the Applicant’s personal information in contravention of the Act.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1(j), 1(k), 6, 21, 24, 27, 29, 35, 46, and 52.

Authorities Cited: AB: Orders P2006-004.

Cases Cited: *Solosky v. The Queen* (1980), 1 S.C.R. 821.

I. BACKGROUND

[para 1] After reviewing the Applicant's submissions, which were difficult to follow, I gather that the Applicant was employed by the Organization. In the months leading up to his departure from the Organization, the Applicant was given a favourable performance evaluation.

[para 2] Following his resignation from his employment with the Organization, the Applicant made a complaint to Employment Standards regarding his final pay cheque, and started a Provincial Court action against the Organization's parent company. Although the complaint was resolved and the civil claim was eventually settled, given what was said in the course of the litigation and the information that Employment Standards was given by the Organization, the Applicant suspected that the Organization may have incorrect personal information about him in its records. The Applicant also felt that the Organization may have been disclosing incorrect information about him to potential employers, making it difficult for the Applicant to secure employment positions that he felt he should have been offered. As well, the Applicant believed that the Organization had altered records it disclosed to Employment Standards, to the Applicant's detriment.

[para 3] On September 8, 2008, the Applicant made an access request under the *Personal Information Protection Act* (the "Act") for all of his personal information being held by the Organization so that he could review the information, and request corrections if necessary. His access request stated that he wanted:

1. All personal records pertaining to myself held by [the Organization] and/or any of its bodies operating under the [Organization's] 'umbrella'.
2. Any notes regarding telephone conversations, meetings or discussions with regard to or referencing myself, during or subsequent to my employment with [the Organization] to include all or any of its bodies operating under the [Organization's] 'umbrella'.
3. Electronic information in any format with regard to or referencing myself, during or subsequent to my employment with [the Organization] to include all or any of its bodies operating under the [Organization's] 'umbrella'.
4. Any material with regard to my performance and/or competence, including reference to such, including any comments made verbally by officers of [the Organization] and/or any of its bodies operating under the [Organization's] 'umbrella'.

5. Any material with regard to any contract or conditions of such or agreements, including reference to such, including any comments made verbally by officers of [the Organization] and/or any of its bodies operating under the [Organization's] 'umbrella'.

[para 4] On September 22, 2008, the Organization responded to the Applicant's request, attaching photocopies of the Applicant's personal information but stating, "[i]nformation related to investigations or protected by legal privilege are not accessible."

[para 5] On October 14, 2008, the Applicant wrote to this office to request a review of the Organization's response. The Commissioner authorized a portfolio officer to investigate and attempt to resolve the issues between the parties but this was unsuccessful and the Applicant requested an inquiry.

[para 6] The Applicant and the Organization submitted both initial and rebuttal submissions. I also received comments from the Applicant about the Organization's index, which was provided by the Organization in its rebuttal submissions.

II. INFORMATION AT ISSUE

[para 7] At issue are 34 pages of records in the custody and control of the Organization which were entirely withheld from the Applicant. As well, the Applicant raises the issue that there are missing records, which are also at issue.

III. ISSUES

[para 8] The Notice of Inquiry dated February 17, 2010 lists the issues for this inquiry as follows:

Issue A: Did the Organization collect/use/disclose "personal information" or the "personal employee information" of the Applicant as defined in sections 1(j) and 1(k) of the Act?

Issue B: Did the Organization obtain the Applicant's consent in accordance with section 8 of the Act before collecting/using/disclosing the information?

Issue C: If the Applicant did not consent to the collection/use/disclosure of his "personal information" or "personal employee information", did the Organization collect/use/disclose the information in contravention of, or in compliance with, section 7(1) of the Act? In particular,

- a. **Did the Organization have the authority to collect/use/ disclose the Applicant's personal information without consent, as permitted by sections 14, 17 & 20 of the Act?**

- b. Did the Organization have the authority to collect/use/disclose the information without consent, because the information was the Applicant's "personal employee information" as that term is defined in section 1(j) of the Act, and the terms of section 15, 18 & 21 were met?

Issue D: If the Organization had the authority to collect/use/disclose the personal information under sections 14, 17 & 20 but not under sections 15, 18 & 21, did it collect/use/disclose the information contrary to, or in accordance with, sections 11, 16(1)/19(1) of the Act (collection/use/disclosure for purposes that are reasonable)?

Issue E: If the Organization had the authority to collect/use/disclose the personal information under section 14, 17 & 20 but not under section 15, 18 & 21, did it collect/use/disclose the information contrary to, or in accordance with sections 11(2), 16(2) & 19(2) of PIPA (collection/use/disclosure to the extent reasonable for meeting the purposes)?

Issue F: Did the Organization comply with section 24(1)(a), (b) and (c) of the Act?

Issue G: Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?

Issue H: If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)? In particular,

- a. Did the Organization properly apply section 24(2)(a) (legal privilege)?
- b. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?
- c. Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?

Issue I: If the withheld records contain the personal information of the Applicant, and if section 24(3)(b) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

Issue J: 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)?

Issue K: Did the Organization comply with section 29(c) of the Act (contents of response)?

Issue L: Did the Organization fail to retain the Applicant’s personal information for legal or business purposes as long as reasonable, as required by section 35 of the Act?

Issue M: Did the Organization comply with section 6(a) (develop and follow policies and practices) and 6(b) (provide information about policies and practices)?

[para 9] Issues A-E above relate to whether the Applicant’s personal information was properly collected, used, and/or disclosed. On careful review of the Applicant’s access request, request for inquiry, and submissions, I note that the Applicant peripherally makes mention of the Organization collecting, using, or disclosing his personal information, but these are not complaints that the Organization collected, used, or disclosed his information contrary to the Act. The Applicant’s comments relative to the collection, use, and disclosure of his personal information are made in passing in the course of expressing his concerns about the accuracy of the information and whether he was given access to all of it. I note that although the Notice of Inquiry sets out issues A-E which deal with collection, use, and disclosure, the Applicant did not make any specific arguments relating to improper collection, use, or disclosure of his personal information.

[para 10] Given that the Applicant has not complained that his personal information was collected, used, or disclosed contrary to the Act, I will not discuss issues A-E. I will confine my findings to the issues that the Applicant has raised and is concerned with in this inquiry – the Organization’s response to his access request, its search, and its information management policies.

[para 11] As well, the Applicant raised several issues in addition to those listed above, including employment issues, issues regarding a release agreement signed as the result of the settlement of his litigation, and various other miscellaneous issues that do not relate to the Act and which I will not address in this Order.

IV. DISCUSSION OF ISSUES

F: Did the Organization comply with section 24(1)(a), (b) and (c) of the Act?

G: Was the information in the withheld records, or any of it, responsive to the Applicant’ request for his personal information?

[para 12] Section 24(1) of the Act states:

24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:

(a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization;

(b) the purposes for which the personal information referred to in clause (a) has been and is being used by the organization;

(c) the names of the persons to whom and circumstances in which the personal information referred to in clause (a) has been and is being disclosed.

[para 13] Section 24 of the Act allows the Applicant to make an access request but only for his own personal information. If the Organization has custody and control of the Applicant's personal information, the Organization's obligations under section 24 of the Act are engaged.

[para 14] However, if the Applicant makes a request for information in the possession of the Organization that is not his personal information, while records containing such information may be responsive to the Applicant's request, they are not responsive to a request for personal information, and the Organization has no obligation under the Act to provide such information.

[para 15] Section 1(k) of the Act defines personal information as, "information about an identifiable individual". In Order P2006-004 the Commissioner clarified this definition. He stated:

The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily "about" that person.
(Order P2006-004 at para 12)

[para 16] Therefore, information must be about an individual, and not merely related to an individual, in order to be the individual's personal information.

[para 17] The Organization provided me with unsevered copies of the records it found to be responsive to the Applicant's access request but that it withheld. Some of the records were withheld under section 24(2)(a) of the Act (legal privilege). I will deal with those specific records below.

[para 18] The remaining records were withheld under section 24 of the Act. The records include e-mails which deal with the Organizations' strategy in concluding its relationship with the Applicant, following his resignation. Though some of the information relates to the way the Organization is considering dealing with the Applicant generally, this information is about the Organization managing its business and finances,

and is not about the Applicant. Therefore, this information is not the Applicant's personal information.

[para 19] As the information in the withheld records that is the Applicant's personal information is limited, and intermingled with information that is not his personal information, I find that requiring the Organization to disclose the Applicant's personal information in this instance would not be reasonable within the terms of the opening words of section 24(1). The limited information to which the Applicant would be entitled would consist primarily of his name and some employment history. This is information that I assume the Applicant already knows and that, when disclosed not in the context of the entire e-mail, would be meaningless to the Applicant.

[para 20] The Organization also provided records to me which were disclosed to the Applicant by the Organization on September 22, 2008, November 3, 2008, and August 25, 2009. These records were provided in response to the Applicant's access request and include records relating to his hiring, vacations, performance, and resignation. These records are about the Applicant and are his personal information.

[para 21] The Applicant's access request was extensive and included requests both for his personal information and for information that was not about him and, therefore, was not his personal information. Although the non-personal information in the withheld records is responsive to the Applicant's access request, he has no right to it under the Act. If I narrow the Applicant's access request to just his personal information in the custody and control of the Organization, I find that the records that were withheld are not responsive to the Applicant's request for his personal information. The Organization has provided the Applicant with the greatest part of information that is his personal information other than information that would be meaningless to him if provided in a format severing non-personal information. I therefore find that the Organization has complied with section 24(1)(a) of the Act.

[para 22] However, the Organization did not advise the Applicant of the purposes for which his personal information was used or the persons to which it was disclosed – that is, whether it was disclosed to persons outside of the Organization, and the names of those persons. I find, therefore, that the Organization has not complied with sections 24(1)(b) or 24(1)(c) of the Act.

- H: If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)? In particular,**
- a. Did the Organization properly apply section 24(2)(a) (legal privilege)?**
 - b. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?**

c. Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?

I: If the withheld records contain the personal information of the Applicant, and if section 24(3)(b) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

[para 23] As I have found that the withheld records do not contain the Applicant's personal information, I do not need to comment on the applicability of section 24(2) and 24(3) of the Act. However, I do note that the information found at pages 8, 9, 10, 11, 22, 26, 27, 28, 29, and 34 are subject to legal privilege and specifically solicitor-client privilege.

[para 24] In *Solosky v. The Queen* the Supreme Court of Canada held that in order for solicitor-client privilege to apply to a record the following criteria must be met:

- a. it must be a communication between a solicitor and a client;
- b. which entails the giving or seeking of legal advice; and
- c. is intended to be confidential by the parties.

[para 25] The information on these pages consists of communications between the Organization and its lawyer regarding litigation involving the Applicant and advice about this litigation. By virtue of the nature of the communication and the subject matter, I find that this information was intended by the parties to be confidential, and, therefore, is covered by solicitor-client privilege.

[para 26] I also note that I did not receive pages 30, 31, 32, and 33, which I assume are the missing pages of a letter from the Organization's counsel to the Organization. If that is correct, I would also find that this information was subject to solicitor-client privilege.

J: 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 27] Section 27(1)(a) of the Act states:

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 28] Included in the scope of section 27 of the Act is an organization's duty to perform an adequate search in order to assist applicants and make complete responses to access requests.

[para 29] After reviewing the initial and rebuttal submissions from the parties, I requested more information from the Organization regarding its search. The Organization provided a letter, dated July 22, 2010, written by its Privacy Officer, who was the individual responsible for responding to the Applicant's access request.

[para 30] The Privacy Officer submits that personal information is retained primarily in three locations: a locked cabinet in the District Manager's office in Edmonton, a locked cabinet in the corporate office in Calgary and computer files with restricted access. The Privacy Officer searched these three locations and provided the Applicant with his personal information contained in the files.

[para 31] The Applicant's managers were also contacted as to whether they had any of the Applicant's personal information in their possession. One manager did have copies of legal correspondence relating to a law suit filed by the Applicant, but this information was not provided to the Applicant due to legal privilege. Finally, the Organization's "Performance and Development Management" software was searched and the Applicant was given copies of his personal information stored on that database.

[para 32] The Applicant believes that there are several records responsive to his request which in his view ought to be in the custody and control of the Organization but which have not been provided. These include a copy of his Performance and Development Review ("PDR"), a letter of complaint he sent to one of his managers, notes from a meeting between the Applicant and his manager, and e-mails and information he prepared for files on which he was working.

[para 33] The records provided by the Organization contain an electronic version of the Applicant's PDR. The electronic version of the PDR appears to be a transcribed copy of the handwritten PDR the Applicant provided as part of his initial submissions. The Organization did not provide me with a copy of the handwritten version of the Applicant's PDR. I agree with the Applicant that this is a record which one would expect to be in the custody and control of the Organization. Neither the Applicant nor I were given an explanation as to why it was not provided as a responsive record.

[para 34] The Applicant also states that he sent a letter to one of his managers which set out a list of complaints he had. According to the Applicant, this letter was the subject of a meeting between himself and one of his managers. This letter does not appear to be in any responsive records, and no explanation has been given as to why it was not included. I agree with the Applicant that this is also a record that one would expect to be in the responsive records.

[para 35] The Applicant also feels that notes of the meeting should have been taken and kept. The Act does not require an organization to make a record. If notes were not taken and there is no such record in the custody and control of the Organization, I cannot find that there ought to have been one. I have not been provided with any evidence that these notes ever existed. I can deal only with records that exist, not with ones that ought to have been made in the Applicant's opinion, but were not.

[para 36] The Applicant provided little information regarding the e-mails he believes should have been in the responsive records. He states that these e-mails related to business matters and employment matters. The content of e-mails relating to business matters is not the personal information of employees, it is their work product. E-mails relating to a person's employment may be his or her personal employee information. However, I do not have enough information about the content of e-mails relating to the Applicant's employment to make a finding that such e-mails containing his personal information existed. I do note, however, that I was not given any information from the Organization suggesting that it searched for e-mail communications relating to the Applicant.

[para 37] Finally, the Applicant seeks information that he prepared for files that was left on the files when he left his employment. It is my understanding from the Applicant's submissions that the records related to files he was working on and are about the projects he was working on. Such information in a work context is not 'about' the person creating it; it is work product. Therefore, this information is not the Applicant's personal information.

[para 38] Based on the information provided by the Organization on July 22, 2010, I find that, for the most part, the Organization conducted an adequate search for records responsive to the Applicant's request. However, I note the deficiency that the Organization does not appear to have searched for e-mail communications that may consist of or contain the Applicant's personal information, nor did the Organization provide, in the alternative, a reason why electronic records were not searched. As well, an original copy of the Applicant's PDR and complaint letter were not in the responsive records. Therefore, I cannot find that the Organization conducted an adequate search.

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

[para 39] Section 29(c) of the Act states:

29 (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 a review under section 46.*

[para 40] I have reviewed the Organization's response to the Applicant dated September 22, 2008. The response was short but did state that, "[i]nformation related to investigations or protected by legal privilege are not accessible." It also stated that if the Applicant had any questions, he could contact the Privacy Officer.

[para 41] This response was deficient in that it did not cite the provisions of the Act on which the Organization relied to deny access. It also did not advise the Applicant that he could ask for a review under section 46 of the Act.

[para 42] As the Applicant did ask for a review and this matter has now proceeded through an inquiry, in which the Organization's reasons for refusing access were examined in detail, ordering the Organization to provide an adequate response at this time would serve no purpose. Therefore, I will not order the Organization to do so. However, the Organization ought to take note of my findings regarding the inadequacy of its response when responding to future access requests.

L: Did the Organization fail to retain the Applicant's personal information for legal or business purposes as long as reasonable, as required by section 35 of the Act?

[para 43] Section 35 of the Act states:

35 Notwithstanding that a consent has been withdrawn or varied under section 9, an organization may for legal or business purposes retain personal information as long as is reasonable.

[para 44] On July 22, 2010, in response to questions I posed, the Organization confirmed that to the best of the Privacy Officer's knowledge, no records containing the Applicant's personal information have been destroyed.

[para 45] As mentioned above, there are some records that appear to be missing from the responsive records provided to the Applicant. It is possible that these records may have been destroyed and that is why they were not provided. However, I have no evidence that this is the case and no compelling argument that, if these records were destroyed, that they were not kept "as long as reasonable" for legal or business purposes.

[para 46] I find, on a balance of probabilities, that the Organization has not breached section 35 of the Act.

M: Did the Organization comply with section 6(a) (develop and follow policies and practices) and 6(b) (provide information about policies and practices)?

[para 47] The Applicant argues that the Organization does not have proper policies in place or, if it does, it is not properly following the policies.

[para 48] Section 6 of the Act states:

6 An organization must

(a) develop and follow policies and practices that are reasonable for the organization to meet its obligations under this Act, and

(b) make information about the policies and practices referred to in clause (a) available on request.

[para 49] As I stated above, I was given a copy of the Organization's policy manual which contains its privacy policy and practices relating to both its clients' and employees' personal information. I have reviewed the policy manual as it relates to the Organization's policies and practices for collection, use and disclose of employees' personal employee information and find that the policies and practices are reasonable. The policy is essentially a restatement of the Act as it relates to personal employee information, and therefore it meets the Organization's obligations under the Act.

[para 50] As well, the policy was made available to the Applicant when he was hired. I have no evidence that the Applicant requested the policy manual from the Organization and was denied access; therefore, I cannot find that the Organization breached section 6(b) of the Act.

V. ORDER

[para 51] I make this Order under section 52 of the Act.

[para 52] I find that the information withheld from the Applicant by the Organization was either not responsive to the Applicant's request or was withheld in accordance with section 24 of the Act.

[para 53] I find that the Organization did not conduct an adequate search for the Applicant's records, and order the Organization to search for any e-mails responsive to the Applicant's request, or, confirm that no such records exist and indicate why it believes that they do not exist.

[para 54] I order the Organization to provide the Applicant with an original copy of his Performance and Development Review and complaint letter, or, confirm that these records are no longer in existence.

[para 55] In accordance with section 24(1)(b) and 24(1)(c) of the Act, I order the Organization to indicate the purposes for which the Applicant's information was being used and to whom it disclosed the Applicant's personal information, if it did disclose any of the Applicant's personal information.

[para 56] I find that the Organization did not provide an adequate response as required by section 29 of the Act.

[para 57] I find that the Organization has complied with sections 6(a), 6(b), and 35 of the Act.

[para 58] 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.

Keri H. Ridley
Adjudicator