

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2010-017

December 22, 2010

THE CHURCHILL CORPORATION

Case File Number P1221

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 The Churchill Corporation (“the Organization”), the “parent” company of his former employer. The Organization responded to the Applicant’s request and provided him with his personal information, but withheld records to which it claimed 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 made comments that the Organization did not properly collect, use, and/or disclose his personal information, did not properly respond to his access request, and did not ensure that the information it collected about him was accurate and complete as required by the Act.

The Adjudicator found that the information withheld had been properly withheld pursuant to solicitor-client privilege (section 24(2)(a) of the Act).

As well, the Adjudicator found that the Applicant had met his evidential burden to show that the Organization disclosed his personal information only with respect to a letter of August 29, 2008. She held that this personal information had been disclosed to the recipient as intended by the Applicant or, in the alternative, that the Applicant’s consent to disclosure of the information by the Organization was deemed within the terms of section 8(2) of the Act.

The Adjudicator also found that the Organization had met its duty to assist the Applicant and had responded properly to his request. However, the Adjudicator ordered the Organization to inform the Applicant as to anyone to whom it had disclosed his personal information.

Finally, the Adjudicator found that the Organization had complied with section 33 of the Act, as the Applicant had not provided evidence or compelling argument that the information the Organization collected was inaccurate or incomplete.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ss. 1(k), 7, 8(2), 16, 19, 24(1), 24(2), 27(1)(a), 29(c), 33, and 46, 52.

Authorities Cited: AB: Order P2006-008 and P2010-016

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

I. BACKGROUND

[para 1] The Applicant was an employee of Stuart Olson Constructors Inc., an independent company, which is a subsidiary of The Churchill Corporation (“the Organization”).

[para 2] On September 8, 2008, the Applicant wrote a letter to the Organization requesting access to the following records and information pursuant to the *Personal Information Protection Act* (“the Act”):

1. All personal records pertaining to myself held by the [Organization] and/or any of its subsidiaries.
2. Any notes regarding telephone conversations, meetings or discussions with regard to or referencing myself, during or subsequent to my employment, with or between any subsidiary of the [Organization] or any individual or organization.
3. Electronic information in any format with regard to or referencing myself, during or subsequent to my employment, with or between any subsidiary of the [Organization] or any individual or organization.
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 subsidiaries, or with or between any individual or organization.
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 subsidiaries.

[para 3] On February 3, 2009, the Organization responded to the Applicant, providing him access to hardcopy and electronic records, with the exception of those that it severed or withheld pursuant to section 24(2)(a) of the Act.

[para 4] On February 25, 2009, the Applicant wrote to this office and requested a review. The Information and Privacy Commissioner authorized a portfolio officer to investigate and attempt to resolve the issues between the parties but this was unsuccessful. A written inquiry was initiated and the Applicant and the Organization provided both initial and rebuttal submissions.

II. ISSUES

[para 5] The Notice of Inquiry dated February 17, 2010 listed the issues for this inquiry. To properly reflect the issues raised in the submissions and for better flow in the discussion, I have re-ordered and re-worded the issues as follows:

Issue A:

Did the Organization collect/use/disclose “personal information” of the Applicant as defined in PIPA section 1(k)?

Issue B:

Did the Organization obtain the Applicant’s consent in accordance with section 8 of the Act before using/disclosing the information and if so, was the information used/disclosed for a reasonable purpose?

Issue C:

Did the Organization collect/use/disclose the “personal information” in contravention of, or in compliance with, section 7(1) of the Act. In particular:

- 1. Did the Organization have the authority to collect/use/disclose the information without consent, as permitted by sections 14, 17, and 20 of the Act?**
- 2. 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?**

Issue D:

If the Organization had the authority to collect/use/disclose the personal information under sections 14, 17, and 20 but not under sections 15, 18, and 21, did it collect/use/disclose the information contrary to, or in accordance with sections 11, 16(1)/19(1) of the Act?

Issue E:

If the Organization had the authority to collect/use/disclose the personal information under sections 14, 17, and 20 but not under sections 15, 18, and 21, did it collect/use/disclose the information contrary to, or in accordance with sections 11(2), 16(2), and 19(2) of the Act?

Issue F:

Did the Organization ensure that the Applicant's personal information collected/used/disclosed by or on behalf of the Organization was accurate and complete as required by section 33 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) of the Act? In particular, did the Organization properly apply section 24(2)(a) of the Act?

Issue I:

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

Issue J:

Did the Organization comply with section 27(1)(a) of the Act?

Issue K:

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

[para 6] In his submissions, the Applicant also raises issues relating to a release agreement between the Applicant and the Organization, the Organization's compliance with the *Business Corporations Act*, and the Organization's compliance with its own whistleblower policy. In my view, these matters have no relevance to whether the Organization complied with the Act, and therefore, in this inquiry, I will deal with only the issues noted above.

[para 7] Throughout the Applicant's submissions, he also makes reference to what occurred between the parties or what was said to this office's portfolio officer by the Organization. He also included a letter from the portfolio officer regarding her opinion following her investigation. The inquiry into this matter is a separate process from the investigation and is *de novo*. Therefore, I will not rely on what was said by the Organization to the portfolio officer, or the portfolio officer's opinion, when I make my findings in this inquiry.

III. DISCUSSION OF ISSUES

- A: Did the Organization collect/use/disclose “personal information” of the Applicant as defined in PIPA section 1(k)?**
- B: Did the Organization obtain the Applicant's consent in accordance with section 8 of the Act before using/disclosing the information and if so, was the information used/disclosed for a reasonable purpose?**

[para 8] In Order P2006-008, the Information and Privacy Commissioner explained the burden of proof in inquiries related to complaints about the collection, use, or disclosure of personal information under the Act, as follows:

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information.

This initial burden is what has been termed the “evidential burden”. As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act.

(Order P2006-008 at para 10 and 11)

[para 9] Therefore, the Applicant needs to provide some evidence that his personal information was collected, used, or disclosed in order to meet his initial burden, and to thereby trigger the Organization's burden to establish that it collected, used, or disclosed the Applicant's personal information in compliance with the Act.

[para 10] The Applicant's submissions do not, for the most part, focus on the issue of the Organization's collection, use, or disclosure of his personal information. In fact, having reviewed his submissions carefully, I do not believe that he takes issue with the Organization's collection or use of his personal information. For the most part, he seems to take issue only with the Organization's failure to disclose his personal information to him.

[para 11] However, there is one exception to this generalization. In his initial submissions, the Applicant does take issue with an e-mail from an Organization's employee to another individual ("AB") in which the employee forwarded a letter from the Applicant dated August 29, 2008 to AB. On the basis of evidence that this was done, the Applicant submits that his personal information was improperly disclosed by the Organization on this, and perhaps other, occasions.

[para 12] The forwarded letter contained information about the Applicant's employment history and a recent settlement agreement reached between the Organization and the Applicant. I find that the letter does contain the Applicant's personal information.

[para 13] However, with respect to any other possible instances of disclosure, I find that the Applicant has not met his evidential burden to show that any of his personal information was disclosed to other third parties. Therefore, I will discuss only the possible disclosure of the Applicant's personal information to AB.

[para 14] In its initial submissions, the Organization explained that AB was a member of its Board of Directors and a lawyer by profession and that the letter was forwarded to him to obtain his feedback. The Applicant's letter of August 29, 2008 was addressed to the Organization. Though put to the attention of the Chairman of the Organization, the letter starts with the greeting, "Dear Sirs". I think that it is reasonable to assume that the Applicant meant for the Organization as a whole to be made aware of the content of his letter, and this would certainly include the Organization's Board of Directors. Therefore, the action of the Organization in forwarding the letter to AB may be most appropriately seen as furthering an intended disclosure of the information by the Applicant himself.

[para 15] This position is further supported by the fact that after the Organization had explained AB's role with the Organization in its initial submissions, the Applicant did not take issue with the Organization forwarding the letter to AB in his rebuttal submissions. Instead, the Applicant's rebuttal position on this point was that AB was not acting in his capacity as a lawyer (hence that the information was not subject to solicitor client privilege), and that AB may have "created, used or disclosed" the Applicant's personal information "with other individuals". The Applicant provided no evidence of any further collection, use, or disclosure by AB and therefore, has not met his burden in this regard.

[para 16] However, if forwarding the letter was in fact a disclosure by the Organization, I note that section 8(2) of the Act states:

8(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and

(b) it is reasonable that a person would voluntarily provide that information.

[para 17] Therefore, I would find that the Applicant may be deemed to have consented to the use or disclosure of his letter of August 29, 2008 to AB, within the terms of section 8(2) of the Act, when he sent the letter to the Organization. The letter concerned the legality of a recent release agreement between the Organization and the Applicant. If there was merit to the Applicant's arguments, this would have implications for the Organization, to which the Board of Directors would have to respond. Given this, I find that it was reasonable that the Applicant would voluntarily provide it for the purpose of its use or disclosure to AB so as to enable AB to provide any responses he had to the issues raised by the Applicant.

[para 18] I further find, if the Organization disclosed the information, that this disclosure was for a reasonable purpose, and reasonable for the purpose, within the terms of sections 16(2) and 19(2) of the Act.

[para 19] Section 16 of the Act governs an organization's use of personal information and states:

16(1) An organization may use personal information only for purposes that are reasonable.

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

[para 20] Section 19 of the Act governs an organization's disclosure of personal information and states:

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 21] The Organization stated its purpose in using or disclosing the Applicant's personal information when it forwarded the Applicant's letter to AB was to obtain AB's feedback. As the letter was about the Applicant contesting the propriety of a recent settlement and release agreement between the Applicant and the Organization, I think it is reasonable to assume that it was providing the information to AB to get his opinion as both a member of its Board of Directors and as a lawyer. I find this to be a reasonable purpose for the use or disclosure. I also find that forwarding the entire letter to AB was necessary to meet this purpose and therefore sections 16 and 19 of the Act are satisfied.

[para 22] Therefore, I find that the Organization complied with the Act in its use or disclosure of the Applicant's personal information.

- C: Did the Organization collect/use/disclose the “personal information” in contradiction of, or in compliance with, section 7(1) of the Act. In particular:**
- 1. Did the Organization have the authority to collect/use/disclose the information without consent, as permitted by sections 14, 17, and 20 of the Act?**
 - 2. 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?**
- D: If the Organization had the authority to collect/use/disclose the personal information under sections 14, 17, and 20 but not under sections 15, 18, and 21, did it collect/use/disclose the information contrary to, or in accordance with sections 11, 16(1)/19(1) of the Act?**
- E: If the Organization had the authority to collect/use/disclose the personal information under sections 14, 17, and 20 but not under sections 15, 18, and 21, did it collect/use/disclose the information contrary to, or in accordance with sections 11(2), 16(2), and 19(2) of the Act?**

[para 23] Given my finding above that the Applicant consented to the use or disclosure of the personal information that he has established was used by or disclosed to AB, I do not need to address whether the Organization had authority to disclose the information in the absence of consent, and the related questions that follow there from.

- F: Did the Organization ensure that the Applicant's personal information collected/used/disclosed by or on behalf of the Organization was accurate and complete as required by section 33 of the Act?**

[para 24] Section 33 of the Act states:

33 An organization must make a reasonable effort to ensure that any personal information collected, used or disclosed by or on behalf of an organization is accurate and complete.

[para 25] As I stated above, the Applicant's main issue in this inquiry is whether he was properly denied access to the information he requested for the purposes of determining if his personal information in the custody of the Organization was accurate.

I have no evidence before me nor has the Applicant made any compelling argument that suggests that any personal information that may have been collected, used, or disclosed by the Organization was inaccurate or incomplete. Therefore, there is no basis on which to conclude that the Organization failed to comply with section 33 of the Act.

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

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) of the Act? In particular, did the Organization properly apply section 24(2)(a) of the Act?

[para 26] Section 24(2) of the Act allows an Organization to withhold an applicant’s personal information from that applicant in certain circumstances, including, where the information is protected by any legal privilege. Section 24(2)(a) states:

24(2) An organization may refuse to provide access to personal information under subsection (1) if

(a) the information is protected by any legal privilege;...

[para 27] The Organization claims that all of the information which it refused to give to the Applicant is subject to solicitor-client privilege.

[para 28] 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 29] The Organization decided not to provide this office with copies of the records it withheld pursuant to solicitor-client privilege. Instead, it chose to use this office’s “Solicitor-Client Privilege Adjudication Protocol” (“the protocol”). The protocol was designed to elicit information from an Organization which would allow an adjudicator to determine if solicitor-client privilege was properly being claimed without the Organization being required to disclose the records to this office.

[para 30] Following the protocol, the Organization advised me that the withheld records were communications between the Organization and its solicitor relating to ongoing litigation and an attachment described as “General Commentary on Canadian Privacy Legislation.” Given the circumstances surrounding the creation of these records (which was done in response to the Applicant’s civil claim and access request/privacy complaint) I find that, on a balance of probabilities, the records contained information in

which legal advice was sought and received and that the communications were intended to be confidential.

[para 31] Therefore, I find that the Organization properly applied section 24(2)(a) of the Act to the records it withheld from the Applicant.

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

J: Did the Organization comply with section 27(1)(a) of the Act?

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

[para 32] 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 33] Section 29(c) of the Act states:

29 In a 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 a review under section 46.

[para 34] As I discussed in Order P2010-016, the Organization did respond to the Applicant's access request but did so later than is allowed by the Act. The Organization's response dated February 3, 2009 attached the Applicant's personal information, stated the reasons for not disclosing certain records, referenced the Applicant's rights under section 46 of the Act, and provided the name of the person to whom the Applicant could direct any questions. Therefore, the Organization complied with section 29(c) of the Act.

[para 35] As well, I find that the Organization complied with section 27 of the Act in that, although its response was late, it did make every reasonable effort to assist the Applicant and respond accurately and completely.

[para 36] However, 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 37] The Organization's response did not state the purposes for which the Applicant's personal information has been and is being used, as required by section 24(1)(b) of the Act. However, I have already found that the Applicant's personal information was being used to elicit feedback from board members regarding a legal matter between the Applicant and the Organization; therefore, nothing would be gained, at this point in the process, by requiring the Organization to state the purpose for which it used the Applicant's personal information.

[para 38] The Organization also did not provide the Applicant with the names of persons to whom, and the circumstances in which, his personal information had been disclosed. I will direct the Organization to provide the Applicant with this information, subject to any information that may be withheld on the basis of solicitor-client privilege.

IV. ORDER

[para 39] I make this Order under section 52 of the Act.

[para 40] I find that when the Organization conveyed the Applicant's personal information to AB it was furthering the Applicant's own disclosure to AB, as a member of the Organization's Board of Directors, in accordance with his intentions, or, in the alternative, I find that the Applicant is deemed to consent to the Organization's disclosure of the information.

[para 41] I find no basis on which to conclude that the Organization contravened section 33 of the Act.

[para 42] I find that the information withheld from the Applicant by the Organization was withheld in accordance with section 24(2)(a) of the Act.

[para 43] I find that the Organization complied with section 27(1)(a) and 29(c) of the Act but did not comply with sections 24(1)(b) and 24(1)(c) of the Act. I order the Organization to inform the Applicant of the persons to whom his personal information has been or is being disclosed and the circumstances in which it was disclosed, if it did disclose any of the Applicant's personal information.

[para 44] I further order the Organization to notify me, in writing, within 50 days of the receiving a copy of this Order that it has complied with the Order.

Keri H. Ridley
Adjudicator