

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2011-002

September 29, 2011

DOUBLE L TOWING

Case File Number P1714

Office URL: www.oipc.ab.ca

Summary: Two individuals participated in the creation of a promotional video made on behalf of the Organization; both were employed with the Organization at the time the video was made, but were no longer employed with the Organization at the time of the complaints. The Complainants alleged that the Organization collected, used and disclosed their personal information in contravention of PIPA. Specifically, the Complainants alleged that the Organization told them that they would have an opportunity to view the promotional video before it was disclosed, and to decide at that time whether to consent to its disclosure.

The Adjudicator determined that the images of the Complainants in the promotional video constituted work product information, and not the Complainants' personal information under the Act. Therefore the Adjudicator found that *Personal Information Protection Act* ("PIPA") did not apply to the collection, use and disclosure of the Complainants' images in the promotional video.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 5, 52.

Authorities Cited: AB: Orders P2006-004, P2006-005, P2007-002, P2009-009, Investigation Report P2005-IR-004.

I. BACKGROUND

[para 1] Two individuals made separate complaints about the collection, use and disclosure of their personal information by the Organization, a vehicle towing company. Complainant A and Complainant B were both employees of the Organization at the time of the incidents from which the complaints arose.

[para 2] In spring of 2009, the Organization hired a contractor to make a promotional video. The video included images of various employees performing services offered by the Organization (e.g. changing tires, hooking vehicles up to be towed, and driving). Both Complainants state that the Organization has shown this video to its clients, thus disclosing their personal information, without obtaining their consent.

[para 3] Complainant A also complained that the Organization disclosed his personal information without consent when it posted a picture of him on its Facebook page.

[para 4] The Organization states that upon receiving notice of the complaints, it removed Complainant A's picture from its Facebook page, and has ceased to use the promotional video.

[para 5] The Commissioner authorized a portfolio officer to investigate and attempt to mediate the complaints under section 49 of PIPA. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 6] In his rebuttal submission, Complainant A indicated that since the Organization removed the parade photo from Facebook, he was no longer interested in pursuing that portion of his complaint.

II. INFORMATION AT ISSUE

[para 7] The information at issue consists of the images of Complainants A and B that were recorded in the Organization's promotional video.

III. ISSUES

[para 8] The Notice of Inquiry states the issues for inquiry as the following:

- 1. Did the Organization collect, use and/or disclose the Complainants' personal information as that term is defined in section 1(k) of PIPA?**
- 2. If the answer to question 1 is yes, did the Organization collect, use and/or disclose the Complainants' personal information contrary to, or in compliance with, section 7(1) of the Act? In particular,**
 - a. Did the Organization have the authority to collect, use and disclose the Complainants' personal information without consent, because the**

information was the Complainants' "personal employee information" as that term is defined in section 1(j), and the terms of sections 15, 18 & 21 were met?

- b. **If the Organization did not have the authority to collect, use and/or disclose the Complainants' personal information or personal employee information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of the Act before collecting, using and disclosing the information? In particular,**
 - i. **Did the individual consent in writing or orally, or**
 - ii. **Is the individual deemed to have consented by virtue of the conditions in section 8(2)(a) and (b) having been met? Or**
 - iii. **Is the collection, use or disclosure permitted by virtue of the conditions in 8(3)(a), (b) and (c) having been met?**
 - c. **If the Complainants consented to the collection use and/or disclosure of the Complainants' personal information, did the Complainants withdraw consent within the terms of section 9(1) of the Act?**
 - d. **If the Complainants withdrew or varied any consent they had given, did the Organization comply with section 9(4)(a) or (b) of the Act?**
3. **If the Organization is relying on its authority to collect, use and/or disclose the Complainants' personal information on section 8, did it collect, use and/or disclose the information contrary to, or in accordance with sections 11(1), 16(1) & 19(1) of the Act?**
 4. **If the Organization is relying on its authority to collect, use and/or disclose the Complainants' personal information on section 8, did it collect, use and/or disclose the information contrary to or in accordance with sections 11(2), 16(2) & 19(2) of the Act?**

IV. DISCUSSION OF ISSUES

[para 9] Recent amendments to PIPA came into force on May 1, 2010. The previous version (i.e. the version in force immediately prior to the May 2010 amendments) will apply to the collection, use or disclosure of personal information occurring before May 2010. The current version of the Act will apply to the collection, use or disclosure of personal information occurring after May 1, 2010.

1. Did the Organization collect, use and/or disclose the Complainants' personal information as that term is defined in section 1(k) of PIPA?

[para 10] The Organization hired a contractor to shoot the footage and create the promotional video. Section 5(2) of the Act states

5(2) For the purposes of this Act, where an organization engages the services of a person, whether as an agent, by contract or otherwise, the organization

is, with respect to those services, responsible for that person's compliance with this Act.

[para 11] Although the Complainants' personal information was collected by the contractor, which then used it to create the video, the Organization is responsible for the collection and use of the personal information by the contractor.

[para 12] "Personal information" is defined in subsection 1(k) (now section 1(1)(k)) of the Act as "information about an identifiable individual." Images, including video images, of an individual are his or her personal information if that individual is identifiable by *someone*. I have viewed the promotional video, which clearly shows individuals performing various tasks; the Organization acknowledges that both Complainants took part in the video. Most of the individuals in the video are shown in sufficient detail to be identifiable by someone.

[para 13] Past Orders have distinguished between an employee's personal information and "work product" information. In Order P2006-005 the Commissioner stated:

In Order P2006-004, I considered the meaning of "personal information about an individual" within the meaning of the Act:

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.

This reasoning applies equally to an individual's work, which may be associated with an individual, but is not necessarily about the individual who performed the work.

...

I agree with the Organization's position that the "work product" or records produced by an employee in the course of employment is generally not the personal information of the employee. Pipeline reports, asset allocation reports, client agreements, tapes of calls, customer satisfaction and referrals are records created by employees as a part of their employment duties. These records are not about the employee as an individual, but about the task at hand.

[Order P2006-005, at paras. 46-47, 50]

[para 14] In P2007-002 the Director of Adjudication stated:

"Package B" also contains a letter the Psychologist received about the Applicant, dated July 23, 2001, from the Department of Justice. Most of this letter is factual (rather than opinion) information about the Applicant. However, the person who wrote the letter signed it, and there is thus a question whether the contents are also the personal information of the author. In my view, they are not. In this regard, I

adopt the reasoning in Order F2004-026, at paras 109-113, which held that “a record of what a public body employee has done in their professional or official capacities is not personal or about the person, unless that information is evaluative or is otherwise of a 'human resources' nature, or there is some other factor which gives it a personal dimension”. That case was decided under the *Freedom of information and Protection of Privacy Act*, but in this case, this reasoning applies as well to a person in private enterprise acting in a professional capacity. It also applies to the very fact that the person provided information about the Applicant. [Order P2007-002, at para. 50]

She also stated, in Order P2009-009:

Numerous decisions of this office have held that records of a person’s “work product” are not “personal information” about them (unless there is something about the context which gives the information a personal dimension). Work product will often reflect the thought processes of its creator, yet in the present context it is more properly regarded as about the work than about the person doing it.

[Order P2009-009, at para 26]

[para 15] Each of these Orders considered the distinction between personal information and work product information in the context of a request by an individual for access to his or her personal information under Part 3 of the Act. However, I believe that the distinction also applies to the collection, use and disclosure of personal information under Part 2. In this case I am determining whether the images of the Complainants in the promotional video constituted their personal information such that the Act applies to it.

[para 16] The Complainants performed various services, which are part of their normal work duties, on camera, to help the Organization produce a product: the promotional video. In other words, the promotional video is a record of employees performing their work duties.

[para 17] In Order P2006-004, the Commissioner included taped calls in a list of items that he considered work product information. The taped calls were ostensibly calls between the applicant in that case and her clients, occurring during her employment with the organization to whom the applicant made her access request. As handling clients was part of the applicant’s work duties, the taped calls were a record of the performance of those work duties.

[para 18] Here, the Complainants’ images were not simply recordings of the performance of their work duties, but the *work duty itself* was to perform a normal work function for the purpose of being taped. The product was not the changed tire or the towed truck, but the video footage of the tire being changed and the truck being towed, and the Complainants were part of the team creating this end product for the Organization. Similarly, a film or photograph of an actor or model could be characterized as the work product of that actor or model, as a record of what that individual has done as part of his or her work duties.

[para 19] That said, the footage of the Complainants may be their personal information if there is a personal dimension to the footage. Having reviewed the video, I find that it did not include any additional personal information of the employees, such as qualifications or name tags. There was no comment or evaluation of the quality of the services performed by individual employees. I find that the footage of the Complainants in the video is a record created by the contractor with a team of the Organization's employees, including the Complainants, as a part of their employment duties. These records are not about the employees as individuals, and do not have a personal dimension such that they would contain the Complainants' personal information.

[para 20] It might be argued that participating in a promotional video is not part of the Complainants' normal employment duties, and that because of this and the voluntary nature of the Complainants' participation, the Complainants' involvement in the video was outside their employment duties and cannot be considered their work product. I do not believe that the one-off and voluntary nature of the promotional video means that the video cannot be considered the work product of the Complainants. Employees of any organization may have an opportunity to choose to participate in various projects; a resulting report or similar product would not become the personal information, or personal employee information, of those employees simply on the basis that the employee *chose* to participate in the project.

[para 21] I draw a distinction between this promotional video and a surveillance tape of employees working, taken for safety, security or similar purposes. In such a scenario, a surveillance tape is not the product of the employees but rather is intended to monitor the conduct of employees or other individuals where there is a concern about theft or to monitor for unauthorized personnel, for example. In such cases, the recorded images of employees have been found to be personal employee information under the Act (see IR 2005-IR-004). Rather, the situation in the present case is more similar to a situation where employees are tasked to create a training video, and the training video is the work product, in the way same a report might be.

[para 22] For these reasons, I find that the images of the Complainants in the promotional video are not the Complainants' personal information under the Act, but rather their work product. The collection, use and disclosure provisions in Part 2 of the Act therefore do not apply to the Complainants' images in the video.

- 2. If the answer to question 1 is yes, did the Organization collect, use and/or disclose the Complainants' personal information contrary to, or in compliance with, section 7(1) of the Act? In particular,**
 - a. Did the Organization have the authority to collect, use and disclose the Complainants' personal information without consent, because the**

information was the Complainants' "personal employee information" as that term is defined in section 1(j), and the terms of sections 15, 18 & 21 were met?

- b. **If the Organization did not have the authority to collect, use and/or disclose the Complainants' personal information or personal employee information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of the Act before collecting, using and disclosing the information? In particular,**
 - i. **Did the individual consent in writing or orally, or**
 - ii. **Is the individual deemed to have consented by virtue of the conditions in section 8(2)(a) and (b) having been met? Or**
 - iii. **Is the collection, use or disclosure permitted by virtue of the conditions in 8(3)(a), (b) and (c) having been met?**
 - c. **If the Complainants consented to the collection use and/or disclosure of the Complainants' personal information, did the Complainants withdraw consent within the terms of section 9(1) of the Act?**
 - d. **If the Complainants withdrew or varied any consent they had given, did the Organization comply with section 9(4)(a) or (b) of the Act?**
3. **If the Organization is relying on its authority to collect, use and/or disclose the Complainants' personal information on section 8, did it collect, use and/or disclose the information contrary to, or in accordance with sections 11(1), 16(1) & 19(1) of the Act?**
4. **If the Organization is relying on its authority to collect, use and/or disclose the Complainants' personal information on section 8, did it collect, use and/or disclose the information contrary to or in accordance with sections 11(2), 16(2) & 19(2) of the Act?**

[para 23] Given my decision under Issue 1, I do not need to consider these issues.

V. ORDER

[para 24] I make this Order under section 52 of the Act.

[para 25] I find that the Organization did not collect, use or disclose the Complainants' personal information.

Amanda Swanek
Adjudicator