

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2011-005

November 10, 2011

CANAVISTA ENTERPRISES LTD.

Case File Number P1404

Office URL: www.oipc.ab.ca

Summary: An individual made a complaint under the *Personal Information Protection Act* (PIPA or the Act) that his personal information had been improperly collected, used and disclosed by the Organization on two occasions: first, when the Organization retained a private investigator to covertly take photographs of the Complainant while he was on medical leave, and; second, when the Organization allegedly disclosed his expenses and bonus information to two other employees who were being considered to take over his position.

The Adjudicator found that the Complainant's allegations were substantiated, and that neither of these dealings with the Complainant's personal information was authorized under the Act. She ordered the Organization to stop collecting, using and disclosing the Complainant's personal information in contravention of the Act.

Statutes Cited: **AB:** Rules of Court, AR 124/2010, Rule 5.33(1); *Personal Information Protection Act* S.A. 2003, c. P-6.5, as it was in force between June 2, 2005 and October 29, 2009, ss. 1(f) [now 1(1)(f)], 1(j) [now 1(1)(j)], 1(k) [now 1(1)(k)], 1(i)(i) [now 1(1)(i)(i)], 7(1), 8, 11, 11(1), 11(2), 14, 14(d), 15, 15(2)(a) [now 15(1)(b)], 16(1), 16(2), 17, 18, 19(1), 19(2), 20, 21, 52, 52(3)(e).

Orders Cited: **AB:** P2006-008, P2007-IR-005, F2011-007; **CANADA:** PIPEDA Case Summary 257, PIPEDA Case Summary 233, PIPEDA Case Summary 388.

Court Cases Cited: AB: *University of Alberta. v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112.

I. BACKGROUND

[para 1] The Complainant made a complaint under the *Personal Information Protection Act* [PIPA or the Act] that his personal information had been improperly collected, used and disclosed by the Organization on two occasions.

[para 2] The first complaint relates to the Organization's having retained a private investigator to take photographs of the Complainant on June 7, 2006, while he was on medical leave. The photos were taken outside the Complainant's home while he was mowing the lawn, and at a shopping mall, in each case without the Complainant's knowledge.

[para 3] The second complaint relates to an alleged disclosure by the Organization, to two other employees, of the Complainant's expenses and bonus information as contained in a spreadsheet.

[para 4] An investigator was appointed to try to resolve the complaint, but this did not succeed and the matter proceeded to inquiry.

[para 5] The Complainant and the Organization both provided both initial and rebuttal submissions.

[para 6] PIPA has been amended twice since the events to which this inquiry relates. Because the Organization's alleged contravention of the Act occurred prior to the amendments, the legislation applies as it existed previously (in the version that was in force between June 2, 2005 and October 29, 2009). For the purpose of cross-reference, I note when there has been an amendment to a section of PIPA that I discuss in this Order.

II. INFORMATION AT ISSUE

[para 7] The information at issue is that which was or was allegedly collected, used and disclosed as described above.

III. ISSUES

[para 8] The issues stated in the Notice of Inquiry were as follow:

Issue A: Did the Organization collect, use and disclose the Complainant's personal information as that term is defined in section 1(k) [now 1(1)(k)] of PIPA?

Issue B: Did the Organization collect, use and/or disclose the Complainant's personal information in compliance with, section 7(1) of the Act (no collection, use or disclosure without either authorization or consent)? In particular,

- a. Did the Organization have the authority to collect, use and/or disclose the Complainant's personal information without consent, as permitted by sections 14, 17 & 20 of PIPA?
- b. Did the Organization have the authority to collect, use and/or disclose the information without consent, because the information was the Complainant's "personal employee information" as that term is defined in PIPA section 1(j) [now 1(1)(j)], and the terms of sections 15, 18 & 21 were met?
- c. If the Organization did not have the authority to collect, use and/or disclose the Complainant's 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?

Issue C: If the Organization is relying on section 8 or sections 14, 17 or 20 did it collect, use or disclose the information in compliance with sections 11(1), 16(1) and 19(1) of PIPA (collection, use and/or disclosure for purposes that are reasonable)?

Issue D: If the Organization is relying on section 8 or sections 14, 17 or 20 did it collect, use or disclose the information in compliance with sections 11(2), 16(2) and 19(2) of PIPA (collection, use and/or disclosure to the extent reasonable for meeting the purposes)?

[para 9] As well, the Organization has raised, as a preliminary issue, its request that I should hold this matter in abeyance until such time as a civil action for wrongful dismissal that the complainant has taken against the Organization has been resolved. I will deal with this issue first.

IV. DISCUSSION OF ISSUES

[para 10] Canavista Enterprises Ltd. is an organization within the terms of section 1((i)(i) [now 1(1)(i)(i)] of the Act, and therefore is subject to the Act.

Preliminary Issue: Abeyance request

[para 11] The Organization's request that this matter be held in abeyance is based on two points.

[para 12] First, it says that the factual and legal basis for its actions in taking the photos "is intimately tied up with the proceedings before the Court...". As well, it argues that statements made by the Complainant during the discovery process in the civil matter are relevant to its position that it had a reasonable basis for having the Complainant's photographs taken, but that this evidence is not presently available to it. This is by reference to the Rule of Court to the effect that statements made during discovery cannot be used in another proceeding without the agreement of the parties, an order of the Court, or some other legal requirement (Rule 5.33(1)).

[para 13] Second, it argues that it should not be required to defend itself on two fronts at the same time.

[para 14] On the first point, the Complainant replies that the statement would remain inaccessible for use in another proceeding without a court order even after the litigation is concluded, so that this point cannot justify an abeyance.

[para 15] I accept this point. As well, the rule mentioned by the Organization does not limit when the court order for use of evidence in another proceeding may be made. If an order that the evidence may be used is merited, the Organization has been in a position to ask for such an order already. However, possibly the Organization is anticipating that the information in question will be filed as a record of the Court, hence the implied undertaking rule will become inapplicable once the action has been heard by the Court.

[para 16] However, even if that is the case, the Organization is already in a position to give information as to what informed its subjective beliefs about the Complainant at the time these beliefs were formed, and it has done so. I do not see how information that became available to the Organization only long after its decision to retain the investigator to take the photos had been made – the Complainant's statements that he made on discovery - can affect the reasonableness of the decision that was made on the basis of the factors that were known at the time of the decision.

[para 17] As to the second point, the Organization has already made its submissions, and I do not see how it would be unduly onerous to now rely on them to proceed with this matter. There is, furthermore, no way of telling when or if the civil litigation will be resolved. I do not see that the two matters are sufficiently related to justify waiting indefinitely for the conclusion of the civil matter before resolving the quite separate matter of the privacy complaint, which involves a remedy entirely different in its nature from that which may be given in a civil action. I do not see anything in the present circumstances which would make continuance of the inquiry oppressive or vexatious to the Organization, or an abuse of the process of the Court in the civil action. I will therefore proceed with this inquiry.

Issue A: Did the Organization collect, use and disclose the Complainant's personal information as that term is defined in section 1(k) [now 1(1)(k)] of PIPA?

[para 18] The Organization concedes that it took photographs of the Complainant, as described above, and that this was his personal information. I find that this was a collection of the Complainant's personal information. The Organization also indicates that it provided this information to its legal counsel for the purposes of the legal proceeding. However, the Complainant notes that this information was not referenced in the litigation documents, and he does not complain in his submission about any further use or disclosure of this information.

[para 19] I accept the statement made in the Complainant's submission that he was not aware the photographs were being taken.

[para 20] With respect to the use and disclosure of the expense and bonus information¹, there is a conflict in the sworn written testimony as between the witnesses for each side – the Organization's Director, Mr. L, on the one hand, and Mr. D, another former employee, on the other.

[para 21] In his initial submission, the Complainant stated that

... Canavista revealed a spreadsheet containing [the Complainant's] wages and bonus to [Mr. D] and [Mr. B], who were employees of Canavista. This incident occurred on June 21, 2006, and [the Complainant] only became aware of this incident because [Mr. D] relayed the incident to [the Complainant] over a telephone conversation.

[para 22] In its initial reply submission, the Organization responded as follows:

The Complainant's initial submissions provide very few details as to the nature and extent of the alleged disclosure. No information is provided as to who in the Organization made the alleged disclosure, what exactly was disclosed (e.g. amounts), where the disclosure took place, and what were the circumstances that led to the alleged disclosure.

...

[Mr. L], the President of the Organization, does not recall disclosing any details of the Complainant's wages or bonuses to [Mr. D and/or Mr. B], as alleged or at all. The Complainant's submissions at paragraph 45 state that [Mr. L] "does not recall disclosing the spreadsheet though it was 'possible'". This is an unfair summary of the response previously given by the Organization. The response of the Organization dated February 22, 2010 stated that:

[Mr. L] has no recollection of showing a spreadsheet containing [the Complainant's] personal information to any other employee. [Mr. L] has always been careful that no personal information of this sort is shared between

¹ The initial discussion was in terms of disclosure of *wage* and bonus information, but the subsequent affidavits spoke instead about *expenses* and bonuses.

employees. Payroll is kept in a locked cabinet and during discussions of bonus or salary no comparatives are used. It is possible this may have happened when discussing new salary arrangements after [the Complainant's] departure in July, but [Mr. L] does not recall doing this.

The evidence on behalf of the Organization is that [Mr. L] does not recall disclosing wage and bonus information on June 21, 2006 as alleged, or at all. [Mr. L's] lack of memory is understandable having regard to the lapse of five years since the alleged disclosure. It is submitted that no adverse inference can be drawn against the Organization by [Mr. L's] inability to recall. The evidence on behalf of the Complainant is hearsay and lacking in detail. It is respectfully submitted that the Complainant's comment at paragraph 45 that "There appears to be no reason why they would fabricate that" is pure speculation. It is submitted that there is insufficient evidence before the Commissioner to find that bonus and wage information was in fact disclosed.

[para 23] The Complainant's rebuttal submission contained an affidavit sworn by one of the two other employees [Mr. D], which contains the following statements:

2. In or around July 2006, [Mr. L] called a meeting with [Mr. B] and myself to discuss compensation and new salary arrangements.
3. During this meeting, [Mr. L] explained how [the Complainant] and the management of Multi-National Logistics ("MNL"), a division of Canavista, related to Canavista's employees compensation.
4. Specifically, [Mr. L] explained the arrangement Canavista and [Mr. L] had with [the Complainant] and MNL with regards to bonuses and expenses (the "Arrangement"). As a result of this Arrangement, [Mr. L] stated that there was less money for the employees and that it was [the Complainant's]² decision to adjust the compensation of the employees.
5. [Mr. L] then offered [Mr. B] and myself a significant base salary increase plus a bonus structure based on operating margin.
6. During [Mr. L's] discussion of the arrangement, I recall the following:
 - (a) [Mr. L] stating the total dollar value of what [the Complainant] had taken for his expenses and bonuses; and
 - (b) [Mr. L] using a spreadsheet to demonstrate the bonus structure that was discussed.
7. As this meeting occurred close to 5 years ago, I do not recall the number that [Mr. L] stated being the total dollar value for what [the Complainant] had taken for his expenses and bonuses.

² This reference to the Complainant appears to be an error as the reference would logically be to Mr. L rather than to the Complainant.

[para 24] In its rebuttal, the Organization provided an affidavit from Mr. L in which he stated that his recollection of the meeting had been somewhat refreshed by reading the affidavit of Mr. D. He then stated the following:

3. In July 2006, I called a meeting in the boardroom at the offices of Multi-National Logistics ... between myself, [Mr. B], now deceased, and [Mr. D] to discuss the future management arrangements of the company after [the Complainant's] termination.

4. During this meeting, I disclosed the company's financial position to them. I did this in anticipation that [Mr. B] and [Mr. D] would become the management team of the company, in other words, to fill the gap left by [the Complainant]. I also informed them that I would be raising their salaries from their present position, and would be including them in the bonus structure of the company. Any bonus, which was payable from the operating margin, would be split between them and would be at my discretion.

5. I do not recall discussing the topic of expenses with them. Business expenses were available to everyone and were common knowledge among the staff.

6. With regard to the bonuses and expenses of [the Complainant] specifically, I did not discuss this information with [Mr. B] and [Mr. D]. I did say to them that [the Complainant], as the manager of Multi-National Logistics, had an arrangement regarding a bonus payment and expenses, and that a similar arrangement would be offered to [Mr. B] and [Mr. D] if they assumed the role of joint managers. However, I did not discuss any number values of any bonus or expense payment made to [the Complainant] pursuant to his specific arrangement.

7. I did have a spreadsheet at the meeting, but did not show either [Mr. B] or [Mr. D] the information there contained. If [Mr. B] or [Mr. D] looked at the sheet, it was without my knowledge.

[para 25] In its rebuttal submission about this question, the Organization commented that Mr. L was entitled to disclose to Mr. B and Mr. D that the person or persons occupying the position of manager (or joint manager) of Multi-National Logistics was entitled to a bonus payment and entitled to claim certain expenses, as both Mr. B and Mr. D were being considered for this position. It said that such information was "corporate information" and not "personal information" or "personal employee information" as defined by the Act. It said that any information obtained by Mr. D from the spreadsheet was done without Mr. L's knowledge. It also pointed to the fact that no specific dollar amount for the Complainant's bonuses and expenses was given by Mr. D.

[para 26] The evidence of the two witnesses is not possible to fully reconcile.

[para 27] However, it is clear that Mr. L disclosed to the employees that the Complainant had had a bonus and expenses arrangement with the Organization. I do not accept that it is only "corporate" information, and is not also personal information, that a particular employee, who had historically occupied the position of manager, had had a bonus arrangement with his employer. This may not have been sensitive information, but it was nonetheless personal. The same may be said of the fact that employees generally

were entitled to claim expenses, and that this was generally known. This was still the personal information of employees who were entitled to make such claims.

[para 28] As well, the Organization concedes that the specific details of the Complainant's expenses and bonus, which were his personal information, were brought to the meeting in the form of a spreadsheet, and had been placed where the other employees could have seen them. While this would not be a deliberate disclosure of the information, it would, at a minimum, be a manner of handling the information that failed to sufficiently secure it against inadvertent disclosure.

[para 29] As well, in my view the evidence of Mr. D to the effect that he was told about the bonus and expense dollar values (the details of which he has since forgotten) is to be preferred to that of Mr. L saying that this did not happen, since Mr. D was constant in what he recalled, whereas Mr. L changed his recollection after being reminded of the circumstances. I have no reason for disbelieving Mr. D's sworn assertion that he knew the dollar amounts at one point, whether he derived this information independently from the spreadsheet that was visible to him, or had been told it.

[para 30] On the basis of the foregoing evidence I conclude that some personal information of the Complainant relating to his bonus and expenses was disclosed directly to Mr. D by Mr. L, and some (the dollar amounts) was more likely than not verbally disclosed to the employees who were present at the meeting, and were at a minimum indirectly or passively disclosed by virtue of the fact that the spreadsheet was left in view of these other employees. The actions of Mr. L with respect to this information can also be said to have been a use of the information, to the degree that he provided it to the other employees for the purpose of providing context for his proposals with respect to their prospective employment terms.

Issue B: Did the Organization collect, use and/or disclose the Complainant's personal information in compliance with, section 7(1) of the Act (no collection, use or disclosure without either authorization or consent)? In particular,

- a. Did the Organization have the authority to collect, use and/or disclose the Complainant's personal information without consent, as permitted by sections 14, 17 & 20 of PIPA?**
- b. Did the Organization have the authority to collect, use and/or disclose the information without consent, because the information was the Complainant's "personal employee information" as that term is defined in PIPA section 1(j), and the terms of sections 15, 18 & 21 were met?**
- c. If the Organization did not have the authority to collect, use and/or disclose the Complainant's 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?

[para 31] I will not consider sub-issue (c), as the evidence and arguments before me do not raise a possibility that the Complainant consented to collection, use or disclosure of his personal information, nor does the Organization rely on this section.

Collection of information by taking the photographs

[para 32] I will deal first with the collection of personal information by taking photographs. The Organization says it is not relying on section 15 because it had not provided notification of the collection to the Complainant, which is a requirement under section 15. It relies, instead, on section 14(d), which permits collection of information that is reasonable for the purposes of an investigation or legal proceeding. (I will, nevertheless, comment on the application of section 15, for reasons I will give below.)

Section 14(d)

[para 33] Section 14 of the Act provides:

14 An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:

...

(d) the collection of the information is reasonable for the purposes of an investigation or a legal proceeding;

[para 34] “Investigation” is defined in section 1(f) as follows:

1(f) “investigation” means an investigation related to

(i) a breach of agreement,

...

(iii) circumstances or conduct that may result in a remedy or relief being available at law,

if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;

[para 35] According to the terms of these provisions, in order to rely on them, an organization must establish that it is reasonable to conduct an investigation in the circumstances, and that the collection of the information is reasonable for the investigation. The same questions are reflected in section 11 of PIPA, which provides that:

11(1) An organization may collect personal information only for purposes that are reasonable.

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

[para 36] Previous orders of this office have held that to determine if covert surveillance is reasonable, the following questions must be asked:

- Does a legitimate issue exist to be addressed through the collection of personal information?
- Is the collection of personal information likely to be effective in addressing the legitimate issue?
- Is the collection of personal information carried out in a reasonable manner?

(Order P2006-008.)

[para 37] The Organization acknowledges these requirements, and argues that they are met. It presents information on which it bases its position that it “had sufficient evidence that the Complainant was probably breaching his employment contract by misrepresenting the state of his health” – which it argues was “a legitimate issue” to be addressed by the taking of the photographs.

[para 38] The evidence to which the Organization refers consists of the following:

- On the day before the two-week period of sick leave commenced, the Organization’s Director, Mr. L, had a detailed discussion with the Complainant relating to concerns about his work performance (which had been a concern for several months), as well as regarding the legitimacy of a number of expense claims that the Complainant had submitted as business expenses that Mr. L thought may not in fact have been business-related.
- The Organization was not made aware of the nature of the Complainant’s illness during the absence period.
- The Complainant was in a common-law relationship with a previous employee who had taken stress leave when she learned of an impending termination, and that employee’s health insurer had subsequently denied all of her claims.
- The Complainant was hostile toward the Organization and Mr. L.

[para 39] I do not accept that the past behavior of another person with whom the Complainant was apparently involved in a relationship, even if this had been established as having been dishonest (which is not the case), can be taken as having been a reasonable indicator of the Complainant’s dishonesty. As well, I do not believe the Complainant needed to give precise details to his employer of the nature of his medical condition – it was in my view sufficient to establish that he was ill by providing medical evidence in the form of substantiation of illness from a doctor. As for the point regarding hostility, even if the Complainant demonstrated a hostile attitude – which was alleged but not demonstrated by evidence – this is not an indicator of dishonesty.

[para 40] I also do not accept that events and actions of the Complainant that occurred after the photos were taken (which are also documented in the Organization's submissions) are relevant to the reasonableness of the Organization's actions in taking the photos.

[para 41] The only potential indicator of dishonesty on the part of the Complainant would be the alleged falsification of business expense claims. However, the materials supplied by the Organization in relation to these concerns indicate that there was a concern that some of the entertainment and meal expenses "may be personal", but nothing is provided that demonstrates anything more than there was a suspicion about this. As well, the details provided in relation to the allegedly mis-claimed auto expenses are inadequate to show that they were demonstrably not business expenses, and as well, one of them appears to relate to "June", which may have been claimed after the illness leave was over. Further, while these expenses are the subject of the Organization's correspondence with the Complainant, and are described therein as being "questionable", with reasons given for the Director's suspicions, they do not appear to be mentioned in the litigation documents which the Organization provided in its submissions. In my view, the circumstances do not establish that, in the words of the Assistant Commissioner in the federal Office of the Privacy Commissioner in PIPEDA Case Summary 388, there is "substantial evidence to support the suspicion that the relationship of trust has been broken".

[para 42] Furthermore, even if it is the case that the Organization's suspicions about the validity of these expenses were legitimate, any basis for suspicion about the truthfulness of the Complainant's representations about his health is strongly, indeed conclusively in my view, countered by the doctors' notes that were supplied by the Complainant to his employer. According to the Complainant's evidence, which the Organization does not dispute, doctors' notes were obtained on May 30 and June 1, 2006 to cover the period from May 30 to June 12. These notes do not detail the nature of the Complainant's illness, but state, on the first one dated May 30, 2006, that the Complainant "will require 3-5 days off work due to illness", and on the second one, dated June 1, 2006, that the Complainant is "off due to illness", indicating a RTW [return to work] of June 12, 2006. The doctors' notes are, in each case, written on sheets from printed notepads that set out the doctors' professional contact information. The Complainant's covering letter to his employer, which attached these notes, stated:

Attached please find copies of the doctor's notes I have covering my leave from May 30, 2006 until June 12, 2006.

I will be re-assessed at the end of next week and will advise if I require additional time off.

The uncontradicted evidence of the Complainant was that the photographs were taken on June 7, 2006, after the notes had been provided to the employer.

[para 43] The Organization gives no explanation as to the basis on which it regarded these notes, signed by doctors, as not accurately representing the fact that the

Complainant was ill and needed time off work, that they ought to be discounted, and that some other means needed to be employed to determine the state of the Complainant's health. The Organization does mention that the nature of the illness was not provided. However, there are numerous decisions of Privacy Commissioner's offices to the effect that medical diagnoses should not be required by employers on medical absence forms. See, for example, PIPED Act Case Summary 233, titled "[a]n individual challenged the requirement to provide the medical diagnosis on her doctor's certificate for sick leave". See also PIPEDA Case Summary 257, as well as Order F2011-007 (para 88) and P2007-IR-005 (paras 49 and 50), both issued by this office.

[para 44] Furthermore, if, as the Organization may be suggesting, its suspicion was that the Complainant would be taking an unfounded stress leave, photographs of him mowing his lawn or shopping at a mall would not operate to counter a claim of stress-related illness. Thus, even if such an issue were legitimate, the information collected would not help the Organization to address it. As well, I note that in his cover letter attaching the medical notes the Complainant indicated an intention to return to work once his condition permitted it, that his existing leave to June 12 was for a relatively short time-period, and that while he mentioned an impending re-assessment by his doctor, he raised no suggestion of the prospect of an extended leave. Thus I do not see that it was reasonable for the Organization to apprehend an extended, unfounded medical leave.

[para 45] While I appreciate that the Organization was dissatisfied with the Complainant as an employee, I do not believe that the circumstances it describes warranted conducting an investigation into whether the Complainant was misrepresenting the state of his health. Despite the Organization's concerns about the Complainant, I do not see how it could reasonably have doubted the accuracy of the medical notes. Indeed, it has not made any direct suggestion that the notes may have been fraudulent. Therefore there was not, in my view, "a legitimate issue to be addressed" by collecting the information.

[para 46] Further, even had it been reasonable to conduct such an investigation, I do not believe it would warrant the intrusion on the Complainant's privacy that was involved in having a private investigator covertly take his photographs in circumstances outside his workplace. The Organization speculates that the Complainant would have refused to cooperate had he been directly approached to provide some further, less privacy-intrusive, substantiation for his illness leave, such as, for example, to provide or authorize further confirmation from the doctors, or to submit to an independent medical exam. However, it did not ask him to do so.

[para 47] Accordingly I find that the collection of information by taking photographs did not meet the criteria that it was reasonable to conduct an investigation in the circumstances, that the collection of the information was reasonable for the investigation, or that it was done in a reasonable manner. On this account, the Organization cannot rely on section 14(d) of the Act as authority for its actions of taking covert photographs of the Complainant.

[para 48] Similarly, I find that the collection of this personal information cannot be justified on the basis that a legal proceeding was anticipated. Possibly the Organization was intending to terminate the Complainant and speculated that a legal proceeding, initiated by the Complainant, might ensue. In this regard, I accept the Complainant's submission that a mere remote possibility of a legal proceeding is insufficient to trigger the provision. However, even if it were reasonable in the circumstances for the Organization to anticipate a legal proceeding, a collection of personal information under such circumstances must be reasonable for the purposes of the legal proceeding. For the reasons already given, I find that there was no reasonable basis for doubting that the Complainant was ill, and thus no basis for hiring an investigator to take photos for the purpose of proving that he was not.

Section 15

[para 49] I turn to whether collection of the personal information by way of photographs was authorized by section 15, which relates to "personal employee information". The relevant parts of this provision as it existed at the time of the collection (in 2006) provided as follows [the provision has since been amended to some degree]:

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

...

(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.

[para 50] Information about the state of an employee's health can be "personal employee information" within the terms of the Act when it relates to the legitimacy of an employee's absence from work. The Organization said it was not relying on this "personal employee information" provision because it had not given notice in accordance with the requirement in section 15.

[para 51] I agree that the Organization was not entitled to rely on section 15 to justify having taken the photographs. This is because, for the reasons given above, I would find

that section 15(2)(a) [now section 15(1)(b)] – which requires that the collection must be reasonable for the purpose – was not met. Similarly, I would find that the information did not meet the definition of “personal employee information” insofar as it was not reasonably required to manage the employment relationship (which is similar to saying the collection was not for a reasonable purpose).

[para 52] However, I do not rule out the possibility for other cases that there may be circumstances in which organizations can collect personal employee information in the absence of notification to the employee. While the Act requires that before personal employee information can be collected without the employee’s consent, the requirement is to give the employee “reasonable notification” about the fact of and purposes for collection. It may be arguable, in circumstances in which such notification would make collection of the information impossible because it would stop the employee from engaging in behavior that constitutes the information to be collected, any notification would be unreasonable. (Alternatively, it may be that the scheme of the Act is that section 14(d) adequately covers such circumstances, and that any information collection from employees pursuant to section 15 must be with notice – “reasonable” in that event speaking only to the practicability or the timing of the notice.)

[para 53] In any event, I do not need to decide whether section 15 might apply in this case despite the absence of notification, because I have found, as explained above, that the collection of the photographs was not for a reasonable purpose and was not reasonable for the purpose, within the terms of section 14(d) and section 11.

Use and disclosure of the bonus and expenses information

[para 54] In its initial submission the Organization’s evidence as to whether it had disclosed this information was that the Director did not recall doing so. It said that before it could reply, it would require further particulars. In his rebuttal submission, the Complainant provided an affidavit about this information, sworn by one of the employees who said the information had been disclosed to him, and in response to that, the Organization provided its own affidavit from the Director, as has been outlined above.

[para 55] As explained above, I have found that the Organization did use and disclose the information that the Complainant had a bonus and expenses arrangement with the Organization, which is the Complainant’s personal information. As well, I found that it is more likely than not that the Organization revealed the dollar amounts of these items to the other employees verbally, and that at a minimum, it dealt with them in a manner that enabled at least one of the employees to see what these amounts were.

[para 56] Earlier orders of this office have held that once a complainant has provided evidence that his personal information has been collected, used or disclosed, the onus shifts to the organization to establish that its collection, use or disclosure of the complainant's personal information was authorized by the Act. (See, for example, Order P2006-008). This approach to the burden of proof has been confirmed by the Alberta

Court of Queen's Bench in *University of Alberta. v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, at para 108.

[para 57] The Organization argued that its use of and disclosure to the other employees of the fact that the Complainant had had a bonus and expense arrangement with the company was not his personal information nor was it his "personal employee information", but was "corporate information". As I stated above, I do not agree that the information was only corporate – it was also personal.

[para 58] I have also considered whether authority for the use and disclosure might be found under sections 18 and 21 of the Act³ by treating the information as "personal

³ The relevant parts of section 18 as it existed at the time of the disclosure provided as follows.

18(1) Notwithstanding anything in this Act other than subsection (2), an organization may use personal employee information about an individual without the consent of the individual if

- (a) the individual is an employee of the organization, ...*
- (2) An organization shall not use personal information about an individual under subsection (1) without the consent of the individual unless*
 - (a) the use is reasonable for the purposes for which the information is being used,*
 - (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 using the information, provided the individual with reasonable notification that the information is going to be used and of the purposes for which the information is going to be used.*

The relevant parts of section 21 as it existed at the time of the disclosure provided as follows.

21(1) Notwithstanding anything in this Act other than subsection (2), an organization may disclose personal employee information about an individual without the consent of the individual if

- (a) the individual is or was an employee of the organization, ...*
- (2) An organization shall not disclose personal information about an individual under subsection (1) without the consent of the individual unless*
 - (a) the disclosure is reasonable for the purposes for which the information is being disclosed,*
 - (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 disclosing the information, provided the individual with reasonable notification that the information is going to be disclosed and of the purposes for which the information is going to be disclosed.*

The definition section (1)(j) defined "personal employee information" as follows:

"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;

employee information”, on the basis that the Organization was using or disclosing the information for the purpose of managing or terminating its employment relationship with the Complainant. However, I find that this provision cannot constitute the requisite authority. At the time of the disclosure, the Organization was managing the transition from the Complainant’s departure, but it was not managing or terminating its relationship with the Complainant. Thus, in the context, the information did not meet the definition of “personal employee information”, and sections 18 and 21 could not apply so as to authorize its disclosure.

[para 59] Furthermore, it is not clear that it needed to advise potential future occupants of the position as to what the former office holder’s situation had been, and certainly it did not need to disclose the particular dollar amounts. Thus I see no reasonable purpose for these disclosures.

[para 60] Beyond its arguments as outlined above, the Organization did not try to demonstrate that it had any authority for its disclosure of the Complainant’s personal information relating to his bonus and expense arrangements with the Organization. As the Organization has failed to show that it had authority under the Act to disclose this personal information of the Complainant, I find that its actions in disclosing the information were not in compliance with the Act.

Issue C: If the Organization is relying on section 8 or sections 14, 17 or 20 did it collect, use or disclose the information in compliance with sections 11(1), 16(1) and 19(1) of PIPA (collection, use and/or disclosure for purposes that are reasonable)?

[para 61] As I have already decided that there was no authority under the Act for the collection of personal information by way of photographs, it is not strictly necessary for me to go on to consider whether this collection was for a reasonable purpose within the terms of section 11(1). However, for the reasons given above, in the discussion that concluded that it was not reasonable to conduct an investigation into whether the Complainant was misrepresenting the state of his health, I would find that the Organization’s collection of his personal information by way of photographs was not for a reasonable purpose.

[para 62] Similarly, as I have already found that there was no authority under the Act for the use and disclosure of the bonus and expense information, it is not necessary for me to consider whether this was done for a reasonable purpose within the terms of sections 16(1) and 19(1). I do note that the Organization argued that its reference to the fact that the Complainant had a bonus and expense arrangement was a natural function of the fact that its discussion with the other employees was in relation to their potentially assuming the Complainant’s former position. It says:

Mr. L was entitled to disclose to [the employees] that the person (or persons) occupying the position of manager (or joint manager) of Multi-National Logistics was entitled to a

bonus payment, and entitled to claim certain expenses, as both [the employees] were being considered for this position.

However, while it may have been perfectly reasonable to discuss the topic of bonuses and expense claims with candidates for the vacated position, it is not clear that this would require a reference to the fact that there were such arrangements of the former holder of the position (which Mr. L states in his affidavit that he did make clear). The fact that the Complainant had such an arrangement may not have been sensitive information, and thus this aspect of the disclosure was not egregious, but it was nonetheless disclosure of personal information for which no clear purpose has been articulated.

[para 63] With respect to the actual dollar amounts, the disclosure of this information whether deliberately or inadvertently, can certainly not be justified on the basis of a claim that it was a natural or inevitable part of the discussion with the prospective employees. In my view there was no reasonable purpose for the disclosure of this information.

Issue D: If the Organization is relying on section 8 or sections 14, 17 or 20 did it collect, use or disclose the information in compliance with sections 11(2), 16(2) and 19(2) of PIPA (collection, use and/or disclosure to the extent reasonable for meeting the purposes)?

[para 64] Again, as I have found that there was no authority for the collection of the photographs, or for the use or disclosure of the bonus and expense information, it is not necessary for me to reach any conclusion on the application of sections 11(2), 16(2) and 19(2) of the Act. As well, given that I would find there was no reasonable purpose for these actions, it would not be necessary for me to consider whether they were to the extent reasonable for meeting the purpose.

V. ORDER

[para 65] I make this Order under section 52 of the Act.

[para 66] I find that the Organization collected, used and disclosed the personal information of the Complainant as described above, and that its collection, use and disclosure were not in compliance with the Act.

[para 67] Under section 52(3)(e) of the Act, I order the Organization to stop collecting, using and disclosing the Complainant's personal information in contravention of the Act.

[para 68] Under section 52(4), I specify, as a term of this Order, that the Organization ensure that officers and employees of the Organization 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 its officers and employees in a way that the Organization considers appropriate.

[para 69] 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.

Christina Gauk, Ph.D.
Director of Adjudication