

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2012-13

December 20, 2012

STOLO'S PIZZA & SPORTS BAR

Case File Number P1581

Office URL: www.oipc.ab.ca

Summary: An individual made an access request to his former employer, Stolo's Pizza & Sports Bar (the Organization) for his "Record of Employment and a copy of all pay stubs starting in February 2008, stating all hours, hourly pay, deductions, and vacation pay." The Organization failed to respond to the Applicant, who then requested a review by this office of the Organization's "deemed refusal." Case file P1559 was opened, and the Organization provided some information to the Applicant, specifically his Record of Employment and T4 forms. The Applicant requested a review of the Organization's response, as the requested pay stubs had not been provided.

The Organization did not provide any arguments or response to this office in the course of the inquiry.

The Adjudicator determined that Organization failed to fulfill any aspect of its duty to assist the Applicant.

Statutes Cited: **AB:** *Employment Standards Code*, R.S.A. 2000, c. E-9, ss. 1, 14, 15, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 24, 27, 52.

Authorities Cited: **AB:** Orders P2006-012, P2009-005.

I. BACKGROUND

[para 1] By letter dated February 9, 2010, an individual made an access request to his former employer, Stolo's Pizza & Sports Bar (the Organization) for his "Record of Employment and a copy of all pay stubs starting in February 2008, stating all hours, hourly pay, deductions, and vacation pay." The Applicant states that he had made prior informal requests to the Organization, via phone and text, for the same information before making his request in writing. The Organization failed to respond to the Applicant, who then requested a review by this office of the Organization's "deemed refusal." Case file P1559 was opened, and the Organization provided some information to the Applicant, specifically his Record of Employment and T4 forms. The Applicant requested a review of the Organization's response, as the requested pay stubs had not been provided. The portfolio officer assigned to investigate this second request did not receive a response from the Organization; the matter was then set down for inquiry.

[para 2] Although the Notice of Inquiry, sent to both parties, states only that the Applicant's pay stubs remain at issue, the Applicant refers to the following in his submission: "time cards, pay stubs, proof of the vacation pay owed to [him] being paid out to [him] at the time of [his] dismissal, and proof of the deduction taken off of [his] last pay and that [he] was notified of it in writing with [his] signature (as per employment standards)."

[para 3] Neither time cards nor signed notifications of deductions were requested by the Applicant in his initial written request to the Organization or in his request for inquiry; therefore, these records are not at issue. Information about vacation pay (including pay outs of vacation pay) and deductions are at issue as part of the requested breakdown of his pay stubs.

[para 4] The Organization has not made any submissions in this inquiry, so I do not have the benefit of any arguments from it.

II. INFORMATION AT ISSUE

[para 5] The information at issue consists of the Applicant's pay stubs, including his hours worked, hourly pay, deductions and vacation pay.

III. ISSUES

[para 6] The Notice of Inquiry, dated May 17, 2012, states the issue for inquiry as the following:

- 1. 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)?**

IV. DISCUSSION OF ISSUES

[para 7] Amendments to PIPA came into force on May 1, 2010. As the Applicant's access request was made prior to the amendments, the previous version (i.e. the version in force immediately prior to the May 2010 amendments) will apply.

[para 8] An applicant may request access to his or her own personal information under section 24(1) of the Act; the relevant provision is as follows:

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;

...

[para 9] Personal information is defined in section 1(k) of the Act, which reads as follows:

1 In this Act,

...

(k) "personal information" means information about an identifiable individual;

...

[para 10] The Applicant has requested his pay stubs, including information about his hours worked, hourly pay, deductions and vacation pay. This is information about the Applicant, and therefore is his personal information under the Act.

[para 11] An organization's duty to assist an applicant is set out in section 27(1)(a) of the Act, which states the following:

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 12] An adequate search has two components: every reasonable effort must be made to search for the actual records requested, and the organization must inform the applicant, in a timely manner, what steps have been taken to search for the requested records. Further, the decision as to whether an adequate search was conducted must be

based on the facts relating to how a search was conducted in the particular case (Order P2009-005, at para. 47).

[para 13] With respect to the burden of proof, an applicant must show some basis that an organization failed to locate or provide a record in its custody or control; the burden then shifts to the organization to show that it conducted an adequate search (Order P2006-012 at para. 12).

[para 14] The Applicant states that he is a former employee of the Organization. The Organization has not made submissions in this inquiry to either confirm or deny this; however, the Organization did provide the Applicant with his Record of Employment. I am satisfied that the Applicant is a former employee of the Organization.

[para 15] Section 14 of the *Employment Standards Code (Code)* requires employers to maintain certain records for each employee; it states the following:

14(1) Every employer must keep an up-to-date record of the following information for each employee:

- (a) regular and overtime hours of work;*
- (b) wage rate and overtime rate;*
- (c) earnings paid showing separately each component of the earnings for each pay period;*
- (d) deductions from earnings and the reason for each deduction;*
- (e) time off instead of overtime pay provided and taken.*

(2) At the end of each pay period, an employer must provide a written statement to each employee setting out, in respect of the employee,

- (a) the information described in subsection (1), and*
- (b) the period of employment covered by the statement.*

(3) The hours of work of an employee, maintained by an employer under subsection (1)(a), must be recorded daily.

(4) An employer must keep an up-to-date record of the following additional information for each employee:

- (a) name, address and date of birth;*
- (b) the date that the present period of employment started;*
- (c) the date on which a general holiday is taken;*
- (d) each annual vacation, showing the date it started and finished and the period of employment in which the annual vacation was earned;*
- (e) the wage rate and overtime rate when employment starts, the date of any change to wage rates or overtime rates, and particulars of every change to them;*
- (f) copies of documentation relating to maternity and parental leave;*

(f.1) copies of documentation relating to reservist leave;

(g) copies of any termination notice and of written requests to employees to return to work after a temporary layoff.

(5) On request, an employer must give to an employee a detailed statement of how the employee's earnings were calculated and the method of calculating any bonus or living allowance paid, whether or not it forms part of wages.

15 Employment records must be retained by an employer for at least 3 years from the date each record is made.

[para 16] As section 1(j) of the *Code* defines “earnings” as including vacation pay, the information listed in section 14(1) would satisfy the Applicant’s request for his pay stubs including his hours worked, hourly pay, deductions, and vacation pay. In other words, the information requested by the Applicant is information of which section 14(1) of the *Code* requires employers keep a record.

[para 17] Section 15 of the *Code* requires employment records to be retained by the employer for at least three years from the date each record is made. The Applicant’s request to the Organization is for pay stubs dating from February 2008; however, the Applicant’s February 25, 2010 letter to this office states that his employment with the Organization began in February 2009 rather than February 2008. His employment was terminated in January 2010.

[para 18] Whether the Applicant worked for the Organization from February 2008 or 2009, the requirement in section 15 of the *Code* to retain employment records for at least three years is applicable in this case. In other words, whether the records date back to 2008 or 2009, the Organization should, according to the *Code*, have had copies of the records requested by the Applicant at the time of his 2010 request. I have no indication from the Organization that it made any attempt to search for the requested records.

[para 19] In order to fulfill the duty to assist under section 27(1), an organization must also inform the applicant, in a timely manner, what steps have been taken to search for the requested records. I have no indication that the Organization made an attempt to search for the records at issue and there is likewise no indication that the Organization told the Applicant about any steps it took in conducting a search.

[para 20] The Applicant’s February 25, 2010 letter to this office states that the Applicant was told by one of the Organization owners via text message that “legally she does not have to give [the Applicant] a copy” of the records he had requested. The Organization is obligated to provide the Applicant with his personal information if it exists in a record in the Organization’s custody or control, and I have found that the information requested by the Applicant is his personal information, and is information the Organization is required by the *Code* to record and retain. The Organization is therefore required to search for and provide access to any records at issue, subject to the application of any exception to access in the Act. The response the Applicant states he

received from the Organization via text message does not satisfy its obligation to respond to the Applicant as accurately and completely as is reasonably possible.

[para 21] I find that the Organization failed to fulfill any aspect of its duty to assist the Applicant.

V. ORDER

[para 22] I make this Order under section 52 of the Act.

[para 23] I find that the Organization has not met its duty to assist the Applicant under section 27(1) of the Act. I order the Organization to conduct an adequate search for the records containing the requested information in its custody and control, and to respond to the Applicant as required by the Act. If the Organization fails to locate any or all of the information responsive to the Applicant's request, I further specify that the Organization must write an explanation to the Applicant, indicating whether such records exist or ever existed, the specific steps taken to identify and locate records containing information responsive to his access request, the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.), the steps taken to identify and locate all possible repositories of records relevant to the access request (e.g., keyword searches, records retention and disposition schedules, etc.), and why, if no records are located, the Organization believes that no records of the requested information exist.

[para 24] 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.

Amanda Swanek
Adjudicator