

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2012-14

December 20, 2012

CANADIAN LINEN AND UNIFORM SERVICE CO.

Case File Number P1977

Office URL: www.oipc.ab.ca

Summary: An individual requested his personnel file from his former employer, Canadian Linen and Uniform Service Co. (the Organization). He made his first request via email on July 5, 2011, and subsequently sent a letter dated August 5, 2011, with the same request.

The Applicant was also involved in litigation with the Organization; both the Organization and the Applicant had counsel acting on their behalf with respect to the litigation. The Organization's counsel sent a letter to the counsel of the Applicant, informing the Applicant's counsel that the Applicant's employment file would be provided in the course of the litigation, and requesting that the Applicant stop requesting his personnel file directly from the Organization.

The Applicant requested a review by this office as to whether the Organization's response complied with the *Personal Information Protection Act* (PIPA, or the Act). In the course of the inquiry, the Organization provided the requested records to the Applicant. The issues remaining at inquiry concerned the timeliness and content of the Organization's response.

The Adjudicator found that the Organization's response to the Applicant's counsel (representing the Applicant in the litigation), that the requested information would be produced in the course of the litigation process, did not meet the Organization's obligations under PIPA. The ability to access the requested information in the course of a

litigation process does not detract from an applicant's ability to request access to the information under PIPA.

The Adjudicator also determined that the Organization appeared to have known that the Applicant was making his request independently of his counsel, and therefore the Organization should have responded to the Applicant himself.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 24, 26, 28, 29, 52.

Authorities Cited: AB: Decision P2011-D-003, Orders F2007-029, F2009-015.

I. BACKGROUND

[para 1] An individual requested his personnel file, in its entirety, from his former employer, Canadian Linen and Uniform Service Co. (the Organization). He made his first request via email on July 5, 2011, and subsequently sent a letter dated August 5, 2011, with the same request.

[para 2] The Applicant was also involved in litigation with the Organization; both the Organization and the Applicant had counsel acting on their behalf with respect to the litigation. The Organization's counsel sent a letter dated August 19, 2011, to the counsel of the Applicant, informing the Applicant's counsel that the Applicant's employment file would be provided in the course of the litigation, and requesting that the Applicant stop requesting his personnel file directly from the Organization.

[para 3] The Applicant requested a review by this office as to whether the Organization's response complied with the *Personal Information Protection Act* (PIPA, or the Act). The Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter; this was not successful and the Applicant requested an inquiry.

[para 4] By letter dated July 24, 2012, after the Applicant had provided his initial submission and just prior to the deadline for the Organization's initial submission, the Organization notified this office that it had sent the Applicant a copy of his employment file, as requested. The Organization opined that the issues at inquiry were therefore moot. The Applicant was asked whether he wished to continue with the inquiry; in his response, he confirmed that he had received the file, and also that he wished the inquiry to continue.

[para 5] The Organization's counsel is also acting on its behalf in this inquiry, but for simplicity I will refer only to the Organization; the Applicant is acting on his own behalf.

II. INFORMATION AT ISSUE

[para 6] As the Organization provided the Applicant with the requested information, there is no information at issue.

III. ISSUES

[para 7] The Notice of Inquiry, dated, May 30, 2012, states the issues for inquiry as the following:

- 1. Did the Applicant make an access request under section 24 of the Act?**
- 2. Is the access request for the Applicant's personal information?**
- 3. Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?**
- 4. Did the Organization comply with section 29(1)(c) of the Act (contents of response)?**
- 5. If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)?**

[para 8] As the Applicant had received the requested records, and there is no indication that the records were severed or if they were, that the Applicant had issue with any severing, the last issue listed above has been dropped from this inquiry. A revised Notice of Inquiry, dated August 16, 2012, was provided to both parties, listing the following issues for the inquiry:

- 1. Did the Applicant make an access request under section 24 of the Act?**
- 2. Is the access request for the Applicant's personal information?**
- 3. Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?**
- 4. Did the Organization comply with section 29(1)(c) of the Act (contents of response)?**

IV. DISCUSSION OF ISSUES

1. Did the Applicant make an access request under section 24 of the Act?
2. Is the access request for the Applicant's personal information?

[para 9] Section 24(1) of the Act states the following, in part:

24(1) An individual may, in accordance with section 26, request an organization

(a) to provide the individual with access to personal information about the individual, or

...

[para 10] Section 26 outlines how to make a request under section 24(1); it states the following:

26(1) A request under section 24(1) or 25(1) must

(a) be in writing, and

(b) include sufficient detail to enable the organization, with a reasonable effort, to identify any record in the custody or under the control of the organization containing the personal information in respect of which the request is made.

(2) An applicant who is requesting access to personal information under section 24(1)(a) may ask for a copy of the record containing the personal information or to examine the record.

[para 11] Personal information is defined in section 1(1)(k) of the Act:

1(1) In this Act,

...

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

...

[para 12] The Applicant provided a copy of the request he made by email on July 5, 2011, in which he requested copies of his "personal employee information." He also provided the request he sent to the Organization by registered mail, dated August 5, 2011, which states that he is requesting copies of his personnel file. Both requests meet the requirements of section 26. Further, the Organization concedes that the Applicant's request made via email on July 5, 2011 fulfills the requirements of section 24. The

Organization also concedes that the request relates to the Applicant's personal information under PIPA.

[para 13] Although not all records in a personnel file are necessarily the personal information of the employee (or former employee), a personnel file will clearly include personal information about the employee, such as payroll information. As the personnel file has not been provided to me, I accept the Organization's concession that the file contains the Applicant's personal information. I find that the Applicant made an access request for his personal information under section 24 of the Act.

3. Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?

[para 14] Section 28(1) states the following:

28(1) Subject to this section, an organization must respond to an applicant not later than

(a) 45 days from the day that the organization receives the applicant's written request referred to in section 26, or

(b) the end of an extended time period if the time period is extended under section 31.

(2) An organization is not required to comply with subsection (1)(a) if the time period is extended under section 31.

[para 15] The Organization sent a letter to the Applicant's counsel (who was representing the Applicant in his litigation with the Organization) on August 19, 2011, informing the Applicant's counsel that the Organization would be producing the Applicant's employment file in the course of litigation and that the Applicant should cease demanding production of that file directly from the Organization. The Organization argues that the above letter was provided within the 45 day time limit under section 28(1).

[para 16] I note that past decisions of this office have stated that a discovery process does not obviate a Public Body's requirement to respond to an access request under the *Freedom of Information and Protection of Privacy Act* (Orders F2007-029 at paras. 55-57 and F2009-015 at paras. 66-67). In decision P2011-D-003 the adjudicator found that this conclusion applies equally to access requests under PIPA (at para. 38).

[para 17] That said, the Organization does not seem to be arguing that it was not required to process the Applicant's request because of the ongoing litigation process between the Organization and the Applicant. Rather, the Organization seems to argue that it had been communicating with the Applicant's counsel both with regard to the litigation and the Applicant's access request. The Organization states that it was led to believe that providing the employment file in the course of the litigation was acceptable. However, it has not provided any evidence to support this belief. Conversely, the Applicant states that

his counsel was representing him with regard to the litigation only, and not with regard to his access request; he has provided me with copies of letters from his counsel to the Organization (albeit dated after the Applicant requested a review from this office) stating that counsel had at no time represented the Applicant with respect to his access request.

[para 18] There is no indication in the documents provided to me by the Applicant that either the Applicant or his counsel informed the Organization in response to the Organization's August 19, 2011 letter, of the Organization's misapprehension that the Applicant was represented by counsel with respect to the access request. However, as the Applicant points out, the Organization's letter of August 19, 2011 specifically states that the Applicant "has been **independently** demanding delivery of his personnel file" (my emphasis).

[para 19] Although the Organization did, in a sense, respond to the Applicant's request within its 45 day time limit, the Organization was required to respond *to the Applicant*. In a situation such as this, where the Applicant and Organization are also involved in litigation, it may have been reasonable for the Organization to contact the Applicant's counsel, to clarify to which party the organization should respond. However, this would have to have been done before the 45 day time limit expired. Further, based on the Organization's letter of August 19, 2011, it seems clear that the Organization was aware that the Applicant was making an access request independently of his counsel and independently of the litigation process. Therefore I find that the Organization did not respond to the Applicant, as it was required to do under section 28(1).

4. Did the Organization comply with section 29(1)(c) of the Act (contents of response)?

[para 20] The relevant portions of section 29(1)(c) states the following:

29(1) In response to a request made under section 24(1)(a), 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 21] The Organization admits that on a "strict interpretation" of PIPA, its response to the Applicant's request did not meet the requirements of section 29(1)(c). I agree. As noted above, the Organization did not respond directly to the Applicant although its August 19, 2011 letter indicates that the Organization was aware that the Applicant made his request independently of counsel. Further, although the Organization's response

indicated that the Applicant's employment file would be provided in the course of the litigation, it did not address whether access would be provided pursuant to PIPA. I find that this response is essentially a refusal to provide access to the requested information.

[para 22] The Organization also failed to provide reasons under PIPA for the refusal, the name of a person who can answer questions on the Organization's behalf about the refusal, or that the Applicant may ask for a review under the Act. Therefore this response does not meet the requirement under section 29(1)(c) of the Act for these reasons as well.

V. ORDER

[para 23] I make this Order under section 52 of the Act.

[para 24] I find that the Organization did not respond to the Applicant in accordance with sections 28(1) and 29(1)(c) of the Act. However, as the Organization provided the Applicant with the requested information in the course of this inquiry, I do not find it necessary to order the Organization to provide an adequate response under section 29(1)(c) to the Applicant in regard to his access requests.

Amanda Swanek
Adjudicator