

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER P2013-02**

May 7, 2013

**SANGHA OPERATING GROUP INC.**

Case File Number P1849

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An individual made an access request to his former employer, Sangha Operating Group Inc. (the Organization) for access to his employment file in its entirety.

The Organization initially failed to respond to the Applicant but in the course of the review by this office, eventually provided the Applicant with nine pages of records.

The Applicant continued to assert that more records should exist, and expressed concern that some information has been inappropriately destroyed by the Organization.

The Adjudicator accepted that the Organization had provided all of the Applicant's personal information to him that the Organization had in its custody and control. The Adjudicator also found that the Organization had not breached its obligations under the Act regarding the retention of personal information.

The Adjudicator determined that the Organization had failed to meet the timelines set out in the *Personal Information Protection Act* (PIPA), and initially failed to fulfill its duty to assist the Applicant. However, the Organization ultimately responded appropriately to the Applicant.

**Statutes Cited:** **AB:** *Employment Standards Code*, R.S.A. 2000, c. E-9, s.15, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 24, 27, 28, 29, 35, 52.

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

## **I. BACKGROUND**

[para 1] By letter dated January 4, 2011, an individual made a request to his former employer, Sangha Operating Group Inc. (the Organization) for access to the entirety of the Applicant's employment file. The individual also requested that the Organization advise him of the reason for his dismissal, the amount of any severance pay, and the calculation leading to any severance pay. By letter dated March 16, 2011, when no response was received from the Organization, the Applicant requested a review by this office.

[para 2] The Commissioner authorized an investigation, which ultimately resulted in a response from the Organization. However, in his Request for Inquiry, the Applicant stated that the Organization's response was not complete and did not resolve all of his issues. The Applicant is also concerned that the Organization's response indicates that his personal information was destroyed by the Organization, possibly after the Applicant made his request for access.

[para 3] In the course of the inquiry, the Organization provided me and the Applicant with nine pages of records, consisting of the Applicant's Record of Employment, two pay stubs spanning the duration of the Applicant's employment, a record of insurable earnings, and T4 forms.

## **II. INFORMATION AT ISSUE**

[para 4] The information at issue consists of personal information about the Applicant related to his employment with the Organization.

## **III. ISSUES**

[para 5] The Notice of Inquiry, dated November 29, 2012, states the issues for inquiry as the following:

- 1. Is the access request for the Applicant's personal information?**
- 2. Is the Applicant's personal information in the Organization's custody or control?**
- 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 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?**

5. **Did the Organization comply with section 29(c) of the Act (contents of response)?**
6. **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)? In particular,**
  - a. **Did the Organization properly apply section 24(2)(a) (legal privilege)?**
  - b. **Did the Organization properly apply section 24(2)(b) (confidential information of a commercial nature) to certain requested records or parts thereof?**
  - c. **Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?**
  - d. **Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to certain requested records or parts thereof?**
  - e. **Did the Organization properly apply section 24(2)(e) (information collected by a mediator or arbitrator) to the information?**
  - f. **Did the Organization properly apply section 24(2)(f) (information relating to exercise of prosecutorial discretion) to certain requested records or parts thereof?**
  - g. **Does section 24(3)(a) (threat to life or security) apply to certain requested records or parts thereof?**
  - h. **Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?**
  - i. **Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?**
7. **If the withheld records contain or consist of personal information of the Applicant, and if section 24(2)(b), 24(3)(a), 24(3)(b) or 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?**
8. **Did the Organization comply with section 35 of the Act (retention and destruction of information)?**

## IV. DISCUSSION OF ISSUES

### Preliminary issue

[para 6] In his Request for Inquiry, the Applicant states that the Organization failed to inform him of the personal information the Organization had about him, the purposes for which the personal information was used by the Organization, and the names of persons to whom and circumstances with which personal information had been disclosed. An applicant may make a request for information about the use or disclosure of personal information about him or her (section 24(1)(b)); however, the Applicant's request to the Organization under the *Personal Information Protection Act* (PIPA) was for access to his personal information pursuant to section 24(1)(a), and did not include a request for the information described in section 24(1)(b). I cannot review a decision of the Organization that the Organization did not have an opportunity to make. Therefore this inquiry does not address obligations pursuant to a request under section 24(1)(b).

### 1. Is the access request for the Applicant's personal information?

[para 7] 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) 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 8] Personal information is defined in section 1(1)(k) of the Act, which states:

*1(1) In this Act,*

...

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

...

[para 9] The Applicant requested his employment file and any information related to his severance (including the calculation and payout of severance pay). Information related to the Applicant's pay and hours worked is information about the Applicant and therefore his personal information under section 1(1)(k).

[para 10] Information related to any severance pay made to the Applicant would also be his personal information. Information about the reasons for severance and calculation of severance pay *may* be personal information about the Applicant; however, it may also be work product information (which is not personal information) or information about the Organization's business practices, rather than information *about* the Applicant. Whether or not information related to severance is the Applicant's personal information would

depend on the context of the information. For the reasons provided below, I accept that the Organization does not have records containing information related to severance pay for the Applicant.

**2. Is the Applicant's personal information in the Organization's custody or control?**

[para 11] The Organization obviously had custody of the nine pages of records provided to me and the Applicant. For reasons I discuss below, I accept the Organization's explanation that it does not have custody or control of any other records relating to the Applicant.

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

[para 12] Section 28(1) requires an organization to respond to an applicant within the time specified in that provision:

*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.*

*(2.1) The failure of an organization to respond to a request in accordance with subsection (1) is to be treated as a decision to refuse the request.*

[para 13] The Applicant's access request is dated January 4, 2011; the Organization did not respond until an investigation was underway by this office. In his Request for Inquiry, the Applicant refers to a response from the Organization received by the Applicant on October 20, 2011; this response has not been provided to me and I do not have information as to its contents. Regardless, the Organization clearly missed its 45-day timeline for responding to the Applicant and failed to respond as required under section 28.

**4. 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)?**

[para 14] 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 15] An adequate search requires an organization to make every reasonable effort to search for the actual records requested. 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 16] 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 17] The Organization acknowledges that the Applicant is a former employee. It states that the only information the Organization has about the Applicant is the nine pages of records it has provided in the course of the inquiry. It states that “we believe there is no other responsive record as we do not keep any other information of our staff.”

[para 18] By letter dated March 21, 2013, I asked the Organization where it searched for responsive records and why it believes no more responsive records exist. The Organization told me that all employee records are kept on-site in paper and/or electronic format. The owner of the Organization searched the work site for all relevant paper and electronic records. The Organization has told me that its standard practice is to destroy an employee’s paper files six months after the employee’s last day of work. The Applicant’s last day of work was in the end of December 2009; therefore the Applicant’s paper employee file would have been destroyed in July 2010.

[para 19] I also asked the Organization about records relating to the Applicant’s severance, including severance pay. The Organization responded that the Applicant ceased to show up for shifts and the Organization accepted this as his implicit resignation. The Organization mailed the Applicant his Record of Employment as required by law, but no records relating to the Applicant’s severance were created.

[para 20] I accept the explanation from the Organization that it no longer has a paper file relating to the Applicant as it would have been destroyed several months before the Applicant made his access request. While the Organization initially failed to respond to the Applicant, I find that its eventual search for records was reasonable.

[para 21] However, as the Organization failed to respond to the Applicant until an inquiry had commenced, I find that the Organization failed to fulfill its duty to assist the Applicant under section 27(1).

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

6. **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)?**
7. **If the withheld records contain or consist of personal information of the Applicant, and if section 24(2)(b), 24(3)(a), 24(3)(b) or 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?**

[para 22] Section 29(1)(c) states the following:

*29(1) In a 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 23] The Organization states that it has provided the Applicant with all the personal information about him that the Organization has in its custody and control. As I found that the Organization conducted an adequate search for records, I accept that the Organization has not withheld any information from the Applicant under the exceptions to access in PIPA and section 29(1)(c) is not applicable. Similarly, sections 24(2), (3) and (4) are not applicable and I therefore do not need consider issues 5, 6 or 7.

8. **Did the Organization comply with section 35 of the Act (retention and destruction of information)?**

[para 24] Section 35 of the Act states the following:

*35(1) An organization may retain personal information only for as long as the organization reasonably requires the personal information for legal or business purposes.*

*(2) Within a reasonable period of time after an organization no longer reasonably requires personal information for legal or business purposes, the organization must*

*(a) destroy the records containing the personal information, or*

*(b) render the personal information non-identifying so that it can no longer be used to identify an individual.*

*(3) Subsection (1) applies notwithstanding any withdrawal or variation of the consent of the individual that the personal information is about under section 9.*

[para 25] The Organization has retained electronic copies of the some information related to the Applicant, but has destroyed any related paper file. The Applicant expressed concern that the Organization improperly destroyed information related to the Applicant's employment.

[para 26] Section 35 does not set out a required retention period for organizations; rather, it limits the retention of personal information by organizations. It is an offence under section 59(1)(c) to destroy personal information in response to an access request or where an access request is reasonably contemplated.

[para 27] The Organization has stated that the Applicant's paper file had been destroyed in accordance with its standard practice of destroying paper files relating to employees six months after the last day of employment. Following this practice, the Organization states that the Applicant's paper file would have been destroyed in July 2010, which is well before the Applicant made his access request. I have no evidence before me that contradicts this.

[para 28] If the Organization believes that it no longer has a business or legal purpose for retaining an employee's paper file for longer than six months after the last day of employment, then the Organization has a duty under PIPA to dispose of the personal information in that file. I note that section 15 of the *Employment Standards Code* requires employers to retain certain employment records for three years; this likely explains the Organization's maintenance of the electronic records consisting of payroll- and tax-related information. In other words, in relation to the Organization's responsibilities under PIPA, I do not see any incongruity between the Organization's maintenance of the electronic file and the destruction of the paper file.

[para 29] The Applicant has not complained about the retention of information by the Organization, only the destruction of information. I have no reason to suspect that the Organization destroyed information in contravention of the Act, nor that it failed to fulfill its obligations under section 35 of the Act.

## **V. ORDER**

[para 30] I make this Order under section 52 of the Act.

[para 31] I find that the Organization did not meet its timelines under section 28 of the Act. However, as the Organization ultimately provided the Applicant with the requested information, there is no appropriate order to make in the circumstances.

[para 32] I find that the Organization initially failed to fulfill its duty to assist the Applicant under section 27 of the Act but eventually responded to the Applicant as required.

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Amanda Swanek  
Adjudicator