

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2013-06

October 30, 2013

SUNCOR ENERGY INC.

Case File Number P1976

Office URL: www.oipc.ab.ca

Summary: The Applicant's employment was terminated by the Organization on the basis that he had failed to comply with particular safety procedures when he moved a truck that was being serviced and inspected. As contemplated by the *Personal Information Protection Act* (the "Act"), he requested his personnel records and all documentation relating to the incident. The Organization withheld some of the information, and the Applicant requested a review of that decision.

The Adjudicator found that the Applicant was not entitled to access to parts of the records at issue, as they did not consist of his personal information, which is the only type of information to which section 24(1)(a) of the Act permits access.

The Adjudicator found that the Organization had properly applied section 24(2)(c) of the Act to the remaining records at issue, as the information was collected for an investigation. He accordingly confirmed the decision of the Organization to refuse the Applicant access to all of the information that had been withheld.

Additionally, the Adjudicator found that section 24(3)(b) of the Act applied to a small amount of information in the records at issue, as the information would reveal personal information about another individual.

Statute Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1(1)(f), 1(1)(f)(i), 1(1)(k), 24, 24(1)(a), 24(2)(a), 24(2)(c), 24(3)(b), 24(3)(c), 24(4), 33, 51(a), 52 and 52(2)(a)(ii).

Authorities Cited: AB: Orders P2006-004, P2006-005 and P2008-007.

I. BACKGROUND

[para 1] The Applicant was employed as a heavy equipment technician with Suncor Energy Inc. (the “Organization”). His employment was terminated in April 2011, on the basis that he had failed to comply with particular safety procedures when he moved a truck that was being serviced and inspected.

[para 2] By e-mail dated May 12, 2011, the Applicant made an access request to the Organization under the *Personal Information Protection Act* (the “Act” or “PIPA”). He asked for his “complete personnel records/files and all relative documentation including the ILP#82622 with the name of the owner/writer of the ILP and supporting evidence/documentation.” The “ILP” was a record created by the Organization following the incident involving the truck.

[para 3] By letter dated July 28, 2011, the Organization gave the Applicant access to 59 pages of records but withheld all of 18 pages, and parts of two of the 59 pages, citing sections 24(2)(c) and 24(3)(b) of the Act, which are reproduced below.

[para 4] In a form dated August 26, 2011, with an attached letter dated August 25, 2011, the Applicant requested a review of the Organization’s decision to withhold information from him. The former Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. This would appear to have been partly successful, in that annual personnel evaluations that the Applicant believed to be missing from the package provided to him by the Organization were located and released to him in September 2011.

[para 5] As the Organization still refused to disclose the full and partial pages referenced above, the Applicant requested an inquiry by way of a form dated January 25, 2012. A written inquiry was set down.

II. RECORDS AT ISSUE

[para 6] The Organization submitted copies of the records released to and withheld from the Applicant in response to his access request. As set out in an Index of Records prepared by the Organization, the records at issue are all or parts of pages 8, 30 to 33, 62 and 64 to 77. With its inquiry submissions, the Organization disclosed parts of pages 67 and 68, as it had done with parts of pages 8 and 62 at the time of its initial response to the Applicant’s access request.

III. ISSUES

[para 7] The Notice of Inquiry, dated November 21, 2012, set out the following issues:

Did the Organization properly apply section 24(2)(c) of the Act (discretion to refuse access to information collected for an investigation) to certain requested records?

Does section 24(3)(b) of the Act (requirement to refuse access to information revealing personal information about another individual) apply to parts of the requested records?

IV. DISCUSSION OF ISSUES

[para 8] Section 24 of PIPA reads, in part, 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...

...

(2) An organization may refuse to provide access to personal information under subsection (1) if

(a) the information is protected by any legal privilege;

...

(c) the information was collected for an investigation or legal proceeding;

...

(3) An organization shall not provide access to personal information under subsection (1) if

...

(b) the information would reveal personal information about another individual;

(c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.

(4) If an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the applicant, the organization must provide the

applicant with access to the part of the record containing the personal information after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.

[para 9] As noted by the Organization, section 24(1)(a) permits the applicant to request his own personal information only. Under section 1(1)(k) of PIPA, “personal information” means information about an identifiable individual. Order P2006-004 (at para. 12) commented on this definition as follows:

... “About an applicant” is a much narrower idea than “related to an [a]pplicant”. Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily “about” that person. ...

[para 10] In view of the above excerpt, the Organization submits that pages 64 to 66 of the records at issue consist of witness statements by employees that describe the incident involving the truck, but include no personal information of the Applicant to which he may be entitled. I generally agree. The statements record the employees’ observations about the truck that had apparently been moved by the Applicant and about their own activities, and the activities of employees other than the Applicant, in relation to the truck. An exception is that the witness statement at page 66 contains some information that describes the Applicant’s activities in relation to the truck. I find this to be his personal information, as it is about his conduct that was alleged by the Organization to be wrongful, and therefore has a sufficient personal dimension to make it about him within the meaning of the definition of “personal information”.

[para 11] I agree with the Organization that page 75 contains no personal information about the Applicant, as it is a copy of the service and inspection work order regarding the truck.

[para 12] As pages 64, 65, 57 and most of page 66 do not contain the Applicant’s personal information, which is a condition for entitlement to access under section 24(1)(a), he is not entitled to all or parts of these pages, as the case may be. The same may also be said of the parts of pages 8 and 62 that were withheld from him. While the Organization applied section 24(3)(b) to those parts, on the basis that the information reveals the personal information of other individuals, the redacted information is not the Applicant’s personal information in the first place. It consists of separate and distinct information about other individuals, being their names, ID numbers and seniority dates as found in lines of a seniority list, and information about an individual’s locker as found in two lines of an e-mail.

[para 13] As for the personal information of the Applicant that does appear in the records at issue, including that on page 66, it is up to the Organization to establish to my satisfaction that the Applicant has no right of access to it, as set out in section 51(a) of PIPA.

A. Did the Organization properly apply section 24(2)(c) of the Act (discretion to refuse access to information collected for an investigation) to certain requested records?

[para 14] Section 24(2)(c) of PIPA allows, but does not require, an organization to refuse to provide access to the personal information of an applicant if it was collected for an investigation.

1. Do the records at issue fall within the terms of section 24(2)(c)?

[para 15] Section 1(1)(f) of PIPA defines “investigation”, in part, as follows:

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

(i) a breach of agreement,

...

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

[para 16] The Organization explains that the Applicant moved a truck despite the fact that another employee, a tire technician, had placed her personal lock on the truck, indicating that she was still in the process of completing work on it and that it therefore should not be moved. The Organization submits that pages 30 to 33 and 64 to 77 of the records at issue arose out of an investigation into whether the Applicant had breached certain of the Organization’s rules and procedures, and what the consequences would be if that were the case.

[para 17] The Organization submitted copies of five of its rules and procedures that it had believed that the Applicant had breached, being *Suncor’s Life-Saving Rules, Equipment Lockout and Orderly Transfer of Control – Procedure Number MEP2057A, General Safety & Health Rules – Rule Number MER1008A, Field Level Risk Assessment – Rule Number MER1024A, and Moving Equipment in or out of the Shop (MEM HD Shops) – Rule Number MER1009A.*

[para 18] An investigation can be an investigation of possible misconduct or non-compliance in relation to a rule or policy incorporated into an employment agreement (see, e.g., Order P2008-007 at para. 29). I first find that the foregoing rules and procedures formed part of the Applicant’s employment agreement, and therefore part of an agreement within the terms of section 1(1)(f)(i) of PIPA.

[para 19] In order to fall within the definition of “investigation”, the investigation in question must also relate to a breach of agreement that has or may have occurred or is likely to occur, and it must be reasonable to conduct the investigation. I find that, at the time that the Organization initiated its review of the Applicant’s conduct, a breach of safety procedures on his part may have occurred: the truck had been moved, he was the

employee that had driven it, and the tire technician had apparently left her personal lock on the truck, which would mean that it could only be moved with her consent. The Applicant argues that he was not wrong in moving the truck, as he was not told by a supervisor that the tire technician had been servicing the truck, the tire technician had not properly placed her name tag on the lock, and he believed that he was moving the truck with the true lock owner's consent. However, it is sufficient that the Applicant's breach of rules and procedures incorporated into his employment agreement "may have occurred" in order for there to have been an investigation under PIPA. Further, as noted by the Organization, it is not my role in this inquiry to review the outcome of the Organization's investigation, or decide whether the Applicant actually breached any safety procedures in view of his version of events.

[para 20] As for whether it was reasonable for the Organization to conduct the investigation, the Organization submits that this requirement is met because the Applicant's work environment was safety-sensitive with a potential for injury or death if safety procedures were not carefully followed. I agree that the investigation was reasonable. The purpose of the procedure entitled *Equipment Lockout and Orderly Transfer of Control*, for instance, is "to manage the control of hazardous energy when machinery, equipment or powered mobile equipment is to be serviced, repaired, tested adjusted or inspected". In order to achieve this important purpose, once a unit such as a truck has been locked out by an employee servicing it, the lock may only be removed by that employee following a complete circle check to ensure that the work is finished and after all employees working on or near the truck are accounted for, after which the unit may be moved.

[para 21] Given the foregoing, I find that the Organization was conducting an investigation, as that term is defined in PIPA. I also find that the records at issue were collected for that investigation, as they consist of facts, statements, notes, e-mail correspondence and documentation gathered for the purpose of determining whether the Applicant had breached safety procedures and, if so, what the consequences would be.

[para 22] I conclude that the Organization was entitled to rely on section 24(2)(c) so as to withhold the Applicant's personal information from him on the basis that it had been collected for an investigation. I now turn to whether it properly exercised its discretion when relying on the provision and deciding to withholding the information.

2. Did the Organization properly exercise its discretion to withhold the records at issue?

[para 23] The Organization explains that it exercised its discretion to withhold the Applicant's personal information in the records at issue in reliance on section 24(2)(c) of PIPA because investigations must remain confidential and anonymous so as to ensure that people accurately report an incident regarding a breach of policy or procedure and respond truthfully regarding the incident. It adds that this is for the purpose of the Organization appropriately considering the potential consequences of a breach of policy and procedure, which is particularly important given the safety-sensitive work

environment at the Organization's premises and the need to maintain that safe work environment.

[para 24] I accept the foregoing explanation of the Organization's exercise of discretion. I also note the Organization's submission that some of the information that it withheld under section 24(2)(c) was also required to be withheld under section 24(3)(c), as it would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity. Indeed, this rationale for withholding information under section 24(3)(c) overlaps in certain respects with the rationale for withholding information collected for an investigation under section 24(2)(c). As for the Applicant's personal information in the records at issue that would not, by virtue of context, reveal the identities of individuals who provided an opinion about him in confidence, I find that the Organization properly exercised its discretion to withhold it on the basis that it prefers not to reveal the discussions that took place about the facts in relation to the incident in question and the potential consequences of the Applicant's conduct.

[para 25] On this point, the Applicant notes that a "Fact Sheet" at pages 30 to 33 of the records at issue was presented to senior management of the Organization and that the information on them was used to terminate his employment. He argues that, once the names of third parties are redacted, he should be given access to those pages so that he can address what he believes to be inaccuracies and fabrications that have seriously harmed his reputation. With respect to his access request more generally, the Applicant argues that he is entitled to fully know the reasons for his termination, and to defend himself against the accusations of the Organization. He submits that his right of access should outweigh the Organization's discretion to withhold the information.

[para 26] The Applicant's argument that he is effectively entitled to know all of the details surrounding the investigation of his conduct and the decision to terminate him does not convince me that the Organization improperly exercised its discretion to withhold the records at issue. I see, from the package of records released to him, that the Applicant was given access to, among other things, a letter setting out his termination and the reason for it following the investigation, and more detailed facts about the investigation as found in a "Major Mishap Review". Moreover, I note and accept the Organization's submission that it could also have withheld pages 30 to 33 under section 24(2)(a), on the basis that they are protected by solicitor-client privilege. The Organization explains that the Fact Sheet, which consists of background to the incident involving the truck and the potential options to deal with the Applicant, was presented not only to senior management but also to the Organization's in-house legal counsel in order to obtain legal advice on how to address the matter.

[para 27] Finally, I dismiss the Applicant's argument that he is entitled to the records at issue because he believes that they contain inaccurate information about him. This is despite the existence of section 33 of PIPA, which reads as follows:

33 An organization must make a reasonable effort to ensure that any personal information collected, used or disclosed by or on behalf of an organization is accurate and complete to the extent that is reasonable for the organization's purposes in collecting, using or disclosing the information.

The fact that an organization has a duty to ensure the accuracy and completeness of an individual's personal information does not mean that the individual has a right of access to that personal information. To the extent that an organization might not properly exercise its discretion to withhold an individual's personal information if the individual requires it to disprove inaccuracies, I have already noted that the Applicant did receive information explaining the results of the Organization's investigation of his conduct and the reasons for its decision to terminate him. Moreover, documentation prepared and submitted by the Applicant indicates that he is aware of the underlying facts that were gathered by the Organization, as he provides his reasons for disputing those facts.

[para 28] I conclude that the Organization properly exercised its discretion to withhold the Applicant's personal information under section 24(2)(c) of PIPA, on the basis that the information was collected for an investigation.

B. Does section 24(3)(b) (requirement to refuse access to information revealing personal information about another individual) apply to parts of the requested records?

[para 29] Section 24(3)(b) of PIPA sets out a mandatory exception to disclosure in that an organization is required to refuse an applicant access to his or her own personal information if the information would reveal personal information about another individual.

[para 30] The Organization submits that section 24(3)(b) applies to various parts of the records at issue. In addition to the seniority list at page 8 and the e-mail at page 62, which I discussed earlier, the Organization determined that section 24(3)(b) applied to the aforementioned Fact Sheet setting out background to the incident involving the truck moved by the Applicant, e-mail correspondence discussing the investigation and making recommendations with respect to the outcome, handwritten notes assessing the involved employees' conduct in relation to one another, Supplemental Information containing the views and opinions of individuals about the incident and the Applicant's conduct, and an Employee Statement setting out an employee's perception of the Applicant's attitude and behaviour as it related to the incident and the investigation.

[para 31] The Organization argues that the context of information in the foregoing records reveals the personal information of other individuals. I agree, but only with respect to a small amount of information. In particular, some of the Applicant's personal information is intertwined with the personal information of another employee whose conduct was also investigated by the Organization following the underlying events. As a result of this intertwined personal information, the Organization is not reasonably able to sever the personal information of the other individual so as provide the Applicant with

the remaining information, as contemplated by section 24(4). In other instances, however, the two sets of information are separate and distinct, meaning that the Organization might have given the Applicant access to his own personal information, had it not instead exercised its discretion to withhold it under section 24(2)(c).

[para 32] Much of the information that the Organization determined to be subject to section 24(3)(b) is not the personal information of other individuals. This is because work product information or records produced by an employee in the course of employment is generally not the personal information of the employee (Order P2006-005 at para. 50). Here, when employees are commenting on the truck and the fact that it was moved, they are doing so in their work-related capacity without any personal dimension that would render the information their personal information, unlike the situation with the Applicant and other individual who were alleged to have done something wrong in the course of their duties. Similarly, where members of senior management are discussing the Applicant's conduct and the consequences, they are doing so as part of their work-related responsibilities without any personal dimension so as to make the information their personal information.

[para 33] I conclude that the Organization was required to withhold a small amount of the Applicant's personal information in the records at issue, on the basis that it would reveal, under section 24(3)(b), the personal information of the other individual who was investigated. It is not necessary for me to specify this personal information of the Applicant that must be withheld, given that I concluded earlier in this Order that the Organization properly withheld all of the Applicant's personal information in the records under section 24(2)(c). I also do not need to specify which information is not the personal information of other individuals to which section 24(3)(b) does not apply. Again, the Applicant is not entitled to information that is not his own personal information, and where the records do consist of his personal information, the Organization properly refused access on the basis that the information was collected for an investigation.

[para 34] Finally, even where it does not constitute personal information, information must be withheld by an organization if it would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity, as noted earlier in this Order in reference to section 24(3)(c). In other words, while I have found that certain information in the records is not the "personal information" of individuals subject to section 24(3)(b), some of it would be "information [that] would reveal the identity of an individual..." and therefore be subject to section 24(3)(c). It is not necessary for me to decide which parts of the records consist of views about the Applicant, would reveal the identity of the individuals providing the views, and would therefore be subject to section 24(3)(c). Again, this is because I have already found that such information was properly withheld under section 24(2)(c), in any event.

V. ORDER

[para 35] I make this Order under section 52 of PIPA.

[para 36] I find that the Applicant is not entitled to access to some of the records at issue, as they do not consist of his personal information, which is a condition for access under section 24(1)(a) of PIPA.

[para 37] I find that the Organization properly applied section 24(2)(c) of PIPA to the Applicant's personal information in the remaining records at issue, as the information was collected for an investigation. Under section 52(2)(a)(ii), I confirm the decision of the Organization to refuse the Applicant access to the remaining records at issue.

[para 38] Additionally, I find that section 24(3)(b) of PIPA applies to a small amount of information in the records at issue, as the information would reveal personal information about another individual.

Wade Raaflaub
Adjudicator