

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2013-07

November 29, 2013

MOORE'S INDUSTRIAL SERVICE LTD.

Case File Number P1806

Office URL: www.oipc.ab.ca

Summary: An individual complained that his former employer, Moore's Industrial Service Ltd. (the Organization) gained access to his personal web-based email account and collected, used and/or disclosed emails located in that account, in contravention of the *Personal Information Protection Act* (PIPA). The Complainant argues that his personal information was accessed without authorization, as was the personal information of former coworkers and other contacts.

In October 2010, the Complainant states that he noticed that emails from his personal email account had been forwarded to the Organization's CEO. The Complainant states that he realized the CEO must have had access to the Complainant's personal email account and was forwarding some of the emails to the CEO's email account.

The Organization acknowledges that it accessed the Complainant's personal web-based email account, but stated that the Complainant had returned a work laptop that still contained his personal email account information. It argued that the Complainant had therefore implicitly consented to the Organization's access to his personal email account.

The Adjudicator determined that the Complainant did not provide consent to the Organization to access his personal email account. She found that the Organization did not have authority to collect, use or disclose the Complainant's personal information contained in his email account.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 2, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 36, 46, 52.

Authorities Cited: AB: Orders F2012-07, P2011-005.

I. BACKGROUND

[para 1] An individual complained that his former employer, Moore's Industrial Service Ltd. (the Organization) gained access to his personal web-based email account and collected, used and/or disclosed emails located in that account, in contravention of the *Personal Information Protection Act* (PIPA).

[para 2] The Complainant retired from his position with the Organization in August 2009. At that time, he returned a laptop belonging to the Organization. During the time he had use of the laptop, the Complainant had used it to access his personal web-based email account. The Complainant states that he had had the hard drive of the laptop wiped before he returned it to the Organization, to ensure his personal information would be deleted.

[para 3] In October 2010, the Complainant states that he noticed that emails from his personal email account had been forwarded to the Organization's CEO. The Complainant states that he realized the CEO must have had access to the Complainant's personal email account and was forwarding some of the emails to the CEO's email account. The Complainant states that some of the emails were between him and other employees of the Organization (former coworkers), including a reference letter written by the Complainant for a former coworker. He states that two emails between him and a former coworker, which the CEO had forwarded to himself from the Complainant's personal email account, were later emailed again (presumably by the CEO) to the same former coworker. (No individual other than the Complainant is involved in this inquiry).

[para 4] The Complainant states that he does not know how many emails were forwarded by the CEO to the CEO's email account, as the CEO deleted the 'sent' messages.

[para 5] The Complainant does not indicate the date that he realized the CEO was accessing his personal email account. He does state that the earliest emails that were forwarded were from early October 2010. He also states that he changed his personal email account password in early December 2010.

[para 6] The Complainant argues that his personal information was accessed without authorization, as was the personal information of former coworkers. He also states "I need to inform all my contacts... that [the CEO] was accessing my emails to make them aware that their privacy was corrupted as well."

[para 7] The Organization acknowledges that it accessed the Complainant's personal web-based email account.

[para 8] The Commissioner authorized a portfolio officer to investigate and attempt to mediate the Complainant's complaint. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. INFORMATION AT ISSUE

[para 9] The information at issue consists of the Complainant's personal web-based email account information as well as personal information in emails in the Complainant's personal email account.

III. ISSUES

[para 10] The Notice of Inquiry dated March 15, 2013 states the issues for inquiry as the following:

Did the Organization collect, use and/or disclose the Complainant's personal information in contravention of PIPA?

Did the Organization collect, use and/or disclose the Complainant's personal information and/or personal employee information, as those terms are defined in section 1(1) of PIPA? If so,

Did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authority or consent)? In particular,

Did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 14, 15, 17, 18, 20 and/or 21 of PIPA?

If the Organization did not have the authority to collect, use and/or disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before collecting, using and/or disclosing the information? In particular,

Did the Complainant consent in writing or orally? Or

Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met? Or

Were the conditions in sections 8(3)(a), (b) and (c) met?

Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, sections 11, 16 and/or 19 of PIPA (collection, use and

disclosure for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

Did the Organization collect the information directly from the Complainant? If the Organization collected the information other than directly from the Complainant, was the collection contrary to, or in accordance with, section 12 (sources for collection)?

Did the Organization collect the information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide and did it provide notification before or at the time of collecting the information?

IV. DISCUSSION OF ISSUES

Scope of inquiry

[para 11] Under PIPA, an individual can make a complaint about the collection, use and disclosure of personal information by an organization, regardless of whom the personal information is about. Section 46(2) states that an individual may initiate a complaint with respect to the issues referred to in section 36(2), including a complaint that personal information has been collected, used or disclosed in contravention of the Act (section 36(2)(e)).

[para 12] The Complainant is concerned about the Organization's collection, use and disclosure of his own personal information, as well as the personal information of two former coworkers. He also indicates that the personal information of other individuals with whom he corresponded via email could have been viewed without authorization by the CEO.

[para 13] The Organization agrees that at least one email was forwarded from the Complainant's account to the CEO's email account by the CEO; this email contained a reference letter written by the Complainant for one of his former coworkers. The Organization also acknowledges that this email was disclosed by the CEO to two other employees of the Organization. Therefore the Organization acknowledges the collection and disclosure of this former coworker's personal information.

[para 14] The Organization argued that "the CEO reviewed only messages that had an appearance of pertaining to MIS business." Even where the content of an email was not read, a sender's name may be part of their email address, which is often viewable without opening the email, as is the subject line of the email. Further, depending on the email account and settings, the sender's name (instead of, or along with, his or her email address) may be viewable without opening the email. An individual's name is clearly his or her personal information; further information may be revealed in the subject line of the email. Therefore, even if the CEO read only emails that he believed may have been

related to his company, he may have viewed the personal information of many other individuals who had emailed (or received email from) the Complainant.

[para 15] However, no individual other than the Complainant is part of this inquiry and no one other than the Complainant has submitted arguments or evidence. As the Notice of Inquiry refers only to the Complainant's personal information, I have decided not to directly address the collection, use or disclosure of personal information of other individuals. This does not preclude other individuals from initiating their own complaints against the Organization.

Did the Organization collect, use and/or disclose the Complainant's personal information and/or personal employee information, as those terms are defined in section 1(1) of PIPA?

Was the information personal information?

[para 16] "Personal information" is defined in section 1(1)(k) of the Act as "information about an identifiable individual."

[para 17] In Order F2012-07 I found that under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), a login ID for a personal email account (which is usually the email address itself), and the password to that account, are personal information. I find that the login and password are similarly personal information under PIPA.

[para 18] I do not know all of the content of the emails the CEO reviewed in the Complainant's personal email account (nor does the Complainant). However, the content of the Complainant's personal email account – i.e. with whom he corresponds via email – is generally his personal information. The Organization collected and used the Complainant's personal information when the CEO accessed the personal email account.

[para 19] The Organization also admits that the CEO forwarded at least one email to other employees of the Organization. The Complainant provided me with a copy of that email, along with the attached reference letter written for a former coworker; both the email and the attachment contain the Complainant's personal information. From the submissions of the parties it appears that the Organization did not "use" the Complainant's personal information in those emails; however, it did disclose the information to two other employees of the Organization (the email seems to have been forwarded to these two employees because of the content related to the former coworker, not because of any information it contained about the Complainant).

Was the information personal employee information?

[para 20] The definition of "personal employee information" in section 1(1)(j) reads:

1(1)(j) “personal employee information” means, in respect of an individual who is a potential, current or former employee of an organization, personal information reasonably required by the organization for the purposes of

(i) establishing, managing or terminating an employment or volunteer-work relationship, or

(ii) managing a post-employment or post-volunteer-work relationship

between the organization and the individual, but does not include personal information about the individual that is unrelated to that relationship;

[para 21] The Complainant is a former employee of the Organization. The definition of personal employee information in PIPA encompasses former employees in addition to current and potential employees; however, the definition also requires that in order for personal information to be personal *employee* information, the information must be reasonably required for one of the listed purposes. As the Complainant’s employment had already ended, the only possibly relevant purpose is for managing the post-employment relationship.

[para 22] The Organization states that there is a termination agreement with the Complainant, which states that the Complainant cannot contact any of the Organization’s customers, and cannot discuss the Organization’s business with anyone. The Public Body states that the CEO viewed only those emails that he felt may pertain to the Organization’s business. It is arguable that enforcing a termination agreement could be part of managing a post-employment relationship. Regardless, the information must also be *reasonably required* for that purpose. In this case, the Organization has not provided any reason for believing that the Complainant may have violated the terms of the termination agreement. Without a reason to suspect a violation of the agreement, the Organization’s ongoing surveillance of the Complainant’s personal email account cannot be said to be “reasonably required” to enforce the Organization’s termination agreement.

[para 23] Even if the Organization had reason to expect that the Complainant may have breached the termination agreement, it is not clear that accessing the Complainant’s personal email account would have been a reasonable step to take for the purpose of managing a post-employment relationship.

[para 24] I find that the Complainant’s personal information was not personal employee information under PIPA.

Did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authority or consent)? In particular,

Did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 14, 15, 17, 18, 20 and/or 21 of PIPA?

[para 25] As I have determined that none of the personal information at issue was personal employee information, sections 15, 18 and 21 are not applicable.

[para 26] The Organization argues that the Complainant was obliged under a termination agreement not to contact customers of the Organization or discuss the Organization's business. The Organization states that the CEO reviewed the Complainant's personal email account "from time to time to see if anything pertained to MIS business." The Organization states that the CEO reviewed only those messages that appeared to pertain to the Organization's business, and that the CEO "felt at liberty to do this in accordance with the company's electronic mail policy."

[para 27] With respect to disclosure of the information, the Organization states:

the only email message that was forwarded from the CEO to anyone else was the one concerning [a former coworker] and this was forwarded only to two senior employee of MIS who worked directly with [the former coworker] as evidence that [the former coworker's] loyalty was no longer with the company. The employees were subsequently directed to delete the message.

[para 28] A copy of the Organization's privacy policy was provided to me in the Organization's submission. Having reviewed this policy, I cannot find anything in it that relates to the Organization's accessing an employee's (or former employee's) personal email account, nor does it address the use of company laptops.

[para 29] The Organization did not point to a provision in PIPA that would authorize the collection, use or disclosure of personal information from the Complainant's email account, without consent. The only provisions that may be relevant are the provisions permitting collection, use or disclosure of personal information without consent where the collection, use or disclosure is reasonable for the purposes of an investigation or legal proceeding (sections 14(d), 17(d) and 20(m), respectively). "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 30] In Order P2011-005, the Director of Adjudication stated that in order to rely on sections 14(d) to collect personal information, "an organization must establish that it is reasonable to conduct an investigation in the circumstances, and that the collection is

reasonable for the circumstances.” The same can be said for sections 17(d) and 20(m) (use and disclosure of personal information for an investigation).

[para 31] Further, the definition of “investigation” in section 1 requires that a breach of an agreement occurred, may have occurred, or is likely to occur. Although the Organization cites the Complainant’s termination agreement as justification for its actions, the Organization has not provided me with any reason to conclude that the Organization had undertaken an investigation or legal proceeding with respect to that agreement. As stated earlier, the Organization has not argued that it had any reason to expect that the Complainant may have breached the termination agreement, or that a breach was likely to occur. Therefore, the Organization has not satisfied me that a breach of the agreement occurred, may have occurred, or was likely to occur. Nor has it satisfied me that it was reasonable to conduct an investigation to determine whether the Complainant had breached the termination agreement.

[para 32] Even if the Organization had reason to expect that the Complainant may have breached the agreement, it is by no means clear that accessing the Complainant’s personal email account would have been a reasonable step to take for the purpose of investigating a suspected breach, within the terms of sections 14(d), 17(d) or 20(m).

[para 33] I find that the Organization was not authorized to collect, use or disclose the personal information at issue without consent.

If the Organization did not have the authority to collect, use and/or disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before collecting, using and/or disclosing the information? In particular,

Did the Complainant consent in writing or orally? Or

Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met? Or

Were the conditions in sections 8(3)(a), (b) and (c) met?

[para 34] I have found that the Organization was not authorized to collect, use or disclose the Complainant’s personal information without consent under sections 14, 17 or 20. As such, in order to comply with the Act, the Organization would have had to obtain consent from the Complainant, under section 8 of the Act.

[para 35] The Organization argues that the Complainant consented to the Organization’s access to his personal email account. The Organization states that the Complainant did not wipe the hard drive of the laptop, and that access to the personal email account was left open on the laptop. The Organization argues that

... since the Complainant had opportunity to remove his email account from the computer and did not, and in fact did not even change his password, we presumed this was done deliberately as an indication from the Complainant that he had nothing to hide. The Complainant stated that he first noticed his emails were being accessed on October 6 or 7, 2010 yet he did not request MIS to cease that access and apparently made no effort to change his password. In our opinion this implies his consent to the viewing of subsequent emails.

[para 36] The Organization also argues that the CEO felt he could view the Complainant's personal email account "in accordance with the company's electronic mail policy." I have already determined that the Organization's privacy policy does not address the circumstances at issue.

[para 37] The Organization's arguments indicate that it is relying on the deemed consent provision in section 8(2) of PIPA. This section states:

8(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and

(b) it is reasonable that a person would voluntarily provide that information.

[para 38] The Complainant asserts that he had the hard drive of the laptop wiped before giving the laptop back to the Organization, and that the CEO must therefore have hacked into his email account. Neither party has provided evidence to support its assertion; however, I do not need to make a factual determination on this point. In my view, even if the Complainant returned the laptop with his email account information intact, it was not reasonable for the Organization to conclude that the Complainant intended the Organization to access his personal email account on an ongoing basis. A more reasonable conclusion is that the Complainant simply neglected to remove all of his personal information from the laptop or that he tried to do this (or have it done) but failed.

[para 39] Section 8(2) is intended to "deem" consent in situations in which it is obvious to the individual providing the information that the organization is collecting, using or disclosing the personal information, for a particular purpose. It also only applies where it is reasonable for an individual to volunteer the information for that purpose.

[para 40] The Complainant's assertion that he had the laptop "wiped" of personal information indicates that even if the email account information remained, the Complainant was not aware of this. I have no reason to reject his evidence. However, even if the Complainant had known that his personal email account information remained on the laptop, there is nothing to suggest that it would be reasonable for him to expect that the Organization would use the information to access the email account on an ongoing basis.

[para 41] Further, the deemed consent provision requires that there be *a particular purpose* for which the individual has provided the relevant information. It is possible that the Organization is arguing (although it does not do so expressly) that the purpose for which the Complainant “provided” access to his email account was to enable monitoring of his compliance with the termination agreement.

[para 42] In my view, this is a far too speculative, and indeed unlikely, explanation of the events to meet the requirements of section 8(2). A personal email account can include sensitive personal information of the account-holder and anyone else who emails, or receives emails from, the account-holder. It is not reasonable to assume (or deem) that the Complainant consented to unfettered access to his personal email account for the purpose of enabling ongoing monitoring of a particular category of information.

[para 43] The Organization also argues that the Complainant knew that the CEO had been accessing his personal email account since October, but did not say anything until December. This is offered as support for the Organization’s conclusion that the Complainant consented to the Organization’s access of his personal email.

[para 44] The Complainant has stated that the first time he noticed his emails being forwarded to the CEO was October 6 or 7, 2010. The Complainant states that the next occurrence of which he has knowledge was the email to a former coworker containing the reference letter, and other email exchanges between the Complainant and the former coworker, which took place a few days later.

[para 45] The Complainant states “I couldn’t figure out how my emails were being sent to [the CEO] until another 2 emails were sent to him. This is when I realized he was hacking into my email.” I do not agree with the Organization that the Complainant’s statements indicate that he knew the CEO was accessing his personal email account in early October 2010. It does not seem to be unreasonable that the Complainant did not immediately realize that the emails had been forwarded to the CEO because the CEO had access to the Complainant’s personal email account.

[para 46] I find that the Organization did not have the Complainant’s consent to access his personal email account, or to collect, use or disclose his personal information from that account.

Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, sections 11, 16 and/or 19 of PIPA (collection, use and disclosure for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

[para 47] Sections 11(1), 16(1) and 19(1) require an Organization to respectively, collect, use and disclose personal information only for purposes that are reasonable. These sections state:

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

16(1) An organization may use personal information only for purposes that are reasonable.

19(1) An organization may disclose personal information only for purposes that are reasonable.

Section 2 defines reasonable as follows:

2 Where in this Act anything or any matter

(a) is described, characterized or referred to as reasonable or unreasonable, or

(b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,

the standard to be applied under this Act in determining whether the thing is reasonable or unreasonable, or has been carried out or otherwise dealt with or reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

[para 48] Sections 11(2), 16(2) and 19(2) limit an organization's collection, use and disclosure, respectively, to what is reasonable for meeting the purposes of the collection, use and disclosure. These sections state:

11(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.

16(2) Where an organization uses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is used.

19(2) Where an organization discloses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is disclosed.

[para 49] As I have found that the Organization did not have authority to collect, use or disclose the Complainant's personal information, I do not need to consider whether the Organization's purposes for, and extent of, the collection, use and disclosure were reasonable.

[para 50] However, I will comment that the Organization's continued access to the Complainant's personal email account is far from being a reasonable collection, use or disclosure of personal information, nor is the purpose at all reasonable.

[para 51] In Order F2012-07, I found that a public body's access to an employee's personal email account, which occurred in the course of an employment investigation,

was “excessively invasive and patently unreasonable.” That finding is equally applicable in this case.

Did the Organization collect the information directly from the Complainant? If the Organization collected the information other than directly from the Complainant, was the collection contrary to, or in accordance with, section 12 (sources for collection)?

[para 52] Section 12 states:

12 An organization may without the consent of the individual collect personal information about an individual from a source other than that individual if the information that is to be collected is information that may be collected without the consent of the individual under section 14, 15 or 22.

[para 53] Although the Complainant’s personal information was collected from his own email account, this would be a direct collection only if the Complainant intentionally provided the information or provided access to his email account for the purpose of providing the information. I have found that the Complainant did not intend to provide the Organization with his email account information for the purpose of allowing the Organization to have access to that account. Therefore, the Complainant did not provide the Organization with his personal information found in that account; rather the information was collected indirectly.

[para 54] An organization is permitted to collect personal information indirectly if the personal information can be collected without consent under sections 14, 15 or 22 of PIPA. I have found above that the Organization did not have authority to collect the Complainant’s or the former coworker’s personal information without consent under section 14, and that section 15 is not applicable. Section 22 applies only to business transactions as defined in the Act (for example, the acquisition or disposal of an organization or business asset). It is therefore not applicable in this case.

[para 55] I find that the Organization collected the personal information of the Complainant, without authority under the Act to do so.

Did the Organization collect the information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide and did it provide notification before or at the time of collecting the information?

[para 56] Organizations obtaining consent for collection under section 8(1) must also fulfill the notice requirements set out in section 13(1). The relevant portions of section 13 state:

13(1) Before or at the time of collecting personal information about an individual from the individual, an organization must notify that individual in writing or orally

- (a) as to the purposes for which the information is collected, and*
- (b) of the name or position name or title of a person who is able to answer on behalf of the organization the individual's questions about the collection.*

[para 57] As I have found that the personal information at issue was not collected directly, this issue does not arise.

V. ORDER

[para 58] I make this Order under section 52 of the Act.

[para 59] I find that the Organization collected, used, and disclosed the Complainant's personal information. I order the Organization to stop collecting, using, and disclosing the Complainant's personal information. As a condition of complying with this Order, the Organization must provide training to staff concerning the appropriate management of personal information.

[para 60] I further order the Organization to notify me and the Complainant in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator