

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2014-05

July 16, 2014

CANADIAN CORPS OF COMMISSIONAIRES

Case File Number P2269

Office URL: www.oipc.ab.ca

Summary: The Applicant requested his employee file from the Canadian Corps of Commissionaires (the Organization) under the *Personal Information Protection Act* (PIPA).

The Organization identified itself as a non-profit organization and argued that PIPA did not apply to the information requested by the Applicant for that reason.

The Adjudicator determined that the Organization is a non-profit organization registered under Part 9 of the *Companies Act*. The Adjudicator determined that collecting, using, and disclosing personal information to manage employees is not a transaction or course of conduct that is of a commercial character within the terms of section 56(1). She confirmed that the Organization did not have any duties under PIPA in relation the Applicant's request for access.

Statutes Cited: **AB:** *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 24, 52, 56; *Companies Act* R.S.A. 2000, c. C-21, s. 206 **CA:** *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c-5 s. 4

Authorities Cited: **AB:** Decision P2013-D-01

Cases Cited: *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and its Local 736 v. E.S. Fox Ltd.*, 2006 CanLII 468 (ON LRB)

I. BACKGROUND

[para 1] The Applicant made a request to the Canadian Corps of Commissionaires (the Organization) for access to information under the *Personal Information Protection Act* (PIPA). The Applicant stated:

Please know and note that I wish to make a formal P.I.P.A. request as per provincial legislation to access everything on any and all my file(s) while Employed for the Corps of Commissionaires.

[para 2] The Organization searched for responsive records. It located responsive records and provided them to the Applicant. However, it withheld some information under sections 24(2) and (3) of PIPA.

[para 3] The Applicant requested review of the Organization's response to his access request. The Commissioner authorized mediation to resolve the issues between the parties. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] Prior to the inquiry, the Organization raised the issue that it is a non-profit organization registered under Part 9 of the *Companies Act*. It argued that PIPA does not apply to it for that reason.

[para 5] I decided to address the jurisdictional issue first, and then decide the merits of the Applicant's request for review should I have jurisdiction to decide them.

II. ISSUE

Issue A: Does PIPA apply to the Organization?

[para 6] To decide the question of whether PIPA applies, I must first answer the question of whether the Organization is a non-profit organization within the terms of section 56(1)(b) of PIPA.

[para 7] Section 56(1)(b) of PIPA states:

56(1) In this section,

(b) "non-profit organization" means an organization

(i) that is incorporated under the Societies Act or the Agricultural Societies Act or that is registered under Part 9 of the Companies Act, or

(ii) that meets the criteria established under the regulations to qualify as a non-profit organization.

[para 8] The Organization submitted a search of the Corporate Registration System to establish that it is registered as a non-profit private company. The Organization also submitted an order of the Court restoring the Organization to the register under section 206(1) of the *Companies Act*. These records establish that the Organization is registered under the *Companies Act*, and is registered as a non-profit company under the Part 9 of that Act.

[para 9] The next question that must be decided is whether the information requested by the Applicant was collected, used, or disclosed by the Organization in connection with any commercial activity as defined by section 56(1)(a), carried out by the Organization within the terms of section 56(3).

[para 10] Section 56(1)(a) of PIPA states:

56(1) In this section,

(a) “commercial activity” means

(i) any transaction, act or conduct, or

(ii) any regular course of conduct,

that is of a commercial character and, without restricting the generality of the foregoing, includes the following:

(iii) the selling, bartering or leasing of membership lists or of donor or other fund-raising lists;

(iv) the operation of a private school or an early childhood services program as defined in the School Act;

(v) the operation of a private college as defined in the Post-secondary Learning Act;

[para 11] Section 56(3) of PIPA states:

56(3) This Act applies to a non-profit organization in the case of personal information that is collected, used or disclosed by the non-profit organization in connection with any commercial activity carried out by the non-profit organization.

[para 12] By operation of section 56(3), if the information that is the subject of the Applicant’s access request is personal information collected, used or disclosed by the Organization in connection with a commercial activity, as defined by section 56(1)(a), then PIPA will apply to that information, even though the Organization is a non-profit organization within the terms of section 56(1)(b).

[para 13] In Decision P2013-D-01, the Adjudicator commented on the meaning of “commercial activity” within section 56. He said;

My interpretation that there is a relatively broad test for determining what constitutes a commercial activity is consistent with the definition that is set out in section 56(1)(a) of PIPA itself. A commercial activity is any transaction, act, conduct, or regular course of conduct that is of a commercial character. While admittedly somewhat circular, the definition does not say that a commercial activity is an activity that is “commercial”. Rather, an activity must have a commercial “character”. To me, the definition is meant to capture activities that are more or less commercial, or appear to be commercial by most accounts. To adapt a colloquial phrase, if it looks like a commercial activity, and walks like a commercial activity, then it is a commercial activity. In short, PIPA is meant to apply to non-profit organizations that are carrying out activities as though they are a business. Moreover, the idea that profit is not determinative or even relevant, when deciding whether an organization is carrying out a commercial activity, is even clearer under PIPA, given that the organization in question is already a “non-profit” organization (unlike the organizations in question under PIPEDA, which refers to the notion of “commercial activity” to decide whether any organization is subject to that legislation). Virtually all non-profit organizations under PIPA do not have the objective of making an overall profit that is distributed to individuals associated with the organization.

[para 14] To determine whether an activity of a non-profit organization has a commercial character, one must examine the activity in question and determine whether the activity is more or less commercial. The activity in question in the case before me, is the collection and use of an employee’s personal information for employment purposes, given that the Applicant has made a request for his employee file.

[para 15] In my view, the information in an employee file will not meet the requirements of section 56(3) as it is not information that is collected, used, or disclosed by a non-profit organization in connection with a commercial activity. Non-profit organizations, like for-profit organizations must act through employees. While organizations pay employees for their service, this alone does not mean that the personal information of employees is collected, used, or disclosed in connection with a commercial activity. Hiring and managing employees is not the commercial activity in which a for-profit business engages. A for-profit business may hire and manage employees in order to engage in commercial activities. For example, a commercial retailer is not in the business of hiring employees, but retail. Although non-profit organizations are similar to for-profit organizations in that they may both hire employees, it is not the fact that a for-profit organization hires, pays, and manages employees that give the organization’s activities a commercial character.

[para 16] I draw support for this conclusion from *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers and its Local 736 v. E.S. Fox Ltd.*, 2006 CanLII 468 (ON LRB), in which the Ontario Labour Relations Board rejected the argument that an organization’s collection, use, or disclosure of personal information for employment-related purposes is a commercial activity within the terms of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c-5 (PIPEDA). In that decision, the Board interpreted section 4(1)(a) of PIPEDA and the meaning of “commercial activity” as defined in section 2 of that Act. The Board said:

Under subsection 4(1) of PIPEDA, Part 1 of that Act applies to personal information that the company collects, uses or discloses in the course of “commercial activities”. PIPEDA defines “commercial activity” as follows:

“commercial activity” means any particular transaction, act or conduct or any regular course of conduct that is of a commercial character, including the selling, bartering or leasing of donor, membership or other fundraising lists.

Although the definition of commercial activity is quite broad and, as a result, subsection 4(1)(a) of PIPEDA would include the collection, use or disclosure by the company of the personal information of its employees’ for commercial purposes, where the employees’ personal information is being collected, used or disclosed for employment-related purposes, subsection 4(1)(a) does not apply. First, the collection, use or disclosure by an organization of the personal information of its employees solely for employment-related purposes cannot reasonably constitute a “commercial activity” under any logical interpretation of that phrase. The mere fact that an organization carries on a commercial activity cannot, on its own, render the collection, use or disclosure of employee personal information for employment-related purposes into a commercial activity [...]

[para 17] I agree with the reasoning in the foregoing excerpt. The information in an applicant’s employee file is the information an employer collects and uses for the purpose of managing the employee relationship. This, in itself, is not a commercial activity.

[para 18] For the reasons above, I find that the information that is the subject of the Applicant’s access request is not information collected, used, or disclosed in connection with any commercial activity. I therefore find that section 56(3) does not apply. As a consequence, I find that the information the Applicant has requested falls outside the scope of PIPA, and that PIPA does not apply to the Applicant’s access request. I will therefore confirm that the Organization has no duties under PIPA to respond to the Applicant’s access request.

[para 19] As the answer to the question of whether 56(3) is “no”, the need to conduct a review on the merits of the Applicant’s access request is obviated and the inquiry is now concluded.

V. ORDER

[para 20] I make this Order under section 52 of the Act.

[para 21] I confirm that the Applicant’s access request falls outside the scope of PIPA. I confirm that the Organization has no duties under PIPA to respond to the Applicant’s request.

Teresa Cunningham
Adjudicator