

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2015-06

May 15, 2015

SYNCRUDE CANADA LTD.

Case File Numbers P1963 and P2166

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Personal Information Protection Act* (“the Act”), the Applicant, a former employee of Syncrude Canada Ltd. (“the Organization”), requested a copy of his full and complete personnel file. The Organization responded but the Applicant believed that the response was not complete and requested a review by the Office of the Information and Privacy Commissioner. In addition, the Applicant made another request of the Organization for records relating to a “truck incident” as well as information disclosed to a potential employer. The Organization could not locate records responsive to this request and the Applicant asked this Office to review the Organization’s response.

The Adjudicator found that the Organization made all reasonable efforts to locate records responsive to the Applicant’s requests with one exception. Based on the information before the Adjudicator there appears to be a delay between when a record is created and when it is transferred to the employee’s personnel file. Therefore, the Adjudicator ordered the Organization to search all possible repositories for additional records responsive to the Applicant’s request for his personnel file that have not yet been incorporated into the file.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 24, 27, and 52.

Authorities Cited: AB: Order P2006-012

I. BACKGROUND

[para 1] The Applicant is a former employee of Syncrude Canada Ltd. (“the Organization”). On April 20, 2010, the Applicant requested his personal information from November 24, 2008 to the date of the request. The Organization provided records to the Applicant on April 27, 2010.

[para 2] Following this access request, on March 10, 2011, pursuant to the *Personal Information Protection Act* (“the Act”), the Applicant made an access request for his “full and complete” personnel file. On July 28, 2011, the Applicant e-mailed the Organization’s privacy officer and requested records he felt were missing from the information the Organization provided to him on April 27, 2010. He specifically mentioned two statements he had provided while employed by the Organization (one in 2009 and one in 2010). I will collectively refer to this access request as the Applicant’s first access request.

[para 3] On July 29, 2011, the Organization provided the Applicant with a copy of the records that were on his personnel file at the time but withheld some information pursuant to section 24(3)(b) of the Act. The 2009 and 2010 statements were not included in the Organization’s response to the Applicant. The Applicant asked the Office of the Information and Privacy Commissioner (“this Office”) to review the Organization’s response. Specifically, he believed that the response was incomplete and that the Organization ought to have provided him with the 2009 and 2010 statements.

[para 4] On March 2, 2012, the Applicant made a second access request to the Organization for information that was released to another potential employer and for notes taken by an employee of the Organization regarding a “truck incident”. On June 29, 2012, the Organization responded by advising the Applicant that no responsive records were found. The Applicant asked this Office to review the Organization’s response to his March 2, 2012 access request as well.

[para 5] On September 14, 2012, the Applicant made a further access request for “information related to and leading to the drug test that was administered on the morning of March 26, 2010”. The Organization responded on October 9, 2012 and provided the Applicant with a Loss Control Report (“LCR”) dated March 26, 2010, Post-Incident alcohol and drug test documentation, A&D Test – acknowledgement and consent, and Canada – Urine Drug Field Screen Custody and Control Form (I will refer to these records collectively as “drug test information”). The September 14, 2012 access request is not the subject of this inquiry, however, as I will discuss below, the drug test information is relevant to the issues in this inquiry.

[para 6] The Commissioner authorized an investigation into both matters in an attempt to settle the issues between the parties. However, this was not successful and the Applicant requested an inquiry into both the first and second access requests. It was decided that given the parties and issues are the same for both matters, they would be

heard together. I received initial and rebuttal submissions from both parties. I also asked questions of the Organization regarding its search and took its answers to those questions into consideration when making my decision.

II. INFORMATION AT ISSUE

[para 7] The only issue in this inquiry is if the Organization performed an adequate search for responsive records. Therefore, there is no information directly at issue.

III. ISSUE

[para 8] The Notice of Inquiry dated October 29, 2014 states the only issue in this inquiry as follows:

Did the Organization comply with section 27 of the Act (duty to assist)? In this case, the Commissioner will also consider whether the Organization conducted an adequate search for responsive records.

[para 9] In the Applicant's submissions, he argues that the Organization failed to release the correction to his "Bradford Index". It is my understanding from reading both the Applicant's and Organization's submissions that the "Bradford Index" issue is the subject of another Request for Review and does not form part of this inquiry. Therefore, I will not make any findings regarding this particular record.

[para 10] I will also not make any findings regarding the Organization's employment policies or its disciplinary policies. While I understand that the Applicant feels that he was treated unfairly by the Organization during his employment, employment matters are beyond my jurisdiction. This is not the proper forum in which to air those grievances.

[para 11] Finally, the Applicant makes several references to his personal information being improperly collected by the Organization in the form of witness statements and being improperly collected by and disclosed to another organization (who is not a party to this action). The Applicant did not bring up these issues in either of his Requests for Review or his Requests for Inquiry. The sole issue at this inquiry is whether the Organization complied with section 27 of the Act and specifically if it performed an adequate search for responsive records. Therefore, I will not be making any findings regarding the collection of information.

IV. DISCUSSION OF ISSUES

Did the Organization comply with section 27 of the Act (duty to assist)? In this case, the Commissioner will also consider whether the Organization conducted an adequate search for responsive records.

[para 12] The portion of section 27 of the Act that is relevant in this inquiry states:

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 13] As part of fulfilling its duties to the Applicant, the Organization must conduct an adequate search for records that respond to the Applicant's access requests. This means that the Organization must have made every reasonable effort to search for the records requested. The initial, or evidentiary, burden of proof lies with the Applicant to provide some evidence that the Organization failed to provide records in its custody or control. If the Applicant meets this initial burden, the onus then shifts to the Organization to prove, on a balance of probabilities, that it made every reasonable effort to conduct an adequate search for responsive records (Order P2006-012 at para 12).

[para 14] In his submissions, the Applicant notes that there were records which ought to be have been in his personnel file but were not provided to him in response to his first and second access requests. Specifically, he argues that in response to his first access request (for his personnel file), he should have received the following:

1. A 2009 statement he made;
2. A 2010 statement he made regarding a major incident involving another employee;
3. Drug test information.

[para 15] The Applicant was not provided with these records in response to his first access request for his personnel file but was provided with the 2010 statement and drug test information after the Organization's initial response. The Organization says that the 2009 statement has not been located. The Applicant specifically recalls making the statement and giving it to an employee of the Organization.

[para 16] The 2010 statement and drug test information were obviously in the custody and control of the Organization as those records were eventually found. I also believe that this information is responsive to the Applicant's access request. I accept the Applicant's evidence that the 2009 statement was also in the custody and control of the Organization at some point and, if it still exists, would be responsive to the Applicant's access request. Therefore, I find that the Applicant has met his evidential burden.

[para 17] Regarding the existence of information responsive to his second access request for information released to a potential employer and notes taken about the "truck incident", the Applicant states that following an interview with a potential employer, he was told that the reason he was not the successful candidate in that competition was because the potential employer had found out why he was no longer working for the

Organization. Further, he states that he witnessed an employee of the Organization take notes during a hearing in which the “truck incident” was mentioned.

[para 18] While the Applicant’s evidence as to the existence of records responsive to his second access request is less concrete than the evidence relating to his first access request, I find that it is still enough to meet his evidentiary burden, which has a low threshold. It now falls to the Organization to prove that it conducted an adequate search for the following responsive records:

1. A 2009 statement he made;
2. A 2010 statement he made regarding a major incident involving another employee;
3. Drug test information;
4. Information released to a potential employer;
5. Notes taken by a named employee of the Organization regarding the “truck incident”.

[para 19] As the facts surrounding each record are somewhat different, I will deal with each record separately.

i. 2009 statement:

[para 20] As I stated above, the Applicant recalls making the 2009 statement and providing it to a supervisor. However, the Organization has not been able to locate the statement. The Organization provided evidence that when it was discovered that the statement was not in the personnel file it did the following in an attempt to locate it:

- The privacy officer contacted human resources and supervisors who worked with the Applicant when the statement was made and asked them to search their paper and electronic files for the missing statements.
- The privacy officer advised the Organization’s legal counsel that the records were not located.
- The Organization’s legal counsel contacted the same employees as the privacy officer and asked them to search again.

[para 21] In response to another argument by the Applicant, the Organization indicated that from the time a record is created to the time that it gets to where the personnel files are stored and, searchable, there is a lag. This lag in time accounted for why some information (discussed below) was not found in response to the Applicant’s first access request. I felt that this lag in time could also be the reason the 2009 statement was not found. So, I asked the Organization questions about where the information is located prior to being transferred to the file, how long it takes to get into the file, and whether records that are not yet in the file are also searchable.

[para 22] I was advised by the Organization that drug testing information is collected by the “Health Centre”. The records collected by the Health Centre are in paper format and are eventually transferred to the P-File Centre where they are filed. There is no set timeline as to when this transfer of information or filing ought to happen. Given that there appears to be a significant lag in time between when a record is created and when it is filed in an employee’s personnel file, in order to perform an adequate search for an employee’s personal information, it is necessary for the Organization to search beyond its personnel file. In this case, the Organization did just that to an extent. However it should also have searched for any records being held by the Health Centre and any records held by the P-File Centre that had not been filed on the Applicant’s personnel file. Because the Organization did not search these other two possible repositories, I cannot find that it performed an adequate search for responsive records.

ii. *2010 statement:*

[para 23] Prior to this inquiry, the Organization followed the same steps as it did in an attempt to locate the 2009 statement, but was not able to locate the 2010 statement. It advised the Applicant of this. As part of his submissions in this inquiry, the Applicant suggested that the Organization search a file that contained information from an internal hearing of another employee. The Applicant’s thought was that his statement might have been used at the hearing because his statement dealt with the conduct of the other employee.

[para 24] After reviewing the Applicant’s submissions, the Organization searched the other employee’s file and found a sealed envelope which contained the 2010 statement. The Organization provided the Applicant with a copy of this statement as part of its submissions in this inquiry. On reviewing the 2010 statement provided to the Applicant, I noted that it seemed to be incomplete. I asked the Organization about this and they advised that the statement was only one page. In response, the Applicant stated that he recalled writing his statement on the front and back of a piece of paper but was only provided with a copy of one side of the paper. It is possible that the Organization does not have an original copy of the statement and that the copy it does have is incomplete. Therefore, I will order the Organization to confirm that it provided as complete of a copy of the 2010 statement that it has.

[para 25] The Applicant argues that the discovery of the 2010 statement is evidence that the Organization did not perform an adequate search for the statement in the first place. I disagree. The test for adequacy of search is not perfection. An organization must make all *reasonable* efforts to find responsive records. I do not believe that it is reasonable to require the Organization to search for personal information in a sealed envelope kept on file that, on its face, does not appear to relate to the Applicant. Once the Applicant provided the Organization with the additional background information about the purpose of the statement, and a sound reason why the statement would be located in another file, it was reasonable to expect the Organization to search that file (which it did). However, without the additional information, there was nothing guiding the Organization as to how to broaden its search beyond what it had already done.

[para 26] Excepting my findings regarding the transfer of records to the Applicant's personnel file above, I find that the Organization made all reasonable efforts to search for the 2010 statement.

iii. Drug test information:

[para 27] The Applicant's first access request was broad. It was for a complete copy of his personnel file. This request was certainly broad enough to encompass his drug test information. However, he was not provided this information until October 9, 2012 when the Organization responded to his September 14, 2012 access request.

[para 28] The Organization submits that the reason the Applicant was not given his drug test information in response to his first access request was because those records had not yet been placed on his personnel file. The records did eventually make it onto the Applicant's personnel file at some point after his access request.

[para 29] As I mentioned above, I asked the Organization questions regarding the delay in information actually being filed on a personnel file. Based on the information I have before me, I find that in order to perform an adequate search for responsive records, the Organization ought to have searched records held by the Health Centre, and those held by the P-File Centre, which have not yet been filed on the Applicant's personnel file. It did not do this, and therefore, I find that the Organization did not make all reasonable efforts to find records responsive to the Applicant's request.

iv. Information released to a potential employer:

[para 30] Following his employment with the Organization, the Applicant applied for a position with another organization. According to the Applicant, in his interview he was asked why he no longer worked for the Organization. He declined to give a detailed answer to this question, but was advised that it had no bearing on his application in any event. After being told that he was not the successful candidate for the position, he contacted the person from human resources that interviewed him, to ask why he did not get the job. That individual informed him that it was a small industry and she had found out the details of why he was no longer employed by the Organization.

[para 31] As a result, the Applicant made a request of the Organization for information that was released to his potential employer. The Organization responded that no responsive records were located.

[para 32] In its submissions, the Organization stated that in attempting to locate this information it contacted the current and former employees of the Organization the Applicant had named in his second access request. The Organization submits the following:

- [Employee A] advised that he was never contacted by anyone for references relating to the Applicant or any other employee. [Employee A] also indicated that his practice as per company process is not to release any information to anyone about the work performance of any employee (past or present) of [the Organization]. The only information to be provided, if requested, is the employment dates and job title.
- [Employee B] advised that he was never contacted nor did he speak with anyone regarding work references for the Applicant.
- [Employee C] advised that the last time he spoke with the Applicant was more than two years ago, and since then, no one has ever contacted him for work references.
- [Employee D] had retired from [the Organization] and could not be reached at the last phone number [the Organization] had for him. As such, a letter was written to [Employee D] on June 13, 2012, and he responded by telephone on June 19, 2012. [Employee D] advised that he has never been contacted by anyone for work references for the Applicant. In addition, [Employee D] said he did not remember taking notes at the Applicant's termination hearing, and if he did, they would either have gone to human resources or would have been included in a file that would have been turned over to the manager who took over his area, [employee E]. Human resources was then contacted and confirmed that there was no information in the personnel file, which is where such notes would have been placed. [Employee E] was also contacted and he advised that he searched his file cabinet where some current employee information is kept and there were no records of information related to the Applicant in his files.

(Organization's initial submissions, para 17)

[para 33] In his second access request, the Applicant does name employees A, B, C, and D but also seems to indicate that these were not the only employees he wished to have questioned about the release of information. In any event, I find that the Organization fulfilled its duty under section 27 of the Act because, according to section 24 of the Act, the Organization must give an applicant access to his or her personal information only when that information is contained in a record. The portions of section 24 of the Act relevant to this inquiry state:

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

(b) to provide the individual with information about the use or disclosure of personal information about the individual.

(1.1) Subject to subsections (2) to (4), on the request of an applicant made under subsection (1)(a) and taking into consideration what is reasonable, an organization must provide the

applicant with access to the applicant's personal information where that information is contained in a record that is in the custody or under the control of the organization.

[para 34] The Applicant indicates that the release of his personal information to a potential employer would have been verbal. In his access request he states:

At this point in time I would like to remind [the Organization] that there (*sic*) own confidentiality agreement does not have any exclusion for releasing verbal information.

(Applicant's email to the Organization dated March 2, 2012)

[para 35] On the Applicant's own evidence and argument, the information that he believes was disclosed by the Organization was likely disclosed verbally. Therefore, there will be no record of it and, therefore, no obligation to provide that information to the Applicant.

[para 36] I do note that section 24(1.2) of the Act requires an organization to advise an applicant how his personal information was being used and the circumstances in which it has been disclosed. Section 24(1.2) of the Act states:

24(1.2) On the request of an applicant made under subsection (1)(b), and taking into consideration what is reasonable, an organization must, if the organization has in its custody or under its control a record containing personal information about the applicant described in the request, provide the applicant with

(a) information about the purposes for which the personal information has been and is being used by the organization, and

(b) the names of the persons to whom and circumstances in which the personal information has been and is being disclosed.

[para 37] In this case, there are records showing the reason the Applicant left his employment and the information that the Applicant believes was disclosed to a potential employer could likely be derived from those records. If that is the case, pursuant to section 24(1.2) of the Act, the Organization must, taking into consideration what is reasonable, advise the Applicant to whom and in what circumstances the information about his termination has been disclosed.

[para 38] Given the Organization's submissions about who they contacted, I believe that it did attempt to determine who (if anyone) disclosed this information to the Applicant's potential employer. The people contacted by the Organization were people the Applicant himself felt would most likely have disclosed the information. The Applicant was advised by the potential employer that a former "manager/employee" of the Organization disclosed the information. Requiring the Organization to contact every former

manager/employee and ask if they disclosed the reason the Applicant left his employment is not reasonable and therefore not required by section 24(1.2) of the Act. In asking the people noted by the Applicant in his access request, I believe that the Organization has fulfilled its obligation under section 24(1.2) of the Act.

v. *Notes regarding the “truck incident”:*

[para 39] As I mentioned above, the Applicant recalls an employee of the Organization taking notes at a hearing while that employee was questioning the Applicant about the “truck incident”. In attempting to locate the notes, the Organization contacted the employee the Applicant claims took the notes and found the following:

[The employee] said he did not remember taking notes at the Applicant’s termination hearing, and if he did, they would either have gone to human resources or would have been included in a file that would have been turned over to the manager who took over his area, [employee E]. Human resources was then contacted and confirmed that there was no information in the personnel file, which is where such notes would have been placed. [Employee E] was also contacted and he advised that he searched his file cabinet where some current employee information is kept and there were no records of information related to the Applicant in his files.

(Organization’s initial submissions, para 17)

[para 40] Keeping in mind my findings regarding the transfer of records to the Applicant’s personnel file above, I find that the Organization made all reasonable efforts to search for the notes regarding the “truck incident”.

V. ORDER

[para 41] I make this Order under section 52 of the Act.

[para 42] I find that the Organization fulfilled its duty under section 27 of the Act with respect to searching for the 2009 and 2010 statements, as well as notes regarding the “truck incident”, and information released to the Applicant’s potential employer.

[para 43] I order the Organization to review its copy of the 2010 statement to ensure that the Applicant was given a complete copy.

[para 44] I find that the Organization failed to fulfill its duty under section 27 of the Act when, in spite of the lag between when a record is created and filed in an employee’s personnel file, it did not search other repositories for responsive records. I order the Organization to search all other possible repositories for records responsive to the Applicant’s first access request for his personnel file and to provide the Applicant with any additional records located, subject to any exceptions to disclosure listed in the Act.

[para 45] I further order the Public Body to notify me and the Applicant in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Keri H. Ridley
Adjudicator