

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER P2015-08**

August 20, 2015

**WATCH ME GROW AGENCY**

Case File Number P2450

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

**Summary:** Watch Me Grow Agency (“the Organization”) contracts with various day home providers. The Applicant requested records containing his personal information and that of his child from the Organization pursuant to the *Personal Information Protection Act* (“the Act” or “PIPA”). The Organization initially ignored the Applicant’s request, believing it did not have to respond, but did eventually provide the Applicant with copies of the responsive records it located. The Applicant requested a review by the Office of the Information and Privacy Commissioner (“this Office”) stating that the Organization did not perform an adequate search for responsive records.

The Adjudicator found that the Organization performed an adequate search. The Adjudicator also found that the Organization failed to meet its time limit when responding to the Applicant’s access request.

**Statutes Cited: AB:** *Alberta Corporate Tax Act*, R.S.A. 2000, c. A-15 s. 64; *Freedom of Information and Protection of Privacy Act* R.S.A. 2000, c. F-25, ss. 4; *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 4, 24, 26, 27, 28, 52 and 61.

**Authorities Cited: AB:** Order F2010-022.

## **I. BACKGROUND**

[para 1] Watch Me Grow Agency (“the Organization”) is a business that is paid by the Northwest Alberta Child and Family Services Authority (“the Authority”) to recruit, screen, train and monitor day homes with which it has contracts. In addition it collects child care fees from the parents of children attending its day homes and provides those fees to the day home operators. The Organization also maintains liability insurance for all of its day homes and each day home operator pays the Organization a portion of the premium for that liability insurance. For these services, the day home operators pay the Organization a fee.

[para 2] In 2010 the Applicant’s former partner stopped operating her day home. At that time, the Applicant’s child began attending another day home that had a contract with the Organization (“first day home”). This arrangement ended shortly after it began. The Applicant’s child was then moved to another day home that had a contract with the Organization. This relationship continued from until April of 2012.

[para 3] In 2010, the Applicant made a verbal request for records relating to himself and his child. The Organization claims that it provided the Applicant with all of his and his child’s personal information shortly after this request. For the reasons set out below, no issue in this inquiry turns on this point.

[para 4] On July 24, 2013, the Applicant made a written request to the Organization for all of his and his child’s personal information in its custody and control. The Organization did not respond. It erroneously believed that it did not need to respond because it had given the Applicant all of the requested information in 2010. The Applicant complained to the Office of the Information and Privacy Commissioner, asking for a review of the Organization’s response (or lack thereof) to his access request.

[para 5] Mediation was authorized by the Commissioner to attempt to settle the issues between the parties but this was not successful and the Applicant requested an inquiry. I received initial and rebuttal submissions from both parties.

## **II. RECORDS AT ISSUE**

[para 6] As the issues in this inquiry relate to the adequacy of the Organization’s search for responsive records, there are no records directly at issue.

## **III. ISSUES**

[para 7] The Notice of Inquiry dated November 21, 2014 states the issues in this inquiry are:

**Issue A: Is the access request for the Applicant’s and his son’s personal information?**

**Issue B: Is any such personal information in the Organization’s custody and/or control?**

**Issue C: Did the Organization meet its duty to the Applicant within the terms of section 27 of PIPA? In particular, did the Organization conduct an adequate search for the records; did it account to the Applicant for all responsive records it located?**

**Issue D: Did the Organization respond to the Applicant in accordance with section 28(1) of the PIPA (time limit for responding)?**

[para 8] I will deal as a preliminary issue with the question of whether the Applicant can make an access request on behalf of his child.

[para 9] As the Applicant seems to raise an issue of jurisdiction given that there is a relationship between the Organization and a public body, I will also deal with that issue as a preliminary matter.

[para 10] Finally, as a preliminary issue I will discuss when the Applicant’s access request was actually made as there seems to be some confusion on that issue.

[para 11] The Applicant provided a large amount of information to me relating to custody matters which have no bearing on the issues in this inquiry. Although I read all the material, I will not be commenting on evidence or argument provided to me which has no relevance to these issues or any other issues over which I have no jurisdiction.

[para 12] I will also not be making any findings regarding the Applicant’s related access request to a public body with which the Organization had a contract for records in the custody and control of that public body. That is the subject of another inquiry. I will also not be making findings relating to the collection, use or disclosure of information by the Organization as I understand these matters will be dealt with in another case file.

[para 13] Finally, I was asked by both parties to consider or review the findings of the mediator who was assigned to this matter initially. This inquiry is a *de novo* process. Therefore, I did not review the findings of the mediator and will not comment on his or her findings or recommendations.

#### **IV. DISCUSSION OF ISSUES**

##### **Preliminary Issues:**

##### *i. Can the Applicant make an access request on behalf of his child?*

[para 14] An individual who is under the age of 18 is allowed to make an access request under the Act only if he or she “understands the nature of the right or power and the consequences of exercising the right or power” (section 61(1)(b)). If this condition is

not met, section 61(1)(c) of the Act allows the guardian of the individual who is under the age of 18 to exercise the right or power on his or her behalf.

[para 15] The Applicant in this matter made an access request for his personal information and that of his child. In accordance with section 61(1)(c) of the Act, two conditions must be met in order to allow the Applicant to access his child's personal information. The child must not understand the nature of the right or power or the consequences of exercising the right or power under the Act, and the Applicant must be the child's guardian.

[para 16] The Applicant's child is not yet 10 years old. I find that by virtue of his young age, he does not possess the requisite understanding of his right or power to request his personal information in the custody or control of the Organization. Therefore, the first condition is met. In addition, the Applicant shares custody of his child with the child's mother and is one of his child's guardians. Therefore the second condition is met. I find that the Applicant is authorized to make an access request on behalf of his child.

**ii. Does PIPA apply to the Applicant's access request?**

[para 17] Where information is in the custody of an organization, but the organization has a relationship with a public body such that both the organization and the public body have some rights and/or interests or duties respecting that information, the question arises whether PIPA or the *Freedom of Information and Protection of Privacy Act* ("FOIP") applies to the information.

[para 18] Generally, information in the custody or control of the Organization is governed by PIPA (see section 4(1) of PIPA) and records in the custody or control of the Authority are governed by FOIP (see section 4(1) of FOIP).

[para 19] The interaction between these two acts is governed largely by section 4(2) of PIPA which states:

*4(2) Subject to the regulations, this Act does not apply to a public body or any personal information that is in the custody of or under the control of a public body.*

[para 20] As an extension to section 4(2) of PIPA, section 4(3)(e) of the Act states:

*4(3) This Act does not apply to the following:*

...

*(e) personal information that is in the custody of an organization if the Freedom of Information and Protection of Privacy Act applies to that information;*

[para 21] Section 4(2) speaks of FOIP (rather than PIPA) applying to information over which a public body has *custody or control*, whereas section 4(3)(e) speaks only of information to which FOIP applies that is in the *custody* of an organization. Presumably,

the absence of the word “control” in section 4(3)(e) is meant to signify that this provision applies where the organization has custody of the information, but the public body, rather than the organization, has control.

[para 22] This makes sense given how many public bodies operate. Public bodies are responsible for administering and governing a vast number of programs that affect the lives of Albertans. Sometimes, in order to perform their functions, public bodies will contract with organizations, who are not in themselves governed by FOIP. I believe that this section was drafted as it was to ensure that information that is in essence a public body’s information is still afforded all the same protections as it would be were the information in the custody of a public body.

[para 23] It is not uncommon for both a public body and an organization to have rights, interests or duties relative to the same information, which might be thought of as types of “control” in the way that term is commonly used. Therefore, the type of control referred to in section 4(2) of PIPA should be interpreted such that the provision can be said to apply only where, despite the fact the organization has custody, the public body, but not the organization, has this type of control over the information.

[para 24] Whether the public body has the requisite type of control, or not, will be easy to determine in some circumstances.

[para 25] For example, where the information that has been provided to the organization by the public body, or collected by the organization on the public body’s behalf, it might well be reasonable to conclude that this is in essence the public body’s information. In such circumstances, if an access request were made to the public body, it would be reasonable to require it to produce the records, whereas this might not be true if the request were made to an organization with custody of the record.

[para 26] The opposite end of the spectrum is also easy to identify. There are many circumstances in which the fact that a public body has the ability to demand a copy of a record in the custody of an organization for a particular purpose would not mean it would have the requisite degree of control for section 4(2) to oust PIPA.

[para 27] For instance, section 64 of the *Alberta Corporate Tax Act* gives the Minister the authority to demand that a corporation (who could be an organization under PIPA), or any other person, produce “any document” which could include employment records of employees. This authority could be thought of as a type of control, yet, if section 4(2) of PIPA were interpreted to mean that because the organization was under a duty to produce it to the Minister for regulatory purposes, under FOIP, but not PIPA, an organization would not have to disclose employee records to an employee asking for them. This would mean that individuals could not ask for their employment records from their employers simply because the public body was in the midst of a tax audit or an investigation under the *Alberta Corporate Tax Act*. This would be an absurd result.

[para 28] It is harder to make the determination in circumstances where both a public body and an organization have the same or similar rights, interests, or duties relative to the information. For instance, in the present case, the reasons for collecting and retaining information may be said to be not only to enable the public body (and its agency) to monitor the proper working of day homes, but arguably equally serves the need and interests of day home providers themselves.

[para 29] That said, as I mentioned in the background section of this Order, there is a contractual relationship between the Organization and the Northwest Alberta Child and Family Services Authority (“the Authority”), a public body. The contract which governs this relationship contains terms about what records are to be kept by the Organization and what records the Authority will be provided with and able to request. The contract states:

5.1 The Agency [the Organization]:

...

5.1.b acknowledges that all documents submitted by the Agency to the Authority [the Public Body], become the property of the Province of Alberta, and as such become subject to the provisions of the *FOIP Act*;

5.1.c acknowledges that the *FOIP Act* applies to personal information created, obtained or collected from any source, including information received from the Authority and obtained by the Agency;

...

5.1.f must provide to the Authority any records that are requested under the access provisions of the *FOIP Act*, within 7 days of receiving notification by the Authority;

[para 30] I interpret these contractual provisions to mean that the Public Body has retained exclusive control over the Applicant’s personal information in the custody of the Organization. As a result, I find that pursuant to section 4(3)(e) of PIPA, FOIP applies to all personal information of the Applicant and his child in the custody of the Organization.

[para 31] As an aside, the contract spells out the duties of the Organization when an access request is made to the Authority. It does not state what the Organization ought to do when an access request is made to the Organization for records that are in its custody but in the control of the Authority and therefore subject to FOIP. However, even if the information requested by an applicant is not subject to PIPA, the Organization still is. Therefore, it has a duty to assist an applicant pursuant to section 27. I believe that part of this duty would be to advise an applicant that in order to have access to his or her information, an access request should be made to the Authority.

***iii. When was the Applicant’s Access request made?***

[para 32] As I noted above, in 2010, the Applicant made a verbal request for records. The Organization claims that he was provided with all the records relating to him that were in the Organization’s custody at the time. The Applicant does not specifically deny

that he was given the records, but his arguments seem to suggest he was not provided with records in response to his request. In any event, this verbal request for records was not a request under the Act. Section 26 of the Act states a request for records made pursuant to the Act must be in writing.

*26(1) A request under section 24(1) or 25(1) must*

*(a) be in writing, and*

*(b) include sufficient detail to enable the organization, with a reasonable effort, to identify any record in the custody or under the control of the organization containing the personal information in respect of which the request is made.*

*(2) An applicant who is requesting access to personal information under section 24(1)(a) may ask for a copy of the record containing the personal information or to examine the record.*

[para 33] Therefore, when I refer to the access request, I mean the written access request which the Applicant made on July 24, 2013.

[para 34] As well, the Applicant suggests several times that he is entitled to an original record. Section 26(2) of the Act makes it clear that the Applicant may request *copies* of records. Therefore he is not entitled to have the original record.

**Issue A: Is the access request for the Applicant’s and his son’s personal information?**

[para 35] The Organization concedes, and I agree, that the Applicant’s request was for his and his child’s personal information.

**Issue B: Is any such personal information in the Organization’s custody and/or control?**

[para 36] It is clear from the Applicant’s submissions that he is seeking not only information that is in the custody of the Organization but also information that he believes is in its control.

[para 37] Although the Applicant requested all of his and his child’s personal information from the Organization, the majority of his submissions focus on a typed letter which was written by his child’s first day home operator and provided to the Applicant’s former partner (“the typed letter”). According to the Applicant, a copy of the typed letter was provided to the Court by his former partner during a hearing regarding a custody dispute. I do not know if the Applicant was given a copy of the letter at the Court hearing, but I gather, from the Applicant’s submissions regarding the content of the letter, that he has read it. I was not given a copy of the typed letter, but according to the Applicant, the letter discussed the reason that his child’s first day home operator decided

to stop providing childcare for the Applicant's child after only eight days. According to the Applicant, the reason the day home operator gave was the Applicant's conduct.

[para 38] Although I have not seen a copy of the typed letter, I believe the Applicant's uncontradicted assertion that, at one time, it did exist, and that it contained both his and his child's personal information. Therefore, if the letter were in the custody or control of the Organization at the time of his access request, it would be responsive to his request.

[para 39] The Organization submits that it never had custody of the typed letter. In an affidavit provided to me, the owner of the Organization swears that the typed letter was not typed using one of the Organization's computers, and that the typed letter was not provided to the Organization by the first day home operator. I accept this evidence.

[para 40] Therefore, assuming the typed letter is in the custody of the day home operator who wrote it, it must be in the control of the Organization for it to be subject to the Act. In order for the letter to be in the control of the Organization, the Organization must have the right to have a copy of the typed letter provided to it. It should be noted that this is a different type of control than the exclusive control to which I referred earlier in this order when I discussed section 4 of the Act. The control to which I now refer is control under section 24 of the Act.

[para 41] According to the affidavit provided by the Organization, all of its day home operators are independent contractors of the Organization. They are not employees.

[para 42] Order F2010-022 set out a list of criteria which could be considered when trying to decide if a public body has control over a record. I believe that these same criteria apply to Organizations under PIPA. They are:

- Were the records created by an officer, employee or service provider of the Public Body?
- What use did the creator intend to make of the records?
- Does the Public Body have possession of the records either because they have been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the Public Body does not have possession of the records, are they being held by an officer, employee or service provider of the Public Body for the purposes of that person's duties as an officer, employee or service provider?
- Does the Public Body have a right to possess the records?
- Does the content of the records relate to the Public Body's mandate and functions?
- To what extent have the records been relied upon by the Public Body?

- How closely are the records integrated with other records held by the Public Body?
- Does the Public Body have the authority to dispose of the records?
- Does the Public Body have the authority to regulate the use of the records?

(Order F2010-022 at paras 23 and 31)

[para 43] Applying the criteria listed above, I find that:

- The typed letter was created by an independent contractor;
- The first day home operator planned to provide the typed letter to the Applicant's former partner, and does not appear to have ever given a copy to the Organization;
- There is no evidence that the Organization required the first day home operator to write this letter as part of her duties as a day home operator. Given the content of the letter as explained to me by the Applicant, I do not see any reason for the day home operator to have written the letter as part of her obligations in providing care to the Applicant's child;
- The Organization does not have possession of the letter and it is not being held by the independent contractor for the purpose of her duties as an independent contractor;
- I have no evidence that the Organization has the right to possess the typed letter;
- Given its content, the typed letter does not relate to the Organization's mandate and functions;
- I have no evidence that the Organization has the authority to regulate the use of the typed letter;
- The Organization did not rely on the typed letter;
- The typed letter was not integrated with other records held by the Organization;
- I have no evidence that the Organization had the authority to dispose of the typed letter.

[para 44] Based on the information before me, I find that the Organization did not and still does not have control over the typed letter which may or may not still exist and be in the custody of the first day home operator. That said, there are other records which may be in the custody of the first day home provider that would be in the control of the

Organization, for instance, activity or inspection reports or other records which the Organization requires day home operators to fill out. However, as per my findings above regarding the contract between the Organization and the Authority, I find that FOIP applies and therefore, the Applicant's access request ought to be directed to the Authority who would be in the control of any records responsive to his request.

**Issue C: Did the Organization meet its duty to the Applicant within the terms of section 27 of PIPA? In particular, did the Organization conduct an adequate search for the records; did it account to the Applicant for all responsive records it located?**

[para 45] Section 27(1) of the Act 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 46] As part of fulfilling its duty to the Applicant under section 27 of the Act, the Organization must perform a reasonable search for all responsive records.

[para 47] The Applicant argues that the Organization did not respond to his access request completely. As evidence of this, he points to several records he feels were missing from the Organization's response. These missing records include the typed letter described above, a letter written by the owner of the Organization (which he did eventually receive from the Organization), and records which he received from Child and Family Services in response to a related access request he made to that Public Body and which the Applicant feels ought to have been in the custody and control of the Organization as well. In addition to these specific records, the Applicant also hypothesizes that there are other records missing which he believes ought to exist, though he has no evidence that they do exist. He feels an appropriate remedy is for me to order a third party to search the Organization's records again.

[para 48] The Organization argues that it performed a reasonable search for all possible responsive records. It states that it searched its archived files relating to the Applicant's son's day home operators, as well as the Applicant's former partner's file, for records responsive to his request. The Organization notes that it has only a two year record retention period and that its computers were not searched. The reason for the two year record retention period is not clear, but the reason the Organization says its computers were not searched is that the owner was confident there would be no responsive records stored on the Organization's computers. She noted in her affidavit that the Organization is very small and as such she has a good knowledge of what information is kept on its computers.

[para 49] Given my finding that the typed letter was not in the custody or control of the Organization, there is no obligation for the Organization to have requested that particular letter from the first day home operator. The fact the typed letter was not found or produced by the Organization is not an indication that the Organization failed to meet its duty under section 27 of the Act.

[para 50] There could be responsive records in the custody of the Applicant's child's day home operators that are in the custody of the Organization. These would be records that the Organization requires its day home operators to keep, for example, attendance and activity logs or injury reports. Given my findings above regarding the contract and the operation of section 4(3)(e) of PIPA, I find that these records would be in the control of the Authority and, therefore subject to the FOIP Act. As such, I find that the Organization does not have an obligation to look for these records under PIPA.

[para 51] I find that the Organization performed a reasonable search for records responsive to the Applicant's request to which the Act applies and of which it would have custody or control.

**Issue D: Did the Organization respond to the Applicant in accordance with section 28(1) of the PIPA (time limit for responding)?**

[para 52] Section 28(1) of the Act states:

*28(1) Subject to this section, an organization must respond to an applicant not later than*

*(a) 45 days from the day that the organization receives the applicant's written request referred to in section 26, or*

*(b) the end of an extended time period if the time period is extended under section 31.*

[para 53] The Organization did not respond to the Applicant's access request within 45 days, nor did it attempt to extend that time period. The Organization states that it believed it did not have to respond to the Applicant's access request because the Applicant had been given a copy of all of the responsive records in response to his verbal request.

[para 54] This was an erroneous assumption. Unless an organization asks for and receives permission from the Commissioner to disregard an access request, it must respond. Therefore, the Organization was obligated to respond to the Applicant's written request in accordance with the Act. It failed to do so, but has since responded.

**V. ORDER**

[para 55] I make this Order under section 52 of the Act.

[para 56] I find that the Organization fulfilled its duty to conduct an adequate search under section 27 of the Act.

[para 57] I find that the Organization failed to respond to the Applicant's access request within the time limit set out in section 28(1) of the Act.

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Keri H. Ridley  
Adjudicator