

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2015-10

November 2, 2015

HEALTH SCIENCES ASSOCIATION OF ALBERTA

Case File Numbers P2538 and P2774

Office URL: www.oipc.ab.ca

Summary: An Applicant made two access requests under the *Personal Information Protection Act* (PIPA) to the Health Sciences Association of Alberta (the Organization). The first request, dated September 23, 2013, was for “interviews, [an] investigation report, e-mails and documentation” related to an investigation into a complaint made by the Applicant against another member of the Organization. The second request, a letter dated January 7, 2014, was for information relating to a grievance regarding disciplinary actions taken against the Applicant by his employer.

The Organization denied access to the information relating to the former request, citing section 24(2)(c) (information collected for an investigation or legal proceeding). In regard to the latter request, the Organization provided some information, but withheld other information under sections 24(2)(c) (information collected for an investigation or legal proceeding) and 24(3)(c) (information revealing identity of a person who provided opinion in confidence).

The Applicant requested a review of the Organization’s responses to his access requests.

The Adjudicator determined that the information withheld by the Organization in response to both requests was information collected for the purpose of an investigation or legal proceeding. She upheld the Organization’s decision to withhold information relating to the grievance, but ordered the Organization to exercise its discretion to withhold the

investigation report, as the Organization had not explained how it initially exercised its discretion to do so.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 24, 27, 52.

Authorities Cited: AB: Orders F2004-026, P2006-006, P2006-007, P2007-002, P2012-09.

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23 (CanLII).

I. BACKGROUND

[para 1] An Applicant made two access requests under the *Personal Information Protection Act* (PIPA) to the Health Sciences Association of Alberta (the Organization). The first request, dated September 23, 2013, was for “interviews, [an] investigation report, e-mails and documentation related to the investigation”. The investigation referred to in this request was an investigation into a complaint made by the Applicant against another member of the Organization. This request relates to file P2538.

[para 2] The second request, a letter dated January 7, 2014, was for information relating to a grievance regarding disciplinary actions taken against the Applicant by his employer. This request relates to file P2774.

[para 3] The Organization denied access to the information relating to the former request (file P2538), citing section 24(2)(c) (information collected for an investigation or legal proceeding). In regard to the latter request (file P2774), the Organization provided some information, but withheld other information under sections 24(2)(c) (information collected for an investigation or legal proceeding) and 24(3)(c) (information revealing identity of a person who provided opinion in confidence).

[para 4] The Applicant requested a review of the Organization’s responses to his access requests. Regarding the request for information related to his grievance (file P2774), the Applicant states that he received the official letters and grievances but not file notes. The Commissioner authorized an investigation of this complaint. This did not resolve the matter and it was set down for a written inquiry.

[para 5] Part 1 of the inquiry addressed a preliminary issue, which was whether the Organization was a non-profit organization as defined under PIPA. That issue has been resolved; the Organization clarified that it is not a non-profit organization under PIPA, and the Act fully applies. Part 2 of this inquiry addresses the Organization’s responses to the Applicant’s access requests.

II. INFORMATION AT ISSUE

[para 6] The information at issue is an investigation report relating to a complaint made by the Applicant, as well as the information relating to the Applicant's grievance (file notes and grievance summaries).

III. ISSUES

The Notice of Inquiry for Part 2 of the inquiry, dated March 6, 2015, set out the issues for inquiry as the following:

1. Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?
2. Is the access request for the Applicant's personal information? Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?
3. If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) (discretionary grounds for refusal) or with section 24(3) (mandatory grounds for refusal)? In particular,
 - a. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?
 - b. Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?
4. If the withheld records contain personal information of the Applicant, and if section 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

IV. DISCUSSION OF ISSUES

- 1. Did the Organization comply with section 27(1)(a) of the Act (duty to assist, including duty to conduct an adequate search for responsive records)?**

[para 7] Section 27(1)(a) of the Act states the following:

- 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 8] The duty to assist under section 27(1)(a) includes an obligation to conduct an adequate search (Orders P2006-006 and P2006-007).

[para 9] The Applicant has stated that he did not receive all of the information he wanted in response to his access request. However, his submissions to this inquiry do not indicate that he questions the Organization's search for records, only that he did not receive everything he was looking for. The Organization has withheld several records in their entirety; based on my review of the records at issue (the records the Organization located but did not provide to the Applicant), it appears that the Applicant's concern is whether the Organization was authorized to withhold the records it did, and not whether the Organization conducted an adequate search.

[para 10] The Organization's responses to the Applicant and its submissions to this inquiry have been clear regarding what information was located and withheld from the Applicant. As he has not made any arguments regarding whether further records should have been located, and as the withheld records appear to be what the Applicant is seeking, the Applicant's concerns that he did not receive the information he requested will be addressed in the portion of this Order that considers the Organization's authority to withhold the records at issue. Therefore, I do not need to address whether the Organization conducted an adequate search for records.

2. Is the access request for the Applicant's personal information? Was the information in the withheld records, or any of it, responsive to the Applicant's request for his personal information?

[para 11] An applicant may request only his or her own personal information under section 24(1) of the Act. Personal information is defined in section 1(1)(k) of the Act, which reads as follows:

1(1) In this Act,

...

(k) "personal information" means information about an identifiable individual;

...

[para 12] The investigation report that is responsive to the Applicant's first access request (file P2538) resulted from a complaint made by the Applicant about another member of the Organization. In addition to being the complainant, the Applicant had a work relationship with that other member; as such, the investigation report referred to the Applicant.

[para 13] Information about employees acting in the course of their job duties is normally not considered information *about* those individuals; however, there may be circumstances that give that information a “personal dimension”, such as disciplinary issues or performance evaluations (see Orders F2004-026 and P2012-09). In this case, because the Applicant was the complainant, and the complaint was related to a conflict with the other member, I find that there is a personal dimension to the information about the Applicant in the investigation report.

[para 14] This applies only to the information that relates to the Applicant; much of the report contains information about the other member, as well as information about the process of the investigation. These parts of the investigation report do not relate to the Applicant in either a professional or personal manner.

[para 15] The information withheld by the Organization in response to the Applicant’s request for information related to his grievance (file notes and grievance summaries) contain information about the Applicant that has a disciplinary context. Even where those records relay information that is about the Applicant’s work duties, the context of that information is a disciplinary one. Therefore, I find that the information about the Applicant in those records is his personal information.

3a. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?

[para 16] I will first consider whether section 24(2)(c) applies to the investigation report, then whether it applies to the information relating to the Applicant’s grievance. If I find that the exception applies to any of the information, I will then consider whether the Organization properly exercised its discretion to withhold that information.

[para 17] The relevant provisions of section 24 are as follows:

24(1) An individual may, in accordance with section 26, request an organization

(a) to provide the individual with access to personal information about the individual, or

...

(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.

...

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

...

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

...

[para 18] Section 24(2)(c) of the Act permits an organization to withhold personal information that was collected for an investigation or legal proceeding. Section 1(1)(f) of PIPA defines “investigation”, in part, as follows:

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

(i) a breach of agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) circumstances or conduct that may result in a remedy or relief being available at law,

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

[para 19] “Legal proceeding” is defined at section 1(1)(g) of the Act as:

(g) “legal proceeding” means a civil, criminal or administrative proceeding that is related to

(i) a breach of an agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) a remedy available at law;

Investigation Report (file P2538)

[para 20] The Organization withheld the investigation report from the Applicant, in its entirety, under section 24(2)(c) of PIPA. The investigation was regarding an alleged contravention of the Organization’s bylaws by another member of the Organization. According to those bylaws, a contravention of the bylaws can result in disciplinary action against the contravening member. The investigation resulting in the report meets the definition of “investigation” in the Act.

[para 21] The investigation report was created for the purpose of determining whether the complaint by the Applicant was well founded. Clearly, the information in it was collected for the purpose of the investigation into the alleged contravention of the bylaws by the other Organization member. Therefore, section 24(2)(c) applies to the Applicant’s information in that report.

Information in records relating to the Applicant's grievances (file P2774)

[para 22] The Organization withheld grievance summaries and notes made by the Organization's Labour Relations Officer (the Officer) from the Applicant, in their entirety. Other records, such as correspondence, were provided to the Applicant.

[para 23] The Organization argues that the file notes and grievance summaries withheld from the Applicant meet the definition of both "law enforcement" and "legal proceeding" in PIPA.

[para 24] The Organization states that the Applicant's personal information in the file notes and grievance summaries was collected for the purposes of investigating the merits of the grievance (a potential violation or breach of a collective agreement), and assessing whether to advance the grievance to arbitration.

[para 25] Having reviewed the records, I agree that they were created for the purpose of assessing the Applicant's grievance and determining whether it should be taken forward to arbitration, and that they were authored by someone with authority to make those assessments and determinations.

[para 26] The Applicant's grievance concerned an alleged breach of a collective agreement by his employer; an arbitration concerning a possible breach of a collective agreement meets the definition of "legal proceeding" in the Act. The Applicant's information in these records was collected in the course of the Organization's investigation into the Applicant's complaint that his employer breached a collective agreement between the Organization and the Applicant's employer. The grievance summaries and file notes were then created, using the information collected during the investigation, for the purpose of determining whether to proceed with a legal proceeding (the arbitration process).

[para 27] I find that the Applicant's personal information in the file notes and grievance summaries was collected for the purpose of an investigation or legal proceeding, and that section 24(2)(c) applies.

Exercise of discretion

[para 28] Section 24(2)(c) of PIPA is a discretionary provision; this means that even if the exception applies to requested information, an organization must properly exercise its discretion to determine whether the information should nevertheless be disclosed to the applicant.

[para 29] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a public body's exercise of discretion under the Ontario *Freedom of Information and Protection of Privacy Act* (FOIP Act). The Court stated (at paras. 68-69, 71):

The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.

In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed.

...

The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

[para 30] While this decision involved the exercise of discretion under FOIP legislation, in my view, the authority of the Commissioner to review an organization's exercise of discretion under PIPA is the same.

[para 31] Orders from this Office under the FOIP Act have given guidance regarding appropriate factors to consider in exercising discretion to withhold information under that Act, including the purpose of the Act, and the purpose of the particular exception being applied. Further, in Order P2007-002, the Director of Adjudication commented on factors that may be relevant to considering whether to withhold information subject to section 24(2)(c). She said (in footnote 34):

An example of a situation in which withholding information would achieve the policy goals of this heading is where an investigation was under way and providing an applicant's own personal information to him could compromise its effectiveness. This might happen where the investigation was into some wrongdoing on the part of the Applicant and providing the information could help him conceal evidence of the wrongdoing, or where providing to the Applicant some of the statements others were making about him relative to the matter being investigated would dissuade others who remain to be interviewed from providing information. In this regard, I note the parallel provision in British Columbia does not apply after an investigation or legal proceeding has been concluded, so that disclosure of information that was collected for such purposes, but can no longer harm the investigation or proceeding, cannot be withheld on the basis of this provision. The Alberta provision does not contain this restriction. However, in my view, there is still an implicit restriction that before information is withheld,

it must be clear that disclosing the information would or likely would have some consequence that is contrary to the policy goals of the provision permitting withholding of information collected for an investigation or legal proceeding.

[para 32] The Organization provided me with an explanation of its exercise of discretion to withhold the records relating to the Applicant's grievance under section 24(2)(c). It states that:

[it] does not want parties outside of [those responsible for determining whether to initiate the arbitration process with respect to a grievance] to access how [it] assesses cases, including what comments [the Organization] makes regarding credibility, the law, and other matters such as labour relations issues with the employer.

...

[I]t is very important for [the Organization] that its Grievance Summaries do not end up disclosed to the employer (usually Alberta Health Services) as the employer will then have an insight into [the Organization's] confidential assessment of the grievance, including issues of credibility, settlement, and likelihood of success. If the employer were to gain that information, it would prejudice the member, [the Organization's] ability to properly represent the member, and also other members who may have a similar grievance (now or in the future) – all of which would interfere with [the Organization's] statutory obligation under section 153 of the [*Labour Relations Code*] to represent its members. (Rebuttal submission, attachment #b at page 6)

[para 33] The Organization also argued that it is important that it be able to frankly and confidentially assess grievances and that this would be impeded if grievance summaries and related records (such as the file notes) were disclosed to members and/or other third parties.

[para 34] I accept this explanation from the Organization regarding its exercise of discretion to withhold the Applicant's personal information in the grievance summaries and file notes.

[para 35] In its submission relating to the investigation report, the Organization did not address its exercise of discretion to withhold the Applicant's information in that report. The explanation that it provided regarding the grievance records, set out above, refers to the significance of the grievance being between the Organization and the employer for whom the grievor works. In the case of the investigation report, the complainant and investigated person were both members of the Organization; as such, the Organization's discussion of its exercise of discretion to withhold the grievance records does not appear to apply to the decision to withhold the investigation report. Therefore, I do not know what specific factors the Organization considered in withholding this report, and I cannot uphold its exercise of discretion to do so. As a result, I will order the Organization to reconsider that decision, taking into account appropriate factors, such as those listed above.

- 3b. Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?**
- 4. If the withheld records contain personal information of the Applicant, and if section 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?**

[para 36] The Organization also applied section 24(3)(c) to withhold the Applicant's information in the records relating to the Applicant's grievance. However, as I have found that it properly applied section 24(2)(c) to that information, I do not need to consider whether section 24(3)(c) or section 24(4) applies.

V. ORDER

[para 37] I make this Order under section 52 of the Act.

[para 38] I find that section 24(2)(c) applies to the Applicant's personal information in the records relating to his grievance and confirm the decision of the Organization to refuse access to that information.

[para 39] I find that section 24(2)(c) applies to the Applicant's personal information in the investigation report; however, I do not uphold the Organization's exercise of discretion with respect to that information. I therefore direct the Organization to re-exercise its discretion to withhold the information, on the basis of the proper considerations, including the purpose of the Act generally as well as the particular provision, and whether withholding the information would further these purposes.

[para 40] I order the Organization to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order. If the Organization decides to continue to withhold the Applicant's personal information, I further order it to provide an explanation of how it exercised its discretion to do so, to both me and the Applicant, at that time.

Amanda Swanek
Adjudicator