

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2016-07

November 30, 2016

REDI ENTERPRISES SOCIETY

Case File Number P2863

Office URL: www.oipc.ab.ca

Summary: The Complainant was asked to provide a written account of her criminal conviction by REDI Enterprises Society (the Organization). She argued that the Organization did not have the authority under the *Personal Information Protection Act* (the Act or PIPA) to collect that information.

The Adjudicator found that the Organization is in compliance with the Act when it collects a written account of its employees' criminal activity.

Statutes Cited: AB: *Personal Information Protection Act*, R.S.A. 2003, c. P-6.5, ss. 1, 2, 7, 14, 15, 36, 46, 52, 56

Authorities Cited: AB: Orders: P2013-D-01, P2014-05

Cases Cited: *Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner)* 2011 ABCA 94 CanLII

I. BACKGROUND

[para 1] The Complainant took issue with her employer, REDI Enterprises Society (the Organization), when it sought to collect information regarding her past criminal conviction. Her complaint is the Organization is not in compliance with the *Personal*

Information and Privacy Act (the Act or PIPA) when it collects personal information about its employees' past criminal convictions.

II. ISSUES

[para 2] The Notice of Inquiry contains two issues, Issues A and B.

Issue A: Does PIPA apply to the Organization?

This requires answering the following questions:

1. Is the Organization a non-profit Organization within the terms of section 56(1)(b) of PIPA?
2. If the Organization is a non-profit Organization, did it attempt to collect the Complainant's personal information in connection with a commercial activity within the terms of section 56(3) of PIPA?

[para 3] Initially, I suggested the parties make submissions regarding only Issue A – whether PIPA applies in the present circumstances. On reviewing the submissions, it appeared to me that because the Notice of Inquiry told the parties, in relation to Issue A, that they “may wish to have reference to Order P2014-05 in making submissions on this question”, the parties may have been led to believe that the outcome in Order P2014-05 – which is that PIPA did not apply to the situation in that case – was also applicable to the facts in the present case.

[para 4] Order P2014-05 does not address all of the same questions as are raised by the facts in the present case. The Order was referenced simply to draw the parties' attention to the fact that an earlier order exists which also deals with non-profit organizations and commercial activities, rather than to suggest that the Order was determinative of the outcome in the present case.

[para 5] In view of the way the parties responded to Issue A, I offered the parties an option to assume that PIPA applied to the Organization, and to go on to Issue B – the question of whether PIPA permits the collection of personal information on the facts of the present case.

[para 6] The parties agreed to this option. Accordingly, this Order primarily addresses Issue B.

Preliminary Matter: Is the inquiry a futile exercise as the disputed information was never collected?

[para 7] The Organization suggests that since the information complained about was never collected, the Act does not permit this inquiry. It says:

...this endeavor appears to be, on all accounts regarding an accounting of information that was never ever provided and never ever collected.

[para 8] I refer the Organization section 46 which allows an individual to make a complaint to the Commissioner with respect to issues referred to in section 36(2).

36(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that

- (a) a duty imposed by section 27 has not been performed;*
- (b) an extension of a time period under section 31 for responding to a request is not justified;*
- (c) a fee estimated or required by an organization under this Act is inappropriate;*
- (d) a correction of personal information requested under section 25 has been refused without justification;*
- (e) personal information has been collected, used or disclosed by an organization in contravention of this Act or in circumstances that are not in compliance with this Act;*
- (f) an organization is not in compliance with this Act.*

[para 9] This complaint falls under section 36(2)(f) as the Complainant suggests the Organization's policies regarding requiring information about a criminal record is not in compliance with the Act.

[para 10] PIPA balances the right of an individual to privacy of their personal information with the need for an organization to collect, use and disclose personal information. If an organization can demonstrate the collection of personal information is necessary to enable it to meet certain reasonable purposes and it is collected in a reasonable manner, then the collection may be allowed under the Act.

[para 11] If I find the Organization contravened the Act, I will issue an order confirming that it is required to stop contravening the Act. If there has been no contravention of the Act, the order will confirm the Organization has met its obligations to comply with the Act.

Issue B: If the Organization is subject to PIPA, is it in compliance with the Act when it collects information from its employees regarding their past criminal convictions?

This requires answering the following questions:

1. Does the Organization have a practice of collecting the past criminal convictions of its employees?

If the Commissioner finds the Organization collects such information, she will also decide the following issues:

2. In collecting information about past criminal convictions, is the Organization collecting its employees' "personal employee information"?
3. If the answer to question 2 is yes, is the collection of personal employee information in contravention of, or in compliance with, section 7(1) of PIPA (no collection without either authorization or consent)? In particular, did the Organization have the authority to collect the personal employee information under section 15(1) of PIPA?
4. If the answer to question 2 is no, is the collection of personal information in contravention of, or in compliance with, section 7(1) of PIPA (no collection without either authorization or consent)? In particular, did the Organization have the authority to collect the personal information under section 14 of PIPA?
5. If the Organization had authority to collect the information under section 14, did the Organization collect the information contrary to, or in accordance with, section 11(1), (collection for purposes that are reasonable)?
6. If the Organization had authority to collect the information under section 14, did the Organization collect the information contrary to, or in accordance with, section 11(2), of PIPA (collection to the extent reasonable for meeting the purposes)?

III. DISCUSSION OF ISSUE

1. Does the Organization have a practice of collecting the past criminal convictions of its employees?

[para 12] In submissions to this inquiry, the Organization indicates it does not have a practice of collecting the past criminal convictions of its employees. It submits:

... a potential candidate might become an employee by satisfying the "Qualifications" for the position. One example of such a qualification is the potential candidate's provision of a Police Information Check. This is different than a "past criminal conviction". The voluntary provision of a Police Information Check to the Organization is not, in the Organization's submission, 'collecting the past convictions of its employees'. The point at which a Police Information Check is gathered together with other documentation is prior to that candidate becoming an employee. After acceptance of an offer, the Police Information Check (regardless of conviction, pardon, no conviction) is housed in Section 6 of the now employee's personnel file.

[para 13] I do not understand the Organization's submission. It does not matter if there is no conviction listed on the Police Information Check. If there is a conviction listed on the Police Information Check and that is placed on a file controlled by the Organization, then the Organization is collecting the past criminal convictions of its employees.

[para 14] I find the Organization is collecting the past criminal convictions of its employees.

[para 15] I also asked the Organization if it has a practice of collecting “a written, signed account of the criminal activity” of its employees. The Organization responded:

The Organization indicates that a potential candidate might become an employee by satisfying the qualifications for the position. One example of such a qualification is agreement to the provision of a written, signed account of the criminal activity if the employee discloses a criminal record. The voluntary provision of this account is not, in the Organization’s submission, a practice of collecting a written, signed account of the criminal activity of its employees.

[para 16] The Organization makes the following statements regarding collection of information.

The prospective employee has every opportunity not provide (sic) this information. The *Freedom of Information and Protection of Privacy Act* (the “Act”) contemplates only *actual* collections, uses and disclosure of personal information, and, in the Organization’s submission, the Commissioner is bound by those limits.

After hire, should an employee be asked about whether they will provide a written, signed account of the criminal activity, that employee can refuse. If the employee refuses, there is no collection. The employment relationship continues on.

[para 17] This inquiry is dealing with provisions under the *Personal Information and Protection Act*.

[para 18] Both the Organization and the Complainant provided me with documents showing the Organization had a policy of requiring a written, signed account of the criminal activity of its employees. I was provided a copy of a form titled “Criminal Charges/Record Details” with the Organization’s logo. The form states:

To ensure that our services and operations are provided in a safe manner, employees with current criminal records are required under policy to provide a handwritten account of all criminal charges and convictions...

[para 19] The Organization is not arguing this policy does not exist. I find the Organization is collecting a signed, written account of criminal charges and convictions of its employees.

2. In collecting information about past criminal convictions, is the Organization collecting its employees’ “personal employee information”?

[para 20] The Act defines personal employee information:

I(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 Organization concedes this point.

3. If the answer to question 2 is yes, is the collection of personal employee information in contravention of, or in compliance with, section 7(1) of PIPA (no collection without either authorization or consent)? In particular, did the Organization have the authority to collect the personal employee information under section 15(1) of PIPA

[para 22] Section 15(1) of the Act states

15(1) An organization may collect personal employee information about an individual without the consent of the individual if

- (a) *the information is collected solely 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,*
- (b) *it is reasonable to collect the information for the particular purpose for which it is being collected, and*
- (c) *in the case of an individual who is a current employee of the organization, the organization has, before collecting the information, provided the individual with reasonable notification that personal employee information about the individual is going to be collected and of the purposes for which the information is going to be collected.*

[para 23] The Organization asserts that the information regarding past criminal activity is given to the Organization on a voluntary basis (the individual consents to the collection). The Organization's policy manual and the memo referenced and emphasized in para. 25 below make it clear the information must be provided. This provision of this personal information is a requirement for employment and for continued employment and is therefore not provided to the Organization by consent.

[para 24] The Complainant disclosed a criminal record at an initial interview as a pre-condition to employment. The Organization conducted an internal review of employee personnel files sometime after the Complainant was hired. At that time, it was discovered that the Complainant had not complied with a policy that stipulates that an employee with a criminal record "must provide a written, signed account of the criminal activity".

[para 25] In a memo sent to the Complainant by the Organization regarding the collection of this information, the policy and the reasons behind the policy are stated:

... REDI has the reasonable approach that we need to do some follow-up with new and existing employees should they have a criminal record. We work with vulnerable clients – and need to do our due diligences for funders, accreditation, and to ensure the safety and security of our clients. In the government’s mind, a criminal record exists until pardoned. If we were to pick and choose which “record” is exempt and which isn’t, we would be doing an arbitrary minimizing of this portion of our hiring process – and could suffer the consequences from funders and auditor. Our policy is clear and reasonable:

If an employee “has a criminal record, the Manager and Human Resources Manager will interview the employee. The new employee must provide a written, signed account of the criminal activity.”

This policy, along with our requirement for criminal record checks, protects our clients, our team, our agency - and you, by providing necessary due diligence in maintaining a safe work environment and quality services (my emphasis).

[para 26] The Organization asserts that the collection of this information is to manage employees. The Organization submits that the information sought from its employees ensures adherence to internal policies. These policies include ensuring safety and security for their clients and providing due diligence for their funders. The Organization states on a form entitled “Criminal Charges/Record Details”:

[...] generally we do not hire individuals with non-pardoned criminal records. However, our mandate is to help create a community where everyone belongs – and this may include providing employment (and opportunities) to individuals who have incurred criminal charges or convictions.

[para 27] In its Policy and Procedure Manual, on page 40 at item 25, the Organization indicates what use it will make of the information provided:

Allegations of criminal activity and actual criminal activity can have a substantial negative impact of REDI, its reputation, daily operations, employees and employee morale. Criminal activity is defined as behaviour that may result in liability under any criminal law legislation.

[...]

REDI will deal with any circumstances of possible or actual charges, or convictions on an individual basis. A number of factors will be considered to determine the consequences, if any, to your employment. These factors include, for example, your job performance and position; the relation between the criminal matter and your work; the nature and seriousness of the criminal matter; your ability to continue to perform your employment duties in a satisfactory manner; whether the activity is incompatible with your terms of employment; and the effect of the criminal matter on REDI, its reputation, daily operations, employees and employee morale.

[para 28] In the same document, the Organization explains how it will administer this policy:

- If a new employee has a criminal record, the Manager and Human Resources Manager will interview the employee. The new employee must provide a written signed account of the criminal activity. The Human Resources Manager will provide recommendations regarding hire/placement along with pertinent information to the Executive Director. The Executive Director will make a decision regarding hire/placement and, if appropriate, will notify the employee and Supervisor/Manager of conditions placed on the employee.
- If a current employee is charged with a criminal offence, the Manager will review the circumstances with the Human Resources Manager, who will provide recommendations to the Executive Director for review. The Executive Director will make a decision regarding continuing employment.

[para 29] It further submits that there is a clear statement to each employee that the information:

[...] will be kept in Section 6 of your personnel file (next to your Criminal Record Check) – and will, like all confidential documents, only be viewed by management/administration. We value your privacy and dignity as well! If you receive a subsequent Pardon, it would be removed and destroyed.

[para 30] The Organization submits:

REDI was collecting the information to provide insight to management and administration to govern the employment relationship – perhaps unsurprisingly given REDI’s mandate and the vulnerable individuals REDI’s management seeks to assist.

[para 31] The Organization states:

On hire, employees voluntarily provide a criminal record check as a pre-condition to employment. A further term of employment is that they will comply with REDI’s policy and procedure manual. That manual states that “a written, signed account of the criminal activity” will be provided. It is clear that it will be stored in the personnel file of the employee, and treated as confidential.

[para 32] I have evidence from the Organization that the collection of the personal information that the Complainant objects to is solely for employment related purposes. Further, I have evidence that the information will be contained in her employee file and will only be used to manage the employment relationship.

[para 33] The provisions of section 15(1) require that the reason for collection be reasonable for the purpose. Reasonable is defined in section 2 of the Act:

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 or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in an a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

[para 34] The Court of Appeal of Alberta spoke of this concept of reasonableness:

This section essentially embraces the common law concept of the “reasonable person”, and provides that the conduct of organizations using personal information must be scrutinized accordingly. The hypothetical reasonable person would recognize both of the values set out in s. 3: the rights of individuals to a reasonable level of privacy, and the needs of organizations to make reasonable use of information in the conduct of their activities. (*Leon’s Furniture Limited v. Alberta (Information and Privacy Commissioner)* 2011 ABCA 94 CanLII, para. 38).

[para 35] In this case, I find the Organization has provided me with a reasonable explanation for why the information it collects is necessary to manage an employment relationship. I also find the Organization gave sufficient notice to the Complainant of the reason for the collection. The Organization works with vulnerable individuals and seeks to ensure a safe and secure environment for those clients. Further, the Organization seeks the information only to manage the employment relationship. The information is on the employee file and will be treated as confidential.

[para 36] I find the Organization is in compliance with section 15 of the Act when it collects a written signed account of criminal activity from its employees.

[para 37] Since I have found the Organization is in compliance with the requirements of PIPA when it collects information of the type complained about in this case, it is not necessary for me to decide Issue A – whether PIPA applies in the circumstances of this case. My conclusion with respect to Issue B means there is no contravention of PIPA.

IV. ORDER

[para 38] I make this Order under section 52 of the Act.

[para 39] I find the Organization is in compliance with the Act when it collects a written, signed account of the criminal activities of its employees.