

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2016-08

December 14, 2016

ALBERTA ASSESSORS' ASSOCIATION

Case File Number P2848

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that the Alberta Assessors' Association (the Organization) disclosed her personal information by using a data matching database called "Turnitin" to analyze a demonstration report she had submitted to the University of British Columbia ("Turnitin" is software that assists in the identification of plagiarism.) The Complainant's name and student number were included in the demonstration report. The Organization took disciplinary measures against the Complainant on the basis of the analysis of the demonstration report. The Complainant complains that these actions on the part of the Organization are in contravention of the *Personal Information Protection Act* (PIPA).

The Adjudicator determined that the Organization was a non-profit organization within the terms of section 56 of PIPA. Further, she found that the Organization collected, used, and disclosed the Complainant's personal information as part of its regulatory and disciplinary function. The Adjudicator held that commercial activities are typically those that involve the buying, selling, or exchange of goods or services. As the Adjudicator found that the Organization's collection, use, and disclosure of the Complainant's personal information was not in connection with a commercial activity, she found that PIPA did not apply.

Statutes Cited: **AB:** *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1, 7, 8, 11, 12, 13, 14, 16, 17, 19, 20, 52, 55, 56; *Personal Information Protection Regulation* A.R. 366/2003 s. 21

Authorities Cited: AB: F2009-028, F2010-013, F2011-002, F2011-018, F2012-17, F2013-17, F2013-37, F2013-47

I. BACKGROUND

[para 1] The Complainant made a complaint to the Commissioner that the Alberta Assessors' Association (the Organization) disclosed her personal information by using a data matching database called "Turnitin" to analyze a demonstration report she had submitted to the University of British Columbia ("Turnitin" is software that assists in the identification of plagiarism.) The Complainant's name and student number were included in the demonstration report. The Organization took disciplinary measures against the Complainant on the basis of the analysis of the demonstration report. The Complainant complains that these actions on the part of the Organization are in contravention of the *Personal Information Protection Act* (PIPA).

[para 2] The Commissioner authorized mediation to resolve the issues between the Complainant and the Organization. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. ISSUES

Issue A: Is the Organization a non-profit organization as defined in section 56 of the Act?

Issue B: Did the Organization collect, use and/or disclose "personal information" of the Complainant as that term is defined in PIPA?

Issue C: Did the Organization collect, use and/or disclose the Complainant's personal information in connection with a commercial activity within the terms of section 56(3) of the Act?

Issue D: If yes, did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular,

- a. Did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 14, 17 or 20 of PIPA?**
- b. If the Organization did not have the authority to collect, use and/or disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of the Act before collecting, using or disclosing the information? In particular,**
 - i. Did the individual consent in writing or orally, or**

- ii. **Is the individual deemed to have consented by virtue of the conditions in section 8(2)(a) and (b) having been met? or**
- iii. **Is the collection, use or disclosure permitted by virtue of the conditions in 8(3)(a), (b) and (c) having been met?**

Issue E: Did the Organization collect, use or disclose the information contrary to, or in accordance with, sections 11(1), 16(1) and 19(1) of PIPA (collection, use and/or disclosure for purposes that are reasonable)?

Issue F: Did the Organization collect, use or disclose the information contrary to, or in accordance with, sections 11(2), 16(2) and 19(2) of PIPA (collection, use and/or disclosure to the extent reasonable for meeting the purposes)?

Issue G: If the Organization collected personal information other than directly from the Complainant, was the collection contrary to, or in accordance with, section 12 (sources for collection)?

Issue H: Did the Organization collect the information contrary to, or in accordance with, section 13 of PIPA? In particular, was it required to provide, and did it provide, notification, before or at the time of collecting the information, in accordance with section 13 of PIPA?

III. DISCUSSION OF ISSUES

Issue A: Is the Organization a non-profit organization as defined in section 56 of the Act?

[para 3] Section 56 of PIPA states, in part:

56(1) In this section,

(a) “commercial activity” means

(i) any transaction, act or conduct, or

(ii) any regular course of conduct,

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

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

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

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

(b) *“non-profit organization” means an organization*

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

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

(2) *Subject to subsection (3), this Act does not apply to a non-profit organization or any personal information that is in the custody of or under the control of a non-profit organization.*

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

[para 4] The Organization states that it is a non-profit organization as defined by section 56 of PIPA. It provided a copy of its certificate of incorporation under the *Societies Act* as evidence to support its position that it is a non-profit organization within the terms of section 56. The Organization takes the position that the activities that are the subject of the complaint giving rise to this inquiry are regulatory in nature, and not commercial.

[para 5] In her submissions for the inquiry, dated April 6, 2016, the Complainant requested a remedy under section 52(3)(h). This provision states:

52 (3) If the inquiry relates to any matter other than a matter referred to in subsection (2), the Commissioner may by order do one or more of the following:

(h) *with respect to a personal information code established under Part 6 by a professional regulatory organization, require the professional regulatory organization to amend or otherwise change the personal information code so that it is consistent with the purposes and intent of sections 1 to 35.*

From this aspect of her submission, I infer that the Complainant takes the position that the Organization is a professional regulatory organization within the terms of sections 1(1)(k.2) and 55 of PIPA. If so, then PIPA applies to the collection, use, and disclosure of personal information by the Organization.

[para 6] I note too that the Organization refers to its collection, use, and disclosure of the Complainant’s personal information as “subject to the regulatory activities of a regulatory authority as defined by section [1(1)(k.2)] of the Act. Section 1(1)(k.2) defines a “professional regulatory organization” for the purposes of section 55 of PIPA and section 21 of the Personal Information Protection Act Regulation (the Regulation).

[para 7] In my view, sections 1(1)(k.2) and 55 do not apply to the Organization or its activities. Section 55 (and section 21 of the Regulation, which sets out the circumstances in which a professional regulatory organization may adopt a personal information code) applies to a “professional regulatory organization” which is defined by section 1(1)(k.2) of PIPA as “an organization incorporated under a professional Act”.

[para 8] The Organization in this inquiry is incorporated under the *Societies Act*, which is not a professional Act. The Organization is *registered* as an association under the *Professional and Occupational Associations Registration Act*; however, that is not the same thing as being *incorporated* under that Act.

[para 9] The evidence before me establishes that the Organization is incorporated under the *Societies Act*. As a result, I find that it is a non-profit organization within the terms of section 56(1)(b)(i) of PIPA.

Issue B: Did the Organization collect, use and/or disclose “personal information” of the Complainant as that term is defined in PIPA?

[para 10] The Organization states that it collected, used, and disclosed the Complainant’s personal information as part of its regulatory processes. As the Organization, which I have found to be a non-profit organization, concedes that it collected, used, and disclosed the Complainant’s personal information, and as the exhibits it provided in evidence support finding that it collected, used, and disclosed the Complainant’s personal information, I find that it did. As a result, I must answer the question as to whether the collection, use, and disclosure of the Complainant’s personal information were done in connection with a commercial activity. If the collection, use, and disclosure were done in connection with a commercial activity, then PIPA applies to the collection, use, and disclosure. If not, then PIPA does not apply.

Issue C: Did the Organization collect, use and/or disclose the Complainant’s personal information in connection with a commercial activity within the terms of section 56(3) of the Act?

[para 11] Section 56(1) of PIPA defines “commercial activity” for the purposes of section 56. It states:

56(1) In this section,

(a) “commercial activity” means

- (i) *any transaction, act or conduct, or*
- (ii) *any regular course of conduct,*

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

- (iii) *the selling, bartering or leasing of membership lists or of donor or other fund-raising lists;*
- (iv) *the operation of a private school or an early childhood services program as defined in the School Act;*
- (v) *the operation of a private college as defined in the Post-secondary Learning Act [...]*

Section 56(1) defines “commercial activity” inclusively. If a transaction, act or conduct, or a regular course of conduct is of a commercial character, then it is a commercial activity.

[para 12] Section 56(3) of PIPA states:

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

By operation of section 56(3), the Act applies to a non-profit organization when personal information is collected, used, or disclosed in connection with a commercial activity carried out by the organization.

[para 13] The term “commerce”, from which the term “commercial” is derived, is not defined in PIPA. However, this word is generally understood to refer to the buying, selling, or exchange of goods or services.” “Commercial” then, means “engaged in” or “concerning” commerce, or the buying, selling, or exchange of goods or services.

[para 14] Orders F2009-028, F2010-013, F2011-002, F2011-018, F2012-17, F2013-17, F2013-37, and F2013-47, made under the *Freedom of Information and Protection of Privacy Act* have defined “commercial information” as information about the “buying, selling, or exchange of goods and services”. If it is assumed that the Alberta Legislature uses terms consistently when it enacts legislation, then commercial activities within the scope of PIPA are activities involving the buying, selling, or exchange of goods and services, including those activities enumerated in section 56(1).

[para 15] The Applicant provides two grounds for her argument that the Organization was engaged in an activity with a commercial character when it collected, used, or disclosed her personal information. First, she argues that licensing software is itself an activity with a commercial character. Second, she argues that the collection, use, or disclosure of her personal information was for the purpose of collecting fines.

Further evidence to support the commercial activity - as the definition of “commercial activity is very vague when looking at the Act as defined in s. 56(1)(a). Page 18 of Personal Information and Protection of Privacy Act (PIPA) Findings, May 8, 2015 - Report by [...], Senior Information and Privacy Manager. (para 23) In decision P2013-D-OI, the adjudicator commented on the meaning of "commercial activity within section 56. He said [:] My interpretation that there is a relatively broad test for determining what constitutes a commercial activity is consistent with the definition that is set out in section 56(1)(a) of PIPA itself. A commercial activity is any transaction, act, conduct, or regular course of conduct that is of a *commercial character*. While admittedly somewhat circular, the definition does not say that a commercial activity is an activity that is “commercial”. Rather, an activity must have a commercial “character”. To me, the definition is meant to capture activities that are more or less commercial, or appear to be commercial by most accounts. To adapt a colloquial phrase, if it looks like a commercial activity, and walks like a commercial activity, then it is a commercial activity. *In short, PIPA is meant to apply to non-profit organizations that are carrying out activities as though they are a business.*”

I have included with my original inquiry- the Alberta Assessors' Association practice review committee meeting minutes - Oct 10, 2013 - Page 2 - Where it indicates the purchase options for the text matching software est. cost of program \$6,600 (actual purchase of software is commercial activity as confirmed by [the senior information and privacy manager appointed by the Commissioner] “the purchase of the license itself was a commercial activity ... page 20), as well as “*the necessary budget be allocated ... and costs the associated with investigation be recouped in the manner of fines...*” To date the organization has accumulated \$3,000 per case of persons they have found “guilty” of plagiarism (to current which the organization has no policy or definition thereof so they can technically find any person guilty as no controls of policy have been made prior to the commencement of this report review). To my knowledge there have been 5 cases, cost & fines to be paid Totaling \$15,000. So to me, this is a cut and dry approach of a commercial activity, of financial gain, as the license of the program costed \$6,600, putting the organization in the plus \$8,400. To current this whole investigation of “plagiarism” is still on going, just working off of the results of the database, as the database has been deleted. There is no limitation to what the organization will gain financial from the results they plan to issue complaints to.

This report review for plagiarism that the organization commenced is not a regulatory function of the Alberta Assessor Association. This report review is the very first of its kind that the organization has done within its existence since 1962. There is nothing in the [...] Professional and Occupational Associations [Registration] Act (POARA), or the Municipal Assessor Regulation that states the organization has the powers to do such a function; specific to [an] independent Demonstration Report Review. [emphases in original]

[para 16] As noted above, the Organization’s position is that any collection, use, or disclosure of the Complainant’s personal information was done in the course of fulfilling its regulatory function. The Organization argues that regulating the conduct of assessors is not a commercial activity as that term is defined in PIPA. While the Organization agrees that it licensed software to examine the Complainant’s report, it argues that the collection, use or disclosure of the Complainant’s personal information was not done in the course of the commercial leasing transaction. It states:

As there was no collection, use or disclosure of personal information in the purchase of the software license, and as such, the Organization did not contravene the Act. If, as the Complainant contends that the commercial activity of purchasing office goods and supplies extends to the ultimate use(s) of an office good or supply purchase, then the simple act of

purchasing of paper would contravene the Act because personal information is frequently recorded on office paper.

[para 17] In response to the Complainant's argument that assessing fines is an activity with a commercial character, the Organization argues:

In Order P2007-007, dated January 21, 2008, of the Office of the Information and Privacy Commissioner, it states (para 30) the general rule is that PIPA does not apply to non-profit organizations" pursuant to section 56(2). However, it further states that circumstances of every case are determined on a case by case basis. [...]

The noted case considered whether fundraising was charitable or to raise funds for regular business operations or for non-charitable purposes. The former is not a commercial activity, but the latter may be.

In this light and extending the argument, it is the position of the Organization that the assignment of fines and costs is not a commercial activity that raises funds for the Organization's operations. It is a result of a disciplinary function and regulatory in nature.

Furthermore, the assignment of fines or costs is not a requirement of sanctions against a disciplined member. Fines or costs or a combination of fines and costs, are among the options a disciplinary tribunal is permitted by legislation [the *Professional and Occupational Associations Registration Act* and the *Municipal Assessor Regulation*] to consider. Other options include requiring additional training of a disciplined member which likewise does not monetarily enrich the Organization.

[para 18] The Organization explains that it did not collect, use, or disclose any personal information when licensing the software it used to review the Complainant's report. While it does not dispute that buying a product is a commercial activity, it takes the position that using the software, which is the activity in which the Complainant's personal information was used, is not connected to the purchase transaction. Rather, its use of her personal information through application of software was for the purpose of regulating a member of the assessor profession.

[para 19] I agree with the Organization that its subsequent use of the software is not "in connection with" the transaction in which it purchased the software. I interpret section 56(3) as establishing that PIPA applies to a non-profit organization when the organization collects, uses, or discloses personal information in connection with a commercial activity. If it had collected, used, or disclosed personal information in the course of software licensing, then arguably, PIPA would apply. However, it cannot be said that its subsequent use of the software in assessing the Complainant's report was connected to its obtaining a software license, such that it was "in connection" with this transaction.

[para 20] I do not accept the argument that assessing fines against members is a commercial activity, or that the fact that the Organization's investigation is necessarily a commercial transaction because it resulted in the assessment of fines and costs. As discussed above, the term "commerce" usually refers to the buying, selling, or exchange of goods and services. Fines are not goods or services, and they are not bought, sold, or exchanged. In this case, the fine was assessed in order to deter a particular type of conduct. However, in assessing the fine and costs, the disciplinary committee was not

providing a good or a service, or requiring that the Complainant purchase a good or a service. I am therefore unable to say that the assessment of fines has a commercial character.

[para 21] Even if it were the case that the purpose of making money could be said to give the action of assessing a penalty a commercial character, I disagree that this would mean that the Organization's investigation – in which it could be said to have collected, used, and disclosed personal information – would have a commercial character. The Organization conducted the investigation to determine whether the Complainant's conduct met its standards of conduct. If it had found that the conduct in question met its standards, then it would not have assessed penalties. As a result, it cannot be said that the purpose of the investigation was to make money, assuming that having acquiring money as a purpose in conducting a transaction renders a transaction "commercial". However, as discussed above, in my view, a commercial transaction is one that involves the buying, selling, or exchange of goods or services. Acquiring funds may be the result of these kinds of activities, but acquiring funds in and of itself is not a commercial activity.

[para 22] For the reasons above, I find that the Organization's collection, use, and disclosure of the Complainant's personal information was not done in connection with a commercial activity within the terms of section 56(3). As a result, I find that PIPA does not apply to the collection, use, and disclosure of the Complainant's personal information that is the subject of her complaint.

[para 23] As I find that PIPA does not apply to the complaint, I need not answer any of the other questions posed for the inquiry.

IV. ORDER

[para 24] I confirm that the activities that are the subject of the complaint are not activities to which PIPA applies. I therefore lack jurisdiction to make an order.

Teresa Cunningham
Adjudicator