

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2017-01

February 28, 2017

ACCESSIBLE ACCESSORIES LTD.

Case File Number 000355

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Summary: The Complainant stated that fellow employees sent an email and texts containing her personal information to her parents. The email was sent from the Organization's email accounts. The Complainant asserted that these disclosures were done by the Organization, through its employees, and that the disclosures were in contravention of the *Personal Information Protection Act* (the Act). The Complainant also asserted that a coworker disclosed personal information about her to her employer, and that this disclosure was in contravention of the Act.

The Adjudicator determined that the email and most of the text messages were sent by the Complainant's coworkers in a personal capacity, as friends. Therefore, these disclosures of the Complainant's information were not subject to PIPA. Some of the text messages could be interpreted as a coworker acting in her work capacity; however, those texts do not disclose any of the Complainant's personal information.

The Adjudicator determined that the information provided to the employer by one of the coworkers was personal employee information about the Complainant, and this use and/or disclosure was not authorized under the Act.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 17, 18, 20, 21, 52.

Authorities Cited: AB: Order P2006-005.

I. BACKGROUND

[para 1] The Complainant states that fellow employees sent an email and texts containing her personal information to her parents. The email was sent from the Organization's email accounts. The Complainant asserts that these disclosures were done by the Organization, through its employees, and that the disclosures were in contravention of the Act. The Complainant also asserts that a coworker disclosed personal information about her to her employer, and that this disclosure was in contravention of the Act.

[para 2] The Complainant requested a review of these uses and/or disclosures of her personal information, and subsequently an inquiry. The Complainant's submissions to this inquiry referred to other incidents in which her personal information may have been used and/or disclosed; however, the inquiry will focus on those outlined above, which were contained in the Complainant's original complaint.

II. ISSUES

[para 3] The Notice of Inquiry, dated May 13, 2016, states the issues for inquiry as the following:

1. Did the Organization use and/or disclose "personal information" of the Complainant as that term is defined in section 1(1)(k) of PIPA?

This question pertains to the alleged uses/disclosures by the fellow employees to the Complainant's family members, as well as to the alleged use/disclosure of the Complainant's information when the Office Manager conveyed information to the employer. The parties are also asked to consider whether these alleged uses/disclosures were done by the Organization, or by the employees in a personal capacity.

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

Did the Organization have the authority to use and/or disclose the information without consent, as permitted by sections 17 and 20 of PIPA?

3. Did the Organization use and/or disclose "personal employee information" of the Complainant as that term is defined in section 1(1)(j) of PIPA?

This question pertains to the alleged use/disclosure of the Complainant's information when the Office Manager conveyed the information to the employer.

4. If yes, did the Organization use/disclose the "personal employee information" in contravention of, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular,

Did the Organization have the authority to use/disclose the information without consent, as permitted by section 18 and 21 of PIPA?

III. DISCUSSION OF ISSUES

[para 4] Before discussing the separate issues, I will outline the facts as I understand them.

[para 5] On September 9, 2014, a coworker (Coworker A) of the Complainant sent an email to the Complainant's father. The Complainant provided me with a copy of this email; the coworker refers to herself as a coworker and a friend of the Complainant, and makes statements about the Complainant's personal life. The email does not refer to the Complainant's work performance. The email is from the coworker's work email account; however, the coworker informs the Complainant's father that she chose to use that email account so that it would appear legitimate (i.e. not a scam). She provides her personal email account address as contact information for a personal discussion.

[para 6] The Complainant alleges that Coworker B communicated with the Complainant's mother via text. She sent me several pages of screenshots of text messages; the screenshots are presumably from the Complainant's mother's phone, as the author of the outgoing texts refers to herself as the Complainant's mother. The primary person sending the texts to the Complainant's mother is clearly another coworker of the Complainant (Coworker B), and occasionally another person is involved in the text conversation, whom the Complainant identifies as Coworker A.

[para 7] These texts primarily discuss the Complainant's personal life; however, Coworker B tells the Complainant's mother that the Complainant's employer approached Coworkers A and B to discuss the Complainant. Coworker B relays some of that conversation to the Complainant's mother, indicating that the discussion was about the Complainant's work performance and steps the employer intended to take, including allowing for a leave of absence, requiring rehabilitation and random drug testing. Coworker B also tells the Complainant's mother that the employer wished to arrange a meeting with the Complainant, the Complainant's mother, the employer, and Coworkers A and B.

[para 8] The Complainant states that both Coworkers A and B were friends with the Complainant outside of work.

1. Did the Organization use and/or disclose "personal information" of the Complainant as that term is defined in section 1(1)(k) of PIPA?

Is the information "personal information"?

[para 9] "Personal information" is defined in section 1(1)(k) of the Act as "information about an identifiable individual."

[para 10] Previous orders of this Office have stated that information about individuals acting in a professional capacity (information about work duties) is not personal information within the

meaning of the Act, unless it has a personal dimension. In Order P2006-005 former Commissioner Work stated:

In Order P2006-004, I considered the meaning of “personal information about an individual” within the meaning of the Act:

The Act defines “personal information” as “information about an identifiable individual”. In my view, “about” in the context of this phrase is a highly significant restrictive modifier. “About an applicant” is a much narrower idea than “related to an Applicant”. Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant – and that is therefore connected to them in some way – is not necessarily “about” that person.

[para 11] In this case, the information at issue is information about the Complainant’s personal life, as well as information about her work performance. In my view, all of the information about the Complainant in the text messages and email are the Complainant’s “personal information”, including the information relating to her work performance. This is because the work-related information is not merely about her job duties; rather it is about her performance of her work duties and how her performance relates to the other personal aspects of her life being discussed. In other words, all of the information has a “personal dimension” such that it is personal information.

[para 12] Regarding the information relayed by the Complainant’s Coworkers (A and B) to the employer, the information appears to have been discussed in relation to the Complainant’s work performance in relation to other aspects of her personal life. Therefore, I find that information discussed between Coworkers A and B, and the Complainant’s employer, is the Complainant’s personal information.

Did the Organization use or disclose the Complainant’s personal information?

Disclosure to the Complainant’s parents

[para 13] The Organization argues that Coworkers A and B were not acting on behalf of the Organization when they disclosed the Complainant’s personal information to the Complainant’s parents, and that therefore, the Organization did not disclose this information. I will first consider whether the coworkers were acting on behalf of the Organization such that the Organization is responsible for the use and/or disclosure of the Complainant’s personal information. The other individual involved in the events is described by all parties as “the employer”. Nothing in the information before me indicates that the employer acted in anything but a professional capacity, on behalf of the Organization. The Organization’s submissions do not appear to dispute this. Therefore, actions taken by the employer are actions taken on behalf of the Organization.

[para 14] Regarding the disclosures of the Complainant’s personal information to her parents by Coworkers A and B, I find that the coworkers were not acting in their capacities as employees of the Organization when they emailed and texted the Complainant’s parents. Coworker A made clear in her email to the Complainant’s father that she was acting as the Complainant’s friend, rather than as a coworker. She explained why she chose to use her work email address and offered her personal email address for future discussions. The Complainant also admits that this

email was sent in a personal capacity. As Coworker A was acting in a personal capacity and not on behalf of the Organization, I find that the Organization did not disclose the Complainant's personal information appearing in the email to the Complainant's father.

[para 15] I make the same finding regarding Coworker A's participation in the text messages with the Complainant's mother. There is no indication that she was acting in any capacity other than as a friend (i.e. in a personal capacity).

[para 16] The Complainant has told me that she and Coworker B were also friends outside of work. Therefore, Coworker B's involvement also may be as a friend and not as an employee of the Organization. However, Coworker B's texts to the Complainant's mother include indications that she was speaking on behalf of the employer. This, by itself, does not persuade me that Coworker B was speaking on the Organization's behalf; relaying information said by the employer during a personal conversation is not the same as having the authority to speak for that employer. However, Coworker B appears to have been organizing a meeting with the Complainant and her mother, at the behest of the employer.

[para 17] In its September 2, 2016 submission, the Organization states that the meeting was requested by the Complainant and her mother; in its November 10, 2016 submission, the Organization states that "[the employer] became aware of the situation and a meeting was set up in the mother's hotel room."

[para 18] The copies of emails provided to me by the Organization and the Complainant that refer to the meeting all refer to a "10:00 meeting", indicating the meeting had already been discussed prior to these emails. The earliest indication of the meeting time is the text messages between Coworker B and the Complainant's mother.

[para 19] To summarize, the facts before me regarding the actions of Coworker B are: she was friends with the Complainant outside of work; she contacted the Complainant's mother about personal matters involving the Complainant; she spoke to the employer about the same issues; she relayed information purportedly from the employer to the Complainant's mother regarding the employer's plans; the Organization denies that the information relayed by Coworker B regarding the employer's plans was correct (i.e. Coworker B may have been representing the employer without authority); Coworker B was involved in organizing a meeting with the employer, the Complainant, and the Complainant's mother, which did take place.

[para 20] Given these facts it is difficult to determine whether Coworker B was acting entirely in an individual capacity, or if she was acting on behalf of the Organization at some point (specifically, when organizing the meeting). In any case, the disclosure of the Complainant's personal information occurred early in the text messages, when Coworker B seems to have been acting as the Complainant's friend. Later in the conversation, when Coworker B began talking about the employer's plans and organizing the meeting, she may have been acting as an employee of the Organization but she did not disclose any of the Complainant's personal information at that point. It is therefore not necessary for me to make a finding as to whether Coworker B was acting on behalf of the Organization at that point.

[para 21] I find that the disclosure of the Complainant's personal information by Coworkers A and B to the Complainant's parents was done in a personal capacity and not on behalf of the Organization. Therefore, the Organization did not disclose the Complainant's personal information to the Complainant's parents.

Use/Disclosure to the employer

[para 22] It is not entirely clear from the information before me what information coworkers provided to the employer about the Complainant. The text messages between Coworker B and the Complainant's mother indicate that the information provided to the employer is similar to that provided to the Complainant's mother. The November 10, 2016 submission of the Organization indicates the same.

[para 23] In that submission, the Organization states:

The [information] was provided by the Complainant to her friends voluntarily, who happened to be fellow employees. The information was provided on a personal basis and not at the request of the employer.

...

Information which may have been exchanged between the employee and employer concerning the Complainant's [personal life] and its effect upon her employment performance may be classified as personal employee information that is retained for the purposes of managing the employment relationship between the Complainant and the employer. If the information which is the subject matter of this complaint is in fact personal employee information, then the disclosure from [Coworker B] to [the employer] is not in fact a disclosure by the organization as it is only an internal providing of information. Although the term "disclosure" is not defined by the *Act*, a reasonable interpretation is that the disclosure must be to a third party, and not within the organization. (At page 2, items 1 and 3)

[para 24] The Complainant provided me with a copy of a text message from Coworker B to the Complainant's mother, which states: "[Coworkers A and B and the employer] had a talk and unfortunately what they the employers had suspected; was confirmed by us." This text message indicates that both Coworker A and B talked to the employer about the Complainant. However, the Complainant's initial complaint to this office referred only to Coworker B providing information to the employer about the Complainant and this issue as listed in the *Notice of Inquiry* reflects that. In their submissions to this inquiry, both the Complainant and the Organization talk about Coworker B providing information to the employer about the Complainant; therefore, the discussion of information provided to the employer about the Complainant will be limited to information provided by Coworker B.

[para 25] The Organization does not tell me whether Coworker B approached the employer with the information about the Complainant unsolicited, or whether the employer approached Coworker B to ask about the Complainant in relation to perceived performance issues. The only evidence before me in this regard is the above-cited text message from Coworker B to the Complainant's mother. In that message, Coworker B states that the employer had noticed that the Complainant was stressed and her work performance was affected. In the absence of any other

evidence, I accept that Coworker B provided information to the employer at the request of the employer.

[para 26] In some circumstances an employee might provide personal information about a coworker to an employer in a personal capacity. To try to distinguish information provided by a coworker in a personal capacity and that provided as an employee or an organization, by determining what the coworker knows as a friend and what the coworker knows as an employee seems impractical and unworkable. It seems more practical to make the determination based on the circumstances in which the information is provided. When the information is provided in the workplace, and especially where it is solicited by someone in the organization that has the ability to deal with performance issues (as the employer does here), it seems to be reasonable to assume that the information is being provided as an employee, and not in a personal capacity. In this case, the Organization has not provided me with reasons not to come to this conclusion.

[para 27] In my view, Coworker B was not acting in a personal capacity, but was acting as an employee of the Organization when she provided information about the Complainant to the employer. Therefore, Coworker B's use and/or disclosure of the information to another member of the Organization (the employer) is a use and/or disclosure *by* the Organization.

“Personal information” and “personal employee information”

[para 28] Before addressing issues 2-4, I will briefly discuss the difference between “personal information” and “personal employee information” in the Act, as it pertains to this case.

[para 29] “Personal information” is a broad category, encompassing any information *about* an identifiable individual. “Personal employee information” is a subset of personal information; it is information about an employee that is reasonably required to establish, manage or terminate the employment relationship. Personal employee information is *also* personal information under the Act; however, different rules apply to personal employee information.

[para 30] In this case, I have found that personal information about the Complainant was used and/or disclosed by the Organization; there is no argument from the parties that this was done with the Complainant's consent. This use and/or disclosure of personal information *without consent* may have been permitted by sections 17 and/or 20 of the Act. This is the question addressed in issue #2 of this Order. If sections 17 and/or 20 do not permit the use and/or disclosure without consent, the next question is whether the Complainant's information used and/or disclosed to the employer was the Complainant's personal *employee* information. This is the question addressed in issue #3 of this Order. If the information is personal employee information, the use and/or disclosure may be permitted under sections 18 and/or 21 of the Act. This is the question addressed in issue #4 of this Order.

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

Did the Organization have the authority to use and/or disclose the information without consent, as permitted by sections 17 and 20 of PIPA?

[para 31] I have found that the disclosures of the Complainant's personal information by Coworker B to the Complainant's parents are not disclosures within the scope of the Act. However, the use or disclosure of the Complainant's information by Coworker B to the employer is within the scope of the Act. The information that was used and/or disclosed was similar to the information disclosed to the Complainant's parents, and is the Complainant's personal information, as I have found above.

[para 32] Section 17 of the Act establishes the circumstances in which an organization may use personal information without consent. Section 20 of the Act sets out the circumstances in which an organization may disclose personal information without consent. In this case, the Organization has argued only that if the use and/or disclosure by Coworker B to the employer falls within the scope of the Act, then it was a use and/or disclosure of personal *employee* information. The Organization did not address whether the use and/or disclosure of the personal information was authorized under sections 17 or 20, which address the use and disclosure of personal information, rather than personal employee information.

[para 33] Based on the limited information before me, the only possibly applicable provisions in sections 17 and 20 are those that permit use and disclosure of personal information without consent for the purposes of an investigation or legal proceeding (sections 17(d) and 20(m)). The relevant provisions state:

17 An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

[...]

(d) the use of the information is reasonable for the purposes of an investigation or a legal proceeding [...]

20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:

[...]

(m) the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding

[...]

[para 34] Section 1(1)(f) of the Act defines the term "investigation" for the purposes of the Act. It states:

1(1) In this Act,

(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, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation [...]

[para 35] Section 1(1)(g) of the Act defines “legal proceeding”. It states:

1(1) In this Act,

- (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[...]*

[para 36] The Organization states that the information was used or disclosed for the purpose of managing the Complainant’s employment. The text from Coworker B to the Complainant’s mother indicates the employer had concerns about the Complainant’s work performance. The Organization also states that the Complainant is no longer an employee of the Organization because she resigned, not because she was fired. The emails between the employer and the Complainant that were sent after the employer met with the Complainant show no indication that the Organization was conducting an investigation into the Complainant, or initiating a legal proceeding. Therefore, neither sections 17(d) nor 20(m) provide authority for the use or disclosure of the Complainant’s information by the coworkers.

[para 37] With the information before me, I see no other provisions that could reasonably authorize the use or disclosure of the Complainant’s personal information by Coworker B to the employer.

[para 38] I will consider whether the use and/or disclosure were authorized under the provisions dealing with personal employee information.

3. Did the Organization use and/or disclose “personal employee information” of the Complainant as that term is defined in section 1(1)(j) of PIPA?

[para 39] The definition of “personal employee information” in section 1(1)(j) reads:

1(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 40] The Organization admits that Coworker B provided information about the Complainant to the employer. It argues that the information provided by Coworker B to the employer regarding the Complainant is “personal employee information” relating to the management of the Complainant’s employment. Coworker B’s text messages to the Complainant’s mother indicate that the employer asked Coworker B about the Complainant.

[para 41] I have accepted that the evidence provided by the Complainant indicates the employer approached Coworker B to ask about the Complainant. The text indicates that the employer expressed concern about the Complainant’s performance and was seeking information in that regard. The employer’s purpose in approaching Coworker B appears to have been to manage the Complainant’s employment.

[para 42] Similarly, the limited information before me indicates that the coworkers provided information about the Complainant in response to the employer’s request and concern regarding a performance issue. Therefore, the use and/or disclosure of the Complainant’s information was done for the purpose of providing information that would be useful in the Organization’s management of the Complainant’s employment. I find that the information provided by Coworker B is personal employee information of the Complainant.

4. If yes, did the Organization use/disclose the “personal employee information” in contravention of, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authorization or consent)? In particular,

Did the Organization have the authority to use/disclose the information without consent, as permitted by section 18 and 21 of PIPA?

[para 43] An organization may use personal employee information as follows:

18(1) An organization may use personal employee information about an individual without the consent of the individual if

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

(2) Nothing in this section is to be construed so as to restrict or otherwise affect an organizations ability to use personal information under section 17.

[para 44] An organization may disclose personal employee information as follows:

21(1) An organization may disclose personal employee information about an individual without the consent of the individual if

- (a) the information is disclosed solely for the purposes of
 - (iii) establishing, managing or terminating an employment or volunteer-work relationship, or*
 - (iv) managing a post-employment or post-volunteer-work relationship, between the organization and the individual,**
- (b) it is reasonable to disclose the information for the particular purpose for which it is being disclosed, and*
- (c) in the case of an individual who is a current employee of the organization, the organization has, before disclosing the information, provided the individual with reasonable notification that personal employee information about the individual is going to be disclosed and of the purposes of which the information is going to be disclosed.*

...
(3) Nothing in this section is to be construed so as to restrict or otherwise affect an organizations ability to disclose personal information under section 20.

[para 45] The Organization argues that internally providing information is not a “disclosure” under the Act. This may be correct; however the Organization did not address whether it would be a “use” of information, and if so, how that use was authorized under the Act.

[para 46] Whether Coworker B used the Complainant’s personal information or disclosed it, when she provided information to the employer, both the use and disclosure provisions require an Organization to notify an employee that her information will be used or disclosed and for what purpose. This notification must be given before the information is used or disclosed.

[para 47] “Reasonable notice” in sections 18 and 21 does not necessarily mean notifying the employee before any use or disclosure of personal employee information. A policy on how an organization deals with performance or disciplinary issues, and/or when feedback may be requested from supervisors or coworkers would likely serve as reasonable notice, if the policy were brought to the attention of employees (for example, upon hiring the employee).

[para 48] Alternatively, had the employer approached the Complainant first, about performance concerns, the employer may have advised the Complainant that the employer may also need to seek input from the Complainant’s coworkers, since the employer works primarily offsite. Whether any resulting use or disclosure by those coworkers would have met the remainder of the test in sections 17 and 20 is not clear, but the notification portion of the test would have been met.

[para 49] In this case, the Organization has not given me any information that would indicate the Complainant was provided with the required notice. Rather, the information before me suggests otherwise. Therefore, I cannot conclude that the Organization had authority for the use or disclosure of the Complainant's personal employee information under sections 18 or 21.

[para 50] As one of the requirements in both sections 18 and 21 was not met in this case, I do not need to consider whether the remaining two requirements in those provisions were met (specifically, whether the information that was used or disclosed by Coworker B was reasonable for the purpose for which it was used or disclosed; and whether the information was related only to the Complainant's employment).

IV. ORDER

[para 51] I make this Order under section 52 of the Act.

[para 52] I find that the Organization used and/or disclosed the Complainant's personal information and personal employee information. I find that this use and/or disclosure was not authorized under the Act.

[para 53] The Complainant is no longer an employee of the Organization; therefore, it does not seem to serve a purpose to order the Organization to stop using and/or disclosing the Complainant's personal information or personal employee information. As this issue arose from the employer's enquiries regarding the Complainant, I will order the Organization to provide training to its employees regarding the use and disclosure of personal information in the workplace.

[para 54] I further order the Organization to notify me and the Complainant, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Amanda Swanek
Adjudicator