

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2018-03

August 23, 2018

PRIMARIS MANAGEMENT INC.

Case File Number 002802

Office URL: www.oipc.ab.ca

Summary: The Complainant was employed by a tenant in the Organization's shopping mall. The Complainant was involved in an incident with an employee of the Organization, while performing his duties for his employer. The Organization provided a statement to the Complainant's employer (the tenant), as well as the video of the incident, which led to the Complainant's dismissal.

The Complainant requested a review of the Organization collection and use of his personal information, and the disclosures to his former employer. The Complainant subsequently requested an inquiry, which the Commissioner granted.

The Adjudicator determined that the collection and use of the Complainant's personal information via video surveillance were done with his deemed consent, as the Complainant has knowledge of the video surveillance, and the video was collected and used for obvious purposes (following Order P2016-02).

The Adjudicator determined that the Organization was authorized to disclose the statement and video to the Complainant's employer under section 20(m) of the *Personal Information Protection Act* (PIPA) (disclosure reasonable for an investigation or legal proceeding).

Statutes Cited: **AB:** *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 7, 8, 20, 52.

Authorities Cited: AB: Orders P2005-006, P2006-005, P2008-007, P2008-008, P2008-010, P2016-02, P2017-02

Cases Cited: *Canada Safety United v. Shineton*, 2007 ABQB 773.

I. BACKGROUND

[para 1] The Complainant was employed by a tenant in the Organization's shopping mall. The Complainant asked the Organization's Guest Services Representative (GSR) to provide a cart for him to use in performing his duties for his employer. The GSR refused this request; however she provided the Complainant with a quarter from her petty cash to obtain a cart from another tenant of the mall. The Organization provided a statement to the Complainant to the effect that after obtaining and using the cart, the Complainant rammed the cart into the Guest Services desk and walked away, rather than returning the cart to the other tenant. The Organization provided a copy of this statement about his behaviour to his employer, as well as the video of the incident, which led to the Complainant's dismissal.

[para 2] The Complainant requested a review of the Organization's disclosure of his personal information by the Organization to his former employer. The Complainant subsequently requested an inquiry, which the Commissioner granted.

II. ISSUES

[para 3] The Notice of Inquiry, dated January 8, 2018, states the issues for inquiry as the following:

1. Did the Organization collect, use and/or disclose the Complainant's 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,
 - 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?

III. DISCUSSION OF ISSUES

Did the Organization collect, use and/or disclose the Complainant's 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 collect, use and/or disclose the information without consent, as permitted by sections 14, 17 and 20 of PIPA?

Did the Organization collect, use and/or disclose the Complainant's personal information?

[para 4] "Personal information" is defined in section 1(1)(k) of the Act as "information about an identifiable individual."

[para 5] 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 6] In this case, the Complainant was performing work-related tasks at the time the incident took place. However, the Complainant’s personal information in the video and the related statement is not information only about his work duties but his personal conduct while performing those duties, which led to his dismissal. In other words, the information has a “personal dimension” such that it is personal information.

[para 7] The Organization collected the Complainant’s personal information via the video. The Organization states that it used the personal information to investigate a report created by the GSR involved in the incident with the Complainant. The Organization also states that it disclosed details of the incident to the Complainant’s former employer, and later disclosed the video to the former employer.

Did the Organization have authority to collect, use and disclose the Complainant’s personal information?

[para 8] The issue in the Notice of Inquiry asks if the Organization collected, used and/or disclosed the Complainant’s personal information in compliance with section 7(1) of the Act. Section 7 states:

7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,

- (a) collect that information unless the individual consents to the collection of that information,*
- (b) collect that information from a source other than the individual unless the individual consents to the collection of that information from the other source,*
- (c) use that information unless the individual consents to the use of that information, or*
- (d) disclose that information unless the individual consents to the disclosure of that information.*

[para 9] The Organization argues that it had the Complainant’s consent to collect his personal information via the video surveillance, and to use it for the purpose for which it was collected. In

other words, the Organization is arguing that the collection and use are authorized under section 7(1)(a) and (c).

[para 10] Section 7(1) indicates that collection, use and disclosure of personal information may be permitted without consent if the Act otherwise provides for that collection, use or disclosure. In this case, the Organization argues that the use of the Complainant's personal information without his consent was authorized under section 17(1), and the disclosure was authorized under section 20(1).

Collection

[para 11] The Organization argues that the Complainant consented to the collection of his personal information. Section 8 of the Act sets out the forms in which consent may be obtained. The Organization specifies that it obtained consent in compliance with subsection 8(2) (often referred to as "deemed consent"). That provision states:

8(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if

- (a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and*
- (b) it is reasonable that a person would voluntarily provide that information.*

[para 12] The Complainant argues that he did not expressly consent to the collection (or use or disclosure) of his personal information. He also argues that he did not "voluntarily" provide his personal information to the Organization within the terms of section 8(2).

[para 13] The Organization states that the video surveillance on its premises is overt, and that notices are posted in prominent places around the premises. It has provided me with a photo of one of the notices. It also provided me with a copy of its external privacy policy, available on its website, explaining how video surveillance is used. It states, in part:

The recordings collected through video surveillance are used:

- (a) to investigate any incident involving the safety or security of its employees, patrons, and/or contractors;
- (b) to provide evidence as required to protect Primaris' legal rights; and
- (e) to provide law enforcement agencies with evidence related to an incident under investigation.

[para 14] The Organization also states that the Complainant has particular awareness of the Organization's policy on video surveillance, as he formerly worked for the Organization and had signed a form "indicating he understood and agreed to abide by [the Organization's] policies, specifically including the external privacy policy" (initial submission, at para. 12).

[para 15] The Complainant argues that this signed form cannot stand as express consent to collect his personal information, as he had signed that form two years ago and is no longer an employee of the Organization. I agree that the signed form (a copy of which was provided to me) cannot stand as express consent of the Complainant in this case. However, I do not read the Organization's submission as arguing that this form is proof of express written consent. Rather, the Organization seems to offer this form as proof that the Complainant has been notified of the Organization's use of video surveillance and the purposes for that surveillance.

[para 16] Neither does the Organization argue that it obtained express consent in any other manner; the Organization argues that the Complainant is deemed to have consented to the collection of his personal information via the video surveillance because he was aware of the surveillance, and voluntarily provided his information "for the purposes of maintaining and promoting building security, deterring acts of theft or criminal mischief, or collecting information to assist in prosecution or legal proceedings in relation to criminal offences when they occur" (initial submission, at para. 13). It cites Order P2016-02 in support of this position.

[para 17] In Order P2016-02, the adjudicator discussed the use of overt video surveillance on the premises of a condominium. In that case, the notice on the condo building stated "Building is monitored by Video Surveillance", which is similar to the notices posted by the Organization. She found that video surveillance is ubiquitous and it can be reasonably understood that when a condominium collects personal information through surveillance, the purpose is to maintain security and the value of the building (against vandalism) and to deter criminal acts. She further states (at para. 23):

It may also be reasonably understood that footage from the camera may be used in legal proceedings or for investigations... For a residential condominium corporation such as the Organization to rely on section 8(2) as consent for its collection of personal information for particular and reasonable purposes of maintaining security and value and to deter criminal acts, it is sufficient to provide notice that the building is under surveillance. If individuals choose to visit the building despite the presence of surveillance cameras, or notice that surveillance is taking place on the premises, they may be deemed to agree to having their images collected by surveillance cameras for these purposes. However, if a residential condominium collects personal information for purposes other than these self-evident ones, it will be necessary for it to provide notice of these purposes in order to rely on section 8(2).

[para 18] The adjudicator's reasoning applies equally well in this case, where the Organization operates a mall open to the public.

[para 19] The Complainant argued that the Organization did not provide him with notice of its intention to collect, use or disclose his personal information. However, the notices of video surveillance on the premises would have been obvious to him as any other employee or patron. The Complainant has been given reasonable notice of the surveillance, via the notices posted at the doors, and the Organization's policy that was specifically brought to his attention when he had been an employee of the Organization. The purposes set out by the Organization for its surveillance match those discussed in Order P2016-02. Therefore, I find that the Complainant is deemed to have consented to the collection of his personal information for the purposes of security and deterrence of criminal acts.

[para 20] The Organization states that “collecting information to assist in prosecution or legal proceeding in relation to criminal offences when they occur” are also acceptable, self-evident purposes for the surveillance. I agree, and would add “investigation of a criminal act or security incident” as these all logically flow from the purposes of maintaining security and deterring crime.

[para 21] I accept the Organization’s arguments that it collected the Complainant’s personal information via the video surveillance for the purposes discussed above.

[para 22] The Complainant points out that section 8(4) of the Act states that consent under section 8(2) cannot be construed as consent to the collection, use or disclosure of personal information for purposes other than the particular purpose of the collection. In this case, the purpose of the video surveillance includes maintaining security of the premises; in my view, the Organization collected the Complainant’s personal information via video for that purpose.

Use

[para 23] The Organization argues that it used the Complainant’s personal information in the video to investigate a report made by the GSR regarding the incident with the Complainant. It argues that the Complainant is also deemed to have consented to this use, as it was contemplated by the privacy policy (discussed above) and was “reasonable for the purpose of ensuring security of Primaris' buildings and properties, maintaining and promoting building security, and deterring acts of criminal mischief following a report by a Guest Services representative that the [Complainant] rammed the Guest Services' desk with the cart” (initial submission, at para. 16).

[para 24] The Organization argues, in the alternative, that the use of the Complainant’s personal information was authorized without consent under section 17(d), as it was used in the course of conducting an investigation. I do not need to consider this latter argument because I agree that the Complainant is deemed to have consented to the use of his personal information in the video for the purposes for which it was collected (as discussed in the previous section of this Order).

[para 25] If the deemed consent provision in section 8(2) applies to the collection of personal information via video surveillance, then the use of the video surveillance for the same purposes is also permitted under that same provision. It would be illogical to conclude that the Complainant is deemed to have consented to the collection of his personal information via video surveillance for the purposes of security, deterrence etc. as I have done, yet find that he is not deemed to have consented to the use of the video surveillance for the same purposes. The purpose of the collection would be thwarted if the use were not also permitted, as long as the purposes for collection and use are the same. Therefore, I find that the Organization used the Complainant’s personal information with consent.

[para 26] In the next section of this Order I will discuss the Organization’s disclosure of the Complainant’s personal information to his employer. Before moving on, I note that the Organization did not argue that the deemed consent provision in section 8(2) of the Act extended

to the disclosure of the Complainant's personal information. In my view, although the Organization's first disclosure to the employer was directly related to the Organization's investigation, it might unduly strain the scope of section 8(2) to suggest that such a disclosure to the employer is a purpose obvious to the Complainant such that he could be said to have deemed to consent to that disclosure.

Disclosure

[para 27] The Organization disclosed the Complainant's personal information to his employer on two occasions. The first disclosure occurred when the Organization informed the employer of the Complainant's interactions with the Organization's employees. The second disclosure was the disclosure of the video to the employer, at the employer's request.

[para 28] The Organization argues that both disclosures were authorized under section 20(m); this provision states:

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 29] The Organization has argued only that the disclosures were for investigations, not for legal proceedings.

[para 30] 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 31] The Organization states that the first disclosure to the employer was done "to request that [the employer] ensure [the Complainant] not engage with any employee of [the Organization] in the future and to allow [the employer] to decide whether to initiate its own investigation" (initial submission at para. 20).

[para 32] Regarding the second disclosure, the Organization provided me with a copy of the request for the video from the employer. The employer informed the Organization that it was conducting its own HR investigation into the incident, and requested a copy of the video.

[para 33] The Organization further argues (initial submission, at para. 24):

Disclosure of the initial statement to [the employer] and the subsequent disclosure of the video to [the employer] was entirely reasonable in the circumstances given that:

- a. [the employer] was [a] tenant of the mall;
- b. the incident occurred in the course of the [Complainant] discharging his employment duties for [the employer]; and
- c. tenants of the mall, including the employees of tenants, are expected to refrain from actions that compromise their contractual relationship with [the Organization].

[para 34] The Complainant argues (initial submission, at para. 14, 17 and 18):

[The Complainant] submits that sections 17(d) and 20(m) are not applicable in the circumstances. No investigation or legal proceeding is or was contemplated or advised prior to the use or disclosure of [the Complainant's] personal information, and cannot therefore be considered to have been reasonably used or disclosed for the purposes of an investigation or legal proceeding.

...

Neither defined terms [for “investigation” or “legal proceeding”] expressly contemplate a future investigation or legal proceeding. Moreover, the definition of investigation specifically contemplates circumstances or actions having taken place or that are ‘likely to occur’, *and* it is reasonable to conduct an investigation. As the OIPC has previously held, the provision regarding investigation or legal proceedings justifying collection, use or disclosure have “no temporal restriction but arguably ‘an investigation or legal proceeding’ refers to an existing or pending proceeding rather than one that is conditional on particular facts happening that may never come to pass”. [Citation omitted]

While the relevant provisions clearly contemplate possible (but not yet instituted) investigation or legal proceedings, embracing the widest possible interpretation of the provision still does not eliminate the need for such investigation or legal proceeding to be ‘likely’ to take place considering the circumstances. In [the Complainant's] situation, the use and disclosure of his personal information - in voluntarily providing the same to [the Complainant's] employer - cannot reasonably be said to relate to a likely investigation or legal proceeding. Simply put, use and disclosure here on the part of [the Organization] was voluntary and, in [the Complainant's] view, designed to cause harm to him.

[para 35] The Complainant cited Order P2008-010 as support for its argument. The paragraph of that Order cited by the Complainant consists of a quote from Order P2008-008, in which the adjudicator considered the scope of “investigation” and “legal proceeding” under PIPA. In that Order, the adjudicator determined that the provisions in PIPA for investigations and legal proceedings apply when the investigation or legal proceeding is contemplated or likely, but not when either is merely possible. Order P2008-008 was quashed on judicial review on the grounds that the applicable legislation is unconstitutional; the discussion of the scope of “investigation” and “legal proceedings” were not at issue before the reviewing courts.

[para 36] The Organization cites *Canada Safety United v. Shineton*, 2007 ABQB 773 (at para 61), which was a judicial review decision upholding Order P2005-006. In that decision, the Court rejected the idea that there must be an *ongoing* investigation for section 20(m) of the Act to apply.

[para 37] In my view, the analysis in that Order P2008-008 regarding the scope of “investigation” and “legal proceedings” is correct, and is consistent with the Court’s comments in *Canada Safety United v. Shineton*.

[para 38] The Complainant seems to argue that no investigation was likely at the time of the Organization’s first disclosure to the employer, citing the Organization’s arguments that the first disclosure was to request that the Complainant not engage with Organization employees, and to allow the employer to *decide whether* to conduct its own investigation. In other words, the Organization did not have reason to expect that the employer would ‘likely’ conduct an investigation into the matter.

[para 39] I do not need to address that question, as the Organization itself conducted an investigation into the incident. The Organization’s submissions indicate that the first disclosure to the employer was related to the Organization’s investigation, not a possible investigation by the employer; this was stated at paragraph 24 of the Organization’s initial submission, (quoted at paragraph 33 of this Order).

[para 40] In my view, the Organization’s investigation constitutes an investigation for the purposes of section 1(1)(f) and 20(m). The Organization received a report about the Complainant’s conduct – occurring in the course of performing his work duties – that allegedly affected both the Organization’s property and its employees. The Complainant is an employee of the Organization’s tenant, which has a contractual relationship with the Organization. The Organization referred to actions that compromise this contractual relationship; the Organization seems to be saying that the Complainant’s conduct may have contravened (implicitly or explicitly) the agreement between the Organization as landlord and the employer as tenant. Therefore, I conclude that the Organization was conducting an investigation into a possible breach of an agreement between it and the Complainant’s employer/tenant.

[para 41] I also conclude that this first disclosure was reasonable for the purposes of the investigation. The agreement is between the Organization and the employer/tenant; it is abundantly reasonable to inform the employer/tenant that its employee’s conduct is compromising that agreement. To suggest that the Organization can conduct the investigation and not inform its tenant of the conclusion that affects their agreement is untenable.

[para 42] Regarding the second disclosure wherein the Organization provided the video to the employer, the employer informed the Organization that it was conducting an investigation and requested the video. The Complainant argues (rebuttal submission, at para. 7):

Further, even if, as contended by [the Organization], [the employer] later commenced some internal human resources investigation with respect to its employee, there is no authority before the OIPC to suggest that such an internal investigation, not yet in existence at the time of the

disclosure, constitute “an investigation” for the purposes of or within the meaning of Section 20(m) of PIPA.

[para 43] The employer’s investigation may not have actually commenced when it requested (or received) the video from the Organization, but it was clearly in contemplation (i.e. ‘likely’). Further, past Orders of this Office have held that an investigation into a possible breach of an employment agreement fall within the definition of “investigation” in the Act (see for example, Order P2017-02, at paras. 28-9, Order P2008-007 at para. 29). Therefore, I find that the employer was conducting an investigation for the purposes of section 1(1)(f) and 20(m) of the Act. As the video is direct evidence of the Complainant’s conduct, I find that it was reasonable for the Organization to disclose the video to the employer at its request, for its investigation.

[para 44] I conclude that the Organization’s two disclosures of the Complainant’s personal information were authorized under section 20(m) of the Act.

IV. ORDER

[para 45] I make this Order under section 52 of the Act.

[para 46] I find that the Organization’s collection, use and disclosures of the Complainant’s personal information were authorized.

Amanda Swanek
Adjudicator