

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2023-06

August 1, 2023

LINDT & SPRUNGLI (CANADA) INC.

Case File Number 023481

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Personal Information Protection Act* (PIPA) to Lindt & Sprungli (Canada) Ltd. (the Organization) for a copy of a particular performance evaluation completed by her former Manager. The Organization responded to the Applicant's request for access; two performance evaluations were provided to the Applicant, but the specific evaluation identified in the Applicant's request was not provided.

The Applicant requested a review of the Organization's response. The Commissioner authorized a Senior Information and Privacy Manager to attempt to settle the matter. Following this review, the Applicant requested an inquiry.

The Adjudicator found that the Organization conducted an adequate search for responsive records.

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

Authorities Cited: AB: Orders P2006-012, P2009-005

I. BACKGROUND

[para 1] The Applicant made an access request under the *Personal Information Protection Act* (PIPA) to Lindt & Sprungli (Canada) Ltd. (the Organization) for a copy of a particular performance evaluation completed by her former Manager (JC). The Applicant believes the

performance evaluation was completed prior to December, 2020 as JC left the Organization in December, 2020. The Organization responded to the Applicant's request for access on August 13, 2021 with performance evaluations from 2019 and 2020. While two performance evaluations were provided to the Applicant, the one believed to have been completed by JC was not provided.

[para 2] The Applicant requested a review of the Organization's response. The Commissioner authorized a Senior Information and Privacy Manager to attempt to settle the matter. Following this review, the Applicant requested an inquiry.

II. INFORMATION AT ISSUE

[para 3] As this inquiry addresses the adequacy of the Organization's search for responsive records under section 27 of the Act, there are no records directly at issue.

III. ISSUES

[para 4] The Notice of Inquiry, dated May 11, 2023, states the issue for inquiry as follows:

Did the Respondent meet its obligations required by section 27(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Respondent conducted an adequate search for responsive records.

IV. DISCUSSION OF ISSUES

[para 5] Section 27(1)(a) of the Act states the following:

27(1) An organization must

(a) make every reasonable effort

(i) to assist applicants, and

(ii) to respond to each applicant as accurately and completely as reasonably possible,

...

[para 6] The duty to assist includes conducting an adequate search for responsive records, as well as informing the applicant, in a timely manner, what steps have been taken to search for the requested records (Order P2009-005, at para. 47).

[para 7] The Notice of Inquiry states that this issue relates to whether the Organization conducted an adequate search for records. The Notice directs the Organization to provide its submission in the form of a sworn document describing the search it conducted in response to the Applicant's request. It directs the Organization to consider addressing the following:

- The specific steps taken by the Respondent to identify and locate records responsive to the Applicant's access request.

- The scope of the search conducted, such as physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories where there may be records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search? (Note: that person or persons is the best person to provide the direct evidence).
- Why the Respondent believes no more responsive records exist other than what has been found or produced. (In answering this question the Respondent should have regard to the reasons the Applicant gave for believing more records exist than were located/provided to him/her **or** in answering this question the Respondent should have regard to the Applicant's description of the records/kinds or records he/she believes should have been provided to him/her.)
- Any other relevant information.

[para 8] With respect to the burden of proof, an applicant must show some basis that an organization failed to locate or provide a record in its custody or control; the burden then shifts to the organization to show that it conducted an adequate search (Order P2006-012 at para. 12).

[para 9] In her request for review and request for inquiry, the Applicant set out her reasons for believing that JC completed a performance review for the Applicant. The Applicant explained that following JC's departure from the Organization, in January 2021, "JO" (the Applicant's new supervisor) was responsible for completing the performance evaluation for 2020. This was the one provided to the Applicant in response to her request for access. The Applicant believes a performance evaluation had been completed by JC because "[JO] said that [JC's] review had some rather 'not so nice things written about me'".

[para 10] The Applicant further states in her request for review that JO told her that she (JO) had redone the Applicant's performance review. The Applicant states that she asked JO for a copy of the review that JC had written and the JO replied "we should start fresh and let's leave it be." The Applicant states that JO has subsequently told the Applicant that "there was no report ever sent to her".

[para 11] In its initial submission, the Organization states that upon receiving the Applicant's access request, a Senior Human Resources Manager, E, conducted a search for records on the Organization's Talent Management System, which is the system the Organization uses for all performance reviews. The Organization states that E located all of the Applicant's historical performance reviews and provided her with the performance review for 2019, which was completed by JC, as well as her performance review for 2020, which was conducted by JO.

[para 12] The Organization states that when the Applicant indicated her belief that JC sent JO a performance review for the Applicant before leaving the Organization in December 2020, both E and JO conducted an additional search of their email accounts for relevant emails. Variations on the Applicant's name were used as search terms, and the search included all email folders, including the deleted folder. Neither E nor JO located a 2020 performance review completed by JC.

[para 13] The Organization further states that it was unable to conduct a search of JC's email for responsive records, for two reasons:

- when an employee leaves the Organization, the employee's emails are not retained unless specifically requested by their manager, in which case they are accessible for a limited time. JC's emails were not retained on her departure; and
- the Organization transitioned its email services from an on-premise server to a cloud server in April 2021 (prior to the Applicant's access request). JC's email account was not included in this transition; no information from JC's email account was moved to the new server. The data maintained on the on-premise server was permanently deleted after the transition.

[para 14] The Organization states that while all performance reviews are stored on the Talent Management System, which had already been searched, it took the additional step of searching its Human Resources Shared Drive, using the Applicant's name as a search term, as well as the hard copy employment file for the Applicant. A 2020 performance review completed by JC was not located.

[para 15] The Applicant's submission does not include additional reasons for expecting that the Organization has a copy of a 2020 performance review completed by JC, aside from the reasons provided in her request for review and request for inquiry. In her submission, the Applicant provided additional information regarding the difficult working relationship the Applicant had with JC, and JC's management style. Possibly the Applicant is providing this information as support for her view that JC was likely to have written a poor performance evaluation of the Applicant.

[para 16] I understand that the Applicant expects that a 2020 performance review was conducted by JC based on what she had been told. Based on what the Applicant states was said to her, it is not beyond the realm of possibility that JC started (or completed) a performance review that JO decided to rewrite herself. In that case, JO may not have retained a copy of what JC had written. It is possible that JC informed JO that she had written a performance review for the Applicant and relayed some of its contents to JO, without actually providing a copy to JO before she left the Organization in December 2020. It is also possible that JC did not write a performance review for the Applicant for 2020.

[para 17] In any event, the issue for this inquiry is not whether the requested record ever existed; rather, the issue is whether the Organization conducted an adequate search to locate the record if it does exist. I accept the Organization's explanation of the searches it conducted and the limits of those searches. The Organization didn't end its search with the repository where performance evaluations are maintained; it also searched email accounts, the HR shared drive, and the Applicant's employment file. In my view, the various searches described by the Organization are sufficiently comprehensive to fulfill its obligations under the Act.

[para 18] In her submission, the Applicant also points out that the Organization's submission was not in the form of a sworn affidavit. The Notice of Inquiry states that the Organization's

submission “should be in the form of a sworn document, describing the search it conducted for records responsive to the Applicant’s access request.” While a sworn document is preferable, the Organization’s submission in this case is sufficient to meet its burden of proof.

V. ORDER

[para 19] I make this Order under section 52 of the Act.

[para 20] I find that the Organization conducted an adequate search for records.

Amanda Swanek
Adjudicator