

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2020-05

June 8, 2021

WEINRICH CONTRACTING LTD.

Case File Number 002209

Office URL: www.oipc.ab.ca

Summary: The Complainant and his brother were equal shareholders in Weinrich Contracting Ltd. (the Organization), and the Complainant was sole director. The brothers were involved a legal dispute relating to the business of the Organization. In January 2016, this Office received a complaint from the Complainant that in the course of the legal dispute, the brother (S) collected the Complainant’s personal information from his work computer, and used and disclosed it, contrary to the *Personal Information Protection Act* (PIPA).

Subsequently, the legal action was settled and S became the sole shareholder and director. The Organization provided evidence that a condition of the “With Prejudice Offer to Purchase” which was made to further settlement of the legal dispute between the parties was that the Complainant would withdraw the complaint against the Organization made to this Office. This condition was accepted by the Complainant. As well, the “Mutual Release” agreement provided a complete and unconditional release by the Complainant of the Organization and the brother arising from or relating to allegations of breach of privacy.

In October 2016, this Office received a request for inquiry from the Complainant. The Commissioner agreed to conduct an inquiry, with the first issue being whether the complaint should be dismissed on the basis that the Complainant signed an agreement in which he agreed to withdraw his complaint against the Organization before this Office.

In Decision P2020-D-01, the Adjudicator determined that the agreement between the Complainant and the Organization does not preclude the Commissioner from conducting an inquiry into the issues raised by the Complainant.

In this part of the inquiry, the Adjudicator considered whether the Organization collected, used or disclosed the Complainant's personal information in contravention of the Act.

The Adjudicator determined that S collected the Complainant's emails on his own behalf, acting in an individual capacity. Therefore, PIPA does not apply to that collection, or subsequent use or disclosure.

Statutes Cited: AB: *Business Corporations Act*, R.S.A. 2000, c. B-9, s. 239, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 33, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 4, 52

Authorities Cited: AB: Decision P2020-D-01, Orders F2019-05, P2006-005

I. BACKGROUND

[para 1] The Complainant and his brother (S) were equal shareholders in Weinrich Contracting Ltd. (the Organization), and the Complainant was sole director at the relevant time. The brothers were involved a legal dispute relating to the business of the Organization. In January 2016, this Office received a complaint from the Complainant that in the course of the legal dispute, S collected the Complainant's personal information from his work computer, and used and disclosed it, contrary to the *Personal Information Protection Act* (PIPA). Specifically, the Complainant states that S accessed and copied the Complainant's emails.

[para 2] Subsequently, the legal action was settled, and S became the sole shareholder and director. The Organization provides evidence that a condition of the "With Prejudice Offer to Purchase" which was made to further settlement of the legal dispute between the parties was that the Complainant would withdraw the complaint against the Organization made to this Office. This condition was accepted by the Complainant. As well, the "Mutual Release" agreement provided a complete and unconditional release by the Complainant of the Organization and S arising from or relating to allegations of breach of privacy.

[para 3] In October 2016, this Office received a request for inquiry from the Complainant. The Commissioner agreed to conduct an inquiry, with the first issue being whether the complaint should be dismissed on the basis that the Complainant signed an agreement in which he agreed to withdraw his complaint against the Organization before this Office. In Decision P2020-D-01, I determined that this Office is not precluded from continuing an inquiry into the issues raised by the Complainant, despite the Agreement and Release signed between the Complainant and the Organization.

[para 4] I issued a second Notice of Inquiry setting out the additional issues to be addressed in this part of the inquiry, as well as a new schedule for submissions.

II. ISSUES

[para 5] The Notice of Inquiry, dated January 6, 2021, states the issues for inquiry as the following:

Did the Organization collect, use and/or disclose the Complainant's 'personal information', or the Complainant's 'personal employee information', and if either or both is the case, did it do so in contravention of, or in compliance, with PIPA?

'Personal employee information' is narrower in scope than 'personal information', but the former also falls within the definition of the latter. The circumstances in which each may be collected, used and disclosed are different. The rules under PIPA permit collection, use and disclosure of information meeting the definition of "personal employee information" in specified employment circumstances. However, even if information that is personal employee information cannot be collected, used and/or disclosed in the circumstances by the organization, it may still be permissible for the organization to deal with it under the rules for permitting collection of personal information.

Therefore, in an inquiry in which information may meet the definition of personal employee information, then, in case it may not be dealt with by an organization as such, it is also necessary to ask whether this information can be collected, used and/or disclosed under the rules for collecting personal information.

The specific questions for this inquiry are, therefore:

Did the Organization collect, use and/or disclose the Complainant's 'personal employee information', as that term is defined in section 1(1)(j) of PIPA? If so,

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 authority or consent)? In particular,

Did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 15, 18 and 21 of PIPA?

If the Organization did not collect, use and/or disclose the Complainant's 'personal employee information' as that term is defined in section 1(1)(j) of PIPA, or was not authorized to collect, use and/or disclose such information under sections 15, 18 and/or 21 of PIPA, the Commissioner will also address the following issues:

Did the Organization collect, use and/or disclose the Complainant's 'personal information', as that term is defined in section 1(1)(k) of PIPA? If so,

Did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no use or disclosure without either authority 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/or 20 of PIPA?

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

III. DISCUSSION OF ISSUES

Preliminary issue – evidence not accepted from the Complainant

[para 6] In his rebuttal submission, the Complainant argued that the Organization provided copies of only some of the emails that S had accessed; specifically, only those that supported its position. In his initial and rebuttal submissions, the Complainant had not provided his own copies of the emails. Following his rebuttal submission, the Complainant asked permission to provide the copies of all of the emails. The Complainant states that he no longer has his own copy of these emails. He asked that the emails he had previously provided to this Office in the course of the earlier review be returned to him, so that he could provide them to me for the inquiry.

[para 7] After reviewing the initial and rebuttal submissions of both parties, I decided not to grant this request. For the reasons set out in this Order, I find that it was S acting in a personal capacity, and not the Organization, who collected, used and disclosed personal information in the Complainant's emails. The Act does not apply to S acting in a personal capacity. This means that even though the emails may contain at least some personal information about the Complainant, I do not have jurisdiction to review the collection, use or disclosure of that information by S. I therefore determined that it isn't necessary to review the emails, as the content of the emails would not change or otherwise affect my analysis.

Did the Organization collect, use and/or disclose the Complainant's 'personal information', or the Complainant's 'personal employee information', and if either or both is the case, did it do so in contravention of, or in compliance, with PIPA?

[para 8] The Organization states that while the Complainant and S were equal shareholders in the Organization, the Complainant was the sole director of the Organization at the relevant time.

[para 9] It states that the brothers were involved in a legal dispute (initial submission, at para. 7):

Commencing in November of 2014, the Complainant and [S] were in a legal dispute, related to the ownership and control of the Organization, in which there was an existing Court of Queen's Bench corporate shareholder oppression action between [S] and [the Complainant] ("the Oppression Action"). Notably, the Organization was not a party to the Oppression Action.

[para 10] The statement of claim, a copy of which was provided to me by the Organization, was filed on November 6, 2014. On November 7, 2014, the brothers attended court for an

application related to the action. Following the application, Justice Belzil ordered that S would be reinstated to his previous position with the Organization, and be granted full access to the Organization's financial information and corporate property. Justice Belzil also ordered that any issuance of funds or removal of funds from the Organization must be authorized by both the Complainant and S.

[para 11] The Organization provided me with a copy of an affidavit sworn by S on November 23, 2014 and filed with the Court in relation to the same legal dispute. In that affidavit, S states that after the November 7 proceeding, the Complainant purchased equipment without the consent of S, and it was unclear whether this was done on the Complainant's behalf personally, or on behalf of the Organization, which may have contravened the court order. S states that he was unable to get a satisfactory answer, so he accessed the Complainant's work email, printing off a number of emails. He states that he provided these emails to his counsel on November 19, 2014.

[para 12] Clearly, S acknowledges that he accessed the Complainant's emails as alleged. According to the affidavit, he did this sometime between November 7 and November 19, 2014. The Organization argues that S accessed the Complainant's emails in relation to the ongoing legal proceeding. It argues that the proceeding was initiated by S as a shareholder in the Organization. Specifically, the Organization states that S was acting in a personal capacity, and not on behalf of the Organization in bringing forward the legal action.

[para 13] PIPA applies to organizations that collect, use and disclose personal information. "Organization" is defined in section 1(1)(i) of the Act, as follows:

(i) "organization" includes

- (i) a corporation,
- (ii) an unincorporated association,
- (iii) a trade union as defined in the Labour Relations Code,
- (iv) a partnership as defined in the Partnership Act, and
- (v) an individual acting in a commercial capacity,

but does not include an individual acting in a personal or domestic capacity;

[para 14] Section 4(3) of the Act sets out circumstances in which the Act does not apply; section 4(3)(a) is relevant here. It states:

4(3) This Act does not apply to the following:

- (a) the collection, use or disclosure of personal information if the collection, use or disclosure, as the case may be, is for personal or domestic purposes of the individual and for no other purpose;

[para 15] If S was acting in a personal capacity, PIPA does not regulate the collection, use or disclosure of personal information by S.

[para 16] The Organization states (initial submission, at para. 50):

[S] investigated [Organization] property – property he was permitted access to in the November 7, 2014 Order of Justice Belzil – for the purpose of the Oppression Action legal proceedings, an action pursuant to the [*Business Corporations Act*]. The Oppression Action, by its very nature, is an action designed to provide relief to an individual, like a shareholder, due to oppressive conduct of a director of a corporation. In contrast, corporations have the ability to bring derivative actions, but not oppression actions. Oppression actions involve a uniquely prejudiced complainant, the complainant is *not* the corporation itself.

[para 17] The Organization points to section 239 of the *Business Corporations Act*, R.S.A. 2000, c. B-9 (BCA) in support of its argument. This section defines who can be a complainant in specific actions, including the type of action brought by S. A “complainant” in this section includes shareholders or former shareholders, directors and officers or former directors and officers, a creditor, or any other appropriate person as determined by the Court.

[para 18] More significantly, in the statement of claim filed by S, he alleges that the Complainant, as the then-director of the Organization, had failed to fulfill his fiduciary duty to S, as shareholder. From the evidence before me, it seems clear that the action was brought by S as a shareholder, and not on behalf of the Organization.

[para 19] In the statement of claim, S sought leave to bring a derivative action on behalf of the Organization. In such an action, S would arguably have been acting not in an individual capacity, but on behalf of the Organization. Neither party has provided much detail about whether a derivative action was commenced; however, I note that the Agreement signed by the brothers contains a provision stating the release between the parties “shall explicitly apply to all of the allegations contained within the Oppression Action, including, without limitation, the allegations made in the proposed Amended Statement of Claim and proposed derivative action on behalf of [the Organization] against [the Complainant].” (Offer to Purchase, Tab 21 of Organization’s initial submission, at para. 4, my emphasis). It appears that while a derivative action may have been contemplated, it was not commenced.

[para 20] In its rebuttal submission, the Organization provided information about subsequent legal proceeding involving the Complainant, S, and the Organization. In 2017, the Organization initiated a proceeding against the Complainant. This relates to an allegation that the Complainant contravened a non-compete clause in the agreement in which he agreed to sell his shares in the Organization to S. Based on the evidence before me, the Complainant was the sole director of the Organization until August 31, 2016, at which time he ceased being involved with the Organization and he agreed to certain non-compete restrictions for two years after that date. The allegations against the Complainant relate to a loan that the Organization alleges was made by the Complainant to a competitor of the Organization. The proceeding therefore relates to actions that the Complainant allegedly undertook after August 2016.

[para 21] The Organization provided me with copies of the Statement of Claim for the above-referenced proceeding (filed on November 9, 2017), as well as an Anton Piller Order (filed November 9, 2017), the Notice to Admit Facts (filed December 13, 2018) and Reply to Notice to Admit (filed January 2, 2019). Nothing in these documents indicate that the emails accessed by S are related in any way to the 2017 proceeding initiated by the Organization. The Complainant

has not provided any information that would link the emails to the proceeding brought by the Organization.

[para 22] Therefore, while the Organization (as opposed to S acting in a personal capacity) has brought proceedings against the Complainant, these proceedings were initiated several years after the emails at issue were accessed; they appear to relate to actions taken by the Complainant after August 2016; and there is no indication that the emails at issue relate at all to this proceeding.

[para 23] Given the information provided by the Organization, I am satisfied on a balance of probabilities that S was acting in a personal capacity, as a shareholder, when he accessed the Complainant's emails. This means that the collection of the Complainant's personal information by S, was not done on behalf of the Organization or any other organization as defined in the Act.

[para 24] As I find that S was acting in a personal capacity when he accessed the Complainant's emails, I find that PIPA does not apply. I make no comment regarding whether this was an appropriate action for S to take.

[para 25] Regarding the subsequent use and/or disclosure by S to his counsel and to the court, these actions were undertaken in the course of the same legal proceeding. Therefore, I conclude that any use or disclosure was done by S in a personal capacity as well. While subsequent proceedings were initiated against the Complainant by the Organization (as opposed to S alone), the mails do not appear to relate to those subsequent proceedings.

[para 26] The Complainant argues in his rebuttal submission that the Organization "may continue to have that information and access as long as they have access to my information."

[para 27] In S's affidavit, he states that he provided the emails to his counsel. From S's submissions I gather that some of the emails contained information that appeared to be privileged, since his counsel provided them to a third-party (another law firm) to sort through the emails and determine which were subject to a claim of privilege. That third-party counsel sorted the emails into four categories: Privileged; Unclear if Privileged; Privileged Forwarded to 3rd Parties; and Not Privileged. S states that the records were returned to his counsel in four sealed envelopes. His counsel opened and copied only the contents of the envelope marked "Not Privileged". All four envelopes, including the three remaining sealed, were then given to the Complainant's counsel.

[para 28] From this, I understand that S, or his counsel, retained only the emails in the "Not Privileged" envelope.

[para 29] I have found that it was S, and not the Organization per se, who collected the Complainant's emails. The Complainant has not provided any reason to expect that the Organization later collected these emails from S, or that S otherwise has used them in his work capacity with the Organization.

[para 30] That said, as the Complainant used his work email account to send and receive these emails, the Organization may continue to have copies of some or all of the emails. However, it was the Complainant himself who caused these emails to be in the Organization's system. In other words, the Organization did not collect these emails from elsewhere.

[para 31] From the parties' submissions, it seems clear that many (if not all) of the emails relate to the Complainant's work duties with the Organization. For example, some emails relate to the Complainant's purchase of equipment, which was done on behalf of the Organization. The Organization may continue to have operational reasons to maintain these emails.

[para 32] PIPA does not apply to information about individuals that relates only to the performance of their work duties. "Personal information" is defined in section 1(1)(k) of the Act as "information about an identifiable individual." 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 (See Order P2006-005).

[para 33] Therefore, PIPA does not apply to emails that the Organization may have kept, that contain information only about the Complainant acting in his work capacity.

[para 34] To the extent that any of these emails contain information that has a personal dimension and *is* the Complainant's personal information, I reiterate that it was the Complainant who placed this information in the Organization's email system, by using his work email account. In Order F2019-05, I considered whether a public body collected personal information of a former employee within the terms of the *Freedom of Information and Protection of Privacy Act* (FOIP Act) in emails that employee sent or received using his work email account. I said (at paras. 39-44):

It is not unusual for an employee to keep personal information at their workplace, such as family photos, diplomas and certificates, and medical information to be submitted for health benefits. Where an employee brings such information into the workplace and files it in a desk drawer or tacks it on a bulletin board, a public body might be characterized as having 'custody' of such items insofar as they are on a public body's premises.

However, a public body as employer generally does not have authority to 'collect' such personal information under section 33. Were section 33 to apply in these circumstances, public bodies would have to prohibit personal items or risk contravening section 33 of the Act. Such a result seems nonsensical.

Electronic copies of records have additional considerations not arising where the personal information is in a tangible record sitting in or on a desk. Public bodies have obligations to maintain and monitor electronic systems such as email servers and document storage. They also have terms of use policies that employees must abide by. Personal documents (such as photos) uploaded onto a public body's network by an employee can be included in scans conducted by the public body to locate malware etc. on its systems. Those personal documents could be quarantined or deleted by the public body if necessary to maintain security of its systems. A public body could even decide to mass-delete items saved on its servers, or wipe a computer hard drive to contain malware etc.

However, a public body could also empty its physical location. In all of these situations, the public body has the ability to delete or remove items containing employee personal information that the employee has brought into the workplace and/or uploaded to a computer or network. Therefore, the public body has some control over the information whether it is tangible or electronic. This control arises from a public body's duty to maintain its premises, property and systems.

The Ontario and Alberta courts have concluded that this ability to regulate personal documents or records by virtue of obligations to maintain its systems is not sufficient, by itself, to give a public body control over these documents such that they can be subject to access requests. As these Courts have stated, the ability to regulate personal documents stems from the public body's ability to regulate its systems and use of its systems. The ability to regulate is not tied to the document itself. Absent other considerations, the public body does not have the right to possess the document or regulate the document other than to maintain its systems. (Other considerations include workplace investigations during which a public body might intentionally collect an employee's personal files kept on the public body premises or electronic system).

In my view, this kind of custody or control also does not mean that a public body has collected the personal information within the terms of Part 2 of the FOIP Act. Whether electronic or tangible, when an employee voluntarily stores personal information at the workplace and that information:

- is for the personal use of the employee
- is unrelated to the employee's work duties, and
- is unrelated to the functions of the public body (i.e. is not personal information of the employee collected for human resources purposes)

then the public body will generally not be found to have collected it within the terms of Part 2 of the Act.

[para 35] I further found that one of the public bodies retained the employee's emails for its own purpose (to pursue an investigation into the employee's actions). I found *that* retention to be a collection by the public body, separate from the mere custody of the emails.

[para 36] While that Order discussed the application of the FOIP Act, I see no reason to not also apply this analysis under PIPA. To the extent that the Organization has emails sent or received by the Complainant using his work email account, and those emails contain the Complainant's personal information, the Organization did not 'collect' that personal information by virtue of the Complainant's use of the email system. Rather, the Organization has 'mere custody' of the emails.

[para 37] Also following the analysis in Order F2019-05, if the Organization retains and uses any personal information in those emails for its own purpose that would be a collection and use of personal information by the Organization, subject to the rules in PIPA.

[para 38] In this case, the Complainant has not provided any reason to expect that the Organization – as opposed to S acting in a personal capacity – has collected, used or disclosed his personal information in the emails. As discussed above, I understand that the Organization, as

opposed to S acting in his personal capacity, has brought a legal proceeding against the Complainant; however, none of the evidence before me indicates that any information in the emails at issue are related to that proceeding.

[para 39] As also discussed, the information in the emails that relates only to the Complainant's performance of work duties is not the Complainant's personal information within the terms of PIPA. It is entirely reasonable for the Organization to continue to maintain such information, as it relates to the functioning of the Organization. In any event, PIPA does not regulate the use of that information.

[para 40] Lastly, the Complainant states that his spouse has experienced identity theft. The submissions indicate that the Complainant believes the identity theft is related to the Organization. He states that S and his counsel "hired [HG] to image all of my personal information and it turns out he was convicted of and spent three years in us [sic] jail for fraud and there is no way to verify if he has copies of my information or my wife's" (rebuttal submission).

[para 41] In its rebuttal submission, the Organization explained that the reference to HG relates to the legal proceeding initiated by S and the Organization against the Complainant in 2017, discussed earlier in this Order. The Organization states (rebuttal submission, at paras. 5-8, footnotes omitted):

These references in the Complainant's rebuttal submissions are to a search conducted by Independent Legal Counsel (the "ISS") pursuant to a Court Ordered Anton Pillar Order (the "APO"), or civil search warrant, in legal proceedings between the Organization and [S], as Plaintiffs, and the Complainant, as a Defendant, in 2017 (the "1703 Action"). In granting the APO against the Complainant, the Court had satisfied itself that the Complainant was likely to destroy evidence.

The APO set out what types of evidence was to be searched for and seized, and the Complainant's health records, social insurance information, passports, "and more", are not included.

The subject matter of the 1703 Action includes that the Complainant loaned \$1 Million to a competitor of the Organization within approximately one week of his buyout from the Organization, in contravention of the terms of a Non-Competition and Non-Solicitation Agreement, which prohibited him from doing so.

Neither [S], nor the Organization's counsel, nor the Organization (though it is not alleged) has the Complainant's information, or the Complainant's spouse's information, as alleged in his rebuttal submissions. What was seized in November of 2017, *3 years after the events that are the subject matter of this complaint*, is held pursuant to a Court Order by the ISS.

[para 42] The Anton Piller Order was signed November 2, 2017, and essentially permits the search and seizure of documents in control of the Complainant (the defendant in that proceeding). As stated by the Organization, the seized documents were not provided to the Organization (which was the plaintiff in the proceeding); rather, they were provided to the Independent Supervising Solicitor.

[para 43] Anything seized in relation to the Anton Piller Order occurred after the Complainant submitted his complaint to this Office. As such, it is not at issue in this inquiry.

[para 44] If the Complainant's claims about identity theft and 'imaging' his information relate to his initial complaint to this Office, regarding S's access of the Complainant's emails in 2014, he has not provided any support to substantiate such claims. He has not provided any support to link the Organization to the identity theft or fraud that he or his spouse has experienced.

[para 45] For all the reasons above, I conclude that the Organization did not collect, use or disclose the Complainant's personal information as alleged.

IV. ORDER

[para 46] I make this Order under section 52 of the Act.

[para 47] I find that the Organization did not collect, use or disclose the Complainant's personal information.

Amanda Swanek
Adjudicator