



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order P06-05

LANGLEY CRUISESHIPCENTERS LTD.

David Loukidelis, Information and Privacy Commissioner
December 14, 2006

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Summary: The organization collected emails to and from the three complainants that were sent and received using the organization's email system. Much of the emails' contents consisted of "work product information" and "contact information", not personal information, but they also contained some personal information of the complainants and other individuals. PIPA authorized the organization to collect, use and disclose that personal information for the purpose of its "investigation" into whether the complainants had breached their agreements with the organization.

Key Words: personal information—contact information—work product information—investigation.

Statutes Considered: *Personal Information Protection Act*, ss. 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

Cases Considered: *Re Trigg*, [2003] B.C.E.S.T.D. No. 40; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983.

1.0 INTRODUCTION

[1] Three individuals who had a business relationship with Langley CruiseShipCenters Ltd. ("organization") complained to this Office under the *Personal Information Protection Act* ("PIPA") about the organization.¹ Their complaints related to alleged "unauthorized access and usage of consultant paid subscription emailed documents", disclosure of emails to third parties, and use of "personalized email accounts and email addresses for purposes of email

¹ I will refer to the three complainants individually as complainant A, complainant B and complainant C and collectively as the complainants.

marketing and possible other uses” after termination of their “independent contracts” with the organization.

[2] The complaints did not settle in mediation, so an inquiry was held under PIPA. The complainants made submissions, as did the organization and the private investigator that the organization had hired and whose activities were, in part, the source of the complaints.²

2.0 ISSUE

[3] The notice of inquiry issued to the participants said that the inquiry would

...determine whether the information in question constitutes “personal information” or “employee personal information” and whether in collecting, using and disclosing personal information or employee personal information contained in the email system used by the complainants, the organization and third party acting on behalf of the organization were in compliance with ss. 10, 22, 12, 13, 14, 15, 16, 17, 18 and 19 of the Act [PIPA].

[4] It has to be said that this is a rather general statement of the issues. The participants have, however, clearly joined issue on what the complainants view as surreptitious, non-consensual collection, use and disclosure of their personal information, which they believe violated PIPA.

[5] I will note here that what appears to be mediation material was included in some of the complainants’ submissions in the inquiry. The organization with justification objected to this in reply and I have disregarded any such material in reaching my decision.

3.0 DISCUSSION

[6] **3.1 Background**—According to complainant A, a private investigator retained by the organization “hacked into my email” without telling her. She says such access is “not part of our contract [with the organization] and I certainly never gave my permission”.³ She denies there was any basis for the organization’s decision to investigate her activities and specifically alleges that the reason the organization gave for initiating the investigation—that the organization’s owner had reviewed a client’s file to resolve a “hurricane related problem” and found evidence warranting investigation—is false.

[7] Complainant A also alleges her emails were shown to third parties. She cites the fact that the organization’s receptionist and other “consultants

² This office gave the private investigator notice of the inquiry. No complaints were made directly to this office about the private investigator, an organization under PIPA.

³ Page 2, complainant A’s initial submission.

selling for” the organization were shown her emails. This, complainant A says, “is clearly an invasion of privacy”.

[8] Complainant A also alleges that, after termination of her relationship with the organization, it used her email account and address for marketing purposes—she says it “continued to market to clients under my name via email in an effort to bring business into their office”.⁴ She goes on to say this:⁵

...I also believe that my email address was kept open and that personal emails were not forwarded to me at my home address. This continued for at least 6 weeks and this is totally inexcusable. I have copies of emails sent to my circle of influence that are dated in November, 2004. All of my customers including my circle of influence were sent letters informing them I was no longer affiliated with them, which resulted in several phone calls asking about the meaning of the letter. I know that I received mail from Canada Post that was not returned or forwarded, resulting in another invasion of my privacy. I was forced to file a fraud charge against Langley Cruiseshipcenters Ltd as someone at that office signed my name for documents addressed to me. I was later denied the documents by... [an employee of the organization].⁶

[9] It appears from complainant A’s submission that there may be litigation involving her and the organization, since she asks that “all emails, pictures, and taped recordings obtained by” the organization be “forwarded to me and should not be allowed to be used in court as part of their evidence as they were illegally obtained.”⁷ Even if I were to find that the materials described in this submission were “illegally obtained”, I have no authority under PIPA to prohibit their use in court in any proceedings involving the organization and the complainants. The decision as to whether any such materials are admissible in court lies with the court, not with me.

[10] Complainant A also asks that the “maximum penalty” be levied against the organization, asks for compensation and a personal letter of apology for damage to her reputation and demands that the apology letter be published in newspapers circulating in the Langley area.

[11] Complainant A also objects to the fact that the private investigator taped his conversation with her. Complainants B and C also contend that the

⁴ Page 2, complainant A’s initial submission.

⁵ Page 3, complainant A’s initial submission.

⁶ I will not deal with complainant A’s allegation that her privacy was invaded because mail addressed to her was intercepted. She has not provided evidence that her personal information was collected, used or disclosed because “mail from Canada Post was not returned or forwarded” to her.

⁷ Page 3, complainant A’s initial submission.

organization's private investigator followed them. The private investigator denies this.⁸

[12] The complaints made by complainants B and C about collection, use or disclosure of personal information are at heart the same as complainant A's, outlined above, with only differences of nuance or expression. I will therefore not summarize them here.

[13] According to the organization's sole shareholder, during her review of a client's file, she found "competitive business information (logos)". Combined with what the owner considered to be "unauthorized attendance at industry functions" around the same time by one or more of the complainants, this led her to retain a private investigator "to investigate and determine the level of risk and harm being done to myself and my business."⁹ After this, "emails sent via the company server were retrieved, reviewed, and given to the investigator" and, the owner says, it

...soon became obvious that five independent contractors and a U.S. agency were using my company's business offices, business equipment, communications equipment and confidential company information, to underhandedly establish several competitive business locations in the area.¹⁰

[14] The organization then decided to terminate its relationship with the complainants and the organization's owner asked the private investigator to accompany her in conducting "the 'Exit Interviews' of these individuals".

[15] Regarding the complainants' allegation that their emails were disclosed to third parties, and that their email addresses and accounts were used for marketing purposes, the owner says this:

To the best of my knowledge no emails were disclosed to any third parties other than to the investigator and to the individual independent contractors involved.

To the best of my knowledge the independent contractors' personal email addresses and personal email accounts were not sent to email marketers, or to anyone else at any time. The independent contractors' corporate email addresses did appear on corporate literature for a short time until it [*sic*] was deleted/changed by corporate head office.¹¹

⁸ There is no basis in the material before me on which one can plausibly conclude that, even assuming the private investigator did follow the complainants, this entailed collection, use or disclosure of personal information.

⁹ Page 1, organization's initial submission.

¹⁰ Page 1, organization's initial submission.

¹¹ Page 1, organization's initial submission.

[16] The private investigator says the organization retained him in relation to concerns it had about activities of some of the organization's consultants. He says this:

An investigation was started and I was provided with copies of inter office emails retrieved from the company server from January 19, 2004 through September 26, 2004 (and subsequently thru October 16, 2004) these emails were directed to and/or from addresses @ cruiseshipcenters.com.

Subsequently a timeline and series of activities was developed and it was determined that six (6) employee/consultants and one (1) competitor cruise agency were involved in the covert establishment of three (3) separate locations.

When these six employee/contractors were identified and the extent of their involvement was determined, they were immediately terminated for cause and all access to the Companies [sic] facilities, business media, and proprietary information was terminated. The Companies [sic] legal counsel and Corporate Head Office were then informed and consulted.

As "time was of the essence" to minimize the amount of harm and damage done to the Companies [sic] business, Termination Interviews were conducted at the earliest possible opportunity. These interviews were conducted and tape recorded with the consent of the employee/contractor involved and they were permitted to have any witness(s) [sic] present they wished.

[17] The private investigator also says that he has "no knowledge of any use of the suspects' email account and/or email address for any marketing, or any other use."¹²

[18] In her reply submission, complainant A disputes the organization's stated reasons for having suspicions about the complainants' activities. She also disputes the suggestion that she was at any time an employee of the organization. She says that none of PIPA's provisions relating to "employee personal information" apply. Complainants B and C make similar points in reply. Complainant C also denies that she was ever told her interview with the private investigator was being taped and says she did not consent to it.¹³

¹² Page 3, investigator's submission.

¹³ I will not deal with complainant C's allegation that she was not told her exit interview with the organization's private investigator was taped. The investigator says the interviews were tape recorded with the consent of the individuals involved and, he says, they were permitted to have witnesses present if they wished. The organization's principal agrees the interviews were taped, but does not recall the investigator telling any of the complainants that they did not have the right to refuse.

[19] The organization's reply submission contains particulars of the client-related issue that led the organization's principal to review the complainants' emails. The organization adds this:¹⁴

I do not believe this to be a violation of anyone's privacy as the overseeing and retrieval of company e.mail's [sic] from the company server by the manager is a commonplace and generally accepted practice in the industry, especially when it is to address and satisfy a customer's urgent situation. The company's e.mail system is provided for company business not personal business and any improper use of this system especially when it has the potential to bring harm to the company, should be reasonably expected to be discovered.

...

I do not believe that a reasonable expectation to personal privacy exists on a company based e.mail system over an international corporate based server provided for [the] sole purpose of conducting company business. Any reasonable person would expect that a right to personal privacy would exist on a person's home or personal e.mail. Any confidential/underhanded activities should reasonably be expected to be conducted on a personal e.mail system not a corporate one.

[20] I will note here, in passing, that every organization that gives its employees and agents authority to use its email and internet systems is well advised to have clear policy on the limits to that use and to communicate that policy to those employees. Policy that clearly spells out that employee email or internet use may be monitored will go a long way to countering arguments that the employee had an expectation of privacy respecting use of the employer's email system or the internet.

[21] Before addressing the merits, I must consider what personal information is involved here.

[22] **3.2 What Personal Information Is Involved?**—The thrust of the complaints is that the complainants' "privacy" has been invaded. PIPA does not create or protect a free-standing right of "privacy". Consistent with the fair information practices that are widely accepted internationally, it governs the collection, use and disclosure of personal information by provincially-regulated private sector organizations. There is no doubt that the organization is an "organization" covered by PIPA. Accordingly, the first question is whether the organization has collected, used or disclosed "personal information" as PIPA defines it:

"personal information" means information about an identifiable individual and includes employee personal information but does not include

¹⁴ Page 2, organization's reply submission.

- (a) contact information, or
- (b) work product information.

[23] There is a fair amount of “personal information” in the material before me, in the form of emails that contain information about the health, social activities and educational activities of the complainants and of third parties.

[24] At the same time, many of the emails include business contact particulars for the complainants and other individuals, including business address, telephone and fax numbers and email addresses. As regards the complainants, certainly, this information is their “contact information” as defined in PIPA:

"contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.

[25] Since PIPA excludes contact information from personal information, the complainants’ business contact particulars do not qualify as their personal information. PIPA does not apply to the organization’s collection, use or disclosure of this information.

[26] Last, a great number of the emails contain information about what are clearly, on the evidence at hand, business activities of the complainants and others. Personal information under PIPA does not include “work product information”:

"work product information" means information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information.

[27] In my view, this information about other business activities—which is clearly outside any employment or business responsibilities or activities of the complainants or third parties in relation to the organization complained of here—is “work product information”. I will mention only two of many possible examples of this kind of information. First, the documents include a September 2, 2004 email that contains graphic designs for a logo for a cruise business with a particular name and the associated email text discusses colour choices and other design issues for this business identity. Second, an August 31, 2004 email from one of the complainants to the other two, and a third party, discusses possible website domain names for a cruise business.

[28] These and other documents indicate that these discussions did not have to do with the organization’s business or possible new business products of the organization. Nor is the information merely about business ideas of the

complainants and others. It is information they prepared or collected as part of their responsibilities or activities related to a business of theirs. In the circumstances of this case, even if this information could be said to be “about an identifiable individual”, I am satisfied that it is excluded from the definition of “personal information”.

[29] PIPA’s definition of “work product information” is not, I note, restricted to information prepared or collected as a part of responsibilities or activities related to an individual’s employment or business relationship with the organization in question. By contrast, the Legislature explicitly enacted such a restriction in defining “employee personal information”. That class of personal information is expressly limited to personal information collected, used or disclosed in relation to “an employment relationship between the organization and that individual”.

[30] In the event that my interpretation of “work product information” is wrong, I will also analyze PIPA’s application to the information about business activities of the complainants and others on the assumption, for discussion purposes, that it is their personal information.

[31] **3.3 Collection, Use and Disclosure of Personal Information**—The next question is whether the organization’s collection, use or disclosure of information complied with PIPA.

[32] As indicated earlier, the complainants contend that they were “independent contractors”, not the organization’s employees, such that PIPA’s rules relating to collection, use and disclosure of “employee personal information” did not authorize the organization to do what it did.

[33] I do not need to decide whether PIPA’s definition of “employee” captures an individual who provides services to an organization under contract even if that individual would not be considered an employee of the organization for, to give two examples, employment standards purposes or income taxation purposes.¹⁵ Rather, this case can be addressed under ss. 12(1)(c), 15(1)(c) and 18(1)(c) of PIPA. I will therefore assume, for discussion purposes, that the information in issue is personal information and not employee personal information.

[34] Sections 12(1)(c), 15(1)(c) and 18(1)(c) of PIPA authorize, respectively, the collection, use and disclosure of personal information about an individual without that individual’s consent, or from a source other than the individual, if it is

¹⁵ Nor do I need to consider whether statutory definitions in other statutes are relevant to this issue, including the definition of “employee” in the *Employment Standards Act*, which defines an employee as including “a person an employer allows, directly or indirectly, to perform work normally performed by an employee. (I note in passing that the British Columbia Employee Standards Tribunal has said that the *Employment Standards Act* definition of “employee” is to be broadly interpreted and the common law tests of employment are subordinate to the statutory definition. *Re Trigg* [2003] B.C.E.S.T.D. No. 40. Also see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983.)

“reasonable to expect” that the collection, use or disclosure with the individual’s consent “would compromise the availability or the accuracy of the personal information and the collection is reasonable for an investigation or proceeding”.

[35] PIPA defines “investigation” as follows:

"investigation" means an investigation related to

- (a) a breach of an agreement,
- (b) a contravention of an enactment of Canada or a province,
- (c) a circumstance or conduct that may result in a remedy or relief being available under an enactment, under the common law or in equity,
- (d) the prevention of fraud, or
- (e) trading in a security as defined in section 1 of the *Securities Act* if the investigation is conducted by or on behalf of an organization recognized by the British Columbia Securities Commission to be appropriate for carrying out investigations of trading in securities,

if it is reasonable to believe that the breach, contravention, circumstance, conduct, fraud or improper trading practice in question may occur or may have occurred.

[36] The Independent Contractor Agreement (“agreement”) between the organization and each of the complainants contained these provisions:

8. CONFIDENTIAL INFORMATION

- 8.1 All manuals, files, programmes, reports proposals, customer lists and prospect lists (including any copies thereof) provided to or otherwise acquired by the I.C. in or to assist in providing the services (the “Confidential Information”), shall remain confidential and the exclusive property of the Center.
- 8.2 The I.C. agrees that during the term of this Agreement or at any time thereafter, he/she will not either directly or indirectly, publish, divulge, disclose or use for any purpose other than in the performance of his or her obligations hereunder, the Confidential Information or any other information concerning the business or affairs of the Center or CruiseShipCenters International Inc.

[37] An “investigation” for the purposes of PIPA includes an investigation relating to a “breach of an agreement”. The agreement between the organization and each of the complainants contained the above provisions.¹⁶

¹⁶ There are formatting and minor linguistic differences among the various versions of these provisions in the agreements between the organization and the various complainants, but the differences are not material.

[38] Despite the complainants' contention that there was no basis for the organization to investigate their activities, in light of the material before me,¹⁷ I find that the organization had cause to investigate, and was investigating, whether the complainants had breached their agreements when it reviewed and copied their email communications. I also find there was a reasonable basis for the organization to expect that, had it sought consent to collection, use or disclosure of personal information, seeking their consent would have compromised the availability or the accuracy of personal information in the emails.

[39] Many of the emails contain personal information of the complainants and other individuals (including, as noted earlier, health information and information about social activities). This collateral personal information is intertwined with other information in the emails. It is difficult to see how the organization could reasonably have reviewed and copied the emails without also capturing that other personal information. That other information got swept up in the investigation and was collected for that purpose, I accept, alone. I find that collection, use and disclosure of the personal information was reasonable in the circumstances for the purposes of the organization's investigation and find that the organization complied with ss. 12(1)(c), 15(1)(c) and 18(1)(c) of PIPA.

[40] I will add here that, in my view, it is implicit in ss. 12(1)(c), 15(1)(c) and 18(1)(c) that the notice of collection otherwise required under s. 10 of PIPA does not apply in such cases. It would defeat the purpose of the authority for non-consensual collection, use or disclosure of personal information in order not to compromise an investigation or proceeding if an organization nonetheless were required to give notice before collection. In this respect, I note that s. 10(1) of PIPA, which requires that notice be given, stipulates that notice must be given either at the time of or before collection of personal information where the personal information is collected "from the individual". By contrast, ss. 12(1)(c), 15(1)(c) and 18(1)(c) authorize the collection, use and disclosure of personal information without consent "or from a source other than the individual". In my view, the Legislature intended this provision to authorize collection, use and disclosure without having to give notice before collection, which would otherwise be required under s. 10(1).

[41] For clarity, assuming for discussion purposes only that the emails contain no "work product information" and that their entire contents are "personal information" (apart from the "contact information" mentioned above), I find that the collection, use and disclosure of the personal information was authorized under ss. 12(1)(c), 15(1)(c) and 18(1)(c) of PIPA.

¹⁷ The organization's owner and its private investigator have provided reasons for the organization's decision to investigate a possible breach of the agreements. Although I make no finding and express no view on whether or not the complainants in fact breached their agreements with the organization, the emails in question on their face appear to contain material suggesting a basis for an investigation, at least.

4.0 CONCLUSION

[42] To summarize, I have found that the emails contain a good deal of “work product information” and also some “contact information”. PIPA does not apply to the collection, use or disclosure of such information. Assuming for discussion purposes only that the work product information is personal information, I have found that ss. 12(1)(c), 15(1)(c) and 18(1)(c) of PIPA in any event authorized the organization to collect, use and disclose this information.

[43] For the reasons given above, I confirm the decision of the organization to collect, use and disclose the personal information in issue here and, under s. 52 of PIPA, I confirm its decision to collect, use and disclose the personal information.

December 14, 2006

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

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