Order P20-06

WEST COAST REALTY LTD. doing business as SUTTON GROUP – WEST COAST REALTY

Ian C. Davis
Adjudicator

September 30, 2020

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Summary: The applicant made a request to West Coast Realty Ltd., doing business as Sutton Group West Coast Realty (Sutton), for access to part of an email chain. Sutton refused to disclose the requested information on the basis that it is not the applicant's personal information as required by s. 23(1) of the *Personal Information Protection Act* (PIPA). Sutton also says that the information is exempt from disclosure under ss. 23(4)(c) and 23(4)(d) of PIPA. The adjudicator determined that the requested information is exempt from disclosure under s. 23(4)(d) and that it was not necessary to also consider s. 23(4)(c).

Statutes Considered: *Personal Information Protection Act*, ss. 1 (definitions) and 23(4)(d).

INTRODUCTION

[1] Section 23(1)(a) of the *Personal Information Protection Act* (PIPA) gives an individual the right to access their personal information under the control of an organization, subject to certain exceptions. In this case, the applicant made a request under s. 23(1)(a) to West Coast Realty Ltd., doing business as Sutton Group West Coast Realty (Sutton), for access to part of a June 13, 2012 email chain that he says contains his personal information.

[2] Sutton refused to disclose the requested information on the basis that it is not the applicant's personal information. Sutton also says that the information is exempt from disclosure under ss. 23(4)(c) and 23(4)(d) of PIPA because disclosure would reveal personal information about another individual or would reveal the identity of an individual who provided personal information about the applicant.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review Sutton's decision. Mediation did not to resolve the matter and it proceeded to inquiry.

PRELIMINARY MATTERS

[4] Sutton stated for the first time in its submissions that the applicant's request is "frivolous, vexatious and an abuse of process."[1] In its reply submissions, Sutton said "the Commissioner should prohibit [the applicant] from making any further applications to [the OIPC] for any documents from Sutton or any of its staff".[2] According to Sutton, the applicant should not be allowed to "waste" the OIPC's time and resources on "his continual and always unsuccessful quest for what he calls justice."[3]

[5] An organization may apply under s. 37 of PIPA for authorization to disregard an access request on the grounds that it is frivolous or vexatious. An organization may also seek relief in relation to future requests. In this case, however, Sutton did not make a formal s. 37 application prior to responding to the applicant's request. Further, whether the applicant's request is frivolous, vexatious or an abuse of process is not stated as an issue in the Investigator's Fact Report or the Notice of Inquiry. For these reasons, I decline to address that issue here.[4] I note that Sutton acknowledged in its submissions that this issue is "not part of the frame of reference of this Inquiry".[5]

ISSUES

[6] The issues I will decide in this inquiry are:

1. Is the requested information the applicant's personal information?

2. Is Sutton required to refuse to disclose the requested information under s. 23(4)(c)?

3. Is Sutton required to refuse to disclose the requested information under s. 23(4)(d)?

[7] Under s. 51 of PIPA, Sutton must prove that the applicant has no right of access to the requested information.

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[1] Sutton's initial submissions at p. 5.
[2] Sutton's reply submissions dated March 13, 2020 at p. 1.
[3] *Ibid*.
[4] For a similar finding, see Order P18-01, 2018 BCIPC 6 (CanLII) at paras. 6-7.
[5] Sutton's initial submissions at p. 5.

BACKGROUND

[8] The applicant is a real estate agent.[6] In 2011, he entered into a "salesperson's contract" with Sutton. Among other things, the contract permitted the applicant to carry on business under the Sutton name using its systems, financial services and facilities. The contract stated that either party could terminate the contract upon 30 days written notice.

[9] In 2012, the applicant assisted another Sutton real estate agent with the sale of a property. A dispute arose between them about who was entitled to commission and in what amount. Pursuant to Sutton policy, the dispute was referred to Sutton's Managing Broker, who decided that the commission would be split.

[10] Subsequently, in consultation with Sutton's General Manager, the Managing Broker terminated the contract between Sutton and the applicant. The applicant then sued Sutton for the commission he claimed it owed him. The applicant also sued the Managing Broker for defamation and intentional interference with economic relations. Both actions were dismissed.

[11] Because the applicant believes that Sutton and others have wronged him, he seeks documents that will assist him in repairing his reputation. The applicant made the following access request to Sutton:

> [The Managing Broker] sent an email to [the General Manager] on June 13, 2012 at 8:29 AM ("June 13 email"). I request all email correspondence relating to that June 13 email. At this point, I like to remind you that [the General Manager] produced an email dated June 13, 2012 ("June 13 Reply") which identified me by name at trial. Despite the June 13 Reply being relevant or not at trial, it is about my personal information and must be produced, please.[7]

[12] The applicant also sought access to versions of a letter written by the real estate agent that he assisted with the property sale, as well as emails relating to that letter.[8] In addition, the applicant requested emails about him sent by the Managing Broker to various parties.

[13] The trial that the applicant refers to in his request is the trial of the applicant's defamation action against the Managing Broker. The presiding justice

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[6] Unless otherwise stated, the information in this background section is based on the evidence in the affidavit of DS in Supreme Court File No. VLC-S-S-171938, sworn January 20, 2020 [Affidavit of DS], which I accept.
[7] Letter from the applicant to Sutton dated June 25, 2018 at p. 2.
[8] *Ibid*.

decided that Sutton was not required to produce the "June 13 Reply" to the applicant.[9]

[14] By letter dated June 26, 2018, Sutton replied to the applicant's access request. Sutton stated that it would not release the "June 13 Reply" because it is not the applicant's personal information.

RECORDS AND INFORMATION IN DISPUTE

[15] The only responsive record that Sutton provided to the OIPC is an email chain. The chain starts with the June 13, 2012, 8:29 AM email that the applicant referred to in his access request (Initial Email). After the Initial Email, there are two one-line emails (Short Emails) and then a third, longer email (Reply Email). I understand the Reply Email to be the one that the applicant referred to in his access request as the "June 13 Reply".

[16] Although Sutton's submissions addressed the Initial Email,[10] I am satisfied that email is not in dispute in this inquiry. The applicant included it as part of his submissions and discussed its contents.[11] He attached it as an exhibit to an affidavit he swore in a BC Supreme Court action. He says Sutton produced the Initial Email to him in litigation.[12] The reasons for judgment in the defamation action show that the applicant has access to the Initial Email because it was one of the grounds for his defamation claim and was entered as an exhibit at trial.[13]

[17] I am also satisfied that one of the Short Emails is not in dispute in this inquiry. It is on the same page as the Initial Email that the applicant provided to me and that the applicant attached as an exhibit to one of his affidavits in a BC Supreme Court action.

[18] For these reasons, I conclude that the only information in dispute in this inquiry is the information in the other one of the Short Emails (Short Email) and the Reply Email.

PERSONAL INFORMATION

[19] Section 2 of PIPA states that the purpose of the Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the rights of individuals to protect their personal information and the need of organizations to collect, use or disclose personal

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[9] Affidavit of DS, *supra* note 6 at para. 26; Affidavit #1 of the applicant in Supreme Court File No. VLC-S-S-171938, sworn August 19, 2019 at paras. 4-5.
[10] Sutton's initial submissions at pp. 1 and 3 (ss. 2.1 and 4.2-4.3).
[11] Exhibit "E" to Affidavit #5 of the applicant in Supreme Court File No. VLC-S-S-171938, sworn January 29, 2020; applicant's further submissions dated August 12, 2020 at para. 2(a).
[12] Applicant's further submissions dated August 12, 2020 at para. 2(b).
[13] Tab 6(12) of the Inquiry Record at paras. 63-71.

information for purposes that a reasonable person would consider appropriate in the circumstances.

[20] Section 23(1)(a) of PIPA gives an individual a right to access their own personal information. The term "personal information" is defined in s. 1 as:

> information about an identifiable individual and includes employee personal information but does not include
>
> (a) contact information, or
>
> (b) work product information[.]

[21] There are three steps to determining whether the disputed information is the applicant's personal information.[14] The first is to determine whether the disputed information is about an identifiable individual, namely the applicant. The second is to consider whether the disputed information is excluded from the definition of personal information because it is contact information or work product information. The third step, if necessary, is to consider whether the disputed information is employee personal information.

Is the disputed information about an identifiable individual, namely the applicant?

[22] Information is about an identifiable individual if it is "reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information, and is collected and used for a purpose related to that individual."[15]

[23] Sutton submits that the disputed information is not the applicant's personal information.[16] It says the information is "just an internal communication between Sutton people" that mentions a particular first name.[17] Sutton argues that "if a third party who did not know anything about the situation looked at the Email, they would not even know that it was [the applicant] who is being referenced."[18] Sutton says there are several other persons within its organization that have the same first name as the applicant.

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[14] See e.g. Order P13-01, 2013 BCIPC 23 (CanLII) at paras. 14-28; Order P20-04, 2020 BCIPC 24 (CanLII) at paras. 25-34.
[15] Order P12-01, 2012 BCIPC 25 (CanLII) at para. 85.
[16] Sutton's initial submissions at pp. 1-3 (ss. 3.1-3.2); Sutton's further reply submissions dated August 13, 2020 at p. 1 (RE: 3.2).
[17] Sutton's further reply submissions dated August 13, 2020 at p. 1 (RE: 3.2).
[18] Sutton's initial submissions at p. 2 (s. 3.2).

[24] The applicant submits that the disputed information is his personal information.[19] He says it is not logical for the author of the Reply Email to use a particular first name without knowing who they are referring to. He also says the context and the steps taken by Sutton after the Reply Email show that it is clearly about him. Finally, the applicant notes that Sutton has not provided any evidence to establish that the author of the Reply Email was referring to someone other than the applicant who shares his first name.

[25] I will address the Short Email first. It is a five-word acknowledgement email that does not relate to the substance of the Initial Email. I find it does not contain the applicant's personal information. Therefore, the applicant is not entitled to it.

[26] Turning to the Reply Email, I find that the information in it consists of the sender's opinions or advice to the receiver about what Sutton should do regarding the situation between the applicant and Sutton arising from the commission dispute and the applicant's impending termination.

[27] In my view, the information in the Reply Email is about an identifiable individual, namely the applicant. In Order P12-01, former Commissioner Denham stated that, to be "personal information" under PIPA, information "need not identify the individual to everyone who receives it; it is sufficient in a case such as this if the information reasonably permits identification of the individual to those seeking to collect, use or disclose it."[20] In this case, I am satisfied that the Reply Email reasonably permits identification of the applicant to the sender and receiver of the email given their background knowledge of the situation. I agree with the applicant that it does not make sense for the sender of the Reply Email to use a first name without knowing which particular individual they were referring to.

[28] I also find the information in the Reply Email is "about" the applicant. It refers to the applicant by first name and relates to what Sutton should do regarding the applicant's contract, the commission dispute he was involved in and the applicant's future with Sutton. Sutton acknowledges in its submissions that the email chain is "regarding a matter related to [the applicant]".[21]

[29] I conclude that the information in the Reply Email is about an identifiable individual, namely the applicant.

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[19] Applicant's further response submissions dated August 12, 2020 at paras. 1-2 and 14-15. The applicant makes many points in his submissions that provide helpful context for this inquiry, but that I have not addressed because they are not relevant to the issues as stated in the notice of inquiry.
[20] Order P12-01, *supra* note 15 at para. 82.
[21] Sutton's initial submissions at p. 1 (s. 2.1).

Is the disputed information "contact information" or "work product information"?

[30] The next question is whether the Reply Email is excluded from the definition of personal information because it is "contact information" or "work product information". Those terms are defined in s. 1 of PIPA as follows:

> **"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; …
>
> **"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.

[31] The parties did not address "contact information" in their submissions. Based on my review of the Reply Email, I find it includes contact information in the "to" and "from" fields and in a signature block. Based on the emails themselves, the context in which they appear and the other material before me, I am satisfied this information is "information to enable an individual at a place of business to be contacted". As a result, I find it is contact information and not personal information.

[32] I turn now to whether the Reply Email contains work product information.

[33] Sutton submits that the Reply Email is work product information.[22] It says that the email is not the applicant's work product information, but rather the work product information of the sender. Sutton argues that, since the applicant is not entitled to disclosure of his own work product information, it follows that he is not entitled to the work product information of others.

[34] The applicant did not provide detailed submissions on whether the disputed information is work product information. He says it is up to the OIPC to determine if the Reply Email is work product information.[23]

[35] Based on my review of the Reply Email, I accept that it contains information prepared by the sender as part of that individual's responsibilities and activities relating to Sutton's business. However, work product information does not include "personal information about an individual who did not prepare or collect the personal information." Contrary to Sutton's submissions, the applicant

[22] Sutton's initial submissions at p. 3 (ss. 3.7-3.8).
[23] Applicant's further response submissions dated August 12, 2020 at para. 13.

is entitled to information prepared by others as part of their work responsibilities if that information is the applicant's personal information and he did not prepare it. If Sutton's position were correct, a manager's email that formally assesses an employee's employment performance would not be the employee's personal information because the manager who sent the email prepared that assessment as part of the manager's work responsibilities. This is not how the definition of "work product information" works.

[36] As I found above, the text of the Reply Email is about an identifiable individual, namely the applicant. I find it evident from the Reply Email that the applicant did not prepare the information it contains, let alone do so as part of his employment or business responsibilities or activities. Accordingly, the information in the Reply Email is the applicant's personal information, not work product information.[24]

[37] To summarize, I conclude that the information in the Short Email is not the applicant's personal information, so he is not entitled to it. As for the information in the Reply Email, I find it is the applicant's personal information, except for the contact information identified above.

[38] Given this conclusion, it is not necessary in this case to also consider whether the Reply Email is the applicant's "employee personal information".

SECTION 23(4)(d)

[39] For the following reasons, I find that s. 23(4)(d) applies in this case, which means the organization is prohibited from disclosing the Reply Email to the applicant.

[40] Section 23(4)(d) states that an organization "must not" disclose personal information, and other information under s. 23(1) or (2), if "the disclosure would reveal the identity of an individual who has provided personal information about another individual and the individual providing the personal information does not consent to disclosure of his or her identity."

[41] Sutton submits that disclosure of the Reply Email would reveal the identities of the sender and receiver, neither of whom consented to disclosure of their identity.[25] Sutton relies on Orders P08-01 and P11-01.[26]

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[24] For similar findings, see Order P20-04, *supra* note 14 at para. 30; Order P14-03, 2014 BCIPC 49 (CanLII) at para. 19.
[25] Sutton's initial submissions at pp. 3-4 (ss. 4.1-4.4).
[26] Sutton's initial submissions at p. 4; Order P08-01, 2008 CanLII 21702 (BC IPC); Order P11-01, 2011 BCIPC 9 (CanLII).

[42] The applicant submits that Sutton's argument is "untenable" because he "knows the names of the two parties between whom the emails were exchanged therefore there are no privacy concerns."[27] The applicant identified two individuals by first and last name in his submissions. The applicant says that, in the course of the defamation trial, he "had access" to the Reply Email and "read the email in part."[28] He says this is how he knew the email existed and how he knew the email mentioned him by name. In short, I understand the applicant to be arguing that disclosure of the Reply Email would not "reveal" the identities of the sender and receiver because he already knows their identities.

[43] In Order P11-01, the adjudicator dealt with a similar argument. The applicant sought his personal information relating to an investigation the organization undertook in response to an employment-related complaint the applicant made. The applicant argued that s. 23(4)(d) did not apply because he knew the identities of certain individuals who provided information to the organization as part of the investigation. In finding that s. 23(4)(d) applied, the adjudicator stated that he could not confirm or deny whether the individuals the applicant named appeared in the withheld information.[29]

[44] I make a similar finding here. I find that disclosing any part of the Reply Email would reveal the identity of the sender, particularly given the applicant's background knowledge and the information he already has. Although the applicant claims to know the identity of the sender, I cannot, as in Order P11-01, confirm or deny whether the applicant is correct. I am also satisfied on the evidence before me that the sender does not consent to disclosure of his or her identity.

[45] In the result, s. 23(4)(d) prohibits the organization from disclosing the information in the Reply Email. Given this conclusion, it is not necessary to also consider s. 23(4)(c).

SECTION 23(5)

[46] Section 23(5) provides that if Sutton is able to remove the information in the Reply Email to which s. 23(4)(d) applies, then Sutton must provide the applicant with access to the remaining personal information of the applicant.

[47] In my view, the information in the Reply Email that would reveal the identity of the sender is so intertwined with the applicant's personal information that it cannot be removed. Given the applicant's background knowledge and the information already available to him, I find that disclosing any of the information

[27] Applicant's submissions dated March 10, 2020 at para. 24.
[28] Applicant's submissions dated March 10, 2020 at para. 12.
[29] Order P11-01, *supra* note 26 at para. 18.

in the Reply Email would reveal the identity of the sender, and therefore Sutton is not "able to" remove that information.[30]

CONCLUSION

[48] For the reasons given above, under s. 52 of PIPA, I require Sutton to refuse access to the Reply Email.

September 30, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: P18-76733

[30] For a similar finding, see Order P11-01, *ibid* at paras.19-21.