



Order P23-10

ABERCROMBIE & ASSOCIATES CHARTERED PROFESSIONAL ACCOUNTANTS

Elizabeth Vranjkovic
Adjudicator

September 13, 2023

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Summary: An individual (complainant) requested access to certain documents from an organization under the *Personal Information Protection Act* (PIPA). The complainant complained that the organization failed to provide him with his personal information or tell him what PIPA provision it was relying on to refuse to provide him with his personal information. The adjudicator found that the organization did not make a reasonable effort to respond to the complainant as accurately and completely as reasonable possible under s. 28(b) of PIPA. The adjudicator also found that the organization did not make a reasonable effort to provide the requested personal information under s. 28(c) of PIPA. The adjudicator ordered the organization to perform its duties under ss. 28(b) and (c) of PIPA.

Statutes Considered: *Personal Information Protection Act*, SBC 2003, c 63, ss. 28, 28(b), 28(c), 30(1), 52(3)(a), 52(4) and 53(1).

INTRODUCTION

[1] This inquiry is about whether Abercrombie & Associates Chartered Professional Accountants (Abercrombie) performed its duties pursuant to s. 28 of the *Personal Information Protection Act* (PIPA).

[2] Abercrombie provided professional services to an individual (the complainant). The complainant subsequently requested access, under PIPA, to “[a]ll the records which were used to calculate the time worked on [his] tax documents that were sent to the CRA [Canada Revenue Agency] in 2021.”

[3] Abercrombie refused to provide “firm time records” because they “are the property of the firm” and so PIPA does not apply to them.¹

[4] The complainant complained to the Office of the Information and Privacy Commissioner (OIPC) that Abercrombie failed to provide him with his personal information or tell him what PIPA provision it was relying on to refuse to provide him with his personal information.

[5] Mediation by the OIPC did not resolve the complaint and it proceeded to inquiry.

ISSUE

[6] The notice of inquiry and the investigator’s fact report identify the issue as whether the organization failed to assist the applicant with a request for personal information pursuant to s. 28².

[7] Section 28 includes the duty to assist an applicant (s. 28(a)), the duty to respond accurately and completely (s. 28(b)) and the duty to provide the requested personal information (s. 28(c)). I can see from the complainant’s complaint and inquiry submission that his complaint is really about ss. 28(b) and (c) and not the s. 28(a) duty to assist.³ As a result, I find that the issue is more appropriately stated as whether Abercrombie performed its duties under s. 28(b) and (c).

Burden of proof

[8] PIPA does not expressly say who has the burden of proof in relation to s. 28.

[9] Previous OIPC decisions have found that where PIPA does not specify who has the burden of proof, it is in each party’s interest to provide information and evidence to support and justify its position.⁴

[10] However, OIPC orders concerning the duty to assist access applicants under the *Freedom of Information and Protection of Privacy Act* (FIPPA) have consistently placed the burden of proof on the public body because it is in the

¹ This information is from the complainant’s August 30, 2021 complaint.

² Whenever I refer to section numbers throughout this order, unless otherwise specified, I am referring to sections of PIPA.

³ The complainant says that Abercrombie failed to assist him by not responding to his request or providing his personal information. The complainant also seeks an order compelling Abercrombie to respond in accordance with PIPA and to provide the complainant with his personal information. The complainant does not say that Abercrombie has done or failed to do anything else that might fall under s. 28(a).

⁴ Order P09-02, 2009 CanLII 67292 at para 4; Order P21-03, 2021 BCIPC 11 at para 30.

best position to prove that it fulfilled its obligations under FIPPA.⁵ While OIPC orders about FIPPA are not binding, when interpreting a statute, it is appropriate to refer to similar language, or provisions, in other statutes dealing with the same subject matter.⁶

[11] I find it appropriate to adopt the approach taken in FIPPA orders given the similar subject matter of FIPPA and PIPA, and in particular, the similarity of the duty to assist provisions in each act.⁷ Moreover, in my view, Abercrombie is in the best position to prove that it performed its duties under s. 28. Therefore, I find the burden of proof is on Abercrombie to prove it performed its duties under s. 28.

DISCUSSION

[12] Section 28 sets out an organization's duty to assist applicants. Section 28 says as follows:

Duty to assist individual

28 An organization must make a reasonable effort

- (a) to assist each applicant,
- (b) to respond to each applicant as accurately and completely as reasonably possible, and
- (c) unless section 23(2), (3.1) or (4) applies, to provide each applicant with
 - (i) the requested personal information, or
 - (ii) if the requested personal information cannot be reasonably provided, with a reasonable opportunity to examine the personal information.

[13] The requirements of s. 28 are informed by s. 30(1), which says:

In a response under section 28, if access to all or part of the personal information requested by the applicant is refused, the organization must tell the applicant

⁵ Order F23-55, 2023 BCIPC 64 at para 6; Order F20-34, 2020 BCIPC 40 at para 6; Order F20-13, 2020 BCIPC 15 at para 13. FIPPA does not say who has the burden of proof in relation to the duty to assist.

⁶ Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont: Lexis Nexis Canada, 2014) at para 13.25.

⁷ In Order P19-03, 2019 BCIPC 42, Adjudicator Francis determined that FIPPA and PIPA are in many ways materially similar, and they undoubtedly deal with the same subject matter. Section 6(1) of FIPPA says that the head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

- (a) the reasons for the refusal and the provision of this Act on which the refusal is based,
- (b) the name, position title, business address and business telephone number of an officer or employee of the organization who can answer the applicant's questions about the refusal, and
- (c) that the applicant may ask for a review under section 47 within 30 days of being notified of the refusal.

Parties' submissions, s. 28

[14] The complainant says that:

- The request was a properly made request for his personal information;
- The ownership of the firm time records does not matter for the purposes of PIPA;
- To the best of his knowledge, the organization has not identified an exception to the right of access; and
- The organization has failed to assist him in accordance with s. 28 by not responding to his request and not providing his personal information to him.

[15] The complainant also provided some email correspondence between himself and Abercrombie. I can see from this email correspondence that Abercrombie responded to the complainant's request as follows:

This email is to confirm that we provided you in March 2021 with PDF copies of all of the records with respect to your 2020 Canadian personal tax engagement. Please note that our firm time records are the property of the firm and are not applicable to the Personal Information Protection Act.

[16] The complainant seeks an order for Abercrombie to respond to him in a manner that complies with PIPA and for the firm time records to be provided to him.

[17] Abercrombie says that the firm time records are its property, not the property of the client.

Analysis and findings, s. 28

Is the complainant an applicant?

[18] Section 28 sets out an organization's duties in relation to applicants. Thus, the first issue I must decide is whether the complainant is an applicant. The relevant sections say as follows:

25 In this Part, “applicant” means an individual who makes a request under s. 27.

...

27 For an individual to obtain access to his or her personal information or to request a correction of his or her personal information, the individual must make a written request that provides sufficient detail to enable the organization, with a reasonable effort, to identify the individual and the personal information or correction being sought.

[19] Section 1 of PIPA defines personal information as information about an identifiable individual and includes employee personal information but does not include contact information or work product information.

[20] Under these sections, an applicant is an individual who makes a written request for access to their personal information that provides sufficient detail to enable the organization, with a reasonable effort, to identify the individual and the personal information being sought.

[21] I can see from the email correspondence provided by the complainant that his request was as follows:

Please accept this email for all the records which were used to calculate the time worked on my tax documents that were sent to the CRA in 2021... You have previously stated that you keep detailed records of your time which were then used to calculate clients’ bills. Those are the records I am seeking. I am also requesting any internal emails related to me and my taxes, sent by you or your employees, or any other person, that have not already been sent to me.

[22] I am satisfied that the complainant’s request is a request for his personal information because it is for records about professional services provided to him as an individual. It is clear to me that such records would contain information about the complainant as an identifiable individual. I am also satisfied that the request includes sufficient detail for the organization to identify the complainant and the personal information being sought. As a result, I find that the complainant is an “applicant” and Abercrombie must comply with s. 28 in responding to the complainant.

[23] I found above that the complainant’s complaint is really about ss. 28(b) and (c). I will consider each of these sections in turn below.

Duty to respond as accurately and completely as reasonably possible, s. 28(b)

[24] Section 28(b) requires an organization to make a reasonable effort to respond to an applicant as accurately and completely as reasonably possible.

[25] Although Abercrombie made no submissions about s. 28(b), the complainant provided a copy of Abercrombie's response for my review, as set out in paragraph 21 above. I have considered whether that response indicates that Abercrombie performed its duty under s. 28(b).

[26] I find that Abercrombie's response is not complete because it does not meet the requirements of s. 30(1): Abercrombie does not identify the provision(s) of PIPA on which its refusal to provide the firm time records was based, provide contact information of an officer or employee who could answer questions about the refusal, or inform the complainant of his right to ask for a review under s. 47. While Abercrombie provided a "reason for the refusal" (because the firm time records are the "property of the firm"), this is not a basis for denying access under PIPA. In my view, responding in this way is not making a reasonable effort to respond as accurately and completely as reasonably possible in accordance with s. 28.

[27] For these reasons, I find that Abercrombie did not perform its duty under s. 28(b) to make a reasonable effort to respond to the complainant as accurately and completely as reasonably possible.

Duty to make a reasonable effort to provide the requested personal information, s. 28(c)

[28] Section 28(c) requires an organization to make a reasonable effort to provide an applicant with the requested personal information or a reasonable opportunity to examine the personal information, unless s. 23(3), (3.1) or (4) applies.

[29] I found above that the complainant's request was for his personal information. Abercrombie does not say that s. 23(3), (3.1) or (4) applies to any of that personal information. Additionally, I find it clear from Abercrombie's email response to the complainant that Abercrombie did not make a reasonable effort to provide the complainant with the requested personal information or a reasonable opportunity to examine that information. Therefore, I find that Abercrombie has not performed its duty under s. 28(c).

CONCLUSION

[30] For the reasons given above, I make the following orders under s. 52(3)(a) of PIPA:

- 1) I require Abercrombie to perform its duty under s. 28(b) to make a reasonable effort to respond openly, accurately and completely to the complainant's request. In order to perform its duty under s. 28(b), if

Abercrombie refuses access to all or part of the personal information requested by the complainant, Abercrombie's response must include the information set out in s. 30(1)(a), (b) and (c).

- 2) I require Abercrombie to perform its duty under s. 28(c) to make a reasonable effort to provide the complainant access to his personal information under its control or, if it cannot be reasonably provided, with a reasonable opportunity to examine that personal information, withholding only the complainant's personal information that Abercrombie is authorized or required to withhold under s. 23.
- 3) As a condition under s. 52(4), I require Abercrombie to provide the OIPC registrar of inquiries with written evidence of its compliance with the above orders.

Under s. 53(1) of PIPA, Abercrombie is required to comply with these orders by **October 26, 2023**.

September 13, 2023

ORIGINAL SIGNED BY

Elizabeth Vranjkovic, Adjudicator

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