



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order P13-01

KONE INC.

Ross Alexander
Adjudicator

August 28, 2013

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Summary: KONE collects and uses GPS information from cellular phones issued to its service mechanic employees. KONE employees complained that KONE is not permitted under PIPA to use this information to manage their employment relationships. The adjudicator determined that KONE is permitted to collect and use the information under PIPA in the manner and for the purposes identified by KONE.

Statutes Considered: *Personal Information Protection Act*, ss. 5, 10, 11, 13, 14 and 16.

Authorities Considered: **B.C.:** Order P13-02, [2013] B.C.I.P.C.D. No. 24; Order P12-01, [2012] B.C.I.P.C.D. No. 25; Order F13-04, [2013] B.C.I.P.C.D. No. 4; Order F07-18, [2007] B.C.I.P.C.D. No. 30; Order P06-05, [2006] B.C.I.P.C.D. No. 39; Order P06-04, [2006] B.C.I.P.C.D. No. 35; Decision P12-01, [2012] B.C.I.P.C.D. No. 11; **AB:** Order P2006-005, [2007] AIPCD No. 46.

Cases Considered: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14; *Eastmond v. Canadian Pacific Railway*, [2004] F.C.J. No. 1043.

Authors Considered: Sarah Blake, *Administrative Law in Canada* (5th ed.), (LexisNexis: Toronto, 2011), pp. 141-143.

INTRODUCTION

[1] This inquiry relates to the collection and use of information transmitted by Global Positioning System (“GPS”) enabled cellular phones in an employment setting. Elevator service company KONE Inc. (“KONE”) issues the phones to its elevator service maintenance mechanic employees and uses the collected GPS information, in part for employee management purposes.

[2] The complainants are KONE employees who complained to the Office of the Information and Privacy Commissioner (“OIPC”) that KONE is using the phones to collect and use their employee personal information in contravention of the *Personal Information Protection Act* (“PIPA”). The complainants are members of Local 82 of the International Union of Elevator Constructors (“Union”).

[3] This order is being issued contemporaneously with Order P13-02¹ about another elevator service company dealing with analogous technology for similar purposes. The primary distinction between the GPS technology in Order P13-02 and in this order is that KONE receives its information from cell phones carried by its employees, while the GPS locator technology in Order P13-02 is attached to company vehicles being driven by employees.² Both of these orders are preceded by Order P12-01,³ in which Commissioner Denham completed a comprehensive analysis of the law in relation to similar technology deployed by a different elevator company.⁴

The uses and purposes of the phone technology

[4] KONE operates in the elevator and escalator service industry, and has a mobile workforce that attends client sites to service elevators. KONE’s maintenance mechanics generally work alone, and almost always go directly from their home to a client work site to begin their workday.

[5] Prior to 2010, KONE maintenance mechanics used cell phones to report to KONE when they arrived at or left a client site, as well as reporting the amount of time they spent on each job.⁵ Mechanic time reporting is important to KONE because KONE pays its mechanic employees based on hourly rate time calculations (including travel time), and it generally invoices clients based on time.

[6] In 2010, KONE started issuing GPS-enabled cell phones to its elevator service mechanic employees. The phones are specifically assigned to each mechanic, so KONE knows which mechanic has which phone.

[7] The information that employees input into their phones determines what GPS information is sent to KONE. Mechanics input when they are “on duty” and “off duty”, and also input when they arrive at or leave client sites.

¹ [2013] B.C.I.P.C.D. No. 24.

² The elevator company in Order P13-02 also collects information about how its employees operate company vehicles.

³ The parties in this inquiry did not have the reasons from Order P12-01, [2012] B.C.I.P.C.D. No. 25 before them in arguing this case because the submissions in this inquiry were made at the same time as the submissions giving rise to Order P12-01.

⁴ [2012] B.C.I.P.C.D. No. 25. The technology in Order P12-01 is the same technology as in Order P13-02. Also, see Order F13-04, [2013] B.C.I.P.C.D. No. 4, which considered a GPS tracking system installed in company vehicles. The employer in Order F13-04 was a public body so the *Freedom of Information and Protection of Privacy Act* applied, but many of the same principles apply under PIPA.

⁵ Except for the Kelowna area, which used a paper reporting system.

[8] The GPS information is only sent to KONE for times when a mechanic's phone is set to "on duty" status. Mechanics' phones are in "on duty" status throughout their workday, except during break periods. For example, mechanics put their phones into "off duty" status at the start of their lunch break, and log back "on duty" at the end of their break. The GPS information from the phone is transmitted to KONE's telecommunications provider every 11 minutes, and is accurate to a range of 3 to 15 metres. However, the GPS information is only transmitted from the telecommunications provider to KONE when a mechanic inputs into their phone that he or she is leaving a client site, which occurs an average of 4 to 6 times per day.

[9] When KONE receives the GPS information, it is downloaded into KONE's computer system where software applications arrange the information for KONE to use. KONE primarily uses the GPS information in dispute here, in conjunction with the information the employees input into their phones, to:

- use a software application entitled "Safety Locator" to ascertain: a mechanic's arrival and departure from a client site; the location of an on-duty mechanic; a mechanic's travel time between client sites; and when and where a mechanic went on and off duty;
- generate weekly reports to compare the Safety Locator information to the work times recorded by the mechanics;
- plan routes for mechanics using software known as "Dynamic Dispatch". When a mechanic selects "next destination" on the phone, Dynamic Dispatch gives the mechanic a list of five customer sites based on an algorithm that computes the mechanic's geographical location, call priority and other factors;
- produce a computer map to help KONE's call centre staff reprioritize the mechanics' work assignments when there are new assignments, such as emergency calls;
- send automated emails or web-based updates to clients regarding work to their equipment, including mechanic arrival and departure times. These emails are copied to the client's KONE salesman, but do not identify the mechanic; and
- be able to contact a mechanic whenever the phone has been stationary for more than 30 minutes as a safety measure. KONE has introduced this technology in other jurisdictions, and expects to introduce it in British Columbia in the near future.⁶

⁶ Affidavit of K. Leitch #2, at para. 21.

[10] KONE states that the purposes of collecting and using the GPS information are to:

- a) ensure accurate client invoicing;
- b) use the information as evidence in litigation, for client invoice disputes, and to provide client servicing records;
- c) act as a time clock for employees to verify employee attendance and payroll. KONE pays its employees based on hourly rate time calculations, and it uses the information for “evaluating employee productivity in the same sense that attendance and work records are normally and universally used for such purposes”, including travel times between client work sites;
- d) optimize client response times, which has incidental benefits such as fuel savings, identifying when vehicle maintenance is required, and reducing carbon emissions; and
- e) quickly locate employees in the event of an accident or emergency.⁷

ISSUES

[11] The dispute at the heart of this case is whether KONE is permitted to collect and use GPS information collected from the phones to manage its workplace.

[12] The issues in this inquiry are:

1. Is the GPS information collected by the phones “personal information”, as defined in s. 1 of PIPA? If not, PIPA does not apply to this dispute.
2. If yes to question 1, is the GPS information “employee personal information”, as defined in s. 1 of PIPA?
3. If PIPA applies to this dispute, is KONE authorized to collect and use the GPS information from the phones?
4. Has KONE met its obligations regarding notice, policies, and practices under ss. 5, 10, 13(3) and 16(3) of PIPA?

[13] The complainants allege that KONE is collecting and using information in breach of ss. 5, 10, 11, 13, 14 and 16 of PIPA. I will consider these sections in addressing the four issues above.

⁷ Affidavit of K. Leitch #1, at para. 64; KONE initial submissions, at paras. 71 to 73.

DISCUSSION

Is the information “personal information”?

[14] The first issue is whether the GPS information is personal information, since PIPA only applies to “personal information”, defined as:

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

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

[15] The parties provided extensive submissions on the definition of “personal information”, including case law from multiple jurisdictions, and argue that statutory interpretation principles support their respective positions. The complainants submit that the information is “personal information”, while KONE submits that it is not. Many of these arguments were made and addressed in Order P12-01, an inquiry relating to similar GPS technology.⁸

[16] The first step in assessing whether information is “personal information” is determining if the information is “about an identifiable individual”. The second step is to determine whether the information is excluded from the definition because it is “contact information” or “work product information”. In Order P12-01, Commissioner Denham discussed the interpretation of the term “personal information” at length. The Commissioner concluded that ‘personal information’ is information that 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.⁹ I adopt this approach to personal information and apply it here.

[17] KONE assigns phones to its mechanics, knows which phone each mechanic possesses, and attributes the resulting GPS information to the specific mechanic. The information collected from the phones is therefore about specific mechanics. Tracking individually identified employees is, in fact, a major purpose of this technology. For example, KONE management has questioned at least one employee based on the GPS information collected from an employee’s phone.¹⁰ KONE’s submission that the GPS information is not “about” its individual employees within the meaning of “personal information” under PIPA cannot be reconciled with the fact that KONE collects and uses the information, in part, to confirm employee attendance and to otherwise manage relationships with its employees. This information, considering these uses, is about these identifiable individuals. The GPS information collected by KONE is “about an identifiable individual”.

⁸ [2012] B.C.I.P.C.D. No. 25.

⁹ [2012] B.C.I.P.C.D. No. 25, at para. 82.

¹⁰ Affidavit of Employee #2, at para. 6; Affidavit of B. Gosselin, at paras. 14 to 15.

Work Product Information Exclusion

[18] KONE submits that, in any case, the GPS information is “work product information,” which is excluded from the definition of “personal information” under PIPA. PIPA states:

“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. [Emphasis added]

[19] KONE submits that the GPS information is produced by its mechanics in the course of their work, so the information is “prepared” within the meaning of “work product information”. In support of this argument, KONE cites previous orders in which emails or client agreements were found to be work product information.¹¹ In my view, the situations in these other orders do not apply to the GPS information in this case because the information in those other orders was consciously created, or prepared, by those individuals. In this case, the information is machine-generated in a manner that is incidental to the conscious, directed actions of individuals. The GPS information is an automatic recording of data that reflects when and where its employees are undertaking their employment responsibilities, not information that the employees are preparing or collecting in any real sense.¹² A similar conclusion to this issue was reached in respect to elevator mechanics using similar technology in Order P12-01, which states:

The responsibilities or activities of [the employer's] mechanics are to service and repair elevators, travelling to and from their homes and job sites to do that. The system that [the employer] has installed reflects how, where and when its employees are driving those vehicles (along with other data). This is not, in any real sense, information that the mechanics themselves prepare or collect.¹³

[20] Consistent with the findings in Order P12-01, I conclude that KONE’s employees do not prepare or collect the GPS information in the sense intended or captured by the definition, so the “work product information” exclusion does not apply.

Is the information “employee personal information”?

[21] Organizations are authorized to collect and use “employee personal information” without consent in more circumstances than for non-employee “personal information”

¹¹ Order P06-05, [2006] B.C.I.P.C.D. No. 39; Alberta (Information and Privacy Commissioner) Order P2006-005, [2007] AIPCD No. 46.

¹² [2012] B.C.I.P.C.D. No. 25, at para. 96.

¹³ [2012] B.C.I.P.C.D. No. 25, at para. 97.

under PIPA, so it is necessary to determine whether the GPS information is employee personal information. PIPA defines “employee personal information” as:

...personal information about an individual that is collected, used or disclosed solely for the purposes reasonably required to establish, manage or terminate an employment relationship between the organization and that individual, but does not include personal information that is not about an individual's employment;

[22] In Order P06-04, former Commissioner Loukidelis interpreted the definition of “employee personal information” to include four distinct elements, stating:

1. The information must be “personal information”, *i.e.*, “information about an identifiable individual”.
2. The personal information must be collected, used or disclosed “for the purposes reasonably required” to establish, manage or terminate an employment relationship.
3. The personal information must be collected “solely” for those purposes.
4. The personal information must not be “personal information that is not about an individual's employment”.¹⁴ [Emphasis added]

[23] I have found that the GPS information is personal information, and it is not unrelated to an individual's employment. Therefore, elements 1 and 4 of the definition are satisfied.

[24] Previous orders have used element 2 to evaluate an organization's purposes for collecting, using and disclosing information. Order P06-04, for example, states:

[56] The focus in the employee personal information definition is on whether the “purposes” for which personal information is collected, used or disclosed are “reasonably required” to establish, manage or terminate an employment relationship.¹⁵

[25] KONE's purposes for collecting and using the GPS information are, I find, for purposes reasonably required by KONE for its business operations. As Commissioner Denham stated in Order P12-01:

[The employer's] purposes are, as the complainants acknowledge, to manage employee performance—to manage productivity, manage hours of work, and ensure they drive safely and lawfully.

¹⁴ [2006] B.C.I.P.C.D. No. 35, at para. 38.

¹⁵ Order P06-04, [2006] B.C.I.P.C.D. No. 35, at para. 56; Also see Order P12-01, [2012] B.C.I.P.C.D. No. 25, at para. 141. This element is a separate issue than whether the collection, use, or disclosure of employee information is reasonably required and authorized under ss. 13, 16 and 19 of PIPA.

These are legitimate, reasonable, business purposes. A business is entitled to ensure, subject to applicable laws and agreements, that its employees meet productivity standards. It is also a reasonable purpose for a business to collect personal information to ensure that its employees are actually working the hours for which they are paid. It is, at least reasonable for a business to be able to ensure that its employees are, in the course of their employment, driving company vehicles lawfully and with reasonable care. I therefore find that the information is collected for purposes reasonably required to manage an employment relationship.¹⁶

[26] KONE has a legitimate interest in knowing where its employees are during work hours, maximizing efficiency for dispatching and vehicle routing, and using this technology to provide better customer service. Employers are also entitled to take reasonable steps to ensure that their employees are working the hours for which they are paid. Time recording using GPS is, for example, similar to employees having a swipe card system to record their work attendance or being directly observed by a supervisor at their workstation. Therefore, I find that element 2 of the definition has been satisfied.

[27] Element 3 relates to the fact that the personal information must be collected “solely” for employment management purposes.¹⁷ There is no evidence here that KONE is using the GPS information as personal information for purposes other than to manage the employment relationship, so I am satisfied that element 3 has been met.

[28] I find, based on the above, that the GPS information is ‘employee personal information’.

KONE collecting and using information under ss. 13 and 16 of PIPA

[29] The fact that the information is ‘employee personal information’ does not end the matter. KONE can only collect and use the information if the PIPA provisions governing the collection and use of employee personal information also allow it. Those provisions are found in ss. 13 and 16, which respectively apply to the collection and use of employee personal information without consent.

Does PIPA only require notice for valid collection or use?

[30] I will first address KONE’s argument that after information is determined to be ‘employee personal information’, compliance with ss. 13 and 16 is really just about giving notice. Sections 13(3) and 16(3) together require an organization to notify an individual that it will be collecting or using employee personal information about the individual, and the purposes for the collection or use, before the organization collects or uses that information without the individual’s consent. According to KONE, giving proper notice under ss. 13(3) and 16(3) simply “enables” it to collect and use employee personal information for employee evaluations, investigations and discipline.¹⁸ The

¹⁶ Order P12-01, [2012] B.C.I.P.C.D. No. 25, at paras. 120 and 121.

¹⁷ Order P12-01, [2012] B.C.I.P.C.D. No. 25, at para. 122.

¹⁸ KONE’s initial submission, at para. 77.

complainants argue that providing notice under s. 13(3) does not permit or “enable” the collection of employee personal information. They say that the determining factor is reasonableness under s. 13(2)(b).

[31] Sections 13(3) and 16(3) do require notice to be given as a precondition to collecting or using employee personal information without consent. KONE’s argument, however, ignores the express language of ss. 13(2)(b) and 16(2)(b). These provisions provide that the collection or use of employee personal information must be “reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual”. The collection or use must therefore be reasonable within the meaning of ss. 13(2)(b) and 16(2)(b), in addition to KONE providing the required notice, to comply with PIPA.

KONE’s assertion that the Commissioner has no authority here

[32] I will next deal with KONE’s contention that once I have found that the GPS information is employee personal information and that notice has been provided, this inquiry of the matter is complete. KONE submits that it is not in the Commissioner’s jurisdiction to make an order prohibiting KONE from using lawfully collected employee personal information to exercise its management authority in employee relationships, or to oblige it to “willfully ignore” pertinent information for evaluating or disciplining employees. KONE further submits that it is within the jurisdiction of an arbitrator under the collective agreement to determine the validity of disciplinary action taken against employees, or with the courts in the context of wrongful dismissal.¹⁹

[33] The complainants reply that the matter at issue is within the Commissioner’s jurisdiction, and that KONE’s position in this regard is contrary to the core intention and functionality of PIPA. They submit that the regime of PIPA restricts KONE from using the personal information for “any extraneous purpose that cannot, itself, be justified as reasonable in accordance with the applicable test for reasonableness”, and that the Commissioner may require KONE to cease and desist from engaging in the collection and use of information in contravention of PIPA.²⁰

[34] KONE appears to be arguing that the Commissioner has no authority to prohibit KONE from using the information to discipline or dismiss its employees if there are other permitted uses for the personal information. However, PIPA restricts an organization’s use of employee personal information to those uses that are reasonable in the circumstances, within the framework of PIPA. The fact that employee personal information can be reasonably used for one declared purpose does not mean that an organization is necessarily entitled to use the information for other purposes.

[35] KONE’s position also appears to be that, since these issues arise in the context of employment relationships governed by a collective agreement, only an arbitrator

¹⁹ KONE initial submissions, at paras. 78 and 79.

²⁰ Complainants’ reply submissions, at paras. 84, 85 and 90.

appointed under the agreement may rule on PIPA issues that relate to the regulation of the employment relationship. I reject that argument. The issues at hand relate solely to whether KONE's collection and use of information received from GPS technologies complies with PIPA, and ss. 50 and 52 of PIPA provide the Commissioner with the statutory authority to "decide all questions of fact and law arising in the course of the inquiry" and to make a resulting order. This includes the authority to consider whether KONE's collection and use of the complainants' employee personal information is reasonable in the circumstances within the meaning of ss. 13 and 16.²¹ The Commissioner's jurisdiction to determine whether KONE is complying with PIPA is not ousted simply because the complainants and KONE are parties to a collective agreement.²²

Is KONE's collection and use of the employee personal information in compliance with ss. 13(2)(b) and 16(2)(b)?

[36] Sections 13(2)(b) and 16(2)(b) establish the framework for evaluating whether the collection and use of employee personal information is reasonable. They provide that an organization may only collect or use employee personal information without consent where it is "reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual".

[37] My conclusion that the GPS information is "employee personal information" included a finding that KONE is collecting and using personal information for "purposes reasonably required" to establish, manage or terminate an employment relationship. That does not mean, however, that the reasonableness of KONE's collection and use of the GPS information has been established within the meaning of ss. 13(2)(b) and 16(2)(b). As Commissioner Denham explained in Order P12-01, these provisions:

...refer to what is "reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual." This requires a further determination, of whether the collection, use or disclosure of employee personal information itself, not the purpose for it, is "reasonable". Sections 13, 16 and 19 are not redundant—they clearly contemplate further scrutiny, by applying to the collection, use or disclosure an objective

²¹ Case law does not support the view that an arbitrator appointed under a collective agreement has exclusive jurisdiction respecting issues under PIPA, over which, as noted above, the Commissioner also has explicit authority as provided in PIPA. See Supreme Court of Canada decisions such as *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 and *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14. Also see Sarah Blake, *Administrative Law in Canada* (5th ed.), LexisNexis: Toronto, 2011, at pp. 141-143. Blake also discusses the application of issue estoppel in cases of concurrent jurisdiction.

²² KONE has not pointed to any decision of an arbitrator or other tribunal with which any order I might make would conflict, and the prospect of such an operational conflict would not necessarily mean that no order could or should be made under PIPA. See Order F07-18, [2007] B.C.I.P.C.D. No. 30 for discussion of this issue. I note, however, that the Commissioner may decline to hold an inquiry if a complainant is attempting to re-litigate an issue that was previously decided by a labour arbitrator: See Decision P12-01, [2012] B.C.I.P.C.D. No. 11 (which is a different case than Order P12-01).

standard of what is reasonable, viewed in light of what a reasonable person would consider appropriate in the circumstances...²³

[38] The complainants submit that KONE must meet several conditions to comply with ss. 13(2)(b) and 16(2)(b). These include KONE demonstrating that: there is a substantial problem that requires the initiation of GPS tracking; GPS tracking will be effective in solving the problem; GPS tracking is necessary to solve the problem; KONE has exhausted all reasonably available and less intrusive alternatives; and the loss of privacy is proportional to the benefit gained.²⁴ The complainants submit that this is the appropriate test for ss. 13(2)(b) and 16(2)(b) of PIPA, which they say is endorsed by the Federal Court of Canada in *Eastmond v. Canadian Pacific Railway* [*Eastmond*].²⁵

[39] In my view, *Eastmond* does not require KONE to meet a series of conditions to be authorized to collect and use information as submitted by the complainants. The court in *Eastmond* lists factors, or considerations, it used to help determine whether the employer's purposes for collecting personal information were those that a reasonable person would consider appropriate given the circumstances of that case.

[40] In *Eastmond*, the employer installed digital video recording surveillance cameras in a portion of its facility. The factors considered in *Eastmond* were:

- Is camera surveillance and recording necessary to meet a specific [employer] need;
- Is camera surveillance and recording likely to be effective in meeting that need;
- Is the loss of privacy proportional to the benefit gained;
- Is there a less privacy-invasive way of achieving the same end?²⁶

[41] The Court in *Eastmond* does not state that the above factors are the only factors to consider, or that each of these factors should be considered in every case, stating that:

Parliament clearly provided the appropriateness of purposes or why personal information needs to be collected must be analysed in a contextual manner looking at the particular circumstances of why, how, when and where collection takes place. Also, the appropriate purposes for collection may be different than the appropriate purposes for use and the appropriate purposes for disclosure of collected information, all of which suggests flexibility and variability in accordance with the circumstances.²⁷

[42] *Eastmond* confirms the need to have a flexible approach, and to analyze the collection and use of personal information in a contextual manner, when determining what is reasonable.

²³ [2012] B.C.I.P.C.D. No. 25, at para. 141.

²⁴ Complainant's initial submissions, at para. 89 citing *Eastmond v. Canadian Pacific Railway*, [2004] F.C.J. No. 1043, at paras. 126 to 130.

²⁵ [2004] F.C.J. No. 1043. *Eastmond* considered the *Personal Information and Electronic Documents Act*, not PIPA.

²⁶ [2004] F.C.J. No. 1043, at para. 127.

²⁷ [2004] F.C.J. No. 1043, at para. 131.

[43] Some of the principles stated in *Eastmond* – such as using a contextual approach to balance the interests of the privacy rights of individuals and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances – are consistent with the principles under PIPA. However, while the federal legislation considered in *Eastmond* and PIPA have some similarities, they differ in how they approach workplace privacy issues.²⁸ Further, the factors in *Eastmond* and other federal privacy decisions on this topic have not been adopted in British Columbia.²⁹

[44] In my view, the overriding criterion for considering ss. 13(2)(b) and 16(2)(b) under PIPA is reasonableness. I agree with the approach taken in Order P12-01 regarding ss. 13 and 16, which states:

As regards PIPA's language, the overriding criterion is reasonableness. Sections 13, 16 and 19 speak to whether the collection, use or disclosure of employee personal information is "reasonable for the purposes of establishing, managing or terminating an employment relationship". That standard is to be viewed in light of s. 4(1), which requires organizations, in meeting their PIPA responsibilities, to "consider what a reasonable person would consider appropriate in the circumstances."

There is also the balancing of rights and needs mandated by s. 2, which "recognizes both the right of individuals to protect their personal information and the need for organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances."...

[45] Commissioner Denham considered a number of non-exhaustive factors for assessing reasonableness in Order P12-01 that I find are useful in the circumstances of this case:

- sensitivity of the employee personal information (*i.e.*, health history or a medical condition is sensitive information, but an employee's name or home address may not be);
- amount of personal information (*i.e.*, Is the employer collecting, using or disclosing more information than is necessary to achieve its purpose(s)?);
- likelihood of effectiveness (*i.e.*, Is there a reasonable likelihood that the collection, use or disclosure of personal information will fulfil the employer's reasonable objectives?);
- manner of collection and use of the personal information (*i.e.*, Was the employee aware that the information was being collected or was it covertly

²⁸ *Personal Information Protection and Electronic Documents Act*, Order P12-01, [2012] B.C.I.P.C.D. No. 25, at para. 138.

²⁹ Order P12-01, [2012] B.C.I.P.C.D. No. 25, at para. 138.

collected? In what circumstances and how often does the employer access the information?);

- less privacy-intrusive alternatives (*i.e.*, Has the employer given reasonable consideration to other methods for achieving its objectives? This factor does not necessarily require the employer to implement the least privacy-intrusive alternative, but the employer must consider the balance between its interest and the right of individuals to protect their personal information); and
- other relevant factors given the circumstances.³⁰

Sensitivity and amount of information

[46] Sensitivity is a function of the nature of the information, but other factors also affect sensitivity. For example, a person's medical information is usually sensitive information, but it is less sensitive if the person died 100 years ago than if the person is living or recently died. Further, a person's financial information may be sensitive in relation to strangers, but not necessarily be as sensitive as between a married couple.

[47] As I previously noted, the GPS device transmits the whereabouts of an on duty KONE employee every 11 minutes to a telecommunication provider, which then transmits the GPS information to KONE in batches, periodically throughout the day. KONE receives this information when the employee inputs into their phone that they are leaving a client site. The information shows where the employee has been at 11 minute intervals during the periods that the employee's phone is in "on duty" status. Thus, the information received by KONE describes the employee's location while on duty throughout the workday.

[48] The 11 minute GPS intervals, and the transmission of the GPS information to KONE, are less frequent here than in Order P12-01 and Order P13-02, in which the information was continuously transmitted to the employers in real or near-real time. In some circumstances, these differences would significantly affect the sensitivity of the information. However, in my view, these differences do not materially affect the sensitivity of the information in this case because the difference in GPS interval collection times does not result in the employers in Order P12-01 and Order P13-02 receiving appreciably more detailed information than KONE (particularly since KONE's technology more precisely identifies the locations of its employees), and the difference between receiving the information in batches every few hours and immediately receiving the information – which is only periodically reviewed by supervisors – does not appreciably affect the time sensitivity of the information in this case.

[49] In this case, KONE is tracking the phones carried by its mechanics. It is possible that the mechanics might not carry their phones at all times, but it is reasonable to conclude that this technology more precisely records an employee's location than the

³⁰ [2012] B.C.I.P.C.D. No. 25, at paras. 123 to 166.

methods described in Order P12-01 and Order P13-02, in which the GPS systems were attached to the mechanics' vehicles, since mechanics are not in their vehicles for most of their workdays. This increased accuracy, or preciseness, of the GPS location information that KONE is collecting from the phones makes the GPS information in this case more sensitive than in those other Orders.

[50] The nature of the personal information here concerns the locations of KONE's employees during work hours in the context of work activities with assigned job sites, service routes and tasks. This fact diminishes the sensitivity of the GPS location information as between employee and employer in this case.

[51] In summary, the GPS information in this inquiry is more sensitive than that in Order P12-01 and Order P13-02 because KONE is collecting more accurate information about the location of its employees. However, the information in this case is not significantly more sensitive than in those other Orders.

[52] As to the amount of information being collected and used, KONE is not collecting more personal information than is necessary to meet its purpose for collection. It is not, for example, collecting location information when its mechanics are on lunch breaks, attending personal appointments or otherwise not at work.

Likely effectiveness of the technology

[53] The complainants submit that the GPS technology used by KONE does not achieve KONE's stated purposes for the technology, such as mechanic safety, Dynamic Dispatch, time reporting and the monitoring of mechanics' travel between client sites.³¹

[54] KONE acknowledges that it has not yet implemented the mechanic safety portion of its technology in British Columbia. However, once put into operation, KONE's new system will automatically contact a mechanic whenever a phone has been stationary for more than 30 minutes in order to establish that the mechanic is not in distress. I am satisfied that this feature of the technology is likely to be a more effective safety tool than KONE's current system, which does not have automatically generated alerts. Similarly, upgrades to Dynamic Dispatch are going to be implemented that will make it easier for KONE to determine which mechanic to route to emergency service assignments.³²

[55] The complainants submit that KONE's technology is unlikely to be effective for time reporting because the technology only tells KONE that the mechanic is at a particular location, not whether the mechanic has actually performed the service work that he or she claims to have performed. The complainants submit that the GPS technology does not displace the need for KONE to maintain its regular checks and balances to ensure that its employees' work is performed. I agree with the complainants that KONE's technology does not ensure that its employees are actually

³¹ Complainant's submissions, at paras. 21, 25 to 27 and 88; Affidavit of Employee #1 at para. 11; et. al.

³² Affidavit of K. Leitch #2, at paras. 9 to 15.

working, but I am satisfied that the technology is likely to be an effective tool for KONE to independently verify employee attendance, which is a legitimate business purpose.

[56] The complainants submit that it is unlikely that KONE's technology will be effective in confirming that mechanics are driving appropriately, or taking a reasonable amount of time to travel between client sites during the workday. However, in my view, this technology does give KONE the ability to review travel time and vehicle routing based on the GPS information, which enables KONE to identify significant anomalies that are potential instances of employees taking personal time before going to the next job site. It is reasonable for KONE to use the GPS information to identify situations and patterns regarding employee travel time that warrant further investigation. The fact that KONE's technology has some limitations in evaluating employee travel does not diminish the overall effectiveness of the technology.

[57] The complainants submit that KONE has not provided sufficient employee training for the technology to be effective. However, KONE has provided some employee training, which I discuss below in considering the notice KONE has provided to employees. I do not consider this to be an obstacle to the likely effectiveness of the technology.

[58] In conclusion, I am satisfied that use of the system is likely to be effective for KONE's stated purposes.

Manner of collection and use of the personal information

[59] KONE informed the complainants that it was going to collect the GPS information before it enabled the GPS technology on the phones. I find that the complainants have been aware that the GPS information is being collected, and that the collection is not covert.

[60] I also consider the extent that KONE monitors, or reviews, the GPS information to be a factor in this case. As Commissioner Denham stated in Order P12-01:

I am particularly influenced by the fact that the GPS-derived location information is not continuously monitored. If an organization were to engage in continuous, real-time monitoring of employees' whereabouts, during or outside work hours, for employment management purposes, I would want to look very carefully at the situation.³³

[61] KONE does not continuously monitor or review the GPS information. The information is only transmitted to KONE in batches when a mechanic inputs that he or she is leaving a client site, and the information is generally only reviewed by managers and supervisors on a weekly basis for approving employee payroll and verifying client invoices.³⁴ KONE has historically known how long mechanics spend on

³³ [2012] B.C.I.P.C.D. No. 25, at para. 165.

³⁴ Affidavit of R. Dickens at paras. 4 and 6.

each client site based on mechanic time reporting, but a primary difference with the new GPS technology used by KONE is that this new technology enables KONE to independently confirm that its employees are at client work sites during work hours.

[62] KONE more systematically reviews the GPS information than the employer in Order P12-01, in which the GPS information was used when a complaint or other event triggered an inquiry.³⁵ However, the employer in Order P12-01 was also collecting other personal information, such as what time employees were turning their vehicles on and off, to determine whether its employees were working the hours they were required to work. KONE's periodic review of the GPS location information for employee payroll and client invoicing purposes is more frequent and systemic than in Order P12-01, but it is less significant of a factor than with other types of more detailed information, such as video footage, because the GPS information only enables KONE to determine whether its employees are at work locations, not other more detailed information.

Availability of less privacy-intrusive alternatives

[63] Many employers use regular in-person supervision to confirm employee attendance at work, and to otherwise manage employment relationships. However, KONE mechanics are a mobile workforce who generally work alone in widely distributed geographic areas, so regular in-person supervision is not practical.

[64] The complainants submit that KONE does not require the GPS information for routing mechanics, safety, guarding against time theft, or the monitoring of employee travel time.³⁶ The complainants submit that KONE ought to disable the GPS on the phones, noting that KONE is the only elevator industry company using GPS enabled cellphones.³⁷ Disabling the phones would result in a reporting system similar to the one KONE used prior to introducing the phones.³⁸

[65] As stated above, I am satisfied that the technology KONE employs, when fully implemented, is likely to help KONE achieve its stated purposes for the technology. It enables KONE to verify employee attendance, and I am persuaded that KONE will be better able to achieve its objectives by using the new technology system compared to less privacy intrusive alternatives. The GPS information collected from the phones is more sensitive than the personal information collected from employees' vehicles in Order P12-01 because it more precisely determines the location of an employee, but on balance I find that the difference in the sensitivity of the information is reasonable relative to the purposes for collection and use, and the particular circumstances of this case. I further note that the information that KONE collects is less privacy-intrusive than in Orders P12-01 and Order P13-02 in some respects because KONE does not collect

³⁵ [2012] B.C.I.P.C.D. No. 25, at para. 24.

³⁶ Complainant's initial submissions, at paras. 91, 92, 102 to 105, 114 to 118, and 124 to 126.

³⁷ Affidavit of B. MacMillan #2, at paras. 7 and 9.

³⁸ KONE maintenance mechanics in British Columbia used a cell phone based reporting system before the GPS phones were introduced, except for the Kelowna area, which used a paper reporting system.

information about the manner in which its employees operate their company vehicles, such as braking, accelerating, etc., which was collected in those Orders.

Offence to employees' dignity

[66] The complainants submit that KONE's technology does not address any significant problems, and at the same time results in a significant loss of their privacy. They submit that KONE intends to use the technology as a performance management and disciplinary tool, and "[p]erhaps the most egregious and invasive example of this is KONE's use of GPS Tracker to scrutinize the speed with which [e]mployees perform their work and to pressure them to work faster."³⁹ They state that this technology is detrimental to employee morale and the employment relationship.⁴⁰

[67] KONE's collection and use of the GPS information for employee management is the central issue for the parties. The parties adduce conflicting evidence about an event in which a KONE supervisor questioned a mechanic about his movements based on GPS information.⁴¹ However, the question in this inquiry is not whose version of that event I accept, or whether KONE management acted reasonably in issuing the warning to the employee in those particular circumstances. Rather, the question is whether KONE's collection and use of the GPS information complies with PIPA.

[68] As Commissioner Denham stated in Order P12-01, "there is nothing remarkable in the management of a company questioning its employees about their compliance with company rules as to hours of work, performance of assigned work tasks (including following assigned service routes), and use of company property according to the rules."⁴² KONE's evidence in this case is that the information reports are reviewed for billing and payroll purposes, and looked at more closely if a report shows a low accuracy percentage between the mechanic's reported location and the GPS location information.⁴³ KONE's technology is designed to alert the company to atypical mechanic activity that it would not otherwise know about. This in turn allows it to make follow-up inquiries to determine whether the mechanic is meeting his or her employment obligations.

[69] KONE's use of this technology to determine whether its mobile mechanics are frequently at locations that differ from what they are reporting to KONE is not as intrusive, for example, as continuously monitoring an employee's actions using video surveillance, or installing computer keystroke technology without an employee's knowledge to determine what they do on their workstation computer.⁴⁴ Further, in my view, the complainants' submission that this GPS technology enables KONE to pressure employees to work faster somewhat overstates the impact of the technology in

³⁹ Complainant's initial submissions, at para. 140.

⁴⁰ Affidavit of B. MacMillan #2, at para. 4.

⁴¹ Affidavit of Employee #3, at para. 9; Affidavit of B. Gosselin, at para. 10; Affidavit of M. Tominac, at para. 5.

⁴² [2012] B.C.I.P.C.D. No. 25, at para 164.

⁴³ Affidavit of B. Gosselin at para. 5.

⁴⁴ For example, see Order F07-18, [2007] B.C.I.P.C.D. No. 30.

this case, since employees reported to KONE how long they spent working at each client site before this technology was introduced, and – as the complainants acknowledge in their submissions – this new technology does not confirm what work, if any, a mechanic is actually performing.⁴⁵

[70] The GPS location information in this case is periodically reviewed to identify and make inquiries about inaccurate time reporting. KONE's use of the GPS information is not, in my view, an offence to dignity of employees that tips the scales against KONE. I am not persuaded that there is an offence to the employees' dignity in this case that precludes KONE from collecting and using the GPS information.⁴⁶

Applying all factors for ss. 13 and 16 of PIPA

[71] Considering the above factors for ss. 13 and 16, including the purpose of PIPA, I find that collecting and using the information is reasonably required for KONE to manage the employment relationship, and that a reasonable person would consider it appropriate in the circumstances for KONE to collect the GPS information.⁴⁷ In concluding that KONE's collection and use of the GPS information is reasonable within the meaning of ss. 13(2)(b) and 16(2)(b), some of the pertinent facts include that:

- the information relates to the location of KONE's employees during work hours in the context of work activities with assigned job sites, routing and tasks, which diminishes the sensitivity of the information as between employer and employee. Further, KONE is not collecting GPS information from its employees when they are on their lunch breaks, attending personal appointments or outside of the workday;
- the information collected by KONE contains few additional details other than GPS location information. KONE's technology does not have, for example, a video component that would enable KONE to covertly evaluate actual employee performance or conduct other surveillance on its employees;
- KONE has legitimate business purposes for the technology, such as becoming more efficient (*i.e.*, improving customer service or lowering costs) and ensuring that employees are working the hours they are paid for. KONE's technology is likely to be effective in furthering its legitimate business purposes;
- KONE does not continuously monitor the GPS information;
- KONE supervisors generally review the GPS information on a weekly basis for payroll or client billing purposes, and only take a closer look at the GPS information if KONE's Safety Locator technology identifies a "low accuracy

⁴⁵ Complainants' initial submissions at para. 119.

⁴⁶ [2012] B.C.I.P.C.D. No. 25, at para. 165.

⁴⁷ Section 2 states the purpose of PIPA. This finding does not decide, or otherwise impact, whether KONE's plans for retaining the GPS information complies with s. 35 of PIPA (retention of personal information), as this issue is not in the scope of this inquiry.

percentage” between a mechanic’s actual and reported locations.⁴⁸ For example, a KONE supervisor deposed that she would not question a mechanic unless the mechanic stopped for at least an hour between client sites.⁴⁹ The evidence does not persuade me that KONE is using the GPS information to question or investigate minor deviations between its employees’ time reporting and their actual movements; and

- KONE’s maintenance mechanics work alone in widely distributed geographic areas, so regular in-person supervision or other traditional methods of confirming employee attendance are not practical.

[72] KONE is therefore authorized to collect and use the GPS information for the uses and purposes identified in this order under ss. 13 and 16 of PIPA.

Sections 11 and 14 of PIPA

[73] Sections 11 and 14 are limiting provisions regarding the collection and use of personal information. These provisions state that an organization may collect or use personal information for purposes that a reasonable person would consider appropriate in the circumstances, and that fulfill the purposes that the organization discloses under s. 10(1) or are otherwise permitted under PIPA.⁵⁰ These sections do not place additional limits on collection and use of information beyond those I have already considered. Therefore, I find that ss. 11 and 14 have also been satisfied.

Employee notification, policies and practices

[74] KONE is authorized to collect and use the GPS information under PIPA, subject to the PIPA notice provisions I will now address.

[75] The complainants submit that KONE is not complying with ss. 5 and 10 of PIPA because KONE has not provided the notice required under PIPA, which the complainants submit must be a specific GPS cellular privacy policy.

[76] Section 5 requires organizations to develop and follow policies and practices that are necessary to meet the obligations of PIPA, as well as to make information about its policies and practices available on request. Section 10 relates to the required notice for collection of personal information.

[77] Section 10 does not apply in this case. As stated in Order P12-01, s. 10 applies to personal information collected directly “from” the individual in consensual collection

⁴⁸ Affidavit of B. Gosselin at para. 5; Affidavit of R. Dickens at para. 5.

⁴⁹ Affidavit of B. Gosselin at para. 12.

⁵⁰ Section 14(b) also contains a provision for information collected before PIPA came into force, which does not apply in this inquiry.

situations.⁵¹ KONE is not collecting the GPS information “from” its employees, nor does it have their consent to collect the information. However, ss. 13(3) and 16(3) impose notice requirements for collecting and using employee personal information without consent, and these sections apply to the substance of the complainants’ argument regarding notice.

[78] Sections 13(3) and 16(3) provide that an organization “must notify” an individual that it will be collecting or using that individual’s employee personal information, and notify him or her of the purposes for the collection or use, before collecting or using the employee personal information.

[79] KONE provided its employees with a general privacy policy. The privacy policy contains 12 broad provisions regarding KONE’s use of employee personal information, and appears to be drafted to cover a wide variety of circumstances in which KONE collects and uses employee personal information. In addition, KONE provided a letter to its employees notifying them that it was activating the GPS on their phones before KONE started collecting and using the GPS information. It also provided two separate PowerPoint presentations at employee training sessions, one about the information the employees input into their phones and the other generally relating to the Safety Locator technology and GPS information. All of these things must be taken into account in considering whether KONE’s notice to employees complies with PIPA.

[80] In my view, ss. 13(3) and 16(3) require organizations to notify employees of the types of employee personal information to be collected or used with some degree of specificity. It requires KONE to provide meaningful notice so employees know what types of personal information are being collected, the uses for the personal information, and the purposes for collection and use. It would be insufficient for KONE to give notice by only providing a general privacy policy with no details or context.

[81] In this case, KONE notified its employees that it was going to collect the GPS information before it started collecting the information. Further, KONE’s PowerPoint presentations provided a significant amount of information regarding its use of the information collected from the phones. The presentations do, as the complainants submit, tend to emphasize the benefit of the technology for the mechanics rather than the other primary purposes for the technology.⁵² However, the PowerPoint presentations do disclose the employee management aspect of the technology, stating for example:

Our technicians have a moral obligation to actually deliver the work reported on their time ticket. Safety Locator provides us with an opportunity to ensure that we are delivering the service to our customers that our technicians reported.

...

⁵¹ [2012] B.C.I.P.C.D. No. 25, at para. 173. An exception to this statement is that s. 10(3) states that s. 10 does not apply to information collected with implied consent under s. 8.

⁵² Affidavit of Employee #3 at para. 3 and Affidavit of K. Lietch at para. 53.

The expectation for KONE employees is clear...40 hours of work for 40 hours of pay.

...

Safety Locator compares technicians' reported time on-site to the acquired position information of the technician.⁵³

[82] I find that, taking all of the material together, KONE notified employees that it would be using the GPS information for the specified uses and purposes identified in this inquiry. In particular, I observe that the PowerPoint presentations specifically give notice of the collection and use of the GPS information with KONE's purposes for the information, such as managing the workplace, improving business efficiencies and providing customer service.

[83] I am satisfied the KONE has provided the required notice under ss. 13(3) and 16(3) of PIPA. This notice also satisfied KONE's obligations under s. 5 of PIPA.

[84] Notwithstanding the above finding, I recommend that KONE create a specific policy for the phones that comprehensively sets out the purposes for which the GPS information may be collected, used or disclosed. This policy could then provide existing (and new) employees with a single, clear and continuing source of notice of KONE's purposes for the technology, which is preferable to using multiple PowerPoint presentations and other materials in combination to provide the required notice.

CONCLUSION

[85] For the reasons given above, under s. 52 of PIPA, I confirm that KONE has performed its duties under PIPA respecting its collection, use and disclosure of GPS information, including its duties under s. 5.

August 28, 2013

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

OIPC File No. P10-42250

⁵³ Complainants' submissions at para. 17; Affidavit of Employee #1, at Exhibit "A".