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

Order P10-02

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1004

Michael McEvoy, Adjudicator

March 3, 2010

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Summary: The applicant, a union member involved in a grievance, requested access to his own personal information from the union. The union is authorized to refuse to disclose some information because it is privileged to the union's benefit, but the union is not authorized to refuse disclosure of other information under litigation privilege or Wigmore privilege. Nor does s. 23(3)(c) apply in the circumstances.

Statutes Considered: *Personal Information Protection Act*, ss. 1, 23(3)(a) and 23(3)(c); *Labour Relations Code*, ss. 12 and 84.

Authorities Considered: B.C.: Order P06-02, [2006] B.C.I.P.C.D. No. 28; Order F06-16, [2006] B.C.I.P.C.D. No. 23.

Cases Considered: *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] S.C.J. No. 41; *Rayonier Canada (B.C.) Ltd. (Employer) and International Woodworkers of America, Local 1-217 (Union) and Ross Anderson (Employee) and Forest Industrial Relations* (Intervener), [1975] B.C.L.R.B.D. No. 42; *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner),* [1995] B.C.J. No. 2594 (B.C.S.C.); *College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, [2002] B.C.J. No. 2779; *Keefer Laundry Ltd. v. Pellerin Milnor Corp*., 2006 BCSC 1180; *Akbar Buksh and Brewery, Winery * Distillery Workers' Union, Local 300 and Molson Brewery B.C. Ltd*., [1994] B.C.L.R.B.D. No. 457; *Blank v. Canada (Minister of Justice),* [2006] S.C.J. No. 39; *Cuddy Food Products and U.F.C.W., Loc. 175 (Baddaoui) (Re)* (1997), 63 L.A.C. (4th) 365; *Canadian Pacific Forest Products Ltd. and I.W.A., Loc. 2693* (1993), 31 L.A.C. (4th).

1.0 INTRODUCTION

[1] Section 23(1)(a) of the *Personal Information Protection Act* ("PIPA") gives individuals a right of access to their own personal information under the control of an organization. The Canadian Union of Public Employees, Local 1004 ("CUPE"), the organization in this case, received a request from the applicant, one of its members, for information related to a "rate of vacation pay" grievance, a legal opinion CUPE received about the grievance and related notes, memos, emails and records. CUPE responded, over four months later, by denying access to the requested information under s. 23(3) of PIPA. The applicant requested a review of this denial by this Office, saying that he thought he was entitled to the information because it was about his grievance.

[2] Mediation led to the disclosure of responsive information, including a transcript of a meeting of March 16, 2005, between the applicant and a CUPE official. CUPE said it had searched its files and could find no other records. It also clarified that it was refusing to disclose any other information on the following grounds:

- The requested information does not exist;
- The requested information is not personal information as defined in Schedule 1 of PIPA; and
- CUPE is not required to disclose the information under ss. 23(3)(a) and (c) of PIPA.

[3] Mediation was not otherwise successful and the matter proceeded to inquiry.

2.0 ISSUE

[4] The notice for this inquiry states that the issues before me are whether:

> a) the information requested is personal information as defined in sec. 1 of PIPA;
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> b) the organization is authorized to refuse to disclose personal information under section 23(3)(a) or 23(3)(c) of PIPA.

[5] Section 51 of PIPA sets out the burden of proof in inquiries:

> 51 At an inquiry into a decision to refuse an individual
>
> (a) access to all or part of an individual's personal information,
> (b) information respecting the use or disclosure of the individual's personal information, or
> (c) the names of the sources from which a credit reporting agency received personal information about the individual,

> it is up to the organization to prove to the satisfaction of the commissioner that the individual has no right of access to his or her personal information or no right to the information requested respecting the use or disclosure of the individual's personal information or no right to the names of the sources from which a credit reporting agency received personal information about the individual.

3.0 DISCUSSION

[6] **3.1 Background**—The applicant is an employee of the City of Vancouver ("City") and a member of CUPE, which is certified as the exclusive bargaining agent representing certain outside employees of the City ("employees"), one of whom is the applicant. The employment terms for the employees are governed by a collective agreement between CUPE and the City ("Collective Agreement").[1] The Collective Agreement provides that CUPE can file a grievance regarding any dispute over the interpretation and application of the Collective Agreement. The grievance procedure is set out in the Collective Agreement, as required by s. 84 of the *Labour Relations Code*.

[7] As the exclusive bargaining agent of its members and a party to the Collective Agreement, CUPE has sole conduct of and control over the grievance process.[2] This is subject only to CUPE's duty, under s. 12 of the *Labour Relations Code*, to fairly represent the CUPE member who is named as the grievor. This means CUPE has the power to advance, settle or drop a grievance, even if the grievor disagrees with it.

[8] The records in dispute here relate to a grievance in which CUPE grieved the City's interpretation and application of the vacation rate provisions of the Collective Agreement as they applied to the applicant. CUPE advanced the grievance to arbitration where, in May 2005, the arbitrator denied the grievance.[3] CUPE did not challenge that decision, or at least it did not provide any evidence here, or argue, that the arbitration award is the subject of appeal or review proceedings.

[9] **3.2 Is This Personal Information?**—CUPE's position is that not all of the information in the disputed documents is the applicant's personal information, so that any non-personal information should be removed if I find the records must be disclosed. Although it acknowledges that the applicant had an interest in the outcome of the grievance, CUPE argues that he was not a party to the grievance and that most of the information the applicant seeks relates, not to him, but to the

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[1] CUPE's initial submission, para. 3.

[2] *Noël v. Société d'énergie de la Baie James*, 2001 SCC 39, [2001] S.C.J. No. 41, paras. 41, 45; *Rayonier Canada (B.C.) Ltd. (Employer) and International Woodworkers of America, Local 1-217 (Union) and Ross Anderson (Employee) and Forest Industrial Relations* (Intervener), [1975] B.C.L.R.B.D. No. 42.

[3] CUPE's initial submission, para. 3; McKenna affidavit, para. 4.

interpretation of the Collective Agreement or to the possible settlement of the grievance.[4]

[10] Section 1 of PIPA defines "personal information" as follows:

> "**personal information"** means information about an identifiable individual and includes employee personal information but does not include
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> (a) contact information, or
>
> (b) work product information;

[11] CUPE provided me with copies of the 13 documents in dispute, which range in date from February 2003 to December 2005. They can be described this way:

1. Legal Opinion of CUPE's legal representative J. Stanley – October 24, 2004;
2. Handwritten statement of facts and request for legal opinion – undated;
3. Handwritten note to Mr. Stanley from CUPE National Representative – September 14, 2004;
4. Fax cover sheet with handwritten note – December 16, 2005;
5. Handwritten notes written on a typed Statement of Facts dated January 24, 2005 – notes undated;
6. Handwritten notes on fax cover sheet with additional page – April 4, 2005;
7. Handwritten notes of arbitration proceedings – April 7, 2005;
8. Handwritten notes of meeting (applicant present) – March 12, 2005;
9. Handwritten meeting notes of CUPE Business Agent (applicant present) – February 5, 2003;
10. Handwritten notes of preliminary preparation session for arbitration – March 14, 2005;
11. Handwritten notes entitled Step III – undated;
12. Handwritten notes – April 14, 2005; and
13. Handwritten notes of meeting (applicant present) – June 21, 2004.

[12] CUPE identified some of the text in eight documents with either a line or a box, annotating each with the phrase "not personal information". I agree with CUPE that the identified portions deal with matters relating to the interpretation of the Collective Agreement or CUPE's strategy, ideas or arguments to be advanced at arbitration. Some portions merely refer to

[4] CUPE's initial submission, paras. 41-44, initial submission.

a Collective Agreement provision. These portions are not, in my view, the applicant's "personal information" and are therefore not accessible under PIPA.

[13] **3.3 Solicitor-Client Privilege**—CUPE takes the position that s. 23(3)(a) applies to all of the applicant's personal information in the disputed records. Section 23(3)(a) reads as follows:

> 23(3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances:
>
> (a) the information is protected by solicitor-client privilege;

[14] CUPE argues that the documents all fall under the first branch of solicitor-client privilege, that is, they are protected by legal professional privilege because they are confidential communications between client and lawyer that relate to the giving or seeking of legal advice. CUPE says document 1 is a legal opinion and that documents 2-4 were written by its representatives, as client, for the sole purpose of seeking legal advice from CUPE's counsel and were intended to be confidential.[5] CUPE provided affidavit evidence that documents 5 to 13 were written by one or more CUPE representatives to facilitate the lawyer giving legal advice in relation to the grievance.

[15] CUPE also argues all of the documents are protected by litigation privilege, which is protected under s. 23(3)(a), because they were all created for the dominant purpose of preparing for arbitration. CUPE says that, since it had sole conduct of the grievance proceedings, any communications between it and its lawyer that were created in anticipation of arbitration proceedings are "privileged as between the Union [CUPE] and its solicitor". Referring to a British Columbia Supreme Court decision, CUPE argues that records protected by privilege are not severable.[6] CUPE described its usual practice in cases like the applicant's as follows:[7]

> 21. … The policy of the Union [CUPE] and the National Union is to investigate a grievance, gather facts and prepare documents, and then give this information to its solicitor for review and further assessment, for the purpose of obtaining legal advice and instructing counsel, and in anticipation of a potential grievance arbitration. In the case at hand, all documents created by representatives of the Union during the grievance

[5] CUPE's initial submission, paras. 8-13.
[6] CUPE's initial submission, para. 17. CUPE refers to *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner),* [1995] B.C.J. No. 2594 (B.C.S.C.). I will note here, however, that the British Columbia Court of Appeal later took a different view in a decision involving s. 14 of FIPPA. In *College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner),* 2002 BCCA 665, [2002] B.C.J. No. 2779, the Court held that s. 14 protected only part of a document written by in-house counsel to the College.
[7] CUPE's initial submission, para. 21.

> proceeding were created pursuant to this policy and with the expectation that these documents would be provided to a solicitor to aid in giving legal advice concerning the grievance in anticipation of arbitration. Indeed, all documents created by the Union representatives were prepared and disclosed to the Union's counsel in contemplation of litigation with the request for a legal opinion. In the Union's submission, these documents therefore attract claims for both solicitor-client and litigation privilege.

[16] CUPE has provided me with affidavit evidence indicating that, generally, a national staff representative will represent a local union at arbitration or will act as co-representative with one of CUPE's in-house lawyers.[8] In the arbitration proceedings at hand, a national staff representative represented the local union. Although CUPE's lawyer did not appear during the arbitration proceedings, the national staff representative's evidence, in part, is as follows:

> 10. I verily believe that all of the documents at Tabs [5]-13 were prepared by agents of the Union with the expectation that these documents would be disclosed to the Union's counsel in anticipation of arbitration. I verily believe that these documents were prepared with the intention and expectation that they were strictly confidential and would not be disclosed to anyone but the Union, the National Union, and its solicitors.
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> 11. I forwarded all of the documents at Tabs [5]-13 to the Union's solicitor for the purpose of obtaining legal advice in anticipation of potential grievance arbitration.

[17] CUPE argues that litigation privilege extends to documents created in anticipation of litigation for the purpose of instructing counsel and that litigation privilege continues as long as there is a potential for related litigation to arise. Without referring to grounds for saying so, CUPE says a "real potential" exists that the applicant could apply to the Labour Relations Board under s. 12[9] of the *Labour Relations Code* for a finding that CUPE breached its duty of fair representation. CUPE denies that any such claim would have any merit, but argues that the allegedly "real" potential for this "related litigation" suffices to maintain its claim of litigation privilege.[10]

[18] CUPE also argues that litigation privilege applies to documents 5-13, even though a CUPE representative prepared them, because CUPE's relationship with that staff representative was "analogous to a solicitor-client relationship" and thus any documents the representative produced "in confidence" in anticipation of arbitration should be protected by litigation privilege. In any case, CUPE says, labour arbitrators have found that litigation privilege can apply to documents prepared by union representatives even where no lawyers are involved.[11] CUPE's argument continues as follows:

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[8] Affidavit of Tom McKenna, paras. 2-4.
[9] This section imposes a duty of fair representation on unions.
[10] CUPE's initial submission, paras. 21-24.
[11] CUPE's initial submission paras. 25-30.

> 29. The confidentiality of documents created by union representatives during the course of the grievance process is one of the fundamental underpinnings of labour relations in British Columbia. During the grievance process, union representatives will not only record the facts gathered and the minutes of any meetings, but will often note their assessment of the merits of a grievance, comment on the strengths and weakness of any potential witnesses, or take note of legal issues or principles which may occur to the union representative during the process.
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> 30. If parties to collective agreements are forced to disclose notes taken of grievance and settlement meetings, union representatives and employer representatives alike would become reluctant to have meaningful discussions or to make detailed records of these meetings. The Union submits that as a result of this potential "chilling effect" on grievance settlement and investigation proceedings, the grievance dispute resolution mechanism contained in the *Code* would be rendered ineffective.
>
> 31. Labour arbitrators have recognized the importance of keeping grievance or settlement discussions strictly confidential… .

[19] Finally, CUPE argues that documents 5-13 meet the four-part test for what is often called 'Wigmore privilege', which is a privilege against disclosure of confidential communications. CUPE also says disclosure of documents relating to grievance settlement negotiations would have a "chilling effect". It argues that this effect would be greater than any benefit to be gained from disclosure, such that an "expansive reading of the solicitor-client privilege incorporated into s. 23(3)(a)" is called for.[12]

[20] The applicant's submissions were brief. He believes he is the client, not CUPE, that the withheld information relates to his interests and that it would not exist but for his grievance. He also makes the point that he was present at some meetings when the notes CUPE seeks to withhold were taken.[13]

Does solicitor-client privilege protect the documents?

[21] Order P06-02[14] confirmed that s. 23(3)(a) of PIPA, which covers information that is "protected by solicitor-client privilege", has the same meaning as s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). Both sections incorporate common law principles of solicitor-client privilege, namely legal advice privilege and litigation privilege. The principles applied in Order F06-16 and many other s. 14 decisions, including court decisions in judicial review proceedings involving FIPPA decisions, are relevant under PIPA. Order F06-16 also confirmed that common law principles must be applied by

[12] CUPE's initial submission, paras. 32-36.
[13] Applicant's initial and reply submissions.
[14] [2006] B.C.I.P.C.D. No. 28.

examining each record with an awareness of the particular relationships and obligations involved.[15]

Legal advice privilege

[22] While it is perhaps understandable that the applicant believes he is the client of CUPE for solicitor-client privilege purposes, the case law is clear that CUPE, not the grievor, is the lawyer's client.[16] CUPE's affidavit evidence, and my review of the records, satisfy me that documents 2, 3 and 4 were each written by a CUPE representative to the CUPE lawyer for the purpose of obtaining a confidential legal opinion. Document 1 is that legal opinion. Applying the principles established in such orders as Order P06-02 and Order F06-16, I am satisfied that documents 1 through 4 are each covered by legal advice privilege and that the applicant's personal information in them can therefore be properly withheld by CUPE under s. 23(3)(a). Having concluded that legal advice privilege applies, it is not necessary for me to consider whether they can also be properly withheld under litigation privilege.

[23] As for documents 5 to 13, subject to the qualification respecting document 10 discussed below, I find that they are not protected from disclosure under legal advice privilege.

[24] None of these documents is a communication between client and lawyer. Record 5 consists of two plain sheets of paper entitled "Statement of Facts". It is an objective explanation of the applicant's employment history and the nature of the grievance and the positions taken by the parties to the grievance and is not addressed to anyone in particular. Record 6 is a fax communication between two CUPE representatives. Record 7 appears to be a contemporaneous written recording of what happened at the applicant's arbitration proceeding taken by a CUPE representative. Records 8 through 13 are handwritten notes most of which record what happened at various steps of the grievance process or record meetings with the applicant in preparation for arbitration. There is no indication CUPE's lawyer was present at any of these recorded meetings. None of the records, with the one minor exception noted below, reveals on its face the seeking, formulating or giving of legal advice.

[25] CUPE argues records 5-13 were subsequently conveyed to their staff lawyer for seeking a legal opinion "in anticipation of a potential grievance arbitration". This is obviously not the case at least as far as record 7 is concerned because, as noted above, it records the arbitration proceeding itself. In any event, even if CUPE subsequently sent the records to its staff counsel, that act, in the circumstances of the creation of the records described above, does not suffice to make the records privileged. As Grey, J. noted in the case of

[15] Order F06-16, [2006] B.C.I.P.C.D. No. 23, para. 14.
[16] See, for example, *Akbar Buksh and Brewery, Winery * Distillery Workers' Union, Local 300 and Molson Brewery B.C. Ltd*., [1994] B.C.L.R.B.D. No. 457.

Keefer Laundry Ltd. v. Pellerin Milnor Corp.,[17] cited by CUPE, a "lawyer is not a safety-deposit box" whereby documents received by that lawyer are necessarily privileged.

[26] In summary, the disputed documents consist of notes CUPE representatives took during various meetings relating to the grievance and the arbitration proceeding. They are factual in nature and do not disclose, expressly or inferentially, the seeking, formulating or giving of legal advice. Accordingly, they do not meet the test for legal professional privilege.

[27] The exception to this, which I noted above, relates to document 10. It contains a minor and discrete sidebar comment referring to legal advice CUPE received. This comment reveals confidential legal advice and I find that this information is properly withheld by CUPE under legal advice privilege.

[28] The remaining question is whether documents 5 to 9, 11 to 13 and the remainder of document 10 are properly withheld under the litigation privilege branch of solicitor-client privilege. Litigation privilege protects from disclosure any record that has been created for the dominant purpose of preparing for, advising on or conducting litigation that was underway at the time the record was created or that was in reasonable prospect at that time. In *Blank v. Canada (Minister of Justice)*,[18] the Supreme Court of Canada explained the policy underlying this branch of solicitor-client privilege:

> 27. Litigation privilege … is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[29] Unlike legal advice privilege, litigation privilege is temporary—it "expires with the litigation of which it was born".[19] The privilege therefore ends when the litigants or related parties are no longer "locked in what is essentially the same legal combat":[20]

> 36. … common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege ….[21]

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[17] 2006 BCSC 1180, 59 B.C.L.R. (4th) 264.
[18] [2006] S.C.J. No. 39.
[19] *Blank, supra*, para. 8.
[20] *Blank, supra*, para. 34.
[21] *Blank, supra*, para. 37.

[30] As was the case in Order P06-02, I accept that grievance arbitration proceedings qualify as litigation for the purposes of this PIPA exemption.[22] I also accept that documents 5 to 13 came into existence for the dominant purpose of that litigation or its conduct. However, the litigation itself came to an end long ago. Assuming, without deciding, that litigation privilege can be asserted by a non-lawyer,[23] what CUPE is trying to do here is extend that privilege to a potential proceeding (a possible s. 12 *Labour Relations Code* complaint) between different adversaries (CUPE and the grievor), in which the information it seeks to withhold here would presumably be the very information it would need to rely on in order to defend itself and establish it had discharged its duty of fair representation.[24] I have some doubt that a s. 12 complaint would constitute the type of "closely related proceeding" contemplated by the Supreme Court of Canada in *Blank*, particularly in light of the purpose of s. 12 of the *Labour Relations Code.*[25]

[31] In any event, there is no evidence before me to suggest that the applicant has any intention of making a complaint against CUPE under s. 12 of the *Labour Relations Code*. CUPE did not submit any evidence relating to the s. 12 complaints process, let alone evidence that would establish that the Labour Relations Board would entertain such complaints years after the fact. CUPE's speculation that the applicant might at some future point try to make such a complaint is not sufficient. To accept such speculation without any evidentiary basis would be tantamount to applying litigation privilege in such a way as to make it permanent.

[32] As noted earlier, CUPE relies on Wigmore privilege, which is based on principles of confidentiality. This privilege is not a branch of solicitor-client privilege and therefore documents are not protected by this privilege under s. 23(3)(a).[26] I will only add the comment that the chilling effect CUPE refers to, and the cases it relies on, speak to the importance of preserving the confidentiality of the grievance investigation and settlement process as between a union and employer, the parties to the grievance, not between the union and a member who is the grievor. This is reflected in, for example, *Canadian Pacific Forest Products Ltd. and I.W.A., Loc.* 2693,[27] one of the cases CUPE referred me to:

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[22] [2006] B.C.I.P.C.D. No. 28, paras. 33-37.
[23] I note that in Ontario, arbitrator Snow accepted that contemplated litigation privilege is not limited to material prepared by a lawyer and can apply to documents prepared by other persons in anticipation of litigation, holding that "it is clear that it could apply to documents prepared by Stewards or by Union representatives": *Cuddy Food Products and U.F.C.W., Loc. 175 (Baddaoui) (Re)* (1997), 63 L.A.C. (4th) 365, at p. 382.
[24] See, for example, *Buksh*, above.
[25] As discussed in the *Rayonier* case, for example.
[26] Order P06-02, [2006] B.C.I.P.C.D. No. 28, paras. 24-25.
[27] (1993), 31 L.A.C. (4th) 173, at p. 185.

> The rationale usually given for the exclusion of evidence of grievance and/or settlement discussions is that the admission of this evidence would stifle the free and open discussion necessary to resolve grievances. If a party to a grievance has to be concerned about the disclosure of admissions or compromise positions at an arbitration hearing, it will be unwilling to say anything that might later be used against it. The effect of admitting this evidence would be to thwart any meaningful discussion used against it. The repression of that information would make it difficult, if not impossible, for a party to ask for or extend offers of settlement. This result would do a disservice to the parties and labour relations in general. For that reason arbitrators have universally accepted the exclusionary principle regarding evidence of discussions that have taken place during the grievance procedure… .

[33] For these reasons, I find that CUPE is authorized to withhold documents 1 to 4 because they are protected by solicitor-client privilege but that, subject to the qualifications noted above respecting document 10, it cannot withhold the applicant's personal information in documents 5 to 13 under s. 23(3)(a) of PIPA.

[34] **3.4 Investigation or Proceeding**—CUPE also argues that the applicant has no right of access to his personal information in the records under s. 23(3)(c) of PIPA, which reads in part as follows:

> 23(3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances: …
>
> (c) the information was collected or disclosed without consent, as allowed under section 12 or 18, for the purposes of an investigation and the investigation and associated proceedings and appeals have not been completed; …

[35] Section 1 of PIPA contains these definitions:

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

> "**proceeding**" means a civil, a criminal or an administrative proceeding that is related to the allegation of
>
> (a) a breach of an agreement,
>
> (b) a contravention of an enactment of Canada or a province, or
>
> (c) a wrong or a breach of a duty for which a remedy is claimed under an enactment, under the common law or in equity;

[36] CUPE says it collected the documents for an "investigation" and an "appeal or associated proceeding" has not been completed. CUPE points out that "investigation" in PIPA includes an investigation into a violation of an agreement and says:

> 38. … the Union had sole conduct of a grievance. In our submission, an important purpose of the grievance procedure is to provide the Union with an opportunity to assess the merits of a grievance and determine the best strategy by which to proceed. Essentially, the Grievance was a complaint that the Employer had breached the Collective Agreement, and the inquiry into the grievance, by the Union and the Employer during the grievance procedure, and by an arbitrator in this case, constitutes an investigation under the *PIPA* definition.
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> 39. In the circumstances of this case, the personal information in the Documents [was] collected with consent, even if implicit. However, [the] Documents were created by the Union, in part, as an investigation of the merits of the Grievance and would factor into the Union's decision as to how to pursue the grievance and whether to pursue the grievance to arbitration. Disclosure of the information collected by the Union during the grievance procedure to the Applicant would compromise this investigation.

[37] CUPE also says that, if the applicant was dissatisfied with CUPE's assessment or handling of the grievance, his recourse was under s. 12 of the *Labour Relations Code*. Such a complaint would include an examination of CUPE's investigation of the grievance and would be an "appeal" or "associated proceeding". CUPE argues it is not obliged to produce documents associated with the "alleged breach of the Collective Agreement" while "a potential appeal or associated proceeding of this investigation is still outstanding".

The application of s. 23(3)(c) to documents 5 to 13

[38] CUPE's reliance on s. 23(3)(c) of PIPA as a basis for withholding the applicant's personal information in documents 5 to 13 is readily disposed of. First, and as CUPE has acknowledged, it collected the personal information about the applicant during its grievance investigation with the applicant's consent. Section 23(3)(c) applies only where personal information has been collected "without consent". Second, if for the purpose of discussion, CUPE's processing of the grievance constitutes an investigation and the subsequent

arbitration proceeding relate to a "breach of an agreement", it cannot be said that "the investigations and associated proceedings and appeals have not been completed", as is required under this provision. As I have already pointed out, CUPE did not allege or provide any evidence that would establish that the arbitration award is the subject of appeal or review proceeding. While CUPE speculates that the applicant might, at some future date, complain that CUPE breached its duty of fair representation, even if I assume, for the purposes of discussion only, that such a complaint would constitute an "associated" proceeding, there is simply no evidence that a s. 12 complaint proceeding is underway or even contemplated. In my view, s. 23(3)(c) clearly requires any "associated proceedings and appeals" to be underway in order to invoke this exception to disclosure.

4.0 CONCLUSION

[39] For the reasons given above, I make the following orders under s. 52 of PIPA:

1. I confirm CUPE's decision to refuse the applicant access to documents 1 to 4 under s. 23(3)(a) of PIPA;

2. I confirm CUPE's decision to refuse the applicant access to that part of document 10 that reflects legal advice provided to CUPE under s. 23(3)(a); and

3. Subject to the preceding paragraph and the removal of the non-personal information in the records referred to at paragraph 12 (passages of which are highlighted in pink in a copy of the records I have provided to CUPE) I require CUPE to give the applicant access to his personal information in documents 5 to 13 within 30 days of the date of this order, as PIPA defines "day", that is, on or before April 16, 2010 and, concurrently, to copy me on its cover letter to the applicant.

March 3, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator