OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
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Order 00-21

# INQUIRY REGARDING LABOUR RELATIONS BOARD RECORDS

David Loukidelis, Information and Privacy Commissioner
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**Summary:** Applicant requested Board records relating to a previous labour relations matter in which she was involved. Board properly withheld some records because they were personal notes, communications or draft decisions of persons acting in a quasi judicial capacity as contemplated by s. 3(1)(b). Board's search efforts fulfilled its s. 6(1) obligation.

**Key Words:** Excluded records – judicial or quasi judicial capacity – adequate search.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(b) and 6(1).

**Authorities Considered: B.C.:** Order No. 103-1996; Order No. 110-1996; Order No. 170-1998; Order No. 327-1999; Order 00-16.

## 1.0 INTRODUCTION

This inquiry arises out of the applicant's request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for records of the Labour Relations Board ("Board"). The applicant had previously made a complaint to the Board under s. 12 of the *Labour Relations Code*. That section deals with allegations that a trade union has acted unfairly in representing an employee in a bargaining unit or in referring a person for employment. The Board apparently dismissed that complaint and, in October of 1996, the applicant sought a reconsideration of that decision under s. 141 of the *Labour Relations Code*.

The reconsideration process took some time. The applicant believes that, during the time the Board was dealing with the matter, it may have been assigned to more than one Board member or vice chair. The applicant ultimately made a request under the Act for access to her "entire file" with the Board. The Board's response, dated July 28, 1999, enclosed copies of records on the applicant's file, "with the exception of any personal notes, communication or draft decision of a Vice Chair". It withheld these records under s. 3(1)(b) of the Act, which excludes from the Act's operation any "personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity".

The applicant requested a review, under s. 52 of the Act, of this response. Since the matter was not settled in mediation, I held a written inquiry under s. 56 of the Act.

## 2.0 ISSUES

The issues in this inquiry are as follows:

1. Did the Board adequately assist the applicant under s. 6(1) of the Act by making every reasonable effort to search for the requested records?

2. Was the Board correct in deciding that, because of s. 3(1)(b), the Act does not apply to some of the responsive records?

The Act is silent on the burden of proof for questions under ss. 3 and 6. Past decisions have held that the burden of proof lies on the public body. See, for example, Order No. 103-1996, Order No. 110-1996, Order No. 170-1998 and Order No. 327-1999.

## 3.0 DISCUSSION

**3.1 Adequacy of Board's Search for Records** – Section 6(1) of the Act reads as follows:

> 6(1) 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.

The applicant is convinced the Board failed to locate or produce all of the records that are responsive to her access request. She says a variety of records is missing, including case management memos, e-mails, phone logs and records to and from counsel, Board vice chairs, other Board personnel and the Ombudsman's office, a communications record of a Board special investigating officer and a letter dated January 18, 1999 from the applicant to the Board's chair.

The applicant filed a statutory declaration as part of her submissions. Attached to it are several documents she says demonstrate the Board must have records it has not located or has not produced to her. The first document is the applicant's letter to the Board of

January 18, 1999. That applicant asked in that letter for any reports of the investigating officer to the Board, as well as a variety of other materials.

The next document attached to the applicant's statutory declaration is the Board's reply, dated February 1, 1999, under the Act. The Board's chair signed that letter. It confirmed what the applicant requested and told the applicant that – apart from the other records already disclosed to the applicant – the only other responsive records were a phone log that started November 26, 1996 and a memo dated August 2, 1996 from the Board's special investigation officer.

The next record appended to the applicant's statutory declaration is a letter, dated February 19, 1999, from the applicant to the Board. That letter claimed that the Board's previous access response was incomplete in relation to the special investigator's file communications for the periods between June and September 1996 and August to October 1997. The Board's reply dated March 2, 1999, from the special investigator, is the next document provided by the applicant. This is a quote from that document:

> This is further to our telephone conversation of today's date. It is in response to your letter to the Chair of the Labour Relations Board dated February 19, 1999. In your letter you have asked us to recheck our records concerning communications in which I was involved during two periods, namely, June through September, 1996, and August through November, 1997.
>
> The only document that I have that is not already in your possession is a brief note of a conversation which I had with your former lawyer … on Thursday, June 27, 1996 at 4:30 pm. As requested, I am enclosing a copy of that note.

Last, the applicant has provided me with three records created by her legal counsel, *i.e.*, a memo to file and two letters to the Board, all dated June or July 1996. These records indicate that on June 27, 1996 there was a telephone call between the applicant's counsel and the Board's special investigator. The memo indicates that the special investigator said he was going to approach the employer who was involved in the applicant's labour dispute. The applicant deposes that she spoke with the special investigator on September 8, 1997 and that he admitted at that time to having made further inquiries, the details of which he could not recall, after he spoke with the applicant's counsel on June 27, 1996.

From this information, the applicant has surmised the following:

> The missing records at issue are those which refer to the responses of the employer and possibly the union to the questions identified in Exhibits D, E, and F.
>
> The contents of Exhibit B, the August 2, 1996 memorandum to Vice Chair Brigid Lumholst-Smith from SIO Wayne Mullins does [*sic*] not reasonably or logically follow from the facts presented in the memoranda of June 27, 1996 Exhibits D, E, & F.

The applicant became sufficiently frustrated by waiting for the outcome of the Board's reconsideration process under s. 141 of the *Labour Relations Code* that she made a complaint to the provincial Ombudsman. As a result of interactions between the Board, the Ombudsman's office and the applicant, she came to believe that her case, at the reconsideration level, was transferred between Board vice chairs more than once, and that at least one of the vice chairs left the Board and then resumed some Board duties under a part-time appointment. On this point, the applicant declared as follows:

> It is apparent that the applicant's case file had been re-assigned to Mr. Hall either before he resigned from the Associate Chair Adjudication position on May 31, 1998 or while he was a non-member of the LRB between June and December 1998.
>
> It stands to reason that the re-assignment of the applicant's file would have generated some records. According to the Labour Code, Sections 116, 117, 119 and 120, the Chair, Mr. Keith Oleksiuk would have responsibility for this reassignment of case files. The Labour Code does not establish a procedure for the "contracting-out" of work by the board. This would have been the issue at hand if Mr. J. Hall had been assigned to the applicant's file or had been assigned some specific "tasks" relative to the applicant's case between May 31, 1998 and December 14, 1998.
>
> A contract specifying terms and conditions as well as case specific expectations and responsibilities is likely a legal obligation and documented in some appropriate manner.

The Board submitted an affidavit sworn by Lisa Hansen, who is its registrar and a vice chair. Paragraphs 9 through 11 of that affidavit read as follows:

> 9. In the course of responding to [the applicant's] requests for information, I conducted a thorough search of the following records:
>
> (a) The Board's "official" file, which includes all submissions, progress sheets, panel sheets, memos and printed email notes was searched. [The applicant] was provided with a copy of all documents and records contained in this file.
>
> (b) The personal file of Vice Chair Pekeles was searched for any of the requested records. The file contains the personal notes of the Vice Chair. Those notes have not been provided to [the applicant] with the exception of two records of telephone conversations with legal counsel which have been provided. These telephone records were provided without prejudice to the Board's understanding that all personal notes of an adjudicator are exempt from disclosure pursuant to Section 3(1)(b) of the *Freedom of Information and Protection of Privacy Act*.
>
> (c) Keith Oleksiuk, Clive Lytle and John Hall and their respective secretaries were all canvassed as to any records in their

> possession relating to [the applicant]. All advise that they have no records relating to [the applicant's] file. This includes any existing email.
>
> 10. In the course of the search for responsive documents, I advised those with whom I spoke of the importance of a thorough search and I believe that everyone in conducting their search, did so to the best of their abilities.
>
> 11. I am not aware of any potential source of documents which was not examined for the purpose of responding to [the applicant's] requests.

The applicant does not accept that the Board did not create or keep more records in relation to her case. She believes further records should have been made and must therefore still be in the Board's custody or control.

In my view, the Board undertook an adequate search for records responsive to this access request. I cannot agree, on the material before me, with the applicant's contention that other records must exist which have not been produced. The fact that the special investigator acknowledged making some inquiries does not mean further records must exist in relation to those inquiries. The special investigator may or may not have documented his activities fully. The fact inquiries were made does not, in other words, mean records respecting those inquiries exist. The same observations apply to Board records concerning the Board vice chairs who may have been assigned over time to the applicant's reconsideration application.

The evidence here establishes that the Board repeatedly checked its records in response to the applicant's concerns about the Board's response and that it made reasonable search efforts in relation to the applicant's request. There is no indication that the Board destroyed or suppressed records. I find the Board met its duty to the applicant under s. 6(1) of the Act.

**3.2 Exclusion of Records Under Section 3(1)(b)** – The Board says some responsive records are excluded from the Act's operation by s. 3(1)(b), which reads as follows:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
> …
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity … .

As I said in Order 00-16, the Board's chair – or a Board vice chair, associate chair or member – is, in my view, acting in a quasi judicial capacity when actually considering and disposing of an application under the *Labour Relations Code*. Section 3(1)(b) of the Act covers personal notes, communications or draft decisions of such officials created while they are deliberating on applications. Section 3(1)(b) recognizes that employees of

public bodies – including members of administrative tribunals – may discharge multiple functions, only some of which could be termed functions of a judicial or quasi judicial nature. As a result, an official must be acting in a judicial or quasi judicial capacity in relation to a record in order for s. 3(1)(b) to be triggered. Deliberative secrecy is afforded to the Board by s. 3(1)(b), but the scope of that secrecy depends on the nature of each record and the context in which it exists.

I have reviewed copies of the records in dispute in this inquiry. They consist of 96 pages of handwritten notes. The notes concern the applicant's case with the Board and are a detailed and lengthy consideration of that case. The Board's submissions confirm that these notes are the handwritten notes of a Board vice chair. I find that these records fall under s. 3(1)(b) and are therefore not subject to the right of access created by the Act.

**3.3 Further Submission from the Applicant** – After the close of submissions, the applicant delivered to me what she called "a new piece of evidence that definitely establishes that the Labour Relations Board has withheld significant records." The applicant did not explain why this submission was late and could not have been made as part of her initial submission.

The one-page document contains nine typed lines of text and the number 20 handwritten in the upper right corner. The applicant says this document was stapled to a package of records that the Board had disclosed to her. The document appears to be a record, perhaps created by the Board's special investigator, to provide information to enable the Board to prepare a response to an access request. It refers to an investigation in relation to the applicant's union. It also refers to an access request by a party other than the applicant. There is no suggestion in the text that records were being suppressed or destroyed.

It is unclear what this "new" document is, but it does not suggest that the Board has withheld records from the applicant. It may be part of a larger document prepared for the Board as part of its search for records in response to one or more access requests under the Act. It is undated and would not necessarily have been relevant or responsive to the applicant's access request. It may have been included in error in the disclosure package the Board sent to the applicant.

I decline to make the inference sought by the applicant with regard to this document. Had I been inclined to conclude otherwise, I would have first sought a submission from the Board on this issue, including as to whether it should be considered at such a late stage in the inquiry.

## 4.0 CONCLUSION

Because I have found the Board complied with its s. 6(1) duties in relation to the applicant's access request, no order is necessary under s. 58(3) of the Act.

In light of my finding that the records withheld by the Board from the applicant are excluded from the Act's operation by s. 3(1)(b), the Board is under no duty to deal with those records in response to the applicant's access request under the Act.

July 4, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia