Decision F06-10

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 71 (COMOX)

David Loukidelis, Information and Privacy Commissioner
October 24, 2006

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Summary: Through the same lawyer, a teacher and the teacher's unions requested a review of the School District's decision to give a parent access to records. The teacher, but not the unions, had a right to request a review under s. 52(2) of the applicability of s. 22 to the teacher's personal information. The teacher's interest in s. 22 was an individual interest, not the interest of the unions or the collective interest of the union's members. The applicability of s. 13 and s. 15 will not be considered on the teacher's request for review, but the teacher, and the unions participating under s. 54(b), will be permitted to raise the s. 21 interests that they claim to have.

Key Words: third party—request for review—discretionary exception.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13, 15, 21, 22 23, 24, 52, 53, 54.

Authorities Considered: B.C.: Order 04-04, [2004] B.C.I.P.C.D. No. 4; Order 04-05, [2004] B.C.I.P.C.D. No. 5; Order F05-02, [2005] B.C.I.P.C.D. No. 2.

Cases Considered: *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441; *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131, [2006] B.C.J. No. 155.

1.0 INTRODUCTION

[1] On February 15, 2006 this office received a request for review under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") of a response by the Board of School Trustees of School District No. 71 (Comox) ("School District") to a parent's request for access to records ("Parent") about the investigation of a particular

teacher ("Teacher").[1] This decision concerns three issues preliminary to the scheduling of an inquiry:

1. The role of the Teacher's local and provincial collective bargaining agents, respectively the Comox District Teachers' Association ("CDTA") and the British Columbia Teachers' Federation ("BCTF") (I will refer to them collectively as the "Unions");

2. The basis for review of the applicability of ss. 13 or 15 of FIPPA;

3. The basis for review of the applicability of s. 21 of FIPPA.

2.0 DISCUSSION

[2] **2.1 Background**—I will first set out the background to this decision.

[3] The Parent made an access request to the School District for records relating to an investigation of the Teacher. The School District gave notice under s. 23(1) to the Teacher and to the CDTA, "as [the Teacher's] representative", that the School District intended to give the Parent "access to records that may contain information excepted from disclosure under Section 22(3)(d)".[2] The notice said that the School District had identified three categories of responsive records and invited input about the information that the School District intended to disclose in category 3:

1. Records that were already in the Parent's possession (including correspondence to and from the Parent) that the School District therefore intended to disclose in their entirety.

2. Records the School District intended to refuse to disclose to the Parent in their entirety on the basis that the records related solely to the Teacher's employment history and were therefore excepted from disclosure because of s. 22(3)(d).

3. Records the School District intended to partially disclose to the Parent on the basis that personal information about the Teacher that was excepted from disclosure because of s. 22(3)(d) could be reasonably severed from personal information of the Parent and the Parent's child that was not excepted from disclosure.

[4] The Unions and Teacher delivered a joint 23-page response to the notice through the same lawyer. Although the School District's notice to the Teacher was in relation to s. 22, the response opposed the disclosure of any records at all to the Parent on the basis that ss. 12, 13, 15, 21 and 22 all applied to except the responsive records from disclosure.

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[1] The OIPC file number for this request for review is F05-27891.

[2] Section 22 precludes disclosure of personal information in response to an access request where the disclosure would be an unreasonable invasion of personal privacy. Section 22(3)(d) is the presumption that the disclosure of personal information that relates to employment, occupational or educational history will be an unreasonable invasion of a third party's personal privacy.

[5] The School District, through its lawyer then sent a notice of decision, under s. 24 of FIPPA, to the lawyer for the Unions and Teacher. The letter said that, after considering the submission of the Unions and Teacher, the School District had decided to disclose to the Parent the information in the category 3 records that it had proposed to disclose in the s. 23(1) notice, unless a request for review was requested under FIPPA.

[6] The School District clarified that the category 1 records had already been provided to the Parent; the category 2 records were being withheld in their entirety (and the obligation to provide a summary under s. 22(5) did not apply) and the category 3 records were going to be disclosed to the Parent in severed form.

[7] Through the same lawyer, the Unions and Teacher, describing themselves as all "third parties in this matter", together made a request for review under s. 53 of FIPPA. The request objected to the School District's disclosure of the category 1 records on the basis that those were excepted from disclosure by ss. 12, 13, 15, 21 and 22, and that the School District had denied them an opportunity to make submissions about the disclosure of those records. It also objected to the School District's proposed severed disclosure of the category 3 records on the basis that, even in severed form, they were excepted from disclosure by ss. 12, 13, 15, 21 and 22.

[8] The Registrar of Inquiries sought written submissions on the preliminary issues mentioned above and I have considered those submissions in making my decision on the preliminary issues. The Parent did not provide a submission, but was included in the distribution of submissions that were received. In their submission, the Unions abandoned their intention to argue that s. 12 applies to any of the records**.**

[9] In addition to the request for review made by the Unions and Teacher, the Parent made two requests for review: one in relation to the School District's initial response to the Parent's access request[3] and one in relation to the School District's response to what amounted to a further expanded access request by the Parent.[4] The three requests for review are in relation to the same parties and overlapping records and their merits will be considered together in an inquiry that has yet to be scheduled.

[10] This decision about the Unions' role in the request for review that the Unions made together with the Teacher, and the basis for the raising of certain disclosure exceptions in relation to that request for review, may obviously also have implications for those same issues about the role of the Unions and the raising of those disclosure exceptions in relation to the Parent's requests for review.

[11] **2.2 Role of the Unions**—The request for review made by the Unions and Teacher refers to each of them as a "third party" requesting a review under s. 53 of FIPPA, which prescribes the process for asking for a review by delivering a written request to the commissioner. Counsel for the Unions and the Teacher regard it as a "somewhat academic exercise" to address the Unions' interests separately from the

[3] OIPC file F05-27006.
[4] OIPC file F05-28184.

Teacher's interest because they all "together, or on their own, clearly have standing to make all the submissions that we intend to make in this review" and the same law firm represents them all.

[12] The School District says that the Unions do not have any independent standing or right to request a review in this matter. It emphasizes that, under FIPPA, only an applicant for access to a record or for correction of personal information, or a third party notified under s. 24, has a right to request a review.

[13] I do not agree that examining the roles of the Unions and Teacher is an academic or pointless exercise. It is not in the least apparent that all the issues that the Unions and Teacher seek to raise can be properly raised by any of them. Further, it is not tenable—logically, practically and as a matter of statutory interpretation—to suggest that if *some* person (such as the Teacher) has a right under s. 52 to ask for a review, then that right may be jointly exercised by any number of *other* persons as well. Section 52 must be read and applied as it is enacted and in the context of the overall scheme of FIPPA and this in my view leads to a very clear result in this case.

[14] The meaning of "third party" is defined in Schedule 1 to FIPPA as follows:

> **"third party"**, in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than
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> (a) the person who made the request, or
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> (b) a public body.

[15] Each of the Unions, neither of which is a person who made an access request or a public body, is a "third party" under this definition, but that is not the end of the matter. Not all interests, third party and otherwise, trigger the right created by s. 52 of FIPPA to ask for a review. That section prescribes who has the right to ask for a review as follows:

> 52(1) A person who makes a request to the head of a public body, other than the commissioner or the registrar under the *Lobbyist Registration Act*, for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under section 42(2).
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> (2) A third party notified under section 24 of a decision to give access may ask the commissioner to review any decision made about the request by the head of a public body, other than the commissioner or the registrar under the *Lobbyist Registration Act*.

[16] It is obvious that neither the Unions nor Teacher fit under s. 52(1). That they are not third parties that fit under s. 52(2) requires some understanding of ss. 23 and 24 of FIPPA, which read as follows:

Notifying the third party

23(1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).

(2) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 21 or 22, the head may give the third party a written notice under subsection (3).

(3) The notice must

(a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party,

(b) describe the contents of the record, and

(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.

(4) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that

(a) the record requested by the applicant contains information the disclosure of which may affect the interests or invade the personal privacy of a third party,

(b) the third party is being given an opportunity to make representations concerning disclosure, and

(c) a decision will be made within 30 days about whether or not to give the applicant access to the record.

Time limit and notice of decision

24(1) Within 30 days after notice is given under section 23 (1) or (2), the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, or

(b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision to

(a) the applicant, and

(b) the third party.

(3) If the head of the public body decides to give access to the record or to part of the record, the notice must state that the applicant will be given access unless the third party asks for a review under section 53 or 63 within 20 days after the day notice is given under subsection (2).

[17] The School District gave the Teacher notice under s. 23 that it intended to give access to records that it had reason to believe might contain personal information about the Teacher that was excepted from disclosure under s. 22. The School District then also notified the Teacher under s. 24 of its decision to give access. The notices under s. 23 and s. 24 were directed at personal information about the Teacher in the requested records that the School District considered might be excepted from disclosure under s. 22. Section 52(2) entitles the Teacher to ask for a review of the School District's decision that was the subject of the s. 24 notice.

[18] The Unions' (and the Teacher's) position is summarized as follows in their initial submission:

> …we submit that the Union has standing to speak on its own interests with respect to ss. 21, 13 and 15. We further submit that, generally, the Union ought to be granted standing to speak on its own behalf in respect of issues relating to s. 22. However, in this case, because the Union is content with the representations made on behalf of the Member [the Teacher], the Union does not seek standing to make further submissions on its own behalf in respect of s. 22.[5]

[19] The Unions and Teacher argue that the School District's notice of decision under s. 24 was directed at all of them, not just the Teacher. This is not an accurate depiction of the School District's notice letter, which was from counsel for the School District to counsel for the Unions and Teacher. That letter has to be read in context with the s. 23 notice that preceded it, which was directed to the Teacher and to the CDTA as the Teacher's representative. Also, quite apart from how the notice letters happened to have been addressed, the substance of the s. 23 notice and the s. 24 decision clearly was directed to the applicability of s. 22 and the Teacher's interest in what might be his or her personal information in the records.

[20] This is how the School District states its position:

> …if the head [of the public body] determines that a record may contain information the disclosure of which is harmful to the business interests of a third party (section 21), or harmful to personal privacy (section 22), the head must give the third party a notice under section 23. If the head subsequently decides to disclose a record containing such information, it must give notice of that decision under section 24, and it is that notice that triggers the right to request a review under section 52.
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> If no notice is given under section 23 and then section 24, because the head of the public body does not have reason to believe that the disclosure would harm the privacy interests protected by section 21 or 22, then there is no right of review by a putative third party under section 52. Moreover, the scheme of the Act does not allow for a request for review of a decision made under the discretionary exceptions, except by an applicant.

[5] Page 1, Unions initial submission.

> This is consistent with the scheme of the Act which provides that the role of the Commissioner in adjudicating a request for review is to review a decision of the public body to withhold information from the requested records under one of the Act's exceptions. That review role of the Commissioner is inconsistent with the proposition that the Commissioner has the power to order, or to request, that a public body **withhold** information under a discretionary exemption (i.e. Sections 12(3), 13 or 15) where the head of the public body has decided either that those sections do not apply or that if one of those sections applies, the head of the public body has chosen to exercise his or her discretion in favour of disclosure.
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> …
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> …[if the CDTA or BCTF] assert that they ought to have been provided notice, their remedy lies either by way of judicial review or by bringing a complaint to the Commissioner under section 42(2) that a duty imposed by the Act has not been complied with. The fact that the CDTA and BCTF may assert that they should have been given notice, so as to be able to request a review does not provide a springboard to being able to request such a review without any statutory warrant.
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> The BCTF and CDTA assert that by virtue of their collective bargaining relationship with the Board, they fall within the definition of "third party" under the Act. It would be more accurate to say that they, in relation to a particular access request, **may be** a third party under the Act. The requirement of section 23, however, is that the head of the public body must have reason to believe that the disclosure of a record would reveal information that might be excepted from disclosure under sections 21 or 22. Until that determination is made, the BCTF and CDTA have no right to make submissions on their own behalf or in respect of section. 21.[6] [original bold]

[21] The assertion of coinciding positions on issues by the Unions and Teacher does not create the existence of recognized interests by each of them under FIPPA. The Unions may support the Teacher's request for review with relevant evidence or by otherwise assisting the Teacher's participation, but it remains an important point that the Teacher's right to ask for a review under s. 52(2) is the Teacher's right, not the Union's right. The Unions do not fit under s. 52 and therefore do not have the right to request a review in this matter. The fact that the Unions fall under the definition of "third party" in Schedule 1 of FIPPA does not allow them to piggyback onto the Teacher's s. 52(2) right to ask for a review.

[22] The Unions and the Teacher regard this as an unduly, and unfairly, technical interpretation of s. 52. Section 52 is simply too clearly worded to be reasonably interpreted as the Unions and Teacher would read it. Their reading of the clear legislative language would essentially extend a right to request a review to any person who maintains they have an interest in a disclosure exception in Part 2 of FIPPA, whether or not that exception falls under s. 23 or the public body has given notice of its

[6] Pages 5, 6 and 7, School District initial submission.

possible application to them under s. 23 and then made a decision under s. 24. If this is what the Legislature intended for s. 52, the section would be expressed in that way. It is not.

[23] Last, the Unions and Teacher say that the decision of the Supreme Court of Canada in *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*[7] supports an expansion of the right to request a review under s. 52 of FIPPA. I do not agree. In *Heinz*, the party seeking review in the Federal Court of Canada undoubtedly had a sufficient interest under the federal *Access to Information Act* to do that. The issue was whether the party seeking review could raise the applicability of the mandatory disclosure exemption for personal information, in which the party itself had no interest.

[24] By contrast, the context for this case is that s. 52 of FIPPA gives the Teacher, but not the Unions, a right to request a review in respect of the applicability of a mandatory disclosure exception to the Teacher's personal information. The questions raised by this case have to be answered in relation to the structure and wording of FIPPA, not judicial consideration of materially different facts against the peculiarities of different legislation. For this reason, I will now also further address, within the framework of FIPPA, the arguments for the raising of specific disclosure exceptions on this review.

[25] **2.3 Section 22 and Personal Privacy**—Not surprisingly, the Unions and Teacher acknowledge that the records do not contain information that constitutes personal information of the Unions. Schedule 1 to FIPPA defines "personal information" as "recorded information about an identifiable individual". The Unions are not individuals and information about the Unions, if there is any in the records, is not information about an individual.

[26] The Unions no longer seek to make submissions on their own behalf in respect of s. 22. They say this because the Unions are satisfied with the Teacher's representations, not because they agree that they have no s. 22 interest to which they can speak. They still maintain that the Unions ought to be heard as an interested party, intervener or *amicus curiae* in any review under FIPPA in which a teacher's personal information is at issue.

[27] I agree with the approach of Adjudicator Francis to the status of two collective bargaining agents in respect of the applicability of s. 22 in Order F05-02,[8] another case that involved a parent's complaint about a teacher followed by a school district investigation and an access request under FIPPA by the parent. The requested records contained personal information of the teacher. The school district sent a notice to the teacher under s. 23 of FIPPA and the local union represented the teacher in making representations in response to that notice. The teacher objected to the school district's decision on the access request and requested a review of the decision. In Order F05-02, Adjudicator Francis said the following:

> [10] **3.1 The teacher's submission** – The teacher's submissions in the inquiry were made through counsel, who claimed to represent the British Columbia

[7] [2006] 1 S.C.R. 441.
[8] [2005] B.C.I.P.C.D. No. 2.

> Teachers' Federation ("BCTF") and the NDTA, making submissions on behalf of their member, the teacher, and on their own behalf.
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> [11] The BCTF and NDTA do not acquire interests under the Act [FIPPA] in respect of information in the requested reports by tendering submissions on behalf of the teacher and claiming that the submissions are also made on behalf of the BCTF and NDTA. For example, the issue in this inquiry about whether s. 22 requires the School District to withhold personal information in the two reports concerns the interests of identifiable individuals, not the BCTF or the NDTA. These organizations may, or may not, agree with or support the perspective of an individual who is one of their members (in this case the teacher) in respect of that individual's personal information. The personal information interests nonetheless relate to identifiable individuals, not to organizations. The s. 22 issue in this inquiry relates to the teacher as an identifiable individual, not to the BCTF or the NDTA. That is how I have addressed the issue in this order and, unless otherwise indicated, I have referred to the submissions tendered by the teacher, BCTF and NDTA in this order simply as the teacher's submissions.

[28] Other rights and factors compete within FIPPA's framework with an individual's right of personal privacy and right to request access to and correction of her or his own personal information in records that are in the custody or control of a public body. An example of this is s. 19, which provides that an individual may be denied access to his or her own personal information where disclosure could reasonably be expected to endanger individual safety or health (including that of the access applicant) or the safety of the public.

[29] Another person, such as a collective bargaining agent, may not, however, exercise or speak for an individual concerning the individual's own personal information rights under FIPPA without the individual's express consent for purposes of FIPPA. Even in that case, the other person would be speaking, not on its own behalf, but strictly on behalf of the individual and only as the individual authorizes.

[30] Nor is an individual required to compete with another person, such as the individual's collective bargaining agent, respecting the individual's personal information rights under FIPPA. The prospect of this happening is easy enough to foresee if, in a FIPPA inquiry involving two individual members of a collective bargaining unit—one as the access applicant and one as a third party whose personal information is contained in the requested records—the collective bargaining agent could control the engagement of its members' individual rights under FIPPA as against each other.

[31] **2.4 Sections 13 and 15**—In Order 04-04[9] and Order 04-05,[10] Adjudicator Francis refused to permit a third-party teacher who had requested a review under s. 52(2) to argue that s. 12(3)(b) and s. 13(1)—both discretionary exceptions—applied to the disputed records. Order 04-04 and Order 04-05 were set aside in part and remitted back for reconsideration in *British Columbia Teachers' Federation v. British*

[9] [2004] B.C.I.P.C.D. No. 4.
[10] [2004] B.C.I.P.C.D. No. 5.

Columbia (Information and Privacy Commissioner),[11] but not on Adjudicator Francis's treatment of this issue, which the court found reasonable:

> [87] The Petitioners say the Commissioner [Adjudicator Francis] erred in concluding that the disclosure exceptions in s. 12(3)(b) and s. 13(1) could not be invoked by a third party.
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> [88] It is not an unreasonable interpretation of the Privacy Act [*i.e.*, FIPPA] to find that these provisions are discretionary provisions that may only be invoked by the public body at its own discretion. The third party cannot compel the public body, in this case the School Board, to exercise its discretion in a particular way. Accordingly I would dismiss this ground of review.

[32] In Order F05-02, Adjudicator Francis again refused to permit the applicability of s. 13(1) to be raised in a FIPPA review requested by a third party. The unions in that case had argued that confidentiality provisions in their members' collective agreement with the public body, another school district, removed any element of public body discretion in s. 13(1) and required the school district to refuse to disclose advice and recommendations to which, the unions said, s. 13(1) applied. Adjudicator Francis disagreed and said this:

> [87] The purpose of s. 13(1) is to protect a public body's internal decision-making process and its ability to obtain full and frank advice and recommendations on proposed courses of action, among other things. The Act does not require or otherwise contemplate public bodies giving third-party notice in respect of s. 13. This legislative choice reflects the fact that s. 13(1) addresses public body, not third-party, interests in withholding access to information. If a public body relies on s. 13(1) to withhold information from an access applicant, the access applicant can request a review of that decision, including the public body's application of s. 13(1) to requested records. A third party may not, however, as a means of advancing its own interests or taking up the public body's interests, challenge a public body's assessment that facts or other circumstances do not permit or justify the application, in the public body's interests, of s. 13(1) to requested records.
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> [88] The School District did not apply s. 13(1) to any information in the requested reports or offer an explanation in that regard. Nor was it required to, by the Act or for the purposes of this inquiry.
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> [89] Even if some or all information in the two reports could potentially have fallen under s. 13(1), I do not agree with the teacher's submission. The wording of Article 16 of the collective agreement does not compel the application of s. 13(1). It is also highly questionable that the operation of the Act or exercise of the School District's discretion under the Act, in relation to the applicant, could be dictated in the collective agreement by the parties to that agreement.

[33] In this case, the Unions and the Teacher say that, "when the School District exercises its discretion in relation to an investigation into alleged misconduct of

[11] 2006 BCSC 131, [2006] B.C.J. No. 155 setting aside and remitting back Order 04-04 and Order 04-05, in part, for other reasons.

a teacher, that teacher, the BCTF and its local association ought to be entitled to make submissions on the manner in which the discretion is exercised". They emphasize that the court's decision in *British Columbia Teachers' Federation* did not hold that the adjudicator was correct in her conclusion about third parties raising the s. 12(1)(b) and s. 13(1) disclosure exceptions, only that it was not an unreasonable interpretation of the legislation. The Unions and Teacher submit that they ought to be able to invoke the discretionary disclosure exceptions in s. 13 and s. 15 and make submissions on the factors that the School District ought to consider when exercising its discretion about whether to rely on those provisions, if they are applicable.

[34] They rely on the collective agreement between the School District and the Unions:

> We submit that when the School District exercises its discretion under *FOIPPA*, the Collective Agreement between the School District and the Union (the "Collective Agreement") is a significant factor. In the Collective Agreement, the parties have agreed to keep personnel and disciplinary documents confidential (Articles C.2.6, E.10.6 and Board Policy 2021), including, we submit, any underlying documentation in respect of the same. The fact that the School District has agreed to these confidentiality provisions, gives the Union an interest in the manner in which the School District exercises its discretion under ss. 12, 13 or 15 (or indeed any such discretion) to disclose such documents, as well as the manner in which the School District interprets ss. 21 and 22, in light of the contractual obligations to maintain confidentiality of teachers' personnel and disciplinary information.
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> In this way, the Collective Agreement represents the School District's and the Union's agreement that certain matters will be held in confidence. While we are not asserting that this confidentiality agreement supersedes or alters the School District's mandatory statutory obligations under *FOIPPA*, the Collective Agreement does indeed affect the manner in which the School District exercises its discretion. The Collective Agreement requires the School District to exercise its statutory discretion so as to protect the confidentiality of the matters addressed in Articles C.2.6, E.10.6 and Board Policy 2021. The School District's contractual obligations speak to the continuing relevance of, in this case, ss. 12, 13 and 15, notwithstanding their discretionary nature, and speaks to the ability of the BCTF, the CDTA and the member to rely on these sections and make submissions in respect of them in these proceedings.[12]

[35] They say the records would reveal aspects of the advice or recommendations that led to the School District's decision not to proceed against the Teacher and the School District ought to have exercised its discretion to refuse to disclose those records under s. 13.

[36] They say s. 15 was engaged because the School District's investigations concerning the Teacher were "law enforcement matters" and the School District should have exercised its discretion to refuse to disclose, under ss. 15(1)(a) and (c), "confidential, investigatory documents relating to allegations against the member that were ultimately unsubstantiated".

[12] Page 4, Unions initial submission.

[37] I agree with Adjudicator Francis's conclusion in Order 04-04 and Order 04-05 and with her conclusion and expanded analysis in Order F05-02. Unlike s. 21 and s. 22, to which the s. 23 and 24 regime for public body notice applies, FIPPA does not provide for a public body to give notice about its intentions to apply or not apply s. 13 or s. 15 to information in a requested record. Consistent with this, s. 52(1) gives access to applicants, and individuals as regards requests for correction of their own personal information, a right to request a review. Section 52(2) creates a right to request a review for third parties who received notice under s. 24 in respect of s. 21 or s. 22. There is no right to request a review on the basis that the public body ought to rely on s. 13 or s. 15 to deny access to information. Determination of this issue is a matter of respecting the visible and logical design features in FIPPA that clearly assign notice and request for review rights that are limited to certain types of persons and interests.

[38] The Teacher's request for review under s. 52(2) respecting the application of s. 22 to the Teacher's personal information therefore will not be expanded to consider whether the School District could or should have relied on s. 13 or s. 15 to withhold information in requested records. In reaching this conclusion, I am aware of s. 54(b) of FIPPA, which authorizes me to give a copy of a request for review to any other person I consider appropriate. The potential significance of s. 54(b) to permit the expansion of a review and inquiry if it becomes apparent that the public body overlooked providing s. 23 notice that it ought to have provided with respect to apparent s. 21 or 22 interests was summarized as follows in Order F05-02:

> [18] Section 54 of the Act provides for the Commissioner to give a copy of a request for review to the head of the public body concerned and to "any other person that the commissioner considers appropriate". The exercise of this discretion was considered to some degree in a preliminary ruling dated May 10, 2002, respecting Order 01-52, [2001] B.C.I.P.C.D. No. 55, and in *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner)* (2004) 26 B.C.L.R. (4th) 1 (C.A.), which also concerned Order 01-52.
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> [19] It was not considered appropriate here to notify others, beyond the School District, of the teacher's request for review, for the reasons that s. 23 notices to other individuals were not required. I would add that, at this stage, the inquiry arises from the teacher's request for review, which concerned protection of the teacher's personal privacy, so the focus of the inquiry was quite naturally on whether s. 22 requires the School District to refuse to disclose personal information about the teacher, and not on other issues or matters. This is not to say that unexpected issues may never cause the Commissioner to consider it appropriate to give notice to others under s. 54(b). As the Commissioner stated at p. 11 of his preliminary ruling respecting Order 01-52:
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> > There may be instances where it only becomes apparent at the review stage that a person was not notified by the public body under s. 23 when, as provided in s. 23, that person ought to have been. It is also possible that a public body may entirely overlook that the s. 21 or s. 22 disclosure exception might apply to some of the information involved. In such cases, the person who there is reason to believe might be a third party under s. 21 or s. 22 is given notice of the review under s. 54(b).

[39] Given the design of the notice and right of review provisions in FIPPA, the nature of the s. 13 and s. 15 disclosure exceptions and, if necessary, also the foundations the Unions and Teacher have offered for seeking to argue that the School District could and should have applied those disclosure exceptions, I do not consider it appropriate for the applicability of those provisions to be raised on this review or for the Unions (or anyone else) to be provided with a copy of the request for review under s. 54(b) in order to permit them to raise the applicability of those provisions.

[40] **2.5 Section 21**—The School District did not give any notice to the Unions and it gave notice to the Teacher only in relation to whether s. 22 applied to prevent disclosure of personal information about the Teacher. The Unions and Teacher nonetheless, in response to the notice sent to the Teacher, raised other disclosure exceptions. For s. 21, they said the responsive records contain labour relations information of or about the School District, the Unions and the Teacher (s. 21(1)(a)(ii)), that was implicitly or explicitly supplied in confidence (s. 21(1)(b)), and the disclosure of which could reasonably be expected to either result in similar information no longer being supplied when continued supply is in the public interest (s. 21(1)(c)(ii)) or to reveal information supplied to a labour relations officer or other person or body appointed to inquire into a labour relations dispute (s. 21(1)(c)(iv)).

[41] The Unions and Teacher maintain that the School District ought to have given them notice under s. 23 with respect to their s. 21 interests and they should be able to raise it now anyway. As they point out, s. 21 is mandatory: if it applies to information in a requested record, the School District must refuse to disclose that information.

[42] Similar arguments were made in Order 04-04 and Order 04-05, in which Adjudicator Francis found that s. 21 did not apply to investigation reports into complaints made by parents about a teacher. She reached the same conclusion again in Order F05-02. The court in *British Columbia Teachers' Federation*, held, at para. 91, that Adjudicator Francis's reasons in Order 04-04 and Order 04-05 for declining to find that s. 21 applied were a reasonable interpretation of FIPPA and a matter within her core expertise. The School District invites me to reach the same conclusion in this ruling, while the Unions and Teacher say that these Orders, and Order F05-02, were all wrongly decided as regards s. 21 and are also factually distinguishable from this case. They say it would be unfair to preclude them at this stage from arguing the merits of their claimed s. 21 interests in this case.

[43] Mainly because s. 21 is a mandatory exception, I have decided to permit its application to be raised on this review and that, in addition to the participation of the Teacher who requested the review, it is appropriate under s. 54(b) to allow the Unions to participate on that issue. This is not to say that, based on the material I have reviewed for this decision, I am of the view that the School District erred by not giving the Unions or the Teacher notice under s. 23 on the basis of interests they might have under s. 21; that the facts of this case are necessarily distinguishable from those in the earlier orders in which s. 21 was found not to apply; or that there is merit to the Unions' or the Teacher's position respecting s. 21. Those issues remain to be decided.

3.0 CONCLUSION

[44] My conclusions in this preliminary decision can be summarized as follows:

1. The Teacher had a right to request a review under s. 52(2) of FIPPA.

2. The Unions had no right to request a review under FIPPA.

3. The applicability of s. 13 or s. 15 may not be raised on this review.

4. The Teacher may raise his or her alleged interest under s. 21.

5. The Unions are given notice, under s. 54(b), of the Teacher's request for review for the purpose of participating in the review to raise the Unions' alleged interests under s. 21.

October 24, 2006

ORIGINAL SIGNED BY

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David Loukidelis
Information and Privacy Commissioner
for British Columbia