Order P06-02

VICTORY SQUARE LAW OFFICE & BRITISH COLUMBIA NURSES' UNION

David Loukidelis, Information and Privacy Commissioner
September 14, 2006

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Summary: The applicant requested his personal information in documents of the two organizations. The organizations were authorized and required to refuse disclosure under ss. 23(3) and (4).

Key Words: able to remove—personal information—solicitor-client privilege—mental health or safety—mediation or arbitration—personal information about another individual—reveal the identity of another individual.

Statutes Considered: B.C.: *Personal Information Protection Act*, ss. 23(3)(a), (c), (d), (e)(i), 23(4)(a), (c), (d) and 23(5); *Freedom of Information and Protection of Privacy Act*, ss. 14, 19(1)(a) & 22(1).

Authorities Considered: B.C.: Order P06-01, [2006] B.C.I.P.C.D. No. 5; Order F06-16, [2006] B.C.I.P.C.D. No. 23; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order No. 158-1997 [1997] B.C.I.P.C.D. No. 16; Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 03-08, [2003] B.C.I.P.C.D. No. 8; Order F06-11, [2006] B.C.I.P.C.D. No. 18. **Ont.:** Order P-441, [1993] O.I.P.C. No. 86; Order M-625, [1995] O.I.P.C. No. 413; Order M-431, [1994] O.I.P.C. No. 400.

Cases Considered: *British Columbia (Ministry of Transportation & Highways) v. B.C.G.E.U., Local 1103* (1990), 13 L.A.C. (4th) 190; *Slavutych v. Baker*, [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224; *Re Canada Safeway Ltd. v. Retail Clerks Union, Local 1518*

(1984), 21 L.A.C. (3d) 50; *Ed Miller Sales & Rentals v. Caterpillar Tractor Co.*, [1988] A.J. No. 810 (C.A.); *British Columbia and B.C.G.E.U. (Lowery), Re (* 1992), 28 L.A.C. (4th) 237; *Centre for Addiction and Mental Health* (2004), 133 L.A.C. (4th) 178; *College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner),* [2002] B.C.J. No. 2779 (C.A.); *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] S.C.R. No. 39; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.); *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.); *Humber Memorial Hospital and Ontario Nurses' Association (Tomlinson)* (1993), 37 L.A.C. (4th) 125.

1.0 INTRODUCTION

[1] This decision arises from two requests by the applicant, under the *Personal Information Protection Act* ("PIPA"), for "all information relating to myself and in your possession." These requests, which were made a day apart, were directed to Victory Square Law Office ("Victory Square"), a law firm located in Vancouver, and the British Columbia Nurses' Union ("BCNU").

[2] In his request to the BCNU, the applicant said this:

> In particular, I highlight the fact that I was the subject of a nursing grievance in 2002. I understand that the complaints from nurses who commenced the grievance were those that related to bogus human rights complaints that were filed against me earlier.
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> I understand that the nursing grievance led to a mediation and that the terms of that mediation were open ended.

[3] His request to Victory Square was in the same language, but added, "It is my understanding that your firm participated in these affairs in representation of the BCNU. I understand that the lawyer responsive [*sic*] in this regard is a Ms. Fiona Begg."

[4] Victory Square responded by saying that any "information which is in our possession is subject to solicitor-client privilege and therefore we are not required to produce it pursuant to the *Personal Information Protection Act*." Roughly one month later, the BCNU responded that the information is exempted from disclosure under ss. 23(3)(a), (c) and (e)(i) and ss. 23(4)(a) and (c) of PIPA. A letter that a lawyer with Victory Square sent the applicant some months later said that the BCNU[1] relies on ss. 23(3)(e)(i), 23(4)(a), (c) and (d) of PIPA.

[5] These responses prompted the applicant to request reviews by this Office of the denial of access. Because the matter did not settle in mediation by this Office, a written inquiry was held under PIPA.

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[1] Victory Square represents the BCNU in this inquiry and made submissions on its own behalf respecting the applicant's request to Victory Square. I will refer to Victory Square and the BCNU collectively, where appropriate, as the "organizations".

2.0 ISSUES

[6] The issues in this case are as follows:

1. Whether Victory Square and the BCNU were authorized to withhold records under s. 23(3)(a) of PIPA;

2. Whether the BCNU was authorized to withhold records under ss. 23(3)(c) and 23(3)(e)(i); and

3. Whether the BCNU was required to withhold records under ss. 23(4)(a), (c) and (d) of PIPA.

[7] Section 51 of PIPA establishes the burden of proof in inquiries. The relevant portions read as follows:

> 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 …

[8] This Office gave notice of the inquiry, under s. 41(1)(b), to certain third parties and third parties made submissions in the inquiry.

3.0 DISCUSSION

[9] **3.1 The Right of Access**—A few background comments are in order before turning to the merits.

[10] Section 23 of PIPA gives individuals the right to gain access to their own personal information:

> ***Access to personal information***
>
> 23(1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:
>
> (a) the individual's personal information under the control of the organization;
>
> (b) information about the ways in which the personal information referred to in paragraph (a) has been and is being used by the organization;
>
> (c) the names of the individuals and organizations to whom the personal information referred to in paragraph (a) has been disclosed by the organization.

[11] As is demonstrated by the discussion below, however, PIPA protects certain interests by limiting the right of access to one's own personal information.

[12] **3.2 Solicitor-Client Privilege**—Section 23(3) protects third-party and other interests by placing limits on the right of an individual to gain access to her or his own personal information:

> (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; ….

[13] The organizations contend that s. 23(3)(a) is the "equivalent provision" to s. 14 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") and that both "sections incorporate common law parameters for the purpose of determining solicitor-client privilege."[2]

[14] I accepted this in Order P06-01,[3] seeing no reason to interpret the words "solicitor-client privilege" in s. 23(3)(a) differently from the same words in s. 14 of FIPPA. The principles of legal advice privilege and of litigation privilege applied in Order F06-16[4] and many other FIPPA decisions apply under s. 23(3)(a) of PIPA. I should add that, as I noted in Order 02-01,[5] a decision under FIPPA, "the common law principles of solicitor-client privilege must be applied by examining each record with an awareness of the particular relationships and obligations involved."

[15] The organizations, having indicated their agreement with this view and having set out the elements of legal advice privilege, nonetheless argue that the concept of privilege reflected in s. 23(3)(a) goes further. They say that "several" labour arbitrators have upheld privilege claims "in relation to communications for the dominant purpose of providing labour relations advice to a union member by

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[2] Para. 5, initial submission. The courts have confirmed that the common law principles of solicitor-client privilege apply under s. 14 of FIPPA. See, for example, *College of Physicians & Surgeons v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 2779 (C.A.); *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* (1996), 140 D.L.R. (4th) 372 (B.C.S.C.), *British Columbia (Minister of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.). The Supreme Court of Canada held last week that solicitor-client privilege and litigation privilege are "conceptually distinct"; although they "often co-exist…they are not coterminous in space, time or meaning." See *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] S.C.R. No. 39, at para. 1. The Court went to hold that s. 23 of the federal *Access to Information Act*, which exempts from disclosure information "that is subject to solicitor client privilege", incorporates both types of privilege. As I indicated in Order 02-01, the courts in British Columbia have interpreted s. 14 of FIPPA in the same way and *Blank* does not change this.

[3] [2006] B.C.I.P.C.D. No. 5.

[4] [2006] B.C.I.P.C.D. No. 16.

[5] [2002] B.C.I.P.C.D. No. 1.

either a union steward or union staff representative."[6] Put another way, they contend that arbitrators have, "in the context of arbitration hearings between the employer and the union, recognized "communications as privileged between a union steward or union staff representative for the dominant purpose of obtaining labour relations advice."[7] They suggest that a similar privilege should exist here.

[16] The first of three arbitration decisions that the organizations cite is *British Columbia (Ministry of Transportation & Highways) v. B.C.G.E.U., Local 1103*,[8] where Arbitrator Larson dealt with a preliminary issue relating to the admissibility of evidence. The employer had tried to exclude two documents from evidence. Arbitrator Larson noted the "normal exclusionary rule" relating to discussions between the parties in the processing of a grievance, but held that this rule did not apply. He went on, however, to apply criteria approved of by the Supreme Court of Canada in *Slavutych* v. *Baker*[9] for establishment of privilege over certain confidential communications. The conditions for that privilege were expressed as follows in *Wigmore on Evidence*, a well-known American text on the law of evidence:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[10]

[17] Arbitrator Larson ruled that both of the documents should be protected from disclosure on the basis of this kind of privilege.[11]

[18] The organizations also rely on *Humber Memorial Hospital and Ontario Nurses' Association (Tomlinson)*.[12] This case also involved disclosure of

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[6] Para. 13, initial submission.
[7] Para. 16, initial submission.
[8] (1990), 13 L.A.C. (4th) 190.
[9] [1976] 1 S.C.R. 254, 55 D.L.R. (3d) 224.
[10] *Slavutych*, quoting from vol. 8 of *Wigmore on Evidence*, 3rd ed., (McNaughton Revision, 1961), para. 2285.
[11] The organizations describe Arbitrator Larson's decision in *B.C.G.E.U.* as having been "affirmed" by the British Columbia Court of Appeal. The Court of Appeal dismissed an appeal from his decision on the ground that the Court did not have jurisdiction, in light of the *Industrial Relations Act*, to hear the appeal. The Court did not rule on the merits of the decision, including as regards privilege.
[12] (1993), 37 L.A.C. (4th) 125.

documents in a grievance proceeding. The employer hospital asked the arbitrator to order the union to disclose notes of interviews, telephone discussions and meetings held between the union and its member, as well as other correspondence and written communications between the member and agents or representatives of the union.

[19] Arbitrator Kaufman noted that "there is a general rule of arbitral jurisprudence that communications between the grievor and her union regarding the preparation of a grievance or the settlement of same, are privileged." [13] He went on to note that, in addition, "communications between the grievor and the lawyer acting on her behalf as well as on behalf of the association [union] are subject to solicitor-client privilege."[14] The arbitrator noted that, during the relevant period, "privileged relationships and confidential communications likely existed as between the grievor and the association [union], as between the grievor, the association and counsel for the association, and as between the association and its counsel."[15]

[20] In the last arbitration decision the organizations cite, *Re Canada Safeway Ltd. v. Retail Clerks Union, Local 1518.*[16] Arbitrator McColl (later McColl J.), ruled that conversations between a union shop steward and a member of the union are privileged and cannot be admitted in the proceeding. Although Arbitrator McColl indicated that, in some cases, the confidentiality of communications between a union member and her or his shop steward might well warrant excluding those communications on the basis of a privilege based on policy, no question of solicitor-client privilege arose.[17]

[21] The organizations also argue that disclosure of the requested information "would be particularly unreasonable given that the nurses identifiable in the files gave evidence" against the applicant in a court case, such that the organizations

> …are entitled to deny disclosure of a number of the records [they do not say which] in their files on the basis of absolute privilege, as an extension of solicitor-client privilege as provided for in s. 23(3)(a) of PIPA.[18]

[22] In support, they cite an interim ruling by the trial judge in a lawsuit involving the applicant and others. In that ruling, the trial judge applied what she described as "a partial privilege", based on the principles set out in *Slavutych*, to

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[13] Page 127.
[14] Page 127.
[15] Page 127.
[16] (1984), 21 L.A.C. (3d) 50.
[17] I also note that, contrary to what the organizations submit at para. 15 of their initial submission, Arbitrator McColl did not refuse to allow counsel for the employer to question the grievor about communications between himself and his union steward." Arbitrator McColl held that, for three reasons, any privilege that might otherwise apply had been waived by the grievor's conduct and should be disregarded on policy grounds.
[18] Para. 22.

ban the publication of the names or identifying information of those who had complained against the applicant and the content of those complaints.[19]

[23] The organizations say that, in the circumstances of this case, "there is an inherent interrelatedness among the different grounds for refusing disclosure" which favours total denial of disclosure to the applicant "on the basis that they are privileged in the manner" the trial judge ruled, "and therefore necessarily constitute an extension of solicitor-client privilege for the purposes of coming under s. 23(3)(a) of PIPA".[20]

[24] Again, the organizations argue that the language of s. 23(3)(a) goes beyond solicitor-client privilege and incorporates the kind of privilege contemplated by *Slavutych*, or some other policy-based privilege (including along the lines of *Canada Safeway*). As already indicated, there is no reason to conclude that the Legislature intended the language used in s. 23(3)(a) to have a meaning different from the same language in s. 14 of FIPPA. Further, I rejected a similar argument about the breadth of the words "solicitor-client privilege" in Order 00-08,[21] where I said the following:

> As is noted above, s. 14 of the Act [FIPPA] incorporates only the two branches of legal professional privilege discussed above. In my view, the Legislature did not intend the words "solicitor-client privilege" in s. 14 to have any broader meaning than that. The courts have accepted that forms of professional privilege distinct from solicitor-client privilege may exist. See, for example, *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254. It is clear, however, that these other kinds of professional privilege are different from solicitor-client privilege. Accordingly, even if some kind of common law privilege attached to the disputed records, that privilege is not recognized under s. 14 and the College cannot rely on s. 14 on that basis.

[25] This reasoning was not disturbed on judicial review and I apply it here—s. 23(3)(a) incorporates the two kinds of privilege recognized at common law under the heading of solicitor-client privilege and goes no further.[22]

[26] The applicant submits that the public interest and fairness require disclosure.[23] On the issue of solicitor-client privilege, he notes that the burden is on the party claiming privilege to establish a *prima facie* case for its application.[24] Citing Order 00-08, the applicant contends that solicitor-client privilege "should only extend to direct interactions between client and solicitor and a few others", where the communications are confidential and for the purpose of obtaining and

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[19] [2004] B.C.J. No. 187, at para. 54.
[20] Para. 26.
[21] [2000] B.C.I.P.C.D. No. 8.
[22] I also note that, in *Blank*, although the issue was not squarely raised, the Supreme Court of Canada proceeded on the basis that "solicitor-client privilege" incorporates legal advice privilege and litigation privilege, not more.
[23] Pages 11-12, initial submission.
[24] Page 13, initial submission.

getting legal advice.[25] He also says that litigation privilege does not apply and has not been "pleaded" by the "public body" (by which the applicant must mean the organizations).[26] He also argues that disclosure of the requested information "is critical to my employment and to my life".[27] He says that throughout his interactions with certain public bodies, one of which was his employer, "it has been very confusing as to who has been doing what and when" and alleges certain unspecified conflicts of interest.

[27] In his reply submission, the applicant argues that, in the absence of any affidavit evidence from Victory Square as to its ownership of documents in its files, the documents that Victory Square produced are owned by the BCNU, which has responsibility for and ownership of those documents.[28] He seems to believe that, if the BCNU "owns" the documents, they are not likely to be privileged. The applicant also directly contends that it is unlikely, if not impossible, that all of the documents in Victory Square's files are privileged.[29] The applicant points out that the cases that the organizations cite in support of their expanded privilege claim relate to arbitrations, whereas no arbitrations were involved here and only a mediation occurred between the BCNU and the relevant hospital.[30] He also argues that the Wigmore principles, mentioned elsewhere in this decision, are relevant here, but contends that the fourth principle "favours release and disfavours secrecy".[31]

[28] Victory Square submitted, on its behalf and on behalf of the BCNU, that "we continue to maintain that all records in the Victory Square File are entirely subject to solicitor-client privilege":[32]

[29] Because of the repeatedly-affirmed importance of solicitor-client privilege, I gave the organizations an opportunity to particularize whether both kinds of privilege imported by s. 23(3)(a) apply and to provide evidentiary support accordingly. The applicant and the third parties were given an opportunity to respond. Victory Square and the applicant provided submissions.

[30] Victory Square submitted an affidavit sworn by John Hodgins, a Victory Square partner, and one sworn by Gayle Duteil, who is with the BCNU. Hodgins deposed that the BCNU retained Victory Square to represent the BCNU in grievances that, Duteil deposed, it filed against the hospital that employed the applicant and nurses belonging to the BCNU. Hodgins deposed that Victory Square received "documentary evidence in support of the grievance"[33] and that

[25] Page 12, initial submission.
[26] Page 12, initial submission.
[27] Page 13, initial submission.
[28] Pages 1-2, reply submission.
[29] Pages 2-3, reply submission.
[30] Page 3, reply submission.
[31] Pages 4-5, reply submission.
[32] Page 1, initial submission.
[33] He referred in his affidavit to both "grievances" and "grievance".

the Victory Square lawyer handling the matter "interviewed various individuals."[34] Hodgins's evidence is that the grievances "advanced to arbitration", but "mediation resulted in an interim settlement", such that the arbitration will reconvene in certain circumstances.[35] Accordingly, Hodgins deposed, the contents of Victory Square's file were "provided or created for the purpose of ongoing litigation and the provision of legal advice."[36]

[31] Gayle Duteil also deposed that the BCNU retained Victory Square to act in grievances brought against the hospital. She deposed that the nurses involved had supplied information to the BCNU, in confidence, for the purposes of the grievances, that the BCNU provided documents to Victory Square, and that the Victory Square lawyer had interviewed various individuals.[37] Her affidavit also says it is the BCNU's position that the "documentary material was produced for the purpose of litigation, and in addition, was received from the nurses on a confidential basis."[38]

[32] The applicant in reply argues that there was no litigation in this case, "either formally or through a stretch of the imagination known as the arbitration." He says there was a mediation, "which is not in any way covered under 'litigation privilege'."[39] He asserts that the evidence shows "union/hospital collaboration took place and that effectively waives any secrecy". He also says "criminal matters" override privilege and that "perjury" and "malicious prosecution" are allegedly at hand, thus vitiating any privilege.[40]

[33] This the first time the question has arisen under PIPA of whether grievance arbitration proceedings under a collective agreement between an employer and union are litigation for the purposes of litigation privilege. Nor has the issue explicitly been decided under FIPPA, although Commissioner Flaherty appears to have accepted, in Order No. 158-1997,[41] without expressly saying so, that grievance arbitration proceedings qualify as litigation for the purposes of litigation privilege under s. 14 of FIPPA.

[34] Similarly, in Ontario Order P-441, Assistant Commissioner Mitchinson appears to have accepted that grievance arbitration proceedings could be considered litigation for the purposes of s. 19 of Ontario's *Freedom of Information and Protection of Privacy Act*.[42] In Ontario Order M-625,[43] Adjudicator Jiwan accepted that "grievance and arbitration hearings" were litigation for the purposes

[34] Para. 8.
[35] Paras. 9 and 10.
[36] Para. 11.
[37] Paras. 4-6.
[38] Para. 9.
[39] Page 1.
[40] Page 2.
[41] [1997] B.C.I.P.C.D. No. 16, at paras. 20-27.
[42] The discussion in Order P-441, [1993] O.I.P.C. No. 86, related to the second branch of s. 19 of the Ontario law, which is somewhat different that s. 14 of FIPPA and s. 23(3)(a) of PIPA.
[43] [1995] O.I.P.C. No. 413.

of Ontario's *Municipal Freedom of Information and Protection of Privacy Act* and Adjudicator Cropley also did so in Ontario Order M-431.[44]

[35] More recently, in Order F06-16, I held that energy regulatory hearings conducted by administrative bodies in Canada and the United States—in Canada, the National Energy Board—were litigation for the purposes of litigation privilege:

> [40] I have concluded that the information the Ministry refused to disclose on the basis of litigation privilege was protected by that privilege. The scope and application of litigation privilege in relation to administrative proceedings, and principles for deciding when proceedings are related to each other, are still developing. In deciding that litigation privilege applies here, I have kept in view the underlying policy of litigation privilege, which is, again, to give parties who are adverse in interest in contested legal proceedings confidentiality protection for information that they obtain or create to prepare their cases.[45]

[36] I also noted in Order F06-16 that the Court of Appeal had, in *College of Physicians*, approved of *Ed Miller Sales & Rentals v. Caterpillar Tractor Co.*,[46] an Alberta Court of Appeal decision "which held that a regulatory investigation can support a claim of litigation privilege in relation to the adversarial interest of the target of the investigation."[47]

[37] There is no doubt that grievance arbitration proceedings under a collective agreement are adversarial in nature—the parties are adverse in interest in contested proceedings. There is no doubt, in my view, that, having regard to the policy underlying litigation privilege, such proceedings qualify as litigation for the purposes of litigation privilege. This is certainly the view taken by labour arbitrators and it would at the very least be anomalous for a different approach to be taken under PIPA.[48]

[38] Turning to the situation at hand, based on the evidence and my review of the contents of the disputed documents themselves, I have determined that s. 23(3)(a) applies as discussed below.

[39] The disputed documents comprise a wide variety of documents that include communications between lawyers with Victory Square and their clients. Some of the documents reflect third-party communications, *i.e.*, communications between third parties that have found their way into Victory Square's files for the

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[44] [1994] O.I.P.C. No. 400.
[45] In *Blank*, Fish J. referred, at para. 27, to the purpose of litigation privilege as creation of a "zone of privacy" that allows opposing parties to prepare their cases without the threat of disclosure to their opponents, thus ensuring the "efficacy of the adversarial process".
[46] [1988] A.J. No. 810 (C.A.).
[47] Para. 41.
[48] See, for example, *British Columbia and B.C.G.E.U. (Lowery), Re* (1992), 28 L.A.C. (4th) 237, and *Centre for Addiction and Mental Health* (2004), 133 L.A.C. (4th) 178. Also see D. Brown & D. Beatty, *Canadian Labour Arbitration*, 3rd ed. (Toronto: Canada Law Book, 2005), at 3:1422.

purpose of providing legal advice. For example, there are copies of letters that the BCNU sent to certain individuals, with those copies being in Victory Square's files in connection with the matters on which Victory Square was advising.

[40] I accept that the relevant documents from the BCNU's files, as well as from Victory Square's files, came into existence for the dominant purpose of litigation that was, in the circumstances of this case, in reasonable prospect at the time of their creation. I also find that litigation privilege has not ended, since the evidence is that the arbitration has been adjourned for as long as the settlement agreement holds. I am satisfied that communications reflected in the relevant documents were confidential communications between client and lawyer for the purpose of seeking or giving legal advice. I therefore find that, in the circumstances, the documents to which s. 23(3)(a) has been applied are protected by solicitor-client privilege. This is not to say, of course, that the contents of a lawyer's files are always privileged. Not everything a lawyer does is privileged. But in these circumstances, s. 23(3)(a) applies as just discussed.

[41] Further, a good number of the records do not, on their face, identify the applicant. As indicated earlier, the organizations submitted that they had only considered whether documents they found contain the personal information of the applicant under PIPA and had not provided them to this office otherwise. My review of the documents, however, revealed that some of the documents the organizations provided to this office, and which are in dispute, actually do not contain any "personal information" about the applicant. For example, documents 2, 3, 4, 5, 10-13 and others do not mention the applicant by name or otherwise contain his personal information. Accordingly, all such documents fall outside the scope of his access requests under PIPA and his right of access under PIPA. I do not propose to itemize these particular documents page by page, but find that, where a document does not contain the applicant's "personal information", he has no right of access to it under PIPA. No order is necessary under s. 52 in this respect, as this material is outside the scope of the applicant's request and in any case is not accessible to him, since it does not contain his personal information.

[42] **3.3 Mediation or Arbitration Records**—The BCNU argues that documents 57 and 58 from its files "fall squarely within the basis for refusal provided in Section 23(3)(e)(i) (PIPA)".[49] That provision reads as follows:

> (3) An organization is not required to disclose personal information and other information under subsection (1) or (2) in the following circumstances:
>
> …
>
> (e) the information was collected or created by a mediator or arbitrator in the conduct of a mediation or arbitration for which he or she was appointed to act

[49] Para 36, initial submission.

(i) under a collective agreement, …

[43] The BCNU's table of records describes record 57 as "Handwritten Notes re Mediation". It does not say whose notes they were or how it qualifies as "information collected or created by a mediator or arbitrator in the conduct of a mediation or arbitration". I have been able to determine that the notes record information submitted during mediation. I find that s. 23(3)(e)(i) applies to this information.

[44] Record 58 is a one-page fax cover sheet with a message on it. It was sent by the mediator to the BCNU and the hospital. It contains no personal information of the applicant. It is therefore outside the scope of the applicant's request and on this basis need not be disclosed. Even if it fell within the scope of the request, I would find that it is exempt from disclosure under s. 23(3)(e)(i).

[45] **3.4 Threat to the Safety or Physical or Mental Health of Third Parties**—Both organizations argue that the mandatory exclusion of personal and other information found in s. 23(4)(a) applies in this case. That provision reads as follows:

(4) An organization must not disclose personal information and other information under subsection (1) or (2) in the following circumstances:

(a) the disclosure could reasonably be expected to threaten the safety or physical or mental health of an individual other than the individual who made the request; …

[46] The organizations cite several decisions under s. 19(1)(a) of FIPPA, which uses the same language in all material respects as s. 23(4)(a) of PIPA.

[47] In Order 00-02,[50] I said the following about standard of proof and interpretation of s. 19(1)(a) of FIPPA:

> Although s. 19(1) involves the same standard of proof as other sections of the Act, the importance of protecting third parties from threats to their health or safety means public bodies in the Ministry's position should act with care and deliberation in assessing the application of this section. A public body must provide sufficient evidence to support the conclusion that disclosure of the information can reasonably be expected to cause a threat to one of the interests identified in the section. There must be a rational connection between the disclosure and the threat. See Order No. 323-1999.
>
> I agree with my predecessor, David Flaherty, that s. 19(1)(a) may have special application in cases involving victims. Disclosure of information surrounding workplace harassment, or events such as those involved here, can cause a victim to re-live her or his experiences - or fear again for her or

[50] [2000] B.C.I.P.C.D. No. 2, at p. 5.

> his safety - in a way that causes anguish or torment. Of course, s. 19(1)(a) speaks of a threat to mental "health", but I do not interpret this as requiring proof that disclosure will cause or exacerbate a mental illness or condition before the section can apply. Accordingly, where disclosure can reasonably be expected to cause serious mental distress or anguish, s. 19(1)(a) may be applied. See, for example, Order No. 125-1996 and Order No. 138-1996.

[48] The organizations accept that there must be a "rational connection" between the disclosure of the information in question and a threat within the meaning of s. 23(4)(a). They also acknowledge what I said in Order 03-08:[51]

> [24] I have acknowledged that the s. 19(1)(a) reference to mental "health" goes beyond mental illness; s. 19(1)(a) may be triggered where disclosure could reasonably be expected to cause serious mental distress or anguish. See, for example, Order 00-02, [2000] B.C.I.P.C.D. No. 2; Order 00-28, [2000] B.C.I.P.C.D. No. 31, Order 00-40, [2000] B.C.I.P.C.D. No. 43, Order 01-01 and Order 01-15, [2001] B.C.I.P.C.D. No. 16. I have also said that "inconvenience, upset or unpleasantness of dealing with a difficult or unreasonable person" is not sufficient to trigger s. 19(1)(a) of the Act. See Order 01-15 at para. 74.
>
> [25] I have approached the s. 19(1) issue bearing in mind my comments in Order 02-50 about the standard of proof where a test of reasonable expectation of harm is involved. As with s. 15(1)(f), I have also kept in mind the nature of this exception, namely the fact that important third-party interests are involved. As I have noted before, the s. 19(1) exception should be approached with care and deliberation, by public bodies and in an inquiry under Part 5. See, for example, Order 01-01, [2001] B.C.I.P.C.D. No. 1.

[49] I will take the same approach to the standard of proof required under s. 23(4)(a) as I took in Order 03-08 in relation to s. 19(1)(a), which also requires establishment of a reasonable expectation of a threat. I will also approach s. 23(4)(a) with the same care and deliberation as is warranted under s. 19(1)(a) of FIPPA and suggest that organizations do the same in light of the interests of third parties whose health and safety interests are engaged in such cases.[52]

[50] There is some evidence of ill-will on the part of the applicant towards those who have, as he perceives it, maliciously opposed him and engaged in lies and other personal attacks against him. It is appropriate in this regard to place some weight on the applicant's own words in the balance in assessing the evidence of reasonable expectation of a threat to the mental health of third parties through disclosure of the information in dispute.

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[51] [2003] B.C.I.P.C.D. No. 8.

[52] This view is not altered by the fact that s. 23(4)(a) is a mandatory exclusion (an organization "must" refuse disclosure where the test is met) as opposed to the discretionary exception under s. 19(1)(a) of FIPPA (a public body "may" refuse disclosure there).

[51] I have also considered the submissions and accompanying *in camera* affidavit evidence on behalf of third parties who participated in this inquiry. As is often the case with decisions made under FIPPA where there are *in camera* evidence and submissions, I cannot explain the reasoning for my finding on this issue without risking disclosure of the very information that the applicant is being denied. It will have to suffice to say that, having carefully reviewed the *in camera* affidavit evidence and the *in camera* submissions, I find that disclosure of the information to which s. 23(4)(a) has been applied could reasonably be expected to threaten the mental health, in the sense mentioned in Order 03-08, of individuals other than the applicant and therefore this information must be withheld.

[52] In reaching this finding, I do not need to address the third parties' contention that s. 23(4)(a) somehow contains a generalized privilege or confidentiality protection respecting information that union members give to their union, in order to promote that kind of disclosure and the activities of unions. My initial view is that this argument takes s. 23(4)(a) well beyond the limits that the statutory language actually employed can bear.

[53] **3.5 Disclosure of Other Individuals' Personal Information**— Section 23(4)(c) of PIPA requires an organization to refuse disclosure where the disclosure "would reveal personal information about another individual". As the organizations point out, s. 23(4)(c) does not involve deciding whether disclosure would invade another individual's privacy, unreasonably or not.[53] To the extent disputed documents contain personal information about other individuals, organizations are required to refuse its disclosure and it must be removed before disclosure to the applicant.

[54] In assessing the application of s. 23(4)(c), organizations must remember that "personal information" under PIPA does not include "contact information" and "work product information". These kinds of information, which PIPA defines, cannot be removed and withheld under s. 23(4)(c).[54]

[55] Many of the disputed documents contain third-party personal information and I find that s. 23(4)(c) requires the organizations to refuse to disclose this third-party information. I will note here that this personal information is often interwoven with other information that I find is protected from disclosure and is in many instances itself exempt from disclosure under the other exceptions discussed here.

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[53] This is in contrast to s. 22(1) of FIPPA, which requires a public body to refuse to disclose personal information the disclosure of which would be an "unreasonable invasion" of a third party's "personal privacy".

[54] Of course, where appropriate in the circumstances, other exceptions to the s. 23 right of access to one's own personal information may apply to the same information. By contrast, "employee personal information", also defined in PIPA, is a sub-category of personal information and would therefore be subject to s. 23(4)(c) in order to protect third-party personal information.

[56] **3.6 Disclosure of Identity of Others**—The organizations also rely on s. 23(4)(d), which prohibits disclosure of information where it would "reveal the identity of an individual who has provided personal information about another individual and the individual providing the personal information does not consent to the disclosure of his or her identity."

[57] I need not decide here to what extent if any s. 23(4)(d) overlaps with s. 23(4)(c). Rather, I find that s. 23(4)(d) in this case applies to identifying information of third parties found in the disputed documents and requires them to refuse to disclose this third-party personal information to the applicant.[55]

[58] **3.7 Severance of Information**—Section 23(5) provides that, if an organization "is able to remove" protected information from any document that contains personal information about the individual who requested it, the organization must provide the individual with access to the personal information after the protected information has been removed.

[59] The organizations say that "any records covered by solicitor-client privilege are not severable"[56] and cite *British Columbia (Ministry of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* in support. In *Ministry of Environment*, Thackray J. (later Thackray J.A.) ruled that, because severance is not a common law concept, records protected by solicitor-client privilege under FIPPA could not be severed despite the requirement in s. 4(2) of FIPPA that protected information must be severed if it "can reasonably be severed from a record", with the remainder being disclosed.

[60] *Ministry of Environment* has been superseded by the Court of Appeal's decision in *College of Physicians*, where the Court held that:

> …the severance provision of the Act [FIPPA] may be applied where, as here, part of the document is not subject to legal advice privilege and a separate part is privileged. In such a case, the non-privileged part can "reasonably be severed".[57]

[61] In any case, I have decided that all of the documents protected by solicitor-client privilege are privileged in their entirety.[58] Section 23(5) requires an

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[55] There may be nuances here that require resolution in future cases. For example, in Order F06-11, [2006] B.C.I.P.C.D. No. 18, Adjudicator Francis accepted that the name of someone who provides an opinion about an individual may be the personal information both of that individual and the individual about whom the opinion is given.

[56] Para. 27, initial submission.

[57] At para. 68.

[58] It is therefore not necessary to decide here what if any distinction exists between s. 4(2) of FIPPA and s. 23(5) of PIPA. I will note in passing my preliminary view that, although the language of s. 4(2) of FIPPA is not the same as that found in s. 23(5) of PIPA, the language in the latter about being "able to remove" information appears to import an objective standard of reasonableness that aligns s. 23(5) well with the requirements of s. 4(2) of FIPPA. I doubt the Legislature intended to require organizations to remove protected information and disclose personal information even in cases where it is extremely costly and technically challenging to do

organization to, if it is "able" to do so, "remove" information protected under s. 23(3)(a) through (c), or s. 23(4), and disclose the remainder. As also indicated earlier, the applicant's right of access under PIPA extends only to his own "personal information". I am satisfied that, in these circumstances, the application of the various exemptions to the disputed documents, taken together with the fact that a good deal of the information at hand is outside the scope of the applicant's request, means that the organizations have complied with their duty under s. 23(5).

4.0 CONCLUSION

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

1. I confirm the decisions of Victory Square and of the BCNU to refuse the applicant access to the information withheld under s. 23(3)(a) of PIPA,

2. I confirm the decision of the BCNU to refuse the applicant access to the information that the BCNU withheld under s. 23(3)(c) and s. 23(3)(e)(i) of PIPA,

3. I require the BCNU to refuse the applicant access to the information that the BCNU withheld under ss. 23(4)(a), (c) and (d) of PIPA.

September 14, 2006

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

so, such that the effort and expenditure involved exceed what is reasonable in all of the circumstances.