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Order F13-27

LABOUR RELATIONS BOARD

Hamish Flanagan, Adjudicator

December 6, 2013

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Summary: The applicant requested information compiled by a Labour Relations Board ("Board") Industrial Relations Officer relating to a union's application for certification. The Board withheld most of the information, asserting that FIPPA did not apply because s. 61(2)(b) of the ATA applied. The Board also argued that if FIPPA did apply, the information must be withheld either under s. 21 of FIPPA, because disclosure would reveal labour relations information supplied in confidence to a person appointed to inquire into a labour relations dispute; or under s. 22 of FIPPA because disclosure would be an unreasonable invasion of a third party's privacy. The Adjudicator found that the ATA does not apply to the information, so FIPPA does apply and most of the information must be withheld under s. 21 of FIPPA. A small amount of information in a memo was not "supplied" under s. 21, does not contain personal information for the purpose of s. 22, and therefore cannot be withheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(2), 21 and 22; *Labour Relations Code,* RSBC 1996, c. 244; *Administrative Tribunals Act*, SBC 2004, c. 45; Notice to Mediate (General) Regulation, BC Reg. 4/2001.

Authorities Considered: B.C.: Order F10-17, 2010 BCIPC 26; Order F08-10, 2008 CanLII 65714; Order F13-02, 2013 BCIPC 2; Order F11-08, 2011 BCIPC 10; Order 01-39, 2001 CanLII 21593; Order No. 42-1995, [1995] B.C.I.P.C.D. No. 15; Order 01-36, 2001 CanLII 21590; Order 04-06, 2004 CanLII 34260; Order F12-08, 2012 BCIPC 12; Order 01-53, 2001 CanLII 21607. **Alta.:** Order 2000-003, 2000 CanLII 28712 (AB OIPC); Order F2012-15, 2012 CanLII 70620 (AB OIPC); Order F2010-029, 2011 CanLII 96618 (AB OIPC).

Cases Considered: *Pepper v. Treasury Board (Department of National Defence),* 2008 PSLRB 8 (CanLII); *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4th) 417 (FCTD); *Timiskaming Indian Band v. Canada (Minister of Indian and Northern*

Affairs) (1997) 148 DLR (4th) 356 (FCTD); *Hardy Buoys Smoked Fish Inc.,* BC Board No. B190/2011, 2011 CanLII 67653.

INTRODUCTION

[1] The applicant requested information from the BC Labour Relations Board ("Board") relating to an application for certification filed by a union in 2008.

[2] The Board is empowered by the *Labour Relations Code* ("*Code*") to decide applications for certification. A successful certification application gives a union the authority to represent a defined group of employees as their bargaining agent in collective bargaining with an employer ("bargaining unit").

[3] Before it authorizes a vote among all potentially affected employees to determine their support for certification, the Board requires a certain threshold level of employee support to justify holding a vote. The Board appoints an Industrial Relations Officer ("IRO") to assist with determining whether this threshold has been met.

[4] One of the IRO's main functions is to prepare a report for the Board that includes an assessment of whether sufficient support exists to hold a certification vote among the employees. This assessment requires the IRO to communicate with the employer to seek among other things a list of employees. The employee list would also assist in creating a tentative voters list of those who would be eligible to cast a ballot in the event a certification vote were held.

[5] The applicant's request for information relates to interactions between the IRO (and her assistant) and the employer subject to the certification application. Of particular interest to the applicant was the employee list.

[6] The Board disclosed a fax from the IRO to the employer requesting information to prepare the IRO's report, but withheld other information including employee lists and draft tentative voters lists based on the employee lists.[1] The Board asserted that s. 61(2) of the *Administrative Tribunals Act* ("ATA") applied to the withheld information, and for that reason the *Freedom of Information and Protection of Privacy Act* ("FIPPA") did not apply. The Board also took the view that if FIPPA did apply to the information, the information must be withheld from the applicant under s. 21 of FIPPA, because disclosure would reveal labour relations information supplied in confidence to a person appointed to inquire into a labour relations dispute.

[1] Based on the applicant's initial submission, the Board gained a new understanding of the scope of the information request which led it to identify some further information as potentially responsive to the applicant's request. It also withheld this additional information and it is considered as part of this inquiry.

[7] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Board's decision to withhold the information. Mediation did not resolve the matter and it was referred to inquiry.

[8] The OIPC received written submissions from the applicant, the Board and the third party, Halton Recycling Limited, which is the employer subject to the certification application. The OIPC invited submissions from several intervenors including the BC Federation of Labour and organizations representing business interests. Only one intervenor, the Coalition of BC Businesses, made a submission to this inquiry.

ISSUES

[9] The Board asserts that s. 61(2)(b) of the ATA applies to the withheld information, and for that reason FIPPA does not apply. The Board also takes the view that if FIPPA does apply to the information, the information must be withheld from the applicant under s. 21 of FIPPA, because disclosure would reveal labour relations information supplied in confidence to a person appointed to inquire into a labour relations dispute.

[10] The Board also argues that if FIPPA applies, some of the information must also be withheld under s. 22 of FIPPA because disclosure would be an unreasonable invasion of a third party's privacy.

[11] The Board says if s. 22 of FIPPA applies to the information, the Board's practise of disclosing voters lists to parties to a certification proceeding is not a breach of s. 22, because it is a situation where s. 3(2) of FIPPA applies. Section 3(2) provides that FIPPA does not limit the information available by law to a party to a proceeding.

[12] Section 3(2) operates only to recognise that powers to disclose information to parties to a proceeding may exist outside of FIPPA and that FIPPA will not operate to prevent those. In this way it is usually raised as a defence to a privacy complaint.[2] This inquiry is concerned with the applicant's access request. Absent a complaint about the Board's disclosure practises, it is beyond the scope of this inquiry to examine whether particular Board information practises are authorized by law and also compliant with FIPPA, and particularly whether s. 3(2) is relevant to those disclosure practises. Accordingly, it is not necessary for this inquiry to consider s. 3(2) FIPPA.

[2] See for example Order F10-17, 2010 BCIPC 26.

[13] Therefore the issues in this inquiry are:

1. Does FIPPA apply to the information in light of s. 61(2)(b) of the ATA?

2. If FIPPA does apply to the information, is the Board required to refuse to disclose the information under s. 21 of FIPPA?

3. If FIPPA does apply to the information, is the Board required to refuse to disclose the information under s. 22 of FIPPA?

DISCUSSION

[14] **Information in issue**—The information in issue comprises records generated and exchanged during interactions between the IRO (and her assistant) and the employer involved in a June 2008 certification application including employee lists and draft tentative voters lists based on the employee lists.

[15] **Does FIPPA apply to the information in light of s. 61(2) of ATA?**—The relevant portions of s. 61(2) of the ATA provide as follows:

> (2) The *Freedom of Information and Protection of Privacy Act*… does not apply to any of the following:
>
> (a) a personal note, communication or draft decision of a decision maker;
>
> (b) notes or records kept by a person appointed by the tribunal to conduct a dispute resolution process in relation to an application.

[16] The Board initially withheld information from the applicant on the basis that s. 61(2)(a) of ATA applied to the information, so that FIPPA did not apply. However, it was not listed as an issue in the Investigators fact report and neither the Board nor the third party raised it in submissions for this inquiry. I therefore take the Board to have abandoned the s. 61(2)(a) of ATA argument and I will not consider it below.[3]

[3] The intervenor argued that s. 61(2)(a) of ATA applies so that FIPPA does not apply to the information (p. 5, para. D, 2nd para.). However, as the intervenor's submission acknowledges, the Board ultimately makes the decision, not the IRO. The IRO's report may be accepted if not challenged by the parties, but that does not turn it into a decision; it is just evidence that leads to the Board's decision.

[17] The Board does argue that s. 61(2)(b) of ATA applies to the information and therefore FIPPA does not apply.[4]

[18] The Board and the intervenor submit that the IRO is involved in a dispute resolution process in relation to an application, and say that the IRO regularly resolves disputes between the parties.

[19] The applicant submits that the IRO neither is appointed to conduct a dispute resolution process nor conducts a dispute resolution process as it is defined in ATA. The applicant also argues that any of the IRO's notes or records are not kept "in relation to an application" as required by s. 61(2)(b) of ATA.

Is the IRO conducting a "dispute resolution process"?

[20] The phrase "dispute resolution process" is defined in s. 1 of ATA:

> **"dispute resolution process"** means a confidential and without prejudice process established by the tribunal to facilitate the settlement of one or more issues in dispute;

[21] The three essential elements of this definition are that the process be

- confidential;
- without prejudice; and
- established to facilitate settlement of an issue or issues in dispute.

[22] If the IRO process fails any of these elements it is not a dispute resolution process for the purpose of s. 61(2)(b) of ATA.

[23] The applicant says that the IRO processes satisfy none of the three essential elements.

[24] **Confidential**—Confidentiality in the context of a dispute resolution process typically means that communications will not be disclosed by the parties involved in the process or by the facilitator of the process.[5] For example, s. 36(1)

[4] Section 61(2)(b) of ATA applies to the Board by virtue of s. 115.1 of the *Code*.

[5] Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan; (1999), 24 Queen's L.J. 561-641 at para. 3. The reasons for confidentiality as an essential component of a dispute resolution process are discussed further in Part I of the article. Certain recognized situations where permission to breach confidentiality is sanctioned by the courts, are discussed in the article. Disclosure may also occur by agreement of all the parties.

of the *Notice to Mediate (General) Regulation* under BC's *Law and Equity Act,* which provides for confidentiality in court-arranged mediation states in part:

> **Confidentiality and compellability**
>
> **…**a person must not disclose, or be compelled to disclose, in any civil, criminal, quasi-criminal, administrative or regulatory action or proceeding,
>
> (a) any oral or written information acquired in anticipation of, during or in connection with a mediation session,
>
> (b) any opinion disclosed in anticipation of, during or in connection with a mediation session, or
>
> (c) any document, offer or admission made in anticipation of, during or in connection with a mediation session.

[25] An example[6] of a typical confidentiality clause in a dispute resolution agreement, reads:

> in order to ensure the confidentiality of the process it is understood that any notes prepared or written by the mediator shall be destroyed; the mediator shall only report to the Board whether there has been a full settlement or not; any memorandum of settlement reached by the parties shall not be placed on any Board file, nor shall its terms be disclosed unless the parties otherwise agree

[26] The IRO process does not provide this type of confidentiality. An IRO is appointed under s. 124(2) of the *Code*, which provides:

> 124(2) The board may request and receive a report from a person it appoints to investigate an application or to investigate and attempt to settle a dispute under this *Code* or a collective agreement, and, despite section 146 (3), the board must disclose the report to the parties.

[27] The evidence shows the clear practise of the Board is to exercise its discretion under s. 124(2) of the *Code* to always request and receive a detailed report from an IRO appointed under this section.

[28] The IRO Report template which guides an IRO in reporting to the Board requires the IRO, among other elements, "to describe in detail those issues that have been resolved by agreements between the parties, all issues that are

[6] Quoted in *Pepper v. Treasury Board (Department of National Defence),* 2008 PSLRB 8 (CanLII) at para. 125, this agreement was in the context of a mediation of a (federal) labour relations dispute.

clearly in dispute between the parties and those issues that may require clarification at the hearing." [7]

[29] This process of requiring a detailed report reveals to the Board the substance, if not the precise detail, of things said by the parties. This means the IRO process does not possess the confidentiality required of a dispute resolution process contemplated by s. 61(2)(b) of ATA.

[30] It is therefore not necessary for me to consider the application of the remaining elements of the phrase "dispute resolution process" in the ATA. I conclude that the confidentiality element of a dispute resolution process for the purpose of s. 61(2)(b) of ATA is not present in the IRO's process and s. 61(2)(b) of ATA does not apply.

[31] **Information that would reveal labour relations information: s. 21**—Because I have found that s. 61(2)(b) does not apply to the information in issue, I will now consider the application of FIPPA to the information. The Board's first argument is that the record should be withheld under s. 21. The relevant parts of s. 21 are:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
>
> …
>
> (ii) … labour relations… information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> ...
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[32] Section 21 is a mandatory exception. This means that if a public body determines the information falls within the exception it must withhold it.

[33] For information to fall under s. 21 in this case, the public body must satisfy the following three-part test:

1. The information must reveal labour relations information of a third party (Section 21(1)(a));

[7] BIRO's Application for Certification Report Form, Appendix 1 to Affidavit of Manuel Alvernaz, point 9.

2. The information must be supplied, explicitly or implicitly, in confidence (Section 21(1)(b)); and

3. The disclosure of the information must reasonably be expected to reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Labour relations information of a third party

[34] The Board argues that the information in issue comprises labour relations information. In Order F08-10[8] the term "labour relations information" was stated to include information:

> - concerning the collective relationship between an employer and its employees or an employer or a union
> - related to a union's role or position in the collective bargaining process with the employer, negotiations and bargaining positions or other related labour relations matters.

[35] Order F08-10[9] quoted the following statement of Adjudicator Francis in Order F05-02,[10] made after considering Ontario orders and the Alberta Information and Privacy Commissioner's decision in Order 2000-003:[11]

> I am of the view that the term "labour relations information" includes information related to particular labour relations issues and disputes, such as grievances, that arise within the collective bargaining relationship between employer and union or analogous relationships.

[36] The Alberta Information and Privacy Commissioner's decision in Order 2000-003, found that "labour relations information" referred to "collective relations" (such as collective bargaining and related activities) and also to relations between a particular management employee and other employees, and to relations between employees. In Alberta Order F2012-15,[12] Adjudicator Swanek found that a settlement agreement connected to the collective bargaining process was labour relations information.

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[8] 2008 CanLII 65714 at para. 38. Note that following a judicial review application, consent orders were entered setting aside Order F08-10 regarding s. 21 without remittal back to the OIPC.
[9] 2008 CanLII 65714.
[10] At para. 42. A passage from F05-02, 2005 CanLII 444 (BC IPC), including this paragraph, was also cited in F08-10.
[11] Order 2000-003, [2000] A.I.P.C.D. No. 33.
[12] Order F2012-15, 2012 CanLII 70620 (AB OIPC).

[37] Labour relations information is not restricted to employer/employee relationships and clearly covers information related to collective bargaining. The information in issue here is related to collective bargaining because it is about the Union's application to become certified to conduct collective bargaining for a particular bargaining unit. It is hard to conceive of a process more closely related to the collective bargaining process that is not part of it—without certification there is no collective bargaining. Also, certification affects the landscape of collective bargaining because certification can involve addressing issues such as who is included and excluded from the bargaining unit.

[38] After reviewing the records and the submissions, I find that "labour relations" information is at issue and releasing the information would reveal labour relations information of the third party employer.

Supplied in confidence — s. 21(1)(b)

[39] The second part of the test in s. 21(1) requires that the information was "supplied", either implicitly or explicitly, "in confidence". This is a two-step analysis. The first is to determine whether the information was supplied to the Board. The second is to determine whether the information was supplied "in confidence".

"Supplied"

[40] The parties' submissions focus on whether the confidentiality requirement was met for the information. Specifically on the issue of supply, from my review of the information, I find that most of the information was either supplied or allows accurate inferences about information supplied to the IRO. The exception is a one page memo created by the IRO for the Board. Some of the memo contains supplied information about affected employees, but some of the information in the memo is the IRO's own analysis about the outcome of and issues related to the certification vote and therefore does not qualify as supplied.

"In Confidence"

[41] Numerous orders have dealt with the issue of whether information was supplied explicitly or implicitly, "in confidence". The test is objective and the question is one of fact; evidence of the third party's subjective intentions with respect to confidentiality is not sufficient.[13]

[13] Order F13-02, 2013 BCIPC 2, para. 18 from Order F11-08, [2011] B.C.I.P.C.D. No. 10, at para. 24 citing Order 01-39 [2001] B.C.I.P.C.D. No. 40, citing *Re Maislin Industries Ltd. and Minister for Industry* (1984) 10 DLR (4th) 417 (FCTD); see also *Timiskaming Indian Band v. Canada (Minister of Indian and Northern Affairs)* (1997) 148 DLR (4th) 356 (FCTD).

[42] There is no explicit evidence that the information was supplied in confidence. The Board cites Order No. 42-1995,[14] s. 146(3) of the *Code* and the Board's practise, set out in policy, of only releasing employee information supplied to the IRO in certain circumstances to support their position that information was supplied implicitly in confidence. The applicant says the information was not supplied in confidence, citing the fact that most of an IRO's report must be released to the parties under s. 124(2) of the *Code* and the Board's policy that some of the employee information supplied to an IRO will be released to the union if certain requirements are met.

[43] The issue of information being implicitly supplied in confidence was addressed in Order 01-36,[15] where former Commissioner Loukidelis stated:

> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
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> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

[44] Order 04-06 stated that there must be evidence of a "mutuality of understanding" between the public body and the third party for the information to have been considered to be supplied "in confidence".[16]

[45] Section 146(3) provides that information obtained by the IRO in the course of his or her duties, for the purpose of the *Code*, is not open to inspection by a person or a court, and the IRO must not be required by a court or tribunal to give evidence relative to it. To the extent that s. 146(3) is relied on by the supplier of the information it is helpful, but it does not provide conclusive evidence that the supplied information in issue was supplied in confidence to the IRO. I note also that s. 146(3) does not override FIPPA. In addition, s. 124(2) of the *Code* requires the Board to disclose an IRO's report to the parties (except information described in s. 124(3)). Section 124(2) is an explicit exception in the

[14] [1995] B.C.I.P.C.D. No. 15.
[15] 2001 CanLII 21590.
[16] 2004 CanLII 34260.

Code to the obligations in s. 146(3). I note, however, that s. 124(2) does not require disclosure of the information *supplied* to the IRO.

[46] Order No. 42-1995[17] is of limited value in this inquiry, because it was decided on the basis of a transitional provision in FIPPA[18] that no longer exists, and before s. 124(2) of the *Code* took full effect.

[47] The Board's clear practise is that the only information supplied to the IRO it may release is an employee list, only to a union, and only in certain circumstances. The employee list records all the employees who would potentially be part of the bargaining unit if the certification application was successful. The ground for release of this employee list is when the IRO reports that the 45% threshold of support for a certification vote has not been met but the union contests this report and the Board considers it necessary to release the employee list to allow a union to fully argue its case at a certification hearing.[19] I note the Board will release a tentative voters list if the IRO has determined the threshold of 45% support for a certification vote has been met. The employee list itself is not released where this 45% threshold is met. The voters list is created by the IRO but usually relies heavily on and therefore reveals information supplied to the IRO by the employer in the employee list.

[48] The Board submits that in their experience release of information provided to the IRO to allow a union to argue its case is usually strongly opposed by the employer and this is confirmed in previous Board decisions cited in the Board's submissions.[20] Consistent with the Board's experience, in this case the third party employer is opposed to disclosure because of its concerns about how information supplied to the IRO, particularly the employee list, could be used by the union if not kept confidential. It is clear from the submissions that the employee list can be valuable information to a union, especially in the context of a certification application.

[49] That the policy outlined above is the Board's practice is acknowledged by all the parties in their submissions and is clearly set out in the Board's guidance documents. The Board's policy represents a clear position on how it will balance between the competing interests of the employer in confidentiality and the need to release employee information to allow a union to fully participate in a hearing about a certification application. In the certification application related to this

[17] [1995] B.C.I.P.C.D. No. 15.
[18] Section 78 of FIPPA, as it then was.
[19] The Board refers to the *Code* generally and s. 3(2) of FIPPA as the grounds for this release. I have discussed above why s. 3(2) of FIPPA is not a stand-alone ground for making a disclosure under FIPPA when no other basis exists, but can be a defence to a practise of disclosure. As I noted above, the Board's practise in this regard is not squarely in issue in this inquiry.
[20] See for example *Hardy Buoys Smoked Fish Inc.,* BC Board No. B190/2011, 2011 CanLII 67653.

inquiry, the Board did disclose the employee list supplied by the employer to the union because of a series of disputes about its accuracy.

[50] Considering all the relevant factors, I accept that the information supplied to the IRO was supplied in confidence. It is clear from the submissions that an employee list can be valuable information to a union, including in the context of a certification application and that employers therefore want this information to remain confidential. The Board acknowledges this desire and it is a reason for its submission that it believes the information is confidential. The Board's submission is not inconsistent with the potential for an employee list or tentative voters list to be released by the Board in certain circumstances. The Board has a clear policy, supported by legislation that it will only disclose this information in prescribed circumstances, such as when it considers s. 3(2) of FIPPA allows it. While this means that the information is being supplied by the employer to the IRO for a purpose that could entail disclosure, it must be remembered that the employer is compelled to supply the information to the IRO. I believe the Board's approach is consistent with a mutual understanding between the employer and the Board that the information is supplied confidentially. I also note that an employer could still object to release of its information to a third party in a given situation by arguing that s. 3(2) of FIPPA does not apply.[21] The employer's information is not otherwise disclosed or available from sources to which the public has access.

[51] For clarity I want to reconcile my earlier finding that the IRO's process was not a confidential decision making process for the purposes of s. 61(2)(b) of ATA with the conclusion that information was supplied in confidence for the purpose of s. 21. The s. 21 inquiry concerns whether the information supplied to the IRO was supplied in confidence to the public body (the Board in this case), the s. 61(2)(b) of ATA inquiry was whether the dispute resolution process was confidential. In the context of a dispute resolution process, disclosure of information by an IRO to the Board matters, particularly in light of the Board's function in conducting a hearing, because it would involve disclosing communications to someone other than the parties[22] to the dispute resolution process. In the context of s. 21, the distinction between a Board hearing and a dispute resolution process is not relevant. In that situation the IRO and the Board are two parts of one entity, with the passing of information between them not undermining the confidential supply of information.

[52] In summary I am satisfied that the information supplied to the IRO was supplied in confidence.

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[21] See Order F10-17, 2010 BCIPC 26, for an inquiry where the applicant objected to a public body relying on s. 3(2) FIPPA to justify release of information to a third party not being prevented by FIPPA.

[22] This includes the facilitator.

Reveal information to a person or body appointed to resolve or inquire into a labour relations dispute — s. 21(1)(c)(iv)

[53] The Board says that the IRO is an arbitrator, mediator, labour relations officer or other person appointed to resolve or inquire into a labour relations dispute. The Board says simply that a contested application before the Board under the *Code* is a labour relations dispute. The applicant says that the IRO is not appointed to inquire into or resolve a labour relations dispute for the purposes of s. 21 because there is no dispute to inquire into or resolve at the time they are involved.

[54] I find that the IRO is clearly a "labour relations officer or other person" and disclosing the information in dispute will clearly reveal information supplied to him or her. The remaining issue is whether the IRO is appointed to resolve or inquire into a labour relations dispute.

[55] The phrase "labour relations dispute" has been discussed in previous cases. In Order F08-10, Adjudicator Francis said:

> I said in Order F05-02 that a "labour relations dispute is a dispute among parties to a labour relationship concerning some aspect of that relationship".

[56] In Alberta Order 2000-003 the Commissioner said:[23]

> In keeping with the definition of "labour relations", I believe that a "labour relations dispute" would refer to any conflict related to labour relations.

[57] In Order F2010-029,[24] Adjudicator Raaflaub disagreed with the breadth of this definition and adopted a definition of "dispute" from the Alberta *Labour Relations Code* of a "difference or apprehended difference arising in connection with the entering into, renewing or revising of a collective agreement".

[58] The issue here is whether the IRO is appointed to inquire into a dispute at all, not whether it is the particular kind of dispute that qualifies as a labour relations dispute. As discussed above, because of the close connection between the certification application in issue and any collective bargaining process, if the IRO is appointed to resolve or inquire into a dispute in relation to this certification application, then I consider it will qualify as a labour relations dispute.

[23] 2000 CanLII 28712 (AB OIPC), at para. 127.
[24] 2011 CanLII 96618 (AB OIPC).

[59] "Dispute" is not defined in FIPPA, but is defined in s. 2 of the *Code*:

> "dispute" means a difference or apprehended difference between an employer or group of employers, and one or more of his or her or their employees or a trade union, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done;

[60] A key feature of a dispute is a difference or apprehended difference between parties. Differences commonly arise between a union and employer during the certification process; but the applicant's argument is that because they do not arise until after the IRO's involvement, the IRO cannot meet the requirement in s. 21(1)(c)(iv) that they be appointed to resolve or inquire into them.

[61] It is clear from the evidence that, at the moment when the IRO is appointed and begins an investigation, the IRO does not know if there will be a dispute. A fax dated June 23, 2008, (released to the applicant) appears to be a standard form fax sent by IROs to employers to help the IRO begin their report on the certification application. Question 11 in the fax asks the employer:

> 11. Do you have objections to this application? If so, briefly explain.

[62] Question 12 of the fax makes it clear that the IRO inquires into the employer's objections if there are any. The question asks the employer:

> 12. Do you agree that the unit is "appropriate" (i.e. nature of work) for collective bargaining? If not, please explain

[63] Also, as discussed above, the IRO's report template[25] prompts the Officer to describe in detail any issues resolved by agreement between the parties, all issues clearly in dispute, and those issues that may require clarification. As I found above, this does not mean that the IRO process is a dispute resolution process for the purpose of the ATA, but it does show some role for the IRO in discovering and recording issues where there are or may be disputes between the parties. This role is sufficient for the IRO to qualify as inquiring into a dispute.

[64] The ability to inquire into a potential dispute is enough for s. 21(1)(c)(iv). This section does not require that the IRO resolve the dispute, neither is it necessary to show that there was a dispute at the time of their appointment nor that they did in fact inquire into a dispute if one did exist. It is sufficient that they were appointed with the power to inquire into a dispute if one presents during their investigation.

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[25] At Qn 9.

[65] The submissions of the parties characterize the IRO's role significantly differently. However, the breadth of the inquiry required to complete an IRO's report to the Board shows that their authority extends at least as far as is required to satisfy the requirements of s. 21(1)(c)(iv).

[66] I note also that the IRO's power to inquire into a dispute is consistent with the scope of the IRO's appointment under s.124(2). Section 124(2) allows for the Board to appoint a person to investigate an application or to investigate and resolve disputes. The affidavit evidence of the Board is that the narrower role described in s. 124(2) is considered the IRO's role.[26] I am satisfied that investigating an application can encompass finding out if there is a dispute, and if there is one, capturing some detail about it. This is consistent with the Board's overall responsibility under s. 22(2)(a) of the *Code* to:

> "make or cause to be made the examination of records and other inquiries including the holding of hearings it considers necessary to determine the merits of an application for certification."

[67] My finding that an IRO can inquire into a dispute is consistent with the section of the *Code* empowering the IRO and can be seen as part of the Board discharging its general obligations in relation to the application.

[68] The effect of my finding that s. 21(1)(c)(iv) applies, is that most of the information in issue must be withheld with the exception of a small amount of information in a one page memo that I found was not supplied.

[69] **Third party personal information: s. 22**—Because of my finding in relation to s. 21, it is not necessary to consider the application of s. 22 to most of the information. I have instead confined my consideration of the application of s. 22 to the portions of a one page memo I found was not supplied for the purposes of s. 21.

[70] The proper approach to s. 22 involves four steps:[27]

1. Is the information personal information?

2. If it is personal information, does it meet any of the criteria identified in s. 22(4), where disclosure would not be an unreasonable invasion of third-party personal privacy?

3. If none of the s. 22(4) criteria apply, would disclosure of the information fall within any of the criteria in s. 22(3), whereby it would be presumed to be an unreasonable invasion of third-party privacy?

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[26] Matacheskie affidavit, at para. 4.
[27] Order F12-08, 2012 BCIPC 12; Order 01-53, 2001 CanLII 21607.

4. If s. 22(3) criteria apply, after considering all relevant circumstances, including those listed in s. 22(2), is any presumption rebutted?

[71] The parts of the memo in question contain information prepared by the IRO for the Board about the results of the certification vote. The information does not contain any personal information. Therefore s. 22 does not apply and the information can be released.

CONCLUSION

[72] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to para. 2 below, I require the Board to withhold the information in issue under s. 21 of FIPPA.

2. The Board is required to disclose the memo (except the highlighted information) which accompanies the Board's copy of this order by **January 22, 2014**, pursuant to s. 59 of FIPPA. The Board must concurrently copy me on its cover letter to the applicant, together with a copy of the memo.

December 6, 2013

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

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