Office of the Information & Privacy Commissioner for British Columbia

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Order F17-16

OFFICE OF THE SUPERINTENDENT OF PENSIONS

Elizabeth Barker
Senior Adjudicator

April 10, 2017

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Summary: The Independent Contractors and Business Association requested access to information that 16 union-sponsored pension plans filed with the Office of the Superintendent of Pensions. The Superintendent withheld some of the requested information under s. 21 (harm to third party business interests) and s. 22 (harm to personal privacy). The adjudicator found that neither s. 21 nor s. 22 applied and ordered the Superintendent to disclose the information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21 and 22.

Authorities Considered: B.C.: Order 00-10, 2000 CanLII 11042 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49182 (BC IPC); Order F04-19, 2004 CanLII 45529 (BC IPC); Order F05-20 2005, CanLII 32548 (BC IPC). **Ont:** Order PO-3472, 2015 CanLII 15988 (ON IPC). **AB**: Order F2012-17, 2012 CanLII 70619 (AB OIPC).

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Lavigne v. Canada*, 2002 SCC 53; *Construction and Specialized Workers Union, Local 1611 v. British Columbia (Information and Privacy Commissioner),* 2015 BCSC 1471; *Trustees of the Bricklayers and Stonemasons Union Local 2 v. Information and Privacy Commissioner of Ontario and Canadian Bricklayers and Allied Craft Unions Members v. Information and Privacy Commissioner of Ontario,* 2016 ONSC 3821 (CanLII); *Re Construction, Maintenance and Allied Workers Canada*

and British Columbia Regional Council of Carpenters Case No. 69087/15, BCLRB Letter Decision No. B246/2015.

INTRODUCTION

[1] This case has an extensive history commencing in 2010 when the Independent Contractors and Business Association ("ICBA") requested records from the Office of the Superintendent of Pensions at the Financial Institutions Commission ("FICOM").[1] ICBA asked for copies of the most recent pension plan filings for 16 union-sponsored pension plans. The request was subsequently narrowed to a spreadsheet containing nine fields of data for each of the pension plans. FICOM disclosed all of the requested data for two pension plans and five fields of data for the rest of the pension plans. FICOM informed the ICBA that it had decided to withhold the balance of the information under s. 21 (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). ICBA asked the Office of the Information and Privacy Commissioner ("OIPC") to review FICOM's decision.

[2] FICOM subsequently reconsidered its decision and gave the pension plans notice under s. 23 of FIPPA that it was going to disclose the withheld information in full ("2012 decision"). Thirteen of the 16 pension plans objected to the proposed disclosure and requested the OIPC review FICOM's decision. That review proceeded to an inquiry and ultimately the decision that s. 21 did not apply (Order F13-02).

[3] Order F13-02 was judicially reviewed.[2] Madam Justice Maisonville said that the case had been decided on an incomplete record because the OIPC had not given all of the interested unions notice of the inquiry and an opportunity to provide submissions. On August 20, 2015, she set aside Order F13-02 and referred the matter back to the OIPC. The OIPC decided to rehear the matter.

[4] Meanwhile, on April 27, 2015, ICBA made an access request for the same, but updated, information. After considering the written representations of the unions and pension plans ("third parties"), FICOM withheld the information for 15 of the 16 pension plans under s. 21 of FIPPA ("2015 decision").[3] ICBA requested that the OIPC review the October 2015 decision and the matter proceeded directly to inquiry.

[5] With the consent of the parties, the 2012 and 2015 decisions were combined into one inquiry. During the inquiry a number of the third parties argued that s. 22 also applied to the records and that issue was added.[4]

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[1] When I use the term FICOM, I am referring to the Superintendent of Pensions located at FICOM.

[2] *Construction and Specialized Workers Union, Local 1611 v. British Columbia (Information and Privacy Commissioner),* 2015 BCSC 1471.

[3] FICOM's May 15, 2015 decision letter to ICBA.

[4] None of the parties objected to adding this new issue.

[6] Inquiry submissions were received from the following parties:

1. FICOM;
2. ICBA;
3. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170 ("Local 170");
4. Pile Drivers, Divers, Bridge, Dock and Wharf Builders, Local 2404 ("Local 2404");
5. Vancouver Island Sheet Metal Workers International Association, Local 276 ("Local 276");

[7] In addition, several third parties provided joint submissions. For ease of reference, I will refer to each group by its solicitor's last name:

Chamzuk Group

6. Sheet Metal Workers (Local 280) Pension Plan;
7. Island Sheet Metal Workers' and Roofers' Pension Plan;
8. Local 213 Electrical Workers Pension Plan;
9. Heat & Frost Local Union 118 Pension Plan;
10. Pile Drivers, Diver, Bridge, Dock & Wharf Builders Pension Plan;
11. Operating Engineers Pension Plan;
12. Victoria Plumbers and Pipefitters' Pension Plan (also known as Victoria Mechanical Industry Pension Plan);
13. Carpentry Worker's Pension Plan of BC;
14. Plumbers Local 170 Pension Plan;
15. BC Labourers' Pension Plan;
16. Construction, Maintenance and Allied Workers Canada;

Thompson Group

17. Cement Masons Union Local 919 Pension Plan;
18. Ironworkers Local 97 Pension Plan;
19. Bricklayer and Masons Pension Plan;
20. Ceramic Tile Workers Pension Plan;
21. Sheet Metal Workers International Association, Local No. 280;
22. Operative Plasterers and Cement Masons International Association, Local 919;
23. International Brotherhood of Electrical Workers, Local 213;
24. International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 97;
25. Bricklayers and Allied Craft Workers, Local No. 2 (BC);
26. International Union of Operating Engineers Local 115;
27. Construction and Specialized Workers Union, Local 1611.

[8] Further, four other third parties were invited to participate but chose not to provide a submission: Construction Labour Relations Association of British

Columbia; Boilermakers Lodge 359; International Association of Heat and Frost Insulators, Local 118; and Victoria Mechanical Industry.

[9] The parties' submissions in this inquiry also include some of what they provided during the first inquiry, correspondence between FICOM and the third parties during the s. 23 FIPPA consultations, as well as materials from the judicial review proceedings.

ISSUES

[10] The issues to be decided in the Inquiry are as follows:

1. Is FICOM required to refuse to disclose the information in dispute under s. 21 and/or s. 22 of FIPPA?

[11] Section 57 of FIPPA governs the burden of proof at inquiry. FICOM's 2012 decision was to disclose the requested information, so the burden is on the third parties objecting to that decision to prove that s. 21 applies and the applicant has no right of access to that information. On the other hand, FICOM's 2015 decision was to withhold the information under s. 21, so the onus is on it to prove that the applicant has no right of access.

[12] As for s. 22, FIPPA places the onus on ICBA, as the applicant, to prove that disclosure of any personal information in the requested records would not be an unreasonable invasion of third party personal privacy.

DISCUSSION

Background

[13] This case involves employment related pension plans registered under BC's *Pension Benefits Standards Act* ("PBSA"). The Superintendent of Pensions, who is located at FICOM, is responsible for administering the statutes that regulate the pension, financial services and real estate sectors in BC. The Superintendent administers and enforces the PBSA to ensure that pension plans comply with the PBSA and meet minimum standards of financial health.[5]

[14] ICBA, the applicant in this case, is a voluntary association of BC construction businesses. It advocates for free enterprise in the construction industry and for legal and policy reforms on behalf of its members and the public.[6] ICBA provides its members construction market information, apprenticeship support, management training and discount programs for goods and services. ICBA does not directly offer retirement benefits. However, through a company called ICBA Benefit Services Ltd, it has negotiated with insurers and pension plan companies to provide interested ICBA members with access

[5] FICOM 2012 initial sub., paras. 4-7.
[6] ICBA 2016 initial sub., para. 21.

to optional employee retirement savings products, such as group RRSPs. These retirement savings products are not "pension plans" under the PBSA, so FICOM has no regulatory responsibilities regarding them.

[15] The unions involved here have negotiated collective agreements with employers in the industrial, commercial and institutional construction sector. An employer who wants to employ a union member must participate in the union-sponsored pension plan by contributing at the rate ($/hour) set out in the applicable collective agreement.

[16] The union-sponsored pension plans in this case are negotiated cost defined benefit plans. "Negotiated cost" refers to the fact that the employers, and in some agreements also the employees, contribute to the pension plan at the rate ($/hour) negotiated in the collective agreement. The term "defined benefit" means that the members are promised a specific benefit upon retirement.[7] Defined benefit plans are valued at regular intervals to ensure that the plan assets are sufficient to pay the benefits promised. If assets are insufficient, the employer is not obliged to contribute more than the negotiated contribution rate to rectify the situation,[8] so benefits may need to be reduced.

[17] Each of the pension plans in this case has a board of trustees which acts as the "plan administrator" for the purposes of the PBSA. Generally, the board of trustees is composed primarily of union members, but it is legally distinct from the supporting or sponsoring union.[9] The PBSA requires the plan administrator register the plan with FICOM and file reports and returns in the form and manner required by FICOM ("pension plan filings"). The PBSA sets out the responsibilities of the plan administrator, including the duty to disclose, upon request, prescribed information to enumerated individuals and organizations.[10] ICBA is not one of those enumerated organizations.

Information in Dispute

[18] In both of its access requests, ICBA initially asked for the pension plan filings of 16 union-sponsored pension plans. However, it subsequently narrowed its requests to a spreadsheet containing the following nine fields of data for each of the pension plans:[11]

1. Number of active members (previous year);
2. Number of active members (current year);
3. Average age of active members;

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[7] Chamzuk 2016 initial sub., paras.9-25.
[8] Thompson 2012 sub. (Hawk affidavit, paras 5-8).
[9] Chamzuk 2016 initial sub., para. 15.
[10] The prescribed information is described in s. 43 of the PBSA Regulation. The enumerated individuals and organizations are at s. 37 of the PBSA.
[11] ICBA 2016 initial sub., para. 24 and 31 and Trivisano 2016 affidavit, exhibits E and F, indicate that it is seeking the same nine data fields in both requests.

4. Average annual hours worked by active members;
5. Current contribution rate ($/hour), both negotiated and actuarial cost;
6. Average annual pension paid to retired members;
7. Average accrued monthly pension entitlement of active members;
8. Surplus or unfunded liability from the previous valuation report; and
9. Surplus or unfunded liability from the current valuation report.

[19] FICOM withheld only data fields 6-7 in its 2012 decision.[12] However, it withheld all nine data fields in its 2015 decision.[13] FICOM's inquiry submissions do not include a copy of the spreadsheets in dispute for either decision. However, ICBA's affidavit evidence includes the severed spreadsheet that FICOM sent it in response to the 2015 request.[14]

Harm to Third Party Business Interests – s. 21

[20] Section 21(1) of FIPPA requires public bodies to withhold information where disclosure could reasonably be expected harm the business interests of a third party. The relevant portions of s. 21 are as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> …
>
> (iii) result in undue financial loss or gain to any person or organization, …

[21] The principles to be considered in applying s. 21(1) are well established.[15] In order to properly withhold information under s. 21(1), the following three elements must be established:

- Disclosure would reveal the type of information listed in s. 21(1)(a);
- The information was supplied, explicitly or implicitly, in confidence, pursuant to s. 21(1)(b); and

[12] It disclosed all data fields for two consenting plans and data fields 1-5 for the other 14 plans.
[13] FICOM disclosed all data fields for one consenting plan.
[14] ICBA 2016 initial sub. (Trivisano 2016 affidavit, exhibit I).
[15] See: Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49182 (BC IPC).

- Disclosure of the information could reasonably be expected to cause the type of harm set out in s. 21(1)(c).

Financial information – s. 21(1)(a)

[22] FICOM, the unions and pension plans all submit that disclosure of the information in dispute would reveal financial information of or about the third parties. Many of them also submit that it would reveal labour relations or commercial information. The Thompson group submits that it would also reveal trade secrets of a third party, but it does not elaborate. ICBA does not dispute what the other parties submit regarding s. 21(1)(a).

[23] I have considered the data fields requested by ICBA and I am satisfied that disclosing this information would reveal financial information of or about the pension plans, so s. 21(1)(a) applies to it. This is information that pertains to the pension plans' finances, money management, financial obligations and the member contribution and benefit calculations.

[24] Several of the third parties submit that the information in dispute is also the financial information of or about the unions.[16] However, the third parties provide no explanation for this, and it is not apparent to me how the specific information in the requested data fields is also the financial information "of or about" the unions. Just because a pension plan is affiliated with a union does not make the requested plan information the financial information "of or about" the union. In conclusion, I find that the financial information in dispute is of or about the pension plans but it is not of or about the unions.

Labour relations information – s. 21(1)(a)

[25] The third parties who submit that the information in dispute is labour relations information of or about the unions do not explain this assertion.[17] To my mind, the only information that could be labour relations information under s. 21(1)(a) is the $/hour contribution rates. Those rates are agreed to during collective bargaining and they reflect labour negotiations. Therefore, I find that the $/hour contribution rates are labour relations information of or about the unions.

Supplied explicitly or implicitly in confidence – s. 21(1)(b)

[26] For s. 21(1)(b) to apply, the information must have been supplied, either implicitly or explicitly, in confidence. This is a two-part analysis. The first step is to determine whether the information was supplied to a public body. The second step is to determine whether the information was supplied "in confidence".

[16] Thompson 2016 initial sub., paras 24-25.
[17] Thompson 2016 initial sub., para. 24; Chamzuk 2016 initial sub., para. 42.

[27] All of the parties objecting to disclosure assert that the information in dispute was supplied to FICOM either explicitly or implicitly in confidence. They say that the information in dispute comes from the pension plans' actuarial valuation reports and information reports that are filed with FICOM.

[28] ICBA does not dispute that the information at issue was supplied to FICOM. Rather, it disputes that it was supplied "in confidence" because, it says, the information is already available to the public and in some cases it is in the public domain.[18]

Supplied

[29] All parties acknowledge that the pension plans provide information to FICOM as part of their reporting obligations under the PBSA, and that the information ICBA seeks is contained in those pension plan filings. FICOM's evidence is that the information in dispute was extracted from actuarial valuation reports filed by the pension plans.[19] None of the parties provide a copy or sample of a valuation report or the type of information that plan administrators give FICOM when they provide their pension plan filings.

[30] To my mind, the information contained in the pension plans' filings under PBSA is clearly information that was "supplied" to FICOM for the purposes of s. 21(1)(b) of FIPPA. I am also satisfied that the information in the spreadsheet, which is a compilation of that same information, is "supplied" information. The fact that the spreadsheet was created by FICOM does not mean that the information that appears in the spreadsheet was not supplied to FICOM. In this case, it is the content, rather than the form of the information that is determinative.[20] In conclusion, I find that all of the information in dispute was "supplied" for the purposes of s. 21(1)(b).

In Confidence

[31] For s. 21(1)(b) to apply, the information must also have been supplied, "implicitly or explicitly, in confidence". To establish confidentiality of supply, it must be shown that information was supplied "under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided." [21]

[32] In this case, the parties objecting to disclosure assert that the information in dispute was supplied to FICOM either explicitly or implicitly in confidence. They also say:

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[18] ICBA 2016 initial sub., paras. 107 and 110.
[19] FICOM 2012 initial sub. (Peters 2012 affidavit, para 16).
[20] *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, [*Merck Frosst*] at para. 157-58.
[21] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.

- the information in dispute includes trust agreements, actuarial and financial reports, statements of investment policy and reciprocal agreements between unions. It is confidential business information that was supplied implicitly in confidence to FICOM and it was not meant to be shared with the public.[22]
- the pension plan trustees only supplied the information in dispute to FICOM because they were obliged to do so by statute and ordinarily they would keep such sensitive information confidential. They supplied it to FICOM on the understanding that FICOM would only use it to perform its regulatory functions.[23]
- the information in dispute is private business information which is only shared with FICOM because the PBSA requires it.[24]
- with the exception of the negotiated contribution rates, the information is highly sensitive and is not publicly available.[25]
- it was "reasonably understood" that the pension plans supplied the information implicitly in confidence to FICOM.[26]

[33] None of the pension plans provide evidence of what they communicated to FICOM about confidentiality at the time they actually supplied the information.

[34] FICOM provides several pages of what it says is evidence that the pension plan filings were explicitly made in confidence. The pages are cover letters and one page excerpts (*i.e.*, title page, table of contents, final page) from actuarial reports for nine pension plans. Given their dates, some appear to have no connection to the information in dispute. There is no explanation about their timing. Some reveal nothing about the conditions under which information was supplied to FICOM because they are communications between the pension plan and its actuary (*i.e.*, not FICOM). Other pages do not contain statements about confidentiality. Instead, they are an actuary's "limited use" statement. By this, I mean that they are a warning that the information should not be relied upon by others because it was prepared for the trustees of a specific pension plan for a limited purpose. However, a few of the pages are labelled as "confidential" and seem, as far as I can tell (FICOM does not clarify), to relate to the time period covered by ICBA's two access requests at issue here.[27]

[35] FICOM says that ICBA requested similar information at least twice in the past and FICOM disclosed full copies or extracts of the pension plan filings. FICOM says that it did not inform the pension plans of those earlier requests and disclosures because FICOM staff apparently did not consider s. 21 of FIPPA when it disclosed those records. However, FICOM took a different approach

[22] Thompson 2016 initial sub., appendices 3 and 7.
[23] Chamzuk 2016 sub., paras. 44-45.
[24] Local 276, 2016 initial sub., para. 26 (Curtis 2016 affidavit, para. 18).
[25] Local 170, 2016 initial sub., paras. 13, 59 and 73.
[26] Local 2404, 2016 initial sub., para. 17.
[27] FICOM 2016 initial sub., para. 41 (Peters 2016 affidavit exhibit B #2, 4, 8, and 9) and Peters 2012 affidavit exhibit A.

before making its final 2012 decision and it chose to consult the third parties under s. 23 of FIPPA. FICOM says that, based on what the third parties said, it concluded the information in dispute had been supplied implicitly in confidence. FICOM says that since that time, its policy is to consider s. 21 and third party input when considering access requests.[28]

[36] FICOM provides evidence that as of February 1, 2013, defined benefit pension plans must file their plan information electronically using a form that contains the following statement: "We accept your information as having been supplied in confidence; however please note that the protection of confidentiality is subject to the law (particularly the provision of the Freedom of Information and Protection of Privacy Act)."[29] FICOM says that it has a mutual understanding with the pension plans that their filings are to be treated as having been supplied in confidence for the purposes of s. 21(1)(b).[30]

[37] ICBA says that the pension plans could have no reasonable expectation that the information in dispute was supplied in confidence and would be kept confidential because the information is otherwise available and is in the public domain. Specifically ICBA points to s. 37 of the PBSA, which has been in effect since September 30, 2015. It requires that plan administrators provide prescribed information upon request to: plan members; a deceased plan member's surviving spouse, designated beneficiary or personal representative; employees who are, or are about to be, eligible to become active plan members; participating employers and unions and other prescribed persons. ICBA says that this prescribed information is identical to the information ICBA has requested. ICBA says that the fact that a large number of people have the right to obtain information from plan administrators, with no restrictions imposed by the PBSA on their further disclosing that information, belies any claim that the information is confidential.[31]

[38] I am not convinced by ICBA's argument on this point. In my view, the statutory obligation of plan administrators to disclose information upon request to plan members and other prescribed individuals with a direct interest in the plan does not mean that the information is publicly available or in the public domain. Nor does it satisfy me that the pension plans did not supply the information to FICOM with the mutual understanding and expectation that FICOM was receiving it in confidence, and it would be kept confidential between FICOM, the pension plan administrators and the prescribed individuals with a direct interest in the plan. I note that the PBSA contains no explicit confidentiality provision. However, that fact does not invalidate what I conclude was a reasonable expectation that the information was being supplied to FICOM in confidence.

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[28] FICOM 2012 initial sub., para. 18 (Peters 2012 affidavit, paras. 12-14, 20).
[29] FICOM 2016 initial sub., para. 42 (Peters 2016 affidavit, exhibit C).
[30] FICOM's 2016 initial sub., para. 45.
[31] ICBA 2016 initial sub., paras. 49, 110,117 and 119.

[39] ICBA also submits, "Furthermore, under the newly enacted PBSA, the Public Body now has considerable enforcement and monitoring powers. These powers include the ability to seek production of documents and other matters via court order, which would presumably involve many of these documents becoming matters of public record."[32] It does not, however, explain how these powers would involve documents becoming matters of public record and that is not clear to me. I also am not persuaded that Alberta Order F2012-17, which ICBA cites, supports its argument in that regard.[33] Order F2012-17 says that Alberta's Superintendent of Pensions has wide ranging powers to ensure compliance with Alberta's *Employment Pensions Act*, including disclosing information gathered during an investigation to plan members. That order, however, does not address disclosure of pension plan filing information to non-members and the general public, which is the issue here.

[40] In conclusion, I am satisfied based on the above information, in particular FICOM's evidence regarding the online form with its explicit statement of confidentiality, that the majority of the information in dispute was supplied in confidence under s. 21(1)(b). (The sole exception is the contribution rates, discussed in the next paragraph). I note that the evidence for confidential supply is stronger for the 2015 decision information than it is for the 2012 decision information. That is because there are no clear and explicit statements of confidentiality for the 2012 decision information and, in the past, FICOM disclosed similar information without considering s. 21 of FIPPA. However, the fact that formerly FICOM staff may have failed to consider s. 21 and the factors it addresses does not lead me to conclude that FICOM did not understand that the information was being supplied in confidence at the time it was received. Given the nature of the information in dispute and the purpose for which it was being supplied to FICOM, I am satisfied that the pension plans had a reasonable expectation that the information they gave FICOM was supplied in confidence and would be kept confidential.

[41] The only information that I find was not supplied in confidence is the $/hour pension plan contribution rates. As the ICBA observes, and several third parties concede on reply, these rates are written into collective agreements and collective agreements are generally publicly accessible. Collective agreements can be found on union websites, the BC Labour Relations Board website, the BC Bargaining Database website and the Construction Labour Relations Association of BC website.[34] It also seems to me that the collective agreements are generally in wide circulation. In my view, there could be no reasonable expectation that the contribution rates were confidential information that was being supplied in confidence to FICOM.

[32] ICBA 2016 initial sub., para. 118.
[33] Order F2012-17, 2012 CanLII 70619 (AB OIPC).
[34] ICBA initial 2016 sub., para. 122; Thompson 2016 reply, para. 37.

[42] In conclusion, I find that s. 21(1)(b) applies to all of the information in dispute with the exception of the $/hour contribution rates.

Reasonable Expectation of Harm – s. 21(1)(c)

[43] The standard of proof under s. 21(1) is whether disclosure of the information could reasonably be expected to result in the specified harm. The Supreme Court of Canada has described this standard as "a reasonable expectation of probable harm" and "a middle ground between that which is probable and that which is merely possible."[35] A public body must demonstrate that disclosure will result in a risk of harm that is "well beyond the merely possible or speculative".[36] The determination of whether the standard of proof has been met is contextual, and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[37]

[44] The third parties and FICOM make several arguments regarding harm under s. 21(1)(c). Two matters, however, can first be briefly dispensed with before turning to the balance of their submissions.

[45] The first is the third parties' submission that ICBA's motive for making its access requests is a relevant consideration when deciding the issue of harm. FICOM and ICBA, on the other hand, say that an applicant's motives are irrelevant to the question of whether s. 21 applies. I agree. FIPPA does not impose any requirement on an applicant to explain, let alone justify, its access request.[38]

[46] The second is the issue of whether disclosure of the $/hour contribution rates could reasonably be expected to cause harm under s. 21(1)(c). Technically, it is not necessary to consider this information here because I found it was not supplied in confidence. However, for completeness, I will simply point out that given the information is already publicly available, I am not persuaded that its disclosure in response to ICBA's access requests could reasonably be expected to be the cause of any of the harms listed in s. 21(1)(c). Any reasonable expectation of harm already exists and could not be attributed to disclosure here.

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[35] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54, [*Community Safety*].
[36] *Merck Frosst, supra* at note 20, at para. 206.
[37] *Community Safety*, *supra* at note 35, at para. 54
[38] Order F05-29 2005, CanLII 32548 (BC IPC); Order F04-19, 2004 CanLII 45529 (BC IPC).

Harm to competitive position, s. 21(1)(c)(i)

[47] The third parties submit that releasing the information in dispute could reasonably be expected to significantly harm their competitive position. They say that the relationship between the unionized and non-unionized sectors of the construction industry is adversarial and they compete against each other to attract skilled tradespeople. They rely on attracting and retaining members to keep the pension plans funded and able to pay benefits to retired members. They say that for many years building trade unions have had an advantage in attracting workers because they provide defined benefit pension plans, which are the best way for workers to secure their retirement income. However, they say, that advantage is being eroded as ICBA members can now arrange employee retirement products, like group RRSPs, through ICBA Benefit Services Ltd.

[48] The Thompson group's submissions capture the core of what all the third parties submit about harm to their competitive positions. They say:

> If the Applicants are able to obtain the requested information, then they will be able to a) use that information to fine tune the competing products that they offer to construction workers, b) argue to construction workers that they can obtain a more valuable compensation package by working non-union and c) attack the viability of the building trades' pension plans and tangentially attack the building trade unions themselves.
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> The requested records will provide the Applicant with the pay-off value of retirement benefits to union members, thus giving the Applicant a target to attack or a target to beat. Knowing the target to beat will allow the Applicant and its members to modify and enhance their retirement benefits so as to better compete for skilled labour and market share...[39]

[49] The third parties explain that by their very nature the union-sponsored defined pension plans can experience surpluses and deficits that reflect the current market conditions and demographic realities of the plan. The Thompson group's evidence is also that most Canadian defined benefit pension plans, not just union-sponsored ones, experience these same issues.[40] The Thompson group says:

> The requested information will also provide the Applicant with information as to the viability of each pension plan, albeit at a particular point-in-time. This information, taken in the abstract, and if and when it shows any type of unfunded liability will allow the Applicant, as well as others, to argue that each union's defined benefit plan is not a safe retirement vehicle. It will allow the Applicant and its benefit provider subsidiary, to potentially

[39] Thompson 2012 initial sub., paras. 28 -31.
[40] Chamzuk 2016 initial sub. (Hawk 2012 affadavit, para. 36).

> create an inaccurate portrayal of the health of the pension plans to members of the unions and the general public.[41]

[50] The third parties say plan members may be misled by ICBA's criticism of the plans because information about plan funding, assets and liabilities is technical and complicated.[42] Their concern is that, if the union members misunderstand, they may fear for the safety of their retirement savings and conclude that the non-union sector can offer equivalent or better retirement benefits.[43] If a member quits the union-sponsored pension plan, plan assets would be reduced. This, in turn, would negatively impact the remaining members' benefits and make the plan riskier and more difficult to diversify and manage.[44] Several of the third parties also express a concern that there might be a mass membership exodus or "run on the plan" at a time when a plan is experiencing funding difficulties, resulting in the ultimate winding up of the plan. [45]

[51] The third parties point to past news articles as support for their assumption that ICBA will use the information in dispute to publicly say that the union-sponsored pension plans are not financially viable.[46] The news articles reveal that in the past ICBA has cited pension plan details obtained from its previous FIPPA access requests. The Chamzuk group says:

> Indeed, in that 2003 article the ICBA even notes the average pension paid to those receiving pensions in the building trades. These figures are without context, divorced from any explanation or understanding that would have been contained in the valuation report, and used to suggest that the plans are unstable. If a member of the Pension Plans were to read that statement they would likely become concerned about their own benefit in their Pension Plan".[47]
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> …
>
> The Requested Information is particularly vulnerable to misuse and manipulation and could easily be used to create fear about the viability of a pension plan. That is a more realistic fear when the information is sought by a person or entity that does not have an interest in the plan (not a member, not a union representing the members and not an employer contributing to the plan)."[48]

[52] The third parties submit that they are at a competitive disadvantage because they cannot use FIPPA to access information about the retirement

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[41] Thompson 2012 initial sub., para. 32.
[42] Chamzuk 2016 initial sub., para. 57 (Heise 2016 affadavit).
[43] Local 170, 2016 reply sub., paras. 19 and 21; Chamzuk 2016 initial sub., para. 84 and 2016 reply sub., para. 25.
[44] Chamzuk 2016 initial sub. (Hawk 2012 aff. paras. 14-20, Heise 2016 affadavit, exhibit A).
[45] Local 170, 2016 initial sub., para. 27; Chamzuk 2016 initial sub., appendix A (Hawk 2012 affadavit, para. 16).
[46] Chamzuk 2016 initial sub., paras. 69-71 (Hawk 2012 affadavit exhibits F, G, H & I).
[47] Chamzuk 2016 initial sub., para. 71.
[48] Chamzuk 2016 reply, para. 19.

products that ICBA Benefit Services Ltd. offers. That is because FICOM does not regulate those products. I understand this to be an argument that the third parties feel hampered in their ability to point out any flaws they perceive in ICBA's financial assumptions about the union-sponsored benefit plans and comparisons of those plans to RRSPs and other retirement savings products.[49]

[53] For its part, FICOM says that it does not think that disclosure of the 2012 decision information could cause significant harm given its age.[50] However, it submits that disclosure of the 2015 decision information could reasonably result in significant harm under s. 21(1)(c)(i). Its submissions regarding this harm parallel what the pension plans and unions say.

[54] ICBA says that there is no evidence that disclosure of the information in dispute could lead pension plan members to misapprehend the state of their pensions and leave the plan or cause a run on the plan. In particular, ICBA says that it routinely requested and received this information from FICOM in the past and there is no evidence that any of the alleged harms occurred as a result.[51]

[55] The third parties respond to the ICBA's submission that there is no evidence that any harms resulted from FICOM's previous disclosure of the information in dispute. The Chamzuk group says that it was not aware of those earlier disclosures so it cannot determine if they caused harm to the pension plans. It adds, however, that it is "entirely possible that the retirement products developed by the ICBA are based on the information previously disclosed to the ICBA under FOIPPA."[52] The Thompson group says that, even though there is no evidence of harm from previous releases, it is not possible to infer that no harm would flow from future releases, especially as the issue has now had public attention in news articles.[53] Local 170 says that it does not know if ICBA used the information previously obtained to tailor its competitive retirement benefit plans but ICBA did not deny doing so.[54]

Analysis

Impact of ICBA's comments on workers

[56] The harm FICOM and the third parties allege flows from workers deciding not to participate in unions and union-sponsored pension plans if they hear what ICBA says about those plans and how they compare to the retirement products available in the non-union sector. Specifically, the concern is that existing members will quit their unions and their union-sponsored pension plans and prospective members will not want to join.

[49] Chamzuk 2016 initial sub., paras. 84-85 (Heise 2106 affidavit, exhibit A).
[50] FICOM 2012 initial sub., para. 21.
[51] ICBA 2016 initial sub., paras. 25, 130-34 and 140-42.
[52] Chamzuk 2016 reply, para. 42.
[53] Thompson 2016 reply, paras. 32-33 (Pesa 2016 affidavit, para. 13).
[54] Local 170, 2016 reply, para. 46.

[57] The third parties have established that the union sector competes against ICBA's members to attract skilled tradespeople and that retirement benefits are one tool used by both sides in that competition. The news articles that the third parties provide demonstrate how ICBA used similar information in the past to criticize the unions and their pension plans. I accept that disclosure of the information in dispute would give the ICBA the ability to generate comparisons and criticize the union-sponsored pension plans, if it chooses to use the information in that way again in the future.

[58] In this case, no one provides evidence of workers actually having quit their unions and pension plans in response to past disclosure of information to ICBA. The third parties say that they were unaware of those earlier disclosures so they cannot determine if they caused harm to the pension plans. However, they did not say why, now that they do know, they are unable to examine their records to see (and share) what correlations, if any, are revealed. Also, there is no evidence about why or how often members typically quit their unions and pension plans for any reason, let alone because of something the ICBA said or did. For example, there was no background data, even of the most general sort, about the number of entries and exits from the unions. Also, there was no evidence from workers who had actually made the transition into or out of the union sector about what factors influenced their decision.

[59] To be clear, I am not suggesting that there is any requirement that the parties prove that the alleged harms happened in the past in order to meet the standard of harm under s. 21 of FIPPA. It is simply that such evidence about the impact of the previous disclosures provides important and relevant contextual information about the probability of workers responding in the way the third parties fear. It is a type of evidence that would demonstrate whether the alleged harm is "well beyond the merely possible or speculative". The absence of such information is only one element that I have weighed here.

[60] There is nothing in this case to indicate that circumstances or human nature have changed since the previous disclosures of this same type of information, such that one would expect the outcome of disclosure to be any different now. Common sense suggests that there are many factors involved in an individual's decision about whether to participate in the union versus non-union construction sector. For instance, Local 276 explains that wages and health benefit plans are very important in attracting workers to the union.[55] Other obvious factors include the worker's age, health, family responsibilities and the employment prospects in his or her community. If ICBA opts to use the information in the way that FICOM and the third parties fear, this may very well influence workers' decisions. However, it will not be the only thing they consider. Each individual worker will undoubtedly make such decisions based on an assessment of his or her own particular circumstances.

[55] Local 276, 2016 initial sub., paras. 9-10.

[61] Also on that point, I give little weight to what the third parties say about ICBA's criticism potentially leading to a mass membership exodus or a "run on the plan". There was no compelling evidence to persuade me that workers would respond *en masse* in that way.

[62] In my view, the third parties' harm arguments are largely predicated on their belief that union members are incapable of recognizing ICBA's anti-union approach to the construction industry and can be duped by what ICBA says about union pension plans. The evidence that the third parties provide demonstrates that ICBA publicly and overtly expresses disapproval of the union sector of the construction industry. However, I cannot imagine that a reasonable individual reading or hearing ICBA's assessment of union-related matters would fail to recognize ICBA's political views on labour relations in BC. It seems improbable to me that anyone, but especially an existing union member, would unquestioningly accept what the ICBA says about union-sponsored pension plans. I think that it is more likely that workers would seek additional information from their pension plan administrator or union before leaving the union sector and related defined benefit pension plans.

[63] It is highly doubtful that a union or pension plan would have no opportunity to interact with a plan member before he or she quits the plan or union. It appears much more probable that there will be opportunities for the third parties to counter ICBA's messaging with their own. In fact, there is evidence that this is what indeed occurs. The Chamzuk group says: "The Trustees deal with member inquiries on a regular basis and know the kinds of things members say after hearing partial information or misinformation about their plans."[56]

[64] In addition, I am not convinced by the third parties' arguments that, without information about the specific retirement products available to ICBA members, they cannot point out the flaws in ICBA's financial assumptions and criticism of the union-sponsored benefit plans. Being able to explain and understand the characteristics and merits of different retirement vehicles such as a defined benefit pension plan versus an RRSP does not require the financial specifics of any particular plan. The third parties' submissions demonstrate this, in particular the news articles in which they forcefully and publicly refute ICBA's critique of the union-sponsored pension plans. The third parties' inquiry submissions also comprehensively explain the differences between the various types of retirement savings products. To my mind, the third parties' suggestion that workers would be unable to understand and evaluate what they are told about the differences between a defined benefit pension plan and an RRSP is unsupported by the evidence.

[65] The third parties did not argue or provide evidence that responding to member concerns and defending the plans and correcting any misinformation is a burden that amounts to harm under s. 21(1)(c).

[56] Chamzuk 2016 reply, para. 38.

[66] The Supreme Court of Canada has said on more than one occasion that there must be proof of a "clear and direct connection" between disclosure of the specific information and the harm alleged in order to establish that the risk of the harm is well beyond the merely possible or speculative.[57] In my view, the evidence here does not establish a clear and direct connection between disclosure of the information in dispute and workers quitting or refusing to join unions and union-sponsored pension plans. The possibility of workers responding in this way is so remote, in my view, that it amounts to speculation to suggest this would be the result of disclosure of the information in dispute. This is well short of what the parties opposed to disclosure must demonstrate to successfully advance their case.

Competition between unions and ICBA

[67] I have considered whether disclosure could reasonably be expected to significantly harm the unions' competitive position under s. 21(1)(c)(i) with respect to competition with ICBA. The third parties fear that disclosure of the information at issue will allow ICBA and its members to enhance the attractiveness of the retirement products they offer their employees, thus improving their chances of luring skilled workers to the non-union sector. Local 170 says:

> Competing retirement benefit plans are a key factor in the overall dialectic clash between the union and non-union sectors of the construction industry and their competition for skilled labour and market share… the Responsive Records provide a "*target to attack*" and a "*target to beat*" for the ICBA in its efforts to establish a competing paradigm of retirement benefits in the competing non-union construction industry sector consisting of contractors that are not unionized.[58]

[68] I note that ICBA and the unions do not compete against each other in the traditional sense of buying, selling and seeking profit. Their competition relates to the opposing political paradigms about union versus non-union labour and their competition to attract skilled workers. Whether or not this kind of competition is contemplated by s. 21(1)(c)(i) is not a matter that needs to be decided here. That is because even if I were to conclude that s. 21(1)(c)(i) applies to that type of competitive position, there is no evidence about the magnitude of the feared harm that could reasonably be expected from disclosure of the disputed information.

[69] Section 21 does not protect against all competition but rather only competition that could reasonably be expected to "significantly" harm a party's competitive position.[59] With the exception of their assertions, the third parties

[57] *Merck Frosst, supra* at note 20, at paras. 197 and 219; *Lavigne v. Canada*, 2002 SCC 53 (CanLII) at para 58.
[58] Local 170, 2016 sub., paras.50-51.
[59] Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 9 and 11.

provide no other information to help me determine if the harm they fear would be significant or negligible. Merely by way of illustration, there were no statistics or background about how many workers have shifted to, or from, working in the union sector of the construction industry over recent years. Nor was there affidavit evidence from individuals who had made that transition about the factors that influenced their decisions. Such information would have been helpful in bringing the concerns about the impact of disclosure on the unions' competitive position out of the realm of conjecture. Given the absence of any supporting evidence, I am not persuaded that disclosure could reasonably be expected to "significantly" harm the unions' competitive position with respect to competition with ICBA.

Do pension plans compete?

[70] The pension plans submit that disclosure of the information in dispute could significantly harm their competitive positions. Thus I have considered whether the pension plans have a "competitive position" in the sense intended by s. 21(1)(c). As I understand it, once a pension plan comes into being, it passively awaits contributions made on behalf of the members of the affiliated union. A union's members have no choice and must participate in the specific pension plan sponsored by their union. No one provided evidence that the pension plans compete in the sense that they advertise their services, promote what they offer, solicit business or seek-out new members.

[71] In my view, union-sponsored pension plans and ICBA Benefit Services Ltd. are not in competition, primarily because they serve different clientele. ICBA Benefit Services Ltd. assists ICBA member *employers* to obtain voluntary retirement products, which those employers can in turn choose to offer to their employees. There is no information that the union-sponsored pension plans compete to offer ICBA members a service or product. Similarly, ICBA Benefit Services Ltd. does not offer services or products to workers (whether unionized or not).

Competition between unions

[72] I have also considered the Chamzuk group's argument that the information about one union's pension plan could be used to raid another union of its members. The concern is that a union could use the information to criticize another union's pension plan and cause members to fear for the security of their retirement benefits and induce them to switch unions.

[73] The Chamzuk group cites a BC Labour Relations Board decision to demonstrate how information about the funded position of a pension plan can be used by another union to try and convince workers to switch union allegiance. In that case, a union issued a leaflet publicly criticizing another union's pension plan. The leaflet suggested the plan was insolvent and spoke of the benefit cuts that had occurred. The complainant union argued that this criticism was

an attempt to confuse and scare workers into switching unions. The Labour Relations Board found that the leaflet did not amount to coercion or intimidation that could reasonably have the effect of compelling or inducing a person with respect to their decision about union membership. It said: "Here, the statements in the leaflet are in the context of a representation campaign between two unions. The Board has long allowed for vigorous and hard-fought campaigning that sometimes involving [*sic*] aggressive salespersonship in the nature of '[p]romises and puffery, and hyperbole and exaggeration'." [60]

[74] Contrary to what the third party intended, that case supports my thinking that the type of criticism of a union-sponsored pension plan that the third parties anticipate could not reasonably be expected to harm *significantly* their competitive position regarding other unions. Rather, that case indicates to me that the type of criticism that the third parties fear is within the norm of accepted competitive activity in the labour relations context. Further, the unions provide no other evidence, for example, about how often union raids are attempted and to what extent benefits such as a pension plan contribute to a successful raid. There was also no information about how much, even approximately, workers pay in union dues. Having considered all of the information the parties provide, I am not satisfied that disclosure in this case could reasonably be expected to significantly harm the unions' competitive position with respect to other unions.

[75] In conclusion, I am not satisfied that disclosure of the information in dispute could reasonably be expected to harm significantly the competitive position of the third parties under s. 21(1)(c)(i).

Harm to negotiating position, s. 21(1)(c)(i)

[76] The unions are also concerned that if the information at issue becomes known to employers it will significantly interfere with the unions' negotiating positions during collective bargaining.[61] As I understand it, there are two arguments in this regard.

[77] First, the unions say that their negotiating strength during collective bargaining is based in large part on being an employer's primary or go-to source for skilled tradespeople. If ICBA's public criticism of the pension plans convinces skilled workers to switch to the non-union sector, this will reduce the size of the union membership. This in turn will weaken the unions' bargaining power and their ability to "compel employers (who depend on access to that labour) to sign collective agreements."[62] They also submit that it weakens their bargaining power and ability to make successful demands during collective bargaining.[63]

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[60] *Re Construction, Maintenance and Allied Workers Canada and British Columbia Regional Council of Carpenters Case No. 69087/15*, BCLRB Letter Decision No. B246/2015, at pp. 4-5.
[61] Local 2404, 2016 initial sub., para 19; Local 170, 2016 initial sub., para. 5.
[62] Local 170, 2016 initial sub. (Phillips 2016 affidavit para. 24).
[63] Local 170, 2012 initial sub.

[78] Second, several unions submit that negotiations to renew their collective agreements are currently underway.[64] The third parties are worried about losing their ability to play their cards close to their chest during renewal negotiations. They say that if the employers who are party to those negotiations have the information in dispute, they will be able to tailor their monetary proposals based on a better understanding of the health and viability of the plans.[65] Specifically, the unions do not want the employers to know if a plan is experiencing funding shortfalls because that would reveal whether a proposed contribution rate increase is motivated by necessity (*i.e.*, to address a plan deficit) or a desire to simply improve member benefits. The Thompson group submits that negotiations can involve bluffing and, on issues such as increased pension contributions, such strategies would be negated if the information in dispute were known.[66]

Analysis

[79] Regarding the first argument, I am not persuaded that disclosure of the information in dispute could reasonably be expected to interfere significantly with the unions' ability to maintain their strength position during collective bargaining as the primary or go-to source of skilled workers. That is because I am not satisfied that disclosure of the specific information at issue in this case could reasonably be expected to result in any consequential number of workers quitting, or refusing to participate in, unions and pension plans.

[80] I am also not persuaded by the argument that disclosure will result in employers learning information during negotiations to renew collective agreements that they might not otherwise have access to. It is evident to me that when it comes to *renewing* a collective agreement, the employer is already a participant in the pension plan associated with that agreement and has the ability to access the information in dispute. That is because the PBSA and Regulation grant an employer who participates in a pension plan the right to access the information in dispute. The PBSA defines a "participating employer" in relation to a pension plan as "an employer that is required to make contributions to the plan". Section 37(5) of the PBSA and s. 43 of the Regulation state that a plan administrator must provide a participating employer, upon request, with records including the plan's two most recent actuarial valuation reports and cost certificates, three most recently filed annual information returns and three most recently filed audited financial statements (s. 43(4) Regulation). None of the parties dispute the right of participating employers to access the information in dispute.

[64] Thompson 2016 initial sub., para. 34 (Pesa 2016 affidavit, para. 7); Local 2404, 2016 initial sub., para. 19; Local 170, 2016 sub., para. 65.
[65] Thompson 2016 initial sub., para. 34-35 (Pesa 2016 affidavit, para. 11).
[66] Thompson 2016 initial sub., appendix 7 at p. 5.

[81] Further, the evidence the unions provide is that bargaining in the construction industry takes place by way of a Labour Relations Board protocol that involves multi-trade and multi-employer groups.[67] The parties enter into standard agreements. Based on this context, I conclude that employers, whether existing or new to the particular multi-employer bargaining group, would have access during negotiations to the information available to employers already participating in the pension plan.

[82] In addition, the third parties provide no information to support a finding that the feared interference with their negotiating position would reach the "significantly" threshold set out in s. 21(1)(c)(i).

[83] Local 276 raises a slightly different argument. It says that "none of the signatory employers to Local 276's collective agreement meet the definition of participating employer as the employers are not required to make contributions to the plan. The employer makes a blended payment to the union pursuant to a collective agreement and the union then allocates those payments among various plans which include the pension plan."[68] However, Local 276 does not provide a copy of its collective agreement to substantiate its contention. In the absence of any supporting evidence, I am not persuaded by the mere assertion that these employers are not entitled to access the information in dispute under the PBSA. In any event, Local 276 says that the pension contribution amount is only an element of a larger or blended amount. It is not evident how disclosure of information about this one element would significantly interfere with its bargaining position and Local 276 did not explain.

[84] In conclusion, for the reasons above, I am not satisfied that disclosing the information in dispute in this case could reasonably be expected to interfere, let alone significantly, with the negotiating positions of the unions during collective bargaining, under s. 21(1)(c)(i).

Undue financial loss or gain, s. 21(1)(c)(iii)

[85] The third parties also submit that releasing the information in dispute could reasonably be expected to result in undue financial loss to them and undue financial gain to ICBA.[69] They say that if skilled workers are lured away to the non-union sector, it will erode the union base and result in a loss of union membership dues.[70] The third parties say this would ultimately have a negative financial impact on the unions and the pension plans they sponsor.

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[67] Local 170, 2016 initial sub., para. 65 (Phillips 2016 affidavit paras. 9-17); Thompson 2016 initial sub., para. 34 (Leland 2013 affidavit, para. 20 and Pesa 2016 affidavit, para. 7); Local 276, 2016 reply sub., para. 16.
[68] Local 276, 2016 reply sub., para. 15.
[69] Chamzuk 2016 initial sub., para. 86; Local 170, 2016 initial sub., para. 13.
[70] Local 170, 2016 initial sub., para.58.

Analysis

[86] I have considered what evidence there is that disclosure could reasonably be expected to lead to an undue financial loss or gain. The evidence in this case establishes that the unions compete with the non-union sector for skilled workers. They do so, in part, by touting their respective and very different retirement savings products and pointing out the flaws in what the other has to offer. I accept that if a union member is enticed into the non-union sector this will result in a financial loss in the form of lost union dues and union-sponsored pension plan contributions.

[87] However, I have already concluded that the probability is very low and that it borders on speculation to think that the average rational worker would decide not to participate in the union and its pension plan because of what the ICBA may say about union-sponsored defined benefit pension plans and the benefits of alternative retirement products like group RRSPs. Further, the third parties provided no information about the dollar amount of any loss of union dues or pension contributions. For instance, I was provided with no details about how much, even approximately, a worker pays in union dues and pension contributions and what proportion of the total that would be. Thus I have no information to be able to appreciate the magnitude or significance of the financial loss or gain the third parties fear and whether it would be "undue".

[88] I have also considered the third parties' argument that the information in dispute could be used by ICBA and/or its members to modify, fine tune and enhance the retirement benefits they provide in order to entice workers to the non-union sector. The evidence provided on this point is a report from a pension, benefits and investment consulting firm provided by the Chamzuk group.[71] Throughout his report, the consultant explains and emphasizes that a defined benefit pension plan is a unique and superior type of retirement vehicle and that a group RRSP is inherently different. The consultant says that the information in dispute will allow ICBA to finesse its sales pitch for group RRSPs and better highlight the differences that make them seem more desirable than the defined benefit pension plans sponsored by the unions.

[89] However, the consultant does not say that access to the information about union-sponsored negotiated contribution defined benefit pension plans would allow the ICBA to modify, fine tune or enhance its group RRSPs or design a different type of retirement product. In fact, no one provides evidence explaining how that is even possible. It is not clear to me that it is possible, given all the information the parties provide about how a negotiated contribution defined benefit pension plan is not at all like other retirement vehicles (it has its own set of financial rules, benefits and drawbacks). Also, the third parties' submissions lead me to wonder if the insurers and pension companies who actually provide the retirement products ICBA Benefit Services Ltd. arranges for

[71] Chamzuk 2016 initial sub. (Heise 2016 affidavit, exhibit A: George & Bell Consulting report).

its members would be willing or able to use the information in dispute in the way the third parties fear. There was no evidence about this, however.

[90] I have also considered whether disclosure could reasonably be expected to result in undue financial gain for the ICBA. Even if the ICBA's criticism of the union-sponsored pension plans persuades some workers to leave their unions and join the non-union sector, there was no information to explain how this would result in a financial gain to the ICBA, undue or otherwise. For instance, I considered whether it might increase the money ICBA receives in membership dues. There is no information, however, about the correlation between the number of workers in the non-union sector and the amount of money the ICBA collects in dues from the construction companies that are its members.[72]

[91] I have also considered ICBA Benefit Services Ltd.'s role in the provision of retirement products to ICBA members. The information about this company is vague, however. While I can see that it is involved in arranging for insurers and pension plan providers to offer various retirement savings products to ICBA members, and Local 276 submits that two of the company's directors are also ICBA directors,[73] I have no other details. In particular, there was no information about how ICBA Benefit Services Ltd.'s finances relate to ICBA's finances.

[92] In my view, the information that the parties opposed to disclosure provide in this case does not establish that disclosure of the information in dispute could reasonably be expected to result in undue financial loss or gain under s. 21(1)(c)(iii).

Bricklayers decision

[93] After the inquiry closed the Chamzuk group brought a recent Ontario Superior Court of Justice decision to my attention and offered to provide submissions regarding it: *Trustees of the Bricklayers and Stonemasons Union Local 2 v. Information and Privacy Commissioner of Ontario and Canadian Bricklayers and Allied Craft Unions Members v. Information and Privacy Commissioner of Ontario*[74] [*Bricklayers*]. *Bricklayers* is a judicial review decision of Order PO-3472,[75] an order of the Information and Privacy Commissioner of Ontario ("IPC"). The case involved a request under Ontario's *Freedom of Information and Protection of Privacy Act* ("Ontario Act") for actuarial valuation reports filed by two union sponsored pension plans with the Financial Services Commission of Ontario. The issue was whether the records were exempt under s. 17(1) of the Ontario Act, a provision which is substantially similar to s. 21(1) of FIPPA. The IPC adjudicator found that while the records had been supplied in confidence, the parties opposed to disclosure had not provided sufficiently

[72] Besides, it is not a given that workers leaving the union sector will go to work for an ICBA member because not all employers in that sector are ICBA members.
[73] Local 276 2016 initial sub. (Curtis 2016 affidavit, para. 29).
[74] 2016 ONSC 3821 (CanLII). Leave to appeal refused December 12, 2106 (M46592).
[75] 2015 CanLII 15988 (ON IPC).

detailed and convincing evidence to substantiate the harms under s. 17(1). The Court determined that the standard of proof that the IPC adjudicator had applied was too burdensome and set the order aside.

[94] *Bricklayers* is not binding on the OIPC and it is a decision of a court in another jurisdiction. Nevertheless, I invited all parties to provide submissions regarding it and several did so. In short, the parties opposed to disclosure submit that *Bricklayers* should be treated as persuasive because of its factual similarities to the present case. ICBA submits that *Bricklayers* is not persuasive for several reasons, including that it is a judicial review and the primary focus of the Court's analysis was the appropriate standard of review, one cannot tell from the Court's reasons what evidence on the central issue of harm was before the IPC adjudicator and how similar it is to the evidence in the present case, and the majority's reasons are inconsistent with established freedom of information jurisprudence that states that an applicant's identity and motives are irrelevant to assessing harm.

[95] I agree with what the Court said about the correct legal test for assessing a reasonable expectation of harm. It is the same test I set out earlier, specifically the one the Supreme Court of Canada articulated in *Merck Frosst* and *Community Safety*.[76] I am also persuaded by the statements made by the Court about applying the law to the facts of such a case, for instance how the context and timing of the request are factors to consider. I also agree with the Court's statement that the fact that there is no proof of harm resulting from a previous disclosure is not determinative, but it is one type of evidence that can be used to demonstrate that the harm alleged is well beyond the merely speculative.

[96] However, in other regards I do not find the decision to be persuasive. Section 17 of the Ontario Act is about significant harm to competitive position, significant interference with contractual or other negotiations and undue loss or gain. *Bricklayers* does not reveal what evidence the IPC adjudicator had of a clear and direct connection between disclosure of the specific information and the s. 17 harms alleged. This is the type of evidence that is needed to establish that harm is well beyond the merely possible or speculative. Absent details about the evidence of harm the IPC adjudicator actually had before her, I cannot see sufficiently persuasive similarities to the evidence in the present case. Therefore, I am not persuaded that I should reach the same conclusion as the Court did in *Bricklayers*. I have considered the actual evidence and arguments about harm that are before me in this case.

Summary of findings - s. 21

[97] I find that s. 21(1)(a) applies to the information in dispute. All of it is the financial information of or about the pension plans. In addition, the $/hour contribution rates are the labour relations information of or about the unions. With

[76] See para. 43, above.

the exception of the $/hour contribution rates, I find that the information was supplied in confidence, so s. 21(1)(b) applies. However, FICOM and the third parties have not persuaded me that disclosure of any of the information could reasonably be expected to result in the harms in either ss. 21(1)(c)(i) or (iii). Therefore, I find that they have not proven that FICOM must refuse to disclose the information to ICBA under s. 21(1) of FIPPA.

Disclosure Harmful to Personal Privacy – s. 22

[98] Several of the third parties submit that some of the information in dispute is third parties' personal information and that disclosing it would be an unreasonable invasion of those individuals' personal privacy under s. 22(1) of FIPPA. ICBA submits that it is impossible to determine information about any one individual based on the information in dispute.

[99] Numerous orders have considered the application of s. 22, and I will apply those same principles in my analysis.[77]

Personal information

[100] The first step in a s. 22 analysis is to determine if the information is personal information. Personal information is defined as **"**recorded information about an identifiable individual other than contact information". There is no suggestion in this case that the information in dispute is contact information.[78]

[101] The third parties acknowledge that the information in dispute is average and aggregate information. Nevertheless, they submit that it could be combined with publicly available information to calculate the approximate value of the pension benefits being received by a retiree.[79] They explain that sometimes the names of newly retired union members are published in union annual reports, newsletters or magazines and that one could match these names up with the average annual pension paid to retirees and "have a fairly close estimate"[80] of what the new retirees are receiving.

[102] The Thompson group submits that although the information is not about a particular retiree, it would allow the ICBA to know "roughly" what the income is of every individual drawing a pension.[81] The Thompson group provides some evidence of how many individuals retire per year. It says that 87 workers retired from the International Brotherhood of Electrical Workers, Local 213 in 2015, and that "similar numbers" apply for the International Association of Bridge,

[77] See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.
[78] See Schedule 1 of FIPPA for these definitions.
[79] Thompson 2016 initial sub., para. 40. The Chamzuk and Local 2404 specifically say that they adopt the Thompson sub. regarding s. 22.
[80] Thompson 2016 initial sub., para. 38.
[81] Chamzuk 2016 initial sub. (Hawk 2012 affidavit, paras. 34-35).

Structural, Ornamental and Reinforcing Ironworkers, Local 97.[82] The Thompson group also says that the Ceramic Tile Workers' Pension Plan has 45 members. However, it does not say which union is associated with that plan, how many retire per year and whether that union publishes the names of its newly retired members.

[103] Local 170 raises a slightly different argument regarding why the information is personal information. It says that it is not suggesting that the information would disclose the actual amount received by an individual retiree.[83] It says that any information about a union-sponsored pension plan could be linked to an identifiable individual who is known to be a member of that respective union. Information as to an individual's affiliation with a union is readily available through observation of workers on a job site or through the information that is published by trade unions.[84] I understand this to be an argument that even aggregate and average information is information about any individual who is identified as being part of the group.

[104] For the following reasons, I find that the information in dispute does not meet the definition of personal information in FIPPA.

[105] Based on the evidence, my understanding of the ICBA's request for the average annual pension paid to retired members means the average of what is paid to all retirees in a plan, not just the average paid to the much smaller subset of individuals who recently retired. Some of the third parties' submissions seem to mischaracterize the information in dispute as being the average pension for the smaller subset of the newly retired.

[106] The information in dispute is aggregate and average information, and the third parties' evidence and arguments do not establish how disclosing information of this type would reveal precise information about an individual. Even if only one person retires per year, the average paid to all retired members is not going to reveal what that any one individual receives. At most it will reveal an approximation or estimate.

[107] In my view, by its very nature, aggregate and average information is about a group, not any specific individual. There was no evidence that the groups in question are of a sufficiently small size that one could conceivably use the information in dispute to determine any particular individual's age, annual hours worked, accrued monthly pension entitlements or actual monthly pension payments.

[108] In conclusion, I am not persuaded that the information in dispute is reasonably capable of identifying any individual, either alone or in combination

[82] Thompson 2016 initial sub., para. 38-40.
[83] Local 170, 2016 initial sub., paras. 85-108 and 2016 reply, para. 60.
[84] FICOM 2016 initial sub. (Phillips 2016 affidavit, paras. 54-57).

with other information. Therefore, it is not personal information and s. 22 does not apply.

CONCLUSION

[109] For the reasons above, I make the following order under s. 58(2)(a) of FIPPA:

1. FICOM is not required to refuse to disclose the information in dispute under either s. 21(1) or s. 22(1) of FIPPA.

2. FICOM must give the applicant access to the information in dispute.

3. FICOM must comply with this Order by May 25, 2017 and concurrently copy the OIPC's Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

April 10, 2017

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

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