Order P22-07

CUPE NATIONAL BC REGIONAL OFFICE

Erika Syrotuck
Adjudicator

November 9, 2022

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Summary: The applicant requested his personal information from the CUPE National BC Regional Office (CUPE National) under the *Personal Information Protection Act* (PIPA). In response, CUPE National provided some of the applicant's personal information but withheld the rest of it under ss. 23(3)(a) (solicitor-client privilege), 23(4)(a) (disclosure reasonably expected to threaten safety or mental health of an individual) and 23(4)(c) (disclosure would reveal personal information about another individual). The adjudicator found that CUPE National was authorized to withhold the information in dispute under s. 23(3)(a) since solicitor-client privilege applied to that information. The adjudicator found that s. 23(4)(a) did not apply at all, but that s. 23(4)(c) applied to some of the information in dispute. The adjudicator added s. 23(4)(d) (disclosure would reveal the identity of an individual who provided personal information about another individual) to the inquiry and found that it applied to some of the information in dispute. The adjudicator found that a small amount of the applicant's personal information could be provided to the applicant under s. 23(5).

Statutes Considered: *Personal Information Protection Act*, SBC c 63, ss. 1, 23(3)(a), 23(4)(a), 23(4)(c), 23(4)(d), and 23(5).

INTRODUCTION

[1] An applicant requested his personal information from CUPE National BC Regional Office (CUPE National) under the *Personal Information Protection Act* (PIPA).[1]

[2] In response, CUPE National provided the applicant access to some of his personal information, but refused access to his remaining personal information

[1] 'CUPE' stands for the Canadian Union of Public Employees.

under ss. 23(3)(a) (solicitor-client privilege), 23(4)(a) (disclosure reasonably expected to threaten safety or physical or mental health of an individual other than the applicant) and 23(4)(c) (disclosure would reveal personal information about another individual).

[3] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the organization's decision to refuse access.

[4] Mediation was unable to resolve the issues and the matter proceeded to inquiry.

Preliminary issues – issues not in the notice of inquiry

[5] In his submissions, the applicant raises a number of issues that were not in the Notice of Inquiry or the Fact Report. For example, he complains that the organization did not provide all of his personal information in response to his access request. CUPE National asked the OIPC not to accept these submissions.

[6] The OIPC does not limit what a party can say in their submissions. So, I will not disallow the applicant's submissions on the basis that the applicant raises new issues. However, in general, parties may not add new issues to the inquiry without the OIPC's prior consent. The applicant did not seek prior consent to add any new issues to the inquiry and I do not see any reason why it would be fair to add these new issues at this late stage. Therefore, I will not address the applicant's submissions on issues that were not in the Notice of Inquiry.

[7] However, during the inquiry it became apparent to me that s. 23(4)(d) (disclosure would reveal the identity of an individual who provided personal information about another individual) may be relevant to some of the information in dispute and that s. 23(4)(c) may be relevant to some documents that the organization did not originally apply it to. If any of the circumstances under s. 23(4) apply, an organization must withhold that information. Because it is mandatory, I added s. 23(4)(d) as an issue in the inquiry and sought submissions from both parties on whether s. 23(4)(c) or (d) applied to the applicant's personal information in certain documents. Both parties provided additional submissions on those provisions.

ISSUE

[8] At this inquiry, I must decide the following issues:

1. Is CUPE National authorized to refuse to disclose the applicant's personal information under s. 23(3)(a)?

2. Is CUPE National required to refuse to disclose the applicant's personal information under ss. 23(4)(a), (c) or (d)?

[9] Under s. 51 of PIPA, it is up to the organization to prove that an individual has no right of access to their personal information.

DISCUSSION

Background

[10] At the relevant times, the applicant was a member of a CUPE local by virtue of his position at a public sector employer.

[11] The documents provided to the applicant in response to his access request span a number of years. The documents relate to many different issues including racism experienced by the applicant at a CUPE local meeting and the applicant's complaint to the Federal Human Rights Commission about CUPE National.

Information in dispute

[12] CUPE National has refused the applicant access to the following information:

- 53 names of individuals other than the applicant on a petition signed by members of a CUPE local (Petition);[2]
- names of individuals other than the applicant on a record of notes about a CUPE local Annual General Meeting (AGM Notes);[3]
- a three-page memorandum (Memo);[4] and
- several emails.[5]

[13] I will discuss each document in more detail as it is relevant to each exception to disclosure.

Is the information in dispute the applicant's personal information?

[14] Section 23(1)(a) gives an individual the right to access their own personal information that is under the control of the organization, subject to some exceptions set out in s. 23(2) through s. 23(5). Therefore, the first question that must be answered is whether the information at issue is the applicant's "personal information" as defined in PIPA.

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[2] Pages 5-7 of the records.
[3] Pages 77-79 of the records.
[4] Pages 97-99 of the records.
[5] Pages 87, 88, 95, 96, 268, 272, 273, 278 and 311 of the records.

[15] Under s. 1 of PIPA, "personal information" means information about an identifiable individual and includes employee personal information but does not include "contact information" or "work product information". These terms are also defined in s. 1 as follows:

> "contact information" means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;
>
> "work product information" means information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business but does not include personal information about an individual who did not prepare or collect the personal information.

[16] With one exception, I find that the information in dispute is the applicant's personal information. The majority of the information in dispute is the applicant's name and other details about him and his interactions with CUPE National. It is not the applicant's "work product information" since the applicant did not prepare or collect the information as part of his employment activities or responsibilities. The information is also not the applicant's "contact information" as defined in PIPA because it is not information to enable him to be contacted at his place of business.

[17] However, I find that the names on the Petition are not the applicant's personal information. The organization disclosed the applicant's own name. I am not persuaded that the names of the other individuals who signed are identifiable information about the applicant. This is because the Petition is about a union matter unrelated to the applicant personally. Therefore, the applicant has no right to access the other individuals' names under s. 23(1) of PIPA.

[18] I turn now to whether the organization can withhold the applicant's personal information under the exceptions under s. 23(3) and (4), starting with s. 23(3)(a).

Section 23(3)(a) – solicitor client privilege

[19] Section 23(3)(a) says that an organization is not required to disclose personal information under subsection (1) or (2) if the information is protected by solicitor-client privilege.

[20] In relation to s. 23(3)(a) of PIPA, solicitor-client privilege includes legal advice privilege and litigation privilege.[6] Only legal advice privilege is at issue in this inquiry.

[6] Order P20-01, 2020 BCIPC 6 (CanLII) at para 14.

[21] Legal advice privilege applies to communications that:

i) are between solicitor and client;
ii) entail the seeking or giving of legal advice; and
iii) are intended to be confidential by the parties.[7]

[22] Legal advice privilege also applies to communications that do not specifically offer or request advice so long as it is on the continuum of communications in which the solicitor provides the advice.[8] In addition, legal advice privilege applies equally to in-house lawyers, provided that they are acting in a legal capacity.[9]

[23] CUPE National refused the applicant access to two pages of emails and the Memo under s. 23(3)(a).[10] CUPE National provided these documents for my review.

[24] CUPE National says that the documents are written communications of a confidential character between in-house counsel and other employees of CUPE National and are related to formulating and providing legal advice.

[25] Specifically, CUPE National says that the Memo was written by its then in-house legal counsel (Legal Counsel) for CUPE National personnel. The organization says the Memo contains legal advice about the applicant's complaint against CUPE National at the Federal Human Rights Commission (Complaint).[11]

[26] CUPE National also withheld a two-page email chain. CUPE National explains that some of the emails are between the Legal Counsel and other CUPE National employees discussing the Complaint. It describes the other emails as "emails accompanying the fax" of the Memo.

[27] For the reasons that follow, I am satisfied that the Memo and the emails in dispute are protected by solicitor-client privilege.

[28] First, I am satisfied that the Memo meets the criteria for legal advice privilege. It is clearly legal advice from the Legal Counsel, acting in their capacity as lawyer, to CUPE National about the Complaint. I can tell from the context that it is the kind of information that one would expect to be treated confidentially.

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[7] *Solosky v The Queen,* 1979 CanLII 9 (SCC) at page 837.
[8] *Bank of Montreal v Tortora,* 2010 BCSC 1430 at para. 10 citing *Samson Indian Nation and Band v Canada* 1995 CanLII 3602 (FCA).
[9] *Pritchard v Ontario (Human Rights Commission),* 2004 SCC 31 (CanLII) at paras 19 - 21.
[10] Pages 95-99 of the records in dispute.
[11] CUPE National's initial submissions at para 14.

[29] I find that the emails on the email chain are privileged. In my view, the emails between the Legal Counsel and CUPE National staff clearly contain legal advice about the Complaint, and, again, are clearly of a confidential nature. The other emails on the chain are privileged because they are part of the continuum of communications in which the Legal Counsel offered the advice.

[30] In conclusion, I find that the information that CUPE National withheld under s. 23(3)(a) is protected by solicitor-client privilege.

Section 23(4)(a) – threat to safety or physical or mental health

[31] Section 23(4)(a) requires an organization to refuse to disclose an applicant's personal information when the disclosure could reasonably be expected to threaten the safety or physical or mental health of an individual other than the person who made the request.

[32] It is well established that the phrase "could reasonably be expected to" means that the standard of proof is a reasonable expectation of probable harm. This means that an organization must show that the likelihood of the harm occurring is "well beyond" or "considerably above" a mere possibility.[12] The amount and quality of the evidence required to meet this standard depends on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[13] In addition, there must be a "clear and direct connection" between disclosure of the information in dispute and the harm alleged.[14]

[33] In Order P06-02, former Commissioner Loukidelis said that s. 23(4)(a) of PIPA should be approached in the same way as s. 19(1) of the *Freedom of Information and Protection of Privacy Act*. [15] In the context of s. 19(1), past orders have said that a threat to mental health requires a threat of "serious mental distress or anguish"; it is not enough that disclosure may cause a person to feel upset, inconvenienced or unpleasant.[16]

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[12] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)* 2014 SCC 31 at para. 54 citing *Merck Frosst v Canada (Health)* 2012 SCC 3 at paras. 197 and 199.
[13] *Ibid* citing *FH v McDougall,* 2008 SCC 53 at para. 40.
[14] *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53 at para 58. This principle has been adopted in many orders from the OIPC, for example Order F07-15, 2007 CanLII 35476 (BCIPC) at para 17.
[15] Order P06-02, 2006 CanLII 32980 at paras 46 - 49.
[16] Order F20-03, 2020 BCIPC 3 (CanLII) at para 21; Order 03-08, 2003 CanLII 49172 (BCIPC) at para 24.

Parties' submissions

[34] CUPE National withheld information in seven emails under s. 23(4)(a).[17] CUPE National says that disclosure of the emails could reasonably be expected to threaten the mental health of the CUPE National employees who were engaged in these communications.

[35] More specifically, CUPE National says that, in two of these emails, CUPE National personnel discussed safety concerns about the applicant and whether to contact police regarding those concerns.[18]

[36] CUPE National says that the other five emails at issue are emails sent between CUPE National personnel in response to an email they received from the applicant to the organization.[19] CUPE National says that, in these emails, its personnel discussed the applicant's "history of violence".[20]

[37] CUPE National says that it is appropriate to consider the applicant's own words in assessing whether disclosure of the information in dispute presents a reasonable expectation of probable harm.[21] In this regard, CUPE National says that the applicant has a history of expressing dissatisfaction and ill-will towards CUPE National employees and executives on multiple occasions over a number of years. CUPE National says that disclosed emails in its records package demonstrate this.[22] It also provided an additional letter that it says is a recent example that supports withholding the information in dispute under s. 23(4)(a).[23]

[38] CUPE National also says that organizations should approach s. 23(4)(a) in light of the interests of third parties whose health and safety interests are engaged in the matter.[24] It did not elaborate.

[39] The applicant disputes CUPE National's characterization of him. The applicant says that he "rejects the term 'ill-will' because CUPE National never apologized for the racism that [he] experienced." He says that CUPE National is exaggerating and making a baseless claim without evidence.

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[17] Pages 87, 88, 268, 272, 273, 278 and 311 of the records.
[18] Pages 87 and 88 of the records. See also CUPE National's initial submissions at para 20.
[19] Pages 268, 272, 273, 278 and 311 of the records. See also CUPE National's initial submissions at para 21.
[20] CUPE National's initial submissions at para 21.
[21] CUPE National's initial submissions at para 19 citing Order P06-02, 2006 CanLII 32980 at para 50.
[22] Pages 83-86, 89, 90, 251-253, 268-269, 297, 332 and 339 of the records. See CUPE National's initial submissions at para 23.
[23] CUPE National's initial submissions, Appendix 3.
[24] CUPE National's initial submissions at para 18 citing Order P06-02, 2006 CanLII 32980 at para 49.

Analysis and finding – s. 23(4)(a)

[40] For the reasons that follow, I am not satisfied that disclosure of the emails in dispute could reasonably be expected to threaten the safety or physical or mental health of an individual other than the applicant.

[41] First, I do not think that the disclosed emails that CUPE National relies on support its argument that s. 23(4)(a) applies. I can see that the disclosed emails express the applicant's displeasure about the way CUPE National handled various issues. The tone of these communications is certainly one of frustration. I can also see that, at times, the applicant uses pointed language. However, I am not persuaded that these communications show "ill-will" that could reasonably be expected to cause CUPE National employees anything resembling "serious mental distress or anguish."

[42] In addition, nothing in the content of the withheld emails persuades me that their disclosure could reasonably be expected to threaten the safety or physical or mental health of the individuals involved in the communications. I do not see a connection between the content of the emails and any potential threat to the safety or physical or mental health of the individuals and CUPE National has not sufficiently explained.

[43] Overall, CUPE National has not provided an adequate explanation about how disclosure could reasonably be expected to threaten the mental health of its employees and it is not evident from the documents themselves how this is the case. I find that s. 23(4)(a) does not apply.

Section 23(4)(c) – personal information about another individual

[44] Under s. 23(4)(c), an organization is required to refuse to disclose information if the disclosure would reveal personal information about another individual. This section does not involve deciding whether or not disclosure would unreasonably invade another person's personal privacy.[25] It is enough that the information is the personal information of another individual.[26]

[45] There is information in the AGM Notes and some emails that is at issue under s. 23(4)(c). I will address each of these types of documents in turn.

[25] Order P06-02, 2006 CanLII 32980 (BCIPC) at para 53.
[26] *Ibid.*

AGM Notes

[46] CUPE National withheld the names of individuals other than the applicant from the AGM Notes. It says that the names are not "work product information" or "contact information".[27]

[47] I find that these names are those other individuals' personal information. There is no question that a person's name is identifiable information about them. With regards to whether the AGM Notes are "work product information" as defined in PIPA, CUPE National did not say who prepared the AGM Notes, nor do the notes themselves indicate who wrote them. However, the AGM Notes are written in the first-person and therefore, I conclude that they were not written by any individual named in the notes. For this reason, I am satisfied that the information at issue is not "work product information" as defined in PIPA. I am also satisfied that it is not "contact information" because none of the information is for business contact purposes.

[48] I am persuaded that disclosing the names in the AGM Notes would reveal personal information about another individual. Therefore, s. 23(4)(c) applies.

Emails

[49] As mentioned above, I also sought submissions from the parties on whether s. 23(4)(c) applies to the information in the emails that CUPE National had initially withheld under s. 23(4)(a). I found that s. 23(4)(a) did not apply to the personal information in these emails, and so I turn to whether s. 23(4)(c) applies.

[50] In its further submissions, CUPE National submitted that s. 23(4)(c) applies to two pages of emails between CUPE National employees discussing safety concerns about the applicant and whether to contact police regarding those concerns.[28] It says that these emails contain personal information about an individual other than the applicant. It says that this individual was neither the sender nor a recipient of the emails.

[51] The applicant did not specifically address whether s. 23(4)(c) applies to these emails.

[52] For the reasons that follow, I find that s. 23(4)(c) applies to some information in the two pages of emails.

[53] I find that the emails contain the personal information of an individual other than the applicant. The information is identifiable because it uses the individual's name. It is not "work product information" because it is not the personal

[27] CUPE National's initial submissions at para 28.
[28] Pages 87-88 of the records.

information of the person who prepared or collected it. I am also satisfied that is it not "contact information" because it was not provided for the purpose of contacting that individual at their place of work.

[54] However, the remaining information in the two pages of emails would not reveal personal information about another individual.

[55] First, the names of the senders and what they wrote in the emails is their "work product information." From the context, it seems to me that the senders of the emails prepared or collected the information as part of their job responsibilities. Therefore, the identifiable information about the senders in the context of the emails is their "work product information." Work product information is excluded from the definition of personal information, so the information about the senders is not their personal information. Therefore, s. 23(4)(c) does not apply.

[56] I also find that the names of the recipients of the emails in this context is "contact information." These individuals were communicating for work purposes and therefore I find that their names in this context are "contact information" as defined in PIPA.

[57] As a result, I find that s. 23(4)(c) applies to some of the information in the emails at issue.

Section 23(4)(d) – identity of an individual who provided personal information about another individual

[58] Section 23(4)(d) requires an organization to refuse to disclose information that would reveal the identity of an individual who has provided personal information about another individual and the individual providing the personal information does not consent to the disclosure of their identity.

[59] CUPE National says that s. 23(4)(d) applies to the emails that it initially withheld under s. 23(4)(a). As I previously mentioned, five of the emails are emails sent between CUPE National employees discussing the applicant's alleged "history of violence."[29] The other emails are two pages of emails in which CUPE National employees discussed whether to contact the police about the applicant.[30] The organization says that the individuals who provided the information have not consented to the disclosure of their identities.

[60] The applicant did not specifically address s. 23(4)(d) or CUPE National's arguments about this section.

[29] Pages 268, 272, 273, 278 and 311 of the records.
[30] Pages 87-88 of the records.

[61] In this case, I am satisfied that s. 23(4)(d) applies to information in all of the emails at issue. This is because disclosure of the emails would reveal that named individuals provided personal information about the applicant. In addition, there is nothing that indicates that the individuals providing the personal information about the applicant consented to disclosure of their identities.

[62] I turn now to whether any of the information can be severed and the remainder provided to the applicant.

Section 23(5) - severance

[63] Under s. 23(5), if an organization is able to remove the information referred to in subsection 23(3)(a), (b) or (c) or 23(4) from a document that contains personal information about the individual who requested it, the organization must provide the individual with access to the personal information after the information referred to in subsection 23(3)(a), (b) or (c) or 23(4) is removed.

[64] I have found that ss. 23(3)(a), 23(4)(c) and 23(4)(d) each apply to some information in dispute in this inquiry. I will consider whether any information can be severed without revealing any information that the organization is required or authorized to withhold under those provisions.

[65] First, I have considered whether the organization is able to remove any of the privileged information and provide the applicant access to the remainder of the information to which I have found s. 23(3)(a) applies.

[66] In this regard, Courts have repeatedly cautioned against severing because of the risk of revealing privileged information. For example, in *British Columbia (Attorney General) v Lee*, the BC Court of Appeal said that "severance should only be considered when it can be accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment."[31] In my view, none of the information in dispute can be severed without any risk of revealing privileged information. Therefore, I find that the organization must withhold all of the information to which I have found s. 23(3)(a) applies.

[67] Next, I am satisfied that nothing further can be disclosed from the AGM Notes without revealing personal information about other individuals. This is because the only information that it is in dispute is the names of individuals other than the applicant. Therefore, the organization is not able to remove any information in dispute without revealing the information it is required to withhold under s. 23(4)(c).

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[31] 2017 BCCA 219 at para 40. See also *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority,* 2011 BCSC 88 at para 46.

[68] Finally, it seems to me that some information can be disclosed from the emails without revealing any personal information that the organization is required to withhold under s. 23(4)(c) or (d). For example, CUPE National can disclose the dates and subject lines of the emails under s. 23(5).

[69] In addition, I find that CUPE National can provide some parts of the body of two emails.[32] Unlike below, I do not think that the senders and recipients are discernable from the disclosed parts of the email chain, so it is possible to remove these individuals' names without revealing information that CUPE National is required to withhold. Further, while I acknowledge that CUPE National says that it is not possible to sever the body of emails and leave any intelligible information, I disagree. I find that disclosure of some of the information in the body of the emails would only reveal the applicant's personal information and would not reveal the personal information of an individual other than the applicant or the identity of another person who supplied personal information about the applicant.

[70] However, I am not satisfied that any other information can be disclosed from the remaining five emails.[33] This is because it is already possible to deduce who wrote the emails by looking at the senders and recipients of the other emails in the chain, all of which have been disclosed to the applicant. Therefore, removing those individuals' names would not prevent the applicant from knowing the identity of the individuals who provided the personal information about the applicant and who do not consent to the disclosure of their identities. The organization is required to withhold this information under s. 23(4)(d).

[71] In conclusion, I find the organization is able to provide some but not all of the applicant's personal information under s. 23(5).

CONCLUSION

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

1. I confirm the decision of CUPE National to refuse to disclose the information in dispute under s. 23(3)(a) of PIPA.

2. Subject to item 4, I require CUPE National to refuse the applicant access, in part, to the information in dispute under s. 23(4)(c).

3. Subject to item 4, I require CUPE National to refuse the applicant access, in part, to the information in dispute under s. 23(4)(d).

[32] Pages 87 and 88 of the records.
[33] Pages 268, 272, 273, 278 and 311 of the records.

4. I require CUPE National to give the applicant access to the information in dispute that I have highlighted in blue a copy of pages 87, 88, 268, 273, 278 and 311 provided to CUPE National along with this order.

5. CUPE National must copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

[73] Under s. 53(1) of PIPA, CUPE National must comply with these orders by December 22, 2022.

November 9, 2022

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: P20-84082