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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 42-1995
June 9, 1995

INQUIRY RE: A request for access to records held by the Labour Relations Board, consisting of two Industrial Relations Officer's reports and a draft letter

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on February 28, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review dated November 3, 1994 by the applicant who, on August 18, 1994, sought access from the Ministry of Skills, Training and Labour to documents relating to Labour Relations Board Decisions 7/92/84 and 245/85. In addition, the applicant sought further records created in 1987-1988 in relation to these decisions. As these records were in the custody of the Labour Relations Board (the Board), the Ministry transferred the request to the Board. On October 5, 1994, the Board refused to give the applicant access to these documents on the basis of section 3(1)(b), section 78(1), and section 21 of the Act.

2. Documentation of the inquiry process

Under section 56(3) of the Act, the Office invited written representations from the applicant, other appropriate persons, and the Board. Under section 54 of the Act, the unions, employer, and the Ministry of Skills, Training and Labour were invited to make representations. The Ministry decided not to make representations. The United Brotherhood of Carpenters and Joiners of America, Local Union 1237; United Brotherhood of Carpenters and Joiners of America, Local Union 1998; and Commonwealth Construction Company made representations.

Upon requests for adjournment from the Board and the applicant, I agreed to extend the time frame for the submissions. Initial submissions were due no later than February 23, 1995 and were exchanged among the parties by the Office. Replies were due by February 28, 1995.

The Office provided all parties to this inquiry with a two-page Portfolio Officer's fact report (the fact report), which was accepted by the parties as accurate for the purpose of conducting the inquiry.

The applicant represented himself. Mr. Robert Botterell, articled student with Arvay Finlay, presented the Board's case. Mr. R.A.S. March, Manager, Industrial Relations, Commonwealth Construction Company, presented the employer's case. The Union Local 1998 was represented by Mr. Bert Kerkhof, Business Agent. Mr. Brent Rogers responded for Union Local 1237.

3. The records in dispute

The records in dispute are: a) an Industrial Relations Officer's report written on October 1, 1984; b) an Industrial Relations Officer's report dated October 30, 1984; and c) a draft letter by the then registrar dated April 18, 1988.

4. Issues under review at the inquiry

The first issue to be examined in this inquiry is the interrelationship of section 78(1) of the Act and sections 124(2) and 146(3) of the Labour Relations Code, S.B.C. 1992, c. 82 (the Code).

In addition, the application of section 3(1)(b) of this Act to the draft letter was considered.

The relevant sections of the Act read, in part, as follows:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

> ...
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;
>
> ....

Interim relationship to other Acts

78(1) The head of a public body must refuse to disclose information to an applicant if the disclosure is prohibited or restricted by or under another Act.

(3) Subsection (1) is repealed 2 years after section 4 comes into force. [i.e., October 4, 1995]

Under section 57(1) of the Act, where access has been refused to information in the record, it is up to the Board to prove that the applicant has no right of access to the records or parts thereof.

5. The applicant's case

The applicant states that the major records in dispute are the evidentiary basis for two decisions made by the Labour Relations Board in 1984, after he had made a complaint. He claims that he

has been blacklisted from working on trade union jobs for eleven years, because one of these decisions states that he is a troublemaker.

6. The Labour Relations Board's case

In addition to a jurisdictional argument, which I discuss below, the Board argued that section 78 of the Act requires it not to disclose the Industrial Relations Officer's reports in dispute to the applicant, because it is prohibited from doing so under section 146(3) of the Labour Relations Code. The Board advanced the same argument in Order No. 37-1995, March 31, 1995, where I presented it at greater length.

In its reply, the Board argued that the Industrial Relations Officer's reports could not be released because they were created prior to the introduction of section 124(2) of the Code. Its argument was that section 124(2) does not operate retrospectively, and it relies on British Columbia Labour Relations Board's (BCLRB) decision No. B54/93 (Regal Cleaners v. Canadian Workers Union, Local 5, March 5, 1993).

The Board's view is that the Registrar who wrote the letter was acting in a quasi-judicial capacity and the record in dispute is a draft decision. He was essentially deciding whether a decision of the Board (also in dispute in this inquiry) should be filed in the Supreme Court of British Columbia. It is also arguably a draft because it is double-spaced, not written on letterhead, and there is no signature on the letter.

The Board's argument for non-disclosure of the draft decision letter written by the then Registrar rests on section 3(1)(b) of the Act. It argues that the letter is a "draft decision" of a person acting in a "quasi-judicial capacity," to cite the language of this section. It further submits that this section "should be interpreted in a manner which protects the decision-making processes of quasi-judicial tribunals from public scrutiny and reflects the legislative intent of this section." (Review Brief for the Labour Relations Board, Part IV, paragraph 8)

7. The Union's case

Local Union 1998 (Prince George) of the United Brotherhood of Carpenters and Joiners of America has no objection to the release of the two Industrial Relations Officer's reports written in 1984. However, it rejects the applicant's assertion that he has been blacklisted from working on trade union jobs.

Local Union 1237 (Dawson Creek) of the United Brotherhood of Carpenters and Joiners had also informed the Labour Relations Board that it has "no reservations about [the Board's] supplying [the applicant] with any information the Board deems appropriate."

8. Commonwealth Construction Limited's case

Commonwealth Construction explained that it had employed the applicant during the construction of the Bull Moose Coal Mine facility. He filed a grievance with the appropriate locals of the United Brotherhood of Carpenters and also brought an application before the

Labour Relations Board alleging that his union was not representing him fairly. The company took no position with respect to the requested disclosure.

9. Discussion

As a preliminary matter, I note that the applicant has almost literally besieged my Office with hundreds of pages of submissions, resubmissions, and documentation. He sought many records dealing with his seemingly tangled relations with the two union locals, Commonwealth Construction, and the Labour Relations Board, and also asking me to ask them to do various things. As I have had to do before, I would like to remind applicants that my role is simply to review requests for information under the Freedom of Information and Protection of Privacy Act. While applicants may have a general sense of grievance that they wish me to remedy, I am not in a position to do so under the Act. They cannot obtain the remedies from me that may be available from another venue. (See Order No. 20-1994, August 2, 1994, p. 7)

Jurisdictional argument

I have dealt at length in Order No. 37-1995 with the Labour Relations Board's argument against my having jurisdiction in this case. That argument is essentially identical with the one it advanced in the present matter (before I released Order No. 37-1995). Again I do not find the jurisdictional arguments under several sections of the Labour Relations Code, S.B.C. 1992, c. 82, persuasive. I adopt the reasons set out in Order No. 37-1995 on this point.

Section 78(1)

As in Order No. 37-1995, I accept the argument of the Board that section 78(1) of the Act at least temporarily prohibits it from releasing the Industrial Relations Officer's reports to the applicant, because of section 146(3) of the *Labour Relations Code*.

Sections 124(2) and 146(3) of the Labour Relations Code, S.B.C. 1992, c. 82.

These sections read as follows:

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

....

146(3) Information obtained for the purpose of this Code in the course of his or her duties by a member of the board, an industrial inquiry commission or other tribunal under this Code, a special officer, a mediator or other person appointed under this Code, an employee of any of them or an employee under the administration of the minister shall not be open to inspection by a person or a court ....

The Board essentially argues that section 146(3) of the Code prohibits disclosure of the records in dispute, even though they were prepared in connection with an application under former legislation (the Industrial Relations Act). However, section 124(2) modified the confidentiality provision in section 146(3) by providing for the disclosure of IRO reports to the parties. In Order No. 37-1995, the applicant did not qualify as a party, whereas the reverse is true in the present case. The Labour Relations Code provides that a "party" means a person bound by a collective agreement, or involved in a dispute. The applicant is a person who falls within this category.

It is possible to argue that the two Industrial Relations Officer's reports in dispute do not fall under either section 124(2) or section 146(3) of the Code, since they were prepared under the Industrial Relations Act. In Order No. 37-1995, I determined that section 146(3) of the Code is in substance the same as section 127(3) of the Industrial Relations Act. While the records in dispute were created under the old legislation, section 146(3) of the Code is "simply ... a new expression of existing law; ... the previous enactment is not deemed to have been repealed; it is deemed to remain in force without interruption." (Pierre-André Côté, The Interpretation of Legislation in Canada, Second Edition, 1992, p. 96) In this case, the prohibition under the Industrial Relations Act continues under the Code and also meets the requirements of section 78.

In Order No. 37-1995, I also considered section 161 of the Code, which says:

All applications, proceedings, actions and inquiries commenced under the Industrial Relations Act shall be continued to their conclusion and treated for all purposes under and in conformity with this Code so far as it may be done consistently with this Code.

Section 124(2) of the *Labour Relations Code* had no counterpart in the legislation which preceded it. This revision has changed the substance of a long standing, pre-existing practice by the Labour Relations Board. I agree with the Board's position that this section does not operate retrospectively. To do so would be inconsistent with the Code (see section 161).

The Board relied, for this purpose, on British Columbia Labour Relations Board Decision No. B54/93 (Regal Cleaners v. Canadian Workers Union, Local 5). It applied the principles from case law (Bell v. Montreal Trust Company (1956), 20 W.W.R. 273 (B.C.C.A.)) that:

Unless the language used plainly manifests in express terms or by clear implication a contrary intention, (a) a statute divesting vested rights is to be construed as prospective; (b) a statute, merely procedural, is to be construed as retrospective; (c) a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective. (p. 276).

I have reviewed further authorities which discuss retrospectivity (Gardner v. Lucas (1878), 3 App. Cas. 582; Upper Canada College v. S.J. Smith (1920), 61 S.C.R. 413; Republic of Costa Rica v. Erlanger (1876), 3 Ch. D. 62), as well as other BCLRB decisions on this point (Dorris v. Teamsters Local Union No. 464, Decision No. B101/93, April 15, 1993; Proflex Systems Ltd. v. International Association of Machinists and Aerospace Workers, Lodge No. 692; Letter decision No. B328/93, October 14, 1993).

In determining whether or not a provision is procedural, the court in Upper Canada College v. S.J. Smith provided some direction. Procedure is used in a fairly restricted sense. It has to do with the method of prosecuting an action which exists, not with taking away such a right of action. Thus a statute which, for example, deals with a time limit on actions is not merely procedural, because it takes away a vested right.

It is my opinion that section 124(2) is procedural in character, but it also affects vested rights. Those who provided information to an Industrial Relations Officer in 1984 did so knowing that this information would be kept confidential. When the report was prepared, it was done under the existing legislation, which reflected a long standing policy of the Board that such reports were not disclosed to the parties.

Thus I conclude that section 124(2) does not allow for release of Industrial Relations Officer's reports which were prepared under the previous *Industrial Relations Act*.

Review of the records in dispute

I only need to review the draft letter in dispute for purposes of this section. I agree with the Labour Relations Board that this document is a draft decision of a person acting in a quasi-judicial capacity and thereby excluded from disclosure under section 3(1)(b) of the Act.

10. Order

Under section 58(2)(c) of the Act, I find that the two Industrial Relations Officer's reports in question are prohibited from disclosure by reason of section 78 of the Act and section 146(3) of the Code. The draft decision letter is excluded from the scope of the Act by virtue of section 3(1)(b) of the Act. I therefore confirm the decision of the Labour Relations Board not to disclose the records in dispute to the applicant.

June 9, 1995

David H. Flaherty
Commissioner