OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-16

INQUIRY REGARDING LABOUR RELATIONS BOARD RECORDS

David Loukidelis, Information and Privacy Commissioner
June 9, 2000

Order URL: http://www.oipcbc.org/orders/Order00-16.htm
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: Applicant requested records relating to alleged change in panel of Board vice-chairs charged with hearing an application involving applicant's client. Searches by Board were adequate for purposes of s. 6(1). Responsive records in chair and vice chair case files connected with case were excluded under s. 3(1)(b) as they were personal notes, communications or draft decisions of persons acting in a quasi judicial capacity. Certain administrative records not excluded by s. 3(1)(b). No basis for invoking public interest override in s. 25(1) of the Act.

Key Words: Excluded records – judicial or quasi judicial capacity – adequate search – advice or recommendations – solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(a) and (b), 6(1) and (2), 13(1), 13(2), 14 and 25(1).

Authorities Considered: B.C.: Order 162-1997; Order No. 321-1999; Order No. 327-1999.

Cases Considered: *M.N.R.* v. *Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *I.W.A.* v. *Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282; Adjudication Order No. 3 (June 30, 1997).

1.0 INTRODUCTION

The roots of this inquiry are in a matter considered by the Labour Relations Board of British Columbia ("Board") in 1999.

Early in 1999, the Board had released what is known as a letter decision, under the *Labour Relations Code* ("Code"), respecting a labour dispute between an employer and the union commonly known as the Canadian Autoworkers' Union, or CAW. That dispute centred on the CAW's certification to represent employees at a McDonald's of Canada restaurant in Squamish.

On February 11, 1999, the employer applied to the Board for leave for reconsideration of the Board's letter decision. The applicant had acted for the employer in the labour dispute. He says that, in March of 1999, a Board employee told him and a colleague that a panel of three vice-chairs had been appointed as a reconsideration panel for the employer's application. Another Board employee was, the applicant said, quoted a short time later in 'The Vancouver Sun' as saying no panel had been appointed yet. The applicant says that, in late April of last year, he spoke to the Board's head of mediation, who told him that he believed a panel had been appointed. That person allegedly identified the then chair of the Board as the chair of the panel. The applicant says that individual was not one of those who were originally identified as panel members in March. Early in May, the applicant says, the Board's registrar told him a panel of five vice-chairs had been appointed.

The applicant says he has received information that the employer's reconsideration application was on the agenda for, and discussed at, weekly Board policy conferences. He also says the then chair of the Board circulated a memorandum criticizing the original reconsideration panel and expressing reservations about their consideration of the matter.

Although the labour dispute itself is apparently now concluded, the applicant believes there were irregularities in the Board's appointment of the reconsideration panel. The applicant has pursued this inquiry, he says, as a "matter of accountability". He contends that, contrary to the Board's assertion that only one reconsideration panel was ever appointed, there was an initial panel that was subsequently replaced by a second panel to ensure a pro-labour outcome. The applicant says this alleged impropriety means "[w]e are entitled to take advantage of the Board's legal mistake and to receive in effect the legal musings of the members of the Board who thought they were a panel. This point goes to the heart of accountability of section 2 of the *Act*."

On May 27 and June 28, 1999, the applicant made access requests to the Board. Following clarification of the applicant's first request, the Board provided the applicant with records from which the Board withheld some information under ss. 13(1) and 14 of the Act. The Board also told the applicant that some responsive records were excluded under s. 3 of the Act. On July 20, 1999, the Board responded to the applicant's second request by disclosing records from which, it said, some irrelevant information had been severed. The Board also told the applicant that records responsive to the second request were excluded under s. 3 of the Act.

In its June 25, 1999 response to the applicant's first request, the Board said that only one panel was ever appointed. It denied there was ever an original panel and then a later panel in the way described by the applicant. With its first response to the applicant, the

Board provided records confirming appointment of the panel. It said there were no draft decisions, or other documents pertaining to discussions, of any "original panel". It appears, though the Board's response letter is internally inconsistent, that it withheld all or parts of a number of records under ss. 13(1) and 14 of the Act. It also told the applicant that his request encompassed records "that fall outside the scope of the Act (see Section 3(1)(b))". (As will be seen from the discussion below, ss. 13 and 14 are not in issue in this inquiry.)

In its July 20, 1999 response to the applicant's second request, the Board repeated its position about s. 3(1)(b). It also said s. 15(1)(h) applied to some information, although that section is also not in issue in this inquiry.

These responses led the applicant to seek a review, under s. 52 of the Act, of the Board's decisions. After he requested the review, the applicant, having taken the view that the Board should disclose all of the records under s. 25 of the Act, sent the Board a letter to that effect on October 13, 1999. By a letter of October 20, 1999, to the applicant, the Board refused to disclose the records under s. 25. The s. 25 issue is before me in this inquiry.

2.0 ISSUES

The issues set out in the Notice of Written Inquiry are as follows:

1. Was the Board's search for records adequate for the purposes of s. 6(1) of the Act?

2. Was the Board correct in deciding that the Act does not apply to some of the requested records by virtue of s. 3(1)(b)?

3. Is disclosure to the applicant of the requested records clearly in the public interest for the purposes of s. 25(1)(b) of the Act?

The Notice of Written Inquiry issued by this Office indicated that the Board's application of s. 13 to the records would also be considered in this inquiry. For the reasons given below, I have decided that ss. 13 and 14 do not arise in this inquiry. They are moot in relation to any records that are covered by s. 3(1)(b) and thus outside the Act's scope. In relation to the records which are not covered by s. 3(1)(b), the Board has failed to pursue disclosure exceptions under Part 2 of the Act.

As to the burden of proof, the Board has the burden for issue one, above. See, for example, Order No. 327-1999. Section 57(1) places the burden on the Board regarding issue two. The burden is on the applicant with respect to the issue of disclosure under s. 25 of the Act. See, for example, Order No. 162-1997.

3.0 DISCUSSION

3.1 Preliminary Matters – I must address a number of preliminary matters before I turn to the substantive issues in this inquiry.

The Underlying Labour Relations Dispute and This Proceeding

The merits of the labour dispute in which the applicant's client was embroiled – and the truth of the applicant's allegations about what happened with the constitution of the Board's reconsideration panel – are not relevant to this inquiry. My task here is not to divine whether or not the applicant's very serious accusations of wrongdoing are correct. My function in this proceeding is to address the jurisdictional issue raised by the Board under s. 3(1)(b) of the Act and to deal with other issues arising under the Act. A considerable portion of the material submitted by the applicant in this inquiry relates to his allegations about the Board's conduct in dealing with the employer's leave for reconsideration application. That material is not germane to the issues facing me.

Identification of the Responsive Records

I reviewed records identified by the Board to me as the responsive records. When I later sought confirmation of the identity of all disputed records for the purposes of this inquiry, the Board produced considerably fewer records to me. The Board has confirmed that records it delivered to me on February 23 and 29, 2000 are the only responsive records in this inquiry. It appears the Board originally had made available those of its files "which may contain relevant records" and that it later winnowed those files down to records which are responsive, and removed those records which it initially had thought might be responsive but were not. This means that I did not subsequently review all the records I initially reviewed, and I have not considered all the Board's (non-responsive) records in this inquiry. I will discuss the records in more detail below.

Inclusion of Mediation-Related Material

The Notice of Written Inquiry issued to the parties in this proceeding contains the following passage:

> If a party includes, without the written permission of the other party, any record generated by the Office of the Information and Privacy Commissioner during the mediation process, or a record provided by any party related to the mediation process, the Office will remove that mediation record from the submission and return it to the party submitting it. It will not form part of the record of proceedings before the Commissioner in the inquiry.

The applicant included, as part of his initial submission, a copy of an October 13, 1999 letter he had sent, during the mediation phase of this proceeding, to the portfolio officer responsible for the investigation and mediation in this matter. Counsel for the Board has consented to inclusion of this letter in the record before me. This consent is conditional,

however, on inclusion of the September 27, 1999 letter from this Office to the applicant, to which the applicant's letter responded.

The applicant's October 13, 1999 letter referred to a further letter from this Office, dated September 29, 1999. This Office informed the parties that all three of the letters just described would form part of the material before me in this inquiry. The applicant's October 13, 1999 letter to the Board – and its October 20, 1999 reply – regarding his position on disclosure of the records under s. 25 of the Act are also before me.

Applicant's Affidavit

I have no need to rely on the affidavit sworn by the applicant, much of which is hearsay. Among other things, it attests to the applicant's belief about the truth of certain things, but does so by relying on statements the applicant says were made by anonymous Board representatives. It speaks to factual matters that are strongly disputed by the Board. The applicant himself acknowledged that his affidavit is "not strictly relevant" to this inquiry. I agree. It is part of my role to examine the adequacy (including the *bona fides*) of the Board's search for requested records. However, the applicant's affidavit makes wider allegations of Board wrongdoing, which are not for me to decide. Because of the irrelevance of the contentious parts of the applicant's affidavit, it is also unnecessary for me to resolve the propriety of the applicant, as counsel for the employer that instructed him to make the access request, speaking to his own affidavit. This practice is generally undesirable. In this case, it resulted in blended and potentially problematic roles for the applicant – as counsel, witness and applicant.

3.2 Are the Responsive Records Excluded From the Act? – Turning to the substantive issues in this case, I will deal first with the Board's contention that some of the responsive records are excluded from the Act's operation by s. 3(1)(b) of the Act. The relevant portions of s. 3(1) read as follows:

> 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 … .

The essence of the applicant's s. 3(1)(b) submission is that, because matters proceeded before the Board in a manner other than that described by the Board, I should order disclosure of all records not already provided and should order the Board to produce whatever other records it has. In his view, irregularities in the appointment of a reconsideration panel mean that any records created by that panel – whether notes, communications or draft decisions – were not created by a person acting in a judicial or quasi judicial capacity and consequently cannot be excluded from the Act under s. 3(1)(b). The applicant takes this position because he says an irregularly appointed panel is not really a panel, so its supposed members were not, at the relevant times, acting

in a judicial or quasi judicial capacity. The applicant says s. 3(1)(b) does not, for this reason, apply.

The Board says s. 3(1)(b) must be interpreted in a "pragmatic and functional way, having regard to the developed jurisprudence concerning the term 'judicial' or 'quasi judicial'". According to the Board, the courts have clearly rejected the distinction between the exercise of a judicial or quasi judicial function and the exercise of administrative functions. The Board conceded, however, that the Act must be interpreted "as drafted". This is just as well, since s. 3(1)(b) indicates the Legislature clearly considered that actions in a "judicial or quasi judicial capacity" are a species separate from actions in other capacities.

The Board also argues that the Act should not be interpreted "in a manner uninformed by the actual roles, functions and duties carried out by the Labour Relations Board, or the manner in which they are exercised". Reference was made to the fact that the Code contains a form of statutory confidentiality requirement. This, it was said, demonstrates the "underlying rationale" for protecting "information in the possession of" the Board.

It follows, according to the Board, that once an application has been filed with the Board under the Code – such that the "case is being considered in such a way that decisions are being made about it" by vice chairs or the Board's chair – those officials are carrying out a quasi judicial function and any of their notes or communications are not covered by the Act. As the Board put it:

> … the Commissioner should determine that, once a particular dispute is submitted to the Labour Relations Board, then notes or communications by the Board's Chair, Associate Chairs, or Vice Chairs, made in respect of that dispute, are made in the exercise of a judicial or quasi-judicial function.

In support of this argument, the Board provided a fairly detailed review of how the Board acts under the Code in relation to applications before it. Having taken that review into account, and having considered the Code itself, I need not summarize either here.

I agree with the views expressed by my predecessor in Order No. 321-1999, which admittedly dealt with a different set of circumstances. In that order, he said the following:

> The purpose of section 3(1)(b) appears to be to create an exclusion from the scope of the Act which extends deliberative secrecy to personal notes, communications, and draft decisions of those engaged in a judicial and quasi-judicial capacity. The only functional parameter required to trigger section 3(1)(b) is a person acting in a judicial or quasi-judicial capacity. Thus, despite the fact that the deliberative secrecy concept normally revolves around protecting the integrity and independence of *adjudicative* processes, there is no requirement in 3(1)(b) that the function be *adjudicative*.

It seems to me the thrust of the Board's argument is that it may act in relation to a particular application other than in a formal hearing of the matter. The Board may, for example, discuss a case in one of its weekly 'policy' conferences. To take another example, the Board may examine a case in the context of assigning it to a panel for decision.

Having considered the nature of the Board and its statutory functions under the Code, in my view, the Board chair – or a vice chair, associate chair or member who is assigned to consider and dispose of an application of some kind (as is the situation here) – is someone who is acting in a quasi judicial capacity in dealing with that application. Section 3(1)(b) covers personal notes, communications or draft decisions of the Board chair, a vice chair, an associate chair or a member created while she or he is deliberating upon the application. This does not mean a record created by such an individual for Board administrative purposes – even those relating to the application – is excluded from the Act's ambit under s. 3(1)(b).

I stress that s. 3(1)(b) is only triggered when a person is actually "acting" in a judicial or quasi judicial capacity in respect of the record in issue. The section recognizes that employees of public bodies – including members of administrative tribunals – may discharge multiple functions, only some of which could be termed functions of a judicial or quasi judicial nature. For example, a "manager" designated by the Minister of Environment, Lands and Parks under the *Waste Management Act* ("WMA"), and employed by that Ministry, undoubtedly has a variety of duties, as a civil servant, that are of an administrative nature. But the WMA also charges managers with duties that may have a quasi judicial nature. Under Part 2 of the WMA, a manager may amend waste management permits. In discharging that function, a manager may be "a person who is acting in a judicial or quasi judicial capacity" for the purposes of s. 3(1)(b). This does not mean, however, that every record created by that official in the discharge of his or her other duties under the WMA is exempt under s. 3(1)(b). A person must be acting in a judicial or quasi judicial capacity in relation to the record in question.

This interpretation of s. 3(1)(b) – that the exclusion does not cover Board administration records – is reinforced by the wording of s. 3(1)(a). If "acting in a judicial or quasi judicial capacity" in s. 3(1)(b) referred to all judicial or tribunal activities, there would be no need for s. 3(1)(a) to refer to records of judges, judicial administration records and records relating to support services provided to judges. The definition of "judicial administration record" in Schedule 1 of the Act is further confirmation of this point:

> "judicial administration record" means a record containing information relating to a judge, master or a justice of the peace, including
>
> (a) scheduling of judges and trials,
> (b) content of judicial training programs,
> (c) statistics of judicial activity prepared by or for a judge, and
> (d) a record of the judicial council of the Provincial Court.

This view also accords with the criteria articulated by the Supreme Court of Canada in *M.N.R.* v. *Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1, for deciding whether a function is judicial or quasi judicial:

> (1) Is there anything in the language in which the function is conferred, or in the general context in which it is exercised, which suggests that a hearing is contemplated before a decision is reached?
>
> (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
>
> (3) Is the adversary process involved?
>
> (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

The first question in this case is whether the Act applies to any records relating to constitution of the particular panel that was struck to hear the leave for reconsideration application. The Board has disclosed to the applicant a number of e-mails and other records relating to assignment of vice chairs to the panel. But the Board also maintains that this aspect of the exercise of its functions – as to the panel's creation – falls under s. 3(1)(b) because these are records of someone acting in a "quasi judicial" capacity. In my view, Board communications informing Board members, and staff, of the constitution of a particular panel are not records of a person acting in a quasi judicial capacity within the scope of s. 3(1)(b). Such communications do not engage the deliberative processes that are protected by s. 3(1)(b).

Further, an agenda for a policy conference, or advance notice of such a conference, does not, in my view, qualify as a "personal note, communication or draft decision of a person acting in a judicial or quasi judicial capacity" for the purposes of s. 3(1)(b). I find support for this conclusion in the case of *I.W.A.* v. *Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282. At pp. 330 and 335, Gonthier J., speaking for the majority, observed that full board meetings, properly conducted, were a "consultation process" as opposed to a form of "participation" in board quasi judicial decision-making in any sense which would trigger or offend principles of natural justice or procedural fairness. The consultation principle in *Consolidated Bathurst* does not include consultation on well-settled points of evidence law.

By contrast, a memorandum, e-mail or other personal communication from one panel member to another about the panel's substantive deliberations on the merits of an application before the Board, in my view, falls under s. 3(1)(b). A draft decision written by a panel member is obviously covered by s. 3(1)(b), since the section explicitly covers "draft decisions". Further, a memorandum or other communication from a panel member to a Board lawyer or other staff member – *i.e.*, to someone who is not a Board member – about the merits of an issue in a particular application before the Board, would also be a "personal note" or "communication" of a person acting in a quasi judicial capacity. The response to such a communication would not be excluded under s. 3(1)(b), although any notes to file written by a panel member who received the response would be excluded.

(The staff member's response might, depending on the circumstances, be protected under s. 13(1) or another of the Act's exceptions.)

The end result is that deliberative secrecy is afforded to the Board by s. 3(1)(b), but the scope of that secrecy depends on the nature of each record and the context in which it exists. It bears emphasizing that although some records will not be excluded from the Act's ambit under s. 3(1)(b), they may still be excepted from disclosure under one or more of the Act's exceptions to the right of access.

Records Excluded by Section 3(1)(b) in this Case

I have reviewed the records in dispute in this inquiry. They came from five accordion files, each of which was created and maintained by and for one of the vice chairs, and the chair, who heard the employer's application for leave to reconsider. The records found in the files include copies of various drafts of all or parts of the panel majority's decision or the panel minority's decision, with handwritten comments having been made by various panel members on many of those drafts. The material before me establishes these draft decisions of the panel's majority and minority were written by panel members. They are clearly excluded from the Act by s. 3(1)(b). The same goes for panel members' annotations on those copies.

The records also include paper copies of e-mails, and memorandums or notes, created by panel members and sent to others on the panel. These communications deal with the leave for reconsideration application before the panel. They include panel members' comments to each other, or thoughts apparently recorded for later individual reflection, on various issues raised by that application. In some instances, notes of this kind appear to be an outline, or comparable basis, for a draft decision. Some of notes deal with the evidence before the panel.

Some records consist of notes taken by a panel member about various legal authorities raised in respect of the application. Similarly, many records contain notes about various Code sections that apply or may apply to the application. Last, a number of the records appear to be panel members' notes flowing from policy conferences or other meetings of the panel, or its members, at which various aspects of the application were discussed.

Not surprisingly, many of the records are duplicated in the various panel members' files. In some cases, copies of a record have annotations on them, while in other cases the copies are clean and are therefore the same as the original document.

All of the records described in this section are covered by s. 3(1)(b) and are therefore not subject to the right of access created by the Act.

Records Not Excluded by Section 3(1)(b) in this Case

A number of the responsive records are not, I conclude, covered by s. 3(1)(b) and are therefore subject to the right of access under the Act (subject to what is said below about

exceptions to that right). One of these records consists of a copy of the employer's February 11, 1999 application letter to the Board (together with the enclosure to that application, *i.e.*, a copy of the Board's original letter decision). Another record is a copy of a February 16, 1999 letter sent by the Board to "interested parties", notifying them of the February 11 reconsideration application. A copy of this letter is shown as having been sent to the applicant and others. These records are not excluded by s. 3(1)(b).

Two other records in this category consist of internal Board records relating to the constitution of the panel. The first is a February 16, 1999 memorandum from one vice chair to two others (and to a Board staff lawyer). The record refers to two "leave for reconsideration" applications – including the one filed by the applicant – and says the applications are "being directed to this process". The subject line for the memorandum refers to the "Section 141 Leave Panel Process". The memorandum notifies the recipients of a meeting to discuss the matter. The meeting is indicated as being held in the chair's office. This record is not excluded from the Act by s. 3(1)(b).

Similarly, a document signed by the Board's then chair, apparently some time in February of 1999, is not excluded by s. 3(1)(b). It refers to the employer's reconsideration application and says the matter is "referred to this panel". No names of the panel members are included in the form, the relevant portion of which is blank. This instrument, by which the Board apparently acted, through its chair, to assign panel members and thus constitute the panel, is not excluded from the Act by s. 3(1)(b).

There is also a group of e-mails from Board staff to Board employees or panel members, or both, about possible dates for meetings to consider the reconsideration application. These e-mails were sent in the first part of May last year. These records are not excluded from the Act by s. 3(1)(b).

Copies of agendas for policy conferences are also found in the responsive records and, for the reasons given above, I find that these records are not excluded by s. 3(1)(b). This class of records includes a February 16, 1999 memorandum from a vice chair to two other vice chairs, noting that the employer's leave application was being directed to the leave panel process, and an agenda for an April 6, 1999 policy conference.

It should be noted, specifically, that a number of notes taken by one of the panel members were included in the responsive records even though they appear to relate to the applicant's request for access to information under the Act. Because these records are not responsive to the applicant's request, they are not properly before me and I make no finding or order about them.

3.3 Adequacy of Board's Search For Records – In his initial submission, the applicant said the "Board should exercise its authority under Section 6(2) and conduct an electronic search of Board records". For its part, the Board said that it had met its s. 6(1) duty and also had – although it was not required to do so – conducted an electronic search for records. The Board provided affidavit evidence to support its position on these points.

Section 6 reads as follows:

> 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
>
> (2) Moreover, the head of a public body must create a record for an applicant if
>
> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
>
> (b) creating the record would not unreasonably interfere with the operations of the public body.

Section 6(2) creates a limited duty for public bodies to assist access applicants by electronically creating a record – not searching for one electronically – if that can be accomplished as contemplated by ss. 6(2)(a) and (b). If there is a duty to search electronically for records, it arises under s. 6(1). If a public body stores records in electronic form, its search for records in response to access requests must include searches for records in electronic form.

The Board did that here, as the affidavit sworn by Lisa Hansen, the Board's Registrar, on November 5, 1999, indicates. She deposes as to the search efforts the Board undertook in looking for records responsive to the applicant's requests. She spoke to each of the five members of the Board's reconsideration panel and gave them copies of the applicant's first request. She also spoke about the request to the Board's head of mediation, to in-house Board lawyers and to various Board administrative staff. She asked everyone to search for and produce records responsive to the applicant's request. She spoke to everyone at the Board she believed may have "information responsive to the request". She asked them to search, among other things, for any memos or e-mail messages that might be responsive. In the end, Ms. Hansen searched – alone or with the assistance of a Board lawyer – all of the panel members- "personal files" and the "Board file" related to the employer's file.

Ms. Hansen also deposes that the applicant told her, in a telephone conversation, that he was particularly concerned about any communications between the Board's head of mediation and the then chair of the Board. She therefore asked both those individuals to search for records that responded to paragraphs 7 through 9 of the May 27 request. She was told – she did not say by whom – that no such records existed.

As regards the June 28, 1999 request, Ms. Hansen deposes that – having clarified one aspect of the request – she "reviewed the Board's administrative records and found certain documents responsive" to the request. These records were severed and disclosed to the applicant.

Last, Ms. Hansen deposes, in an affidavit sworn November 10, 1999, that the Board undertook an electronic records search. She was told by the Board's manager of information technology that Microsoft Word backup tapes of selected Board administrative staff had been searched by reference to relevant case numbers and names. This search only covered tapes up to March of 1999. No records were found. I am satisfied that the Board undertook a thorough and adequate search for records responsive to this access request as required by s. 6(1) and as contemplated by previous decisions under the Act. (See, for example, Order 00-15.)

During the course of the inquiry, it came to my attention that materials had been removed by a Board employee from one of the five files described earlier. This happened, it turned out, after the Board had produced the responsive records to my Office. According to the Board, instructions by its then chair, Keith Oleksiuk, to his assistant to 'organize' his file were misunderstood by the assistant. The assistant, in the words of the Board's submission:

> … instead conducted the standard file clean up which occurs following the release of a decision, in which the individual panel members' files are organized and duplicate copies of file material, such as authorities, submissions and draft decisions, are discarded.

A further affidavit sworn by Lisa Hansen, on February 21, 2000, deposes to this event, which occurred last November. On learning of the error, she worked with the chair's assistant to determine what had been discarded and she immediately contacted this Office about the mistake. As a result, the Board was able to identify the material disposed of from the chair's file and produced a list of that material. A copy of that list was provided to me and to the applicant.

To say the very least, the destruction of records which are the subject of this inquiry was extremely unfortunate. According to the Board, most of the records exist elsewhere in the Board's records and have been produced to me. It is not possible to say whether the chair's copies of the same records were annotated with the chair's notes. Those notes would likely, but not necessarily, have been excluded from the Act by s. 3(1)(b).

I accept the Board's explanation of what happened. So did the applicant, in his reply to the Board's submission on this point. It hardly needs to be said, however, that public bodies must take every reasonable precaution to ensure that records that are the subject of an access request, or a request for review under the Act, are kept secure and safe and are not altered or destroyed.

In the circumstances, I find the Board undertook an adequate search for responsive records and met its duty under s. 6(1) of the Act.

3.4 Other Exceptions – Although it cited ss. 13, 14 and 15 in its two response letters, the Board has relied, for all intents and purposes exclusively, on s. 3(1)(b) in this inquiry. There is no indication it has severed records under ss. 13(1) or 14 of the Act; no severed records were provided to me for this inquiry.

The applicant indicates his acceptance of application of the s. 14 exception to records subject to solicitor client privilege, but argues the Board cannot exclude records created before the "second reconsideration panel" was appointed.

As was noted above, the Board appears to have initially indicated that s. 13(1) applied to some information in the records. The Notice of Written Inquiry in this matter indicated that s. 13(1) was in issue. In its initial submission, the Board said it had properly applied s. 13(1), but did not elaborate on this contention in its submissions. Again, none of the disputed records indicates that s. 13(1) was applied to it; there is no evidence of severing. This issue is moot for the records I have found are excluded from the Act by s. 3(1)(b). For records which I have found are not covered by s. 3(1)(b), I view the Board's failure to pursue s. 13(1) or other disclosure exceptions in a meaningful way, in this inquiry, as its abandonment of any such claims on its part.

3.5 Disclosure of Records in the Public Interest – Both parties have accepted that I should consider whether the Board is obliged by s. 25(1) of the Act to disclose records to the applicant. Sections 25(1)(b) and (2) read as follows:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
> ...
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

By a letter to the Board dated October 13, 1999, the applicant asked the Board to act under s. 25(1)(a) and disclose responsive records in the public interest. On October 20, 1999 the Board responded by declining to do that.

It would appear from the wording of s. 25(2) that s. 25(1) may apply to a public body despite the exclusions in s. 3(1) of the Act. This was the conclusion of Levine J. in Adjudication Order No. 3 (June 30, 1997), under s. 62 of the Act, where she stated:

> Counsel for the Commissioner submits that Section 25 does not apply to the present records because they are excluded from the operation of the Act under Section 3. I disagree. Section 25(2) makes it clear that Section 25(1) applies despite any other provision of the Act. Section 25 is accordingly paramount over section 3. However, only information, not the entire operational record, that satisfies either the significant harm or clear public interest tests must be disclosed by the Commissioner pursuant to Section 25.

I have therefore approached this issue independent of my conclusions on the applicability of s. 3(1)(b) to some of the records requested by the applicant. Section 25(1)(b) differs in

nature from the access and privacy rights, and disclosure exceptions, in the Act. Section 25(1)(b) is a mandatory, and paramount, requirement for an information disclosure which is "clearly in the public interest."

The concept of the public interest has a number of facets. The reason given by the applicant for public interest disclosure in this case is essentially to secure the proper, and transparent, functioning of the Board under the Code. The Board is an important institution; whether it operates fairly and lawfully no doubt affects labour relations in British Columbia. I accept that the "health" of the Board is a proper object of public scrutiny and concern. I do not believe, however, that the public interest in this general sense – and as it may be invoked by the applicant's reasons for seeking access to Board records in this case – triggers s. 25(1)(b) of the Act. This provision is not an investigative tool for those who seek to look into the affairs of a public body. It is an imperative requirement for disclosure which is triggered by specific information the disclosure of which is clearly in the public interest. The applicant may be suspicious about the manner in which the Board conducts itself. From my review of the requested records, which I have undertaken on a record by record basis, I conclude that while these records may be of interest to the applicant (and others) for purposes of scrutinizing the operations of the Board, that interest, in the circumstances of this case, is not a reason which triggers mandatory public interest disclosure under s. 25(1)(b) of the Act.

4.0 CONCLUSION

Having found that some records requested by the applicant (copies of which are delivered to the Board with this order) are not excluded from the Act by s. 3(1)(b), and having found that the Board is not authorized or required to refuse access to those records by reason of a disclosure exception in the Act, under s. 58(2)(a) of the Act I require the Board to give the applicant access to those records.

There is no need for an order under s. 58(3) of the Act, as I have found that the Board complied with ss. 6 and 25.

June 9, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia