OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 04-04

THE BOARD OF SCHOOL TRUSTEES OF SCHOOL DISTRICT NO. 68 (NANAIMO-LADYSMITH)

Celia Francis, Adjudicator
February 16, 2004

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Summary: Applicant requested review of School District's decision under s. 8(2)(b) to neither confirm nor deny the existence of certain records. Third-party teacher requested review of School District's decision to disclose investigator's report and hearing records in severed form. School District found to have applied s. 8(2)(b) properly and to have correctly decided to sever and disclose report and hearing records.

Key Words: confirm or deny – substance of deliberations – advice or recommendations – developed by or for a public body or a minister – personal privacy – unreasonable invasion – supplied in confidence – employment history – labour relations information – unfair exposure to harm – inaccurate or unreliable personal information – unfair damage to reputation – public interest.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 8(2)(b), 12(3)(b), 13(1), 22(1), 22(2)(e), (f), (g) and (h), and 22(3)(b), (d) and (g), 25(1); s. 3, *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93.

Authorities Considered: B.C.: Order 114-1996 [1996] B.C.I.P.C.D. No. 41; Order 326-1999 [1999] B.C.I.P.C.D. No. 39; Order 00-14 [2000] B.C.I.P.C.D. No. 17; Order 01-07 [2001] B.C.I.P.C.D. No. 7; Order 01-53 [2001] B.C.I.P.C.D. No. 56; Order 02-19 [2002] B.C.I.P.C.D. No. 19; Order 02-35 [2002] B.C.I.P.C.D. No. 35; Order 03-24 [2003] B.C.I.P.C.D. No. 24; Order 03-42 [2003] B.C.I.P.C.D. No. 43; Order 04-05 [2004] B.C.I.P.C.D. No. 5. **Ont.**: Order P-653 [1994] O.I.P.C. 108.

Cases Considered: *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, [2002] B.C.J. No. 2779 (C.A.).

1.0 INTRODUCTION

[1] The applicant in this case is the parent of a child who attends a school within School District No. 68 ("School District"). She submitted two requests in May 2002 under the *Freedom of Information and Protection of Privacy Act* ("Act") to the School District for records. The first request said that the applicant understood that the School District had forwarded certain records to the College of Teachers. It went on to ask whether records of investigations and hearings from 2001 and 2002, including interviews with students and parents, were among the records sent to the College of Teachers. The second request referred to a "2002 investigation and disciplinary hearing" regarding a named teacher (the same third-party teacher as in Order 04-05, [2004] B.C.I.P.C.D. No. 5, the companion to this order) and asked for a report by a named investigator (to which I refer as Report 2 in that order). It also requested "a copy of any discussion from the hearing" concerning the applicant and her son.

[2] The School District responded in July 2002 by refusing, under s. 8(2)(b), to confirm or deny whether it had sent to the College of Teachers any records referred to in the request. The School District confirmed that it was the School District's practice to comply with s. 16 of the *School Act*. The School District went on to inform the applicant that it had decided to disclose the requested report in severed form, in such a way that the applicant would receive the personal information of herself and her son but not information on the teacher's employment history, which fell under s. 22(3)(d) of the Act.

[3] With respect to the request for hearing records, the School District told the applicant that it would provide severed copies of responsive records related to a special closed meeting of the school board, disclosing the personal information of the applicant and her son but withholding information which fell under ss. 12(3)(b) and 13(1) of the Act. The School District also informed the applicant that it had notified the Nanaimo District Teachers' Association ("NDTA"), on behalf of the teacher, of its decision to disclose certain records.

[4] The BC Teachers' Federation ("BCTF"), on behalf of the third-party teacher, requested a review of the School District's decision to disclose certain records in August 2002. At about the same time, the applicant requested a review of the School District's decision to neither confirm nor deny the existence of certain records and of its failure to provide the report and hearing records. The applicant also argued that s. 25(1) of the Act applied to the requested records.

[5] According to the portfolio officer's fact report which accompanied the notice of written inquiry for this case, the School District decided during mediation to disclose more information from the investigation report and hearing records. The third-party teacher objected to this decision as well.

[6] Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. I have dealt with this inquiry, by making all findings of fact and law and the necessary order under s. 58, as the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act.

[7] The Office invited and received representations from the applicant, the School District and, on behalf of the third-party teacher, the NDTA and the BCTF. Legal counsel for the teacher, the NDTA and the BCTF made submissions on behalf of all three. In addition to the issues in the notice for this inquiry, that lawyer argued that s. 21 applies to information in the records in dispute respecting both the teacher and the NDTA and the BCTF (the second request). He also argued that s. 8(2)(a) applies in the case of the first request.

2.0 ISSUE

[8] The issues before me in this inquiry are as follows:

1. Whether the School District is authorized by s. 8(2)(b) to neither confirm nor deny the existence of certain records.

2. Whether the School District is required by s. 22 of the Act to withhold personal information.

3. Whether the School District is authorized by ss. 12(3)(b) and 13(1) to withhold information.

4. Whether the School District is required by s. 21 to refuse to disclose certain information.

5. Whether s. 25(1) applies to the requested records.

[9] Under s. 57(1) of the Act, the School District has the burden of proof regarding ss. 12(3)(b) and 13(1) while, under ss. 57(2) and 57(3)(a), the applicant has the burden of proof regarding third-party personal information. Under s. 57(3)(b), the third party has the burden of proof respecting other information, that is, of showing that s. 21 applies.

[10] Previous decisions of the Commissioner have held that, while s. 57 of the Act is silent on the burden of proof in determining whether s. 25 applies, as a practical matter, it is in the interests of each party to present evidence as to whether s. 25 applies and requires disclosure.

3.0 DISCUSSION

[11] **3.1 Do Sections 8(2)(a) and (b) Apply?** – The School District argued that s. 8(2)(b) applies to the applicant's request for information as to "whether records of investigations and hearings from 2001 and 2002, including interviews with students and

parents," were among certain records the applicant believes the School District sent to the College of Teachers.

[12] The third party agreed with the School District on this point and argued later in his submission that s. 8(2)(a) also applies. This latter section was not listed in the notice for this inquiry. The School District did not object to the third party making this additional argument. As this section does not engage the third party's own interests, however, I have decided not to consider it.

Section 8(2)(b) says:

> **Contents of response**
>
> 8(2) Despite subsection (1) (c) (i), the head of a public body may refuse in a response to confirm or deny the existence of
>
> …
>
> (b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

[13] Section 16 of the *School Act* requires a school board to report a "dismissal, suspension or other disciplinary action" to the College of Teachers and to provide it with copies of records touching on the matter. In the School District's view, information on the existence of a report under s. 16 is employment history information and would fall under s. 22(3)(d) of the Act. Revealing whether or not the School District had provided certain other records with such a report would also fall under s. 22(3)(d), in its view.

[14] Thus, the School District argued, simply revealing the existence or non-existence of the requested information (*i.e.*, whether it provided certain records to the College) would be an unreasonable invasion of the teacher's privacy because it would reveal whether or not the School District had reported the "dismissal, suspension or other disciplinary action" taken against the teacher.

[15] The third party acknowledged that the issue is whether or not the School District may, under s. 8(2)(b), refuse to confirm or deny the requested records. He argued that any records related to a report to the College would be the third party's personal information. He said they should not be disclosed, for the same reasons as in his submission dealing with the unreasonable invasion of the third party's personal privacy.

[16] The Information and Privacy Commissioner set out the principles for applying s. 8(2)(b) in Order 02-35, [2002] B.C.I.P.C.D. No. 35, at paras. 33-40. I have applied those principles here, without repeating them.

[17] It is well-established in previous orders that information on an individual's discipline, suspension, termination and other similar workplace disciplinary matters falls under s. 22(3)(d). Thus, I agree with the School District that information related to the

reporting under s. 16 of the *School Act* of a "dismissal, suspension or other disciplinary action" about an individual falls under s. 22(3)(d) of the Act. Disclosure of such information and of the existence of such information is therefore presumed to be an unreasonable invasion of third-party personal privacy.

[18] In my view, disclosure of whether or not the School District in this case provided certain records to the College – presumably under s. 16 of the *School Act* – would also reveal whether or not the School District had sent a report under s. 16. This in turn would reveal whether or not the School District had reported to the College the dismissal, suspension or other disciplinary matter related to the teacher, an unreasonable invasion of his privacy. I am not aware of any relevant circumstances that would favour disclosure of any such information. I therefore agree with the School District that it is appropriate to neither confirm nor deny whether the School District provided certain records to the College.

[19] **3.2 Personal Privacy** – The School District withheld the bulk of the information in this case under s. 22 of the Act. Specifically, it applied s. 22 in full or in part to all five records: the investigator's report; an employee's notes of the special closed meeting ("meeting notes"); the minutes of that meeting ("*in camera* minutes"); a document containing questions and answers the School District said was developed for the school board ("Q & A document"); and an e-mail message from a parent ("e-mail").

[20] The third party argued that s. 22 applies, in full, both to the investigator's report (what he termed the "Second Records") and to "any information in a record of a Public Body hearing about any discussions from the hearing pertaining to the applicant or her child" (what he termed the "Third Records"). The third party applied his s. 22 arguments generally to the "Second Records" and "Third Records" throughout his initial submission on s. 22 without enumerating the records he considers to fall into the category of "Third Records". However, he argued in his reply that s. 22 applies to all records pertaining to meetings regarding an investigation of the third party. I have, therefore, taken him to mean that this latter category consists of the *in camera* minutes, the meeting notes, the Q & A document and the e-mail.

[21] The parties did not address whether the applicant was acting on her son's behalf, for the purposes of s. 3 of the *Freedom of Information and Protection of Privacy Regulation*, B.C. Reg. 323/93 ("FOI Regulation"). Given that the material before me indicates that the child is in elementary school, I am satisfied that s. 3 of the FOI Regulation applies, and that the applicant is acting on her own and her son's behalf in this case.

[22] The applicant has the burden of proof respecting s. 22 in this case, as specifically noted in the Notice of Inquiry. Despite this, the applicant did not address the specifics of the s. 22 issues in her initial submission and did not submit a reply.

[23] Her entire initial submission, submitted by her legal counsel, reads as follows:

> We have now had an opportunity to review your letter dated February 13, 2003 [the covering letter to the Notice of Inquiry]. We again ask that all records pertaining to our client as well as all other records, to which we are entitled pursuant to the Freedom of Information and Protection of Privacy Act ("Act") be provided to our office at your very earliest convenience.
>
> Please accept this letter as our initial submission to the written inquiry scheduled for March 7, 2003.
>
> We look forward to receiving the same at your very earliest opportunity.

[24] Given that the applicant has — as clearly indicated in s. 57 and in the notice of written inquiry — the burden respecting third-party personal information, her choice not to make a substantive submission was not to her advantage. It would, moreover, have been helpful to have her perspective on the issues.

[25] The Information and Privacy Commissioner has discussed the application of s. 22 in a number of orders, for example, Order 01-53, [2001] B.C.I.P.C.D. No. 56. I will not repeat that discussion but have applied the same principles here.

[26] I reproduce below the relevant parts of s. 22:

> **Disclosure harmful to personal privacy**
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> …
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> (f) the personal information has been supplied in confidence,
>
> (g) the personal information is likely to be inaccurate or unreliable, and
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> …

> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
>
> … .

[27] In addition to the five records in dispute in this case, the School District provided copies of nine other records in Appendix A to its initial submission, numbered 3-11 in Section A of Appendix A. These records either relate to the applicant's child or are no one's personal information. The School District indicated that it proposed to disclose these records along with severed copies of the investigation report and the meeting notes. It did not otherwise address these nine records and they do not appear to be responsive to the request. I have therefore not dealt with them in this decision.

Investigator's report

[28] The School District described the report as an investigator's report about the teacher's workplace behaviour or actions. The School District said it does not believe that s. 22(4) applies to the report, with which I agree. The School District also said that it reviewed the investigator's report line by line and attempted to identify the personal information of the applicant and her son for release to the applicant. It also identified for release information which in its view is no one's personal information.

[29] I have reviewed the report and agree with the School District that some of the information it contains is no one's personal information in that it consists of general information about the terms of reference for the investigation, the investigator's methodology and documentation she reviewed. In addition, some of the information in the methodology section consists of aggregate references to students, staff or parents being interviewed. I agree with the School District that these types of information should be disclosed. I have added to this information a phrase or two which the School District had not marked for release – perhaps through an oversight – but which, in my view, are also not personal information.

[30] The School District argued that the rest of the report falls under s. 22(3)(d) of the Act in that it is the teacher's personal employment history information. Referring to Order 01-53, it argued that:

> Information created in the course of an investigation and disciplinary matter in the workplace that consists of evidence or statements by witnesses or a complainant about an individual's workplace behaviour or actions are part of the third party's

> employment history, and are subject to the presumption created by Section 22(3)(d) [citation omitted].
>
> …
>
> It [the report] is the personal information of the Teacher relating to his employment history and/or personal information of third party witnesses who were interviewed by the investigator in relation to their experiences of the Teacher.

[31] The third party argued that the information in the investigator's report is the third party's personal information and falls under ss. 22(3)(b), (d) and (g). With respect to ss. 22(3)(d) and (g), the third party said, without elaborating, that these sections apply to the investigator's report, as the records consist of information on the third party's employment history and personal evaluations.

[32] Again without elaborating, the third party stated baldly in his initial and reply submissions that s. 22 applies even to the personal information of the applicant and her child. The Information and Privacy Commissioner has acknowledged that, in rare cases, the application of s. 22 may result in an applicant being denied access to her own personal information (see, for example, para. 48, Order 01-07, [2001] B.C.I.P.C.D. No. 7). This is not, however, one of those cases.

[33] I consider that a fair proportion of the rest of the investigator's report falls under s. 22(3)(d) in that it consists of the educational history information of the students who were interviewed. It consists of information about incidents in which the students were involved at school; their personal experiences in school; and comments by the teacher and others about the students' academic performance and behaviour at school.

[34] Where it relates to students other than the applicant's own child, disclosure of this s. 22(3)(d) information to the applicant is presumed to be an unreasonable invasion of third-party privacy. Several lengthy portions in the report evidently relate to the applicant's own child, as they are marked for release to her. As I discuss further below, as the applicant is acting for her son in this case, she is entitled to have access to his personal information.

[35] The rest of the report consists of the teacher's employment history information: allegations and complaints about the teacher's work and workplace behaviour; views and observations of students, parents and school staff about the teacher in the classroom setting; the teacher's own views, opinions and observations on events at school; information about the teacher's current and past work experience and related events; and the investigator's analysis, discussion and findings. In my view, all of this information is employment history information of the type that the Information and Privacy Commissioner has found to fall under s. 22(3)(d) in past orders. Disclosure of this information is therefore presumed to be an unreasonable invasion of third-party privacy.

[36] Some of the s. 22(3)(d) information about the teacher relates to the applicant's own allegations and complaints against the teacher regarding his treatment of her son or

her comments about his behaviour towards her. I consider that some of this is also personal information about the child. The School District evidently concluded it could disclose this information to the applicant as it is marked for release to the applicant. Perhaps it viewed this as the son's personal information. In any case, as I discuss further below, the applicant's knowledge of these allegations, complaints and comments is a relevant circumstance favouring disclosure of this information to the applicant.

[37] Some personal information in the report consists of evaluations of the teacher's past and current work performance which in my opinion falls under s. 22(3)(g). Disclosure of this information is also presumed to be an unreasonable invasion of third-party privacy.

[38] As for s. 22(3)(b), the third party asserted that the investigator's report contains personal information that was compiled and is identifiable as part of investigations into the possible violations by the third party of s. 17 of the *School Act* and the *School Regulation*. The third party also referred to ss. 15(3) and 15(5)-(7) and 16 of the *School Act*, ss. 16(1) and (3) and 28-40 the *Teaching Profession Act* and the relevant collective agreement under the *Labour Relations Code*. The third party did not explain how the investigation of the teacher constituted an "investigation into a possible violation of" any of these laws, as contemplated by s. 22(3)(b) of the Act. The third party also did not explain how the personal information in the report is identifiable as part of any investigation into such supposed violations.

[39] The School District disagreed with the third party's argument that s. 22(3)(b) applies to information in the investigator's report, saying that ss. 15 and 16 of the relevant collective agreement do not set out the grounds under which a teacher may be disciplined, but rather the process for dismissal.

[40] I have found above that the teacher's personal information in the report falls under ss. 22(3)(d) and (g). I do not therefore need to consider whether s. 22(3)(b) applies to the same information.

[41] Turning to a consideration of the relevant circumstances, the third party asserted that ss. 22(2)(e)-(h) are relevant. The School District said it took into account only the relevant factor in s. 22(2)(f), saying that the personal information was supplied in confidence to the investigator. The School District supplied no evidence to support this contention, for example, in the form of policies it may have on complaint investigations or affidavit evidence from the teacher or others involved in the investigation. The School District also said, again without expanding, that it did not consider that there are any relevant factors rebutting the presumption of privacy.

[42] Regarding s. 22(2)(f), the third party argued that the personal information in the report was supplied in confidence in accordance with the express provisions of Article 16 of the relevant collective agreement. The third party supported this argument with affidavit evidence by the NDTA's communications director who deposed in her public affidavit that discipline of NDTA members is dealt with "in a confidential manner" at *in*

camera meetings of the school board. She did not explain what she meant by "a confidential manner".

[43] Attached to this affidavit was a copy of Articles 15 and 16 of the collective agreement. The first of these describes the process for dismissal of teachers based on performance while the second sets out the process for the discipline and dismissal of teachers based on misconduct. Article 16 also acknowledges that the parties will treat dismissal and disciplinary matters confidentially and will not disclose such matters to the public or media except by agreement. This does not, however, mean that parties to the investigation and related matters supplied information in confidence.

[44] The investigator's report itself casts no light one way or the other on the confidentiality issue. The investigator does not, for example, state whether or not she conducted her interviews on a confidential basis. There is also no mention in the report that students, parents and others agreed to be interviewed under conditions of confidentiality.

[45] There is no basis in the material before me on which I can conclude that the personal information in the investigator's report was supplied in confidence. I say this bearing in mind Article 16 of the collective agreement, which does not suffice, in my view, to establish confidentiality of supply within the meaning of s. 22(2)(f). I therefore do not consider that s. 22(2)(f) is a relevant circumstance here.

[46] The third party provided a few lines of *in camera* argument, which amounted to assertion, on other circumstances which he believes are relevant, including ss. 22(2)(e), (g) and (h). The third party did not explain how that these s. 22(2) circumstances might apply, for example, by showing how the personal information might be unreliable or inaccurate, how unfair harm might result or how unfair damage to the third party's reputation might occur. I am unable to conclude from the material before me that the other circumstances the third party raises, principally, ss. 22(2)(e), (g) and (h), apply here.

[47] There is, however, a relevant circumstance which I consider applies here. The Information and Privacy Commissioner has said that the applicant's awareness of a third party's personal information is a relevant factor that public bodies should consider in the application of s. 22. For example, an individual will obviously be aware of information (such as complaints or allegations) he or she has provided about a third party. In such cases, the applicant's previous knowledge favours disclosure of third-party personal information, as disclosure would not result in an unreasonable invasion of the third party's privacy. See, for example, Order 03-24, [2003] B.C.I.P.C.D. No. 24.

[48] In this case, the investigator's report reveals that the applicant is aware of her own complaints and allegations against the teacher where they involve herself and her child, information on her own interactions with the teacher and her comments about the teacher's behaviour as regards her son, because she provided this information to the investigator or the School District. While the teacher's information falls under s. 22(3)(d), its disclosure to the applicant would not, in my view, unreasonably invade the

teacher's personal privacy. I therefore agree with the School District's decision to release this information to the applicant. I have added to this a few items which the School District proposed to withhold but which are similar in nature to those which the School District had marked for release elsewhere.

[49] In addition, s. 3 of the FOI Regulation means that the applicant is entitled to her son's personal information. Thus, the son's personal information may also be disclosed to the applicant. Again, the School District correctly marked such information for release.

[50] I have added to this a small amount of information which pertains to the child and his parents but which the School District did not mark for release, perhaps through an oversight.

[51] I also find that the applicant is entitled to receive a reference to the teacher's name in this record, which the School District proposed withholding, along with references to the name of the school, the grade of the teacher's class and related information and one or two identifiable references to other staff, all of which the School District proposed to withhold. The applicant is undoubtedly aware of this information, which is in any case not sensitive in nature in this context. See Order 01-53, where the Commissioner found that the complainant's knowledge of the respondent's name meant it could be disclosed in the records in that case.

[52] I am not aware of any relevant circumstances favouring disclosure of the other personal information of the teacher which falls under s. 22(3)(d), however, nor of any s. 22(3)(g) information. The School District was correct to withhold this remaining information. I have added to this information a few items which the School District had missed, perhaps inadvertently, which are similar to those it proposed to withhold elsewhere in the report.

Meeting minutes

[53] The applicant requested only information about herself and her son in records related to the special closed meeting. I therefore do not need to consider all of the minutes but only those portions which relate to these two individuals.

[54] In its discussion of s. 12(3)(b), the School District said it relies on s. 22(3)(d) as authority to withhold the minutes but said nothing more about why it feels this section applies. The third party's s. 22 arguments on this record are the same as those above in the discussion of the investigator's report.

[55] The School District pointed out that the minutes contain very little personal information about the applicant or her child. There is simply an indirect reference to an incident recounted in the investigator's report and, the School District said, it intends to disclose that equivalent portion in the report. It did not address the issue of severing the minutes.

[56] I agree with the School District that the bulk of the minutes is s. 22(3)(d) information about the teacher. Almost none of it corresponds to information in the report which I found above could be disclosed. Based on information in the report, I could identify only one phrase at the bottom of p. 5 of the minutes that related to the applicant's son and, for reasons given above, it does not fall under s. 22. I address this portion below in the discussion of s. 12(3)(b).

Meeting notes

[57] The School District says that s. 22(3)(d) applies to an employee's notes, which it says the employee took during two days of the three-day special closed meeting that took place in February and March 2002. The School District says that the notes "primarily record the substance of the presentation made by the Union on behalf of the Teacher". It is, however, prepared to provide the applicant with a copy of the notes, severed so that she receives information about herself and her child.

[58] The third party's s. 22 arguments on this record are the same as those discussed above regarding the investigator's report.

[59] I agree with the School District and the third party that much of the information in the meeting notes consists of the teacher's employment history information, as I described it above. Some corresponds to information in the investigator's report. There is also the employment history information of other people. All of this information falls under s. 22(3)(d) and its disclosure to the applicant is presumed to be an unreasonable invasion of third-party privacy.

[60] I do not agree with the third party that s. 22(3)(g) applies to this record. It contains no personal recommendations, evaluations of the teacher or other information that falls into s. 22(3)(g). For the reasons given above, I do not need to consider if s. 22(3)(b) applies to this record.

[61] As the School District notes, there are portions of the meeting notes which relate to the applicant and her child which the applicant is entitled to receive and which the School District has correctly marked for release to the applicant. The School District has also correctly identified small amounts of s. 22(3)(d) information related to the teacher for disclosure. These two types of information correspond to information marked for release in the investigator's report.

[62] The School District did not argue that any relevant circumstances apply to the meeting notes. As mentioned earlier, the third party generally argued that ss. 22(2)(e)-(h) apply to records related to the special closed meeting, favouring withholding the notes in full. I make the same findings on these arguments as I did regarding the investigator's report, that is, that none of them applies here.

[63] As with the report, the applicant is entitled to her own and her son's personal information. In addition, the applicant's knowledge of some s. 22(3)(d) information about the teacher favours its disclosure to her. For the same reasons that I gave in my

discussion of the investigator's report, the applicant is entitled to her own and her child's personal information in this record, as well as the s. 22(3)(d) information that relates to the teacher which the School District has marked for disclosure. The School District is correct in its decision to disclose these items to her. I note a few phrases in the notes which relate to the applicant's child but which, perhaps through oversight, the School District has not marked for release to the applicant. I have therefore added these items to those that the applicant is entitled to receive. I have also added identifiable references to the teacher and the investigator, which the School District had marked as withheld. As above, the applicant is aware of this information and its disclosure would not be an unreasonable invasion of these people's privacy.

[64] With the exception noted just above, however, I am not aware of any other relevant circumstances that apply, favouring disclosure of the s. 22(3)(d) information in the meeting notes. The balance of this third-party personal information must be withheld.

E-mail message

[65] The School District described this record as an e-mail message from a parent to the union president recounting an incident involving the parent, the teacher, the applicant and her child. It said the union presented the e-mail, among other documents, in support of the teacher at the special closed meeting. The School District said it considered whether it could disclose the e-mail in severed form. It said it determined that it could not sever the e-mail in such a way as to protect the privacy of the third-party parent. It did not explain how it determined this, nor did it say if it asked the parent for his or her views as part of making its decision. The School District said it considers that s. 22 applies to the entire e-mail. It did not argue that any relevant circumstances apply to this record.

[66] The third party's s. 22 arguments on the investigator's report apparently also apply to this record and I make the same findings on them as above.

[67] I agree with the School District that some of the information in the e-mail is the teacher's employment history information and falls under s. 22(3)(d). No relevant circumstances favour its disclosure, in my view. However, I disagree with the School District on the issue of severing this record. The brief references to the applicant and her child can, in my view, be disclosed to her without unreasonably invading the other parent's privacy. Accordingly, I have prepared a severed copy of the e-mail for disclosure by the School District to the applicant.

"Q & A Document"

[68] In its arguments on s. 12(3)(b), the School District said it relied on s. 22(3)(d) to withhold this record in full as it deals with the investigation and possible discipline of the teacher. The School District described the record as "setting out questions developed by the Board during the *in camera* meeting and the responses to those questions".

[69] The third party's s. 22 arguments on this item are apparently the same as those given above.

[70] I agree that most of the information in the Q & A document is the teacher's employment history information and therefore falls under s. 22(3)(d). However, after comparing its contents to the investigator's report, I am able to identify some personal information of the applicant and her son. Section 22 does not apply to any of this information. The School District did not say whether it had considered severing this record. I address this portion of the record below in the discussion of s. 12(3)(b).

[71] **3.3 Section 12(3)(b)** – The School District argued that s. 12(3)(b) applies to the entire set of minutes of the three-day *in camera* meeting of its Board which dealt with the teacher. It also said that s. 12(3)(b) applies to the entire Q & A document, which I describe above. The School District did not argue that s. 12(3)(b) applied to the meeting notes, the e-mail or the investigator's report. The third party argued that s. 12(3)(b) applies to all of the records in dispute.

[72] The purpose of s. 12(3)(b), a discretionary exception, is to protect a local public body's ability to engage in certain types of discussions in the absence of the public. It is thus up to the School District to address its own interests in this case and to exercise discretion in claiming s. 12(3)(b) as it sees fit. I do not consider that the third party can argue the application of an exception where his interests are not engaged, *e.g.*, under s. 22. I therefore decline to consider the third party's arguments on s. 12(3)(b) in relation to the three records to which the School District has not argued it applies, that is, the meeting notes, the e-mail and the investigator's report.

[73] The Information and Privacy Commissioner set out the three-part test for applying s. 12(3)(b) in Order 02-19, [2002] B.C.I.P.C.D. No. 19: there must be legal authority to hold *in camera* meetings; the public body must show that the *in camera* meeting took place; and the public body must show that disclosure of the information in dispute would reveal the substance of deliberations.

Minutes of the* in camera *meeting

[74] The third party pointed to s. 69(2) of the *School Act* and said that disclosure of the information in dispute would reveal the substance of deliberations. He did not develop this argument further, although he argued that s. 12(4) does not apply. He acknowledged that s. 12(3) is discretionary but referred to Article 16 of the relevant collective agreement, arguing that it removes any discretion and requires the School District not to disclose the records. Article 16 of the collective agreement simply recognizes that discipline matters will be dealt with in confidence. It does not somehow turn s. 12(3)(b) into a mandatory exception protecting discipline information. I do not accept the third party's argument on this point.

[75] The School District acknowledged the three-part test and said that it has authority under s. 69(2) of the *School Act* to hold *in camera* meetings. Sections 69(1) and (2) of the *School Act* read as follows:

> 69(1) Subject to subsection (2), the meetings of the board are open to the public.
>
> (2) If in the opinion of the board, the public interest so requires, persons other than trustees may be excluded from a meeting.

[76] The School District says that it held a "special closed meeting" (*i.e.*, an *in camera* meeting) of its Board to consider the investigation of the teacher, the investigator's report and the submissions of the teacher's union representative over three days in February and March 2002. The School District says that, in policy and practice, it holds *in camera* meetings regarding personnel matters such as the investigation and possible discipline of School District employees.

[77] It supported its position on this issue with a statutory declaration from its director of communications in which she deposed that it is the policy and practice of the Board of School District No. 68 to meet *in camera* to consider personnel matters, including the discipline of teachers. Attached to this statutory declaration was the School District's policy on closed meetings, which lists the topics which may be considered at such meetings, including personnel matters.

[78] As mentioned earlier, the School District said that the minutes of the *in camera* meeting do not directly refer to the applicant and her son, although it says there is an indirect two-line reference to incidents involving the teacher and the son described in the investigator's report. It appears that the School District did not consider it appropriate to sever the minutes under s. 4(2) of the Act, even though it said that it intends to disclose those portions in the report that correspond to the two-line reference in the minutes.

[79] The School District argued that it is important for its Board to meet privately when it discusses personnel matters respecting an individual teacher, as to hold such meetings in public might undermine the public's confidence in the teacher or the school administration. It also says that the minutes summarize the content and substance of the Board's deliberations on these confidential personnel matters. The minutes record the purpose of the meetings, submissions made by the NDTA on behalf of the teacher and submissions made by the Superintendent, it says, and thus engage "what was said about controversial matters" (referring to Order No. 114-1996, [1996] B.C.I.P.C.D. No. 41).

[80] I accept that the School District has met the first step in the three-part test for applying s. 12(3)(b), based on s. 69(2) of the *School Act*, which shows that the Board had authority to meet *in camera*. Second, the minutes themselves, which the School District provided with its submission, show that an *in camera* meeting took place. They are 12 pages long and state that they are minutes of a "Special Closed Board Meeting" which took place over a three-day period in February and March 2002. They record the attendance, dates and times of the meeting, topics of discussion, motions of various kinds and outlines of submissions by some attendees.

[81] In my view, the information on the motions, submissions and related items in the minutes would reveal the substance of deliberations and s. 12(3)(b) applies to them, meeting the third part of the test. Information on attendance, dates and times of the meeting and topics of discussions does not fall under this section (see Order 00-14, [2000] B.C.I.P.C.D. No. 17).

[82] As the School District pointed out, there is very little information about the applicant's child in the *in camera* minutes. It did not point me to the appropriate part but I can identify perhaps two and a half lines at the bottom of p. 5 of the *in camera* minutes that relate to the applicant's child. The applicant requested access only to her own and her child's personal information in records related to any hearing. I take this to mean that she does not want access to all of the minutes and other records related to the special closed meeting. I therefore do not need to consider the minutes as a whole but only the portion that pertains to the applicant's child.

[83] While the School District refers in its submission to Order 00-14, it does not, as mentioned, appear to have considered severing the minutes in this case. This is despite the fact that, in Order 00-14, the Commissioner discussed the appropriateness of severing *in camera* minutes. He found that the public body had taken the wrong approach to the application of s. 12(3) by treating it as a class-based records exception, in the sense of it applying to records as a whole. He then ordered the public body to re-consider its decision.

[84] In this case, the School District provided no evidence that it had considered severing the *in camera* minutes in light of the Commissioner's comments in Order 00-14. It also failed to provide any evidence to show that it exercised discretion in applying s. 12(3)(b) to information in the minutes. This is so even for the small amount of personal information that relates to the child, to which the School District has acknowledged with regard to other records the applicant is entitled.

[85] The School District has, in my view, taken the wrong approach to applying s. 12(3)(b) and, like the public body in Order 00-14, has apparently considered this section to apply to the minutes as if it were a class-based exception applying to *in camera* minutes as a whole. It is thus appropriate in this case for me to require the School District to reconsider its decision to apply s. 12(3)(b) to the two and half lines of personal information about the applicant's child, at the bottom of p. 5 of the *in camera* minutes.

Q & A Document

[86] The School District also says that the Q & A document reveals the substance of the Board's deliberations during its special closed meeting,

> … as it sought clarification and additional information about the issues before it. The recorded answers were considered by the Board and taken into account in arriving at its decision in respect of the issues before it relating to the Teacher.

[87] Again, it appears that the School District did not consider severing this record but applied s. 12(3)(b), blanket-fashion, to the entire Q & A document. The School District did not provide any evidence to show that its Board considered the Q & A document at its *in camera* meetings. It provided an affidavit from its legal counsel in which she deposed that she attended the *in camera* meeting in question, that the Board developed questions to ask of people concerning the matters before it and that she provided legal advice to the Board on those questions. She does not, however, say that the questions the Board developed were those in the Q & A document.

[88] In its discussion of the principles for applying s. 12(3)(b), the School District referred to Order No. 326-1999, [1999] B.C.I.P.C.D. No. 39, and acknowledged that a record considered at an *in camera* meeting does not necessarily reveal what the attendees at the meeting said about it. It did not, however, distinguish the Q & A document from the record in Order No. 326-1999, nor did it point to portions of the Q & A document which in its view would reveal the substance of deliberations of its Board. Besides the affidavit noted in the previous paragraph, it provided no other evidence linking the Q & A document to the special closed meeting.

[89] The contents of the Q & A document, which is undated, indicate that it relates to a hearing about the teacher. The minutes show that the Board considered questions of some kind that it had earlier discussed. Despite the lack of evidence on this point from the School District, internal evidence in the *in camera* minutes and the Q & A document themselves supports the conclusion that the Board considered the Q & A document at the special closed meeting involving the teacher. I have already said that the School District met the first two parts of the test. After comparing the two records, I am satisfied that the Q & A document would, if disclosed, reveal the substance of deliberations and that the School District has therefore met the third part of the test.

[90] I mentioned above that the Q & A document contains some information about the applicant and her child. As with the minutes, however, the School District did not say whether it was reasonable to sever the Q & A document to disclose this information to the applicant. The School District also failed to provide any evidence that it had exercised discretion in applying s. 12(3)(b) to information in this record. Rather, it appears to have treated s. 12(3)(b) as a class-based records exemption applying to entire records, regardless of s. 4(2). It has thus, in my view, taken the wrong approach in applying s. 12(3)(b) to this record and it is therefore appropriate for me to order the School District to re-consider its decision to apply s. 12(3)(b) to the personal information of the applicant and her child in the Q & A document.

[91] **3.4 Advice and Recommendations** – The School District acknowledged that s. 13(1) applies to advice and recommendations developed by or for a public body and that its purpose is to protect full and frank discussion of advice or recommendations provided to a public body. It argued that s. 13(1) applies to both the *in camera* minutes and the Q & A document, to the extent that they reveal the advice and recommendations of its superintendent and legal counsel.

[92] The School District did not, however, develop its s. 13(1) argument further, for example, by explaining how information in these two records consists of advice and recommendations. Nor did it point to specific parts of the records which it believes would reveal such information.

[93] Affidavit evidence from its legal counsel reveals that she attended the second and third days of the special closed meeting and provided legal advice to the board during this meeting. She also said she provided legal advice to the Board regarding the questions the Board developed. Despite this, the School District did not seek to apply s. 14 (solicitor client privilege) to the *in camera* minutes and the Q & A document.

[94] As he did with s. 12(3)(b), the third party argued that s. 13(1) applies to all of the records in dispute in this case, not just the *in camera* minutes and Q & A document, as the School District claimed. Section 13(1) is a discretionary exception. Its purpose is to protect a public body's internal decision-making process and its ability to obtain full and frank advice and recommendations on proposed courses of action, among other things. It is up to the School District to address its own interests in this type of forum and to exercise its discretion to claim s. 13(1) as it sees fit. I do not consider that the third party can argue the application of an exception where his interests are not engaged. I therefore decline to consider the third party's arguments on s. 13(1) in relation to the three records to which the School District has not argued it applies, that is, the meeting notes, the e-mail and the investigator's report.

[95] I found above that s. 22 did not apply to the personal information of the applicant and her son in the *in camera* minutes and Q & A document. Since the applicant is only interested in her own and her son's personal information in these records, I need only consider whether s. 13(1) applies to it and do not need to consider the rest of these two records.

[96] The third party refers for support to Article 16 of the relevant collective agreement, which he says removes any element of discretion and requires the School District not to disclose the records. Article 16 of the collective agreement sets out the process for the discipline and dismissal of employees based on misconduct and recognizes that such matters will be dealt with confidentially. It is not clear to me how a public body and a non-public body could purport, by an agreement between them, to vary the terms of the Act. Certainly, Article 16 does not translate s. 13(1) of the Act into a blanket mandatory exception of information related to disciplinary matters as advice or recommendations—I do not see how the School District could fetter its discretion under s. 13(1) in this way. I reject the third party's argument on this point.

[97] The third party also refers to *College of Physicians and Surgeons of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* (2002), 9 B.C.L.R. (4th) 1, [2002] B.C.J. No. 2779 (C.A.) (leave to appeal denied [2003] S.C.C.A. No. 83). The court found there that expert reports that the College had obtained in the course of investigating a complaint were part of the deliberative process, in that the College had considered the information in the reports in arriving at its findings on the complaint. The reports contained expert opinions on whether or not a particular medical

procedure had taken place. They did not contain advice or recommendations to the College on a proposed course of action.

[98] The records in dispute in this case are quite different from those discussed in *College of Physicians*. The portions that relate to the applicant and her son are not expert opinions relying on the exercise of judgement or skill. Nor is there any evidence that the School District weighed this information in making a decision about the teacher. The portions that relate to the applicant and her son also do not contain any explicit or implicit advice or recommendations to the School District. I find that s. 13(1) does not apply to them.

[99] **3.5 Does s. 21(1) Apply?** – Legal counsel for the third party said in his initial submission that, on behalf of the teacher, the NDTA and the BCTF, he would address whether s. 21(1) applies to the records in dispute. He acknowledged that the notice for this inquiry did not say that s. 21(1) would be an issue in this inquiry but said it had been raised earlier with the public body and with this office. The School District does not object in its reply to the third party raising s. 21(1) in his initial submission and, indeed, does not mention this issue at all.

[100] The purpose of s. 21 is to protect the business interests of third parties. I see no application of s. 21(1) to the teacher in this case. His role in this situation was purely personal. However, as the NDTA and the BCTF, as corporate entities, could potentially have s. 21(1) interests at stake in an inquiry and s. 21 is a mandatory exception, I have decided to consider the third party's arguments on this exception. I note that the third party has the burden of proof regarding this issue.

[101] The third party argues that ss. 21(1)(a)(ii), (b) and (c)(ii) and (iv) apply. They read as follows:

> **Disclosure harmful to business interests of a third party**
>
> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party, … .
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> …
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> …
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other

> person or body appointed to resolve or inquire into a labour relations dispute.

[102] For reasons which follow, I find that s. 21 does not apply to the records in dispute in this case.

"Labour relations" information

[103] The third party begins by asserting that s. 21(1)(a) is satisfied in this case as the records would reveal labour relations information of or about the third party NDTA and BCTF, including information about their representation of the third-party teacher, their member. This is all he says on this issue. He does not explain what he considers "labour relations" information to be, nor does he point to specific parts of the records which would reveal such information.

[104] British Columbia decisions do not appear to have considered what the term "labour relations" means in the context of s. 21(1). Numerous Ontario orders have, however, considered the meaning of this term. In Ontario Order P-653, [1994], O.I.P.C.108, for example, Inquiry Officer Holly Big Canoe considered the meaning of the term "labour relations" in s. 17(1) of Ontario's *Freedom of Information and Protection of Privacy Act*. Section 17(1) is the to s. 21(1) of BC's Act.

[105] Section 17(1)(d) of the Ontario Act reads as follows:

> **Third party information -- s. 17(1)**
>
> 17(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> …
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[106] She defined the phrase "labour relations" as follows:

> In my view, the term "labour relations information" refers to information concerning the **collective** relationship between an employer and its employees. [emphasis in original]

[107] I find that the definition in Ontario Order P-653 provides useful guidance in interpreting the term "labour relations" in this province's freedom of information legislation. I consider that the interpretation adopted in Ontario orders on s. 17(1) is appropriate for the term "labour relations" in the British Columbia provision.

[108] The records in this case all involve an individual teacher's case. The NDTA represented the teacher in the investigation and hearing processes and this is reflected in the records. However, the records do not contain information related to the NDTA's and BCTF's role or position in the collective bargaining process with the employer or other general labour relations matters. In my view, the information in these records is not "labour relations" information of or about a third party for the purposes of s. 21(1)(a)(ii).

Confidential supply

[109] The third party said next that s. 21(1)(b) was satisfied in this case as the information was supplied in confidence in accordance with Article 16 of the collective agreement. Again, he said nothing more on this topic and did not supply any evidence to support his assertion.

[110] Regarding the same argument about Article 16 and confidential supply of information, I have already been unable to conclude, based on the material before me, that people involved in the investigation had provided information in confidence. The same applies here. The records themselves contain no support for the third party's position on this issue. I come to the same conclusion here on confidentiality of supply.

[111] I also cannot conclude that all of the information was "supplied" as the Information and Privacy Commissioner has interpreted this term in past orders. Much of the information in the records was not in fact supplied to the School District by the third party unions but by other third parties. Other information was created by the School District.

[112] I find that s. 21(1)(b) does not apply here.

Similar information would no longer be supplied

[113] As before, the third party simply asserted that s. 21(1)(c)(ii) applied, supplying no evidence or argument to support his contention. There is no indication in the records or other material before me to suggest that disclosure of these records would result in similar information no longer being supplied to the School District. On the contrary, the materials suggest that the parties involved, including the unions, would be quite willing in future to come forward in similar future situations.

[114] I find that s. 21(1)(c)(ii) does not apply.

Information supplied to arbitrator to resolve a labour relations dispute

[115] The third party said that s. 21(1)(c)(iv) is also satisfied as

> … disclosure could reasonably be expected to reveal information prepared by a person appointed to inquire into a labour relations dispute (the author of the Second Record [the report]) and a body appointed to inquire into and resolve a labour relations dispute (the Public Body's Board).

[116] As with his other s. 21 arguments, the third party said nothing more on this topic.

[117] I agree that disclosure of the disputed records would reveal information or a report. The difficulty with the third party's position, in my view, is that neither the investigator nor the school board was appointed to inquire into and resolve a labour relations dispute for the purposes of s. 21(1)(c)(iv).

[118] There do not appear to be any British Columbia decisions in which this provision has been considered. However, the provincial government's *Policy and Procedures Manual*, in Chapter C.4.12, provides guidance, which I consider useful, on how to interpret the latter part of this section:

> An "**arbitrator**" is a private, disinterested person, chosen by the parties to a dispute, for the purpose of hearing their contention and giving judgement between them, to whose decision (award) the litigants submit themselves either voluntarily or, in some cases, compulsorily.
>
> A "**mediator**" is one who interposes between parties at variance for purpose of reconciling them [Black's].
>
> A "**labour relations officer**" is any person appointed to inquire into or resolve any form of labour relations dispute or issue.
>
> "**Other person or body appointed to resolve or inquire into a labour relations dispute**". The appointment can be from any level of government or a public body (e.g., ministerial appointments, Cabinet appointments or appointments from the chief executive officer of a public body).

[119] In Ontario Order P-653, Inquiry Officer Big Canoe considered the interpretation of s. 17(1)(d) of the Ontario provincial Act, which I quote above. At p. 6, she said the following:

> It is my opinion that section 17(1)(d) was intended to cover the information furnished to, and the reports prepared by conciliation officers, mediators and others who are appointed as **neutral third parties** to resolve labour relations disputes, and **only** those who are appointed under statutory schemes. [emphasis in original]

[120] In my view, this discussion also provides helpful guidance on the interpretation of s. 21(1)(c)(iv) of the BC Act, although I am not necessarily persuaded that the appointments referred to must always be made under a statutory scheme.

[121] All of these interpretations suggest that the person or body in question must have been appointed to resolve a labour relations dispute, not simply gather facts and make findings, as I see the role of the investigator in this case to have been. The material before me shows that the investigator was appointed to conduct interviews, review and assess various materials and draw conclusions about certain matters. She was not appointed to resolve a dispute, whether by arbitration, mediation or some other method.

The records show that it was up to the School District to make any decisions or recommendations on the subject matter of the investigation.

[122] I also do not view the investigator or the School District as having been appointed to "inquire into" a labour relations dispute. In my view, the "other person or body appointed to resolve or inquire into a labour relations dispute" is similar in nature to an arbitrator, mediator or labour relations officer – someone with the authority to deal with and resolve the dispute at hand. The term refers to someone who is appointed, for example, to determine the cause of, and to devise remedies for, a dispute, not a person hired to gather factual information and assess its validity with a view to making factual findings, as was the case with the investigator here.

[123] Nor was the School District appointed to resolve a labour relations dispute. School boards may well deal with labour relations disputes in the course of conducting their business, but they are not appointed solely for this purpose.

[124] I find that s. 21(1)(c)(iv) does not apply here.

[125] **3.6 Does Section 25(1) Apply?** – The applicant argues that s. 25(1) of the Act requires this information to be disclosed. The Information and Privacy Commissioner has considered, on numerous occasions, whether s. 25(1) applies to records, most recently in Order 03-42, [2003] B.C.I.P.C.D. No. 43. The Commissioner has yet to find that s. 25(1) applies to records in dispute in an inquiry.

[126] As may be seen from my quotation of the applicant's entire submission at the beginning of this decision, she did not address this issue at all. The third party argues briefly that s. 25 does not apply as the records do not contain information about a significant risk of harm, disclosure is not clearly in the public interest and there is no urgent or compelling need for disclosure. The School District agrees.

[127] I see nothing in the records in dispute in this case to warrant the application of s. 25(1). They concern an investigation into a teacher's workplace actions and behaviour and there is no urgent or compelling need for their disclosure without delay to the applicant. Applying the approach outlined in Order 03-42, I find that s. 25(1) does not apply in this case.

4.0 CONCLUSION

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

1. I confirm that the School District is authorized by s. 8(2)(b) to neither confirm nor deny the existence of the records requested in the applicant's first request.

2. Subject to para. 3 below, I confirm that the School District is required to withhold the personal information it withheld under s. 22 of the Act.

3. I require the School District to give the applicant access to information, including her own and her child's personal information, as marked on the copies of the records provided to the School District with its copy of this decision.

4. I require the School District to reconsider its decision to withhold under s. 12(3)(b) the personal information of the applicant and her child, as marked on the copies of the records provided to the School District with its copy of this decision.

5. I find that the School District is not authorized by s. 13(1) to withhold the personal information of the applicant and her son in the *in camera* minutes and the Q & A document.

[129] For reasons given above, it is not necessary to make an order respecting s. 8(2)(a), 21 or 25.

February 16, 2004

Celia Francis
Adjudicator