OFFICE OF THE INFORMATION & PRIVACY COMMISSIONER for British Columbia

Decision P05-02

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Personal Information Protection Act **("PIPA")—Health Benefit Trust ("HBT")—British Columbia Nurses' Union ("BCNU")—OIPC File P04-23355**

This letter deals with HBT's request for a ruling on its obligations under PIPA respecting personal information about BCNU members who receive long-term disability benefits under an HBT plan. In addressing this matter I have considered the following:

- Mr. Skolrood's October 27, 2004 letter and enclosures to me,
- The November 25, 2005 letter from Barbara Haupthoff, Intake Officer, to Mr. Skolrood,
- Ms. Brown's February 5, 2005 letter to me,
- Mr. Skolrood's February 15, 2005 letter to me,
- Ms. Brown's March 3, 2005 letter to me,
- Mr. Skolrood's March 4, 2005 letter me.

Having carefully considered this matter, I have decided that the question HBT has raised does not lend itself—at least not at this time—to an order under

s. 52(3) of PIPA. I am grateful for the time and effort that have gone into this matter on the part of both organizations and for your thoughtful discussion of the interaction of jurisdiction between an arbitration board under the *Labour Relations Code* and the Information and Privacy Commissioner ("Commissioner") under PIPA. As I explain below, however, I have reached my conclusion for reasons somewhat different than those advanced to me.

I have been told that HBT is established by a trust agreement between five named trustees and the Health Employers Association of British Columbia ("HEABC") for the purpose of providing health and welfare benefits to certain eligible employees within British Columbia's healthcare and community social services sectors. These benefits include long-term disability coverage for the majority of unionized healthcare workers whose employers are HEABC members. Some 20% of HBT beneficiaries are BCNU members.

I have also been told that HBT used to give BCNU quarterly reports that included the name, birth date and social insurance number of BCNU members who are receiving long-term benefits through HBT, as well as other personal information about the status of each member's claim. When PIPA came into force on January 1, 2004, HBT, with the concurrence of HEABC, stopped giving BCNU reports containing such personal information unless the individual in question has given written consent to disclosure to the BCNU. HBT has asked me for a ruling confirming that PIPA obliges it to refuse to continue to disclose personal information to BCNU.

BCNU contends, for reasons not spelled out in the material before me, that HBT can continue to provide union members' personal information on BCNU's request and without individual consent. BCNU has grieved the matter and HEABC's denial of the grievance has been referred to arbitration, the hearing of which is pending, I understand, next month.

There is disagreement about whether HBT's obligations under PIPA are within the jurisdiction of the arbitration board. HBT says it is a separate and distinct legal entity that is not a party to the collective agreement between BCNU and HEABC. As HBT sees it, there is no practical utility in an arbitration that cannot result in an order binding on it or a definitive interpretation of its obligations under PIPA, which can only be provided by the Commissioner. A determination by the Commissioner would put an end to this matter, whereas the arbitration will only lead to further, prolonged, proceedings given the opposition of HEABC and HBT to the arbitration board's jurisdiction.

For its part, BCNU says HBT is not a stranger to the collective agreement because HBT stands in the shoes of HEABC. BCNU also says that, rather than considering at this time whether the arbitration board's jurisdiction is exclusive or concurrent with the Commissioner's jurisdiction to determine the extent of HBT's PIPA obligations, it is preferable to defer HBT's request for a ruling. BCNU puts it this way at para. 33 of Ms. Brown's February 5, 2005 letter to me:

> Section 38(4) of PIPA appears to allow the Commissioner to require that a dispute be resolved in a manner directed by the Commissioner before the Commissioner begins a review. In our submission it would be appropriate for the Commissioner to order the parties to complete the arbitration of this proceeding before commencing any review of the matter. What action, if any, is required by the Commissioner to address this issue could be determined after Mr. Hope [chair of the arbitration board] issues his award.

The question of which of two administrative bodies that exist under different statutory regimes should decide a matter when legislation may permit both to do so has been addressed in recent decisions of the Supreme Court of Canada: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, and *Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, [2004] 2 S.C.R. 223. These decisions confirm that labour arbitrators do not always have exclusive jurisdiction in employer-union disputes. Depending on the relevant legislation and the nature of the matter, other decision-makers may have overlapping jurisdiction, may have concurrent jurisdiction or may themselves have exclusive jurisdiction.

A recent Federal Court decision, *Eastmond v. Canadian Pacific Railway*, [2004] F.C.J. No. 1043 (T.D.), has addressed the jurisdictional relationship between the complaint regime of the Privacy Commissioner of Canada under the *Personal Information and Electronic Documents Act* ("PIPEDA") and the grievance and arbitration regime under the *Canada Labour Code*. PIPEDA is a private sector privacy law that applies to federally-regulated organizations such as railways and in certain other circumstances not relevant here. The Court held that the essential character of the dispute was a complaint that Canadian Pacific Railway had violated PIPEDA by using workplace surveillance cameras to collect an employee's personal information without his consent (para. 110). The Court held that, in the absence of any provision in the collective agreement dealing with personal information and how it may be collected in the workplace, the dispute did not arise from the collective agreement and, if an arbitrator had been appointed, the arbitrator would not have had any jurisdiction (paras. 114-115).

It is not evident from the material before me that the issue of whether PIPA prevents HBT from continuing to provide BCNU with long-term disability plan reports containing personal information without individual consent is a question that arises out of the operation of the collective agreement between HEABC and BCNU. There is no indication that this question relates to a violation of the collective agreement and the arbitration board's jurisdiction over HBT is a live issue. It is, therefore, by no means clear that the arbitration board has jurisdiction of any kind respecting this question, taken in its factual context and viewed in its essential nature.

HBT is an "organization" to which PIPA applies and, as provided in s. 36(1) of PIPA, the Commissioner is responsible for monitoring how PIPA is administered to ensure that its purposes are achieved. Unlike *Eastmond*, however, where an affected individual complained to the Privacy Commissioner of Canada that Canadian Pacific Railway's personal information practices violated PIPEDA, HBT

is seeking a ruling that confirms its compliance with PIPA. Not only is there no "complaint" under s. 36(2) or Part 11 of PIPA, but s. 36(1)(a) seems to restrict my initiation of a formal investigation or audit to circumstances where, with or without a complaint, I have "reasonable grounds" to believe that an organization is *not* complying with PIPA. Section 36(1)(b) does permit an order to be made under s. 52(3) confirming or requiring compliance with PIPA in the absence of a formal complaint, investigation, audit, request for review, or inquiry, but the powers of compulsion under s. 38 are tied to the conduct of an investigation or an audit under s. 36 or an inquiry under s. 50.

The arbitration board in this case might find that it lacks jurisdiction or it might find against BCNU for some other reason, leaving HBT to act as it has been regarding its PIPA obligations. On the other hand, if the arbitration board were to find that it has jurisdiction and then interpret or apply the collective agreement to require resumption of HBT's pre-PIPA reporting practice, a complaint and investigation under PIPA might be launched by someone about an alleged violation of PIPA's requirements. This could come about through a complaint by a union member who is opposed in interest to her or his union on the question of disclosure of the member's personal information without individual consent. It could come about on the Commissioner's initiative, perhaps in the wake of a request from HEABC or HBT. In either case, PIPA's formal investigative processes and powers would be engaged and the Commissioner could consider whether the collective agreement contravenes PIPA, either on its face or as interpreted or applied by a party or arbitrator, and, if necessary, a compliance order could be made under s. 52(3) of PIPA.

Based on the material before me, my preliminary view, on a tentative basis, is that there is no flaw in HBT's understanding of its obligations under PIPA. Still, I have decided it is better to allow events to continue to unfold, and to allow the evidentiary record to develop, than it is to now consider an order under s. 52(3) on the basis of what is, effectively, a stated case framed by HBT. To be clear, my jurisdiction under PIPA is not being declined or deferred to the arbitration board. I make no assumption that the arbitration board has jurisdiction of any kind respecting the matter BCNU is bringing to it. I add that s. 38(4) of PIPA, which BCNU has raised, is not relevant because it operates in relation to individual complainants and in circumstances not present here.

Allow me to thank you again for your thoughtful submissions on these emerging issues.

Yours sincerely,

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia