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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 37-1995
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INQUIRY RE: A Request for Access to Records held by the Labour Relations Board (The Reports of an Industrial Relations Officer about an Application for Certification of a Union)

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral inquiry at the Office of the Information and Privacy Commissioner (the Office) in Victoria on February 6, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by the International Union of Operating Engineers, Local 115 (the applicant) to the Ministry of Skills, Training and Labour (the Ministry) for access to, among other records, the following: "a copy of the Industrial Relations Officer's reports and recommendation on the Application for Certification by CISIWU [Canadian Iron, Steel and Industrial Workers' Union] to represent the employee's of TNL Construction Limited (TNL)...." The letter of request dated October 17, 1994 was expressly stated to be made under the Act. The Labour Relations Board (the Board) holds these records.

On October 17, 1994, the Ministry transferred the applicant's request to the Board. The Board responded on October 27, 1994 by refusing disclosure of the above records but providing access to the Notice of the Application of Certification, Notice Poll, Return of Poll, and a copy of the Certification.

The Board relied on section 78 of the Act as authority to refuse release of certain information. It noted that section 78(1) "will be repealed on October 4, 1995. At that time it [the record in question] may be available to you." Alternatively, the Board relied on section 21 of the Act (which it ultimately decided not to argue at the inquiry).

On November 9, 1994 the applicant requested the Office of the Information and Privacy Commissioner to review this decision.

2. Documentation of the inquiry process

On January 10, 1995 the Office, under section 54 of the Act, gave notice of receipt of the request for review to TNL, CISIWU, and the Ministry, stating that if this matter was not settled, the Commissioner would conduct an oral inquiry on February 6, 1995.

On January 20, 1995 the Office issued a Notice of Oral Inquiry. The Office further provided all parties involved with a two-page statement of facts (the Portfolio Officer's fact report), which was accepted by all parties for the purpose of conducting the inquiry.

Charles Gordon, counsel for the International Union of Operating Engineers, Local 115 presented the applicant's case. Rob Botterell, Articled Student, presented the Board's case. As a third party, TNL was represented by its counsel, Barry Dong. CISIWU and the Ministry did not make any submissions. Invited to appear as intervenors, both the Business Council of B.C., represented by Mark Leffler, and the B.C. Federation of Labour, represented by counsel John Hodgins, made submissions.

3. The records in dispute

The records in dispute in this inquiry consist of the following:

A. An interim report dated July 7, 1989 from an Industrial Relations Officer (IRO) to the Industrial Relations Council (now known as the Labour Relations Board) concerning CISIWU's Application for Certification of the Employees' of TNL Construction Ltd.;

B. A final report dated July 12, 1989 from an IRO to the Industrial Relations Council concerning the same Application for Certification;

C. The investigator's report on the Application for Certification - Form A;

D. The investigator's report on the Application for Certification - Form B.

These records are referred to below, collectively, as IRO reports.

4. Issues under review in the inquiry

This inquiry examined the interrelationship of section 78(1) of the Act and section 146(3) of the *Labour Relations Code* (the Code).

Section 78 reads:

> 78(1) The head of a public body must refuse to disclose information to an applicant if the disclosure is prohibited or restricted by or under another Act.
>
> ....
>
> (3) Subsection (1) is repealed 2 years after section 4 comes into force.

Under section 57(1) of the Act, the burden of proof is on the public body to show that the applicant has no right of access to the record under section 78(1).

5. The Labour Relations Board's case

With respect to the interpretation and application of section 78 of the Act, the Board argued that:

> Section 78 requires the head of the Labour Relations Board of British Columbia (the 'Board') to refuse to disclose information, e.g., the IRO Reports, to an applicant if disclosure is prohibited under another act, in this case s. 146(3) of the *Labour Relations Code*, S.B.C. 1992, c. 82. The head has no discretion; he must refuse disclosure if disclosure is prohibited by the *Labour Relations Code*. (Review brief of the Labour Relations Board, Part 2, paragraph 4)

The Board argued that this section of the Act is intended to provide public bodies with a two-year grace period to review their confidentiality provisions and determine whether "notwithstanding clauses" are required. In the interim, section 78(1) preserves "the 'status quo' degree of confidentiality in other acts." (Review brief of the Labour Relations Board, Part 2, paragraphs 6 to 11)

The Board essentially argues that section 146(3) of the Code prohibits disclosure of the records in dispute, even though they were prepared in connection with an application under the former legislation (the *Industrial Relations Act*). This section reads:

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

Section 124(2) of the Code provides for release of IRO reports to the parties, despite section 146(3) of the Code. The Board observes that even if a proceeding under the Code in relation to this application for certification could still be considered to be "alive," section 124(2) would be of no avail to this applicant because it was not a party to the application for certification and section 124(2) only provides for disclosure to the parties. It argues that this decision is consistent with its previous positions. (Review brief of the Labour Relations Board, Part 2, paragraphs 12-28 and Exhibit 2, the affidavit of Stan Lanyon, the Chair of the Board)

6. TNL Construction Ltd.'s case

TNL, while making its own arguments that disclosure is forbidden under section 21 of the Act because it would be harmful to the business interests of TNL, also supported and endorsed the position of the Board against disclosure of the IRO reports.

7. The International Union of Operating Engineer's case

In terms of its request for access to the IRO reports at issue, the applicant emphasized that it was not requesting any personal information contained in these

materials. It stressed the strong presumption in favour of disclosure of non-personal information incorporated in the Act. (Outline of submission of the applicant, paragraphs 1 to 8)

With respect to section 78(1) of the Act, the applicant submitted that the IRO reports do not fall within the protection of section 146(3) of the Code because they were prepared under prior labour legislation (the *Industrial Relations Act*) and not the Code itself. The basis for this argument are the phrases "obtained for the purpose of this Code" and "under this Code" in section 146(3), which the applicant says excludes information obtained under any statute other than this Code. The applicant further submitted that the transitional provisions in sections 160-176 of the Code do not operate to extend section 146(3) to matters arising prior to the enactment of the Code.

In a secondary argument the applicant said that, even in section 146(3) applies, it should be possible to separate information "obtained" by the IRO for his or her report from "comments, conclusions or other information contained in the reports which are the product of the IRO...." (Outline of submission of the applicant, paragraphs 22 to 26)

The heart of the applicant's access request is its concern about "the possibility that the [IRO] Reports contain significant information which was disregarded by the Industrial Relations Council in granting the certification to CISIWU." (Outline of submission of the applicant, paragraph 45) Counsel for the applicant offered the example of a recommendation from the IRO against certification being ignored by the Industrial Relations Council. At the time of the hearing, such information was perhaps relevant to an industrial dispute then underway in Port Alberni.

8. B.C. Federation of Labour's submission

The Federation opposed the "current" request for release of information, "based on an assessment of underlying policy considerations and a concern that requests of this type will have a detrimental impact on processes which are essential to the conduct of labour relations within the institutional framework established by the legislature in the Province." It supports the traditions of confidentiality associated with the work of IROs and the fact that their reports are only now released to the parties under the Code.

The Federation believed that this inquiry must be settled on the basis of section 78 of the Act activating section 146(3) of the Code. In its view, the Industrial Relations Council, which collected the records in dispute, was simply continued as the Labour Relations Board.

9. The Business Council of B.C.'s submission

The Business Council, which represents large employers, agreed with the Board that the records in dispute should be withheld under section 146(3) of the Code. It also maintained that release of their contents to third parties could harm legitimate labour relations interests as contemplated by the exclusion in section 21 of the Act.

10. Discussion

Jurisdictional Argument

The Board submitted, firstly, on the basis of sections 138 and 139 of the Code, that I must accord deference to its decision not to give access to the requested IRO reports. The relevant portions of those sections are as follows:

> 138. A decision or order of the board under this Code, a collective agreement or the regulations on a matter in respect of which the board has jurisdiction is final and conclusive and is not open to question in a court on any grounds.
>
> 139. The board has exclusive jurisdiction to decide a question arising under this Code and on application by any person or on its own motion may decide for all purposes of this Code any question, including,...
>
> (a) a person is an employer or employee;
> ....

As pointed out by the applicant, section 138 does not confer jurisdiction upon the Board. It merely shields Board decisions made within its jurisdiction from judicial review on other than jurisdictional grounds. Section 139 does confer jurisdiction on the Board; it continues on from paragraph (a) through to paragraph (w) with a list of questions over which the Board has exclusive jurisdiction. There is no reference in those paragraphs to disclosure or confidentiality of IRO reports.

The Board's jurisdictional argument is as follows:

(1) It is well established that a high degree of curial deference will be given to the Board in respect of decisions made within its jurisdiction: C.A.I.M.A.W. v. Paccar of Canada Limited, [1989] 2 S.C.R. 983; I.A.M. Lodge 692 v. British Columbia (Industrial Relations Council) (1994), 87 B.C.L.R. (2d) 98 (C.A.); and Lorne W. Comozzi Co. v. I.U.O.E., Loc. 115 (1985), 68 B.C.L.R. (2d) 338 (C.A.).

(2) The confidentiality aspects of an IRO's report are fundamental to labour relations in British Columbia.

(3) The Code has a variety of provisions addressing disclosure of information, including sections 124, 128, 133, 140 and 146.

(4) The Board has both unique expertise and exclusive statutory jurisdiction to decide whether or not to disclose an IRO report.

(5) So long as the Board's decision not to disclose an IRO report is not patently unreasonable, the Commissioner has no jurisdiction under the Act to overturn that Board decision.

(6) In this case, the Board determined that section 146(3) of the Code constitutes a prohibition on disclosure within the meaning of section 78 of the Act, and that section 146(3) applies retrospectively to encompass information obtained under the former *Industrial Relations Act*. The Commissioner's jurisdiction on this inquiry is limited to applying the patently unreasonable standard of review to those Board determinations.

The Board's position on the scope of my jurisdiction to inquire into its interpretation and application of section 146(3) of the Code as it relates to section 78 of the Act is supported by the intervenors and opposed by the applicant. After careful consideration, I have decided that the Board's point of view cannot be sustained.

The Board is a creature of statute, as is the Office of the Information and Privacy Commissioner. The Board has expertise in labour relations questions arising under the Code; I have expertise in access to information and privacy questions arising under the Act. The Board's regulatory authority is over the labour relations community--union and management; my authority is over public bodies as that term is defined in the Act.

The Board is a public body under the Act. (See the definition of "public body" in Schedule 1 and the designation of the Board in Schedule 2 of the Act.) The purposes of the Act (section 2(1)) include giving the public a right of access, subject to limited exceptions, to records in the custody or control of public bodies and to providing for an independent review of decisions made by public bodies under the Act. Under section 42 of the Act, I have general responsibility for monitoring how the Act is administered to ensure its purposes are achieved. That includes (section 42(1)(a)) power to conduct investigations and audits to ensure compliance with <u>any</u> provision of the Act. I am also responsible under Division 1 of Part 5 of the Act for conducting the independent review of <u>any</u> decision, act, or failure to act by the head of a public body in relation to a request for access. Under section 58 I must, upon completion of a Part 5 inquiry, make an order requiring access to be given or refused, in whole or in part, by the head of the public body concerned, or confirm the decision of the head, or order a reconsideration, if the refusal of access was authorized. The only exception to my duties of investigation and inquiry is where the complaint or review is against me in my capacity as the head of a pubic body (see Schedule 2 of the Act), in which case an independent adjudicator is appointed pursuant to Division 2 of Part 5 of the Act.

The issue raised is whether the interpretation and application of section 146(3) of the Code to an access request made under the Act is a question arising under the Code or gives rise to an order or decision of the Board under the Code. Section 78 of the Act deals with the interrelationship of access requests under the Act with other statutes by stipulating how the head of a public body must respond to an access request under the Act, where disclosure is restricted or prohibited by another statute. Section 78 does not address access requests made under other statutes. It addresses access requests made under the Act, and the applicant's current access request was made under the Act, not under the Code. I am directly responsible for monitoring how the Act is administered and complied with, and for inquiring into and reviewing the response of any public body to a request for access under the Act. This includes the administration of section 78 and ensuring that public bodies comply with it.

In my view, the interpretation and application of section 146(3) of the Code to an access request made under the Act is not a question under the Code, nor does it give rise to a decision of the Board under the Code. I accept the submission of the applicant that "the issue of whether the applicant has a right of access to the IRO reports under the Act is not a question which arises under the Code. The applicant's right of access to public body records is conferred under the Act, and it is that right which is at issue in this review." I also accept that, while the Board undoubtedly has expertise in the determination of labour relations questions arising under the Code, it does not have particular expertise or exclusive jurisdiction in issues of freedom of information and protection of privacy arising as a consequence of an applicant's request under the Act for access to the records in the possession or control of a public body.

It is also important to recognize that the jurisprudence on curial deference to Board decisions cited by the Board arose in the context of applications for judicial review of Board decisions. The review that I am engaged in is a statutory review provided for under Part 5 of the Act, which is quite different from the exercise of inherent supervisory jurisdiction over inferior tribunals that a court engages in on an application for judicial review. A judicial review is a test of jurisdiction that concerns itself with the lawfulness and fairness of the process rather than the merits of the decision under review. In contrast, when acting under Part 5 of the Act, I am expressly charged to conduct an inquiry and decide all questions of fact and law arising in the course of that inquiry.

I have concluded, in short, that the parallel the Board has urged me to accept between the position of a court on a judicial review from a Board decision made under the Code, and my position on an investigation or inquiry under the Act from a decision by the Board to refuse a request for access made under the Act, is not persuasive.

There is support for the conclusion I have reached in the reasoning of Ontario Commissioner Sidney Linden in similar circumstances in the case of Re: Ontario Labour Relations Board, Order 21, October 13, 1988, at p. 3:

> As Information and Privacy Commissioner, I am charged with the responsibility of ensuring that the rights and obligations set out in the Act are respected and complied with. Where, as in this case, an institution purports to remove itself from the ambit of the Act through the use of a 'confidentiality provision' in another act, it is my responsibility to scrutinize the provision of that other act to ensure that both the subject matter and the person who would be releasing the requested information under the act (i.e., the head of the institution) are covered by the 'confidentiality provision' relied on.

I also find support for my conclusion in such cases as Worker's Compensation Board v. B.C. Council of Human Rights (1990), 47 B.C.L.R. (2d) 119 (C.A.) and Mans v. Council of Licensed Practical Nurses (British Columbia) (1993), 77 B.C.L.R. (2d) 47 (C.A.). Although not on point in all respects, those cases recognize generally that decisions of one statutory tribunal are not immunized from review by a second tribunal charged with determining whether or not the first tribunal has complied with or contravened an enactment. In those cases, the scrutiny of the Council of Human Rights was not considered analogous to a judicial review or a challenge to validity of the WCB

or the CLPN's decisions, but rather a determination of whether those bodies had engaged in discriminatory conduct in contravention of *Human Rights Act*. Similarly, my role in this inquiry is not to displace the Board's jurisdiction to determine questions under the Code, but rather to review and inquire into whether the Board has complied, or failed to comply with the Act, in its response to the applicant's request for access to the IRO reports.

Section 21

TNL advanced an argument under section 21 of the Act and offered a number of policy considerations against disclosure, which I have not addressed, given my views on the applicability of section 78(1) of the Act to the present inquiry. I have treated the applicant's views on section 21 similarly.

Section 78(1)

I accept the argument of the Board that section 78(1) of the Act at least temporarily prohibits it from releasing the records in dispute to the applicant.

Section 124(2) of the Labour Relations Code

This section now reads:

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

The applicant argued that section 124(2) modified the confidentiality provision in section 146(3) by providing for the disclosure of IRO reports to the parties. (Outline of submission of the applicant, paragraphs 18 to 21) Counsel for the Board correctly emphasized that the applicant does not qualify as a party.

Industrial Relations Act

The applicant has argued that the reports do not fall under section 146(3) of the Code, since they were prepared under the *Industrial Relations Act*. On this issue I accept the arguments of the Board. (Review Brief of the Labour Relations Board, Part 2, paragraphs 22-26). I find that section 146(3) of the Code is in substance the same as to section 127(3) of the *Industrial Relations Act*. While the records in dispute were created under the old legislation, section 146(3) of the Code is "simply...a new expression of existing law;...the previous enactment is not deemed to have been repealed; it is deemed to remain in force without interruption." (Pierre-André Côte, The Interpretation of Legislation in Canada, Second Edition, 1992, p. 96) In this case the prohibition under the *Industrial Relations Act* continues under the Code and meets the requirements of section 78.

I also considered that there is some force in section 161 of the Code. It says that all applications and proceedings under the *Industrial Relations Act* shall be "treated for all purposes under and in conformity with this Code."

"Information obtained"

Having concluded that section 146(3) of the Code is a prohibition within the meaning of section 78 of the Act, I must consider the applicant's submission that information collected from third parties by the IRO would constitute "information obtained" but comments or conclusions drawn by the IRO would not.

I have examined the IRO reports with care. They are concisely written, highly factual investigative reports. Nearly every sentence consists of information obtained by the IRO in his or her investigation. The reports are not recommendatory, nor do they draw conclusions. There are a few passages which indicate that investigative experience and judgment informed the IRO's approach to his or her task, but these are inextricably entwined with his or her reporting of information obtained and cannot be safely or meaningfully severed for disclosure under section 4(3) of the Act.

A precedent for disclosure of IRO reports

The applicant pointed out that the chair of the Board released an IRO report on January 11, 1995 following a request under the Act. (Outline of submission of the applicant, paragraphs 33 and 34; and Exhibit 4, Affidavit of Bert Brooker, including Exhibits A and B.) Counsel for the Board responded that this disclosure had indeed occurred, that it was a mistake, and that the Board had subsequently corrected its practice on disclosure in a directive from the Chair. (See exhibits A and B to Exhibit 2, the Affidavit of Stan Lanyon) Counsel for TNL simply stated that the Board was wrong to make the original disclosure.

I am not persuaded that disclosure by the Board of an IRO report on one or more occasions in the past without full and proper consideration of section 146(3) of the Code, or section 78 of the Act, can or should operate as an estoppel against the Board now, if I conclude that the Board is indeed subject to a prohibition against disclosure within the meaning of section 78 of the Act.

Applicant's application to adduce fresh evidence

The applicant has also applied very recently, and well after the completion of the hearing of evidence and argument on this inquiry, to introduce fresh evidence of what is said to be a further example of the Board having disclosed an IRO report on request. Notice of the application to adduce fresh evidence has been given to all the other parties. I acknowledge that I may accept fresh evidence after the completion of an inquiry, where fairness requires it and particularly where I have not yet rendered my decision. However, I do not need to do so in this case, since I have already observed that evidence admitted earlier, that was of the same nature as the fresh evidence now sought to be adduced, will not change my conclusion, should I find that there is a prohibition in operation within the meaning of section 78 of the Act.

Conclusion

I take note of the fact that the entire labour relations community, except the applicant, seems to be in agreement on the social policy reasons for the non-disclosure of these documents to non-parties to the dispute and the possible negative impact of such a release on the labour relations field in this province.

In my view, given the particularly adversarial and confrontational backdrop of this application, i.e., the Port Alberni dispute, the otherwise unlikely solidarity of the Board, a third party (TNL), the B.C. Federation of Labour, and the Business Council on this issue underlines the common and overriding importance of this issue to them all.

11. Order

Under section 58(2)(b) of the Act, I find that the records in question are prohibited from disclosure by reason of section 78 of the Act and section 146(3) of the Code. I therefore confirm the decision of the Labour Relations Board not to disclose the records to the applicant.

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David H. Flaherty
Commissioner

March 31, 1995