ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2012-06

September 11, 2012

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 30

Case File Number P1441

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Summary: The Complainant was temporarily employed as a business agent by the Canadian Union of Public Employees, Local 30 (the "Organization") in the course of a competition to become permanent business agent. He complained that the Organization contravened the *Personal Information Protection Act* (the "Act") by failing to notify him that his e-mail correspondence would be reviewed, and by reading and referring to certain e-mails at an Annual General Meeting of the Organization.

The Adjudicator found that the Organization had used and/or disclosed the Complainant's personal information, and more specifically his personal employee information, when it reviewed the e-mails in order to evaluate the Complainant's work performance. He further found that the Organization had used and/or disclosed the Complainant's personal information generally, but not his personal employee information specifically, when it reviewed the e-mails in order to assess whether the process for selecting the permanent business agent had been compromised, and when it read and referenced the e-mails, and revealed some other information about the Complainant, at the Annual General Meeting.

The Organization argued that it had the authority to use and/or disclose the Complainant's information for the purposes of an investigation under sections 17(d) and/or 20(m) of the Act. However, the Adjudicator found that the definition of "investigation", as set out in the Act, was not met. The Organization pointed to no policy

regarding computer or e-mail use that the Complainant arguably contravened, to no other aspect of the Complainant's employment agreement, whether express or implied, that the Complainant arguably contravened, and to no aspect of the applicable collective agreement that the Complainant arguably contravened. The Organization conceded that it was not investigating the Complainant at all. Rather, it was assessing whether the process for selecting the permanent Business Agent had been compromised, which did not involve the possibility of any sanction against the Complainant. The Adjudicator also found that the assessment of the selection process was not an investigation for the purposes of the Act. There was still no alleged breach of an agreement by anyone, no alleged contravention of an enactment by anyone, and no circumstances or conduct that could result in a remedy or relief available at law, as alternatively required in order to meet the definition of 'investigation".

As for whether the Organization was authorized to use and/or disclose the Complainant's personal information on the basis of actual or deemed consent under section 8(1) or 8(2) of the Act, on the basis that it gave the Complainant prior notice of its intention to use and/or disclose his personal information and an opportunity to decline or object under section 8(3), or on the basis that it gave the Complainant prior notice that his personal employee information was going to be used and/or disclosed under section 18 and/or 21, the Adjudicator found that the Organization was not so authorized. The Complainant did not give consent, including deemed consent, to the use and/or disclosure of his personal information in the e-mails, and the Organization did not give him notice before using and/or disclosing his personal information in the e-mails, whether for the purpose of evaluating his performance, for the purpose of assessing whether the process for selecting the permanent business agent had been compromised, or for the purpose of informing the general membership of the Organization of matters at the Annual General Meeting.

The Adjudicator concluded that the Organization had used and/or disclosed the Complainant's personal information in contravention of the Act. He ordered the Organization to stop using and disclosing personal information in contravention of the Act, or in circumstances that are not in compliance with the Act. He also ordered the Organization to perform its duty under the Act with respect to giving proper prior notice, when required, before using and/or disclosing personal information or personal employee information. Finally the Adjudicator ordered the Organization to ensure that all of its officers and employees are made aware of the Organization's obligations under the Act.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 1, 1(1)(f) [numbered 1(f) in 2008], 1(1)(f)(i) [numbered 1(f)(i) in 2008], 1(1)(f)(ii) [numbered 1(f)(ii) in 2008], 1(1)(f)(iii) [numbered 1(f)(iii) in 2008], 1(1)(k) [numbered 1(k) in 2008], 1(1)(j) [numbered 1(j) in 2008, and as it read in 2008], 4(1), 4(7), 7(1), 8, 8(1), 8(2), 8(2)(a), 8(2)(b), 8(3), 8(3)(a), 8(3)(a)(i), 8(3)(a)(ii), 8(3)(b), 8(3)(c), 11, 13, 14, 15, 16, 17, 17(d), 18, 18(1) [as it read in 2008], 18(1)(c) [numbered 18(2)(c) in 2008], 18(2) [as it read in 2008], 19, 20, 20(m), 21, 21(1) [as it read in 2008], 21(1)(c) [numbered 21(2)(c) in 2008], 21(2) [as it read in 2008], 52, 52(3)(a), 52(3)(e) and 52(4); *Personal Information Protection Amendment Act, 2009*, S.A. 2009, c. 50. **CAN:**

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, paragraph 7(1)(b).

Authorities Cited: AB: Orders F2006-030, F2008-020, P2005-001, P2006-008, P2007-002, P2008-007, P2009-003 and P2011-003. **CAN:** PIPEDA Case Summary #2009-019.

I. BACKGROUND

[para 1] The Complainant was temporarily employed as a Relief Business Agent by the Canadian Union of Public Employees, Local 30 (the "Organization" or "CUPE Local 30") in 2008. He was one of three candidates for the position of permanent full-time Business Agent who were given the opportunity to train and act as Business Agent for 89 days. Although the Complainant had been a member of CUPE Local 30, he withdrew from membership for the duration of his employment with the Organization, and became a member of the Canadian Office and Professional Employees Union, Local 458 ("COPE Local 458"). The Complainant again became a member of CUPE Local 30 on completion of his temporary employment.

[para 2] The Organization provided the Complainant with a laptop computer and an e-mail address in order to carry out his duties as Relief Business Agent. On the Complainant's last day of employment in November 2008, the then-President of the Organization, along with two other members of an Evaluation Committee that had been struck, accessed the laptop. The Organization explains that it was for the purpose of evaluating the Complainant's work performance, which included his understanding and use of computer software, as part of the competition to become full-time Business Agent. The Organization further explains that, in reviewing certain e-mails that had been sent or received by the Complainant (the "E-mails"), the then-President became concerned about their content. He believed that the e-mail correspondence had compromised the process for selecting the full-time Business Agent. The then-President drew the E-mails to the attention of the other members of the Executive Board of the Organization at a meeting on November 19, 2008. At another meeting on November 25, 2008, the Executive Board decided that it was appropriate to disband the Evaluation Committee, as well as a Selection Committee that had been struck. The Organization believed that, in view of the E-mails located on the Complainant's laptop, it was appropriate to strike a new Selection Committee with members not previously involved in the selection process.

[para 3] The Annual General Meeting of the Organization then took place on November 26, 2008, during which the Executive Board presented a recommendation to the general membership of the Organization that the Evaluation Committee and Selection Committee be disbanded. The Executive Board recommended that a new Selection Committee comprised of individuals external to the Organization be struck, so as to avoid any perception of bias or advantage in relation to any of the candidates during the remainder of the selection process. A member of the Organization would also be on the Committee but only as an observer. At the meeting, the then-President read some of the E-mails aloud, and referred to other ones, during his President's Report.

[para 4] The general membership approved the recommendation that the Evaluation and Selection Committees be disbanded. A reconstituted selection Committee was struck and the Complainant remained a candidate in the selection process, but he was not selected as permanent full-time Business Agent.

[para 5] In correspondence received by this Office on August 31, 2009, August 25, 2011 and September 12, 2011, the Complainant complained that the Organization contravened the *Personal Information Protection Act* (the "Act" or "PIPA") by failing to notify him that the E-mails would be reviewed, and by reading and referring to the E-mails at the Annual General Meeting.

[para 6] The former Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. This was not successful, and the Complainant requested an inquiry by correspondence dated August 24, 2011. A combined written and oral inquiry was subsequently set down. The Organization provided a written response to the Complainant's complaint in a submission received by this Office on May 3, 2012, and I conducted an oral hearing on May 29, 2012. The Organization was represented by its Privacy Coordinator, who brought the then-President of the Organization (the "President") and a National Representative of the Canadian Union of Public Employees (the "National Representative") as witnesses. The Complainant brought a member of the Canadian Union of Public Employees, Local 30 (the "Local 30 Member") as a witness.

[para 7] On May 1, 2010, amendments to PIPA came into force by virtue of the *Personal Information Protection Amendment Act, 2009*. However, the Organization's alleged contravention of the Act occurred in 2008, which was prior to these amendments and others. Accordingly, in this inquiry, the Organization's authority and responsibilities under PIPA are as they existed in 2008, and I will reproduce the relevant sections as they existed at that time. For the purpose of cross-reference, I note in this Order any differences between the relevant sections as they existed in 2008 and exist today, with respect to their numbering and/or substantive content.

II. INFORMATION AT ISSUE

[para 8] The information at issue in this inquiry is the Complainant's personal information and/or personal employee information, as found in the E-mails as well as the transcript of the relevant portions of the Annual General Meeting. What constitutes the Complainant's personal information and/or personal employee information is discussed in greater detail below.

III. ISSUES AND SUB-ISSUES

[para 9] The Notice of Inquiry, dated March 23, 2012, set out the following main issue:

> Did the Organization collect, use and/or disclose the Complainant's personal information in contravention of the Act?

[para 10] The Notice of Inquiry indicated that answers to the following sub-issues, to the extent relevant, might assist in determining the main issue:

> Did the Organization collect, use and/or disclose the Complainant's personal information and/or personal employee information, as those terms are defined in section 1 of PIPA? If so,
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> Did the Organization collect, use and/or disclose the information contrary to, or in compliance with, section 7(1) of PIPA (no collection, use or disclosure without either authority or consent)? In particular,
>
> > Did the Organization have the authority to collect, use and/or disclose the information without consent, as permitted by sections 14, 15, 17, 18, 20 and/or 21 of PIPA?
> >
> > If the Organization did not have the authority to collect, use and/or disclose the information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before collecting, using and/or disclosing the information? In particular,
> >
> > > Did the Complainant consent in writing or orally? Or
> > >
> > > Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met? Or
> > >
> > > Were the conditions in sections 8(3)(a), (b) and (c) met?
>
> Did the Organization collect, use and/or disclose the information contrary to, or in accordance with, sections 11, 16 and/or 19 of PIPA (collection, use and disclosure for purposes that are reasonable and to the extent reasonable for meeting the purposes)?
>
> Did the Organization collect the information contrary to, or in accordance with, section 13 of PIPA (notification required for collection)? In particular, was it required to provide and did it provide notification before or at the time of collecting the information?

[para 11] One of the above sub-issues, and parts of others, do not need to be addressed in this inquiry. The Complainant does not have concerns about the collection of his personal information or personal employee information by the Organization, given that he sent and received the E-mails using the Organization's laptop and the e-mail address that it had assigned to him. As the collection of the Complainant's information is not at issue, I do not have to discuss the last sub-issue in relation to section 13 of the Act. For the remaining issues, I need only discuss the use and/or disclosure of the Complainant's information, and therefore need only refer to the particular sections of the Act dealing with uses and disclosures. In other words, I do not have to address any issue in relation to sections 11, 14 or 15, as these sections deal with collection.

[para 12] In the sub-headings of this Order that follow, I revise the sub-issues set out above to reflect that only the use and/or disclosure of the Complainant's personal

information or personal employee information is at issue in this inquiry. Additionally, I address all of the relevant sub-issues first, followed by the main issue and the overall conclusion.

IV. DISCUSSION OF ISSUES

A. Did the Organization use and/or disclose the Complainant's personal information and/or personal employee information, as those terms are defined in section 1 of PIPA?

[para 13] Under section 1(k) of PIPA [which was renumbered 1(1)(k), effective May 1, 2010], "personal information" is defined as follows:

> *1(k) "personal information" means information about an identifiable individual;*

[para 14] "Personal employee information" is a subset of "personal information". At the time of the Organization's alleged contravention of PIPA, "personal employee information" was defined as follows in section 1(j):[1]

> *1(j) "personal employee information" means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating*
>
> *(i) an employment relationship, or*
>
> *(ii) a volunteer work relationship*

[1] Section 1(j) is now numbered 1(1)(j), and "personal employee information" is now defined as follows:

> *1(1)(j) "personal employee information" means, in respect of an individual who is a potential, current or former employee of an organization, personal information reasonably required by the organization for the purposes of*
>
> *(i) establishing, managing or terminating an employment or volunteer-work relationship, or*
>
> *(ii) managing a post-employment or post-volunteer-work relationship*
>
> *between the organization and the individual, but does not include personal information about the individual that is unrelated to that relationship;*

The change to the definition of "personal employment information" would not have had an impact on the issues in this inquiry even if the new definition had been in force at the time of the Organization's alleged contravention of the Act. The substantive change refers to the management of a post-employment relationship with a former employee. As explained later in this Order, when the Complainant was no longer an employee of the Organization after his 89-day trial employment period as Relief Business Agent ended, the Organization was not managing any post-employment relationship when it used and/or disclosed his information for the purpose of determining whether the process for selecting the full-time Business Agent had been compromised, and when it read and referred to the E-mails at the Annual General Meeting.

between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship;

[para 15] The Organization acknowledges that it reviewed the E-mails that had been sent and received by the Complainant, and that it read or referred to them at the Annual General Meeting. The first sub-issue in the inquiry is whether the E-mails consisted of information in relation to the Complainant that is subject to PIPA. Assuming so, this sub-issue also involves a determination of whether the information was the Complainant's personal information generally, or his personal employee information specifically. If the E-mails consist of the Complainant's personal employee information, there are additional grounds on which the Organization may have been authorized to use and/or disclose it, namely those set out in sections 18 and 21.

1. Do the E-mails consist of the Complainant's personal information or personal employee information?

[para 16] By letter dated May 24, 2012, the Organization submitted copies of all of the E-mails that had been read or referenced at the Annual General Meeting. While the Organization stamped the pages as "Exhibit 1", "Exhibit 2", etc., I prefer to note the pages as "E-mail 1", "E-mail 2", etc. There are 14 in total, with eleven having been read (E-mails 1 to 11), and three having been referenced (E-mails 12 to 14).

[para 17] In its written submissions, the Organization stated that the Complainant had been releasing personal information using office computer equipment during scheduled work hours, and that this is what led to a further review of the E-mails. This explanation suggests that the E-mails were not work-related. I also see that, in his initial complaint, the Complainant referred to the e-mails as "personal and confidential".

[para 18] However, at the oral hearing, the Complainant noted that the E-mails were sent to or from members of CUPE Local 30, or else to or from the human resources department of the City of Edmonton, being the employer for which the CUPE members worked. He said that some of the E-mails did not involve issues in his own work area, but that he did not consider them personal either. He said that he had sent and received the E-mails while carrying out his employment duties in his capacity as Relief Business Agent.

[para 19] On my review of the E-mails, I see that none of their content is "personal" in the sense of having nothing whatsoever to do with the Complainant's employment. In other words, it is not the case that the E-mails are in relation to the Complainant's personal affairs and he simply chose to use the Organization's e-mail system to communicate those personal affairs. Rather, the E-mails are exchanges between the Complainant and others in relation to the affairs of the Organization, although not always in relation to the Complainant's own employment duties.

[para 20] Many of the E-mails (E-mails 1, 2, 9, 10, 11 and 12) are communications among all or part of a group, which includes the Complainant, who were having a disagreement with another group, which includes the President. E-mails 1 and 2 were

sent in order to set up a meeting of the first group, while E-mails 9 and 10 were sent in order to arrange a strategy for bringing a motion regarding the selection of a Dues Committee. E-mail 9 discusses the President. E-mail 12 attaches a photograph intended to mock the President and another member of the Executive Board. While the foregoing E-mails do not reveal very much detail about the disagreement between the two groups, E-mail 3, which is from the National Representative, describes it in the following way: "I do have a problem meeting with one group to build a case against another group. This is a divisive and disruptive way and pits member against [member] in a hostile environment that doesn't do the local any good."

[para 21] E-mail 7 is from the Complainant to a member of the Selection Committee, suggesting how to fill the Business Agent position once each candidate has spent their 89 days in the position and while the permanent Business Agent is yet to be selected. E-mail 6 forwards E-mail 7 to another individual, being the Local 30 Member. E-mail 14 is from the member of the Selection Committee to the Complainant, setting up a time to talk.

[para 22] E-mail 4 is from the Complainant to the President, indicating that the Complainant could not make a meeting with the Evaluation Committee and requesting that it be rescheduled. E-mail 5 is to the Complainant from an individual who was a member of the Evaluation Committee, also regarding the scheduling of the meeting.

[para 23] E-mail 13 is from the Complainant to the National Representative, regarding the Complainant's attendance at an interview for a different position.

[para 24] E-mail 8 is from the Complainant to a representative of the human resources department of the City of Edmonton, regarding an individual's leave of absence.

[para 25] I find that the E-mails have a dual character. They consist of the Complainant's personal employee information – and therefore also his personal information – in relation to one particular purpose for which the Organization reviewed them. They consist of the Complainant's personal information – but not his personal employee information – in relation to another purpose for which the Organization reviewed them, as well as when the President read or referenced them at the Annual General Meeting. I will now explain.

[para 26] There is a unique circumstance in this case, in that the Complainant's temporary employment as Relief Business Agent was a trial period in order to be considered for the permanent position. In this way, all of the E-mails contain his personal employee information. In reference to the definition of "personal employee information" reproduced above, the Complainant was a potential permanent employee of the Organization and the E-mails were collected by the Organization for the purposes of possibly establishing that permanent employment relationship if he were the successful candidate for the position of Business Agent. The E-mails were also related to the employment relationship, within the terms of the definition. While the E-mails were not always in relation to the Complainant's own employment duties, they were in relation to

the affairs of the Organization, which is sufficient for them to "relate" to the parties' employment relationship.

[para 27] Therefore, when the Organization initially reviewed the E-mails for the purpose of evaluating the Complainant's performance as Relief Business Agent, the Organization was, in that particular context, reviewing the Complainant's personal employee information. In further reference to the definition of "personal employee information", the E-mails were "reasonably required" by the Organization in that they were part of the record of the Complainant's performance, which he was reasonably required to create by virtue of his 89-day trial period in the position. Nothing turns on the fact that some of the E-mails were not in relation to the Complainant's specific duties, as the fact that he sent or received them was still relevant to his overall performance.

[para 28] The contents of E-mails 4 and 13 constitute the Complainant's personal employee information on an additional basis, in that they reveal information about the scheduling of the Complainant's interview with the Evaluation Committee, and information about his leave of absence for another interview.

[para 29] The record of what an employee has done in his or her professional or official capacity is not normally personal or "about" the employee (Order P2007-002 at para. 50). Such information is therefore not normally personal employee information specifically, or personal information generally. However, the same kind of information can be personal employee information or personal information if it is evaluative or is otherwise of a "human resources" nature (Order P2007-002 at para. 50). This is one of those cases.

[para 30] The E-mails were subsequently reviewed by the Organization for a different purpose, which was to determine whether the process for selecting the permanent Business Agent had been compromised. In this context, I find that the E-mails lost their character of being evaluative or otherwise of a human resources nature, insofar as the Complainant's employment or performance was concerned. As just stated, and as explained more fully later in this Order, it was the selection process being assessed in this context, not the Complainant. The E-mails were no longer the Complainant's personal employee information when being reviewed for the purpose of evaluating the selection process, as opposed to evaluating the Complainant's performance. In reference to the definition of "personal employee information", the information was no longer being used and/or disclosed for the purposes of establishing or managing the Complainant's employment relationship. The purpose of the review of the E-mails had changed.

[para 31] To further complicate my characterization of the information, however, the E-mails remained the Complainant's personal information generally. This is because there can be other factors that give information a personal dimension (Order P2007-002 at para. 50). A personal dimension might exist where there is associated information suggesting that an individual performing work-related responsibilities was acting improperly, there are allegations that the work-related act of an individual was wrongful,

or disclosure of information is likely to have an adverse effect on the individual (Order F2006-030 at paras. 12, 13 and 16; Order F2008-020 at para. 28).

[para 32] Here, there was an overall suggestion made by the Organization, beginning with its review of the E-mails and leading up to them being read and referenced at the Annual General Meeting, that the Complainant had acted inappropriately by participating in a group that was having a disagreement with the President and other members of the Executive Board, and by communicating with individuals who were members of the Evaluation Committee or Selection Committee. The minutes of the Annual General Meeting that occurred on November 26, 2008 summarize by noting that the President "[r]eported on the posting and selection process for a full time Business Agent and on the events that occurred recently to thwart the process". I accordingly find that, when the purpose for which the E-mails were used and/or disclosed changed from one in relation to the Complainant's work performance to one in relation to the selection process, there was a sufficient personal dimension to render the E-mails the Complainant's personal information generally, although no longer his personal employee information specifically.

[para 33] The transcript of the Annual General Meeting indicates that, in addition to the content of the E-mails themselves, there was some other information about the Complainant revealed by the Organization at that meeting. The President stated at the time that the E-mails had been deleted from the Complainant's computer, implying that he was the one who had deleted them, and that the E-mails were the subject of further investigation. Elsewhere, the President effectively indicated that the Complainant's correspondence with various individuals was of concern to the Executive Board, and that this was why the Board was recommending that a new Selection Committee be struck. Further, the President stated that the Complainant had given a different reason for a particular leave of absence than the one conveyed in one of the E-mails, implying that he had misled the Organization.

[para 34] For the same reasons set out above, I find that the foregoing information – which was not contained in the E-mails themselves – was the Complainant's personal information, although not his personal employee information specifically. First, the information was not the Complainant's personal employee information, in this context, because it was not being used and/or disclosed for the purposes of establishing, managing or terminating the Complainant's employment relationship with the Organization. Rather, the Complainant's information was being used and/or disclosed at the Annual General Meeting for the purpose of explaining the Executive Board's view that the process for selecting the full-time Business Agent had been compromised, and explaining its recommendation to the general membership that the Evaluation Committee and Selection Committee be disbanded. Second, the information still remained the Complainant's personal information generally, in that there was associated information suggesting that he had acted wrongly or improperly in the course of his work-related responsibilities.

[para 35] Given all of the foregoing, I find that the Organization used and/or disclosed the Complainant's personal information, and more specifically his personal employee information, when the Evaluation Committee reviewed the E-mails in order to evaluate the Complainant's work performance. I further find that the Organization used and/or disclosed the Complainant's personal information generally, but not his personal employee information specifically, when the Executive Board reviewed the E-mails in order to assess whether the selection process had been compromised, and when the President read and referenced the E-mails, and revealed some other information about the Complainant, at the Annual General Meeting.

[para 36] In this Order, I do not need to characterize each specific act of the Organization as either a "use" or a "disclosure" under PIPA. The "use" and "disclosure" provisions that are relevant to this inquiry have the same content, and the question of whether the Organization contravened PIPA therefore does not depend on whether the Organization used as opposed to disclosed the Complainant's information, or vice versa. It is for this reason that I repeatedly use phrases such as "used and/or disclosed".

2. Was there possibly no use and/or disclosure of the Complainant's information at all?

[para 37] I considered the possibility that there was no use and/or disclosure of the Complainant's information at all, within the terms of PIPA, when the President read the E-mails aloud at the Annual General Meeting and revealed other information about the Complainant at that time, given that the meeting was of the general membership of CUPE Local 30, and CUPE Local 30 was, collectively, the Complainant's employer. In Order P2009-003, an Adjudicator reviewed information that had been revealed at an annual general meeting of a condominium corporation, writing as follows (at paras. 21-22):

> Based on my review of the CPA [Condominium Property Act], I find that even had there been more detailed information about the legal fees contained in the minutes, such as whether they were owed or owing, there would be no disclosure for the purposes of PIPA. Condominium Corporation 7910117 consists of the unit owners, who are the attendees at the annual general meeting. The minutes were taken in order to record the actions and decisions of the condominium corporation at the annual general meeting. The actions of the condominium corporation in relation to the legal fees, and in explaining what the legal fees related to, are the actions of all the condominium owners acting collectively in accordance with their duties under the Act. As a result, recording what the legal fees related to in the minutes, or providing more detailed information about them, does not have the effect of disclosing information, as the condominium corporation and the owners of the units are the same legal entity. In other words, the condominium corporation was only recording the actions it had taken.
>
> In making this finding, I do not mean that condominium corporation minutes are not subject to PIPA. However, so long as a condominium corporation is carrying out its duties or powers under the CPA and does not include personal information in the minutes extraneous or irrelevant to carrying out those duties and powers, then it will generally not be disclosing personal information in its minutes, but

> recording the action it has taken or decided to take under the CPA or its own bylaws. As a hypothetical example, it would not be a disclosure of personal information to include in the financial statements or minutes that the condominium corporation is taking action in relation to a particular unit for breach of the bylaws or to record such a statement in the minutes, but it may be a disclosure to include personal opinions about a unit owner, or the unit owner's financial or personal circumstances, if recording that information is not done for the purpose of carrying out the business of the condominium corporation as required by the CPA.

[para 38] The above Order noted that, because the actions of the condominium corporation were the actions of all the condominium owners acting collectively, the revelation of certain information at an annual general meeting of the owners was not a disclosure within the meaning of PIPA. The same might be said of any organization whose members discuss matters or act collectively at an annual general meeting. However, the Order added a limitation in that the revelation of information must be in connection with the organization carrying out its duties or powers, and there must be no revelation of personal information that is extraneous or irrelevant to carrying out those duties and powers.

[para 39] At the oral hearing, the President of the Organization suggested that the Complainant's information could be disclosed to the general membership because the decision to disband the Evaluation Committee and Selection Committee (i.e., approving the recommendation of the Executive Board) was the decision of the general membership. The President took the view that the general membership of the Organization had a right to know that the process for selecting the permanent full-time Business Agent had been compromised, and a right to know the reasons for the recommendation that the Committees be disbanded and a new one struck. He testified that it was necessary to read and reference the E-mails at the Annual General Meeting, as the Executive Board has a responsibility to explain to the general membership anything affecting the running of the business of the Organization. He said that this was particularly so in this case, given that the general membership had directed the Executive Board to bring in the three candidates for Business Agent for the 89-day trial employment period.

[para 40] I also note that the general membership of the Organization is responsible for authorizing the employment of a Business Agent, according to the Constitution of the Canadian Union of Public Employees (i.e., the National Union), which was submitted by the Organization.[2] Article B.3.15 of the Bylaws Governing Chartered Affiliates (i.e., such as Local 30) states that "[t]he employment or election of a Business Agent must be done at a regular membership meeting of the Local Union".

[para 41] In response to the testimony of the President, the Complainant effectively argued that the revelation of his information at the Annual General Meeting was not necessary for the purpose of the general membership carrying out its duties or powers,

[2] The Constitution is dated 2011, but the parties agreed that it effectively contains the same information that the Constitution contained in 2008.

and that it was extraneous or irrelevant to carrying out those duties and powers. While the Complainant was not overly concerned about the fact that the Executive Board came to know the content of the E-mails, he said that, in his 34 years as a union member, he had never heard a President, in a President's Report, disclose the information that the President of the Organization disclosed about him when reading and referencing the E-mails at the Annual General Meeting.

[para 42] The Local 30 Member – who has previously been a member of the Executive Board in various capacities – testified that the management of employees falls to the Executive Board, and that details about matters affecting them are not conveyed to the general membership of the Organization. The Privacy Officer similarly said that Business Agents report to the Executive Board, not the general membership, and that the general membership is not involved in the day-to-day activities of Business Agents or other employees.

[para 43] I note that the foregoing accounts are consistent with information contained in a copy of the job description for Business Agents, as set out in Appendix A to the Collective Agreement between the Canadian Union of Public Employees, Local 30 (being the employer) and the Canadian Office and Professional Employees Union, Local 458 (being the Union representing employees such as Business Agents).[3] The job description states that the position is "[u]nder the general direction of the elected Executive Board of CUPE Local 30 and the day to day direction of the President".

[para 44] As for the need to convey information to the general membership of the Organization in order to explain the Executive Board's recommendation to disband the Evaluation Committee and Selection Committee, the Local 30 Member testified that, even where the Executive Board must bring a recommendation to the general membership for approval, it normally brings only the recommendation forward, and not the "finer details" or "nuts and bolts" of any matter involving a staff member or union member, as their personal information is treated as confidential. He said that detailed information in relation to a grievance, disciplinary matter, vacation request and the like would only remain known to the Executive Board. The Complainant similarly submitted that, in the case of grievances, executive boards routinely recommend to the general membership of a union whether a grievance should be taken to arbitration or not, without disclosing the confidential details about the grievance, and that this is despite the fact that the general membership must then vote on the recommendation about how the grievance should or should not proceed. He said that sufficient information for this purpose can be conveyed by disclosing only a minimal amount of personal information. The National Representative added that the general membership's role is effectively to elect its leadership in the form of the Executive Board, which then acts on behalf of the general membership without the general membership having the right to know the personal information of employees.

[3] The Collective Agreement is effective December 2009 to December 2013, but the parties agreed that the same job description was found in the Collective Agreement that was in effect in 2008.

[para 45] Given my understanding of the roles of the general membership of the Organization and the Executive Board – as conveyed to me by the parties and witnesses at the oral hearing, as well as by the excerpts reproduced above from the Constitution and Collective Agreement – I find that, while the general membership of the Organization authorizes the employment of Business Agents, it is the Executive Board, not the entire collectivity that is CUPE Local 30, that deals with the more specific matters involving the employment of Business Agents. Further, the actual selection of the permanent full-time Business Agent was delegated outside the general membership to the Evaluation Committee and Selection Committee, and was therefore not part of the general membership's duties and powers. As for the need to convey the Complainant's information at the Annual General Meeting for the purpose of presenting the recommendation that the Evaluation and Selection Committees be disbanded, which the general membership had to approve, the responsibility of overseeing the work of the Committees was assigned to the Executive Board. In presenting and explaining the recommendation of the Executive Board, I find that the President revealed information about the Complainant that was extraneous or superfluous, insofar as the role of the general membership in approving the recommendation was concerned. I therefore conclude that there was indeed a use and/or disclosure of the Complainant's personal information at the Annual General Meeting.

B. Did the Organization use and/or disclose the Complainant's information contrary to, or in compliance with, section 7(1) of PIPA (no use or disclosure without either authority or consent)?

[para 46] Because the use and/or disclosure of the Complainant's personal information and/or personal employee information has been established, the Organization has the burden to show that its use and/or disclosure of the Complainant's personal information was in accordance with PIPA (Order P2005-001 at para. 8; Order P2006-008 at para. 11).

[para 47] Section 7(1) of PIPA reads, in part, as follows:

> *7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,*
>
> *...*
>
> *(c) use that information unless the individual consents to the use of that information, or*
>
> *(d) disclose that information unless the individual consents to the disclosure of that information.*

[para 48] The foregoing indicates that the Organization was not authorized to use and/or disclose the Complainant's personal information (which includes his personal employee information) unless he consented, meaning in accordance with section 8(1) or section 8(2) of PIPA, or unless "this Act provides otherwise". The latter means, in the context of this inquiry, that the Organization potentially had the authority to use or disclose the Complainant's personal information by providing him with prior notice of

the intention to use or disclose it, and giving him a reasonable opportunity to decline or object, under section 8(3); by providing him with prior notification that his personal employee information was going to be used or disclosed under section 18 or 21; or on the basis that his consent, and therefore also notice to him, was not required at all before using or disclosing his personal information under section 17 or 20.

1. Did the Organization have the authority to use and/or disclose the Complainant's information without consent, as permitted by sections 17, 18, 20 and/or 21 of PIPA?

[para 49] I will discuss the above sub-issue in two separate parts, the first dealing with the use and disclosure of personal information generally, under sections 17 and 20, and the second dealing with the use and disclosure of personal employee information more specifically, under sections 18 and 21.

(a) Did the Organization have the authority to use and/or disclose the Complainant's information without consent, as permitted by sections 17 and/or 20?

[para 50] If the Organization had the authority to use and/or disclose the Complainant's personal information without his consent under sections 17 and/or 20, this would mean that it could also use and/or disclose his personal employee information without his consent, again because personal employee information is a subset of personal information. This would also mean that the Organization was not required to give the Complainant any notice before using and/or disclosing his information. In short, sections 17 and 20 would give the Organization the broadest authority to use and/or disclose the Complainant's information, if the Organization was entitled to rely on those sections.

[para 51] The Organization argues that it had the authority to use and/or disclose the Complainant's information because it was conducting an investigation. Sections 17(d) and 20(m) of PIPA are therefore the relevant provisions. They read as follows:

> *17 An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*
>
> *...*
>
> *(d) the use of the information is reasonable for the purposes of an investigation or a legal proceeding;*
>
> *...*
>
> *20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*
>
> *...*
>
> *(m) the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding;*

[para 52] At the oral hearing, the President explained that the Evaluation Committee discovered that all of the Organization's files that had accumulated on the Complainant's laptop over the course of his 89-day trial employment period had been deleted (although not permanently so, as they were later able to be retrieved from a "deleted" file folder). He also said that the Committee noticed that an attempt had been made to send the Organization's files to the Complainant's personal home e-mail address (although the server had rejected delivery because of the size of the files). The President testified that, as a result of these two discoveries, the Evaluation Committee decided that it needed to "do an investigation on one of the employees", being the Complainant. The Committee then started reviewing all of the e-mails that had been sent or received using the e-mail address that had been assigned to the Complainant, in the course of which it came across the E-mails containing the personal information of the Complainant that is at issue in this inquiry.

[para 53] One of the E-mails received by the Complainant and others invites the recipients to a meeting in order to "exchange ideas as to how we can respond with respect to others putting out false information about our side that will damage our ability to defeat [the President and one of the other candidates for Business Agent]". The President testified that he felt that the Complainant, as an employee of the Organization, should have brought this E-mail forward for his attention. He said that that he considered some of the other E-mails to likewise be inappropriate because they targeted him or other members of the Executive Board. The President further testified that he had concerns about e-mail exchanges involving the Complainant and an individual who was a member of the Evaluation Committee. In addition to E-mails between the Complainant and this other individual, the two were both recipients of E-mails about the meeting to discuss defeating the President and the other candidate for Business Agent. The President felt that these E-mails demonstrated that the selection process was no longer fair and unbiased. When being cross-examined by the Complainant, the President explained that the outside Committee was later struck to ensure that the successful candidate would be selected on the basis of ability rather than popularity.

[para 54] The Complainant argued that he was not actually the subject of any investigation. He noted that, in the minutes of the Executive Board Meeting of November 25, 2008, item 9(e) is "Investigation", but there are no further details set out. He therefore submitted that the minutes do not actually indicate who or what was being investigated. He also said that he has never been informed of the outcome of any investigation in relation to himself, again thereby suggesting that he was never the subject of an investigation.

[para 55] Because the term "investigation" is defined in PIPA, the definition must be met in the circumstances of this case, in order for the Organization to rely on sections 17(d) and/or 20(m). Section 1(f) [which was renumbered 1(1)(f), effective May 1, 2010] reads as follows:

> *1(f) "investigation" means an investigation related to*
>
> *(i) a breach of agreement,*

> *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
>
> *(iii) circumstances or conduct that may result in a remedy or relief being available at law,*
>
> *if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;*

[para 56] The Organization acknowledged at the oral hearing that there was no alleged contravention of an enactment, as contemplated by section 1(f)(ii). When I asked the Organization whether the investigation that it had conducted related to the breach of an agreement within the terms of section 1(f)(i), the Privacy Officer replied that he did not believe so. For his part, the President responded that the Evaluation Committee's initial concerns, on reviewing the E-mails, were that the Complainant had deleted them, that he had attempted to send the Organization's files to his personal home e-mail address, and that he had participated in e-mail exchanges of a "political" nature with Local 30 members, which the President believed to be inappropriate for a staff member of the Organization who was, at that time, not a Local 30 member.

[para 57] An investigation, within the meaning of PIPA, can be an investigation of possible misconduct or non-compliance in relation to a rule or policy incorporated into an employment agreement, incorporated into a collective agreement, or made under the authority of a statute (see, e.g., Order P2008-007 at paras. 28-31). In addition to the testimony of the President just mentioned, I note that the Organization indicated, in its advance written submissions, that it was conducting an investigation "regarding the use of e-mails and computer usage in the office". The Complainant responded at the oral hearing that there was never any indication as to what he could or could not do in relation to sending and receiving e-mail correspondence. As for any other aspects of his employment as Relief Business Agent, he denied doing anything inappropriate or contrary to his employment obligations.

[para 58] The Organization drew my attention to PIPEDA Case Summary #2009-019, in which the Office of the Privacy Commissioner of Canada found that the collection and use of an employee's e-mail was acceptable for the purposes of investigating a breach of agreement.[4] The Assistant Commissioner found that an organization had a justifiable reason to access an individual's corporate e-mail account, as it was for the purpose of investigating a breach of his employment agreement, his involvement in an activity that the organization believed to be inconsistent with his employment obligations, and a

[4] Paragraphs 7(1)(b) of the federal *Personal Information Protection and Electronic Documents Act* is similar to some degree to the sections of PIPA that authorize the collection, use and disclosure of personal information for the purposes of an investigation. Paragraph 7(1)(b) authorizes an organization subject to PIPEDA to "collect personal information without the knowledge or consent of the individual only if it is reasonable to expect that the collection with the knowledge or consent of the individual would compromise the availability or the accuracy of the information and the collection is reasonable for purposes related to investigating a breach of an agreement or a contravention of the laws of Canada or a province".

contravention of an established corporate policy by which employees were required to abide (see PIPEDA Case Summary #2009-019 at p. 3 or para. 10). The organization in PIPEDA Case Summary #2009-019 had set up a policy forbidding certain conduct in relation to e-mail use – meaning that the policy had effectively become part of the employment agreement – and the organization's policy had also expressly notified employees that it reserved the right to access and disclose all messages sent over its e-mail system for any purpose (see PIPEDA Case Summary #2009-019 at p. 2 or para. 7).

[para 59] However, in this inquiry, the Organization has pointed to no policy regarding computer or e-mail use that the Complainant arguably contravened, and has pointed to no other aspect of the Complainant's employment agreement, whether express or implied, that the Complainant arguably contravened. Indeed, the Organization conceded at the oral hearing that it was not investigating the Complainant at all. The President repeatedly testified that it was not the Complainant being investigated, but rather the process for selecting the permanent Business Agent.

[para 60] The President explained that, once the investigation regarding the selection process was underway, the Complainant's performance was no longer being evaluated and he was not otherwise being investigated. He emphasized that, on discovery of the E-mails that are at issue in this inquiry, the evaluation process in relation to the Complainant ended, and moreover, the Evaluation Committee responsible for evaluating the work performance of all three candidates for Business Agent was about to be disbanded altogether. The President added that there was no sanction or remedy available against the Complainant, as he was no longer an employee and no longer a member of COPE Local 458 once his 89-day trial employment period had ended. He noted that the Organization therefore could not discipline him, and could not terminate him. When I asked what, then, was the point of the investigation, the President reiterated that its purpose was to determine whether the process for selecting the full-time Business Agent was flawed or tainted, or whether there had been inappropriate interference with the process.

[para 61] I also note a letter dated February 3, 2009 from the President of the Organization to the President of the Complainant's union, being COPE Local 458, in which the President of the Organization took the position that he and the Executive Board were within their right to report their concerns about the E-mails to the general membership of the Organization. The two Presidents had had a discussion, which the President of the Organization described at the oral hearing as follows:

> And again, the discussion we also had there was by no means [with] any intent to have this investigation to discredit anybody. We wanted a fair and open process, and this investigation was to show that there was something wrong with the process. And all of those E-mails were the reasons for the process, including the one from [an individual who was a member of the Evaluation Committee].

The above excerpt indicates that the investigation was not directed at any person, namely the Complainant, but rather a process, namely the process for selecting the full-time Business Agent.

[para 62] As for whether there were circumstances or conduct that may result in a remedy or relief being available at law, within the terms of section 1(f)(iii), I considered whether there may have been alleged improper conduct on the part of the Complainant for which he may have been sanctioned under the applicable Collective Agreement.[5] Again, however, the President explained that, while the Organization believed that the Complainant had done something wrong in the course of his employment, there was no point in pursuing the matter, given that his temporary employment as Relief Business Agent had ended, in any event. He said that, as the Complainant's employer, the Organization would have had to file paperwork with COPE Local 458, and following his discussions with the President of COPE Local 458, the President of the Organization did not consider that worthwhile.

[para 63] The National Representative noted that, if the Complainant were being investigated for possible misconduct, he should have and would have received a "notice of investigation". I see, in the Collective Agreement governing the Organization as an employer and the members of COPE Local 358 as employees, that there is a process for investigating employees set out in article 19. The process requires the President of the Organization to give the employee a copy of the complaint against him or her, permits the President to refer the matter to a Complaints Committee, and requires the President or Complaints Committee, as the case may be, to interview the employee, render findings in writing, and permit the employee to present a written submission in response. The parties all agree that this process did not occur in this case, with the President of the Organization again explaining that this is because the Complainant was, in fact, not being investigated.

[para 64] An organization's view that there has been possible wrongdoing on the part of an individual does not automatically mean that there is an investigation of that wrongdoing or an investigation of that individual. In other words, the belief that there has been possible wrongdoing is not sufficient, as an investigation of the individual's conduct must actually ensue. In this inquiry, the submissions of the parties and the testimony of the witnesses make it clear that the Complainant himself was not being investigated by the Organization, at least once the Organization embarked on a review of the process for selecting the permanent Business Agent.

[para 65] It is arguable that the Organization was, in fact, investigating the Complainant for a very short period of time. As summarized above, the President and Evaluation Committee initially thought that the Complainant had acted inappropriately in the course of his employment, and the Organization briefly considered subjecting him to an investigation. However, as described by the President, the investigation of the Complainant, if there was one, did not proceed very far and almost immediately shifted to a review of the process for selecting the permanent Business Agent. While the very brief initial investigation of the Complainant might mean that the collection of the E-mails was authorized for the purpose of an investigation (see, e.g., Order P2008-007 at paras. 31-34, in which an organization was authorized to collect personal information for the purpose

[5] This would not be characterized as a breach of an agreement under section 1(f)(i). Rather, the collective agreement is the framework for addressing the alleged misconduct.

of determining whether an investigation was warranted), the collection of the Complainant's personal information in the E-mails is not of concern to him, and therefore is not at issue in this inquiry. Rather, he is concerned with the use and/or disclosure of his personal information.

[para 66] The point at which the Organization decided not to investigate the Complainant, if it ever was considering investigating him, was sometime after the President and the Evaluation Committee had seen the E-mails on the laptop that had been assigned to the Complainant, but before the President drew the E-mails to the attention of the Executive Board for the purpose of determining whether the process for selecting the full-time Business Agent had been compromised. In other words, the use and/or disclosure of the Complainant's personal information by the Executive Board and by the President at the Annual General Meeting occurred after the determination by the Organization that it was the selection process – not the Complainant – that was to be reviewed. As for the initial use and/or disclosure of the Complainant's personal information by the Evaluation Committee, the Organization does not argue that it was for the purpose of an investigation at that time. Rather, it was for the purpose of evaluating the Complainant's performance, which is addressed elsewhere in this Order.

[para 67] I also considered whether there were circumstances or conduct that may result in a remedy or relief being available at law, as set out in section 1(f)(iii) of the definition of "investigation", in the sense that the Complainant faced the possibility of not being hired as the permanent Business Agent. The President said at the oral hearing that someone made a comment about whether the Complainant should be allowed to continue in his application for the position, but that there was never any question, on the part of the Executive Board, regarding the Complainant's participation in the recruitment process carried out by the reconstituted Selection Committee. The President made it clear, when cross-examined by the Complainant, that the Complainant continued to have the same chance of being successful as the other two candidates, and that there was no preference in favour of either of the other two candidates. In any event, I do not characterize the rejection of an individual as a possible or successful candidate in a job competition as a remedy or relief available at law. While an employer or selection committee has the prerogative to pick the candidate of its choice and disqualify other candidates, the employer or selection committee does not obtain a "remedy" or "relief" against the unsuccessful or disqualified candidates.

[para 68] The definition of "investigation" in PIPA, and therefore the authority to use and disclose an individual's personal information for the purpose of an investigation under sections 17(d) and 20(m) of the Act, is not necessarily restricted to situations in which the individual himself or herself is being investigated. However, there must still be a possible breach of an agreement, a contravention of an enactment, or circumstances or conduct that may result in a remedy or relief being available at law. Insofar as the process for selecting the permanent Business Agent was being assessed, the Organization has pointed to none of the foregoing so as to meet the definition of "investigation". In view of the possibility that the Complainant and/or others had compromised the selection process, the Organization has not squarely submitted that some agreement was breached

or that some enactment was contravened. I note, in the transcript of the Annual General Meeting, that the President explains that there were set timelines and an established process for selecting the permanent Business Agent, which the Executive Board believed had not been followed, but insufficient evidence has been placed before me to show that there was an express or implied agreement to which candidates, COPE Local 458 and/or members of the Evaluation Committee or Selection Committee were required to adhere. In any event, the view of the Executive Board was essentially that there had been improper communications between certain individuals, and regardless of whether those communications were improper in a general sense, I doubt very much that there was an actual agreement restricting communications or dictating what they could consist of. As for the timelines, there appears to have been a strong preference for the evaluation of the three candidates and their follow-up interviews to be concluded prior to the Annual General Meeting, but this does not establish that the timelines formed part of an agreement that was allegedly breached.

[para 69] Further, while the Organization has explained that the result of its assessment of the selection process was a recommendation by the Executive Board to the general membership of the Organization that the Evaluation and Selection Committees be disbanded, this does not constitute "a remedy or relief being available at law". A remedy or relief available at law is one being sought by one party against another before a court, tribunal or other body that is able to pronounce judgment or otherwise make a judicial or quasi-judicial decision in the matter. In this case, the fact that the general membership of the Organization decided to disband the Evaluation and Selection Committees, and strike a new Selection Committee, does not mean that it was redressing a wrong in the legal or equitable sense. It was simply making an internal organizational decision, which did not involve anyone's legal rights and did not involve one party seeking a remedy or relief as against another party.

[para 70] I conclude that the Organization did not have the authority to use and/or disclose the Complainant's personal information, without his consent, under sections 17 and/or 20. While these sections authorize the use and disclosure of personal information for the purposes of an investigation, there was no "investigation", as that term is defined in the Act, when the Complainant's personal information was used and/or disclosed in this case.

[para 71] At the oral hearing, the parties were preoccupied with whether the reading of the E-mails had been properly authorized by the Executive Board, with the Complainant noting that there was no related motion reflected in the minutes of the Board meeting of November 25, 2008. He believes that there was never any instruction or direction from the Executive Board to review the E-mails, and alleges an improper motive on the part of President when he read the E-mails aloud at the Annual General Meeting, in that the President did so in order to tarnish the Complainant's reputation and credibility. I also note that much of the testimony of the National Representative, and his questioning by the parties, related to whether the Executive Board had made a motion for the President to read the E-mails at the Annual General Meeting, and whether it was likely that the Board would have forgotten to make such a motion, or that such a motion would have

been inadvertently omitted from the minutes. Finally, I note that the President testified that a National Regional Director of the Canadian Union of Public Employees had concerns about the E-mails when they were shown to her, and had agreed that an investigation was warranted.

[para 72] None of the foregoing is particularly relevant to this inquiry. Even if the reading of the E-mails at the Annual General Meeting was authorized by the Board, and even if the National Regional Director or any other outside party agreed that the investigation in question was appropriate, the Organization's use and/or disclosure of Complainant's personal information must still be in compliance with PIPA. Insofar as the Organization used and/or disclosed the Complainant's personal information for the purpose of an investigation, the Organization has not established that the investigation in question fell within the definition of "investigation" set out in the Act, and therefore has not established that the use and/or disclosure fell within the authority set out in section 17(d) and/or 20(m).

> *(b) Did the Organization have the authority to use and/or disclose the Complainant's information without consent, as permitted by sections 18 and/or 21?*

[para 73] At the time of the Organization's alleged contravention of PIPA, sections 18 and 21 read as follows:[6]

> *18(1) Notwithstanding anything in this Act other than subsection (2), an organization may use personal employee information about an individual without the consent of the individual if*
>
> *(a) the individual is an employee of the organization, or*
>
> *(b) the use of the information is for the purpose of recruiting a potential employee.*
>
> *(2) An organization shall not use personal information about an individual under subsection (1) without the consent of the individual unless*

[6] Effective May 1, 2010, the content of sections 18(2)(c) and 21(2)(c) is found in sections 18(1)(c) and 21(1)(c), respectively. Other parts of sections 18 and 21 have been restructured and amended. The amendments would not have had an impact on the issues in this inquiry even if they had been in force at the time of the Organization's alleged contravention of the Act. The current provisions are more restrictive in granting organizations the authority to use or disclose personal employee information, in that the use or disclosure must be "solely" for the purpose of "establishing, managing or terminating an employment or volunteer-work relationship". While the current provisions are at the same time broader, in that an organization may use or disclose personal employee information of a *former* employee for the purposes of "managing a post-employment or post-volunteer work relationship", the Organization in this inquiry was not managing a post-employment relationship with the Complainant when it used and/or disclosed his personal employee information. It was evaluating his performance as a current or potential employee. In any event, the key finding in this Order is that the Organization did not give the Complainant prior notice, as required by sections 18 and 21, and the requirement to give notice to individuals before using or disclosing their personal employee information, as set out in those sections, was not changed by the amendments that became effective in 2010.

(a) the use is reasonable for the purposes for which the information is being used,

(b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and

(c) in the case of an individual who is an employee of the organization, the organization has, before using the information, provided the individual with reasonable notification that the information is going to be used and of the purposes for which the information is going to be used.

(3) Nothing in this section is to be construed so as to restrict or otherwise affect an organization's ability to use personal information under section 17.

21(1) Notwithstanding anything in this Act other than subsection (2), an organization may disclose personal employee information about an individual without the consent of the individual if

(a) the individual is or was an employee of the organization, or

(b) the disclosure of the information is for the purpose of recruiting a potential employee.

(2) An organization shall not disclose personal information about an individual under subsection (1) without the consent of the individual unless

(a) the disclosure is reasonable for the purposes for which the information is being disclosed,

(b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and

(c) in the case of an individual who is an employee of the organization, the organization has, before disclosing the information, provided the individual with reasonable notification that the information is going to be disclosed and of the purposes for which the information is going to be disclosed.

(3) Nothing in this section is to be construed so as to restrict or otherwise affect an organization's ability to disclose personal information under section 20.

[para 74] Sections 18 and 21 authorize the use and disclosure of personal employee information specifically, not personal information more generally.[7] Earlier in this Order, I concluded that the only time that the Organization used and/or disclosed the Complainant's personal employee information, as defined in the Act, was when the Evaluation Committee reviewed the E-mails in order to evaluate the Complainant's work performance. I will return to the Organization's use and/or disclosure of the Complainant's information for the purpose of assessing whether the selection process had

[7] Although there are references to "personal information" in sections 18(2) and 21(2), these sections refer back to sections 18(1) and 21(1), respectively, which limit the application of the sections to the subset of "personal employee information".

been compromised, and for the purpose of informing the general membership of matters at the Annual General Meeting, when I discuss section 8 of PIPA, which deals with personal information generally.

[para 75] In this inquiry, the parties do not dispute that the Complainant was an employee of the Organization over the course of his 89-day trial period as Relief Business Agent, that the Complainant was also a potential employee in that he might have later been the successful candidate for permanent Business Agent, and that the initial review of the E-mails by the Evaluation Committee was for the purpose of possibly recruiting the Complainant as permanent Business Agent. Sections 18(1) and 21(1) above are accordingly met.

[para 76] I noted earlier in this Order that all of the E-mails consist of information related to the employment relationship between the Complainant and the Organization. It is also quite arguable that reviewing the employment-related e-mail correspondence sent and received by the Complainant was reasonable for the purpose of evaluating his performance. The first two requirements set out in sections 18(2) and 21(2) would accordingly be met. However, I find that the requirement for the Organization to give the Complainant reasonable notification before using and/or disclosing his personal employee information, as set out in sections 18(2)(c) and/or 21(2)(c), was not met.

[para 77] At the oral hearing, the Organization argued that it did not have to give the Complainant notice before reviewing the E-mails, for any purpose, as the information in them was the Organization's own property, and on the Organization's laptop that had been assigned to the Complainant. However, insofar as the records of an organization consist of the personal information and/or personal employee information of an individual, PIPA circumscribes the ability to use and disclose that information. While the Privacy Officer noted a bullet in PIPEDA Case Summary #2009-019 (at p.1), which states that e-mails sent and received by employees on an organization's system may be considered the organization's "corporate records", the same bullet notes that such e-mails can also be the employees' personal information protected by the applicable legislation.

[para 78] As for whether the Organization complied with sections 18(2)(c) and/or 21(2)(c), by giving notice to the Complainant before using and/or disclosing his personal information in the E-mails in order to evaluate his performance as Relief Business Agent, the President testified as follows:

> We had intent – and had said – that we were going to go through everything, including Labourware,[8] their computers, their files, record-keeping, everything that they were trained on because we wanted to ensure that they were able to do the job efficiently and effectively for the members.

[8] The parties explained that Labourware is computer software accessible to all of the officers and employees of the Organization whose duties or functions involve member files, and on which the progress and status of member files are recorded and shared.

[para 79] When the Privacy Officer asked the President whether the Complainant had been told that his laptop and use of computer software would be reviewed by the Evaluation Committee, the President replied that his understanding was that another individual, at some point, conveyed this to the Complainant. The President elaborated as follows:

> We were training them on everything and they were all aware of it, that's why they were in there for the 89 days; that they were getting training on Labourware because it wasn't an easy thing, it was a new thing, and if you didn't know what it was, you weren't going to be a very good Business Agent; that we needed to know how their skills were on computers; that we also needed to know what their skills were on keeping the files and everything together.

The President further explained that he met with the Complainant on his first day of employment, testifying that he "didn't say it [i.e., give notice about reviewing the E-mails] on the first day but we [i.e., the Organization more generally] definitely had discussions throughout that we would be looking through all of these processes".

[para 80] Conversely, the Complainant testified that he was never notified during the recruitment process that his laptop or e-mail correspondence might be reviewed. He added that he received little orientation before he began his temporary position as Relief Business Agent, so was not informed, in that context, that his e-mail correspondence would be scrutinized. Although the President referred to the three candidates being notified while they were being trained, and having various mentors to whom they could talk, the Complainant said that the only training he received was from the Privacy Officer to quickly learn about Labourware.

[para 81] I find that the President did not himself give the Complainant notice that his e-mail correspondence would be reviewed for the purpose of evaluating his performance as temporary Relief Business Agent. At no point in his testimony did he say that he did. At most, the President had the intention of reviewing the E-mails, but he did not actually inform the Complainant that they would be reviewed. While the President suggested that the Complainant may have received notice by some other officer of the Organization, I also find that nobody else gave the Complainant notice. In short, I accept the Complainant's version of events, which is that he was never notified that his e-mail correspondence would be reviewed. Having said this, the testimony of the President excerpted above raises the possibility that the Complainant implicitly knew that his e-mail correspondence would be reviewed for the purpose of evaluating his performance. I discuss this possibility later in this Order when deciding whether the Complainant is deemed to have consented to the use and/or disclosure of his personal information, within the terms of section 8(2) of the Act.

[para 82] I conclude that the Organization did not, before using and/or disclosing the Complainant's personal employee information in the E-mails for the purpose of evaluating his work performance, provide him with reasonable notification that his personal employee information was going to be used and/or disclosed for that purpose. The Organization therefore did not have the authority to use and/or disclose the

Complainant's personal employee information, without his consent, under sections 18 and/or 21.

[para 83] I found earlier in this Order that the Organization used and/or disclosed the Complainant's personal information generally, but not his personal employee information specifically, when the Executive Board reviewed the E-mails in order to assess whether the selection process had been compromised, and when the President read and referenced the E-mails, and revealed some other information about the Complainant, at the Annual General Meeting. At this point, I note that, even if the information at issue remained at all times the Complainant's personal employee information specifically, the notice requirements set out in sections 18(2)(c) and/or 21(2)(c) were still not met. As explained in the part of this Order below dealing with the conditions set out in section 8(3) of the Act, I also find that the Organization did not give the Complainant notice that it would be using and/or disclosing the E-mails for the purpose of assessing whether the selection process had been compromised, or for the purpose of reading and referencing them at the Annual General Meeting.

2. If the Organization did not have the authority to use and/or disclose the Complainant's information without consent, did the Organization obtain the Complainant's consent in accordance with section 8 of PIPA before using and/or disclosing the information?

[para 84] At the time of the Organization's alleged contravention of the PIPA, section 8 read, in part, as follows:[9]

> *8(1) An individual may give his or her consent in writing or orally to the collection, use or disclosure of personal information about the individual.*
>
> *(2) An individual is deemed to consent to the collection, use or disclosure of personal information about the individual by an organization for a particular purpose if*
>
> *(a) the individual, without actually giving a consent referred to in subsection (1), voluntarily provides the information to the organization for that purpose, and*
>
> *(b) it is reasonable that a person would voluntarily provide that information.*
>
> *(3) Notwithstanding section 7(1), an organization may collect, use or disclose personal information about an individual for particular purposes if*
>
> *(a) the organization*

[9] Section 8 now contains additional subsections 8(2.1) and 8(2.2). They would not have had an impact on the issues in this inquiry even if they had been in force at the time of the Organization's alleged contravention of the Act. They deal with deemed consent in certain cases involving a disclosure of personal information to another organization, and involving a collection, use or disclosure of personal information for the purpose of an individual's enrollment under a benefit plan. None of the foregoing would be applicable to the facts of this case.

(i) provides the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect, use or disclose personal information about the individual for those purposes, and

(ii) with respect to that notice, gives the individual a reasonable opportunity to decline or object to having his or her personal information collected, used or disclosed for those purposes,

(b) the individual does not, within a reasonable time, give to the organization a response to that notice declining or objecting to the proposed collection, use or disclosure, and

(c) having regard to the level of the sensitivity, if any, of the information in the circumstances, it is reasonable to collect, use or disclose the information as permitted under clauses (a) and (b).

...

[para 85] Section 8 provided alternative grounds on which the Organization could use and/or disclose the Complainant's personal information. I will now review then in turn.

(a) Did the Complainant consent in writing or orally?

[para 86] Neither party suggested that the Complainant may have expressly consented, whether in writing or orally, to the review of the E-mails, or to them being read and referenced at the Annual General Meeting.

(b) Is the Complainant deemed to have consented by virtue of the conditions in sections 8(2)(a) and (b) having been met?

[para 87] Section 8(2) of PIPA contemplates the possibility of "deemed consent" on the part of the Complainant with respect to the use and/or disclosure of his personal information by the Organization. In order for there to have been deemed consent, the Complainant must have voluntarily provided his personal information to the Organization for a purpose, and it must be reasonable for him to have done so.

[para 88] The Organization argued that the Complainant implicitly consented to the review of the E-mails as part of the terms of his temporary employment and the terms of the competition to become permanent Business Agent. It submitted that the Complainant ought to have known that his entries on the laptop that had been assigned to him, and his e-mail correspondence, would be reviewed for the purpose of evaluating his performance, given that his proficiency with computers and written communication was a required job skill. The Organization submitted a copy of the Collective Agreement containing the job description for Business Agent. I see that it lists, as some of the necessary qualifications, "[g]ood knowledge of written and verbal English", "[c]omputer experience related to Microsoft Windows and Microsoft Office", and "[a]bility to express the thoughts, ideas and union policy in both written and verbal forms". The Organization also submitted a copy of the job posting for Business Agent, to which the Complainant responded. It

similarly states that the job requirements include "[h]ighly developed communication", "[a]bility to express the thoughts, ideas, and Union policy in both written and verbal forms", and "[a] high level of computer skills related to Microsoft Windows and Office".

[para 89] At the oral hearing, the Complainant said that he never thought that his ability to be a Business Agent would be evaluated in reference to his e-mail correspondence, or his use of Labourware. He thought that it would be based on the results that he achieved for members of the Organization in the matters involving those members, and on his dealings with the human resources department of the City of Edmonton, where the members were employed. He stated that he was never told that anything on his laptop would be reviewed during the recruitment process. While he said that he was also not told that the Evaluation Committee would be reviewing his work in relation to member files on Labourware, he conceded that he might have expected this, given that Labourware is a shared resource and the status and progress of member files are stored there. The Complainant also acknowledged that he might have expected his e-mail correspondence to be reviewed had he been told that there was some sort of issue with his performance, or that it had to be improved in some way. However, he said that he was never given any form of interim evaluation or otherwise told that he was doing something wrong in the course of his work. The Complainant was under the impression that the evaluation of his performance was going well, so he had no reason to expect that his e-mail correspondence might be reviewed.

[para 90] In order for an individual to be deemed to consent to the use and/or disclosure of his or her personal information, section 8(2) of PIPA states that he or she must voluntarily provide the information for a "particular" purpose. This means that the individual must understand the purpose in a specific, not general, sense (see Order P2011-003 at paras. 39-40).

[para 91] Here, while the Complainant voluntarily provided his personal information to the Organization when he sent and received the E-mails using the Organization's laptop in the course of his employment, I find that he did not do so for the particular purpose of having his performance evaluated. It is not sufficient that the Complainant knew that his performance would be evaluated in some way. It is also not sufficient that the job description states that the position requires communication skills and computer skills. Most employees would presume that their employer would evaluate their performance by reviewing their work product, as found in a physical file, on a shared computer resource or otherwise distributed, and by seeking input from clients and colleagues. Here, I accept the Complainant's evidence to the effect that he did not expect that his e-mail correspondence would be reviewed by the Organization for the purpose of evaluating his performance. He therefore cannot be said to have voluntarily provided it for that purpose, within the terms of section 8(2).

[para 92] I conclude that the Complainant is not deemed to have consented to the use and/or disclosure of his personal information in the E-mails for the purposes of evaluating his performance as Relief Business Agent.

[para 93] The Organization did not argue that the Complainant is deemed to have consented, within the terms of section 8(2), to the use and/or disclosure of the E-mails for the purpose of determining whether the process for selecting the full-time Business Agent had been compromised, or for the purpose of reading and referencing the E-mails at the Annual General Meeting. I will instead discuss these uses and/or disclosures of the Complainant's personal information in the context of section 8(3).

(c) Were the conditions in sections 8(3)(a), (b) and (c) met?

[para 94] An organization may use and/or disclose an individual's personal information if the organization provides the individual with prior notice in accordance with section 8(3) of PIPA. Section 8(3)(a)(i) requires the organization to provide the individual with a notice, in a form that the individual can reasonably be expected to understand, that the organization intends to collect, use or disclose personal information about the individual for the particular purposes. Earlier in this Order, I concluded that the Organization did not give the Complainant notice, under section 18(2)(c) or 21(2)(c), that the E-mails would be reviewed for the purpose of evaluating his work performance as temporary Business Agent. The same conclusion would apply with respect to whether the Organization gave prior notice under section 8(3). I accordingly find that it did not, insofar as the purpose of evaluating the Complainant's performance was concerned.

[para 95] As for whether the Organization gave the Complainant notice of its intention to use and/or disclose his personal information for the purpose of reviewing the process for selecting the full-time Business Agent and conveying matters to the general membership at the Annual General Meeting, the evidence reviewed earlier in this Order establishes that it did not. At no time was the Complainant notified of the Organization's investigation into whether the selection process had been compromised. The Organization effectively admitted as much. When examined by the Privacy Officer, the President explained that the Executive Board considered it unnecessary to notify the Complainant about its review of the E-mails and the decision to read and refer to the E-mails at the Annual General Meeting, as the Complainant was an employee, and the Board believed that the E-mails could be read and referenced for the purpose of an investigation. My finding that the Organization did not give the Complainant notice prior to the use and/or disclosure of his personal information, for any purpose and at any point in time, is also consistent with the Complainant's initial complaint to this Office. He wrote that he had never been notified of any issues regarding his work performance, and was not given an opportunity to prepare a defence or explain the E-mails that he had sent and received. I accept his version of events.

[para 96] Finally, section 8(3)(a)(ii) (unlike sections 18 and 21) has an additional requirement in that an organization, after giving notice, must give the individual a reasonable opportunity to decline or object to having his or her personal information collected, used or disclosed for the particular purposes. The foregoing also did not occur in this case.

[para 97] I conclude that the conditions set out in section 8(3) were not met, so as to permit the Organization to use and/or disclosure the Complainant's personal information, whether for the purpose of evaluating his performance, for the purpose of assessing whether the process for selecting the full-time Business Agent had been compromised, or for the purpose of reading and referencing the E-mails at the Annual General Meeting.

C. Did the Organization use and/or disclose the Complainant's information contrary to, or in accordance with, sections 16 and/or 19 of PIPA (use and disclosure for purposes that are reasonable and to the extent reasonable for meeting the purposes)?

[para 98] Sections 16 and 19 of PIPA read as follows:

> *16(1) An organization may use personal information only for purposes that are reasonable.*
>
> *(2) Where an organization uses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is used.*
>
> *19(1) An organization may disclose personal information only for purposes that are reasonable.*
>
> *(2) Where an organization discloses personal information, it may do so only to the extent that is reasonable for meeting the purposes for which the information is disclosed.*

[para 99] Sections 16 and 19 require an organization to use and disclose personal information only for purposes that are reasonable, and only to the extent that is reasonable for meeting those purposes. As discussed in the preceding parts of this Order, the Organization has not established that PIPA permitted it to use and/or disclose the Complainant's personal information, without his consent, for the purposes of an investigation within the meaning set out in the Act, on the basis of actual or deemed consent under section 8(1) or 8(2), or on the basis that it gave the Complainant prior notice under section 8(3), 18(2)(c) and/or 21(2)(c). In my view, if an organization does not establish that it used and/or disclosed personal information with consent or prior notice, or in circumstances where consent is not required, it follows that the organization did not use and/or disclose the personal information to a reasonable extent.

[para 100] I accordingly conclude that the Organization used and/or disclosed the Complainant's personal information contrary to sections 16 and/or 19 of PIPA when it reviewed the E-mails and when it read and referenced them, and revealed other personal information of the Complainant, at the Annual General Meeting.

D. Did the Organization use and/or disclose the Complainant's personal information in contravention of the Act?

[para 101] Given all of my findings in this Order, I conclude that the Organization used and/or disclosed the Complainant's personal information in contravention of the Act. The Organization has not established that PIPA permitted it to use and/or disclose the Complainant's personal information without his consent under sections 17(d) and/or 20(m), on the basis of actual or deemed consent under section 8(1) or 8(2), on the basis that the Organization gave the Complainant prior notice of its intention to use and/or disclose his personal information and an opportunity to decline or object under section 8(3), or on the basis that it gave the Complainant prior notice that his personal employee information was going to be used and/or disclosed under section 18(2)(c) and/or 21(2)(c).

[para 102] At the oral hearing, the Organization's Privacy Officer referred to article 4 of the Collective Agreement between the Organization as employer and COPE Local 458, being the union representing Business Agents. Article 4 reads as follows:

> The Union recognizes that it is the right of the Employer to exercise the regular and customary function of Management and to direct the workforce of the Employer, subject to the terms of this Agreement. The question of whether any of these rights are limited by this Agreement may be decided through the Grievance Procedure. For the purposes of this Collective Agreement, Employer representatives shall be the Executive Officers of CUPE Local 30, or when specified the President.

The Privacy Coordinator went on to suggest that customary management rights permitted the Executive Board of the Organization to authorize the review of the Complainant's laptop and e-mail correspondence, and to authorize the reading of the E-mails aloud at the Annual General Meeting. He said that, if an employee takes issue with such authorizations by the executive officers representing the employer, he or she should initiate a grievance in accordance with article 4.

[para 103] However, a collective agreement and customary management rights cannot override the application of PIPA. Section 4(1) and 4(7) make this clear in that they state the following (my emphasis):

> *4(1) Except as provided in this Act and subject to the regulations, this Act applies to every organization and in respect of all personal information.*
> *…*
>
> *(7) This Act applies notwithstanding any agreement to the contrary, and any waiver or release given of the rights, benefits or protections provided under this Act is against public policy and void.*

[para 104] Although customary management rights may assist in interpreting PIPA where there is some ambiguity in a particular section, the Organization must adhere to its statutory duties, and the requirements and limitations set out in the Act. In the context of this inquiry, the Act restricts the use and/or disclosure of the Complainant's personal

information, without his consent and insofar as an investigation is concerned, to a use and/or disclosure of his personal information for the purpose of an "investigation", as defined in the Act (which definition is not met here). As for the use and/or disclosure of the Complainant's personal employee information for the purposes of evaluating his performance, the Act required the Organization to give the Complainant prior notice (which it did not do). As for the use and/or disclosure of the Complainant's personal information for the purposes of determining whether the process for selecting the full-time Business Agent had been compromised and presenting the recommendation that the Evaluation Committee and Selection Committee be struck at the Annual General Meeting, the Act required the Organization to give the Complainant prior notice along with an opportunity to decline or object to the use and/or disclosure of his personal information (which it did not do). Finally, because PIPA sets out the recourse of making a complaint to this Office where an individual believes that his or her privacy has been violated, an individual is not required to resort to making a grievance under a collective agreement.

[para 105] In the course of the inquiry, the Organization noted that the Collective Agreement between the Organization and COPE Local 458 was recently amended. Article 23(a) now states that "[e]lectronic monitoring and surveillance shall not be used for the purposes of individual work measurement of Employees", that "any technology or systems capable of monitoring Employees or their work or any other related equipment shall not be used without the knowledge of Employees", and that "the Employee shall be advised, in writing, of the location and purpose of all surveillance and tracking devices". In its written submissions, the Organization further indicated that its Policy Committee is working toward developing and implementing specific policies regarding computer and e-mail use by employees, and regarding a process to ensure that investigations are conducted in compliance with PIPA.

[para 106] I acknowledge the foregoing efforts of the Organization, and commend it for them. Because the Organization is already taking steps to ensure that it complies with PIPA in the future, I find it unnecessary to set out many terms in my order below, as asked by the Privacy Officer at the oral hearing. Apart from a specific term with respect to ensuring that the Organization's officers and employees are made aware of the Organization's obligations under the Act, my order is more generally worded so as to require the Organization to comply with PIPA. The Organization should take the appropriate steps in order to comply.

V. ORDER

[para 107] I make this Order under section 52 of PIPA.

[para 108] I find that the Organization used and/or disclosed the Complainant's personal information in contravention of the Act. Under section 52(3)(e), I order the Organization to stop using and disclosing personal information in contravention of the Act, or in circumstances that are not in compliance with the Act.

[para 109] Under section 52(3)(a), I order the Organization to perform its duty under what are now sections 18(1)(c) and 21(1)(c) by ensuring that it gives prior notice to individuals before using or disclosing their personal employee information without their consent (unless their consent is not required under sections 17 and 20). Similarly, I order the Organization to perform its duty under section 8(3)(a) by ensuring that it gives prior notice to individuals before using or disclosing their personal information without their consent, as well as gives them a reasonable opportunity to object or decline (unless their consent is not required under sections 17 and 20, or the use or disclosure is in accordance with section 18 or 21).

[para 110] Under section 52(4), I specify, as a term of this Order, that the Organization ensure that all of its officers and employees, including all members of the Executive Board, are made aware of the Organization's obligations under the Act.

[para 111] I further order the Organization to notify me and the Complainant, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order. The notification should indicate the Organization's acknowledgement of each of my orders in the preceding paragraphs, as well as describe the way in which the Organization has communicated its obligations under the Act to all of its officers and employees.

Wade Riordan Raaflaub
Adjudicator