

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2016-03

March 17, 2016

ALBERTA UNION OF PROVINCIAL EMPLOYEES

Case File Number P2626

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Personal Information Protection Act* (the Act or PIPA) to the Alberta Union of Provincial Employees (the Organization). He requested his entire personal file. The Organization provided certain information, but withheld meeting notes taken by Member Services Officers by applying sections 24(2)(a), (b) and (c). The Adjudicator determined that portions of the withheld information did contain the Applicant's personal information and were subject to the Act. She ordered the Organization to re-exercise its discretion in withholding the Applicant's personal information as the Organization's explanation for withholding information related to information other than the Applicant's personal information.

Statutes Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss 1(1)(f)(g), 24(2)(a)(c)(d), 52

Authorities Cited: AB: Orders P2006-004, P2006-005, P2011-D-003, P2015-05

Cases Cited: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289, *Hansraj v. Ao*, 2002 ABQB 385 (CanLII), *Pinder v. Sproule*, 2003 ABQB 33 (CanLII)

I. BACKGROUND

[para 1] The Applicant made an access request under the *Personal Information Protection Act* (the Act or PIPA) to the Alberta Union of Provincial Employees (the Organization). He was a member of the Organization. The request was for his entire personal file. The Organization responded to this request by indicating that it does not keep a personal file of its members. The Organization provided documentation regarding the Applicant's Workers' Compensation Board matter, the Applicant's Long Term Disability Insurance matter and documentation regarding the Applicant's Grievance File.

[para 2] The Organization denied access to certain notes taken by Member Services Officers citing section 24(2)(c) (information collected for an investigation or legal proceeding) and 24(2)(d) (release of information might result in that type of information no longer being provided). At a later stage, it also applied section 24(2)(a). The information withheld is notes taken by the Organization's employees during two meetings attended by the Applicant.

[para 3] The Applicant requested a review of the Organization's response to his access request. The Commissioner authorized mediation. This did not resolve the matter and it was set down for inquiry.

II. INFORMATION AT ISSUE

[para 4] The information at issue is 14 pages of handwritten notes of meetings held on September 26, 2013 and November 25, 2013.

III. ISSUES

The Notice of Inquiry sets out the issues:

1. Are the notes requested by the Applicant his personal information under PIPA?
2. If the answer to the above question is no, does PIPA apply?
3. If the answers to questions 1 and 2 are yes, did the Organization properly apply section 24(2)(a) to withhold the information from the Applicant?
4. If the answers to questions 1 and 2 are yes, did the Organization properly apply section 24(2)(c) to withhold the information from the Applicant?
5. If the answers to questions 1 and 2 are yes, did the Organization properly apply section 24(2)(d) to withhold the information from the Applicant?

IV. DISCUSSION OF ISSUES

- 1. Are the notes requested by the Applicant his personal information under PIPA?**

[para 5] An applicant may request only his or her own personal information under section 24(1) of the Act.

24(1) An individual may, in accordance with section 26, request an organization

(a) to provide the individual with access to personal information about the individual, or

...

[para 6] Personal information is defined in section 1(1)(k) of the Act:

1(1) In this Act,

...

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

[para 7] The Applicant asserts that the records at issue “contain information about me and are my personal information”. He also asserts:

The notes from an employee meeting serve as record of the information presented, as well as a reference for employee after the meeting ends. For this reason the Organization should provide a copy of the records of the meeting to the union member/employee for him to keep. If the employee has a copy of the notes taken during the meeting, this improves the reliability and transparency of the records...In my opinion it is my privilege to access and examine all information about me (including opinions and observations) and PIPA Act allows me to make necessary corrections to the information if that information is inaccurate.

[para 8] The Organization did not make submissions on the issue of whether or not the withheld information is the personal information of the Applicant.

[para 9] Previous orders of this office have considered the term “personal information”. In Order P2006-004, former Commissioner Work at para 12 states:

The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant - and that is therefore connected to them in some way - is not necessarily "about" that person. In this case, only a part of the information that the [Applicant] asked for was information "about" him.

[para 10] In Order P2015-05, the Director of Adjudication said (at para 26):

In my view, someone's version of events or the particular things they observed in a particular situation is their information, though the event may have involved an applicant. Choosing what to recount is implicitly expressing an opinion as to what it is important to convey. Some accounts may be more factual than others, for instance where one person is simply recalling, without comment, what another person said. However, in other types of circumstances, while an account of events may contain purely factual items of information about an applicant, much of the account will also consist of opinion or value laden observations.

[para 11] In Order P2006-005, former Commissioner Work, at para 34, commented on the purpose of the access provisions in PIPA, which he contrasted with the access provisions in freedom of information legislation:

Because a primary purpose of [the FOIP Act] is to provide access to information, access requests are interpreted broadly. In contrast, [PIPA] is intended to protect personal information and to govern the purposes for which an organization may collect, use and disclose personal information. Access requests under [PIPA] are therefore not given a broad interpretation as they are under [the FOIP Act], since the right to make an access request under [PIPA] is intended only to enable an individual to determine whether his or her personal information is being collected, used and disclosed by an organization in accordance with [PIPA]. [PIPA] does not authorize an individual to request information other than the individual's own personal information.

[para 12] The Applicant states that:

My objective is to collect all pertaining information, so I can accurately and precisely report facts as they occurred. In the Human Rights context there is no provision for the process of discovery. Therefore it is particularly important for me to get access to all documents that are directly relevant to my case. The September 26, 2013 and November 25, 2013 meetings and notes taken during these meetings ("the Records Issue") are evidence in my case. My request to access "the Records at Issue" is a part of information gathering process in which collection of all pertaining information is essential to produce well documented report.

[para 13] From this and the Applicant's submission in para 7, it would appear that the Applicant is seeking information relating to, or affecting him, in addition to information that is about him. As discussed above, information relating to him, but is not about him, is not his personal information.

[para 14] The withheld information consists of handwritten notes regarding two meetings. At the September 26, 2013 meeting, representatives of the Applicant's former employer, the Applicant and representatives of the Organization were in attendance. At this meeting the Applicant's return to work was discussed. Pages 1-4 are handwritten notes of this meeting.

[para 15] At the November 25, 2013 meeting the Applicant, his wife and representatives of the Organization were in attendance. At this meeting there were discussions about the Applicant's recent termination. Pages 5-12 are a recording of what was said by individuals at that meeting. Pages 13 and 14 are notes of that meeting

Pages 1-4, 13 and 14

[para 16] Pages 1-4, 13 and 14 are the notes of a Member Services Officer (MSO1) of the meetings (1-4, the September meeting, 13 and 14, the November meeting). These notes are the MSO1's documentation of the positions of the parties at the meeting. They contain her impressions of the conversations and the meeting generally with some detail of what was actually said by the participants.

[para 17] In Order P2015-05, the Director of Adjudication dealt with a similar situation where notes were taken at a meeting where an Applicant and an Organization's representative were present. At para 34 she said:

Similar considerations apply to notes of some of the meetings in which the Applicant was present. One of the sets of notes withheld by reference to litigation privilege appears to simply record the Applicant's statements about his views and positions, and his observations of events, recorded in what seems to be a non-subjective way, and on this account is his personal information (these notes will be discussed further below at para 46, and paras 85 to 87). However, other notes, even though recording a situation in which the Applicant was present, document positions others were taking and explanations they were giving for decisions that had been made, which is not the Applicant's personal information. (my emphasis)

[para 18] The notes on pages 1-4, 13 and 14 "document positions others were taking and explanations they were giving for decisions that had been made" within the terms of the foregoing excerpt. For example, there are notes about why certain options were being put forward by the representatives of the employer. These are the opinions and positions of those representatives. Following the reasoning in Order P2015-05, this is not the Applicant's personal information.

[para 19] Further in these pages, there are descriptions of how the conversation is proceeding. There are assessments of how individuals are reacting. There are questions in the notes that appear to be a flag to the note taker to follow-up on certain issues. I characterize all of this as the assessments or analysis of MSO1. This descriptor encompasses all of the notes taken by MSO1 (pages 1-4, 13 and 14). Since these notes are not the Applicant's personal information, they are not subject to the provisions of the Act. The Organization is not obliged to disclose these records to him.

[para 20] I find that pages 1-4, 13 and 14 do not contain the Applicant's personal information. The Applicant is not entitled access to those records under the provisions of the Act.

Pages 5-12

[para 21] Pages 5-12 are the notes of another Member Services Officer (MSO2) of the November 25 meeting. These notes serve as a transcript of the meeting as nothing appears to be removed or edited by the writer. The majority of the conversation is between MSO1 and the Applicant. MSO2 is recording what is being said by these two

people. In MSO2's notes, there are only 4 occasions (and 15 lines) where someone other than the Applicant and MSO1 is speaking.

[para 22] The notes that I have reviewed on pages 5-12 contain many instances of "simply record[ing] the Applicant's statements about his views and positions, and his observation of events, recorded in what seems to be a non-subjective way" as described by the Director of Adjudication in the excerpt above in para 17. This then, is the Applicant's personal information. As Commissioner Work describes it, in para. 30 in Order P2011-D-003:

What is "about him" is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number.

[para 23] Information withheld that includes the Applicant's personal information is in the notes taken by MSO2 of the November meeting. The notes are formatted with the name of the speaker on one side of the page and what was said by that speaker on the opposite side. The information recorded opposite the Applicant's name is his personal information as it records what the Applicant has said.

[para 24] For greater clarity, I have prepared a table that lists page numbers and the paragraphs on that page that I find are the Applicant's personal information. This is information that the Applicant provided to the Organization about himself and is his personal information.

PAGE NUMBER	PARAGRAPH NUMBER
5	1, 3
6	1, 3, 5
7	1, 3
8	1, 3, 5
9	2, 4, 6
10	1, 3, 5
11	2
12	1

[para 25] Also the information recorded alongside other speakers' names that contain information as discussed above in para 21 is also the Applicant's personal information. These instances describe something that the Applicant has done or ask him questions. A similar table has been prepared of my findings that this is the Applicant's personal information:

PAGE NUMBER	PARAGRAPH NUMBER
6	4
8	2
10	6
11	1, 6
12	4

[para 26] When I refer to the Applicant's personal information in the remainder of this Order, I refer to the information described in the tables above. It is only this information that is subject to the provisions of the Act. As I have found in para 19, pages 1-4, 13 and 14 do not contain the Applicant's personal information.

2. Did the Organization properly apply section 24(2)(c) to withhold the information from the Applicant?

[para 27] Section 24(2)(c) of the Act permits an organization to withhold personal information that was collected for an investigation or legal proceeding.

24(2) An organization may refuse to provide access to personal information under subsection (1) if

...

(c) the information was collected for an investigation or legal proceeding;

[para 28] Sections 1(1)(f) and (g) of PIPA define "investigation" and "legal proceeding" as follows:

1(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;

(g) "legal proceeding" means a civil, criminal or administrative proceeding that is related to

- (i) a breach of an agreement,*
- (ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
- (iii) a remedy available at law;*

[para 29] If the Applicant's personal information was collected in an investigation into the breach of an agreement or for an administrative proceeding relating to that breach, the Organization may withhold the Applicant's personal information under section 24(2)(c).

[para 30] The Organization's submissions are intended to apply to all of the notes. Having found that only portions of the notes are the Applicant's personal information and are subject to the provisions of the Act (paras 24, 25), this discussion will concern only those portions of the records that are the Applicant's personal information.

[para 31] The Organization argues that the meeting notes were part of the Organization's investigation of a workplace dispute and would serve as the evidentiary basis for a legal proceeding.

Was the Organization collecting the Applicant's information for an investigation or legal proceeding?

[para 32] From the affidavit of MSO1 (one of the note takers) I learn:

1. The Organization is a registered trade union in Alberta.
2. The Applicant is a member of the Organization.
3. The Organization and the Applicant's employer are bound to a collective agreement that governed the Applicant's employment.
4. The Applicant was in a dispute with his Employer regarding workplace accommodation.

[para 33] This MSO also states:

The November 25, 2013 meeting arose as a result of the Applicant's termination from employment, and was attended by the Applicant, his wife, and representatives of the Organization. It involved a discussion of what steps could be taken to challenge the termination.

These meetings formed part of my investigation to determine if the Employer's treatment of the Applicant was in breach of the Collective Agreement. The Records at Issue were taken to document the investigation, and would serve as the basis for any opinion to the Organization on whether to bring the Applicant's concerns to arbitration. If the matter did proceed to arbitration, the matters recorded in the Records at Issue would likely form the evidentiary basis for the Organization's submissions.

[para 34] The definition of legal proceedings in the Act includes an administrative proceeding that is related to a breach of an agreement (the Collective Agreement in this case). The meeting on November 25 was a discussion between the Organization and the Applicant about how to proceed after termination of the Applicant's employment.

[para 35] I find the Organization was investigating a potential breach of the collective agreement. In investigating the breach, I find the Organization's representative took notes at a meeting between the Applicant and representatives of the Organization. These notes contain the Applicant's personal information as outlined in paras 24 and 25.

[para 36] I find that the notes taken by the Organization that contain the Applicant's personal information were taken for the purpose of an investigation or legal proceeding. I find that section 24(2)(c) applies to the Applicant's personal information in the notes.

3. Did the Organization properly apply section 24(2)(d) to withhold the information from the Applicant?

[para 37] Section 24(2)(d):

24(2) An organization may refuse to provide access to personal information under subsection (1) if

...

(d) the disclosure of the information might result in that type of information no longer being provided to the organization when it is reasonable that that type of information would be provided;

[para 38] The Organization submits:

To effectively conduct investigations, the Organization's membership services Officers ("MSOs") need to accurately and candidly record their observations and opinion regarding members and their concerns. Determining whether a dispute has merit as a grievance involves determining whether the member is credible and honest, including assessments regarding the member's behaviour and state of mind. If the MSO's notes of conversations with the members are to be disclosed, the MSOs would be reluctant to write down their observations and opinions, which in turn could result in less efficient and accurate assessment and/or resolve of workplace complaints and disputes under the Collective Agreement.

[para 39] Here the Organization refers to something other than the Applicant's personal information: the analysis and views of MSO1. I have already found that information is not subject to the Act.

[para 40] In this case, the records at issue that contain the personal information of the Applicant are part of a recording of a conversation taking place. While opinions are expressed by the people at the meeting about how to proceed after his termination, they are done so in the presence of the Applicant. There are no opinions in the notes that the Applicant would not have heard.

[para 41] I cannot see how disclosing the Applicant's personal information to him that he provided to the Organization would result in that type of information no longer provided to the Organization. The Organization is confusing the Applicant's personal information which is subject to the Act with MSO1's analysis which is not subject to the Act and need not be provided to the Applicant.

[para 42] I find that section 24(2)(d) does not apply to the records at issue where they contain the personal information of the Applicant (paras 24 and 25).

Exercise of Discretion

[para 43] As section 24(2)(c) is a discretionary (“may”) exception of the Act, I must now determine whether the Organization properly exercised its discretion to withhold personal information, considering the objects and purposes of the Act and the purpose of the exception.

[para 44] Upon my request for information on how the discretion was exercised, the Organization provided me with submissions and an affidavit of a director of the Organization.

[para 45] In his affidavit, it is clear that the director of the Organization is also referring to the MSO1’s analysis and assessment and not the Applicant’s personal information. The former is not subject to provisions of the Act. He states:

Not every matter can proceed to arbitration, and part of the Organization’s duty is to assess which claims have merit. Determining the merit of a matter will often involve assessing whether the member is credible, being reasonable and if the alleged employer behavior is actually improper. This assessment and pre-arbitration resolution process is conducted by the Organization’s Member Service Officers (“MSOs”).

...

As part of their job resolving member concerns, MSOs regularly meet with members and their employers. During those meetings, MSOs usually take notes of what has been discussed. These notes are normally just of the points the MSO feels are salient and are not verbatim. The notes are for the MSO to refresh their own recollection of discussions, and are typically not reviewed by other persons.

...

Given that the MSOs notes need to contain an assessment of factors that go to the strength of both sides’ position, they may contain annotations regarding the member that the member may disagree with or find objectionable. For example, the notes may indicate that the MSO agrees with the employer’s position over that of the members, or thinks the member is lying, being evasive, overly sensitive, or unreasonable. Additionally, the notes may contain comments revealing the Organizations labour relations strategies or the MSOs opinions about particular employers or management personnel.

[para 46] In this case, the portions of the notes that contain the Applicant’s information are written by MSO2. The director asserts that the notes are not typically reviewed by others, however the affidavit of MSO1 clearly indicates that she would use MSO2’s notes in her investigation and to provide an evidentiary basis for legal proceedings. Further, unlike the director’s assertions which do not address these records directly, but only the Organization’s processes in a general way, it appears that MSO2’s notes are very close to a verbatim recording of the conversation. As such, the notes would have been useful to MSO1 in her investigation.

[para 47] The Organization asserts that it has balanced the rights of the Applicant to his personal information and the need to preserve the confidential nature of the notes of the MSOs. The Organization considered the following:

1. The records at issue are notes that were taken at meetings where the Applicant was present and could have taken his own notes.
2. The records at issue were never intended to be read or used by parties other than the MSOs involved in the Applicant's workplace dispute.
3. If the Organization is not permitted to maintain the confidentiality of the MSOs' meeting notes, this could impair the Organization's relationships with its members and employers, which in turn could impair the Organization's ability to investigate, assess and resolve workplace disputes.
4. If the Organization were required to disclose the notes, MSOs would likely be less candid and fulsome in their notes, which would also impair their ability to efficiently investigate, assess and resolve workplace disputes.
5. In the present case, the Organization has disclosed all documents to the Applicant except the meeting notes.

[para 48] In this case, the Organization did not consider whether or not the information at issue was the Applicant's personal information in the way that I have discussed. Rather, they were concerned that information regarding the MSOs' analysis and opinions would be disclosed. As I have found that the opinions of the MSOs were not the Applicant's personal information, what remains is a record of a conversation where the Applicant provided his personal information and where his personal information was discussed with him.

[para 49] The Organization's exercise of discretion does not address the fact that the Applicant provided the information that they seek to withhold. If the Organization contemplates some harm from disclosing this information to the Applicant, they have not expressed that concern to this inquiry.

[para 50] I have found that portions of the information at issue contain the Applicant's personal information. These portions are outlined in the tables in paras 24 and 25.

[para 51] I will order the Organization to reconsider its exercise of discretion to withhold the Applicant's personal information in these records from the Applicant. I will ask the Organization to consider that the Applicant provided his personal information to the Organization at the time the notes were taken and was present when his personal information was discussed.

4. Did the Organization properly apply section 24(2)(a) to withhold the information from the Applicant?

[para 52] The Organization, in its initial response to the Applicant's request for his personal information, did not withhold the information at issue in reliance on section 24(2)(a). It would appear that at some time later, perhaps during mediation, the Organization did assert that this section would apply to the information. Since the Notice of Inquiry set this as an issue and both parties have submitted argument on this point, I will also deal with this issue.

[para 53] Section 24(2)(a) of the Act:

24(2) An organization may refuse to provide access to personal information under subsection (1) if

(a) the information is protected by any legal privilege

[para 54] The Organization is asserting that litigation privilege attaches to the information at issue.

[para 55] The Organization submits:

The Records at Issue were created in contemplation of litigation – either a grievance or a duty of fair representation complaint – and the dominant purpose of their creation was to aid the Organization in pursuing a grievance, and if necessary in defending a duty of fair representation complaint. As such, they are protected by litigation privilege and need not be disclosed pursuant to section 24(2)(a).

[para 56] The Organization did not tell me whether lawyers are necessarily involved in taking forward grievance proceedings, or whether this task is given to union representatives. In the event of the latter, an issue could arise whether litigation privilege can be claimed where an employee is represented by a union representative (in contrast to a situation in which the employee is represented by a lawyer or is self-represented). The Supreme Court said in *Blank v. Canada*, 2006 SCC 39: “Litigation privilege... contemplates ... communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties”, a statement which does not explicitly embrace a situation of union representation. I do not need to decide this question, however, because I find below that litigation privilege does not apply to the Applicant’s personal information requested in this case.

[para 57] In *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, at para 27, Justice Binnie talks of the object and purpose of litigation privilege:

Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[para 58] Litigation privilege applies to withhold the documents from an adversary. Since the litigation that is claimed to be contemplated is a grievance, the adversary is the employer, not the Applicant. Justice Slatter in *Hansraj v. Ao*, 2002 ABQB 385 (CanLII) and *Pinder v. Sproule*, 2003 ABQB 33 (CanLII) affirmed the principle that the privilege belongs to the client. Asserting litigation privilege against the Applicant fails on this ground.

[para 59] This claim also fails on another ground.

[para 60] In *Blank*, Justice Fish wrote at para 36:

I therefore agree with the majority in the Federal Court of Appeal and others who share their view that the common law litigation privilege comes to an end, absent closely related proceedings, upon the termination of the litigation that gave rise to the privilege:

[para 61] The Organization has conceded that the time period to grieve under the Collective Agreement has ended. The claim for litigation privilege on that basis has therefore ended.

[para 62] The Organization may also be arguing that the Applicant's personal information, or some part of it, was collected for the dominant purpose of defending an unfair representation claim. The Organization directed me to *Canadian Natural Resources Ltd. v. ShawCor Ltd. (2014) ABCA 289*. The Court at paras 82 - 84 states:

The test for litigation privilege in Alberta is that of "dominant purpose" as described by this Court in *Nova, An Alberta Corporation v Guelph Engineering Co* (1984), 1984 ABCA 38 (CanLII), 50 AR 199 [*Nova*]. The dominant purpose test was explained in *Moseley, supra* at para 24 as follows:

The key is, and has been since this Court adopted the dominant purpose test in *Nova*, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. [emphasis in original]

Accordingly, a record will not be protected by litigation privilege simply because litigation was one of several purposes for which the record was created: *Dow Chemical, supra* at para 38. In *Blank, supra* at paras 59-60, the Supreme Court of Canada affirmed the dominant purpose test and emphasized its narrow nature at paras 60-61:

The dominant purpose test is more compatible with the contemporary trend favouring increased disclosure...

While the solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, the litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.

In addition, it must be remembered that under the dominant purpose test, the focus is on the purpose for which the records were prepared or created, not the purpose for which they were obtained: *Ventouris v Mountain*, [1991] 1 WLR 607 at 620-622 (Eng CA); *General Accident Assurance Company v Chrusz et al* (1999), 1999 CanLII 7320 (ON CA), 45 OR (3d) 321 at 334 (CA). Pre-existing records gathered or copied at the instruction of legal counsel do not automatically fall under litigation privilege: *Bennett v State Farm Fire and Casualty Company*, 2013 NBCA 4 (CanLII) at paras 47-51, 358 DLR (4th) 229. Because the question is the purpose for which the record was originally

brought into existence, the mere fact that a lawyer became involved is not automatically controlling. (my emphasis)

[para 63] Further, at para 87, the Court states:

An assertion that something was for the dominant purpose of litigation must always be examined in the context of all the facts, the nature of the records in question and all the real reasons that the records were created.

[para 64] The affidavit evidence of the MSO1 clearly indicates that the notes would be used as an evidentiary basis for the Organization's submissions in arbitration of the grievance (see para 33). She states further:

Additionally, if the Applicant is unhappy with his representation by the Organization, he has the right to bring a duty of fair representation complaint with the Labour Relations Board. Our investigation, including the Records at Issue, would form the basis on which the Organization would defend such a complaint. (my emphasis)

[para 65] The affidavit evidence indicates that the records were not created primarily to defend an unfair representation complaint. While the records might have been used for that purpose had it become necessary, it was not the dominant purpose for their creation. I find, on the basis of MSO1's affidavit that the dominant purpose of the notetaking was to determine whether to pursue a grievance and not for the purpose of defending a fair representation complaint.

[para 66] Further, for litigation privilege to apply, litigation must be reasonably in contemplation. I have no evidence that the Applicant is considering a complaint of unfair representation. Indeed, the Organization has told me that part of the purpose of the meetings at which the notes were taken was to determine whether the Applicant even wished to pursue the grievance.

[para 67] I find the dominant purpose for creating the records at issue was to determine if a grievance should be pursued on behalf of the Applicant by the Organization. Therefore, the Organization cannot claim litigation privilege on the basis of a prospect of an unfair representation claim brought by the Applicant against it.

[para 68] I find that section 24(2)(a) does not apply to the records at issue.

V. ORDER

[para 69] I make this Order under section 52 of the Act.

[para 70] I find that pages 1-4, 13 and 14 of the information at issue do not contain the Applicant's personal information.

[para 71] I find that the Organization withheld the Applicant's personal information in portions of pages 5-12 of the information at issue. Those portions are outlined in paras 24 and 25.

[para 72] I find that section 24(2)(c) (information collected for an investigation or legal proceeding) applies to the Applicant's personal information.

[para 73] I find that section 24(2)(d) (information no longer being provided) does not apply to the Applicant's personal information.

[para 74] I find that section 24(2)(a) (legal privilege) does not apply to the Applicant's personal information.

[para 75] I order the Organization to re-exercise its discretion to withhold the Applicant's personal information in these records having regard to the fact that the Applicant provided his personal information to the Organization at the time the notes were taken, and was present at the time his personal information was being discussed.

[para 76] I order the Organization to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order. If the Organization decides to continue to withhold the Applicant's personal information, I further order it to provide an explanation to me and to the Applicant of how it exercised its discretion.

Neena Ahluwalia Q.C.
Adjudicator