ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-30

June 20, 2022

CHINOOK'S EDGE SCHOOL DIVISION

Case File Number 008297

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Summary: The Complainant is a teacher employed by Chinook's Edge School Division (the Public Body); she is represented by the Alberta Teachers Association (ATA). Under section 118 of the *School Act*, the Public Body sent the Complainant to a physician (the Physician) for a medical examination in order to manage her employment. The Physician provided much more information to the Public Body than the ATA and the Public Body had agreed would be provided. The Public Body retained the additional information. On behalf of the Complainant, the ATA complained that the Public Body had collected the Complainant's personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act).

The Adjudicator considered whether the Information and Privacy Commissioner (the Commissioner) had jurisdiction over the complaint, or whether exclusive jurisdiction lay with a Labour Arbitrator as provided for in the *Labour Relations Code*, and under the applicable collective bargaining agreement. The Adjudicator concluded that the Commissioner had concurrent jurisdiction with a labour arbitrator over the issues in the Inquiry.

The Adjudicator found that the Public Body collected the Complainant's personal information in contravention of section 33 the Act. The Adjudicator found that the additional information provided by the Physician was not necessary for managing the Complainant's employment; therefore, the Public Body was not permitted to collect it under section 33(c). The Adjudicator ordered the Public Body to cease collecting the Complainant's personal information in contravention of the Act, and to destroy all copies of the additional information.

Statutes Cited: AB: *Education Act*, SA 2012, c. E-0; *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25, ss. 1(d)(v); 1(j), 1(j)(i), 1(n)(i), (ii), (iii), (v), (vi), (vii), (viii), (ix); 1(p)(vii); 2(b), 2(e); 5; 33; 33(c); 34(1)(n); 39(1)(a); 40(x); 53, 53(1)(b); 65; 65(3); 66; 68; 69; 70; 70(a); 70(b); 72; 73; *Human Rights Code*, C.C.S.M., c. H175 s. 58; *Labour Relations Code*, RSA 2000 C. L-1, ss. 12(4); 67.1, 67.1(1.1)(c)(iv), 67.1(3), 67.1(4), 67.1(10); 135; 136; 142(1); 142(4); 143(1); *School Act*, RSA 2000, c. S-3 s. 118; *Workers' Compensation Act*, R.S.A. 2000 c. W-15 ss. 13.1(1); 17(1).

Authorities Cited: AB: Orders 98-002, 2001-004, F2002-020, F2005-03, F2006-019, F2017-83, F2020-26, P2021-09.

Cases Cited: *Amalgamated Transit Union, Local 583 v. Calgary (City),* 2007 ABCA 121; *British Columbia (Workers' Compensation Board) v Figliola,* 2011 SCC 52; *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*, 2007 ABCA 120; *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3; *Northern Regional Health Authority v Horrocks*, 2021 SCC 42; *Penner v Niagara (Regional Police Services Board),* 2013 SCC 19; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 SCR 185; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 SCR 360.

I. BACKGROUND

[para 1] The Complainant is a teacher, employed by Chinook's Edge School Division (the Public Body).

[para 2] In 2017, the Public Body became concerned about the Complainant's behavior at work. In order to determine how to address the Complainant's behavior, pursuant to section 118 of the *School Act*, RSA 2000, c. S-3 (the *School Act*) then in force[1], the Public Body required the Complainant to undergo a medical examination. For ease of reference, section 118 of the *School Act* is reproduced below:

> *118 A board may require any person employed by it to undergo a medical examination by a physician named or approved by the board.*

[para 3] The Public Body initially provided the Complainant with a broad Authorization to Release Information (the Initial Authorization) to sign in respect of the information that the examining physician (the Physician) would gather through the examination. The Initial Authorization permitted the Physician to disclose to the Public Body certain information gathered from the medical examination of the Complainant.

[para 4] The Complainant was represented by the Alberta Teachers' Association (ATA) at the time of the medical examination. The ATA challenged the scope of the Initial Authorization, and, subsequently, the parties agreed that the Physician would

[1] Since replaced by the *Education Act*, SA 2012, c. E-0.3; declared in force as of September 1, 2019.

provide a physician's statement and report answering 11 specific questions relevant to the conditions of the Complainant's continued employment with the Public Body.

[para 5] The Complainant states that the 11 questions were:

> • Whether the person is ill or injured and requires medical leave (yes or no) and commencing date.
>
> • Whether the person is medically fit to return to work as a teacher (yes or no)
>
> • Alternatively, that the person requires medical leave and brief explanation of nature of the illness or disability but "do not provide diagnosis"
>
> • Symptoms or functional limitations associated with the illness or injury which are preventing the employee from completing his/her duties as a teacher.
>
> • Is there a treatment plan in place (yes or no) and if so, whether it is being followed.
>
> • Whether there is any aspect of the treatment plan that would prevent the employee from completing his/her duties as a teacher.
>
> • Has the person been referred to a medical specialist (yes or no)
>
> • Can this person work on a part-time or restricted basis and if yes, describe restrictions.
>
> • List any anticipated restrictions upon return to work.
>
> • Anticipated return to work date and next reassessment (if applicable)

[para 6] I note that the list of "11 questions" above consists of only 10 points. On the paperwork provided to the Physician, the last point is split into two, bringing the total to 11: the anticipated return to work date, and the date of the next reassessment.

[para 7] A revised Authorization to Release Information (the Revised Authorization) was drafted in respect of the agreement that the Physician would prepare a report and statement addressing 11 specific questions. The Revised Authorization is reproduced below:

> **Authorization to Release Information**
>
> I, [Complainant's name], hereby consent to history taking (and examination if necessary) by [the Physician]. I understand that this history will be used to generate a report that will be forwarded to the referring third party that answers the questions;
>
>> (i) is there an identifiable medical condition that adversely affects the ability of [the Complainant] to carry out her role as a school teacher, and
>>
>> (ii) the questions contained in the Physician's Statement attached to my Authorization to Release Information.

> The referring party has not asked for a diagnosis. I also authorize [the Physician] to complete the attached Physician's Statement for release to the Board of Trustees of Chinook's Edge School Division No.73, the referring party.
>
> I further authorize [the Physician] to obtain and review all relevant medical information (including hospital records, reports of laboratory investigations and Doctor's notes) for use in the preparation of the above referenced medical report and Physician's Statement
>
> I authorize [the Physician] to release his report and Physician's Statement to Mr. Kurt Sacher, Superintendent of Schools, for the referring party.
>
> Dated this 23 day of February, 2017 at Edmonton, Alberta.

[para 8] The "Physician's Statement" referred to in the Revised Authorization contains the 11 questions and the Physician's answers to them.

[para 9] While the ATA and the Public Body agreed to the terms of the Revised Authorization, the Complainant signed the Initial Authorization. I note thought that neither party argues that the Initial Authorization governs what information the Complainant agreed to provide to the Public Body. The terms of the Revised Authorization as agreed to, are the ones that apply in this case.

[para 10] Following the medical examination, the Physician provided the Public Body more information about the Complainant than what the Revised Authorization permitted. The Physician provided the Public Body a five-page "Interview Intake Questions Form" (the Intake Form) regarding the Complainant's medical, personal, and employment history, as well as a ten-page medical report (the Physician's Report) containing the Complainant's personal, family, and medical history, the last three pages of which respond to the 11 questions agreed to by the parties.

[para 11] The Complainant and the ATA requested that the Public Body expunge from its files the information provided by the Physician, beyond answers to the 11 questions, but the Public Body did not do so. The Public Body's Superintendent informed the Complainant of this by telephone on November 28, 2017. The ATA then filed a complaint on behalf of the Complainant with this office, regarding collection of the Complainant's personal information by the Public Body.

[para 12] Mediation and investigation were authorized to attempt to resolve the issues. In the course of mediation and investigation, the Public Body agreed to remove all "over collected" information about the Complainant from her personnel file. It redacted from its file all information provided by the Physician past the first page, except for the answers to the 11 questions, and the "Summation" on page 7 of the Physician's Report. Nevertheless, the parties remain at odds about whether collection of all of the information provided by the Physician was permitted under the Act. The Public Body also disputes that it can be said to have collected the information at all. Accordingly, since the legal issues remain unresolved, the matter proceeded to Inquiry.

II. ISSUES

ISSUE A: Is section 33(c) of the FOIP Act inconsistent or in conflict with section 118 of the *School Act*? If so, pursuant to section 5 of the FOIP Act, does section 33(c) of the FOIP Act prevail over section 118 of the *School Act*?

ISSUE B: Did the Public Body collect the Complainant's personal information in compliance with, or in contravention of Part 2 of the FOIP Act?

[para 13] At Inquiry, the Public Body argued that issues regarding whether it complied with the Act were within the exclusive jurisdiction of a labour arbitrator, under the dispute resolution process under the applicable collective bargaining agreement (CBA) between the Complainant and the Public Body. In respect of this argument, I added the following issue to this Inquiry:

ISSUE C: Does the Commissioner have jurisdiction over the Complaint?

III. DISCUSSION OF ISSUES

Preliminary Matter – Other Issues not added

[para 14] In addition to Issue C, the Public Body also requested that I add issues concerning the authority of the Information and Privacy Commissioner (the Commissioner) to delegate her power to extend the amount of time that the Office of the Information and Privacy Commissioner had to respond to the Complaint (Extension of Time Limits) and whether the complaint was made in a timely manner (Timeliness of Complaint). I addressed the Public Body's request to add these issues in a letter to the parties dated February 3, 2021, which contains my reasons for not adding them. Despite that these issues were not added, the Public Body nevertheless included its arguments about them in its initial submission. Since the issues were not added to this Inquiry, I do not consider those arguments.

[para 15] In the Complainant's Request for Inquiry, she raised the issue of whether section 118 of the *School Act* is inconsistent or in conflict with section 33 of the Act. As the concern about collection of information generated in the course of a medical examination under section 118 of the *School Act* was included in the original complaint, I included Issue A in the Inquiry. The Complainant also requested that I address the following other issues in this Inquiry:

> The matter of routine over collection of personal medical information by employing schools boards (the public bodies) is pervasive and represents far-reaching import to the all publicly-employed teachers in Alberta.
>
> a. The Applicant's personnel file was mailed to a wrong address.
>
> b. Medical report was first addressed and opened by the school secretary.

c. Refusal by the public body to admit that the medical information was in their possession and under their control.

d. The role of the medical practitioner contractor *vis a vis* the public body's information handling practices.

e. The apparent loss or destruction of amended medical consent forms by either the public body or the medical contractor.

[para 16] The above issues were not included in the Complainant's original complaint, and so I did not add them to this Inquiry.

[para 17] Since it relates to jurisdiction to consider the other issues, I consider Issue C first.

ISSUE C: Does the Commissioner have jurisdiction over the Complaint?

[para 18] The Public Body's position is that the essential character of the dispute in this case is one of employment, and as such, it is in the exclusive jurisdiction of a labour arbitrator under the CBA between the Complainant's Union and the Public Body, as given force by the *Labour Relations Code*, RSA 2000 C. L-1 (the Code).

[para 19] The Complainant does not dispute that a labour arbitrator would have jurisdiction to consider matters under the FOIP Act where the facts of a matter engage the provisions of the FOIP Act. However, the Complainant's position is that the Commissioner's jurisdiction is not ousted in such cases.

[para 20] The decision of the Supreme Court of Canada in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185 (*Morin*) sets out a two-part test for determining which of two competing tribunals has exclusive jurisdiction over a matter, or whether there is concurrent or overlapping jurisdiction. Recently, the Supreme Court refined the *Morin* test in *Northern Regional Health Authority v Horrocks*, 2021 SCC 42 (*Horrocks*). The Supreme Court clarified that if the relevant labour relations legislation includes a mandatory dispute resolution clause, then a labour arbitrator will have exclusive jurisdiction under the first step of the test, absent clearly expressed legislative intent to the contrary. The Supreme Court stated at paras. 39 to 41:

> To summarize, resolving jurisdictional contests between labour arbitrators and competing statutory tribunals entails a two-step analysis. First, the relevant legislation must be examined to determine whether it grants the arbitrator exclusive jurisdiction and, if so, over what matters (Morin, at para. 15). Where the legislation includes a mandatory dispute resolution clause, an arbitrator empowered under that clause has the exclusive jurisdiction to decide all disputes arising from the collective agreement, subject to clearly expressed legislative intent to the contrary.

> If at the first step it is determined that the legislation grants the labour arbitrator exclusive jurisdiction, the next step is to determine whether the dispute falls within the scope of that jurisdiction (*Morin*, at paras. 15 and 20; *Regina Police*, at para. 27). The scope of an arbitrator's exclusive jurisdiction will depend on the precise language of the statute but, in general, it will extend to all disputes that arise, in their essential character, from the interpretation, application, or alleged violation of the collective agreement. This requires analysing the ambit of the collective agreement and accounting for the factual circumstances underpinning the dispute (*Weber*, at para. 51). The relevant inquiry is into the *facts* alleged, not the *legal* characterization of the matter (*Weber*, at para. 43; *Regina Police*, at para. 25*; Quebec (Attorney General) v. Quebec (Human Rights Tribunal)*, 2004 SCC 40, [2004] 2 S.C.R. 223 ("*Charette*"), at para. 23).
>
> Where two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case. For the reasons given below, concurrency does not arise in this case. I would therefore decline to elaborate here on the factors that should guide the determination of the appropriate forum.

[para 21] The Supreme Court in *Horrocks* described what sort of legislation constitutes a mandatory dispute resolution clause and specifically listed the Code as having such a clause at paragraph 16.

[para 22] The role that a CBA plays in determining whether a dispute arises out of a CBA of was explained in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360 at paras. 25:

> To determine whether a dispute arises out of the collective agreement, we must therefore consider two elements: the nature of the dispute and the ambit of the collective agreement. In considering the nature of the dispute, the goal is to determine its essential character. This determination must proceed on the basis of the facts surrounding the dispute between the parties, and not on the basis of how the legal issues may be framed: see *Weber*, supra, at para. 43. Simply, the decision-maker must determine whether, having examined the factual context of the dispute, its essential character concerns a subject matter that is covered by the collective agreement. Upon determining the essential character of the dispute, the decision-maker must examine the provisions of the collective agreement to determine whether it contemplates such factual situations. It is clear that the collective agreement need not provide for the subject matter of the dispute explicitly. If the essential character of the dispute arises either explicitly, or implicitly, from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide: see, e.g., *Weber*, at para. 54; *New Brunswick v. O'Leary*, *supra*, at para. 6.

[para 23] Below, I consider the two step test from *Morin*. Upon applying the test, I reach the conclusion that there is concurrent jurisdiction between the Information and Privacy Commissioner and a Labour Arbitrator over the issues in this Inquiry. I now turn to the first step of the *Morin* test.

Does a Labour Arbitrator have exclusive jurisdiction?

[para 24] The Code contains mandatory dispute resolution clauses in sections 135 and 136. Section 135 states,

> *135 Every collective agreement shall contain a method for the settlement of differences arising*
>
> > *(a) as to the interpretation, application or operation of the collective agreement,*
> >
> > *(b) with respect to a contravention or alleged contravention of the collective agreement, and*
> >
> > *(c) as to whether a difference referred to in clause (a) or (b) can be the subject of arbitration*
> >
> > *between the parties to or persons bound by the collective agreement.*

[para 25] Section 136 of the Code provides for a dispute resolution process in the event that a collective agreement does not contain the provisions required under section 135. I note the CBA satisfies the requirements of section 135 in articles 15 and 16, which provide for grievance and arbitration procedures. Thus, section 136, while indicative of exclusive jurisdiction on the part of labour arbitrator over matters arising under the CBA provided there is no clear legislative intent to the contrary, is not a part of the CBA in this case.

[para 26] In light of the presence of sections 135 and 136 of the Code, per the decision in *Horrocks*, a labour arbitrator appointed pursuant to the dispute resolution procedures in the articles of the CBA will have exclusive jurisdiction to resolve a matter arising from the CBA, unless there is specific legislative intent to the contrary. For the reasons below, I find that there is specific legislative intention which indicates that the Commissioner maintains jurisdiction over the issues in this case.

[para 27] Both parties made submissions presenting their positions on what provisions of the FOIP Act and Code comprise the relevant legislation, as well as on the effect of the *Horrocks* decision on the matter of jurisdiction.

[para 28] The Complainant argues that sections 5, 53, 65, 66, and 69 of the FOIP Act suggest that the Commissioner has jurisdiction in this matter.

[para 29] Since there is no express statement in the Code or the regulations under the FOIP Act that the Code prevails over the Act, under section 5 of the FOIP Act, it is paramount legislation over the Code:

> *5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*

(a) another Act, or

(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[para 30] Section 53 describes the Commissioner's power and duty "to monitor how the Act is administered to ensure that its purposes are achieved."

[para 31] Sections 65(3), 66, and 69 set out the Complainant's right to seek a review of a collection of her personal information, and the Commissioner's power to conduct a review, and obligation to hold an inquiry unless the matter raised in the review is settled by mediation and/or investigation, as provided for in section 68.[2]

[para 32] The Public Body argues that the Code suggests an intention to provide exclusive jurisdiction to a labour arbitrator. The Public Body quotes the purpose of the Code described in *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*, 2007 ABCA 120 at para. 32:

> The Labour Relations Code seeks to, among other things, encourage the "fair and equitable resolution of disputes in the workplace". To that end, the Labour Relations Code requires that every collective agreement contain a method for the settlement of differences arising "as to the interpretation, application or operation of the collective agreement": s. 135.

[para 33] The Public Body also refers to the purpose of the FOIP Act stated in section 2(b) and (e):

2 The purposes of this Act are

(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information,

(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

[para 34] Neither party argued that any part of the *School Act* is relevant to the question of jurisdiction; after reviewing its terms, I do not see that it is.

[para 35] I find that the following provisions from the Code and the Act are also pertinent to the question of jurisdiction, and demonstrate specific legislative intent not to imbue a labour arbitrator with exclusive jurisdiction.

[2] I note that the Commissioner may refuse to conduct an inquiry under section 70. This point is discussed later in this Order.

Further Relevant Provisions from the FOIP Act

[para 36] The definition of "public body" in the FOIP Act includes, at section 1(p)(vii), "a local public body." "Local public body" is defined at section 1(j) and includes an "educational body" in section 1(j)(i). "Educational Body" includes the Public Body as a school board under section 1(d)(v):

> *(d) "educational body" means*
>
> ...
>
> *(v) a board as defined in the Education Act,*

[para 37] Section 33 places limits on the ability of the Public Body to collect personal information; the provision covers circumstances in which the individual that the information is about is an employee.

[para 38] Section 34(1)(n) of the Act contemplates a public body collecting information for precisely the same purposes and under the same circumstances for which the Public Body states it collected the Complainant's information, namely indirectly collecting information in order to manage her employment:

> *34(1) A public body must collect personal information directly from the individual the information is about unless*
>
> ...
>
> *(n) the information is collected for the purpose of managing or administering personnel of the Government of Alberta or the public body, or*

[para 39] Under section 72 of the Act, the Commissioner has the authority to issue orders with respect to inquiries under the Act. Under section 73 of the Act, the Commissioner's decision is final.

[para 40] I also observe that under section 53(1)(b), the Commissioner may make an order under section 72(3), which includes the authority to order a public body to cease collecting, using, and disclosing personal information, even without a request for review of the matter.

> *53(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may*
>
> ...
>
> *(b) make an order described in section 72(3) whether or not a review is requested,*

Further Relevant Provisions from the Code

[para 41] Under section 67.1 of the Code, the Labour Relations Board has the power to issue a marshalling order in order to avoid duplicative proceedings. The purpose of a marshalling order is stated in section 67.1(3) of the Code.

> *(3) The purpose of a marshalling order is*
>
> > *(a) to avoid duplicate or unnecessary proceedings,*
> >
> > *(b) to ensure that any necessary preliminary issues are dealt with first and in the appropriate forum,*
> >
> > *(c) to avoid the litigation or re-litigation of matters already decided in another forum or that can reasonably and fairly be determined in another forum, and*
> >
> > *(d) where a trade union that is subject to a duty of fair representation is involved in one or more of the proceedings, to clarify the extent of the trade union's duty of fair representation in relation to the various proceedings in issue as they proceed.*

[para 42] The types of proceedings to which a marshalling order may apply are stated in section 67.1(4) of the Code.

> *(4) This section applies only to proceedings that arise out of common circumstances, including a common set of legal issues or factual circumstances, or both, involving a workplace that is subject to a bargaining relationship between a bargaining agent and an employer or employers' organization.*

[para 43] Proceedings in the Office of the Information and Privacy Commissioner are explicitly included in the marshalling provisions of the Code in section 67.1(1.1)(c)(iv) of the Code. According to section 67.1(10) of the Code, the Chair or vice-chair of the Labour Relations Board, may do any of the following, upon hearing an application for a marshalling order:

> *(10) At or after the hearing, the Chair or vice-chair may grant an order that may include any one or more of the following:*
>
> > *(a) a direction that grievances or arbitrations arising out of common circumstances be consolidated and heard in one proceeding;*
> >
> > *(b) where an issue that is the subject of one or more proceedings includes a complaint or other matter before the Board, directions as to which should proceed first or in what forum the issues should be decided, so as to best protect the interests involved while avoiding unnecessary or duplicative proceedings;*
> >
> > *(c) conditions under which proceedings will continue, including an order or schedule of proceedings;*

(d) a stay of any proceeding that will be effectively determined by an arbitration or other proceeding;

(d.1) a direction to a specified adjudicative body to determine one or more of the issues that is the subject of the application for a marshalling order;

(d.2) where a proceeding is stayed by an order under clause (d) or an adjudicative body is specified under clause (d.1), a direction that no further proceeding, investigation, inquiry or other matter by an adjudicative body may be commenced or continued in relation to a matter to which the marshalling order applies;

(e) any further directions that the parties may agree on or that, in the opinion of the Board, are just and equitable in the circumstances.

[para 44] Sections 142(1) and (4) of the Code are also relevant here; they state:

> *142(1) Subject to subsections (2) and (4), no arbitrator, arbitration board or other body shall by its award alter, amend or change the terms of a collective agreement.*
>
> *(4) An arbitrator, arbitration board or other body may interpret, apply and give relief in accordance with an enactment relating to employment matters notwithstanding any conflict between the enactment and the collective agreement.*

[para 45] In my view, the FOIP Act is an enactment that relates to employment matters as contemplated in section 142(4) of the Code. Sections 33 and 34(1)(n) provide for collection of personal information (directly and indirectly) for the purposes of managing employment. Additionally, section 39(1)(a) allows a public body to use information collected in order manage employees for that purpose and section 40(x) permits disclosure for the purposes of managing employees as well.

[para 46] Under section 143(1) of the Code, an arbitrator has the authority to provide final and binding settlement of disputes,

> *143(1) An arbitrator, arbitration board or other body has the authority necessary to provide a final and binding settlement of a dispute having regard to the substance of the matters in dispute and the merit of the positions of the parties, in a manner consistent with the provisions of this Act.*

Considering the relevant legislation

[para 47] Considering the terms of the Code and the FOIP Act as mentioned above, I find that there is clear legislative intention away from exclusive jurisdiction of a labour arbitrator over the issues in this case.

[para 48] The Supreme Court in *Horrocks* provided guidance on indicators of statutory intention away from the exclusive jurisdiction of a labour arbitrator. The majority stated at paras. 32 and 33:

> That said, it remains necessary to consider whether the competing statutory scheme demonstrates an intention to displace the arbitrator's exclusive jurisdiction. In some cases, it may enact a "complete code" that confers exclusive jurisdiction over certain kinds of disputes on a competing tribunal, as it did in *Regina Police* (see also J.-A. Pickel, "Statutory Tribunals and the Challenges of Managing Parallel Claims", in E. Shilton and K. Schucher, eds., *One Law for All? Weber v Ontario Hydro and Canadian Labour Law*: *Essays in Memory of Bernie Adell* (2017), 175, at pp. 184-87). In other cases, the legislation may endow a competing tribunal with concurrent jurisdiction over disputes that would otherwise fall solely to the labour arbitrator for decision. And where the legislature so provides, courts must respect that intention.
>
> What Morin indicates, however, is that the mere existence of a competing tribunal is insufficient to displace labour arbitration as the sole forum for *disputes arising from a collective agreement*. Consequently, some positive expression of the legislature's will is necessary to achieve that effect. Ideally, where a legislature intends concurrent jurisdiction, it will specifically so state in the tribunal's enabling statute. But even absent specific language, the statutory scheme may disclose that intention. For example, some statutes specifically empower a decision-maker to defer consideration of a complaint if it is capable of being dealt with through the grievance process (see, e.g., *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 25; *Canada Labour Code*, ss. 16(l.1) and 98(3*); Canadian Human Rights Act*, R.S.C. 1985, c. H-6, ss. 41 and 42). Such provisions necessarily imply that the tribunal has concurrent jurisdiction over disputes that are also subject to the grievance process. In other cases, the provisions of a statute may be more ambiguous, but the legislative history will plainly show that the legislature contemplated concurrency (see, e.g., *Canpar Industries v. I.U.O.E., Local 115*, 2003 BCCA 609, 20 B.C.L.R. (4th) 301). In these circumstances, applying an exclusive arbitral jurisdiction model would defeat, not achieve, the legislative intent.

[para 49] As noted above, the mandatory dispute resolution provisions in sections 135 and 136 of the Code suggest that a labour arbitrator is intended to have jurisdiction over matters arising from a collective agreement. Further, section 142(4) of the Code indicates that labour arbitrator would have jurisdiction to consider the FOIP Act in relation to employment matters. However, the Commissioner has clear authority to hear this matter under the FOIP Act.

[para 50] As also already noted, the Commissioner is granted power under the Act to review information collection decisions by public bodies. The purposes of the Act in sections 2(b) and 2(e) indicate that the Legislature intended that the Commissioner review complaints against public bodies regarding, among other things, collection of personal information. There is no question that the Public Body is bound by the terms of the Act since it is explicitly included as a defined public body.

[para 51] And, as section 34(1)(n) highlights, the Commissioner’s powers of review over such decisions extend to decisions made in the employment, and hence labour-relations, context – the same decisions over which powers are given to labour arbitrators under the Code or collective agreements entered into under the Code.

[para 52] The Commissioner's power under section 53(1)(b) of the FOIP Act to inquire into collection, use, or disclosure of personal information even in the absence of a request for a review of the same is a telling and significant indicator away from the exclusive jurisdiction of a labour arbitrator as well. Under section 53(1)(b) the Commissioner may inquire into collection, use, and disclosure of personal information of her own volition irrespective of whether the complaint process under the FOIP Act, or any other piece of legislation or collective agreement, is available, or has been engaged. That is to say that the Commissioner, beyond having the run of an administrative process for resolving complaints involving personal information brought by those who allege their rights have been aggrieved, enjoys her own "dominion" over subject matter involving collection, use, and disclosure of personal information. While a collective bargaining agreement under the Code offers a grievance process that might be said to "compete" with the complaint process in the FOIP Act, there are no provisions that bar the Commissioner from examining this subject matter.

[para 53] Further, the FOIP Act contains a paramountcy provision in section 5, as quoted above, and there is no express statement in the Code or the regulations under the Act that the Code prevails over the Act. Therefore, even though the Code might be said to offer a conflicting forum in which allegations that the Act has been contravened may occur, an individual's right to the review and inquiry processes set out in sections 65(3), 66, and 69 of the Act would be not displaced or overridden by the Code's provision of a different forum. Indeed, any question of conflicting statutory terms relating to the Commissioner's jurisdiction under the Act and a labour arbitrator's under the Code would be resolved in favour of the Commissioner by reference to the paramountcy provision. The inclusion of the paramountcy provision is a forceful indicator that the FOIP Act is a "competing statutory scheme" in question which "demonstrates an intention to displace the arbitrator's exclusive jurisdiction" as discussed in *Horrocks*.[3]

[para 54] Lastly, I consider that the labour relations legislation considered in *Horrocks* did not contain provisions similar to the marshalling provisions in section 67.1(10) of the Code. Given the stated purposes of the marshalling provisions in section 67.1(4) of the Code, the Code cannot be sensibly understood to confer exclusive jurisdiction on a labour arbitrator. If there were such exclusive jurisdiction, there would be no need, or even a basis, for the Labour Relations Board to consider which proceeding is best suited to consider which issues. In other words, the Code is on the whole inconsistent with a dispute resolution model that provides exclusive jurisdiction to a labour arbitrator.

[3] In saying the above, I acknowledge that the Supreme Court of Canada in the *Horrocks* case said, at para. 34, that an arbitrator's exclusive jurisdiction trumps the common law paramountcy of human rights legislation. However, that case was not dealing with language such as section 5, which says that the conflicting legislation must "expressly provide" that it prevails despite the Act. As well, the Supreme Court case talked about the express paramountcy of the human rights statute before it (*Human Rights Code*, C.C.S.M., c. H175, section 58) as limited to its substantive rights and obligations; that is not the case here.

[para 55] In saying the above I note that some of the marshalling provisions that purport to grant the Labour Board powers over what the Information and Privacy Commissioner might decide may not be effective in circumstances in which this triggers the operation of the paramountcy clause. However, the point here is that the very existence of the marshalling provisions indicate that the *Labour Relations Code* as a whole does not contemplate exclusive jurisdiction in an arbitrator.

[para 56] As well, in reaching the above conclusion I have considered the Public Body's argument that the marshalling provisions do not indicate concurrent jurisdiction. The Public Body observes that the Labour Relations Board, the Workers Compensation Board, and the Appeals Commission under the *Workers' Compensation Act*, R.S.A. 2000 c. W-15 (the WCA) all expressly enjoy exclusive jurisdiction over certain matters per section 12(4) of the Code, and sections 13.1(1) and 17(1) of the WCA, respectively. The Public Body argues that the marshalling provisions cannot grant concurrent jurisdiction in the face of such grants of exclusive jurisdiction, and therefore should not be understood to indicate concurrent jurisdiction at all, even as between the Office of the Information and Privacy Commissioner and a labour arbitrator. While the express acknowledgement of exclusive jurisdiction to the Labour Relations Board, the Workers' Compensation Board, and the Appeals Commission may demand a different analysis of the effects of the marshalling provisions in relation to those bodies, it does not affect my analysis of what the marshalling provisions indicate in terms of jurisdiction in this matter. There is no express grant of exclusive jurisdiction for me to consider. I find that the marshalling provisions indicate concurrent jurisdiction between a labour arbitrator and the Information and Privacy Commissioner.

[para 57] Accordingly, there is specific legislative intention that indicates that a labour arbitrator does not have exclusive jurisdiction.

[para 58] While I have found that there is legislative intent away from exclusive jurisdiction of a labour arbitrator, the second step of the Morin test remains to be examined. As demonstrated by the Alberta Court of Appeal in *Amalgamated Transit Union, Local 583 v. Calgary (City),* 2007 ABCA 121 (*Amalgamated Transit*) where a labour arbitrator does not have exclusive jurisdiction, the second step of the Morin test invites consideration of the legislated mandates of competing statutory regimes. The Court of Appeal stated at para. 42,

> Applying the two-part test from *Morin* to this case, we must first examine both relevant statutory schemes — the *Labour Relations Code* and the *Human Rights Act* — to ascertain what the legislature has said about the jurisdiction and the mandate of the tribunals created by those statutes. Secondly, we must consider the factual context of the specific dispute in issue here to assess whether the legislative mandate of one, or both, tribunals applies to that dispute.

[para 59] I also conduct the second step of the *Morin* test in the event that my conclusion that a labour arbitrator does not have exclusive jurisdiction is wrong. I will go on to consider *whether if the arbitrator's jurisdiction over matters arising under the collective agreement were exclusive*, the second step of the *Morin* test would be met. In

other words, is the dispute in question one that should be said to be in in its essential character one that arises from the interpretation, application or alleged violation of the collective agreement?

What is the essential character of the dispute?

[para 60] The second step of the *Morin* test is described in *Morin* at para. 15:

> …The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator. The second step is logically necessary since the question is whether the legislative mandate applies to the particular dispute at issue. It facilitates a better fit between the tribunal and the dispute and helps "to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties", according to the underlying rationale of Weber, supra; see Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, [2000] 1 S.C.R. 360, 2000 SCC 14, at para. 39.

What is the essential character of the dispute?

[para 61] The Public Body argues,

> The essential character of this matter is the degree to which a school board may be entitled to medical information to properly process and manage performance concerns of the teacher's it employs. The essential character of the issue concerns the terms or conditions of teachers' employment and is squarely within the ambit of the collective agreement. Consequently, the issues would fall within an arbitrator's jurisdiction over the collective agreement.

[para 62] The Complainant argues,

> …However, there is no dispute that the CESD has the ability to collect personal information in connection with s. 188 [sic] medical examinations. Rather, the essential character of the issue, or the real question in dispute, is simply whether the CESD complied with the FOIP Act in exercising its right to collect personal information…

[para 63] While there is no doubt that the Public Body may collect medical information for the purposes of managing its employees, managing the Complainant is not at the heart of this dispute. The facts of this matter indicate that the collection of the Complainant's personal information is at the core of the matter, and represents its essential character. I note, however, that collection of the personal information in this case arose as a function of the employer's exercise of its management function. Had the Public Body not felt the need to address the Complainant's behavior in the workplace, the collection of personal information that is the subject of this inquiry would not have taken place. I also note that labour arbitrators have jurisdiction to apply other statutes, including the FOIP Act.

[para 64] In light of the above, I find that the collection of information at issue in this case, and whether it conformed with the FOIP Act, engages the legislative mandates of both Information and Privacy Commissioner under the FOIP Act, and a labour arbitrator under the Code. It is clear from the sections of the FOIP Act and the Code laid out above that the respective statutory schemes thereunder both engage the matter of collection, use, and disclosure of personal information of public body employees.

[para 65] As the essential character of the dispute is one that engages the legislative mandates under the FOIP Act and the Code, and neither the Act nor the Code expressly precludes access to another forum - unless the circumstances give rise to a conflict in which case the FOIP Act prevails - the proper result is that there is concurrent jurisdiction between the Information and Privacy Commissioner and a labour arbitrator over the issues raised in this matter.

[para 66] Accordingly, I find that Commissioner has concurrent jurisdiction over this matter. I now consider the final piece of the *Horrocks* analysis: whether to exercise discretion to assume jurisdiction over this matter in light of concurrent jurisdiction.

Whether to exercise discretion to assume jurisdiction

[para 67] To repeat, paragraph 41 of *Horrocks* states,

> Where two tribunals have concurrent jurisdiction over a dispute, the decision-maker must consider whether to exercise its jurisdiction in the circumstances of a particular case…

[para 68] Circumstances that may amount to improperly assuming jurisdiction in a case of concurrent jurisdiction revolve around procedural issues such as whether the principals of finality are respected (*British Columbia (Workers' Compensation Board) v Figliola,* 2011 SCC 52), the fairness of letting a matter proceed if it has already been dealt with (*Penner v Niagara (Regional Police Services Board),* 2013 SCC 19), or whether one or another forum which has jurisdiction is more appropriate in terms of institutional independence and impartiality, or can provide an adequate remedy (*Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3). However, such concerns have not arisen in this case.

[para 69] Further, and in any case, the matter of whether the Commissioner should exercise discretion has already been decided. Under section 67(1) of the Act, the Commissioner must address a complaint; the handling of it cannot be done by any other body. Under section 68, the matter may be investigated or mediated. If those efforts fail, then the matter is either dealt with through the inquiry process, or through a decision under section 70 of the Act to refuse to conduct an inquiry.

[para 70] In the present case, the Commissioner has already determined that the matter should proceed to inquiry, and has delegated to me the power to conduct one.

ISSUE A: Is section 33(c) of the FOIP Act inconsistent or in conflict with section 118 of the *School Act*? If so, pursuant to section 5 of the FOIP Act, does section 33(c) of the FOIP Act prevail over section 118 of the *School Act*?

[para 71] This issue was raised by the Complainant in her request for an Inquiry. Subsequently, in her initial submissions, the Complainant's position changed; she now states that section 118 of the *School Act* is not in conflict with section 33(c) of the Act. The Public Body agrees that there is no conflict. For the reasons below, I find the same.

[para 72] Section 118 of the *School Act*, in force at the time in question, states,

> *118 A board may require any person employed by it to undergo a medical examination by a physician named or approved by the board.*

[para 73] Section 118 states only that a board may require an employee to undergo a medical examination. It does not speak to what information the Public Body may collect about an employee, or for what purpose, as does section 33(c) of the Act. There is no conflict or inconsistency between them.

ISSUE B: Did the Public Body collect the Complainant's personal information in compliance with, or in contravention of Part 2 of the FOIP Act?

[para 74] Both parties have made arguments on who carries the burden of proof on this issue. I consider their arguments below.

Burden of Proof

[para 75] In order F2002-020 at para. 10, the former Commissioner set out a two-step approach to determining which party bears the burden of proof where the Act is silent on the matter:

> *i) Who raised the issue?*
>
> *ii) Who is in the best position to meet the burden of proof?*

[para 76] There is no dispute that the Complainant raised the issue about whether the Public Body complied with the Act. The parties agree, as do I, that the Complainant has the initial burden to establish that the Public Body collected her personal information.

[para 77] The Complainant argues that the Public Body is in the best position to meet the burden of proof to establish that it complied with the Act when it collected the Complainant's personal information.

[para 78] The Public Body observes that both parties are aware of what information was alleged to have been collected, the instruction given to the Physician to prepare the report, and are in substantial agreement about the facts of the matter. In light of similar positions of the parties, the Public Body argues that it and the Complainant are equal in

their ability to meet the burden of establishing whether the Public Body complied with or contravened the Act. The Public Body's position is that since both parties are equal in their ability to meet the burden of proof, the fact that the Complainant raised the issue indicates that she should have the burden of proof in this case.

[para 79] I find that while the Complainant carries the initial burden of showing the Public Body collected her personal information, the Public Body carries the burden of demonstrating that it complied with the Act. I reach this conclusion since, while the parties do share and agree upon significant amounts of information about the facts of this case, the Public Body is in the best position to speak to how it handled the information that it inadvertently received from the Physician, which, as discussed below, plays a large role in determining whether the Public Body "collected" the Complainant's personal information, as that term is used in the Act.

Did the Public Body collect the Complainant's personal information?

[para 80] There is no dispute that the Physician's Report, including the answers to the 11 questions, and the Intake Form, contain extensive and detailed personal information about the Complainant. As discussed in detail below, much of the information is of the type specified in the definition of "personal information" in sections 1(n)(i), (ii), (iii), (vi), (vii), (viii), and (ix). Those sections state,

> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number,*
> >
> > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> >
> > *(iii) the individual's age, sex, marital status or family status,*
> >
> > *...*
> >
> > *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
> >
> > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> >
> > *(viii) anyone else's opinions about the individual, and*
> >
> > *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 81] Other information, such as information about the Complainant's sexual activity, and whether she has had legal issues, is personal information since it is about an identifiable individual, even if it is not specified in section 1(n) of the Act.

[para 82] To provide a greater level of clarity regarding my final decision that the Public Body collected far more information than it was permitted to under the Act, I describe the type of personal information collected throughout the Physician's Report and the Intake Form in detail, below.

[para 83] Here, I note that the wordings of the headings in the Physician's Report discussed below, appear to contain suggestions of what the Complainant's medical status may be. For the sake of protecting the Complainant's personal information, I wish to clarify that none of the headings themselves, my references to them, or any type of personal information, should be construed to be indicative of what the Complainant's condition or status was or is. I make no comment on whether the wording of the headings accurately reflects anything about the Complainant.

[para 84] Page 1 of the Physician's Report contains the Complainant's date of birth, age, marital status, gender, and name. It also contains the Physician's opinion about whether the Complainant was cooperative during the medical examination.

[para 85] Pages 2 through the mid-point of page 6 of the Physician's Report contain a detailed information about the Complainant under the headings "History of Present Illness", "Past Psychiatric History," "Family Psychiatric History," "Past Medical History", and "Personal History." The personal information about the Complainant revealed under these headings is extensive. It includes where the Complainant was born, the details of her immediate family, her marital status and thoughts about her family situation, details of her health over the course of her life (including specific diagnoses), employment history, thoughts and feeling about her workplace, and educational history. There is also personal information about the Complainant in the form of the Physician's opinions about her based on other personal information.

[para 86] Starting on page 6 and continuing through to page 7, the Physician's Report contains the Physician's observations about the Complainant stemming from the medical examination under the heading "Mental Status Examination." Personal information about the Complainant under this heading includes further thoughts and feelings about her workplace, details of her health, and the Physician's opinions about her.

[para 87] Page 7 of the Physician's Report contains his "Summation" of the medical exam of the Complainant. It contains personal information about the Complainant in the form of his opinions about her health, information about her health, workplace history, and thoughts about her workplace. I note that the Summation mentions a specific diagnosis, despite that the Public Body did not request a diagnosis, and question 2 of the 11 questions specifies that the Physician was not to provide a specific diagnosis.

[para 88] Starting on page 7 of the Physician's Report and continuing through to page 8 is a series of seven questions about the Complainant's health and the Physician's answers to them. These questions are not part of the 11 questions agreed to by the ATA and the Public Body. The questions themselves do not contain any personal information about the Complainant. The answers to the questions all contain the Physician's opinion about the Complainant's health and ability to work; this information is the Complainant's personal information.

[para 89] Starting on page 8 of the Physician's Report and continuing through to the end of the Physician's Report on page 10, are the 11 questions agreed to by the ATA and the Public Body, as well as the Physician's answers to them. The 11 questions appear under the heading "Supplement Questions." As with the previous seven questions, the 11 questions themselves do not contain the Complainant's personal information. The answers to the 11 questions contain the Complainant's personal information in the form of the Physician's opinions about her health and ability to work, and whether any part of any treatment would prevent her from being able to fulfill her duties as a teacher.

[para 90] The five-page Intake Form provided to the Public Body by the Physician contains similar personal information about the Complainant as in the Physician's Report. The personal information about the Complainant consists of details about her family, medical history, diagnoses, name, age, gender, height, weight, marital status, and thoughts and feelings about her workplace. The Intake Form also contains further details of the Complainant's personal history such as whether she has or has had any legal troubles, whether she has or is experiencing violence or sexual abuse, whether she has any past and or present stressors, her opinion of her financial situation, and her own views of herself as a person.

[para 91] The Public Body argues that it did not collect any extra information provided by the Physician as the term "collect" is used in the Act. The Public Body's position is that in order to collect information it must take some active step to obtain it, rather than simply receiving it. The Public Body cites an assortment of cases and materials from other jurisdictions suggesting that an active step is required. The Public Body further argues that the earlier decision in Order 98-002 that finds a contrary understanding of the term "collect" is not binding authority, and that a different understanding of "collect" may be reached. The pertinent passage from Order 98-002 at paras. 175 and 176 states,

> The Public Body also argues that section 32 of the Act requires some positive act on the part of the Public Body in collecting personal information. The Public Body maintains that receipt of unsolicited personal information should not be equated with collection. The Public Body says that it should not be found in breach of section 32 merely because a physician, Dr. X. in this case, sent unsolicited personal information to the Public Body, in the form of the entire patient chart.
>
> In Order 98-001, I dealt with the issue of a public body's collection of personal information. It is implicit in Order 98-001 that it does not matter how a public body comes to have personal information; any manner of getting personal information is "collection" for the purposes of the Act. Therefore, I do not accept the Public Body's argument that it

must actively "collect" personal information for that to be "collection" under section 32 of the Act.

[para 92] While it is correct that previous orders from the Office of the Information and Privacy Commissioner are not binding authorities, I cannot find other than that the Public Body collected the Complainant's personal information as the term "collect" is used in the Act.

[para 93] Even if the Public Body could be said not to have collected the Complainant's personal information simply by receiving it, the Public Body did more than that. When the Public Body received more information from the Physician than was expected, the Complainant and the ATA demanded that the Public Body expunge the excess information. The Public Body decided to retain all of the information. At that point, it can no longer be said to have obtained the information unintentionally; it retained it of its own will and must be said to have collected it. The situation here is similar to that in Order P2021-09 where even though the Adjudicator found that receiving unsolicited personal information in a text message was not "collection", maintaining, using and disclosing the text message afterward amounted to collection (Order P2021-09 at para. 44).

[para 94] I turn to the question of whether the Public Body collected the Complainant's personal information in compliance with the Act.

[para 95] The Public Body argues that it is permitted to collect all of the Complainant's personal information as part of an activity of the Public Body. Section 33(c) of the Act permits collections for operating programs and activities of public bodies.[4] Section 33(c) states,

> *33 No personal information may be collected by or for a public body unless*
>
> > *(c) that information relates directly to and is necessary for an operating program or activity of the public body.*

[para 96] Numerous previous orders of this Office have found that managing employees is an operating program or activity of a public body. See, for example, Orders F2020-26 at para. 41, F2006-019 at para. 17, and F2005-03 at para. 12. As previously mentioned this the reason why the Public Body collected the Complainant's personal information.

[para 97] In order to comply with section 33(c), the information collected must relate directly to and be necessary for an operating program or activity of the public body. The term "necessary" as used in section 33(c) was considered and interpreted in Order F2017-83. The Adjudicator stated at para. 14,

[4] Section 34(1)(n) also applies in this case, since the Complainant's personal information was not collected directly from her, but rather came from the Physician. However, it is clear that the Public Body collected the Complainant's personal information for the purposes of a managing her employment as permitted by section 34(1)(n).

> In Order F2008-029, the Director of Adjudication discussed the meaning of "necessary" in relation to a disclosure of information for the purposes of meeting the goals of a program of the Public Body. She said:
>
>> [...] I find that "necessary" does not mean "indispensable" - in other words it does not mean that the CPS could not possibly perform its duties without disclosing the information. Rather, it is sufficient to meet the test that the disclosure permits the CPS a means by which they may achieve their objectives of preserving the peace and enforcing the law that would be unavailable without it. [...]
>>
>> [...] Again, I find that "necessary" in this context does not mean "indispensable", and is satisfied as long as the disclosure is a significant means by which to help achieve the goals of the program.
>
> In my view, this analysis applies equally to collection and use of personal information.

[para 98] A public body also has considerable latitude to determine what information is necessary for an operating program or activity of a public body. (Order F2001-004 at para. 18).

[para 99] The Public Body initially sought all information it might usually obtain from the Physician, under the terms of the Initial Authorization. However, the ATA and the Complainant subsequently reached an agreement with the Public Body that narrowed the terms of the consent, and limited the information that the Public Body was to receive. The agreement, as reflected in the Revised Authorization, was that the Public Body would receive

> …a report…that answers the questions;
>
>> (i) is there an identifiable medical condition that adversely affects the ability of [the Complainant] to carry out her role as a school teacher, And
>>
>> (ii) the questions contained in the Physician's Statement attached to my Authorization to Release Information.

[para 100] It seems that the Public Body, upon exercising its latitude to determine what information was necessary to manage the Complainant's employment, concluded that the information it would receive under the terms of the Revised Authorization would suffice, and that nothing more was necessary.[5] Indeed the 11 questions, and the answers provided, squarely address whether any particular steps are required or recommended in order to manage the Complainant's employment in light of the behavior that the Public Body was concerned about.

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[5] I note that the report referred to in the Authorization consists only of the answers to question i) in the Authorization, and the answers to the 11 questions in the Physician's Statement. The level of personal information provided in the Physician's Report far exceeds what was agreed to in the report contemplated in the Revised Authorization Form.

[para 101] I note that nowhere in the Physician's Report or the Intake Form is question i) from the Revised Authorization directly addressed. However, it seems to me that question 3 of the 11 questions – and the answer to it not reproduced here - addresses substantially the same matter:

> 3) The following are the symptoms, the functional limitations associated with the illness or injury that are preventing the employee from completing her duties as a teacher:

[para 102] In light of the information provided in the answers to the 11 questions, even under the somewhat broad interpretation of the word "necessary" in section 33(c), I cannot see that any further personal information about the Complainant was necessary to manage her employment.

[para 103] Further, the personal information contained in the Intake Form, and personal information in the Physician's Report, other than the answers to the 11 questions, does not address the issue of what, if any, steps should be taken to manage the Complainant's employment. This personal information provides sensitive information about the Complainant, but it is not evident from the information itself, nor does the Physician describe, how the information might guide management of the Complainant's employment. Indeed, the Public Body did not provide any explanation of how, for example, knowing any aspect of the Complainant's "family psychiatric history", thoughts on her family situation, or her views of herself would, in any way, help it address its concerns about the Complainant's behaviour in the workplace.

[para 104] For greater clarity, I note that my conclusion that no information beyond the answers to the 11 questions is necessary to manage the Complainant's employment applies to the Summation on page 7 of the Physician's Report which the Public Body still retains, unredacted.

[para 105] I find that the Public Body collected the Complainant's personal information in contravention of the Act when it retained the Physician's Report (other than the answers to the 11 questions) and when it retained the Intake Form.

IV. ORDER

[para 106] I make this Order under section 72 of the Act.

[para 107] I order the Public Body to destroy all copies of the Physician's Report, with the exception of the answers to the 11 questions, and to destroy all copies of the Intake Form. I note that the degree to which the Complainant's personal information in the Physician's Report (other than the answers to the 11 questions) and the Intake Form is intertwined with small amounts of information that is not her personal information, is such that ordering the Public Body to destroy only the Complainant's personal information is impractical.

[para 108] I order the Public Body to cease collecting the Complainant's personal information in contravention of the Act.

[para 109] I order the Public Body to confirm to me and to the Complainant that it has complied with this order within 50 days of receiving a copy of it.

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John Gabriele
Adjudicator
/kh