February 2007

Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers
Emond Harnden LLP

B.C. Privacy Commissioner rules in favour of litigation privilege and against labour relations privilege.

Federal and provincial privacy legislation in Canada guarantees individuals the right to access their own personal information held by organizations covered by the legislation. However, that right to access is subject to a number of exclusions or exemptions, one of which is where the individual's personal information is also subject to solicitor-client privilege. Now, the British Columbia Information and Privacy Commissioner has confirmed that this exemption applies to documents prepared in connection with the grievance arbitration process.

The decision, Order P06-02, *Victory Square Law Office and British Columbia Nurses' Union* (September 14, 2006), concerned the request for personal information held by the union and the law firm (the organizations). The requester had been the subject of a grievance filed by the union in 2002, in which the named law firm had represented the union. Both organizations resisted the request, principally on the grounds that the requester's information was subject to solicitor-client privilege. After his request was denied by the organizations, the requester applied to the Information and Privacy Commissioner to review the decision.

The legislation under which the information was requested was the British Columbia *Personal Information Protection Act*, which provides that one of the exceptions to an individual's right of access to his or her personal information is where the information is protected by solicitor-client privilege. Solicitor-client privilege under the common law has been interpreted as having two distinct branches: the privilege covering communications between a lawyer and client, and litigation privilege which applies to documents created in contemplation of litigation.

LITIGATION PRIVILEGE APPLIES

Before the Commissioner, the organizations argued that the exemption for solicitor-client privilege under the Act should be extended to protect communications between union members and union officials, where the communication is for the dominant purpose of obtaining labour relations advice. This argument was rejected by the Commissioner, who held that the Act incorporated only the two kinds of solicitor-client privileged recognized under the common law, and not any other form of professional privilege.

However, with respect to the litigation branch of the privilege, the Commissioner held that grievance arbitration proceedings qualified as litigation that would give rise to the privilege:

> "There is no doubt that grievance arbitration proceedings under a collective agreement are adversarial in nature - the parties are adverse in interest in contested proceedings. There is no doubt, in my view, that, having regard to the policy underlying litigation privilege, such proceedings qualify as litigation for the purposes of litigation privilege. This is certainly the view taken by labour arbitrators and it would at the very least be anomalous for a different approach tobe taken under PIPA. […] I accept that the relevant documents from the BCNU's files, as well as from Victory Square's files, came into existence for the dominant purpose of litigation that was, in the circumstances of this case, in reasonable prospect at the time of their creation."

THREAT TO SAFETY OR MENTAL HEALTH

They argued that the information could be withheld from the requester on a number of other grounds, including that the disclosure could reasonably be expected to threaten the safety or mental health of another individual, and that the disclosure would reveal the personal information of another individual. Both of these grounds were upheld by the Commissioner.

With respect to the ground of a threat to safety or mental health, the Commissioner noted that the case law indicated that the term "threat to mental health" went beyond exacerbating a mental illness or condition, but included circumstances where disclosure could reasonably be expected to cause mental distress or anguish. The Commissioner found that there was reason to conclude that mental distress would be caused to third parties by the disclosure to the requester:

> "There is some evidence of ill-will on the part of the [requester] towards those who have, as he perceives it, maliciously opposed him and engaged in lies and other personal attacks against him. It is appropriate in this regard to place some weight on the applicant's own words in the balance in assessing the evidence of reasonable expectation of a threat to the mental health of third parties through disclosure of the information in dispute."

Accordingly, the Commissioner found that the organizations could decline disclosure of the personal information to the requester because it could reasonably be expected to cause mental anguish to other individuals. The Commissioner also found that those documents which contained the personal information of individuals other than the requester could not, under the Act, be disclosed to the requester.

In the result, the Commissioner upheld the decision of the organizations to refuse disclosure of the requester's personal information.

In Our View

While the communication branch of the solicitor-client privilege is not time-limited, litigation privilege expires once the litigation is terminated. In this case, mediation had resulted in an interim settlement, but arbitration of the grievance could have resumed under certain conditions. For this reason, the Commissioner found that the litigation had not been terminated and the privilege survived.

This case was conducted under provincial private sector privacy legislation. In Ontario, there is no equivalent legislation apart from that governing personal health information.

For further information, please contact Steven Williams at (613) 940-2737.

For more news about recent developments in Employment and Labour Law, and for information about how our firm can assist you, please visit http://www.emondharnden.com/