BLACK GROPPER
LABOUR & EMPLOYMENT LAWYERS
1640 - 401 West Georgia Street
Vancouver, BC V6B 5A1

# A GUIDE TO PIPA FOR UNIONS

Under the *Personal Information Protection Act*, SBC 2003, c 63 ("*PIPA*"), a private organization, such as a union or an employee association, may be faced with requests for information.

## OVERVIEW OF THE PROCESS

Section 23(1) of *PIPA* gives an individual the ability to request information about themselves in the control of a union:

> 23(1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:
>
> (a) the individual's personal information under the control of the organization;
>
> (b) information about the ways in which the personal information referred to in paragraph (a) has been and is being used by the organization;
>
> (c) the names of the individuals and organizations to whom the personal information referred to in paragraph (a) has been disclosed by the organization.

The union member's request to access their personal information must be in writing, and must contain sufficient detail to enable the union with reasonable effort to identify the union member and the personal information being sought (Section 27). If a union member's initial request is not specific enough, a union may ask them to clarify the request.

A union must make a reasonable effort to assist the union member, and to respond to their request as accurately and completely as reasonably possible (Section 28).

A union that receives a *PIPA* request from one of its members must respond to that request within thirty days (Section 29), although "days" as defined in *PIPA* do not include Saturdays or holidays. A union may extend the time for responding to a request by up to an additional thirty days if necessary (Section 31).

If the union refuses access to all or part of the personal information sought by the union member, it must advise the union member of the reasons for the refusal and the section of *PIPA* upon which the refusal is based, as well as the name, title, and contact information for the officer or employee of the union that can answer the union member's questions (Section 30).

A union is entitled to charge a union member a "minimal fee" for access to his or her personal information (Section 32(2)). If the union plans to charge a fee, it must first give the union member a written estimate of the fee before responding to the request.

## GUIDELINES FOR DISCLOSURE

First of all, only "personal information" must be disclosed. Personal information is defined in *PIPA* as information about an identifiable individual and includes employee personal information but does not include work contact information, or work product information (Section 1(1)).

As such, documents not including personal information may be refused and excluded from the request. General or aggregate information that may be connected to an individual but that is not "about" them is not personal information.

For example, a copy of a policy or collective agreement provision inside a member's file is not personal information and may be excluded from the request. The same reasoning applies to a fax cover sheet to a mediator or a bill for an arbitrator's services. Further, a union's strategy in respect of a matter has been held not to be a grievor's personal information, thus allowing the union to refuse to disclose these documents.

Although *PIPA* grants a union member access to their personal information held by a union, it also includes the following grounds, among others, upon which a union is entitled to refuse the union member's access to information request:

- Information that is protected by "solicitor-client privilege", which has been interpreted to mean both solicitor-client (legal advice) privilege and litigation privilege (grievance privilege) (Section 23(3)(a));
    - Solicitor-client privilege covers confidential communications between a lawyer and client for the purpose of seeking or giving legal advice. In the union context, it is the union, and not the grievor, that is the lawyer's client.
        - For example, a legal opinion written by a lawyer for the union regarding the likelihood of success at arbitration and the statements of facts drafted by the union for the lawyer for this purpose may be refused under this ground.
    - Litigation privilege, also sometimes referred to as grievance privilege, covers documents created for the dominant purpose of, and in reasonable anticipation of, litigation, including filing a grievance or proceeding to arbitration. However, unlike solicitor-client privilege, litigation privilege is "temporary"; that is, it expires with the litigation of which it was born.
        - For example, handwritten notes of meetings with union representatives, grievance meetings, and arbitration proceedings may all fall under litigation privilege. That is, during the grievance and arbitration process, and any related appeals, the union could refuse disclosure of these documents. However, if the individual made the request after the litigation was finished, the union may be required to disclose the information unless it falls under another exclusionary rule.
        - Litigation privilege has been held to continue to apply where an arbitration has been expressly adjourned for as long as the settlement agreement holds.

        - Litigation privilege has been held not to apply to information related to a completed grievance and arbitration process where the member was seeking to bring a duty of fair representation claim against the union because the specific litigation that the documents were created for (the grievance/arbitration) was at an end.

- The information was collected without consent for the purpose of an investigation, and the investigation and associated legal proceedings and appeals are not yet complete (Section 23(3)(c)); and,

    - Investigation is defined broadly to include investigations related to the breach of an agreement, statute, or circumstances or conduct that could result in a legal remedy or relief.

- The information was collected or created by a mediator or arbitrator in the conduct of a mediation or arbitration for which they were appointed to act, under a collective agreement (Section 23(3)(e)(i)).

    - A union's handwritten notes of a mediation session have been found to be protected from disclosure under this provision on the basis that the notes recorded information submitted to a mediator. However, a union's handwritten notes of arbitrations have been ordered to be disclosed, provided that the arbitration and any associated appeals are completed.

**REFUSAL OF REQUESTS**

While the provisions above cover the situations in which a union *may* refuse to disclose personal information, there are some circumstances where a union *must* refuse a request. This is an important distinction as a union also has a duty to protect personal information under its control, pursuant to *PIPA.*

The following sections deal with when a union must refuse an individual's access to information request:

- The disclosure can reasonably be expected to threaten the safety or physical or mental health of an individual other than the individual who made the request (Section 23(4)(a));

    - Inconvenience, upset or unpleasantness of dealing with a difficult or unreasonable person is not sufficient to trigger this exception, but the reference to "mental health" goes beyond mental illness and may be triggered where disclosure could reasonably be expected to cause serious mental distress or anguish in others.

- The disclosure can reasonably be expected to cause immediate or grave harm to the safety or to the physical or mental health of the individual who made the request (Section 23(4)(b));

    - Again, the reference to mental health encompasses situations where disclosure could reasonably be expected to cause serious mental distress or anguish to the individual who made the request.

- The disclosure would reveal personal information about another individual (Section 23(4)(c)); and
    - Recall that personal information does not include the contact information or work product information of individuals. Contact information is defined as information that enables an individual to be contacted at a place of business, including name, position or title, phone, email, etc. Work product information is defined as information prepared or collected as part of an individual's responsibilities related to his or her employment but does not include personal information about an individual who did not prepare or collect the personal information.
        - As a result, the information of employer or union representatives collected or created while carrying out their work duties should be disclosed, unless another exception applies (such as litigation privilege). This includes emails sent and received and any memos or notes created during meetings.
- The disclosure would reveal the identity of an individual who has provided personal information about another individual, and the individual providing the personal information does not consent to disclosure of his or her identity (Section 23(4)(d)).
    - This exception would be applicable in circumstances where an individual has confidentially complained or provided information about the member making the request.

Finally, where reasonably possible, personal information should be severed or redacted from a document rather than refusing to disclose the entire document (Section 23(5)). However, if it is not possible to sever another individual's personal information without potentially revealing their identity, disclosure of the document must be refused.