LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

CANADIAN OFFICE AND PROFESSIONAL EMPLOYEES UNION, LOCAL 378
UNION

COAST MOUNTAIN BUS COMPANY LTD.
EMPLOYER

(Re: Disclosure of Personal Information to Union (Grievance #07-0009))

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Bruce Laughton, Q.C.
Representing the Employer:	Earl G. Phillips
Date of Hearing:	August 10, 2007
Date of Decision:	September 7, 2007

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Contents

1. Dispute, Submission to Arbitration and Jurisdiction

[1] The union and employer differ on the interpretation of Article 7.11(g) of their collective agreement and the impact of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, as interpreted by the British Columbia Court of Appeal in an earlier stage of this dispute, to the operation of Article 7.11(g).

[2] Article 7 addresses hiring, promotions, transfers and demotions. Article 7.11 deals with competition for job postings. Article 7.11(g) states: "The Employer will provide the Union with copies of applications for OPEIU job bulletins upon request to the local Human Resources Officer."

[3] Article 7.11(g), negotiated into the collective agreement in 1992, had little opportunity to be applied and interpreted before the *Freedom of Information and Protection of Privacy Act* (*FOIPPA*), passed in June 1992, came into force on October 4, 1993.

[4] A difference arose over the nature and extent of the personal information of applicants that the employer was required to disclose to the union under Article 7.11(g) and the whether *FOIPPA* required the employer not to disclose any or all of that personal information. The union argued *FOIPPA* had no limiting effect on the interpretation, application and operation of Article 7.11(g). The employer argued *FOIPPA* rendered Article 7.11(g) ineffective and refused to disclosure documents containing an individual's personal information unless the individual consented in writing.

[5] The union grieved seeking disclosure of certain documents. The grievance was submitted to arbitration under the collective agreement with an agreed statement of facts. The union and employer argued their respective positions about the legal effect of *FOIPPA* on the interpretation, application and operation of Article 7.11(g). The arbitrator addressed the competing interests and concluded as follows:

> There is no dispute the information in question is personal information. The Union as a result, must rebut the presumption that the disclosure of this information is an unreasonable invasion of privacy. A fundamental problem the Union faces in this case is that its argument may well be persuasive if one was dealing with an individual grievance filed and a request made pursuant to that grievance. In this case, however, the Union is making the request pursuant to Article 7.11(g) of the collective agreement and seeking a declaration that the Employer must provide the Union with copies of applications and related documentation obtained or compiled by the Employer in connection with a number of job postings. The Union maintains the Employer is obligated to do so pursuant to Article 7.11(g) and in recognition of the Union's status as exclusive bargaining agent for the employees. It maintains for efficiency and efficacy purposes, it is entitled to the documentation in order to assess whether it would be appropriate to pursue a grievance. It maintains FOIPA does not relieve the Employer of its duties under the collective agreement.
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> While there is much attraction to this argument, I am inclined to agree with the Employer that the parties together negotiated a provision that has been overtaken to a certain extent by the promulgation of legislation concerning privacy rights. This is a developing area which has an impact on matters that had previously been in place between parties. In my view, while the Union is close to fulfilling the conditions set out in Order 02 - 21, *supra*, it cannot fulfill either number two or number four until the grievance has been filed. Once that has occurred, the Employer is entitled to raise privacy concerns in response to a request for documentation which can then be evaluated on a case-by-case basis. That can be dealt with in the context of the specific case between the parties or ultimately by the arbitrator agreed to hear the case. The balancing of interests necessary when dealing with privacy rights can then be considered.
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> I agree with the Employer that any decision to compromise a person's personal information is best made in light of all the circumstances and the labor relations context of the case. The obligation of a public body to protect information should only be compromised to the extent necessary to ensure a fair hearing of a grievance and for the Union to meet its obligations as exclusive bargaining agent for the employees. This is something that in reality in a selection process, can only be determined on a case-by-case basis.
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> To conclude otherwise may well lead to significant compromise of privacy rights without due consideration. While section 3(2) specifically makes clear the Act does not limit the information available by law to a party to a proceeding, it imposes limits on the disclosure of personal information

when that is not the case. While the Union says it is not requesting anything more than ordinary information, even the name of an unsuccessful applicant may in certain circumstances be considered personal information which they may not wish to be disclosed for a variety of reasons. The successful applicant in the selection process will of course be known and not have the same privacy concerns.

It is not without some hesitation that I make this decision. I am cognizant of the need for efficiency in the process between the parties and the resultant benefits. In addition, the Union has a unique status as exclusive bargaining agent with consequent obligations. As the Employer says however, that is the price that must be paid for the preservation and protection of privacy rights put in place by the legislation.

The obligation of the Union to represent the bargaining unit employees is ultimately not impaired if it does not obtain this information pursuant to Article 7.11(g). The Union has access to and already provided with important information. The Employer normally provides the Union with copies of the job postings and a Summary of Internal Applicants Form with names or other identifiers blocked out. The summary includes seniority dates and overall evaluation scores. This can be of assistance to the Union as part of its assessment in a case. The Employer is providing information to the extent it can without providing information about identifiable individuals unless the individual consents. It may be that the parties can discuss whether there is more general information that can be provided that would meet the Union's objective and fulfill the purpose and intent of Article 7.11(g) while remaining within the confines of the FOIPA. Further, section 22(4)(a) provides that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the third party has consented in writing. The Employer may be able to obtain express consent as part of its selection process to facilitate the purposes of Article 7.11(g). In addition, as set out above, the Union is able to access much of this information as a grievance arises and is pursued through the normal processes.

In summary, I agree with the Union that FOIPA does not replace agreed upon procedures in a collective agreement which provide for accesses to personal information. That access however, must not violate the protections set out in FOIPA concerning personal information. Further, FOIPA permits the Employer to use personal information for a purpose consistent with the purpose for which the information was obtained or complied. In this case, I find the use of information which is part of the job selection process, to complete that process in accordance with the collective agreement, is for a purpose consistent with the purpose for which the information was obtained or complied. The difficulty for the Union in this case is section 22 of FIOPA which creates a rebuttable presumption of an unreasonable invasion of a third party's personal privacy if the personal information is related to employment, occupational or educational history. The Union has not been able to rebut that presumption on the basis of Article 7.11(g) alone. That provision is overly broad. Rather, I have concluded the information should be dealt with on the basis of requests in individual grievances, at which time specific privacy concerns can be raised and dealt with in the context of the case. Section 3(2) confirms the Act does not limit the information available by law to a party to a proceeding.

> Accordingly, in answer to the questions posed by the parties I find the Employer is not permitted to disclose information about an identifiable individual to the Union pursuant to Article 7.11(g), without the written consent of the individual. In my view the more appropriate action is to seek an order for disclosure in a specific case which can then be evaluated taking into account the circumstances and labor relations context of the case. As noted earlier, the Union is not without information on this point and accordingly its exclusive bargaining rights and obligations are not significantly impaired. In addition, it can pursue more detailed information as part of the grievance process itself. In the meantime, as indicated above, I encourage the parties to address and possibly add and/or refine the information that can be provided pursuant to Article 7.11(g) without providing information about identifiable individuals unless the individual consents. (*Coast Mountain Bus Company* [2005] B.C.C.A.A.A. No. 86 (Burke) (QL), ¶ 53-59)

[6] The union appealed to the Court of Appeal. The union, employer and Court agreed the Court had jurisdiction under s. 100 of the *Labour Relations Code*.

> Both parties agree that this Court has jurisdiction to hear the appeal under s. 100 of the **Labour Relations Code**, R.S.B.C. 1996, c. 244 (the "Code"). The parties agree that the real basis of the arbitration award is the interpretation of **FOIPPA**, a law of general application, and that the award does not involve principles of labour relations either expressed or implied in the **Code**, or any other Act. Both parties agree that the recent decision of this Court in **British Columbia Public School Employers' Association v. British Columbia Teacher's Federation**, [2005] B.C.J. No. 1791, 2005 BCCA 411, is distinguishable because the award in that case did turn on principles of labour relations. The grievance in the case at bar is a policy grievance, and the decision may affect not only this union, this collective agreement and these employees, but may also affect many other contractual relationships, both labour and non-labour, and many persons who are strangers to this collective agreement. (*Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Company Ltd.* 2005 BCCA 604; [2005] B.C.J. No. 2655 (QL), ¶ 2)

[7] The union and employer agreed the arbitrator had erred in her analysis and interpretation of *FOIPPA* by applying section 22 in Part 2 (Freedom of Information). The employer argued, nonetheless, *FOIPPA* barred disclosure of the documents the union sought under Article 7.11(g).

[8] The Court of Appeal panel unanimously agreed section 22 was not applicable and the arbitrator had erred in her analysis and interpretation of *FOIPPA*. It decided disclosure to the union of information in job applications was permitted under Part 3 (Protection of Privacy) of the Act without a requirement for the employer to obtain the written consent of individuals whose personal information was being disclosed. The Court allowed the appeal and directed the

employer to disclose, with restrictions, the information the union sought.

[9] For future guidance, the Court said: “It would be reasonable for the employer to make efforts to inform job applicants that the job applications of successful candidates and of COPE members may be disclosed to the union for the purposes of ensuring compliance with the collective agreement” (¶ 76).

[10] This dispute is about the extent to which the employer is obliged to disclose information under Article 7.11(g) prior to the union filing a grievance or after filing a grievance and prior to proceeding to arbitration. It is agreed once a grievance is advanced to arbitration the union can apply to the arbitrator for an order that the employer make pre-hearing disclosure to the union of all information necessary for a fair hearing, including personal information of the applicants.

[11] There are differences between the union and employer about whether the Court of Appeal made a binding judgment on the interpretation and application of Article 7.11(g) and on the application and operation of the Court’s judgment in the full scope of the competitive job selection process the employer uses to fill posted position vacancies under the collective agreement.

[12] The union and employer agree I have jurisdiction to finally resolve these differences over the interpretation, application and operation of Article 7.11(g) under their collective agreement.

[13] The foundational facts and representative documents from a sample job competition and selection process were adduced through an agreed statement of facts supplemented by agreed explanation and additional statements during the hearing.

[14] The submission to arbitration consists of three agreed questions:

> The parties seek an Award that will answer the general question of the scope of the Employer’s obligation to disclose (prior to an arbitrator being asked for an order requiring disclosure in a particular job selection grievance) pursuant to Article 7.11(g) of the Collective Agreement in light of FOIPPA and the Appeal Judgment.
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> Specific questions that need to be addressed to answer the general question are:
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> a. What documents typically generated in the job selection process are included in “copies of applications” in Article 7.11(g)?

b. What personal information must be disclosed to meet COPE's purpose of ensuring the Employer's hiring decision complies with the collective agreement? [see para. 71 of the Appeal Judgment]

c. What personal information typically collected in the job selection process is not related to the ability to perform the vacant job or to seniority? [see para. 73 of the Appeal Judgment]

2. Job Vacancy Posting and Competitive Selection

[15] The union is the certified, exclusive bargaining agent for a bargaining unit of approximately 500 employees employed in office, clerical, technical, administrative and related work. Two other trade unions are certified, exclusive bargaining agents for three other groups of the employer's employees. All of the employer's employees and external applicants may apply for position vacancies covered by this collective agreement.

[16] Job advancement through promotion is a critical interest for all employees committed to their career relationship with an employer. Employees achieve their earnings, job satisfaction and retirement savings goals through promotion. Through continuing service and accumulation of seniority, employees demonstrate their commitment to the employment relationship and earn valuable rights to job security, advancement and vacation, pension and other benefits. For some employees, the location or hours of work of a position may be desirable to help balance commitments to family, work and community.

[17] Recognition and use of seniority to advance to other positions in an employer's organization is a very practical and valuable right. In collective bargaining, unions normally seek to maximize the weight seniority is given in the substantive criteria used to select successful candidates in competitions for promotions.

[18] When senior applicants are not chosen in a selection process, they will often turn to their union to understand or challenge the employer's final selection or the process the employer used to arrive at its selection decision. In scrutiny of the employer's decision, there will be an examination of the skills, abilities and qualifications the employer required for the position; the selection criteria the employer considered and weighted; the means by which the employer assessed the skill, ability and qualifications of the competing applicants, including any

interview process and tests used to assess skill and ability; whether senior applicants are entitled to a familiarization, training or trial period in the position; and, perhaps, other aspects of the process and collective agreement provisions.

[19] Article 7 of the collective agreement has an agreed definition of promotion, temporary promotion, demotion and lateral transfer. It addresses eligibility for job competitions. It is agreed preference for job vacancies covered by the collective agreement shall be given to current employees represented by the union. "If at any time the Union is of the opinion that such preference has not been given, and the Employer selects from outside the bargaining unit, the Union shall have the right to grieve such selection" (Article 7.10).

[20] There are agreed provisions on minimum periods of job postings on employer bulletin boards and what information the job postings must contain. There is an agreement on the basis for making promotions and competitive job selections. Article 11(d) states:

> Job selections and promotions under the foregoing shall be on the basis of ability (to perform the vacant job) and seniority, in that order. Where the employee who is junior is selected, his/her ability to perform the vacant job shall be significantly and demonstrably higher than candidates who have greater seniority.
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> Ability shall mean that an applicant has the formal education, special training and experience required in the applicable job description and bulletin prepared by the Employer or the equivalent knowledge and skill, and shall also include consideration of the employee's performance on his/her present job.

[21] Any selection can be the subject of a grievance: "Although selection of employees under the foregoing paragraphs shall rest with the Employer such selection shall be subject to the grievance procedure" (Article 7.11(f)).

3. Employer Selection Process and Disclosure Position

[22] Since the Court of Appeal judgment, the employer has included the following statement for applicants for job vacancy postings covered by the collective agreement:

> I understand that information submitted on this application and attached resume with respect to positions in the COPE bargaining unit, will be used for the purpose of selecting a candidate in accordance with the provisions of the Collective Agreement between Coast Mountain Bus Company (CMBC) and COPE. I further understand that this information may be disclosed to COPE in accordance with applicable law. The collection, use

> and disclosure of personal information by COPE is [are] subject to the provisions of the *Personal Information Protection Act*.

[23] The job competition and selection process begins with the employer having a job description of the position which it intends to post and fill. The process sample with the agreed statement of facts is a vacancy for the position of Depot Work Leader in the Lower Mainland at pay grade 9. The job description is dated March 18, 2004. The February 9, 2007 job posting, with a deadline to apply by February 15th, was for one position to replace someone who had left the position.

[24] On March 27th, on behalf of the most senior candidate, the union grieved the employer's selection for this position and asked for the job description; the job posting; job applications, resumes and seniority dates for each candidate; names of candidates interviewed and the questions and responses for each; criteria used to evaluate candidates and the weigh given each factor; evaluation scores for each; other testing and assessment procedures and the resulting weight given to each; identification of any equivalencies accepted by the employer and the names of the candidates; and a narrative summary from the management selection person or committee detailing reasons for the selection that was made and why the grievor was not selected.

[25] The employer disclosed a copy of the job description and job posting. This is not personal information or "copies of applications." The employer disclosed these and other documents "on a without prejudice or precedent basis" and on the condition the union keep confidential the non-personal information not covered by *Personal Information Protection Act* and destroy the documents at the conclusion of the grievance.

[26] Applicants for vacant positions do not complete a hard copy application form. Since December 2006, the employer uses an online E-Recruit system. Both existing employees of the employer and persons who are not currently employed by the employer apply for vacant positions through the internet. They access a specific webpage for each vacancy; complete certain fields with requested personal contact information; attach a personal resume; and transmit their interest in the position by email. The employer exercises no control over

what information an applicant includes in his or her resume or other attachments. The applicant is sent an email acknowledging employer receipt of the resume.

[27] In the case of the Depot Work Leader competition, the resume of the grievor, a Depot Coordinator, contains his name; contact information; career objective; current and previous employment; education; summary of qualifications; and volunteer experience. The redacted resume of the successful applicant disclosed to the union by the employer identifies that he or she was also a Depot Coordinator. Presumably, the union knows who this employee is because he or she has been selected and is working in the position. The third applicant was a Depot Work Leader. The fourth applicant, who submitted a resume and covering letter, described his or her position as Depot Coordinator/Acting Depot Work Leader.

[28] The employer disclosed to the union the resumes and one covering letter, which it maintains constitute the “applications” under Article 7.11(g). Each of the resumes for the successful candidate and the two unsuccessful candidates who are not grieving was redacted to remove what the employer identified as “personal identifiers.” Examples are names and contact information; names of secondary schools and other educational institutions; course completion dates; dates and location of work history; years of work experience in the applicant’s current position; level of CPR training; class of driver’s licence held and other information. The nature of some of the other redacted information is difficult or impossible to discern.

[29] The employer summarized for the union the seniority dates of the internal applicants who became candidates for the position by their seniority year. If two or more applicants have the same seniority year, the employer will provide the year and month of those applicants. If two or more have the same month, it will provide the date. The more specific it must be, the more likely the information will enable identification of the person. The seniority years for these four candidates are 1981 (the grievor), 1983 (the successful candidate), 1984 (third candidate) and 1989 (fourth candidate).

[30] The employer reviews the resumes. In the case of the Depot Work Leader

position, there were two “musts” for the position that were stated in greater detail than follows in the job posting - (1) completion of Grade 12 including a course in word processing and spreadsheet software; and (2) three years experience in a position where the applicant acquired good basic knowledge of transit operations. An equivalent combination of education and experience will be considered.

[31] The next step in the case of the Depot Work Leader position was to interview each candidate. It was done by a panel of four persons using a pre-determined interview format and set of fourteen questions. The interview panel assigned a value to six skills and abilities that were assigned a separate weight. The six and their assigned weight were:

Leadership and Initiative	10
Problem Solving and Decision Making	10
Interpersonal and Communication	10
Ability to Handle Conflict	9
Attention to Detail	8
Planning and Organizational Skills	7

[32] The employer disclosed to the union copies of the interview questions and the recorded answers by each of the four panellists for the grievor, but not for the successful or other unsuccessful candidates.

[33] The candidates underwent a “number of computer generated clerical tests” that constitute Job Related Testing with a weighting of “9” in the overall scoring. The employer disclosed the grievor’s score for each test and his final score of 8.4. It would not disclose the scores for the other candidates.

[34] The employer did not use any equivalencies in this competition. It told the union that: “All candidates met the qualifications as stated in the job posting.”

[35] The criteria used and the weighting for each candidate consists of the interview and testing assigned a combined value of 60% and reference checks assigned a 40% value. The grievor’s score for the six skills and abilities in the interview and the job related testing was 345.6 out of a possible 640 or 54%. Why it is 640 rather than 575 for the seven was not explained. [$3(10^2) + 2(9^2) + 8^2 + 7^2 = 575$] The 54% of 60% assigned to these seven equals 32.4. He achieved 80% of 40% assigned to reference checks, which equals 32. His total score was 32.4% plus 32%, which equals 64.4%.

[36] The employer disclosed the overall evaluation scores for each candidate. It listed the grievor's score as 64%. The successful candidate's score was exactly fifteen percentage points higher at 79%. The third candidate scored 85% and the fourth candidate's score was lower. The basis on which scores are rounded up or down to whole percentages was not explained.

[37] The candidate the employer selected has less seniority than the grievor, but more seniority than the third candidate who had a higher score. The employer explained to the union that it considers the abilities of the candidate it selected, in the words of Article 7.11(d), to be "significantly and demonstrable higher" than those of the grievor. At the same time, the more junior candidate with the highest score did not meet this test when compared to the candidate selected because the employer considers that: "A significant and demonstrable difference in ability is defined by a minimum 15-percentage point difference between the junior and senior applicant's score." The employer says: "The practice of using a minimum 15-percentage point difference in scores between junior and senior applicant has been in place since 1995."

4. Private Ordering Overlaid with Public Privacy Legislation

[38] Employers and trade unions, voluntarily recognized by employers or certified as exclusive bargaining agents for a bargaining unit or group of employees, privately negotiate the terms and condition of employment for the employees and the terms and conditions for managing affairs between the union and employer. By legislation, such as the *Labour Relations Code*, the state recognizes, authorizes and enables this private ordering through collective bargaining and enforceable collective agreements.

[39] The private ordering by employers and unions through negotiated terms and conditions of employment and agreed norms of behaviour can achieve public policy goals such as economically viable businesses, promotion of productivity, rights protection and efficient and final dispute resolution. Private ordering, rather than public ordering through legislation and executive regulation or order, is particularly suited for dynamic environments, such as competitive marketplaces, requiring constant change and adaptation.

[40] Private ordering in the form of collective bargaining and regulation through enforceable collective agreements developed from the shop floor, rather than the top-down manner of public ordering, has legitimacy because the persons bound by a collective agreement have agreed to its terms. Because of this source for the ordering, a collective agreement can better reflect the needs of the parties and the daily practical challenges they confront than an imposed public ordering.

[41] Flexible, autonomous private ordering through collective bargaining and collective agreements, predicated on limited state involvement in regulating relations and setting norms, has the risk of abuse of power by strong parties with exclusive and autonomous authority. It has the risk that parties will fail to give due recognition and protection to worthy social interests, such as personal privacy.

[42] In British Columbia, private ordering of terms and conditions of employment through collective bargaining and enforceable collective agreements and public ordering thorough legislation, regulation, executive order and judicial precedent or arbitral consensus are not mutually exclusive. While the *Labour Relations Code*, with its high value on private ordering, places few constraints on the outcomes of collective agreement in the form of the content of collective agreements, there is an extensive regime of public ordering through employment standards, health and safety, workers' compensation, human rights, pay equity, public sector collective bargaining, bankruptcy, criminal and industry specific legislation, regulation and executive orders. At times, some public ordering regulation has exempted or deferred to the private ordering norms negotiated in a collective agreement.

[43] It is public policy that grievance arbitration is the principal means of enforcing the terms and conditions of a collective agreement. The courts have decided that, in some cases, arbitration is a forum of original jurisdiction for some disputes traditionally reserved to the courts (E.g., *Weber v. Ontario Hydro* [1995] 2 S.C. R. 929). In other disputes, issues arise whether grievance arbitration and the courts or another forum have concurrent jurisdiction or whether arbitration is precluded because the dispute is reserved exclusively for a specialized dispute resolution tribunal.

[44] Arbitrators must look to and apply law external to collective agreements in the interpretation and application of collective agreements, whether the external law is legislation, executive regulation or orders, judicial precedent or the *Canadian Charter of Rights and Freedoms*. In those situations, the interrelationship of the privately negotiated collective agreement and the public ordering law is a central and crucial issue to the resolution of the dispute.

[45] Consistent with the framework of the *Labour Relations Code*, in 1992 the union and employer negotiated Article 7.11(g) in the context of the employer's operation and their shared and competing interests in hiring, promotions, transfers and demotions. *FOIPPA* was enacted in 1993. The union and employer subsequently negotiated that other provisions of their collective agreement were to be interpreted and administered in compliance with *FOIPPA*. The Court of Appeal decided in 2005 that the interrelationship of Article 7.11(g) and *FOIPPA* is that:

> Although Article 7.11(g) remains in its original form, it too must be read in compliance with the **Act**. The employer may only disclose the information contained in the job applications if the limitations imposed by the **Act** permit that disclosure. Article 7.11(g) must now read:
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> > The Employer will provide the Union with copies of applications for OPEIU job bulletins upon request to the Local Human Resources Office, **in compliance with the Freedom of Information and Protection of Privacy Act**. (*Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Company Ltd.* 2005 BCCA 604; [2005] B.C.J. No. 2655 (QL), ¶ 55; 2005 BCCA 604)

[46] Not all collective agreements have a provision similar to Article 7.11(g) and some unions have less access to personal information than this union has under this collective agreement. In *University of British Columbia*, the union sought a declaration the employer was to disclose to it "resumes of all candidates, applications for each, names of interviewers, questions, answers and marking guide for the interviews and the weighting and scoring for each factor for each candidate" (¶ 12). The union argued because the information was available at arbitration, the issue was merely one of the timing of disclosure and the purposes of the *Labour Relations Code* favoured early disclosure. Arbitrator McPhillips held there was no authority under that collective agreement or the *Labour Relations Code* to make the declaration the union sought. Although he

considered sections in Part 2 of *FOIPPA*, he decided the grievance process was not a "proceeding" contemplated by section 3(2) of *FOIPPA*:

> It certainly can be acknowledged that a grievance arbitration is a quasi-judicial activity and would be a type of "proceeding" contemplated under FOIPPA. However, that designation does not apply to the "grievance process" nor, of course, to a time before that process has even been commenced by the filing of a grievance. Therefore, until a "proceeding" has commenced, which presupposes the appointment of an arbitration board, there is no right of the Union to the documents established under Section 3(2) of FOIPPA. (*University of British Columbia* [2006] B.C.C.A.A.A. No. 166 (QL), ¶ 45)

[47] The union's application to set aside the award was dismissed by the Labour Relations Board, which described the union's position as follows:

> In a nutshell, the Union argues that, despite having no language in the collective agreement entitling it to pre-grievance disclosure of documents used by the Employer in a posting process to fill positions, the Union is nevertheless entitled to this information in order to fulfill its obligations as bargaining agent. Due to this prerogative of the Union and due to the Employer's agreement to the job competition process in the collective agreement, FOIPPA is not an impediment to the disclosure. An arbitrator has jurisdiction to order that the Employer disclose the information on the basis that the information is being sought to assure compliance with those sections of the collective agreement relating to job posting and competitions. (*University of British Columbia* [2006] B.C.L.R.B.D. 100 (QL), ¶ 19)

The Board decided that "in the absence of a dispute arising under the collective agreement, the Arbitrator does not have jurisdiction to order disclosure of the information sought by the Union by virtue of Code provisions" (¶ 29).

> In this case, the Union did not show the arbitrator that the Employer's refusal to provide the information interfered with the administration of the Union. There is no doubt that the Union would be able to do a better job more efficiently if it had earlier access to the information sought. However, as noted by the Arbitrator, it is not without access to the information. It must file a grievance and appoint an arbitrator first. This contrasts to the Board cases where no other method was available for the union to obtain the necessary information.
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> The Board is continually urging parties to promote the cooperative resolution of workplace issues, to respond and adapt to changes in the economy, to foster the development of work related skills and to promote workplace productivity. Allowing the Union access to this information would work to advance these goals. However, I agree with the Arbitrator's concern that to accede to the Union's request would require him to modify the Collective Agreement. That modification should come about as a result of negotiation and cannot be imposed by an arbitrator. (¶ 32-33)

[48] In parallel proceedings involving a selection grievance, a union sought

personal information under a collective agreement that contained an access to information clause that required the employer to accede to, and not unreasonably deny, a union request for information that may include, but was not limited to, “information that may be used in negotiations and processing grievances.” The employer refused a request when the incumbent employee refused to consent to disclosure of personal information. Arbitrator Korbin declined to defer jurisdiction to the Information and Privacy Commissioner. She noted:

> Nor is there any doubt that disclosure of information during this phase of dispute resolution may facilitate settlements, thereby avoiding the need for litigation altogether. Further, the parties agree that it serves no practical labour relations purpose to prohibit the disclosure of relevant documents that are virtually certain to be the subject of an order for disclosure if the matter were referred to arbitration. This is particularly so where, as in the present case, those very documents are necessary to evaluate whether the matter is appropriate for arbitration in the first place.
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> In the case at hand, the information sought by the Union is clearly essential to its ability to fairly and effectively represent its members as required by s. 12 [duty of fair representation] and further to evaluate the proper course of action in light of the respective rights of the grievor and the incumbent under the Collective Agreement.
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> In this case the "person concerned" is also a bargaining unit member. She will be aware there is a collective agreement in effect that governs the selection process and includes a grievance procedure which is binding on the parties and all the members of the bargaining unit. The information at issue came into existence as a result of Ms. Pratt participating in the selection process which is, by its very nature, a competition. It is only reasonable that she would anticipate that other qualified employees might take issue with her selection. In that situation, the Employer might be required to defend its decision by demonstrating its compliance with the Collective Agreement.
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> Every bargaining unit member, including Ms. Pratt, has a legal right to insist that the selection of personnel to fill posted vacancies will be conducted in accordance with the negotiated provisions of the Collective Agreement. The Union is charged with the task of ensuring those provisions have been carried out properly. This obviously requires disclosure to the Union of information relevant to the selection process. It is not reasonable for job applicants in these circumstances to expect that their information will remain a private matter between the applicant and the Employer.
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> The Employer is a public body. In that capacity it has statutory duties that are directly related to the purpose for which the disputed information was obtained. The interpretation of s. 34(1)(b) in the PPM [Privacy Commissioner Privacy and Procedural Manual] (see: PPM s. 34 at page 6) states that necessary for performing the statutory duties "means the personal information is needed to perform duties or obligations required

> by legislation." The phrase "statutory duties" is not given a restricted meaning. It must be taken to mean all applicable statutory duties.
>
> The information at issue was obtained and compiled for the purpose of allowing the Employer to determine that Ms. Pratt met the selection criteria mandated in the Collective Agreement. The Employer has statutory duties under the Code to comply with ss. 48 and 49 and is thereby required to appoint personnel in accordance with the selection provisions of the Collective Agreement. This is a relevant consideration supporting the Union's position that the information requested is not the kind of information the Act is designed to shield. (*Board of School Trustees of School District No. 33 (Chilliwack)* [2004] B.C.C.A.A.A. No. 329 (Korbin (QL), ¶ 63; 97; 103-106)

[49] Arbitrator Korbin concluded FOIPPA "is not intended to interfere with disclosure procedures that are mandated by other statutes" (¶ 108).

> As noted, the alternative options for obtaining the information undermine the function of the grievance procedure as an efficient, cost effective dispute resolution mechanism. There is certainly no clear indication that the purpose of the Act was to erect costly and time consuming procedural hurdles to hinder pre-existing labour relations practices and procedures. Such an interpretation would require acceptance of the proposition that the Legislature intended a FOIPPA application or an arbitration be the only means to access relevant information in this kind of dispute. It would also mean accepting the Legislature intended to allow parties to use the Act to delay the disclosure of relevant information that will, with certainty, ultimately be available to the parties in arbitrations. I find no such intention expressed in the Act and indeed, in the particular circumstances of this case, such an intention would be contrary to the Act, the Code and constructive labour relations.
>
> Two themes emerge from this review of the exception provisions. First, the Act is not intended to prevent disclosure where information is necessary to enable parties to pursue their legal rights. Second, the Act is alive to the public interest in ensuring that privacy concerns are not given paramount status where to do so would interfere with the fulfillment of statutory obligations imposed by other legislation or undermine the normal and efficient functioning of public bodies according to their legislated mandates. (¶ 118-119)
>
> *********
>
> As noted, the Employer maintains that a grievance is not a legal "proceeding" until and unless it is referred to arbitration. Nonetheless, based on all the considerations previously noted in this Award, including the fact that a grievance procedure is a legal process, I am disposed to favour the Union's position on s. 3(2). That is, that the provision is broad enough to capture the circumstances at issue in this case.
>
> Even if I am wrong on the interpretation of s. 3(2), I rely on my conclusions that the information requested falls particularly within the exceptions embodied in s. 22(4)(c) and s. 33(c) and (d) of the FOIPPA. Therefore, it was not reasonable for the Employer to deny the Union's request and to do so was a contravention of the Collective Agreement.
>
> The Employer contends that a finding in favour of the Union would mean that any privacy protections afforded to third parties under the FOIPPA

> would be rendered nugatory simply by the Union filing a grievance. That extreme does not automatically follow from the filing of a grievance. There is a distinction between a request for information that will result in a general release of information to the public at large, as is the case under the FOIPPA, and the release of information to specified parties for specific purposes in a specific context.
>
> Summary
>
> Disclosure of the information sought in this case under a collective agreement is permitted particularly by the exceptions identified in ss. 22(4)(c) and 33(c) and (d) of the FOIPPA. This conclusion is in keeping with the interpretive principle that statutes be construed harmoniously. It does not undermine or detract from the policy objectives of the Code and is consistent with the jurisprudence that recognizes the public interest in expeditious, cost effective methods for resolving labour disputes. It is also consistent with the public interest rationale for the exceptions in the Act. It permits the parties to comply with their Collective Agreement obligations as well as enabling them to fulfill their statutory obligations under the Code and the FOIPPA. It is in accord with the reasonable expectations of the parties in a selection grievance. As well, s. 3(2) conceptually operates to confirm the information requested is available to the Union. Finally, on the submissions of the Union, I am satisfied the grievance procedure affords a reasonable level of protection of privacy for the individuals directly affected.
>
> For all of the reasons outlined above, I find the FOIPPA is not a bar to the Union's disclosure request under Article A16 (e). The Union's grievance succeeds. The Employer is ordered to release the requested information to the Union as soon as practicable to enable the Union to properly investigate the grievance. (¶ 122-127)

[50] The British Columbia Court of Appeal dismissed an employer appeal on the grounds that the real substance of Arbitrator Korbin's award was not a matter or issue of the general law.

> While the arbitrator considered certain provisions of FOIPPA which might be characterized as "general law" in that they affect all employees, whether unionized or not, that consideration did not form the real substance of the award which, in my view, is "whether, having regard to the provisions of FOIPPA, the Labour Relations Code and the Collective Agreement, the refusal by the Employer to produce the requested documents constituted a breach of Article A.16 of the Collective Agreement." Central to that question are several principles expressed or implied in the Code. They include the Code's system of exclusive bargaining authority and duties of a statutory bargaining agent; the binding effect of a collective agreement under the Code and the duties of the parties to implement it; the bargaining agent's duty of fair representation under the Code; the mandatory inclusion under the Code of a method of resolution of disputes without stoppage of work; and the public policy and purpose of the Code to facilitate expeditious, inexpensive resolution of disputes by the parties themselves. The real substance of the award may involve questions of the general law but it cannot, in my view, be described as "a matter or issue of the general law not included in section 99(1)." From that, it follows that section 100 does

not apply. (*British Columbia Public School Employers' Association v. British Columbia Teachers' Federation* 2005 BCCA 411; [2005] B.C.C.A.A.A. No. 1791 (QL), ¶ 45, *per* Esson, J.A.)

5. Framework of *Freedom of Information and Protection of Privacy Act*

[51] The purposes of *FOIPPA* are stated in section 2:

> (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (e) providing for an independent review of decisions made under this Act.
>
> (2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[52] *FOIPPA* "does not limit the information available by law to a party to a proceeding" (s. 3(2)), which includes grievance arbitration under a collective agreement in which an arbitrator can order one party to disclose documents to other parties before or during an arbitration hearing.

[53] *FOIPPA* applies to public bodies. The Greater Vancouver Transportation Authority (Translink) is a "local government body", which in turn is a "local public body" and a "public body" (s. 1 and Sch. 1) to which *FOIPPA* applies. The employer is a wholly owned operating subsidiary of Translink.

[54] Part 2 of *FOIPPA* deals with information rights that are not at issue in this dispute. Part 3 deals with the collection, use, disclosure and disposal of personal information and is referred to as a "Code of Fair Information Practices."

[55] Division 1 of Part 3 deals with the collection, protection and retention of "personal information" by public bodies. "Personal information" is "recorded information about an identifiable individual other than contact information", which is "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual" (Sch. 1). This definition was enacted effective April 11, 2002 (*Freedom of Information and*

Protection of Privacy Amendment Act, 2002, S.B.C. 2002, c. 13, s. 19(b)). The previous definition of personal information was "means recorded information about an identifiable individual, including" an enumerated list of nine types of information (*Freedom of Information and Protection of Privacy Amendment Act*, S.B.C. 1992, c. 82).

[56] Section 26, in Part 3, limits the collection of personal information by a public body:

> No personal information may be collected by or for a public body unless
> (a) the collection of that information is expressly authorized by or under an Act,
> (b) that information is collected for the purposes of law enforcement, or
> (c) that information relates directly to and is necessary for an operating program or activity of the public body.

The employer collects personal information from each job applicant for a posted vacant position and uses it to select and make an offer to an applicant. There is no issue over the nature of the personal information collected from applicants or the legitimacy of that collection. The nature of the "every reasonable effort" the employer makes "to ensure that the personal information is accurate and complete" (s. 28) is not an issue in this dispute.

[57] The information practices mandated by *FOIPPA* oblige the employer to protect the personal information in its custody or under its control against "such risks as unauthorized access, collection, use, disclosure or disposal" (s. 30).

[58] Division 2 of Part 3 of *FOIPPA* addresses public body use and disclosure of personal information it collects. One of the permissible uses is for the purpose for which that information was obtained or compiled or "for a use consistent with that purpose" (s. 32(a)). The public body may disclose the personal information inside Canada "for the purpose for which it was obtained or compiled or for a use consistent with that purpose" (s. 33.2(a)). And it may disclose the personal information "to a representative of the bargaining agent, who has been authorized in writing by the employee whom the information is about, to make an inquiry" (s. 33.2(h)). And it may disclose personal information "to comply with a subpoena, warrant or order issued or made by a court, person or body in Canada with jurisdiction to compel the production of information" (s. 33.2(b)).

[59] The use of personal information is consistent with the purpose for which it was obtained or compiled if the use "has a reasonable and direct connection to that purpose" and "is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information or causes the information to be used or disclosed" (s. 34(1)).

6. Privacy Value and Court of Appeal Decision

[60] In recent years, the Supreme Court of Canada has recognized and interpreted laws to respect a right to privacy under the *Canadian Charter of Rights and Freedoms*. The value of privacy has received expression in the protection of certain privacy interests. Most often the context has been the legal rights sections of the *Charter* (ss. 7 and 8), but privacy has also been considered under the equality section (s. 15). (*R. v. O'Connor* [1995] 4 S.C.R. 411; *M. (A.) v. Ryan* [1997] 1 S.C.R. 157)

[61] In 1997, the Supreme Court of Canada considered a request for weekend employee sign-in logs of a federal government department that the requestor intended to disclose to a union for purposes of collective agreement. The logs were disclosed with names, identification numbers and signatures redacted. One issue before the Court was whether the redacted information was "personal information" exempted from disclosure. The Privacy Commissioner did not support the requestor's complaint that he was deprived of a right of access to information. The trial judge decided the names were not personal information and were to be disclosed. In doing so he gave preference to government disclosure of information over individual privacy. The Court of Appeal allowed an appeal. The Supreme Court decided the information was personal information. With a five-to-four split, the majority decided this personal information was subject to disclosure under an exception in the applicable privacy legislation. (*Dagg v. Canada (Minister of Finance)* [1997] 2 S.C.R. 403)

[62] The careful balance that must be struck in any situation when there is a clash between the value of access to government information, that facilitates democracy by giving citizens information to participate meaningfully and hold politicians and bureaucrats accountable, and the fundamental value of the protection of personal privacy, that respects human dignity and by extension a

civilized society, is reflected in the approach and outcome of the Supreme Court majority and minority reasons and judgments.

[63] In determining whether the "personal information" was of a nature intended to be disclosed, the intervening union had argued disclosure of the information "would facilitate bargaining agents in exercising their rights and ensure that the public is able to determine whether public servants are appropriately compensated for their work." The minority addressed this submission and disagreed:

> I do not find this argument convincing. It is true that there is a general public interest in the smooth functioning of the collective bargaining process and in ensuring that employers, including those in the public sector, live up to their obligations under collective agreements. I do not believe, however, that this interest is embodied in the access to information or privacy statutes. As I have discussed, the *Access to Information Act* is concerned with securing the values of participation and accountability in the democratic process. Of course, collective bargaining plays an important role in the democratic system. However, it is in many ways an autonomous regime, with its own enabling legislation and comprehensive system of dispute resolution. This system attempts to mediate the conflict between the private interests of employers and the private, collective interests of workers. In this sense, a union's interest in obtaining helpful information from its employer is no greater than the employer's interest in obtaining like information. Conflicts regarding such information should be resolved within the confines of that system, i.e., by recourse to the usual dispute resolution methods of labour relations -- negotiation, arbitration and administrative review. There is no indication that access to information legislation was intended to enable one side in this conflict to obtain information that it would not otherwise be entitled to under the collective bargaining system. It is acceptable, of course, if the legislation permits this incidentally, i.e. by permitting someone with a particular private interest to benefit because disclosure accords with the public goals of the legislation. The legislation should not be interpreted, however, with the collective bargaining system specifically in mind. In my view, the fact that disclosure of the sign-in logs in this case would be helpful to the union is not relevant to determining whether the information relates to an employee's position or functions within the meaning of s. 3(*j*) of the *Privacy Act*. (¶ 98-99)

[64] The Court of Appeal adopted from this Supreme Court of Canada decision the principle that, in dealing with personal information under *FOIPPA*, "privacy is paramount over access" (*Canadian Office and Professional Employees' Union, Local 378 v. Coast Mountain Bus Company Ltd.* 2005 BCCA 604; [2005] B.C.J. No. 2655 (QL), ¶ 17; 2005 BCCA 604).

[65] At the same time, taking a functional approach, rather than a literal or

cramped interpretation, the Court of Appeal did not treat collective bargaining as an autonomous regime in the context of the use and disclosure of personal information in selection for job vacancies. The Court supported the private ordering goals of collective bargaining and the *Labour Relations Code* and decided disclosure of personal information to the union in accordance with Article 7.11(g) has a reasonable and direct connection to the purpose for which the information is obtained or compiled because it is logically and rationally connected to that purpose.

[66] Therefore, giving the union access to personal information in accordance with Article 7.11(g) for the union's use to ensure compliance with the collective agreement is a use consistent with the purpose for which the information is obtained or compiled.

> The information collected by the employer in the job competition was obtained for the purpose of determining if a person is a suitable candidate for a job with the employer. The collective agreement governs the job competition. In order for a candidate to be suitable for employment the provisions in Article 7 must be complied with. Therefore, part of the intention in collecting the information was to ensure that the hiring of any candidates would be in compliance with the collective agreement. I agree with the arbitrator where she says, at 19:
>
> > ... it would be artificial to say the Employer can use this information to make a selection but not to allow the Union to use the information to assess that selection and in effect the Employer to defend that selection. ... (¶ 61)

Further the Court concluded: "It is reasonable for applicants to expect that the union may require access to their personal information to ensure the selection process complies with the collective agreement" (¶ 62) and:

> The union's use of the information for the purpose of assessing the employer's hiring decision is therefore a purpose consistent with the purpose for which the information was obtained namely, seeking a suitable candidate for a job with the employer through a job competition governed by a collective agreement. (¶ 63)

[67] Continuing with the same approach, the Court of Appeal decided union access to the personal information in accordance with Article 7.11(g) was also "necessary for performing the statutory duties of, or for operating a legally authorized program" of the employer, the second condition in determining a consistent purpose under section 34(1) of *FOIPPA*. The Court found the personal information was "needed to perform duties or obligations required by

legislation" and therefore was necessary to perform its statutory duty of "running a bus company" and its statutory duty to fulfill the terms of the collective agreement, which include making hiring decisions in accordance with the collective agreement. "Disclosure to the union as required by the collective agreement is necessary to help ensure that this statutory obligation is being met." (¶ 65-66). As a result, the Court concluded "…it would be consistent with the purpose of selecting a suitable candidate for the employer to provide the information contained in the job applications to the union. Disclosure is permitted under s. 33.2(a)" (¶ 67).

[68] Having decided disclosure to the union was a fair information practice under Part 3 of *FOIPPA*, the next question the Court addressed was how much personal information is to be disclosed. This is the question central to this arbitration.

[69] In 1997, the British Columbia Information and Privacy Commissioner investigated two complaints that the Insurance Corporation of British Columbia had made a secondary use of clients' personal information by disclosing it to a contracted survey research company contrary to Part 3 of *FOIPPA*. Providing the information to the contracted survey research company was "disclosure", not a "use", by the public body. In a report intended to provide guidance for all public bodies dealing with the private sector and adopting the mantle of "privacy pragmatist", the Commissioner stated: "The rule is that public bodies should disclose only the personal information that is necessary to complete a task, thus minimizing intrusions into the lives of its clients." (*Investigation P97-009; Insurance Corporation of British Columbia* [1998] B.C.I.P.C.D. No. 31 (QL), ¶ 26).

[70] The public body had disclosed clients' "claim number; claim type; office location; date of loss; driver's name; residential telephone number of driver; age of driver; sex of driver; licence plate and insurance policy number; postal code; reserve code (for category of file)." The Commissioner found most were "necessary for an effective survey research program", but the licence number and insurance policy number were not. This personal information and any other "not strictly necessary for the program" should not be disclosed to the contracted company. The survey results contained no "personal identifiers", that is

"personal information that could identify individual respondents." (¶ 27 - 30)

[71] The Commissioner decided the approach to be taken to personal information is to "use, transfer or disclose only what is necessary to get the job done, within the limits and guidelines of the *FOIPPA* and the governing statutory authority" (¶ 33). This did not include home addresses, but did include the first three characters of the postal code; third-party information about relatives; and social insurance numbers.

[72] The Court of Appeal adopted the minimization rule approach to the use, transfer and disclosure of personal information. "As discussed above, the union's use of the information for the purpose of ensuring the employer's hiring decision complies with the collective agreement is consistent with the purpose for which the information was obtained. Only personal information necessary to meet the union's purpose can be disclosed." (¶ 71)

[73] The Court could have, but did not, end its judgment there. The Court went on to give some advice on the future administration of Article 7.11(g) as read with an amendment incorporating a reference to *FOIPPA*. It did so consistent with the Commissioner's approach that there should be disclosure to the union of what was necessary to get the job done.

> Article 7.11(g) is intended to provide the union with the information necessary to ensure the selection provisions of the collective agreement are carried out properly. Specifically, under Article 7.11 members of the union are entitled to preference in the hiring process.
>
> The union requires the information in the job applications to determine whether or not the collective agreement has been breached, and whether to pursue a grievance. This task does not require the job applications of unsuccessful candidates who are not union members. Disclosure must be limited to what is necessary to ensure the obligations in Article 7.11 are met. The only information required for this task is the job applications of successful candidates and of COPE Local 378 members. Personal privacy can be further protected by removing personal identifiers such as name and contact information. In addition, personal information found in either the successful applicant's or a COPE member's application that does not relate to ability to perform the vacant job or to seniority should be blocked out. Again this information is not necessary at this stage and is beyond the scope of permissible disclosure. Disclosing the job applications of the successful candidate and of COPE members, with the limitations mentioned above, will satisfy the intentions of Article 7.11(g) and the **Act**. (¶ 72-73)

****

> Limiting disclosure in this case to the successful candidate's job application, as well as the applications of any COPE members, interprets Article 7.11(g) in a manner that conforms with the Act. It also strikes a proper balance of protecting individual privacy while at the same time providing the union with access to the information it has bargained for and requires in order to ensure the job competition provisions of the collective agreement are followed.
>
> It would be reasonable for the employer to make efforts to inform job applicants that the job applications of successful candidates and of COPE members may be disclosed to the union for the purposes of ensuring compliance with the collective agreement.
>
> This disposition does not impair the union's right to seek further disclosure in an individual grievance. Section 3(2) of the Act says:
>
> > This Act does not limit the information available by law to a party to a proceeding
>
> A grievance arbitrator can make an order for disclosure of additional information necessary for a fair hearing.
>
> However, the union's limited right to disclosure under s. 33.2(a) is one that can be exercised in advance of a grievance being filed. It may serve to render some grievance proceedings unnecessary, and thereby to effect a saving of time and expense. It protects all strangers to the collective agreement from disclosure of their personal information, save for a successful job applicant who is not a union member. It provides the union with sufficient information to determine whether a grievance is merited, while infringing upon individual privacy rights as little as possible. (¶ 75-78)

[74] The Labour Relations Board made its decision in *University of British Columbia* after the Court of Appeal, but did not have to deal with the interaction of *FOIPPA* and any collective agreement provision as Arbitrator Korbin had in *Board of School Trustees of School District No. 33 (Chilliwack)*.

[75] In *University of Alberta* (2006), 151 LAC (4^{th}) 365 (Sims); [2006] A.G.A.A. No. 32 (QL) the union sought information about job posting competitions the employer denied because of the provisions of *FOIPPA*. The general background was that:

> For some years the University and NASA [the union] have used collaborative problem solving methods to try to resolve issues that might otherwise become grievances. Both parties have found value in this approach. However, a crucial factor in its success, at least from NASA's point of view, has been the willingness and ability of the University to share information and documents about a problem freely and early. This has enabled the parties to search for solutions before positions harden and grievances move to a more formal stage.
>
> The University does not dispute the value of this approach, but in its view it is voluntary. It does not believe that disclosure of information is an absolute and unlimited right under the collective agreement, and more

> particularly it believes it is bound by law to follow the restrictions in the Freedom of Information and Protection of Privacy Act (which we will just call the "privacy legislation" or "the Act"). (¶ 2-3)

The collective agreement dispute resolution procedure included the following:

> The Employer and the Union will work together to foster a collegial and productive workplace. Working together requires a commitment to frequent and open communications and joint problem solving on matters affecting the Collective Agreement and/or the Union-Management relationship.
>
> The purpose of the dispute resolution process is to resolve problems, complaints and grievances, between the Union and the Employer, in a timely and effective fashion, and to maintain harmonious working relations
>
> Both parties recognize their collective duties and responsibilities in these matters.
>
> The parties will disclose all information/documentation concerning the dispute at the earliest possible opportunity.

As here, there was a dispute over the interpretation of the collective agreement and its interaction with *FOIPPA*. The union maintained the employer had taken an overly restrictive interpretation of the limitations imposed on it by *FOIPPA*.

[76] The arbitration board considered the British Columbia Court of Appeal's decision after identifying differences in the provisions of the collective agreements and *FOIPPA* in Alberta and British Columbia. The board concluded disclosure in compliance with the collective agreement was not intended to be open ended or restricted by a precise definition of the issue that at an early stage may not yet be defined.

> [The applicable collective agreement article] is clearly not an open ended obligation to disclose anything on request. However, once a problem is raised that has that potential to blossom into an alleged breach of the agreement as described above, it appears to us to defeat the parties' expressed early problem solving approach to require too precise a definition of the dispute before disclosure is provided. Experience tells us that it takes some time before initial complaints gain contractual focus. Early perceptions can be quite wrong and can change considerably as a result of listening to what others have to say and of reviewing explanatory information provided by the other party. To hold that the disclosure obligation in Article 38.01(b) only arises once that clear focus is achieved is to defeat its apparent object. (¶ 100)

[77] Disclosure was permitted by *FOIPPA* and the arbitration board followed the lead of the British Columbia Court of Appeal in taking a minimalist disclosure approach:

> The purpose of the disclosure under the agreement's terms is to assist in early stage dispute resolution. What is reasonable and necessary at that

> point will depend upon what is being raised as a potential breach of the agreement. The parties, when discussing what it is reasonable to seek or disclose should consider what is truly necessary to explore the problem and to achieve its resolution. This way they give effect to Section 40(4)'s requirement that disclosure be limited to what is truly necessary to achieve their contractual purpose. In the ordinary job selection case, given the limited rights this collective agreement affords for a challenge, the personal information of external applicants would rarely be necessary to the Union's review. We can conceive of cases where the disclosure of such information might be necessary but even then, in most cases, redacted information may suffice. The parties should consider, routinely, what steps might be taken to protect third party interests. This may include redacting identifying personal characteristics, the use of pseudonyms, limitations on to whom the information may be revealed and restrictions on what can be seen or taken away. It is appropriate to consider NASA's own arrangements for protecting privacy which may be sufficient to make disclosure within that "cone of secrecy" reasonable. The parties might consider staged production, releasing some information initially and only releasing other information if and when necessary to answer more specific concerns. Conscientious attention to such arrangements, in the spirit of Section 40(4), and not as an indirect method of resisting disclosure or seeking unjustified disclosure, will ensure that the University is able to meet both its contractual and statutory obligations. (¶126)

7. Union Submissions

[78] The union submits the intent of Article 7.11(g) is to avoid grievances, but if there is a grievance the agreed procedure is intended to operate so that all grievances are “settled as quickly as possible” (Article 3.03). Differences over employer selection decisions in competitive job postings cannot be avoided or quickly resolved if the union does not have access to all materials generated and considered by the employer in the selection process. This requires disclosure of all aspects of the personal information of applicants collected or compiled by the employer for the purpose of the selection process.

[79] For the purposes of this proceeding only, the union accepts the employer’s approach of a minimum fifteen percentage point difference to establish a significant and demonstrable difference in ability. It submits the union must be able to understand and scrutinize how the percentage difference was arrived at. In the sample job posting accompanying the agreed statement of facts, the difference was exactly fifteen percentage points. A change in one percentage point will entitle the grievor to be selected.

[80] The union submits that all the personal information of all the candidates

can be accessible to it simply by advancing a grievance to arbitration where it is "a party to a proceeding." Under section 3(2) of *FOIPPA*, the Act will not limit the information available to the union. The consequence is that this dispute is not one of substantive protection of privacy rights, but a procedural issue concerning the timing of the employer's disclosure.

[81] The union submits full disclosure sooner, rather than later, after the selection decision avoids financial costs, process delays and friction for all concerned. It helps achieve the *Labour Relations Code* goals of recognizing employer and union obligations under the *Code*; encouraging cooperative union and employer participating in dispute resolution; and promoting conditions favourable to orderly, constructive and expeditious settlement of dispute (ss. 2(a), (d) and (e)). It will fulfil the union and employer's shared interest of being competitive and cooperative and emphasize problem solving over adversarial relations (*Orca Bay Hockey Limited Partnership* [2007] B.C.L.R.D. No. 172 (QL), ¶ 54-57).

[82] Consistent with this approach, the union submits that, unlike the collective agreement in the *University of British Columbia* dispute, the union has negotiated Article 7.11(g), which should be given a broad and purposive interpretation similar to the practical and problem solving approach of Arbitrator Korbin in *Board of School Trustees of School District No. 33 (Chilliwack)* and the arbitration board in *University of Alberta*. One of the purposes is speedy resolution of disputes as agreed in Article 3.03. A narrow interpretation will defeat the goal of early problem solving. There is nothing in *FOIPPA* that compels a restrictive interpretation of Article 7.11(g).

[83] The union submits the scheme of the collective agreement is that junior applicants must establish an ability to perform the job that is "significantly and demonstrable higher than candidates who have greater seniority." They do this through the application process with all of its components, not simple through the initial expression of interest and submission of a resume. Their "applications" must address all of these components from resume to interviews to testing to reference checks. All this information is necessary for the union to ensure compliance with the collective agreement. That is the intention of Article 7.11(g).

It is not to give the union a little taste of the information, as the employer's current approach does, and leave the union to guess or have to proceed to arbitration to access the remaining information.

[84] Therefore, the union submits, "applications" includes all documentation produced during the selection process. Without it being disclosed, the union cannot evaluate, question and challenge the employer's selection and the employer cannot answer and defend its selection. There can be no dialogue, no problem solving and no early dispute avoidance or resolution.

[85] The union submits it is recognized by the Court of Appeal that *FOIPPA* in British Columbia and, as reported in *University of Alberta* (¶ 61), *FOIPPA* in Alberta are not intended to impede the flow of legitimate information between a union and employer. In the real world, job applicants will expect that their personal information will not remain private if there is a challenge to the process or selection under the collective agreement.

[86] The union submits the guidelines to be taken from the Court of Appeal judgment are:

> (1) The job applications of successful candidates and COPE Local 378 members are to be disclosed. Job applications of unsuccessful candidates who are not COPE 378 members need not be disclosed.
> (2) Personal identifiers such as name and contact information must be removed.
> (3) Personal information in applications that does not relate to ability to perform the vacant job or to seniority should be blocked out.

The employer does not adhere to these. Rather, it removes all personal information from the redacted resumes it discloses, including "significant aspects of employment history, educational history and skills/training information. These are all matters that relate to an individual's ability to perform the vacant job and must be disclosed in accordance with the Court's decision."

[87] The union submits the employer is obliged to disclose application forms, resumes, interview questions and responses, score sheets, written tests, summary of candidate narratives and internal reference forms. The only exceptions to the disclosure permitted by *FOIPPA* should be those enunciated by the Court of Appeal.

[88] The union submits the repealed definition of "personal information" by specific enumeration in subparagraph (g) included information about an individual's educational and employment history. This is personal information necessary to fulfill the purposes of Article 7.11(g) and is to be disclosed as a use of the information the employer collected in accordance with section 32(a) of *FOIPPA*. "Personal identifiers" to be removed do not include the information necessary to assess an individual's ability as defined in Article 7.11(d) to include "formal education, special training and experience." This personal information must be disclosed even if it has the secondary consequence of enabling the union to identify the individual.

[89] The union submits the employer has failed to comply with Article 7.11(g) of the collective agreement by:

(a) deleting personal information which does not fall within the Court of Appeal's exceptions;

(b) failing to produce interview questions and answers for the successful candidate and unsuccessful candidates who are members of COPE; and

(c) failing to produce test results, score sheets and recorded internal reference information for the successful candidate and unsuccessful candidates who are members of COPE.

8. Employer Submissions

[90] The employer submits that, despite any inconsistencies that may appear in the sample redacted documents disclosed to the union, its focus has been to act so it is not in breach of *FOIPPA*. In doing so, it has had to deal with competing obligations under the collective agreement and *Labour Relations Code*, on the one hand, and *FOIPPA*. There is no hierarchy in these obligations, which are to be treated as having equal value, and its challenge has been to make disclosure to fulfill its collective agreement obligations and their legitimate purpose of early dispute resolution while those obligations are circumscribed by the privacy protection provisions of *FOIPPA*. In this arbitration, the employer seeks "greater clarity under the Collective agreement, FOIPPA and the Appeal Judgment so that it can meet its obligations to COPE and to individuals who

disclose personal information in the course of applying for job postings within COPE's bargaining unit."

[91] As determined in the arbitrator and Labour Relations Board decisions in *University of British Columbia*, the employer submits the most extensive scope of its obligation to disclose is what it has agreed to disclose in the collective agreement, namely "copies of applications." The Court of Appeal decided disclosure of the "applications" is permitted by *FOIPPA*.

[92] The employer submits, the words "copies of applications" on their face best reflect the shared intention of the union and employer and are to be viewed in their normal and ordinary sense (*Northwest Territories* (1997), 65 LAC (4th) (Hope); *Massey-Harrison-Ferguson Ltd.* (1955), 5 LAC 2123 (MacRae); *British Columbia* (2003), 122 LAC (4th) 201 (Germaine)). The words "copies of applications" do not encompass all of the documents collected or produced by the employer in the job selection process.

[93] The employer submits "applications" are documents submitted by applicants "as part of their formal request for consideration in the job selection process." These are the resumes submitted and may include covering letters and any accompanying diplomas or other documents. This is consistent with common dictionary definitions of "application" as "the making of a request, especially of a formal nature" (*The New Shorter Oxford English Dictionary* (1998)); "the formal request, usually in writing, for employment, membership, etc." (*The Canadian Oxford Dictionary* (1998)); and "a request or petition" (*Black's Law Dictionary*, 8th ed. (2004)).

[94] The employer submits it is a modification of the collective agreement to rewrite "copies of applications" as the union proposes to be all materials from the application process. To do so may adversely impact the employer's interest to be attuned and responsive to the expanding privacy culture and to attract the deepest pool of available candidates by not chilling the willingness of persons to apply or provide references. This chilling effect is a real risk, as acknowledge by the arbitration board in *University of Alberta*:

> One particular concern expressed by the University is the chilling effect the potential disclosure of confidential references solicited from third

> parties might have on the frankness of future references. We accept that this is a real risk, and one that therefore calls for prudence by both parties before seeking or disclosing such references. While allegations may arise in an unusual case where disclosure would be justified by the nature of those allegations, we think this will be rare, and we urge caution by both parties in this respect. We remind the parties as well, when they are considering the potential for creating a chilling effect, that the difference may only be between early and discreet disclosure and later and perhaps less discreet disclosure during an arbitration proceeding. (¶ 127)

[95] The employer submits the context in which the words must be given their plain and ordinary meaning is that there is no separate right to disclosure; the employer's right to not disclose is being compromised; the timing of the disclosure is before there is a dispute; and the union can and will eventually have access to all the information if it advances a grievance to arbitration. Further the language is not as broad as that in the collective agreements in the decision in *University of Alberta* or the decision in *Board of School Trustees of School District No. 33 (Chilliwack)*.

[96] The employer submits *FOIPPA* restricts the personal information to be disclosed under Article 7.11(g) to that necessary for the union's role in the job selection process. The Court of Appeal decided the information the union requires is job applications of the successful candidate and applicants who are members of the union after removal of all personal identifiers, such as name and contact information, and any personal information not related to ability to perform the posted job or seniority.

[97] The employer submits disclosure at this stage is for the union to determine if it will proceed with a grievance. All that is required is sufficient information to determine if the employer may not have complied with the collective agreement by selecting a junior candidate without significantly and demonstrably higher ability than a more senior candidate or not giving preference to a union member. The employer currently provides this minimum amount of information. The employer also provide other information that is not personal information that may be helpful - job description, job posting, applicants' seniority dates, interview questions and responses for the grievor, criteria and weighting for each factor, overall evaluation scores, and scores for each criterion for the grievor. This is an appropriate balance of the competing obligations of disclosure and protection of

privacy and is sufficient to achieve the purpose of disclosure to the union.

[98] The employer submits it discloses enough information related to seniority to establish an applicant's seniority relative to other applicants. No more needs to be disclosed. With respect to ability, the employer submits the personal information that is relevant will depend on the job description and applications submitted. It may not be possible to define for all cases what information is not related. The determination will have to be made on a case-by-case basis, but limited to the personal information of the successful candidate and other candidates who members of the union.

9. Analysis, Discussion and Decision

A. Documents included in "copies of applications"

[99] The question submitted for determination is - "What documents typically generated in the job selection process are included in 'copies of applications' in Article 7.11(g)?"

[100] Article 7.11(g), as read by the Court of Appeal to account for the subsequent enactment of *FOIPPA*, states: "The Employer will provide the Union with copies of applications for OPEIU job bulletins upon request to the Local Human Resources Office, in compliance with the Freedom of Information and Protection of Privacy Act."

[101] The interpretation of the shared intended meaning of the phrase "copies of applications" in Article 7.11(g) is a task for arbitration under the collective agreement and *Labour Relations Code*. Consistent with this assignment of jurisdiction to grievance arbitration, the Court of Appeal did not purport to ascribe a specific meaning to these words in this collective agreement.

[102] There is no extrinsic evidence of negotiating history or past practice to assist in determining the shared intention of the union and employer as expressed in these words. The shared intention must be taken to be the plain and ordinary meaning of these words having with regard to the context in which they are found and the practical consequences of competing interpretations.

[103] The language in Article 7.11(g) is not as broad as in *University of Alberta* -

"The parties will disclose all information/documentation concerning the dispute at the earliest possible opportunity" - or as in *Board of School Trustees of School District No. 33 (Chilliwack)* - "information that may be used in negotiations and processing grievances." In those collective agreements, the disclosure agreement had generic application to all possible disputes that might arise under the collective agreement and, consequently, was expressed in broad terms.

[104] In Article 7.11(g), the context is narrower and directed at employer job selection decisions and disputes that may arise in relation to those decisions.

[105] The collective agreement does not speak to the employer's job selection process and does not limit the employer to a particular selection process or one that was in use when the language was negotiated. The language is to operate in changing circumstances and evolving approaches to competitive job selection.

[106] The constant is that, within the framework under Article 7.11(a) to (c) and (e) of posting job vacancies with all pertinent details, acknowledging receipt of each application, accepting late applications and recognizing non-bargaining unit employees may apply, the union and employer agree in Article 7.11(d) to the basis for selection - ability to perform the vacant job and seniority in that order - with preference to be given to members of the union.

[107] Ability is defined with respect to the applicants' formal education, special training and experience required for the described job or equivalent knowledge and skill and performance in his or her present job.

[108] In this context, an applicant's "application" must be given a meaning greater than the initial expression of interest the employer requests, which currently under its online E-Recruit system is completion of some fields with contact information and forwarding a resume with any attachments and covering letter the applicant chooses whose contents the employer does not direct.

[109] None of this initial unstructured information will necessarily impact an applicant's overall score and the selection decision. At a basic level, it is simply

an applicant's introduction to the employer and securing a place in the selection process. At a higher level, it reflects the applicant's assessment of the qualifications, skills and qualities he or she deduces are relevant to the position and his or her effort to put his or her best foot forward. The scope of literature on the best form and content of resumes in unlimited and in many respects arcane. The employer apparently assigns no weight to these documents in its evaluation and scoring of competing candidates.

[110] The significant and valued personal information an applicant provides to the employer that in reality constitutes his or her "application" is the structured interview questions and applicant responses and the tests and applicant responses or performance and resulting test scores. Only in the narrowest sense can the initial request to be considered as a candidate be viewed as the application. To restrict the intended meaning of "applications" to that simple, and apparently not valued, expression of interest is to give the word a literal and cramped meaning divorced from the entire context of Article 7.11.

[111] Consistent with the clear intention of Article 7.11 that applications are to be disclosed to the union to ensure compliance with the agreed selection process and criteria, an "application" includes all the information the applicant gives and all the information the employer asks the applicant to supply to assess his or her ability and seniority. It may be that the employer does not ask an applicant for seniority information, because the employer already has this information. However, once an individual applies, information about his or her seniority is necessarily imported into, and becomes part of, his or her application.

[112] The reference check is a significant body of information that accounts for forty percent of the weighting in the employer's current job selection process. This is not information supplied by the applicant, but by other persons. The agreed facts are not specific whether reference checks are limited to persons identified by the applicant or include others identified by the employer who know, have worked with or have taught or supervised the applicant. In any case, this information about the applicant, including the record of the questions asked and responses received, is not information supplied by the applicant.

[113] It is speculative and without empirical foundation to conclude disclosure of reference information at the grievance stage is likely to have a chilling effect on the willingness of the employer's supervisors or others to candidly provide information. All of the information compiled from references will be disclosed to the union if the grievance proceeds to arbitration as grievances have for decades under innumerable collective agreements in job selection arbitrations. This is not a helpful factor in determining whether this information is encompassed with the intended scope of applications in Article 7.11(g).

[114] Rather, the determinative factor is that the reference check information is not supplied by the applicant. It would give a strained interpretation to the word "applications" to include information that does not emanate from the applicant, even if the applicant supplies the names of the references.

[115] I have concluded it is not a strained interpretation, but rather the intended interpretation, that in the current job selection process used by the employer "copies of applications" includes any electronic or other form the employer requires applicants to use to make timely applications; resumes; any document voluntarily supplied by an applicant; interview questions and responses; score sheets; written tests; criteria used to evaluate candidates and the weight given to each; score sheets; seniority date; and overall scores achieved.

B. Personal Information to be disclosed

[116] The question submitted for determination is - "What personal information must be disclosed to meet COPE's purpose of ensuring the Employer's hiring decision complies with the collective agreement? [see para. 71 of the Appeal Judgment]"

[117] The tension between the union and employer arises from the Court of Appeal statements that disclosure is permitted under section 33.2(a) of *FOIPPA*, but "Only personal information necessary to meet the union's purpose can be disclosed" (¶ 71) and that "Article 7.11(G) is intended to provide the union with the information necessary to ensure the selection provisions of the collective agreement are carried out properly" (¶ 72).

[118] In one clash between a disclosure provision of a collective agreement and

FOIPPA, Arbitrator Korbin held in *Board of School Trustees of School District No. 33 (Chilliwack)* that *FOIPPA* did not limit the union's access to documents under the provision in that collective agreement. For jurisdictional reasons, the employer's appeal to the Court of Appeal was dismissed.

[119] When the issue came before the Court of Appeal again in the earlier stage of this dispute, the Court of Appeal decided this collective agreement was impacted by *FOIPPA* and Article 7.11(g) has to read as: "The Employer will provide the Union with copies of applications for OPEIU job bulletins upon request to the Local Human Resources Office, **in compliance with the Freedom of Information and Protection of Privacy Act**."

[120] Similar to the functional and purposive approach I applied to discern the intended meaning of "copies of applications", the Court of Appeal, following the lead of the Supreme Court of Canada majority in *Dagg v. Canada (Minister of Finance)*, interpreted sections 32 to 34 of *FOIPPA* to conclude employer disclosure of personal information in accordance with Article 7.11(g) is permissible under *FOIPPA*. Recognizing the value of privacy is to be paramount over access to information, both the Supreme Court of Canada and the Court of Appeal, dealing with separate issues under federal and provincial legislation, concluded the union was entitled to access to the information in dispute.

[121] Like the Information and Privacy Commissioner in *Investigation P97-009; Insurance Corporation of British Columbia*, the Court of Appeal did not lean toward being a privacy purist, as the employer had in *University of Alberta*. Rather, like the Commissioner, the Court of Appeal approached the conflict and overlay of public privacy legislation on private ordering through collective bargaining as a privacy pragmatist. It sought to find the balance that gave practical effect to the intention of Article 7.11(g); recognized the unique status of the union in dealing with personal information for employment related purposes and the value of early stage dispute resolution; and respected individual's privacy expectations. It said:

> However, the union's limited right to disclosure under s. 33.2(a) is one that can be exercised in advance of a grievance being filed. It may serve to render some grievance proceedings unnecessary, and thereby to effect a saving of time and expense. It protects all strangers to the collective

> agreement from disclosure of their personal information, save for a successful job applicant who is not a union member. It provides the union with sufficient information to determine whether a grievance is merited, while infringing upon individual privacy rights as little as possible. (¶ 78)

[122] Countenancing disclosure of personal information to a third party contractor, the Information and Privacy Commissioner wrote: "The rule is that public bodies should disclose only the personal information that is necessary to complete a task, thus minimizing intrusions into the lives of its clients" (*Investigation P97-009; Insurance Corporation of British Columbia* [1998] B.C.I.P.C.D. No. 31 (QL), ¶ 26). Consistent with this approach, the Court of Appeal held the union does not* need access to applications of unsuccessful candidates who are not union members. When disclosing the applications of the successful candidate and union members, the employer is to remove information "that does not relate to ability to perform the vacant job or to seniority."

(* correction 07/09/14: "not" mistakenly omitted from original)

[123] Some unrelated or irrelevant personal information may be volunteered by applicants and not solicited by the employer. For example, an applicant may inform the employer she is pregnant or discuss family affairs. Other examples discussed at this hearing include hobby and recreation activity. In redacting or withholding certain information, the employer will be saying that information is not relevant or related to the applicant's ability to perform the vacant job or his or her seniority and was not considered by the employer. It will not be saying it was considered and given no weight. A dispute could arise when the applicant or union thinks the information is relevant and related. An applicant's class of driving licence, level of CPR certificate, course completion dates, years of experience and involvement in work committees are examples of redacted information in the sample disclosure accompanying the agreed statement of facts that is relevant and related to the ability to perform the job.

[124] The nub of the issue arising from the Court of Appeal judgement is the Court's advice that: "Personal privacy can be further protected by removing personal identifiers such as name and contact information" (¶ 73).

[125] "Personal identifiers" is not a term from *FOIPPA*, which contains the phrase "individual identifiers" in relation to a public body's use of personal

information for research and statistical purposes (s. 35(c)(ii)). The Information and Privacy Commissioner used the term “personal identifiers”, rather than “individual identifiers”, in dealing with the disclosure of personal information to a contracted survey research company. In the context of conducting research or compiling statistical analysis, personal or individual identifiers may have to be disclosed to the researcher, but “the product of the survey contains no personal identifiers” (*Investigation P97-009; Insurance Corporation of British Columbia* [1998] B.C.I.P.C.D. No. 31 (QL), ¶ 30). In the context of ensuring compliance with the selection provisions of the collective agreement, the job selection competition is personal among the candidates and the meaning of “personal identifiers” must reflect the fact that disclosure of personal information is both permitted and necessary to fulfill the purpose for which it was obtained or compiled.

[126] When using the term “personal identifiers” in this context, the court of Appeal meant information that is specific to a unique individual. This includes names and contact information, such as postal, email and other addresses and telephone numbers; passwords, social insurance, drivers licence, care card and financial numbers; and, in the current world, biometrics. This is information that is often guarded by individuals to avoid identify theft.

[127] Personal identifiers are not, as the employer has interpreted it, any thread or fragment of information that may enable the union to deduce or discern the name or identify an applicant. This approach has led to redacting the names of schools; transit depot location of current and past positions with the employer; years of employment in a current or past position; dates of course and other activities; past job positions; and other information. Much of this information is related to ability - “formal education, special training and experience” - required for the job vacancy or “equivalent knowledge and skill.”

[128] The employer has exercised caution and prudence giving “personal identifiers” a meaning and scope beyond that intended by the Court of Appeal acting as a privacy pragmatist to give operational effect to Article 7.11(g) by disclosing to the union the personal information “necessary to ensure the selection provisions of the collective agreement are carried out properly” (¶ 72).

[129] I have concluded the personal information to be disclosed to meet the union's purpose of ensuring the Employer's hiring decision complies with the collective agreement is all personal information in the complete "applications", as determined above, of the successful candidate and union members except (1) personal information not related to an applicant's ability to perform the job or seniority and (2) the limited class of information that qualifies as a personal identifier described above.

[130] I have concluded the employer's approach to disclosing information about seniority to identify the relative seniority among candidates is in accordance with *FOIPPA* and the judgment of the Court of Appeal.

C. Information not related to ability or seniority

[131] The question submitted for determination is - "What personal information typically collected in the job selection process is not related to the ability to perform the vacant job or to seniority? [see para. 73 of the Appeal Judgment]"

[132] Paragraph 73 of the Court of Appeal judgement, in its entirety, states:

> The union requires the information in the job applications to determine whether or not the collective agreement has been breached, and whether to pursue a grievance. This task does not require the job applications of unsuccessful candidates who are not union members. Disclosure must be limited to what is necessary to ensure the obligations in Article 7.11 are met. The only information required for this task is the job applications of successful candidates and of COPE Local 378 members. Personal privacy can be further protected by removing personal identifiers such as name and contact information. In addition, personal information found in either the successful applicant's or a COPE member's application that does not relate to ability to perform the vacant job or to seniority should be blocked out. Again this information is not necessary at this stage and is beyond the scope of permissible disclosure. Disclosing the job applications of the successful candidate and of COPE members, with the limitations mentioned above, will satisfy the intentions of Article 7.11(g) and the **Act**.

[133] The information typically collected that is not to be disclosed in order to minimize intrusions into the personal lives of individual applicants is all applications of unsuccessful applicants who are not union members and any personal identifiers of all applicants as described above.

[134] Beyond this information, I agree with the employer that the information typically collected that is not related to the ability to perform the vacant job or to

the applicants' seniority will have to be determined on a case-by-case basis with the employer assuming the burden that information it determines at the time of disclosure is not related to ability or seniority is information it has not and will not rely on to support its selection decision.

[135] I retain and reserve jurisdiction to clarify any aspect of this decision or to complete a response to a question submitted to this arbitration if this decision is incomplete in any respect.

SEPTEMBER 7, 2007, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey