Order No. 05 - 004

Re: Provincial Health Services Authority

Prince Edward Island Privacy Commissioner
Karen A. Rose

April 27, 2005

I. BACKGROUND

The Applicant, a union representative, made a Request to Access Information under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Provincial Health Services Authority (the "Public Body") on March 10th, 2004. The request was for general information and the Applicant asked to receive the following records:

> "Please provide a breakdown of overtime hours worked by [Third Party] in the scheduling department of [Third Party's place of employment] Provincial Health Services Authority for the past 24 months, by pay periods or on a monthly basis. This is to include all paid overtime or credited as time off in lieu in accordance with the Collective Agreement."

The time period of the records requested was for two years.

The Public Body forwarded its decision to the Applicant by letter dated April 1, 2004 and denied access to all information that the Applicant requested based on section 37(1)(m) of the Act. The Public Body stated that since there is no provision under the applicable collective agreement for release of this type of personal information by the employer to a representative of a collective bargaining agent, then authorization in writing by the employee granting such access must accompany the request.

This Office received a request for review on April 23, 2004 from the Applicant. In its request for a review, the Applicant referred the Commissioner to several Articles of its

Collective Agreement. The Applicant asked the Commissioner to review the Public Body's decision to deny access to the records as requested in the Request to Access Information.

On April 28th, 2004, I wrote to the Head of the Public Body to request the records which are the subject of this review. Following a review of the records, it became clear that there was an affected Third Party to the review. This Office notified the Third Party of this Request for Review on June 30th, 2004. Although the burden of proof did not rest on the Third Party, the Third Party was given an opportunity to provide their written reasons for non-disclosure of the records at issue, based on section 15 of the *Act*, as it pertained to the information in dispute.

I also requested written representations from the Public Body and the Applicant with regard to section 15 of the *Act*.

I received written representations from the Applicant on July 26th, 2004 in support of its argument for disclosure. The Public Body provided its written representations on July 28th, 2004. The Third Party did not make representations. The representations were exchanged between the two parties and each was given an opportunity to reply to the other's submissions. I received reply submissions from the Public Body on September 9, 2004. The Applicant provided its reply submissions on October 1, 2004.

II. RECORDS AT ISSUE

The Public Body has provided this office with all records pertaining to the Applicant's request. The records consist of 30 pages, the first page of which is entitled "Employee Bank Maintenance" and indicates the Third Party's department number, employee number and employee name. It is divided into four categories with a total of 34 entries: vacation bank (with entries 1 - 8), sick bank (with entries 9 - 17), miscellaneous bank (entries 18 - 25) and

personnel bank (entries 26 - 34). The remaining 29 pages of records are records of the Third Party dated January 30, 2004 - January 3, 2003 (in reverse chronological order). The name of the Public Body is at the top of each page, as well as the Third Party employee name, cheque number and the date. Additional information contained in the records include hours worked, vacation hours, sick hours, etc. as well as various deduction amounts. These are the records at issue.

III. BURDEN OF PROOF

Section 65(2) of the Act states as follows:

> 65.(1) If the inquiry relates to a decision to refuse an Applicant access to all or part of a record, it is up to the head of the public body to prove that the Applicant has no right of access to the record or part of the record.
>
> *(2) Notwithstanding subsection (1), if the record or part of the record that the Applicant is refused access to contains personal information about a third party, it is up to the Applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*
> ...

Under subsection 65(2), if it is determined that the record contains personal information of the Third Party, the Applicant has the burden of proving that the disclosure of personal information of the Third Party is not an unreasonable invasion of the Third Party's personal privacy.

According to the above guidelines as to burden of proof, it is up to the Applicant to provide an argument under subsection 15(4), set out below. In addition, if a presumption is raised by the Public Body under subsection 15(2), it is up to the Applicant to put forward an

argument setting out all the relevant factors under subsection 15(3) which would rebut the presumption and support disclosure. This burden of proof was outlined in Orders 03-003, 03-004, 04-001, 04-002 and 03-005, and was outlined to all parties in the request from this Office for submissions.

IV. ISSUES

1. Did the Head of the Public Body properly apply section 15 of the *Act* in his decision to refuse to disclose information to the Applicant because it would be an unreasonable invasion of a third party's personal privacy?

2. Did the Head of the Public Body properly apply subsections 37(1)(d) and 37(1)(m) of the *Act* in his decision to refuse to disclose information to the Applicant because authorization in writing by the employee granting such access did not accompany the request?

V. DISCUSSION OF SECTION 15

The provisions of section 15 of the *Act* which have been raised in this review are as follows:

> 15. (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> ...
> (d) the personal information relates to employment or educational history;
> ...
> (3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable

> invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether
> ...
> (c) the personal information is relevant to a fair determination of the applicant's rights;
> ...
> (f) the personal information has been supplied in confidence;
> ...
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
> ...
> (e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;
> ...

Subsection 15(1) of the *Act* is a mandatory exception, so that the Public Body must not disclose personal information to an Applicant if disclosure would be an unreasonable invasion of a third party's personal privacy. As was set out in previous Orders 03-003, 03-004, 04-001 and 03-005, before reaching a conclusion under this section, the public body should follow a two-step process:

1. Firstly, the Public Body should determine whether the requested information is personal information within the meaning of subsection 1(i) of the *Act*.

2. Secondly, the Public Body should determine whether disclosure of the personal information would constitute an unreasonable invasion of privacy to the Third Party. This step may involve two separate analyses:

    (a) If the Applicant raises subsection 15(4), it should be dealt with first. Under

this subsection, there are listed circumstances which are deemed not to be an unreasonable invasion of a third party's personal privacy. If one of these circumstances is found to apply, the information should be disclosed.

(b) If subsection 15(4) does not apply, subsection 15(2) contains examples of circumstances which are presumed to be an unreasonable invasion of privacy. If one or more of the presumptions listed in subsection 15(2) applies, then disclosure of the personal information at issue is presumed to be an unreasonable invasion of the third party's privacy. Still, a factor under subsection 15(3) or a combination of factors favouring disclosure may rebut a presumption from subsection 15(2).

If no presumption of subsection 15(2) applies, then the public body must nonetheless balance all relevant factors favouring disclosure against those favouring nondisclosure, and decide whether or not releasing the information would constitute an unreasonable invasion of a third party's personal privacy. (*French* v. *Dalhousie University* [2003] N.S.J. No. 44, (N.S.C.A.), and *Dickie* v. *Nova Scotia* [1999] N.S.J. No. 116 (N.S.C.A.)).

Over the past nine years, the Alberta Commissioner has identified other relevant circumstances which are not specifically listed in our section 15(3), but which are factors which may be considered in making a decision under section 15(3). A list of these factors was provided to all parties for their consideration and possible application.

The parties were also advised that they could raise their own distinct factors which may be given weight in a section 15(3) determination.

VI. DISCUSSION OF SECTION 37

Section 37 of the *Act* deals with disclosure of personal information. The provisions of section 37 of the *Act* raised in this review are set out below:

> 37(1) A public body may disclose personal information only
> (a) in accordance with Part I;
> (a.1) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 15;
> ...
> (d) for the purpose of complying with an enactment of Prince Edward Island or Canada or with a treaty, arrangement or agreement made under an enactment of Prince Edward Island or Canada;
> ...
> (m) to a representative of a bargaining agent who has been authorized in writing by the employee the information is about to make an inquiry;

As noted in Order 03-005, subsection 37(1)(a) permits the Public Body to disclose personal information in accordance with Part I. If I find that disclosure is required under Part I, subsection 37(1)(a) will be satisfied.

Consistent with my findings in Order 03-005, the Public Body cannot properly raise section 37 as an exception to disclosure of information in an access request. This section falls under Part II of the *Act*, which deals with the positive obligations of a Public Body as they relate to protection of privacy.

Part I of the *Act* deals with the positive obligations of a Public Body to provide access to its records. Part I contains all exceptions to disclosure, and it is only these sections of the *Act* which can properly be raised by the Public Body as exceptions to disclosure of information

in response to an access request.

Despite the above findings, I note that any provision of the *Act* may provide a better understanding of the *Act* as a whole. As section 37 is raised in the arguments of the parties, I will consider it in that context.

VII. ARGUMENTS OF THE PARTIES

Section 15

Is the information at issue "personal information"?

Personal information is defined in section 1 of the *Act* as follows:

> 1. In this Act
> ...
> (j) "personal information" means recorded information about an identifiable individual, including
> ...
> (vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given;

The Public Body confirmed the information requested relates to overtime hours worked by a named employee within the previous 24 month period and points out subsection 1(i)(vii) of the *Act* which defines personal information as recorded information about an identifiable individual, including, information about the individual's employment history. The Public Body states that a record of hours worked clearly falls within the parameters of "employment history" and, therefore, the Public Body submits that the requested information is captured by this definition.

The Applicant does not dispute that the information sought after is "personal information" as defined by section 1(i)(vii) of the *Act*. However, the Applicant argues that disclosure of this personal information would not constitute an unreasonable invasion of the Third Party's personal privacy. This is the crux of the parties' disagreement.

Does disclosure of the information at issue constitute an unreasonable invasion of the Third Party's personal privacy?

Section 15(4)

The Applicant argues that subsection 15(4)(e) provides an exception to non-disclosure. This subsection states as follows:

> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
> ...
> (e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;

The Applicant points out that the Third Party is an employee of the Public Body. In addition, the Applicant relies on the Supreme Court of Canada's decision in Dagg v. The Minister of Finance [1997] 2 S.C.R. 403, wherein a private consultant made an application for sign-in logs of a government department to determine whether union members were working overtime on weekends without claiming compensation. The information sought would provide the employees' names, identification numbers, signatures and their hours at work during the weekends. The Supreme Court of Canada ruled in favour of the applicant. Justice Corey concluded that the information sought, fell within the "responsibilities" of the

positions held by those individuals.

The Applicant states that subsection 3(j)(iii) of the federal *Privacy Act* which was relied upon in Dagg, is "virtually identical" to paragraph 15(4)(e) of our *Act.* Subsection 3(j)(iii) of the *Privacy Act* states as follows:

> 3. In this Act,
>
> "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
> ...
> but for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include
> ...
> (j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual, including,
> ...
> (iii) the classification, salary range and responsibilities of the position held by the individual,

These sections are not identical. In the federal *Privacy Act*, section 3(j)(iii) takes certain government employee information out of the definition of "personal information" for the purposes of accessing it under the *Access to Information Act.* In our provincial *Act*, section 15(4)(e) is a deeming provision which has the effect that certain employee information of designated public bodies is accessible as it is deemed not to constitute an unreasonable invasion of personal privacy. The effects of the two provisions are the same in that information is accessible which might otherwise be interpreted as private information.

The Applicant, in this review, points out that it is important to note that in the Dagg case, the applicant was not the Union. The Applicant implies that, due to its Collective Agreement,

the Union may have a greater right to the information at issue then an ordinary person. However, the Applicant submits that the court's ruling in the Dagg case should apply equally to overtime hours under F.O.I.P.P.

It is the Public Body's position that the release of the requested information would constitute an unreasonable invasion of the Third Party's personal privacy. It acknowledges that subsection 15(4) outlines specific instances where information would not constitute such an invasion, but suggests that the requested information in this case does not fall within any of the enumerated categories of subsection 15(4).

Subsection 15(2)

After considering the categories set out in subsection 15(2) which create a presumption that disclosure of personal information is an unreasonable invasion of a third party's personal privacy, the Public Body relies on subsection 15(2)(d). Section 15(2)(d) states as follows:

> 15.(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> ...
> (d) the personal information relates to employment or educational history;

The Public Body submits that personal information relating to employment history is included in this presumption, and that the information at issue relates to the Third Party's employment history.

Although the Applicant acknowledges there is a presumption listed at subsection 15(2) relating to a third party's employment history, it argues that subsection 15(4)(e) stipulates that there is an exception. The Applicant further submits that in the circumstances, the disclosure would not be unreasonable despite any presumption in subsection 15(2) of the *Act*.

The Applicant argues that even if the information regarding the Third Party's overtime hours was not included in the exception of subsection 15(4), the nature of the information sought, the requirements of the collective agreement and the unionized environment would warrant the disclosure of the information pursuant to subsection 15(3).

Subsection 15(3)

The Public Body states that it considered the factors set out in subsection 15(3) in determining whether or not to disclose the requested information. It submits that none of the subsection 15(3) factors apply to the matter at hand, with the possible exception of subclause (c), being that the personal information is relevant to a fair determination of the Applicant's rights.

As noted earlier, the Public Body acknowledged the Applicant's status of being the exclusive bargaining agent for the employee in question, but argues that although subsection 37(1)(m) provides for the right of a bargaining agent to access employee information, it expressly provides for employee consent. The Public Body states that it initially responded to the Applicant's request for access to the information indicating it would release the requested information provided it received consent from the affected employee. The Public Body submits that after considering all factors, it determined that the requested information should not be disclosed without the named employee's consent. That consent was not sought from the Third Party by the Applicant.

The Applicant relies on subsections 15(3)(c) and 15(3)(f) in its section 15(3) analysis. The Applicant states that it has a duty of fair representation and that the duty of fair representation has been recognized by the Supreme Court of Prince Edward Island and that part of its duty of fair representation includes the duty to investigate. The Applicant cited the following

excerpt from Trade Union Law of Canada, MacNeil, Lynk and Engelmann at pg. 7-51:

> In order to properly represent an employee in the grievance process, and to make appropriate decisions about dropping, settling or arbitrating a grievance, the Union must turn its mind to the subject matter of the grievance, undertaking an adequate investigation and duly weighing the various interests at stake. The duty of fair representation in effect prohibits perfunctory conduct and can be invoked when the result of the Union's lack of action is to provide no representation at all. A summary and expeditious approach on the part of a Union towards a complainant's case, including the absence of an investigation that would have allowed it to obtain the supporting documentation and to consider all relevant information in order to deal with the grievance in an informed manner, showed a perfunctory treatment of the case... The failure to properly investigate may be evidence of bad faith. Union inaction and superficiality in dealing with a complaint may be regarded as gross negligence and hence arbitrary. **The duty to investigate requires the Union to seek critical information relating to the grievance.**

The Applicant argues it has the right and obligation to investigate any complaint of a grievance and refers to Article 15.03 of the Collective Agreement, which states:

> 15.03 The Employer shall not hinder or restrict the grievor or the representative in any manner which shall impede their investigation or processing of a grievance. No member of the Union shall abuse such rights.

The Applicant submits that the Public Body is hindering the Applicant's investigation by improperly relying on the Freedom of Information legislation.

The Applicant submits that collective agreements are ratified by the membership and by

doing so, the membership has agreed that the Union may investigate any perceived violation of the collective agreement. It states the agreement contains a provision requiring a rotation of overtime amongst employees, as set out in Article 22.20 as follows:

> 22.10 Overtime and stand-by shall be rotated among the qualified employees of the affected department unless the employees agree otherwise amongst themselves.

The Applicant submits that a contract of employment may be deemed confidential but that the opposite is true in a unionized environment in that all of the classifications and wages are set out in the schedules attached to the agreement. As well, based on Article 19.04, the Applicant states the Public Body is required to post the name of a successful applicant. In addition, seniority hours must be posted on an annual basis, thus every employee knows what another member is earning.

> 19.04 Within seven (7) working days of the date of appointment to a vacant or newly created position, the name of the successful applicant shall be posted on the bulletin board for a minimum of seven (7) working days excluding weekends and holidays.

The Applicant provides the following detail relating to additional factors relevant under subsection 15(3):

(a) The disclosure of the information would promote the objective of providing an open, transparent and accountable Government. Citizens of the Province want and expect Government and Public Bodies to honour and abide by collective agreements. Withholding the sort of information sought in this instance prevents the Applicant from enforcing the contract. By contrast, the information in the Dagg case, was meant for contract negotiations which is an entirely different situation. That particular

employer and/or third party employees were not being challenged for possibly violating the collective agreement.

(b) The Applicant never sought the Third Party's consent as it would put the Applicant at a third party's and the employer's mercy every time it tried to investigate a possible violation of the collective agreement.

(c) The type of information being requested, is often times available to co-workers within the same department who have the responsibility of preparing the payroll sheets.

(d) The fact of working overtime is usually witnessed by other workers and occurs in the open. By contrast, medical information concerning an employee would not be discussed openly with other workers.

(e) The Applicant has received this sort of information in the past from the Public Body. In the past, this employer and its predecessors associated a degree of accountability with respect to employees' overtime hours.

(f) The disclosure of the information will likely have a significant impact on other employees' income or, perhaps, create a career opportunity due to the creation of a new permanent position. The inordinate use of overtime has been grounds to compel employers to post positions due to an apparent vacancy.

(g) The Applicant may be prejudiced as it could be subjected to claims from other members for failing to fulfil its duty of fair representation.

(h) A negative ruling could have serious repercussions for all Unions as they will be viewed as ineffective in their ability to enforce the terms of their own collective agreements.

(i) Unions will now be subjected to costs for information which they previously obtained as a matter of course from the Employer.

Disclosure Prior to the *Act*

The Public Body confirms that, in the past, the Applicant had requested similar information relating to a breakdown of the same employee's overtime hours and, in response, the information was provided by the Public Body. However, the Public Body advises that was prior to the coming into force of the *Freedom of Information and Protection of Privacy Act* ("the Act"), and states as follows:

> Prior to the coming into force of the Act, this type of information would be routinely released to a trade union certified as the exclusive agent for the employee in question. However, in determining whether release of such information would **presently** constitute an unreasonable invasion of an employee's privacy, section 15(2)(d) the Act deems the release of employment history to be an unreasonable invasion of the employee's privacy. It is this presumption which is the basis for the Public Body's refusal to release the requested information in the absence of the employee's consent.

Section 37

The Public Body relies on subsections 37(1)(d) and (m) as persuasive regarding the intent of the *Act* relating to the issue of disclosure in these circumstances. These subsections state as follows:

> 37(1) A public body may disclose personal information only
> ...
> (d) for the purpose of complying with an enactment of Prince Edward Island or Canada or with a treaty, arrangement or agreement made under an enactment of Prince Edward Island or Canada;
> ...
> (m) to a representative of a bargaining agent who has been

> authorized in writing by the employee the information is about to make an inquiry;

The Public Body states that it has considered the status of the Applicant being the exclusive bargaining agent for the employee in question, together with all the rights and responsibilities in respect of that status. It concedes that this status, together with the history of disclosure, are significant factors favouring disclosure of the requested information. The Public Body states this very issue is addressed to a certain extent in subsection 37(1)(m), which provides for the right of a bargaining agent to access employee information and expressly provides for employee consent. It is the contention of the Public Body that this is a clear indication of the statutory intent and, thus, negates factoring in the Applicant's status in favour of disclosure.

The Public Body acknowledges that the right of the Applicant to police its agreement is protected to some degree by subsection 37(1)(d) of the *Act* which permits the release of information pursuant to a statute or an agreement made thereunder. It further acknowledges that the collective agreement falls within the parameters of subsection 37(1)(d). The Public Body has interpreted this section to permit disclosure but only in those circumstances where the statute or agreement makes express provision for the release of complete or specific information. The Public Body agrees that the collective agreement does provide for the release of certain personal information to the Applicant, but submits it does not provide for the release of the information in dispute.

The Public Body also argues that the collective agreement provides for the release of certain personal information to the Applicant on an annual basis, as set out in Article 9.05 of the Collective Agreement between the Public Body and the Applicant, as follows:

> 9.05 The Employer shall forward to the Union, by December 1st of each year, each member's name, birth date, home address, status, job title, classification and work location.

The Public Body submits that neither the Collective Agreement nor the *Labour Act*,R.S.P.E.I., 1974, Cap. L-1, makes express provision for release of the employment history at issue.

Section 35 of the *Labour Act*

The Applicant points out that the Public Body and the Applicant are governed and bound by a Collective Agreement. The Applicant relies on the following articles of its Collective Agreement in support of its position: 5.02, 8.01, 14.04, 15.01, 15.03, and 22.10. The Applicant provided specific arguments relating to Articles 22.10, 5.02 and 15.03 of the Collective Agreement, which was provided with the Applicant's submissions.

In addition, the Applicant points out the Collective Agreement is a legal and binding agreement on the employers, the Union and its members and was ratified by the membership. It states it is not the same as an employment contract and that by its nature, there is very little privacy afforded to a member. The Applicant points out the following Articles with regard to this submission: Appendix A - sets out all wage rates; Article 19 - requires the name of a successful applicant be posted; and Article 18 - requires that a seniority list be posted. It states the purpose is to ensure that everyone is treated equally and that no one is treated unfairly, nor conversely, is anyone given an advantage.

The Applicant submits that it is entitled to the information at issue as a matter of course under the Collective Agreement based on section 35 of the *Labour Act*, *supra*. The relevant

subsections of the *Labour Act*, *supra,* relied on by the Applicant are as follows:

> 35. (1) A collective agreement, whether or not the bargaining agent is certified, is binding,
>
> (a) upon the parties;
>
> ...
>
> (d) upon the employees in the unit defined in the agreement.
>
> (2) Every employer, employers' organization, trade union and every person who is bound by a collective agreement shall do everything he is required to do and shall refrain from doing anything that he is required to refrain from doing by the provisions of the collective agreement and this Part.

The Applicant argues that section 35(2) of the *Labour Act, supra,* applies to the Public Body and the affected Third Party. The Applicant submits that the Public Body cannot, therefore, "hide behind" the *Freedom of Information and Protection of Privacy Act.* It further states that if both the Public Body and the Third Party have an obligation under section 35, above, then the fact that they are fulfilling those obligations must be ascertainable. In other words, if the Collective Agreement sets out a requirement of the Public Body, then the Applicant Union must have a way to gather evidence the requirement is being fulfilled.

VII. FINDINGS

Subsection 15(4)

There is some disagreement between the parties as to the interpretation of both the Dagg and the RCMP, supra, cases. The Public Body argues that Gonthier J. in the RCMP case has slightly modified the test laid out by Cory C.J. in Dagg to a less open approach in the interpretation of section 3(j) of the federal *Privacy Act* so that the test relating to personal

information would now be the "general characteristics associated with the position or functions held by an employee" or as LaForest J. said in Dagg, "the kind of information disclosed in a job description."

The Applicant takes great exception to the Public Body's interpretation. The Applicant points out that, coincidently, the Court in the RCMP case states at paragraph 37:

> In my opinion, the appellant has mischaracterized this Court's reasons in Dagg. Dagg does not stand for the proposition that objective and factual information that relates to the position or functions of the individual is to be provided to the public, while subjective or evaluative information that relates to the position or functions of the individual is protected by the Privacy Act. Indeed, such an interpretation is contrary to this Court's reasons in Dagg. As the passage quoted above indicates, the reason that the names and identification numbers on the sign-in logs were disclosed is not because the information contained therein was objective and factual, but because the court regarded it as "information 'that relates to' the position or function of the individual, and thus falls under the opening words of s. 3(j)."

The Applicant further quotes Gonthier J. At paragraph 38, as follows:

> In my opinion, it is both artificial and unhelpful to attempt to distinguish between 'information about the person' and 'information about the position or functions'. Section 3(j) applies when the information– which is always linked to an individual– is directly related to the general characteristics associated with the position or functions held by an employee, with the objective or subjective nature of that information being determinative.

I agree with the Applicant that the Court in the RCMP case did not modify the test set out in Dagg.

Both parties have compared subsection 15(4)(e) with the wording of section 3(j)(iii) of the federal *Privacy Act* noted above. Section 3(j)(iii) states as follows:

> 3. In this Act,
> ...
> "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
> ...
> but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include
>
> (j) information about an individual who is or was an officer or employee of a government institution that relates to the position or function of the individual including,
> ...
> (iii) the classification, salary range and responsibilities of the position held by the individual,
> ...

It is obvious that the wording of the section from the federal *Act* differs from the wording of subsection 15(4)(e) of our *Act* with the main difference being the general statement at subsection 3(j) of the federal *Act* that the information "relates to the position or functions of the individual". This difference in wording was not addressed by either party in their submissions. However, I note that at page 6 of Dagg, provided by the Applicant, Cory J. states:

> I am of the view that both the opening words of s. (3)(j) and the specific provisions of s. 3(j)(iii) of the *Privacy Act* are sufficiently broad to encompass the information sought by the appellant.

Further, at paragraph 6, Cory J. states:

> Moreover, I agree with LaForest J. that "generally speaking, information relating to the position...will consist of the kind of information disclosed in a job description", such as "the terms and conditions associated with a particular position, including...qualifications, duties, responsibilities, *hours of work* and salary range".

Finally, at paragraph 9, Cory J. states:

> For the same reason, the information in the sign-in logs is related to "the...responsibilities of the position held by the individual" and falls under the specific exception set out at s. 3(j)(iii) of the *Privacy Act*. Although this information may not disclose anything about the nature of the responsibilities of the position, it does provide a general indication of the extent of those responsibilities. Generally, the more work demanded of the employee, the longer will be the hours of work required to complete it in order to fulfil the "responsibilities of the position held by the individual". Nothing in s. 3(j)(iii) of the *Act* indicates that the information must refer to "responsibilities" in a qualitative, as opposed to quantitative, sense.

In my view, the above descriptions apply equally to the over-time hours of the Third Party in this case. In fact, the letter which is contained at Tab 2 of the Applicant's submissions, from the Public Body to the Applicant, indicates that over-time in this particular case, was required due to the nature of the position itself.

Taking into consideration the reasons of the Supreme Court of Canada in the two cases cited, and the wording of our subsection 15(4)(e), I conclude that the over-time hours of the Third Party constitutes information about the Third Party's responsibilities as an employee of the Public Body pursuant to subsection 15(4) of the *Act.* Therefore, I find that the Applicant has

successfully invoked the deeming provision of subsection 15(4) so that the disclosure of the overtime hours of the Third Party is not an unreasonable invasion of the Third Party's personal privacy.

In the event that a higher authority determines my finding that subsection 15(4) has been invoked to be in error, I will analyze the remaining arguments of the parties and make findings relating thereto.

Subsection 15(2)

As noted above, the Public Body relies on subsection 15(2)(d) to invoke the presumption of an unreasonable invasion of the Third Party's personal privacy in these circumstances. If subsection 15(4) did not apply, then I conclude that subsection 15(2)(d) would indeed be invoked in this case. Overtime hours are included in the Third Party's "employment history" in accordance with the ordinary meaning of that phrase.

The Applicant is correct in that if subsection 15(4) does apply, then subsection 15(2) cannot be invoked. However, the Applicant argues in the alternative that despite the presumption of subsection 15(2)(d), there is ample evidence to rebut it under subsection 15(3). The Applicant points out generally the nature of the information sought, the requirements of the Collective Agreement and the unionized environment. An analysis of the parties' subsection 15(3) arguments is found below, where I have concluded that any presumption raised by subsection 15(2) would indeed be rebutted by circumstances under subsection 15(3).

Subsection 15(3)

Subsection 15(3)(c):

The Applicant relies on subsection 15(3)(c), that the personal information at issue is relevant to a fair determination of its rights. The Alberta Commissioner has considered Alberta's equivalent to subsection 15(3)(c) in several of his Orders. He has determined that in order for this subsection to be considered a relevant circumstance, evidence establishing that all four of the following circumstances have been fulfilled must be placed before the Commissioner:

(a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

(b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(c) the personal information which the applicant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

(Alberta Orders 99-028[32,33], 99-037[38], 2000-027[41], 2000-032[44-45], 2001-027[40]).

I note that the Public Body itself acknowledged that subsection 15(3)(c) may be applicable to the Applicant's review. The Applicant is seeking the personal information at issue in order to fairly determine whether the Public Body is complying with its obligations under the Collective Agreement which governs both parties. In my view, these circumstances satisfy the requirements of subsection 15(3)(c) of the *Act*. The personal employment information of the Third Party, relating to their overtime hours, is required in order for the Applicant to

pursue its grievance.

Subsection 15(3)(f):

The Applicant relies on subsection 15(3)(f) of the *Act* and states that the personal information relating to overtime hours is not confidential information. In fact, the Applicant points out in the "additional circumstances" part of its argument, that this type of information is often times available to co-workers within the same department who have the responsibility of preparing the payroll sheets. I find this particular argument to be irrelevant to my determination as the employees of the Public Body, although they might be privy to such information, must nevertheless adhere to the confidentiality policy of their Public Body as well as the privacy provisions of the *Act.*

The Applicant adds that the fact of working overtime is usually witnessed by other workers and occurs in the open whereas, by contrast, medical information concerning an employee would not be discussed openly with other workers. I find this point to be relevant in that it reflects two different levels of expectation of privacy.

The Applicant submits that a contract of employment may be deemed confidential but that the opposite is true in a unionized environment and that all of the classifications and wages are set out in the schedules attached to the agreement and also points out that the Public Body is required to post the name of a successful applicant to a position. I do not agree with the Applicant's statement that the Union's collective agreement is privacy invasive by its nature. In my view, if tested, Appendix A, Article 19 and Article 18 of the Collective Agreement cited by the Applicant would likely stand up to the privacy requirements of the *Act.*

Therefore, although I would give some weight to subsection 15(3)(f) as a relevant

circumstance in the Applicant's favour, that weight would be very little.

Other circumstances under subsection 15(3):

The Applicant points out that seeking the Third Party's consent, as the Public Body suggested it do, would put the Applicant at the Third Party's and the employer's mercy every time it tried to investigate a possible violation of the Collective Agreement. I agree with the Applicant that the suggestion that it would have to rely on the voluntary consent of a third party in order to determine its rights under its Collective Agreement is a circumstance weighing in favour of disclosure of the personal information at issue in this review.

Three of the Applicant's arguments relate to the issue of a fair determination of the Applicant's rights, i.e. that disclosure of the information will likely have a significant impact on other employees' income, the Applicant may be prejudiced as it would be subjected to claims from other members for failing to fulfil its duty of fair representation, and a negative ruling could have serious repercussions for all unions as they will be reviewed as ineffective in their ability to enforce the terms of their own collective agreements. I have dealt with this argument in my analysis of subsection 15(3)(c) above.

The Applicant also points out that unions will now be subjected to costs for information which they previously obtained as a matter of course from the employer. I point out that costs are discretionary and the Public Body must exercise its discretion in a fair manner, on a case by case basis.

Disclosure Prior to the *Act*:

Both parties discuss the fact that the Applicant has received this sort of information in the past from the Public Body. The Applicant states that this proves that the Public Body's

predecessors associated a degree of accountability with respect to employees' overtime hours. I agree with the Applicant on this point, but point out that, as I concluded in Order 03-004, the matter does not necessarily end there. Section 3(a) states:

> 3. This Act
> (a) is in addition to and does not replace existing procedures for access to information or records;
> ...

I refer all parties to Chief Justice Matheson's decision in MacNeill v. P.E.I. Information and Privacy Commissioner (November 23, 2004), 2004 P.E.I.S.C.T.D. 69, when Her Ladyship found that the voluntarily tabling of information to the Legislature by a Minister did not constitute an "existing procedure" in accordance with the meaning of subsection 3(a). It constitutes a discretionary practice as opposed to a mandatory procedure. In my view, the same reasoning applies here, as there was no "existing procedure" in place prior to the *Act*. The decision, in the past, to disclose the information at issue was a discretionary one, which was not subject to protection of privacy rights. Now it is.

Having regard to all the relevant circumstances under subsection 15(3), I find that, on balance, the evidence favours disclosure of the records at issue, and that the presumption raised by subsection 15(2) has been rebutted by the Applicant, on a balance of probabilities.

Subsections 37(1)(d) and (m):

I reiterate my earlier statement that section 37 cannot be relied upon as an exception to disclosure.

Subsection 37(1)(m) is in place to allow union members to have their union representative working for them to collect their own personal information for the purpose of a grievance or

to enforce some other right on their behalf. The converse is not necessarily true, i.e. personal information of a member can only be disclosed by a public body with the member's consent. Instead, we must look to Part I of the *Act*, dealing with access to records of a public body. The same reasoning applies to section 37(1)(d).

Section 35 of the *Labour Act*

As I have found no conflict between section 35 of the *Labour Act*, cited by the Applicant, and the provisions of the *Freedom of Information and Protection of Privacy Act*, it is not necessary to discuss issues of paramountcy in this Order.

Summary of Findings

I summarize my findings as follows:

1. I find that the head of the Public Body did not properly apply section 15 of the *Act* in his decision to refuse to disclose the records at issue to the Applicant, for the reasons cited above.

2. I find that the Head of the Public Body did not properly apply subsections 37(1)(d) and 37(1)(m) of the *Act* in his decision to refuse to disclose the records at issue to the Applicant, as these sections cannot properly be raised as an exception to disclosure.

VIII. ORDER

I thank the parties for their submissions, and also for their patience in awaiting this Order. It is being issued well outside of the time guidelines set by the *Act*.

I order the Public Body to provide the records at issue to the Applicant pursuant to the Applicant's original request to access information. I note that the Public Body should exclude or sever information in the records at issue which is not responsive to the Applicant's request, as only the information requested by the Applicant has been addressed in this Order.

I also note that in accordance with section 68(ii) of the *Act*, the head of the Public Body shall not take any steps to comply with this Order until the end of the period for bringing an application for judicial review of the Order under the *Judicial Review Act.*

I will be providing a copy of this Order to both parties as well as the Third Party affected by the Order.

_____

Karen A. Rose
Information and Privacy Commissioner