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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 229-1998
April 27, 1998

INQUIRY RE: The adequacy of a search conducted by the Workers' Compensation Board of British Columbia for records requested by an applicant and its decision to withhold records from an applicant

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on February 4, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the response given by the Workers' Compensation Board of British Columbia (WCB) to the applicant's request for records concerning his suspension and dismissal from employment at the WCB.

2. Documentation of the inquiry process

On June 18, 1997 the applicant submitted a request under the Act for records in the custody of the WCB. On July 25, 1997 the WCB responded by disclosing certain records to the applicant and by withholding and severing others under sections 13 and 14 of the Act.

On August 26, 1997 the applicant submitted a request for review of the WCB's decision to my Office, alleging that the WCB improperly withheld and severed records. He also alleged that the WCB did not find records relating to its investigation and dismissal of him.

On September 10, 1997 the WCB informed the applicant that after receiving his advice that records exist relating to a WCB investigation of him, another search was conducted and additional records were found at the WCB Safety and Security Department. The additional records involved the Ministry of Education, Skills and Training. The WCB postponed sending the applicant a decision regarding disclosure of

the additional records pending consultation with the Ministry and affected third parties. On October 14, 1997 the WCB disclosed certain of the additional records and withheld and severed others under sections 15, 19, and 22(1) of the Act.

On December 24, 1997 my Office sent notice under section 54 of the Act to third parties whose interests are affected by this inquiry and whose personal information is contained in the records requested by the applicant. On January 28, 1998 my Office sent notice under section 54 of the Act to the Ministry of Education, Skills and Training.

The original ninety-day deadline for this review was extended by consent of the parties from December 2, 1997 to February 4, 1998.

3. Issues under review and the burden of proof

The first issue is whether the WCB properly applied sections 13, 14, 15, 19, and 22 of the Act to the withheld and severed records. The second issue is whether the WCB fulfilled its duty under section 6 of the Act to adequately search for all the records requested by the applicant.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 13, 14, 15, and 19, it is up to the public body to prove that the applicant has no right of access to the record or part of the record.

Under section 57(2), if the record or part of the record that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy.

Section 57 of the Act is silent with respect to a request for review about the issue of adequate search arising under section 6(1). As I decided in Order No. 103-1996, May 23, 1996, the burden of proof is on the public body.

The relevant sections of the Act are:

Duty to assist applicants

6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Policy advice, recommendations or draft regulations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or

recommendations developed by or for a public body or a minister.

Legal advice

14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(d) reveal the identity of a confidential source of law enforcement information,

....

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

...

(d) the personal information relates to employment, occupational or educational history,

....

4. Procedural objections

In the course of this inquiry, the applicant submitted a letter in which he raised several points. He stated that his letter was not a reply to the submissions of the other parties because he was not permitted to make one. He did not otherwise make any formal submissions on the issues contained in the Notice of Inquiry.

The applicant objects to a decision that I rendered on January 13, 1998 that this inquiry be conducted in written form. Before making that decision, I reviewed the written submissions of the parties and I concluded that the applicant would not be at a disadvantage participating in a written inquiry. I considered that he was able to make the necessary submissions in writing and that the issues in this inquiry are not complex. This objection from the applicant purports to revisit my decision.

The applicant states that he has difficulty understanding parts of the other parties' submissions, including the legal language used, references to previous orders that I have made, and the involvement of third parties that were given status in this inquiry. While I appreciate the substance of the applicant's concerns, I note that the tenor and logic of his written objections is clear and lucid. I am therefore reinforced in my opinion that it is appropriate for this inquiry to be held in written form.

5. The records in dispute

The records in dispute consist of correspondence and memoranda generated by the WCB and the Ministry of Education, Skills and Training that relate to an incident involving the applicant and his subsequent dismissal from employment at the WCB.

6. The applicant's case

The applicant did not submit initial or reply submissions in this inquiry but did provide a letter which addresses some of the substantive issues in this inquiry. The applicant objects to being described by the WCB in "hostile and unsubstantiated" terms. The applicant contends that if the records are not disclosed to him, he will be deprived of

a basic means of defending himself in his dispute with the WCB and the Ministry of Education, Skills and Training. The applicant relies on an independent medical opinion to establish that he does not pose a risk of harm to himself or others. I carefully considered these points before reaching the conclusions set out below.

7. The WCB's case

Since the WCB organized its submission around the types of records that have been severed or entirely withheld, I am presenting its detailed arguments below on the application of specific sections of the Act.

8. The third parties' cases

Submissions on behalf of several third parties were prepared by the Ministry of Attorney General, Legal Services Branch. A number of affidavits from third parties were submitted to my Office on an *in camera* basis. The third parties rely primarily on section 19 of the Act in support of WCB's decision to withhold or sever information which could reasonably be expected to threaten a third party's safety or mental or physical health.

9. Discussion

Section 6: Duty to assist applicants

The applicant takes the position that the WCB did not provide complete copies of all records from his personal files and failed to advise him that additional records were in existence. The WCB filed affidavit material outlining the steps taken in its search for records responsive to the applicant's request. (Affidavit of Patricia Brownell) Ms Brownell detailed the e-mail requests sent to various divisions within the WCB. While Ms Brownell was on vacation, the applicant advised Heather McDonald that further records could exist as a result of an investigation carried out by the WCB's Safety, Health & Security Department or the Field Investigation Department. Ms McDonald contacted those departments and obtained further records. It is not surprising in the circumstances of this case that the WCB's freedom of information office was not aware that these records existed. The WCB has also indicated its willingness and availability to search for records in locations suggested by the applicant or my Office.

I am satisfied on the evidence that the WCB has made every reasonable effort to assist the applicant and to respond openly, accurately, and completely as required under section 6(1) of the Act.

The remaining issue is whether the WCB properly applied sections 13, 14, 15, 19, 22(1), and 22(3)to the records in dispute.

The Grey Volume of Withheld Records - The First Three Records

The WCB states it obtained the first three records from the Ministry of Skills, Training and Labour, which has also refused disclosure. The authors of all three records are third parties in this inquiry and have submitted affidavits outlining their concerns. The WCB has withheld the records on the basis of sections 15, 19, and 22 of the Act and furnished detailed reasons for doing so. (Submission of the WCB, pp. 2 - 4)

Based on my review of the records in dispute and the affidavits, I am satisfied that disclosure of the records would reveal the identity of a confidential source of law enforcement information under section 15(1)(d) of the Act (see Order No. 196-1997, November 13, 1997). In view of the evidence concerning the applicant's past behaviour, the WCB is justified in adopting a cautious approach to withholding and severing information to protect the identity of confidential sources of law enforcement information.

I also accept that the WCB properly applied section 19 to the records in dispute. Section 19 is of particular importance in this case as the evidence establishes that disclosure could reasonably be expected to threaten a third party's safety or mental or physical health. I have considered the independent medical evidence relied on by the applicant to establish that he does not pose a risk of harm to himself or others. However, based on the applicant's past behaviour, I accept that the WCB's concerns regarding the safety of third parties are well-founded.

Since the applicant did not file submissions, he has failed to discharge the burden of proving that disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy. The presumptions against disclosure set out in sections 22(3)(b) and (d) have particular application to the records in dispute.

The Grey Volume of Records - Fourth Record

The WCB has withheld the fourth record which is a letter from its legal counsel on the basis of section 14 of the Act. The letter sets out legal advice to the WCB and falls squarely within the scope of section 14 of the Act. See Order No. 107-1996, May 29, 1996; Order No. 110-1996, June 5, 1996; and Order No. 151-1997, February 14, 1997. (Submission of the WCB, p. 4)

The Grey Volume of Records - Fifth Record

This record, which consists of four pages of notes prepared by WCB managers in anticipation of a meeting with the applicant, was withheld on the basis of section 13 of the Act. Affidavit evidence establishes that the notes are draft advice and recommendations which were confidential planning notes. WCB submits that section 13 of the Act is designed to protect the ability of public body managers to engage in full and frank discussions of a planning nature without concern that their deliberative processes may be disclosed. (Submission of the WCB, p. 4) Based on my review of this record, I accept that it falls into the category of "advice or recommendations developed by or for a public body" contemplated in section 13 of the Act.

Green Volume of Records - Severed Records - First and Second Records

The records which have been severed comprise correspondence and memoranda involving the WCB and UBC concerning the applicant. The WCB severed these records on the basis of sections 15, 19 and 22 of the Act for the same reasons given above, namely privacy rights and concerns regarding the safety of third parties. I have reviewed each of these records and accept that information concerning third parties was properly severed on the basis of sections 15, 19, and 22.

10. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section. I find that the search for records conducted by the Workers' Compensation Board of British Columbia in this case was a reasonable effort within the meaning of section 6(1).

Under section 58(3)(a), I require the Workers' Compensation Board of British Columbia to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the search for records conducted was reasonable, I find that the Workers' Compensation Board of British Columbia has complied with this Order and discharged its duty under section 6(1) of the Act.

I also find that the Workers' Compensation Board was authorized to withhold or sever information from the records in dispute under sections 13, 14, 15, or 19 of the Act. Under section 58(2)(b), I confirm the decision of the Workers' Compensation Board to refuse access to the records in dispute on the basis of sections 13, 14, 15, and 19 of the Act.

I also find that the Workers' Compensation Board was required to withhold or sever personal information from the records in dispute under section 22(1) of the Act. Under section 58(2)(c), I require the Workers' Compensation Board to refuse access to all or part of the records withheld or severed under section 22(1) of the Act.

David H. Flaherty
Commissioner

April 27, 1998