



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Order F05-38

**WORKERS' COMPENSATION BOARD**

Celia Francis, Adjudicator

December 14, 2005

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**Summary:** Applicant requested records in WCB's legal department file. Records are protected by solicitor-client privilege.

**Key Words:** solicitor-client privilege.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 14.

**Authorities Considered:** **B.C.:** Order 02-20, B.C.I.P.C.D. No. 20; Order 02-01, [2002] B.C.I.P.C.D. No. 1.

## **1.0 INTRODUCTION**

[1] The applicant in this case sought and received compensation from the Workers' Compensation Board ("WCB") for a workplace injury. The WCB sued a third party in relation to the applicant's injuries and settled that action. Some time later, the applicant wrote to the WCB expressing dissatisfaction with the WCB's handling of the third-party legal action, alleging misconduct and legal errors on the part of the WCB's legal counsel. The applicant later commenced a legal action against the WCB. Still later, the applicant requested records in the WCB's legal department under the *Freedom of Information and Protection of Privacy Act* ("Act"). The WCB responded by denying access under s. 14 of the Act, on the grounds that the records were subject to solicitor-client privilege.<sup>1</sup>

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<sup>1</sup> paras. 6-16, initial submission

[2] The applicant requested a review of the WCB's decision to deny access, saying he "particularly want[s] the legal department's files and a breakdown of costs attributed to this case". Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act.

## 2.0 ISSUE

[3] The issue before me in this case is whether the WCB is authorized by s. 14 to deny access to the requested records. Under s. 57(1) of the Act, the WCB has the burden of proof.

## 3.0 DISCUSSION

[4] **3.1 Records in Dispute**—The WCB says that its legal services department has four files related to the applicant: the file related to the third-party legal action mentioned above (which the WCB says has since been integrated into the applicant's claim file and disclosed to the applicant in response to a request for file disclosure); a "query file" (which consists of one letter which the WCB has also disclosed to the applicant); and two files related to the applicant's litigation against the WCB (which have since been consolidated into one file). The records in dispute are those in this last file.<sup>2</sup>

[5] **3.2 Public Interest Disclosure**—The applicant argues in his brief initial submission that there is a public interest in disclosing information about the WCB's operations, including its in-house legal communications and the costs of legal services associated with this matter.<sup>3</sup> In its reply submission, the WCB objects to the applicant making, at this late date, what appears to be an argument that s. 25 of the Act applies, saying that this is a new issue that was not listed in the notice for this inquiry. The WCB argues that, in any case, s. 25 does not apply to the records in dispute. Referring to a number of orders, the WCB says that there is no urgent or compelling reason for disclosure of the requested records, nor is disclosure clearly in the public interest for any other reason. It says the applicant also has not demonstrated that the records in dispute are about a risk of significant harm to the environment or health and safety of the public or a group of people. It provides a number of reasons for taking this position.<sup>4</sup>

[6] As the WCB points out, the applicant does not cite a specific section of the Act in saying that there is a public interest in disclosure of the records in dispute but appears to be arguing that s. 25(1) of the Act applies to them (although s. 25(1) was not listed as an issue in the notice for this inquiry). The WCB has provided extensive arguments on s. 25, which reads as follows:

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<sup>2</sup> paras. 1-4, initial submission.

<sup>3</sup> p. 1, reply submission.

<sup>4</sup> paras. 1-15 & 18, reply submission.

**Information must be disclosed if in the public interest**

- 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
- (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
  - (b) the disclosure of which is, for any other reason, clearly in the public interest.
- (2) Subsection (1) applies despite any other provision of this Act.

[7] The applicant provides no basis whatsoever for his argument that there is a public interest in disclosure. Moreover, there is nothing in the material before me which would support an argument, bearing in mind the approach to s. 25(1)<sup>5</sup> found in earlier orders, that s. 25(1)(a) or (b) applies. The records in dispute arise out of a legal action that, according to the WCB, the applicant commenced in his personal interest. Nor can I see any broader public interest, as contemplated by s. 25(1), to be served in disclosure of the records. I find that s. 25(1) does not apply to the records in dispute.

[8] **3.3 Solicitor-Client Privilege**—Many orders and court decisions have addressed solicitor-client privilege under s. 14 of the Act. See, for example, Order 02-01<sup>6</sup>. Without repeating them, I have applied here the principles reflected in earlier decisions.

[9] Section 14 reads as follows:

**Legal advice**

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

[10] The WCB says that the documents it is withholding in full from the applicant are in its litigation file and consist of the following: internal memoranda; handwritten notes made by the WCB's in-house legal counsel; correspondence between its in-house and external legal counsel and documents attached to those items; and invoices of fees and accounts from the WCB's external legal counsel.<sup>7</sup> It says all the documents in this litigation file came into existence from the time the WCB was notified that the applicant was commencing legal proceedings against it. In every case, it says, the withheld records were created or obtained in contemplation of litigation, to defend the WCB in the legal proceeding that the applicant commenced, and for the dominant purpose of preparing for,

<sup>5</sup> see, for example, Order 02-20, [2002] B.C.I.P.C.D. No. 20

<sup>6</sup> [2002] B.C.I.P.C.D. No. 1

<sup>7</sup> paras. 19 & 26, initial submission

advising upon or conducting the litigation. It says the records came into existence solely to defend the WCB in the legal action the applicant commenced and to provide legal advice.<sup>8</sup>

[11] The WCB says it relies on litigation privilege and applies s. 14 to all the records in its litigation file, except for a few items the applicant has or has access to (among other things, correspondence addressed to the applicant). The WCB also discusses the purpose and importance of litigation privilege and provides a number of reasons as to why it would be inappropriate for the WCB to disclose its litigation file to the applicant, who is its adversary in the litigation in question. It adds that invoices in its litigation file, submitted by its external legal counsel, detail that lawyer's fees and accounts. These records also attract solicitor-client privilege, the WCB says, and thus fall under s. 14. It says it has carefully reviewed each record and has, in each case, exercised its discretion to withhold information. The WCB says that the litigation remains unsettled at the time of this inquiry. The WCB refers to a number of orders and court decisions in support of its position on the litigation privilege issue and also provides an affidavit from its in-house legal counsel.<sup>9</sup>

[12] The applicant argues that the WCB was representing him and protecting his interests. It should have nothing to hide about its communications with him, he adds. He suggests that "[i]n a sense, I am WCB's client and a claim of privilege should not arise in this type of circumstance".<sup>10</sup> The WCB disputes this last argument, saying that, while the applicant was its client for the purposes of his claim for compensation, he is its adversary in the current litigation, out of which the records arose and over which it is claiming privilege.

[13] The applicant also alleges he was promised copies of "legal documents" and that the WCB later refused to release them. He refers to two WCB letters which he says support his claim that the WCB made this promise.<sup>11</sup> The WCB responds that the letters the applicant refers to relate to the third-party legal action. It says that the WCB has not claimed privilege over the records in that file and that the records in issue in this inquiry came into existence after the letters the applicant refers to.<sup>12</sup> I accept the WCB's submission on this point. The WCB letters have no relevance to the issue before me.

[14] The WCB provided argument and evidence to the effect that it had not waived privilege over the records.<sup>13</sup> The applicant did not raise waiver as an issue, however, and I therefore see no need to deal with it here.

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<sup>8</sup> paras. 22-26 & 28, initial submission

<sup>9</sup> paras. 26-44, initial submission; paras. 1-6, Neilson affidavit

<sup>10</sup> p. 1, initial submission

<sup>11</sup> reply submission

<sup>12</sup> letter of May 10, 2005

<sup>13</sup> paras. 45-53, initial submission; para. 7, Neilson affidavit

[15] I have carefully reviewed the material before me and am satisfied that the records in dispute in this matter are protected in their entirety by litigation privilege. I find that s. 14 applies to the records in dispute.

***Applicant's request for costs***

[16] In his initial submission, the applicant said the following:

I am particularly interested in the total costs of all the legal services required to investigate my claim ...

[17] The WCB says that it is not clear whether the applicant is asking for the costs related to his claim, the costs the WCB incurred in administering and adjudicating his claim or the costs related to one or all of the legal proceedings in which the applicant has been involved. It says that, in any case, this is a new request and that the applicant did not mention this topic in his request for records or his request for review. It points out that among the records in dispute are accounts and invoices from its external legal counsel and a memorandum outlining "some, but not all, of the [WCB]'s expenses related to the Applicant's compensable claim". It says these records are subject to solicitor-client privilege, as discussed above.<sup>14</sup>

[18] I agree with the WCB that the applicant's request for "total costs of all the legal services" is not clear. His original access request simply asked for the "legal documents" of his claim, although his request for review included a request for a "breakdown of costs attributed to this case". The records in dispute (*i.e.*, those in the litigation file) include items related to certain costs which I found above fall under s. 14. If the applicant wishes records related to other costs associated with his dealings with the WCB, he will have to make a new request for such records to the WCB.

**4.0 CONCLUSION**

[19] For the reasons given above, under s. 58 of the Act, I confirm that the WCB is authorized by s. 14 to refuse the applicant access to the records in dispute.

[20] For reasons discussed above, no order respecting s. 25(1) is necessary.

December 14, 2005

**ORIGINAL SIGNED BY**

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Celia Francis  
Adjudicator

OIPC File No. F05-24138

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<sup>14</sup> paras. 15-18, reply submission