INVESTIGATION REPORT

INVESTIGATION P96-006

An Investigation into the practices of the WORKERS COMPENSATION BOARD OF BRITISH COLUMBIA with respect to disclosing personal information about injured workers to employers

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EXECUTIVE SUMMARY

The Office of the Information and Privacy Commissioner has received several complaints regarding the Workers Compensation Board of British Columbia (WCB)'s policy of disclosing a worker's claim file to an employer for the purposes of an appeal. These complaints raise a number of different issues. Several of the complaints focus on the fact that in appeal circumstances the WCB discloses a worker's entire claim file to his or her employer. The complainant's concern is that information about a worker which is not directly relevant to the appeal may be disclosed to the employer. The complainants also express concern that sensitive information about third parties may be released with the claim file.

Other complaints received by the Information and Privacy Commissioner centre on the worker's assumption that the information in the claim file is privileged. The workers assume that the medical and personal information that they had supplied to the WCB and health professionals was confidential and were surprised to learn that their employers had access to this information. Several complainants were concerned by the fact that the only notification they received regarding the disclosure of their claim file came after-the-fact. These workers complain that they were not informed in advance of the possibility that the contents of their claim file could be disclosed to their employers.

Finally, several of the complaints focus on the inappropriate use of information in a claim file by the employer. The employees complain that the employer carelessly or deliberately misused the information in the claim file. This type of complaint raises questions about the safeguards in place to protect the information in a worker's claim file once it has been disclosed to an employer.

Over the past two years, as a result of such complaints, the Office of the Information and Privacy Commissioner has conducted an investigation into WCB's practice of disclosing the contents of a claim file to an employer when requested for the purpose of an appeal. Currently, claim files are disclosed prior to the filing of an appeal, and the WCB regards this practice as falling outside the parameters of the *Freedom of Information and Protection of Privacy Act* (FOIPPA). The WCB has taken the position that once a worker has filed a claim and an "appealable decision" has been made, a "proceeding" is taking place and, therefore, those activities fall under section 3(2) of the *Freedom of Information and Protection of Privacy Act.* Section 3 states that "this Act does not limit the information available by law to a party to a proceeding."

The WCB's position is that natural justice requires full disclosure of a worker's claim file to an employer, even before an appeal has been initiated. While I support the WCB's goals of administrative fairness and natural justice, I do not agree with its broad interpretation of section 3(2) of the Act, and find that a "proceeding" with respect to this section does *not* take place until either the worker or the employer has initiated a formal appeal. Thus, the WCB must apply the provisions of the *Freedom of Information and Protection of Privacy Act* to requests for claim information any time a request is made prior to the filing of an actual appeal. It should at that time only disclose information to an employer as required for the adjudication and administration of a claim on a "need to know" basis.

The WCB should also take steps fully to advise workers from the moment a claim is commenced, and prior to the collection of any personal information, that any personal information collected by the WCB may be disclosed to the employer during an actual appeal of a WCB decision on a specific claim.

The fact that personal information on a claim file may be disclosed in full during an appeal highlights the importance of the WCB collecting and disclosing only that personal information which is absolutely necessary for the adjudication of a claim. The WCB should develop a policy with respect to sensitive information that it receives, which has not been specifically requested and which is not relevant to the adjudication of the claim. Furthermore, the WCB must work with service providers to ensure that personal information supplied to the WCB does not contain

information about the worker, or other third parties, that is irrelevant to the adjudication of a claim. The goal must be to minimize intrusiveness in the lives of workers and third parties.

There are new legislative penalties under section 95 of the *Workers Compensation Act* for the misuse of personal information about a worker that has been disclosed to an employer. The WCB should take seriously all complaints under section 95 and refer all substantiated complaints to the appropriate Crown counsel's office for consideration.

David H. Flaherty
Commissioner

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Investigation Report written by Mary Carlson and edited by David Flaherty
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1. INTRODUCTION

The Workers Compensation Board of British Columbia was created in 1917 to ensure the safety, protection, and good health of workers in this province. The WCB operates under the statutory authority of the *Workers Compensation Act*. Its foremost priority is preventing workplace accidents and occupational disease. In the case of an injury or a disease, the WCB furnishes workers with wage-loss compensation and seeks to restore productivity through rehabilitation.

The WCB derives its revenues primarily from employer assessments and investment income. Employers are grouped into classifications. An assessment rate is then set for each classification based on its compensation costs arising from workplace injuries and occupational disease. This rate is then applied to every one-hundred dollars of assessable payroll. The money collected is gathered into a common fund from which the costs of accidents are paid.

In 1994 the WCB received 197,911 reported claims. During the same year, 140,785 claims were paid for the first time; more than half were short-term (temporary) disability claims. Long term disability claims accounted for only three percent of new claims that the WCB paid in 1994.2

In 1993 the WCB became subject to the *Freedom of Information and Protection of Privacy Act* (FOIPPA). It established a Freedom of Information and Protection of Privacy Office, which has coordinated training and policy development in this area since 1993.

The purpose of this report is to examine the practices of the WCB with regards to the disclosure of claim files to employers for the purposes of an appeal of a decision on a claim and to determine whether the existing practice is consistent with the *Freedom of Information and Protection of Privacy Act.* The authority for this investigation is section 42(1)(a) of the *Freedom of Information and Protection of Privacy Act*.

The WCB discloses to employers, upon request within ninety days of a decision about a worker's injury, the contents of a claim file for the purposes of an appeal. The WCB makes a distinction between disclosure of information pursuant to the *Freedom of Information and Protection of*

Privacy Act and disclosure for the purposes of an appeal. It is the position of the WCB, with which I agree, that the *Freedom of Information and Protection of Privacy Act* does not apply to the latter.

The WCB undertakes a staggering amount of disclosure each year, through requests under the *Freedom of Information and Protection of Privacy Act*, through the normal course of business, and through disclosures for the purpose of appeals. Virtually every department of the WCB engages in some form of disclosure. In relation to the thousands of disclosures that take place, the number of complaints and requests for review submitted to the Office of the Information and Privacy Commissioner is, on a percentage basis, quite low.

However, since the coming into effect of the *Freedom of Information and Protection of Privacy Act*, 12.2 percent of the total number of complaints received by the Office of the Information and Privacy Commissioner have pertained to the WCB. Several of the complaints made against the WCB have arisen from the practice of providing employers with a complete copy of the claim file for appeal purposes through the Records Management Department. It is the position of the WCB that the *Freedom of Information and Protection of Privacy Act* does not govern this type of disclosure.

I recognize that employers in the workers' compensation system have legitimate information needs. To presuppose that information in a claim file is not accessible to an employer at some appropriate point, due to the privacy rights of the worker, denies a fundamental aspect of a compensation system. Employers have a legitimate interest in information about the status of a claim, for example, at any given point in time. They pay the full costs of work-related injuries. The costs of such an injury and the course of rehabilitation is charged against the employer's specific classification. Employers are often involved in the rehabilitation program of the workers through programs such as graduated return to work or retraining. They must be able to anticipate and plan for prolonged and perhaps unanticipated absences of workers due to lingering injuries. The wage rate that is paid to any worker may place upward pressure on employer assessments. Thus employers have an interest in knowing how the WCB derives the wage rates that it is paying workers.

The structure of this investigative report is apparent from the detailed Table of Contents. The emphasis in sections two through five is on a description of the development and application of the WCB's policies on the disclosure of personal information about workers' injury claims to employers. These practices are not discussed from the perspective of the requirements of the *Freedom of Information and Protection of Privacy Act* until section five.

As part of this investigative process, the WCB provided my Office with initial, reply, and final submissions. My Office would like to thank the staff at the WCB for their assistance and cooperation throughout this review. Heather McDonald, FOI Coordinator, deserves special thanks for her cooperation, advice, and support.

*2. **THE WCB CLAIM FILE***

2.1 Opening the File

Under section 53 of the *Workers Compensation Act*, a worker who is injured or disabled by an occupational disease must report the injury to the employer as soon as practicable after the occurrence. The report must include the worker's name, the time and place of the occurrence, and a description of the nature and cause of the disease or injury. Under section 54, the employer is required to report this injury to the WCB within three days of the occurrence of the injury. The obligation of the employer to report under section 54 is independent of the worker's obligation to provide information under section 53. In the case of disabling occupational disease, the employer must report to the WCB within three days of receiving the information from the worker.

The WCB creates a claim file upon receipt of either the employer's report, the worker's report, or a physician's first report. Although the file contains information that pertains almost exclusively to the worker, the file is considered to be the *claim* file and not the worker's claim file. In the event of a work-related injury resulting in time-loss, the WCB requires the completion and remittance of three standard forms: the Employer's Report of Injury, the Worker's Report of Injury, and the Doctor's Report of Injury. Failure to remit an Employer's Report of Injury or a Doctor's Report of Injury constitutes an offense under the *Workers Compensation Act* and is subject to penalty. It is not an offense under the WCB for a worker to fail to provide sufficient information about an injury; there is no penalty except the possibility that a claim may be denied for lack of sufficient evidence from any source.

2.2 Structure of the Claim File

A Claim file is traditionally divided into five sections. The first is the Claim Section, which contains factual information about the claim, forms, relevant law, and external correspondence. The second is the Medical Section, which contains doctor and specialist reports, medical information supplied by the doctor, and correspondence between the doctor and the WCB. The third section is Medical Accounts for payment to health care professionals. The fourth Memorandum Section contains all internal correspondence. There can also be a Legal Section and a Medical Review Panel Section. There is no separate section in the claim file related to Appeal Division and other appeal information apart from the Medical Review Panel Section.

2.3 Workers' Consent

In filing a claim for compensation, workers are required to sign the following consent form:

I declare all the information I have given on this report is true and correct and I elect to claim compensation for the above mentioned injuries or diseases. This will authorize the Board and Review Board to obtain or view, from any source whatsoever, including records of physicians, qualified practitioners, medical insurers or hospitals, a copy of records pertaining to examination, treatment, history and employment of the undersigned. **This will authorize the Board to disclose information from my claim to the designated advocate of my union or similar association.** [emphasis in original].

This form is being amended expressly to notify the worker at the time that an application for compensation is made that disclosure to the employer for appeal purposes will take place. The

WCB may also disclose information to others where permitted under the *Freedom of Information and Protection of Privacy Act.*

During protracted claims, the WCB does not update the consent of the worker, because, as long as the worker continues to receive benefits, it claims that updated consent is not necessary to permit it to collect and disclose information relevant to the adjudication of the claim.

2.4 Primary Claims Adjudication

In the first instance, a claims adjudicator seeks information about an accident or injury which is sufficient to conduct primary adjudication. The purpose of the process is to determine the rights of the worker to compensation under the *Workers Compensation Act*. The adjudicator attempts to answer two basic questions. Is the claimant a "worker" employed in an industry covered by the *Workers Compensation Act*? Did the injury arise out of, and in the course of, employment?

It is the responsibility of the claims adjudicator to make all decisions relating to the validity of a claim. WCB Policy #97 states:

The correct approach is to examine the evidence to see whether it is sufficiently complete and reliable to arrive at a sound conclusion with confidence. If not, the adjudicator should consider what other evidence might be obtained, and must take the initiative in seeking further evidence.

In determining whether an injury arose "out of and in the course of employment," an adjudicator refers to several indicators for guidance. These include whether an injury occurred on the premises of the employer, whether it happened as a result of instructions given by the employer, whether it was caused by another employee, whether it occurred while the worker was being paid, or whether it took place while the employee was using the employer's equipment.4

Injuries often have multiple causes and cannot clearly be attributed to the workplace. This requires further investigation by the adjudicator to determine whether any "pre-existing" condition rendered the worker vulnerable to an injury or disease. Further evidence that the adjudicator might seek could include medical evidence, more statements from the claimant, and statements by lay witnesses, first aid attendants, family members, employers, and possibly, informants.

2.5 Requests for Medical Information

Certain medical information is normally required to adjudicate claims where a worker is seeking compensation for a work-related injury or disease. The WCB is entitled under the *Workers' Compensation* Act to request medical information concerning an injury or disease from the worker's attending physician. Requests are usually limited to information about the specific injury at issue in the claim, such as chart notes where the injury is periodically discussed. The form letter from the WCB to the attending physician typically states: "We are investigating a claim by X for injury Y which occurred on [date]. Please send any and all information pertaining to injury Y."

The WCB does *not* routinely ask for the entire medical file of the claimant, since it is generally not needed to adjudicate the claim. Furthermore, the WCB must pay a physician for all of the information received and does not wish to pay for information that has not been specifically requested and is not relevant to the adjudication of the claim. However, in some circumstances, an adjudicator may request the entire "chart" of a claimant to determine the extent of treatment relating to pre-existing conditions.

Despite the specificity of the WCB's request, some physicians send the claimant's entire medical file to the claims adjudicator. In other cases, information that is not related to the injury is included in the package sent to the WCB. This information then becomes part of the claim file. Currently, there are no policies or procedural mechanisms in place at the WCB requiring the return of information which was not specifically requested, although this issue is under review.

2.6 The Collection and Disclosure of Third-Party Information

Claim files may contain information about third parties, particularly in those cases where a claim is ongoing over a long period of time. A third party means any person, group of persons, or organization other than the person whom the file is about. For example, the medical history of a worker's family may be mentioned in medical reports.

The following is an edited example of the type of third-party information that may be included in a worker's claim file. This particular example comes from a psychological assessment which was used to confirm whether a worker suffered from a particular pain disorder. (The references of the third parties are underlined.)

Born and raised in Vancouver, he is the second of four siblings. His parents separated and divorced when he was a child (around 6 years of age) and his mother has always had a problem with alcohol, compounded more recently with drug abuse (prescription drugs). He has not seen his father in a long time, and in fact he practically abandoned his children when he left the house. The claimant does not know about his oldest brother because he left BC many years ago and has not kept contact with the family. He sees regularly his younger brother and occasionally his younger sister. Both of them have a substance abuse problem. When X was a child he was frequently abused, both physically and emotionally, by his mother. She was a highly successful salesperson...and had a nice house in Vancouver...where he grew up with his siblings. At about age 15 he tried to obtain assistance for the abuse he was suffering, and went to see a counselor, who then called his home and was convinced by his mother that there was nothing wrong there. He left home at age 15, and for the next 15 years he was addicted to street drugs, anything that was available, with the exception of drugs administered by injection. When he was 30 years of age he decided he needed help, because he became violent at home and his girl friend of 9 years left him. He realized he was losing control of himself and that he needed help, so he went to a...centre for drug abuse, and quit using drugs. He has remained drug-free for the last six years and two months, and has received extensive counseling for the substance abuse problem, and for the physical and emotional abuse he suffered during his childhood. He has had many girl friends in the recent past, and his present relationship has lasted approximately one year. His current girl friend has left him twice recently because he does not have sexual interest and she feels rejected.

The WCB states that information about third parties may be relevant to adjudication of the claim, and that such information is also the personal information of the applicant. The WCB states that:

There is an interesting, and I submit, incorrect assumption in the implied suggestion that the WCB ought to sever medical information pertaining to the claimant's family from documents on the claim file, before disclosing the claim file to the employer for appeal purposes. This is the assumption that such information is not also personal information of the worker in question and relevant to the adjudication and administration of the workers' claim by the WCB, as well as relevant in the appeal process. For example, family medical history, both physical and psychological, is often highly relevant in assessing and ensuring that a worker's disability or injury arose in the course of employment. It can also be relevant in ensuring that an injured worker receives adequate medical treatment through the course of recovery...

...Clearly, where information, even personal information, is considered to be relevant to a legal issue (such as a worker's right to compensation under the WCA and the rights of appeal under the WCB on that issue), it must be disclosed under the rules of natural justice, whether or not the personal information can be considered to be directly personal information of one of the parties to the proceeding.

It is important to note, on an interim basis, that third-party information is not the personal information of the applicant under the *Freedom of Information and Protection of Privacy Act*, even if it may be legitimately disclosed to an employer once an actual appeal of an adjudicator's decision has commenced.

2.7 Decisions Routinely Communicated to the Employer

There is currently no system in place whereby the WCB supplies the employer with regular periodic updates as to the progress of a claim. However, there are several key decisions that are communicated to the employer without it having to request disclosure. The rule is that decisions pertaining to the commencement or ceasing of benefits are copied to the employer. Once a claim has been accepted or rejected, a copy of the decision letter is also sent to the employer. If a worker's claim is rejected, the worker also receives the same Notification of Decision. It contains the following information:

1. The matter being adjudicated.
2. Description of the investigation carried out, including interviews conducted.
3. Outline of the evidence considered.
4. Explanation of how the evidence was evaluated (specify its reliability, analyze conflicting evidence; give reasons for the weight apportioned to the evidence.)
5. Review of contact with the worker where the relevant issues were discussed and detail the worker's response.
6. List of the various conclusions possible from the evidence.
7. In support of the conclusion reached, explanation of:
(a) what evidence was considered favorable, with reasons, and
(b) what evidence was considered unfavorable, or discounted, with reasons.
8. Point out statutory, policy or discretionary factors involved.

9. Discuss the question of balance of probabilities.
10. Summarize the formal decision.
11. Explain what the decision entails regarding non-payment of wage-loss compensation, health care benefit accounts, other benefits, etc.
12. Include the standard appeal paragraph.

Where a claim is allowed and there has been no protest from the employer, no reasons are given. Notification of the claim allowance is sent to any advocate designated by the claimant's designated union or association which is acting on behalf of the claimant. Information may also be disclosed to any other advocate, representative, or other person, as authorized in writing by the claimant.7

If an employer has protested a claim and it has been allowed, the employer is notified of the decision and provided with reasons. Where possible, this information is relayed by telephone. If the employer cannot be reached by telephone, or expresses dissatisfaction with the decision in the course of the telephone conversation, a letter explaining the decision will be sent. This letter follows the guidelines set out above. A copy is also sent to the worker. A copy of the decision letter will be sent to any advocate designated by the claimant's union or association, which is acting on behalf of the claimant. If the worker consents, a copy of the decision letter will be sent to any other advocate. A copy may also be sent to the physician, where the decision involves medical factors.

Where a decision is adverse to a claimant, the reasons are stated in a letter to him or her. The content of that letter follows the same guidelines described above from Policy #99.20.

3. THE CURRENT DISCLOSURE POLICIES OF THE WCB

There are three appellate bodies within the workers' compensation system: the Workers Compensation Review Board, the Medical Review panels, and the Appeal Division. The Records Management Department at the WCB handles disclosures of information for all three appellate bodies. The disclosure practices are governed by Section #99.00 of the Workers Compensation Board Rehabilitation Services & Claims Manual.

3.1 The Need for an Appealable Decision

An employer can request full disclosure of a claim file, if an *appealable decision* has been made and if the request is made within ninety days of the decision. Section 90 of the *Workers Compensation Act* permits an appeal where "an officer of the Workers Compensation Board makes a decision under this Act with respect to a worker, or, if deceased, his dependents or his employer, or a person acting on behalf of the worker, his dependents or employer" and the appeal is made "not more than 90 days from the day the decision is communicated to the worker." In essence, virtually any decision made under the authority of the *Workers Compensation Act* is an "appealable decision." Each claim involves a minimum of seven potentially appealable decisions: Who is the employer? Is the claimant a worker? What is the claimant's earnings? How long will the WCB pay the claimant benefits? Will the WCB accept a particular treatment as necessary and, accordingly, pay for it?

The Request for Disclosure form has two spaces for the employer/worker to fill in. The first states "I am considering appealing the decision in the letter dated X;" the second, "I have appealed the decision in the letter dated X."

3.2 Disclosure for the Purposes of an Appeal

Full disclosure of a claim file is granted to an employer where an appealable decision has been communicated on that file and the request is made within the

ninety day time limit for appeal. It is not necessary for an actual appeal to be taking place or for the employer to have communicated any intention of filing an appeal. The Records Management Department reviews the request for disclosure to first determine whether an appealable decision has been made and whether the request is within the statutory time limits for appeal. For the purposes of an appeal, an employer will be given full access to the appropriate claim file, and any *other* claim file involving the same worker, which the WCB considers relevant. This may include previous claims for a similar injury.

The decisions most commonly appealed are, in order of frequency: claim disallowed; reopening denied; wage-loss benefits terminated; disability award; and permanent disability award insufficient.

3.3 The Contents of a Disclosure

Where an employer has a right to receive disclosure of a claim file, the disclosure will consist of the same information which would be granted to the claimant. Thus the entire file is copied and provided to the employer. The WCB states that the rules of natural justice require that all evidence which was before the adjudicator should be disclosed to the employer. It comments:

...the rules of natural justice require that each party to a proceeding have available all the evidence considered by the initial inquirer or trier of fact--the adjudicator--for appeal purposes. On the claims file is recorded information, or evidence, which the adjudicator considers in reaching his or her initial decision. Some of the evidence which is on the claim file the adjudicator may reject as irrelevant to the claim. However, the party who wishes to appeal is nevertheless entitled to argue before the appellate body that the adjudicator ought to have considered that evidence as relevant. Thus it is essential that all evidence before the adjudicator be disclosed to each party to the proceeding, who are entitled to know what evidence was before the adjudicator who made the initial decision. Further, the appellate bodies under the WCB are entitled to the entire claim file and have powers to compel its disclosure to assist them in understanding what evidence was before the adjudicator.

The WCB regards *all* of the information on the claim file as evidence "before the initial trier of fact"--the adjudicator--in making an appealable decision.

3.4 When Consent is not Necessary

The employer receives full disclosure without the consent of the worker. The WCB states that consent of the worker is not required, but it is amending its consent form to advise workers that information from the claim file will be disclosed to the employer for appeal purposes.

The Records Management Department notifies the worker after the fact that the employer has been granted full disclosure of the claim file by means of the following form letter:

We have sent copies of documents on the claim file(s) noted above to either your employer or their representative. These copies are provided as confidential documents to be used only for appeal(s) relating to the above file(s) under the *Workers Compensation Act*. An employer is entitled to receive disclosure when they have a right of appeal under the *Workers Compensation Act*.

3.5 Routine Disclosure versus Access to Information under the *Freedom of Information and Protection of Privacy Act*

The WCB makes a distinction between disclosure which occurs pursuant to the WCB disclosure policies and granting requests for access under the *Freedom of Information and Protection of Privacy Act*. The WCB states that the *Freedom of Information and Protection of Privacy Act* does not apply to disclosure for the appeal purposes.

Disclosure of a claim file which does not come within the circumstances of "appeal disclosure" is dealt with by the adjudicator and is only provided to the claimant, not the employer. The adjudicator (or manager) will vet the claim file, looking for privacy issues such as those arising under Part 2 of the *Freedom of Information and Protection of Privacy Act*. If any documents are withheld from the claimant pursuant to the FOIPPA legislation, the claimant will be advised of the withholding and directed to the WCB's FOIPPA department to request disclosure of the withheld documents.

Requests by employers for disclosure following an appealable decision are made to the Records Management Department, which reviews the file to determine that an appealable decision has been made within 90 days. Once this has been confirmed, the file is photocopied and sent to the employer.

3.6 Penalties for Breach of Secrecy by Employers

Until recently, there were no penalties under the *Workers Compensation Act* if the employer used the information for purposes other than an appeal. Section 95 of the *Workers' Compensation* Act prohibited "officers of the board and persons authorized to make inquiries" from divulging information obtained in connection with those inquiries. The following amendment came into force on September 1, 1995:

95. (1.1) If information in a claim file, or in any other material pertaining to the claim of an injured or disabled worker, is disclosed for the purposes of this Act by an officer or employee of the board to a person other than the worker, that person shall not disclose the information except

(a) if anyone whom the information is about has identified the information and consented;
(b) in compliance with an enactment of British Columbia or Canada;
(c) in compliance with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information, or
(d) for the purpose of preparing a submission or argument for a proceeding under this Part.

(1.2) No court, tribunal or other body may admit into evidence any information that is disclosed in violation of subsection (1.1).

This amendment prohibits the use of claim file information as evidence in other proceedings unless the worker has consented, or unless the information has been subpoenaed by another body which has the power to compel the production of the information. Furthermore, this amendment now provides penalties for an employer who uses or discloses the information for purposes other than those stated. Anyone who violates subsection 1.1 is in violation of the *Workers Compensation Act* and is subject to a fine on conviction.

4. THE DEVELOPMENT OF THE WCB'S DISCLOSURE POLICIES

4.1 The Napoli Decision, 1981

Prior to the decision of Napoli v. Workers Compensation Board (1981), 27 B.C.L.R. 306 (S.C.), the WCB did not disclose a claim file to either the worker or the employer, even for appeal purposes. When an appeal was filed, the WCB prepared a summary of information deemed to be relevant for such purposes. The appeal body itself had access to the entire claim file, since it was before the initial trier of fact, the claims adjudicator. When this practice was challenged in the Napoli case, the Supreme Court of British Columbia concluded that providing a summary of a worker's claim file was insufficient to comply with the rules of natural justice. The court commented:

Fundamental to any system of justice is the requirement that an adjudicating body reach its decision only on the basis of evidence presented where the parties have an opportunity of cross-examination and reply. When evidence is taken in secret, the right to challenge it by cross-examination and rebuttal is lost. Justice is denied.

4.2 WCB Decision No. 338, August 1981

The WCB responded to Napoli in Decision No. 338, which granted disclosure to the worker and/or the employer only after either the worker or the employer had launched an appeal. Workers were entitled to ***full*** disclosure of the claim file, while employers were provided with copies of the documents that the WCB considered to be relevant to the issue at appeal. The rationale for the new policy was:

In essence our position represents a compromise between the right of a worker to have the information on his file kept confidential, and the right of an employer to disclosure under the rules of natural justice. While the recent court decisions deal specifically only with a claimant's right to his file, we feel that the principles which led the Court to order disclosure must also

apply to employers. Employers are given status under the Workers Compensation Act to pursue and oppose appeals regarding claims and have interests which can be adversely affected by a decision in favour of a worker. Therefore, they must also be entitled to see the claim file under the rules of natural justice. On the other hand, the right of the claimant to privacy means that the employer's right should not be extended beyond what the rules strictly require. Therefore, the employers' right is limited to seeing the documents which are relevant to the issue in dispute.

WCB employees continued to be responsible for identifying the information in the claim file which was deemed to be relevant to the issues in dispute at appeal.

4.3 Public Report No. 7, July 1987, Ombudsman of B.C.

In 1987 the Ombudsman of British Columbia published the Compensation System Study Public Report No. 7, which concerned "fairness to individual workers and employers affected by the administration of workers' compensation in British Columbia."

One of the Ombudsman's primary concerns was the fact that workers were not permitted access to their files until an appealable decision had been made. The WCB justified this practice on the grounds that "allowing disclosure at any time would unduly hamper the activities of the Board's departments in their routine administration." The Ombudsman recommended that workers be given access to their files at any point in time, stating:

Reasonable access on request would have some important benefits for the W.C.B. and claimants. Secrecy breeds suspicion and a lack of confidence in the system. Reasonable access on request would counteract this. There would also be an increased accountability of the W.C.B. to its claimants and an increased understanding by claimants; it would provide positive public relations for the W.C.B. as it would be in the vanguard promoting greater access to information for individuals; and it would contribute toward improved adjudication... Administrative difficulty is an inadequate reason for the W.C.B. to restrict full access to information which concerns an individual's health and income... The W.C.B. has the discretion under the Act to provide disclosure of claim files to workers upon request, and there is no adequate reason not to do so. If disclosure would interfere with or delay a decision on the claim, the worker could be informed of this and thus have the option of deciding whether disclosure was worth the inconvenience.14

The WCB did change its policy to permit full claim file disclosure to workers upon request, whether or not an appealable decision had been made. However, it also extended the same access to employers, the only restriction being that an "appealable decision" must have been made prior to disclosure, and the request must be made within the time limits for appeal. This policy change was premised partially on efficiency concerns: "Based upon its experiences after Decision No. 338 was issued, the WCB in Decision No. 410 decided that entitlement to disclosure at the time an appealable decision had been made would assist both workers and employers in deciding whether they ought to initiate an appeal."15

This policy change was consistent with the Ombudsman's recommendation pertaining to worker access to files but was *inconsistent* with the following relevant recommendation:

That the W.C.B. restrict disclosure to an employer of material judged to be both irrelevant and prejudicial to a worker. Before providing disclosure to an employer, the W.C.B. shall consider representations from the worker on issues of possible irrelevance and prejudice.

In making this recommendation, the Ombudsman commented that:

...if the documentation contains a mixture of relevant, irrelevant and confidential information concerning the worker, the W.C.B. is considering sending this complete document to the employer ... we are concerned that the worker would not be aware that this had been done and would not have an opportunity to comment on a possibly prejudicial and irrelevant statement before it was sent to the employer.17

4.4 WCB Decision No. 410, 1987

In Decision No. 410, the WCB decided to eliminate the distinction between claimants and employers with respect to disclosure, stating:

Implicit in [Decision No. 338] is the principle that the rules of natural justice take precedence over the claimant's right to privacy. If this were not the case, no disclosure would have been extended to employers at all. The distinction between claimant and employer disclosure has been maintained for some years. Based upon its experience during this period, however, it appears to the Board that the compromise which was discussed in Decision No. 338 does not comply with the rules of natural justice.

As a result, the WCB expanded its disclosure policy to allow full disclosure of the claim file to *both* the claimant and the employer *once an appealable decision had been made* and provided that the request for disclosure was made within ninety days. It was no longer necessary for an appeal to be initiated in order to grant disclosure of the claim file to either the worker or the employer. With Decision No. 410, the WCB also abandoned the practice of providing to the employer only those materials which employees of the WCB determined to be relevant to the issue at appeal. In essence, WCB determined that *all* claim file material was arguably relevant on appeal.

Under Decision No. 410, disclosure is given not for the purpose of allowing a party effectively to answer the case against him or her, but rather to give the party an opportunity to review all available information in order to decide whether or not to appeal:

...The Board is of the opinion that allowing disclosure where there is an appealable claims adjudication decision would be a suitable compromise. On the one hand, disclosure at this point would assist both claimants and employers in deciding whether or not they should appeal. On the other hand, delays and complexities in the initial decision-making process would be avoided.

The WCB is now resistant to reinstituting a relevancy test for two reasons. First, its position is that the Napoli and Brand decisions support the practice that all of the evidence on a claim file be provided to both parties to a proceeding so that they may assess the evidence, and, among other things, argue relevancy and weight of the evidence before the appropriate appeal tribunal. In that

sense, all of the evidence on the claim file is "relevant" for use in preparation of submissions for appeal tribunals. In the WCB's view, its employees are not legally entitled to decide issues of relevancy and the weight of evidence: those issues are within the jurisdiction of the appellate tribunals. I agree with this position.

Second, the Board maintains that considerable delays would arise from the application of any relevancy test, since the approximately 7,700 yearly employer appeal disclosures "would need to be read and vetted if the FIPP privacy rules were to be applied." They state that "there is a general concern in the workers' compensation community that appeals be dealt with expeditiously by the system. The complaints are about delays in appeal, not the WCB's disclosure policy for appeal purposes." Furthermore, the WCB states that relevancy tests would produce a "flood of appeals to the Review Board and Appeal Division on issues of disclosure relevancy." I agree with this position as well, subject to the possible need to revisit the issue at a later date.

4.5 The Brand Decision, 1993

The WCB's disclosure policies were upheld in Brand v. WCB (November 15, 1993, Vancouver Registry No. A932031). In this case, the Supreme Court of British Columbia examined the tension that occurs within the workers' compensation system between the worker's interest in privacy and the confidentiality of his or her personal information and the requirement for full disclosure of the case against a person in any judicial or quasi-judicial hearing that affects him or her.

In this case, the WCB notified the three petitioners, employees of MacMillan Bloedel, that their claim files had been sent to Angus Qually Consultants Ltd. whom MacMillan Bloedel had hired to review 400 claim files. The petitioners objected to this disclosure stating that they had a right of privacy in respect of such records and that they should not be disclosed without their "written and informed consent." The WCB relied on the rules of natural justice to defend its policy.

In the decision, the Supreme Court held that:

...the board's guidelines constitute a rational approach to the balancing of the interests involved and do not sacrifice the interests of the workers unnecessarily. Although I might have wished that any employer or employer's agent to whom disclosure is made be required to undertake in writing not to use the information for any purpose other than `pursuing or opposing an appeal' made under the Act, that is a policy decision that lies within the Board's purview and not that of this court. The policy has not been shown to be patently unreasonable or otherwise erroneous in law.

Because this was a judicial review, the Court was considering only whether the Board had the jurisdiction to grant disclosure according to its own policy. While it agreed that the WCB had jurisdiction, it made the following comment at the conclusion of its reasons for judgment:

Last, I should note for the record that although the *Freedom of Information and Protection of Privacy Act* ... was referred to in oral argument, that statute was not in force at the time of the

disclosures ... or at the time of the filing of the Petition herein. I do not think it appropriate to comment on its applicability in this situation or to suggest how the Commissioner appointed thereunder should approach questions such as those in the case at bar.

Thus, the Brand decision did not address the issue of how the *Freedom of Information and Protection of Privacy Act* affects the disclosure practices of public bodies and, in particular, public bodies which are also administrative tribunals subject to the rules of natural justice.

4.6 Section 3(2), *Freedom of Information and Protection of Privacy Act*

The WCB further relies upon section 3(2) of the *Freedom of Information and Protection of Privacy Act* to support its disclosure policy. It states:

3.(2) This Act does not limit the information available by law to a party to a proceeding.

(i) **A Proceeding**

It is the position of the WCB that a "proceeding" with respect to section 3(2) is taking place the moment that the first appealable decision is made with respect to a claim for compensation. It states:

The word `proceeding' is not defined in FOIPPA, nor in the Interpretation Act. [We] note that Section 3(2) of FOIPPA does not narrow the word `proceeding' by referring to a `legal proceeding' or `judicial proceeding' or `proceeding before a court.' This suggests that the legislature intended a more broad interpretation to be given to the word `proceeding.' Black's Law Dictionary defines `proceeding' as including `administrative proceedings before agencies, tribunals, bureaus, or the like' and `an act which is done by the authority or direction of the court, agency, or tribunal, express or implied; an act necessary to be done in order to obtain a given end; a prescribed mode of action for carrying into effect a legal right...'

...With the foregoing in mind, the WCB interprets the word `proceeding'...as the legal administrative process which commences when an appealable decision is made and communicated under the WCA with respect to a worker. The `proceeding' which commences at that point is the ongoing adjudication and management of a claim in regard to the appealable decision, and the legal avenue of appeal which arises at that time.

I disagree with the WCB's position on this point.

(ii) Party to a proceeding

The WCB considers the worker and the employer to be a "party to a proceeding" pursuant to section 3(2). It states:

Both employer and worker have an interest in that `proceeding.' The worker's interest is obvious, because the proceeding involves his physical and financial well-being, and his legal rights under the WCA with respect to his compensation claim and his right to appeal if his claim has been

denied. The employer's interest lies in the fact that ultimately it finances any compensation paid to or rehabilitation services given to the worker. There is a direct financial impact to employers in that claims costs are used to determine an employer's assessment rate under the ERA program. The employer's legal rights also arise under the WCA with respect to appeal of any decision made by an adjudicator with respect to a worker. The employer has the legal right to initiate an appeal of a decision with which it disagrees, and to participate in opposition to an appeal initiated by one of its workers.20

Again, I do not accept the WCB's position on this point.

(iii) Information available by law

The WCB regards *all* of the information on a claim file as information that has been before the adjudicator in making an appealable decision. Furthermore, the WCB thinks it is "impossible for any person to determine, in advance of the consideration of the appeal, which information the appellate decision maker would consider relevant to its disposition." Lastly, the WCB states that disclosing a complete file to the employer prior to the filing of an appeal assists the employer in determining whether or not to pursue an appeal. These issues are discussed further in the following section.

4.7 Section 33, *Freedom of Information and Protection of Privacy Act*

Section 33 of the *Freedom of Information and Protection of Privacy Act* lists the only circumstances under which public bodies may disclose personal information. Section 33(c) permits disclosure "for the purpose for which it was obtained or compiled or for a use consistent with that purpose." Section 33(d) permits disclosure "for the purpose of complying with an enactment of, or with a treaty, arrangement or agreement made under an enactment of, British Columbia or Canada."

The WCB relies on sections 33 (c) and (d) to support its current disclosure policies:

It is considered that the right of appeal given to an employer by the Workers' Compensation Act makes them a party in the process and as such, they are entitled to the information. For example, the acceptance of a claim can affect an employer's obligations under the Workers' Compensation Act. In order to properly comply with our obligations under the Workers' Compensation Act, we must release information about the claim to the employer. On this basis, Section 3(2) and 33(d) of FIPP would justify the release of such information. We should also consider having the Minister designate the release of the information as a consistent purpose under section 33(c) and section 34 of FIPP.

5. *DISCUSSION*

At the outset, I would like to applaud the WCB for its work to date in implementing the *Freedom*

of Information and Protection of Privacy Act. Its Freedom of Information and Protection of Privacy Office has worked diligently to educate the organization regarding the new access and privacy obligations and has actively participated in finding resolutions to disputes arising under the Act. This is shown by the fact that the Office of the Information and Privacy Commissioner has handled 81 requests for review involving the WCB and, of these, only two have proceeded to a formal inquiry before the Commissioner.

However, this report is not about the Freedom of Information and Protection of Privacy Office or its application of the *Freedom of Information and Protection of Privacy Act* to access requests. Rather, the issue relates to the necessary distinction between the disclosure of claim file information through requests made under the *Freedom of Information and Protection of Privacy Act* and disclosure for the purposes of an appeal by the Records Management Department.

If a worker requests a copy of his or her claim file in the absence of an appealable decision, it is generally considered a routine request, and the record is disclosed through the "normal course of business" by the claim unit dealing with the worker's claim. The *Freedom of Information and Protection of Privacy Act* applies. If the request is from an employer where there is no appealable decision as yet, the employer's request is refused.

If a worker or employer requests a claim file for appeal purposes, the Records Management Department processes the disclosure. The current policy of the WCB permits full disclosure of the file to an employer if the request has been made *after* an appealable decision has been rendered and within the time limits for appeal. Claimants are notified after the fact that the file has been disclosed to the employer.

As noted earlier, the WCB regards the practice of disclosing an entire file prior to the filing of an appeal as an effective mechanism to "assist both claimants and employers in deciding whether they should appeal." While that may be convenient and cost-effective for certain parties, I do not believe that this practice is adequate to meet the demands of the *Freedom of Information and Protection of Privacy Act* in preventing prejudicial fishing expeditions and is not an example of information "available by law." Nor, in my view, is it releasable under sections 33(c) or 33(d).

Although the WCB does not provide employers with periodic claim file status reports, employers do not operate in an informational vacuum. They are given copies of letters sent to workers which contain key or benchmark decisions made with respect to the claim. Employers are provided with a copy of the Notification of Decision, which is a detailed description of the decision, the evidence, the findings, and the related law and policy on which the decision was based. Given this practice, the need to disclose the entire claim file to assist the employer in determining whether or not to file an appeal is highly questionable. Furthermore, the vast majority of appeals are filed by *workers*.24 In 1994, 93 percent of all appeals filed with the Medical Review Panel were in this category.

5.1 Legislative History of Section 3(2) of the *Freedom of Information and Protection of Privacy Act*

The historical record as to the intent of section 3(2) is not instructive. There is no legislative record of any debate, and the section is generally not discussed in the public information distributed by the government before and after the passage of the Act.

5.2 When does a "Proceeding" begin?

This is the crux of the main issue in this report. As noted above, the Act does not limit the information available by law to a party to a *proceeding*. At what point in the compensation process does a "proceeding" commence? The WCB states that a "proceeding" pursuant to section 3(2) takes place from the moment that the first decision is made on the claim. The WCB has thus adopted a broad interpretation of a "proceeding" under section 3(2). It states:

The `proceeding' which commences at that point is the ongoing adjudication and management of a claim file in regard to the appealable decision, and the legal avenue of appeal which arises at that time. Both the employer and worker have an interest in that `proceeding.' The worker's interest is obvious, because the proceeding involves his physical and financial well-being, and his legal rights under the WCA with respect to his compensation claim and his right to appeal if his claim has been denied. The employer's interest lies in the fact that ultimately it finances any compensation paid to or rehabilitation services given to the worker. There is a direct financial impact to employers in that claims costs are used to determine an employer's assessment rate under the ERA program. The employer's legal rights also arise under the WCA with respect to appeal of any decision made by an adjudicator with respect to a worker. The employer has the legal right to initiate an appeal of a decision with which it disagrees, and to participate in opposition to an appeal initiated by one of its workers.

The interpretation of "proceeding" contained in the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual is narrower than that provided by the WCB. There are two definitions of "proceeding" in the Manual, one pertaining to section 3(2) and another pertaining to section 27(1)(c)(iii).

With respect to section 3(2), the Manual states:

The Act does not limit the information available by law to a party to a proceeding. `Proceedings' are activities governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment of a court or rules of judicial or quasi-judicial tribunal. Subsection 3(2) means that the Act does not limit or prevent people from using legal techniques such as `interrogatories' and `examinations for discovery' to gather information about an opposing party in a lawsuit.

The fact that an employer or a worker has rights under the *Workers Compensation Act* does not make them a party to a "proceeding" under section 3(2) until an appeal has been filed. Neither does the fact that both parties have an "interest" in the outcome of the adjudication process. Furthermore, the fact that an "appealable decision" has been made does not mean that a proceeding sufficient to invoke
section 3(2) has been launched.

Were I to accept the WCB's argument that both workers and employers are "parties to a proceeding" from the moment the first decision is made on a claim, the entire workers' compensation system would be essentially exempt from the privacy protections set out in Part 3 of the Act. That was clearly not the intent of the Legislature.

Thus I find that the WCB's interpretation of "proceeding" is too broad to be consistent with the spirit of the *Freedom of Information and Protection of Privacy Act*. If the WCB's reasoning were followed, any administrative function whereby eligibility for a benefit was adjudicated and appealable to a quasi-judicial body could be regarded as a "proceeding" under section 3(2) and hence removed from the legislative scheme of the Act. This could, for example, include processes which determine eligibility for social assistance benefits and student loans. **I find that "proceeding" with respect to section 3(2) does not take place until a formal appeal has been launched under the *Workers Compensation Act*.**

RECOMMENDATION 1:

The WCB should amend its disclosure policies to reflect that a "proceeding" with respect to section 3(2) of the *Freedom of Information and Protection of Privacy Act* does not begin until either a worker or an employer has formally initiated an appeal.

5.3 Natural Justice and the Rules of Full Disclosure

Section 3(2) does not limit *information available by law* to a party to a proceeding. The WCB contends that full disclosure of the file is necessary to meet the standards of natural justice articulated in the Napoli decision. Following Napoli, the WCB abandoned the practice of disclosing to employers only those documents which WCB employees decided were relevant to the appeal in favour of full disclosure. The WCB states that "the rules of natural justice require that all evidence, including an individual's personal information, which has been considered by an initial adjudicator" be disclosed. The WCB regards all information that is contained on a file as information "considered" by the adjudicator.

I agree with the WCB's goals of administrative fairness and natural justice after an appeal has started.

My understanding of the adjudicative process prior to an appeal is that no formal hearing takes place where the parties make submissions and present evidence. The WCB collects information, and the claims adjudicator makes a decision based on that information. The rules of administrative fairness apply, but not *all* of the rules that apply to "judicial" or "quasi-judicial" proceedings. Thus the adjudicative process is not a court-like hearing, and the parties do not have the right to present evidence and cross-examine witnesses. However, the adjudicator must base his or her decision on relevant information, and the parties should be advised what particular information was relied upon. The rationale for this process can be described in the claims decision. The information in the decision itself should be sufficient for either party to decide if he or she wishes to appeal. Before an appeal is filed, section 22 of the Act places significant restrictions on the disclosure of personal information about a worker to an employer.

It is my view that the practice of disclosing a worker's entire file to an employer prior to the launching of an appeal exceeds the requirements of natural justice and is a breach of the *Freedom of Information and Protection of Privacy Act***.**

5.4 The Jurisdiction of the WCB over Disclosure

Section 96 of the *Workers Compensation Act* gives the WCB the "exclusive jurisdiction to inquire into, hear, and determine all matters and questions of fact and law arising under Part 1 of the *Workers Compensation Act.*" The WCB states:

This includes matters such as admissibility of evidence in a proceeding under the WCA and appropriate disclosure to the parties in such a proceeding. It is the WCB's position that Section 3(2) of the *Freedom of Information and Protection of Privacy Act* is express recognition of the courts and administrative tribunals to deal with such issues. Were it otherwise, there could be direct conflicts on the issue of appeals disclosure from the Office of the Information and Privacy Commissioner and an appellate body, be it a Court or an administrative tribunal with authority to decide the substantive and procedural issues ancillary thereto. Section 3(2) of *Freedom of Information and Protection of Privacy Act* indicates that it is the Court or administrative tribunal that decides the disclosure issues ancillary to the proceeding in question, not the Office of the Information and Privacy Commissioner.

It is clear that the WCB has the jurisdiction to determine all matters under Part 1 of the *Workers Compensation Act.* However, the Workers Compensation Board, Workers Compensation Review Board, and the Medical Review Panels are all included in Schedule 2 of the *Freedom of Information and Protection of Privacy Act* as "public bodies" covered by the Act and must, therefore, operate within the constraints of that legislation. Any policies and procedures created by the WCB must be in compliance with that *Act*.

Once an appeal has been filed with one of the WCB's appellate bodies, section 3(2) of the Act applies, and the WCB has the authority to design its own policy on disclosure, which the courts oversee. Thus, if the WCB (including Medical Review panels and the Appeal Division) and the Review Board decide they must disclose an entire file at that point, I have no jurisdiction to review this decision. If the appellate bodies choose to disclose more information than the worker believes is necessary, that decision or policy could be challenged through a judicial review. Before an appeal is filed, however, I am of the considered opinion that the FOIPPA Act fully applies to the WCB's disclosure policies.

5.5 The Question of Delay and the Issue of Costs

The WCB is concerned that any changes to its current disclosure policy, such as restoring a relevancy test, would result in significant delays in the appeal process. Such concern is not insignificant. Currently, the waiting time from making a request to actual disclosure is, on average, twelve weeks.

The WCB is further concerned that any such changes in disclosure policies would increase its costs of doing business at a time where the unfunded liability of the WCB has been in excess of

100 million dollars. The current system is infinitely cheaper to administer. For example, if a relevancy test were added, staff would be required to review the file and determine which documents were relevant. Furthermore, this determination itself would likely be appealable. While the concerns over delays and costs are legitimate, **I find that the current disclosure policies of the WCB are in contravention of the *Freedom of Information and Protection of Privacy Act* and that remedial steps must be taken to bring disclosure practices in line with the legislation.**

5.6 Section 33 of the *Freedom of Information and Protection of Privacy Act*

No specific provisions in the *Workers Compensation Act* authorize the disclosure of a worker's personal information to the employer. However, the WCB believes that disclosure of the claim file to the employer is consistent with
section 33(c) of the *Freedom of Information and Protection of Privacy Act*, which permits the disclosure of personal information only "for the purpose for which it was obtained or compiled or for a use consistent with that purpose."

In this regard, the *Freedom of Information and Protection of Privacy Act* Policy and Procedure Manual states that:

Public bodies may disclose personal information if it is necessary to do so in order to accomplish the purpose for which the personal information was originally acquired or assembled.

The "**purpose**" for which personal information was obtained or compiled is the object to be attained or the thing intended to be done, e.g., the administration of a program, the provision of a service or other activity.

Personal information may be "obtained" for a variety or reasons, for example, to decide on a person's eligibility for benefits, to determine if a person is a suitable candidate for a job with the government, to determine the type of medical care a person needs or to ascertain the level of the public's satisfaction with the service provided by a public body...

For a use consistent with that purpose

A **consistent use** is one which has a direct and reasonable connection to the original use. A disclosure for a consistent use is therefore permissible if it is directly connected to the original use or is a logical extension of the original use.

The WCB collects personal information to assist an adjudicator to make initial and ongoing determinations with respect to the worker's eligibility for benefits under the *Workers Compensation Act*, and an employer has the statutory right to dispute those decisions. Disclosure of specific information pertaining to an actual decision for the purposes of an appeal may well be a disclosure consistent with section 33. However, disclosure of all of the information collected prior to the filing of an appeal incorrectly broadens the scope of section 33. During the course of any claim, the WCB collects large amounts of information, which may include financial information, work history, medical history and educational history. All of this information was

collected as part of the management of the claim, and to suggest that it is a "consistent use" to disclose all of it to an employer to assist it in determining whether or not to appeal a decision is, in my view, contrary to the privacy protections in the *Freedom of Information and Protection of Privacy Act*.

5.7 Information Sharing on a "Need to Know" Basis

While I do not agree with the practice of complete file disclosure prior to the filing of an appeal, I believe that some information can be shared with an employer at that stage on a "need to know" basis. What is at issue should have a bearing on what limited personal information may be made available. It is my understanding that the WCB has a policy that states that an employer is entitled to know basic information on a "need to know" basis, if the release of such information is necessary for the initial adjudication and administration of a claim. For example, it would not make sense for an employer to inquire as to when the worker is expected to return to work and be denied this information on privacy grounds. This type of disclosure is typically in the form of verbal information from the adjudicator to the employer regarding when the worker is expected back to work, what the basic injury is, what caused the injury (so the employer can take remedial action in the workplace), and whether the worker will need light duties upon return to work. I accept that this limited and controlled form of information-sharing will continue.

One of the fundamental principles that I am promoting under the Act is that **the right information needs to reach the right persons at the right time for the right purposes**. This includes the disclosure of certain personal information about workers to employers before an appeal has been filed. The latter is **the "need to know" principle** that in my view is also an essential component of the Act.

RECOMMENDATION 2:

Since the *Freedom of Information and Protection of Privacy Act* applies to requests for access to claim file information before an appeal is initiated, the WCB should release information to an employer during this time period only on a "need to know" basis as required for the adjudication and administration of the claim.

5.8 The Issue of Consent

When a worker files a claim for compensation, he or she is required to sign a consent form authorizing the WCB to *collect* information, including personal information, necessary for the adjudication of the claim.

Workers who file for compensation do not specifically consent to the *disclosure* of their personal information to their employer, nor are they advised of the fact that their personal information may be disclosed to their employer. However, most workers acknowledge that employers have justifiable information rights with respect to the claim.

Nevertheless, the complaints that this Office has received reveal that disclosure often comes as an after-the-fact shock when the worker is notified by mail that his or her entire file has been

disclosed, including information from his or her medical file. These workers feel betrayed in the sense that they believe that they disclosed information to the WCB about themselves on a confidential basis.

It is our experience that WCB claimants labour under the mistaken belief that information they supply to their physicians before and after an injury is privileged information. They are shocked to discover that their employer has been given copies of medical information, which they often believe is irrelevant to the claim.

I am pleased to note that the WCB is producing a new consent form to advise workers that information from their claim files may be disclosed to the employer for appeal purposes.

RECOMMENDATION 3:

The WCB should notify workers when they file a claim that all of the information the WCB collects may be disclosed to the employer after an appeal has commenced. This notification should occur prior to the collection of any personal information.

RECOMMENDATION 4:

The WCB should amend the consent form that workers are required to sign to indicate the purpose for collecting personal information, the legal authority for collecting it, and the title, business address, and business telephone number of an officer or employee of the WCB who can answer the individual's questions about the collection pursuant to section 27 of the *Freedom of Information and Protection of Privacy Act* .

5.9 The Disclosure of Third-Party Information

The WCB collects and discloses personal information pertaining to third parties without the consent, and often without the knowledge, of the third party. Such third-party information as this Office reviewed was of the most sensitive type, for example, information about sexual abuse or psychiatric histories. This information tends to be found in psychological, psychiatric, or other specialist reports which generally include a section on "family history." The WCB states that the *Workers Compensation Act* gives it the authority to collect such information, when that information is relevant to the adjudication of a claim. Certainly, if a worker is suffering from a depressive illness, evidence that this illness is hereditary may have a bearing on whether or not an illness could be connected to the workplace. However, if a wage rate decision is appealed, the medical history of a third party is irrelevant to the decision at appeal and should not be collected or disclosed.

While the *Workers Compensation Act* provides the WCB with broad authority to collect personal information, including third-party information, the *Freedom of Information and Protection of Privacy Act* elevates the standards by which personal information is collected, protected, and disclosed. In the instance of third-party personal information, it is problematic that sensitive, and often embarrassing, information is routinely collected and released without the knowledge or consent of the third party.

The WCB appeal system is designed so that workers can argue the relevancy and merit of any information on their file. However, if medical information is subsequently found to be irrelevant, or the employer chooses not to proceed with an appeal, that information has already been disclosed to the employer and is no longer in the custody and control of the WCB.

Much of the data about the prior injuries of workers collected by the WCB arrives on forms supplied to employers and physicians, for example, by the WCB. This minimizes the receipt of extraneous and sensitive personal information. But, increasingly, the WCB finds it necessary to collect a more expansive range of information about so-called soft tissue injuries as it attempts to take a more "holistic" approach to the rehabilitation of an injured worker. It is at this point that the WCB is more likely to acquire sensitive data that an adjudicator eventually decides is unnecessary or not relevant to the matter at hand. Hence recommendation 6, which I intend the WCB to apply prospectively and not retrospectively.

I am pleased to note that the Freedom of Information and Protection of Privacy Office of the WCB has been working with various service providers, including physicians, to educate them about the *Freedom of Information and Protection of Privacy Act* in the context of providing reports to the WCB which contain third-party information. Its liaison committees with such professional groups as the B.C. Medical Association can also address such matters on an ongoing basis. **The goal must be to minimize intrusiveness in the lives of workers and third parties.**

RECOMMENDATION 5:

The WCB should continue to educate information providers, such as health care professionals, about the requirements of the *Freedom of Information and Protection of Privacy Act,* particularly with respect to the provision of unnecessary personal information about workers or third parties to the WCB.

RECOMMENDATION 6:

The WCB should develop a policy for destroying or returning sensitive personal information, including medical information, that it receives which has not been specifically requested and which is determined not to be relevant to the adjudication of a specific claim.

5.10 The Problem of Further Dissemination Following Disclosure

Recent amendments to section 95 of the *Workers Compensation Act* are a positive step towards controlling the use of personal information legitimately disclosed for the purpose of pursuing an appeal. The amendment prohibits the use of WCB information in other proceedings, unless those involved in the proceedings have the authority to compel the production of that information. There is also a provision for sanctions against an employer for disclosure of such personal information for unauthorized purposes.

The WCB brought this amendment to the attention of the government, because it recognized a need for greater protection of information disclosed for appeal purposes. Clearly, the majority of employers in this province appreciate the confidential and sensitive nature of information in a

claim file and take steps to ensure that the information is correctly handled and securely stored. However, a common component of some of the complaints that this Office has handled is that a worker's personal information has been carelessly or deliberately divulged by an employer. This highlights the importance of public bodies collecting and disclosing only that information which is absolutely necessary and ensuring that employers are aware of their obligations regarding the secure handling of the personal information of workers.

***RECOMMENDATION* 7**

The WCB should investigate all complaints of unauthorized use of personal information by employers under section 95 of the *Workers Compensation Act* and refer all serious substantiated complaints to the appropriate Crown counsel's office for consideration.

5.11 Conclusion

Since the preparation of this investigative report has spanned a lengthy time period, there has been considerable discussion with the WCB itself. It is particularly noteworthy that the WCB is already addressing, or indeed following, a number of the recommendations that I have put forward. I should note that I am "recommending" rather than ordering the WCB to do various things out of respect for its complex operations in the compensation field. I also want to give the WCB time to incorporate my recommendations into its operating procedures in an orderly way that promotes its ongoing need for operational efficiency as well as our collective concern for minimizing intrusiveness into the lives of workers by the promotion of fair information practices. Thus my colleagues and I will continue to monitor the impact of our recommendations on the WCB. At the same time, I am confident that it will comply with them.

6. RECOMMENDATIONS

RECOMMENDATION 1:

The WCB should amend its disclosure policies to reflect that a "proceeding" with respect to section 3(2) of the *Freedom of Information and Protection of Privacy Act* does not begin until either a worker or an employer has formally initiated an appeal.

RECOMMENDATION 2:

Since the *Freedom of Information and Protection of Privacy Act* applies to requests for access to claim file information before an appeal is initiated, the WCB should release information to an employer during this time period only on a "need to know" basis as required for the adjudication and administration of the claim.

RECOMMENDATION 3:

The WCB should notify workers when they file a claim that all of the information the WCB collects may be disclosed to the employer after an appeal has commenced. This notification should occur prior to the collection of any personal information.

RECOMMENDATION 4:

The WCB should amend the consent form that workers are required to sign to indicate the purpose for collecting personal information, the legal authority for collecting it, and the title, business address, and business telephone number of an officer or employee of the WCB who can answer the individual's questions about the collection pursuant to section 27 of the *Freedom of Information and Protection of Privacy Act* .

RECOMMENDATION 5:

The WCB should continue to educate information providers, such as health care professionals, about the requirements of the *Freedom of Information and Protection of Privacy Act*, particularly with respect to the provision of unnecessary personal information about workers or third parties to the WCB.

RECOMMENDATION 6:

The WCB should develop a policy for destroying or returning sensitive personal information, including medical information, that it receives which has not been specifically requested and which is determined not to be relevant to the adjudication of a specific claim.

***RECOMMENDATION* 7:**

The WCB should investigate all complaints of unauthorized use of personal information by employers under section 95 of the *Workers Compensation Act* and refer all serious substantiated complaints to the appropriate Crown counsel's office for consideration.

APPENDIX 1-- A SURVEY OF OTHER WORKERS COMPENSATION BOARDS IN CANADA

As part of this investigation, my Office reviewed the disclosure practices of other Workers Compensation Boards across the country. Generally, other boards apply more restrictive policies to the disclosure of personal information of injured workers to employers than does the Workers Compensation Board of British Columbia. The information contained in the following summary was obtained from Comparison of Workers' Compensation Legislation in Canada, Association of Workers Compensation Boards of Canada, 1993.

· **Manitoba**

In Manitoba, the Workers Compensation Board makes an effort to collect only such information as is necessary for the adjudication of the claim. The board allows employers to have access to the claim file once an initial adjudication decision has been made. In making a request for access,

however, the employer must identify a specific issue or issues subject to reconsideration or appeal. Only information which is relevant to that specific issue is made available to the employer. Workers are notified of the intent to disclose information from their file and are provided with an opportunity to object to the disclosure in writing before the information is released. The WCB considers the worker's objections before making a final determination.

Third-party privileged information which may be present in the claim file is not released to either the worker or the employer.

· **Yukon**

In the Yukon, the WCB will only release information to the employer that is relevant to the compensable injury. However, employers are automatically notified of "benchmark" decisions, and may request and receive Progress Reports at regular intervals. These Progress Reports are designed to meet the employer's need for information about the progress of a claim without necessitating access to the complete claim file.

Upon appeal, employers may make a request in writing to view all relevant information held by the WCB. When such a request is received, workers are notified and given fourteen days to object in writing to the release of any information. If a worker objects to disclosure, the President of the WCB makes the final determination.

Workers are also entitled to request that irrelevant information be removed from the claim file.

In order to protect the confidentiality of information that has been disclosed to employers, the unauthorized use of information obtained from the WCB is subject to a fine of up to $5,000 and/or a six-month jail term.

· **Nova Scotia**

The Nova Scotia WCB provides a copy of all information on a file to approved parties upon written request.

· **Ontario**

In Ontario, an issue must be in dispute before access is granted. The issue must be an appealable decision which must be communicated in writing for access to be considered. Employers can access only the records relevant to the dispute. The Ontario Board must also notify the worker of its intention to provide medical reports and opinions to the employer and permit the worker to file written objections before giving the employer access. A further appeal of the decision to allow access to records is available to the worker or employer within twenty-one days, which must lapse before access is granted. The worker is to be advised of any eventual access and of the information given.

· **Saskatchewan**

Saskatchewan is similar to Ontario. The workers' advocates have access to claim files to assist a claimant make a claim or, if indicated, to appeal a finding or decision.

· **Quebec**

In Quebec, access to medical and physical rehabilitation records is restricted to a health professional designated by the employer, who may give the employer a summary of the record and an opinion. Quebec must notify the worker when an employer or designated health professional has been given access. The information is to be used only to exercise the employer's rights under the Act.