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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 188-1997
August 22, 1997**

INQUIRY RE: A decision by the Workers' Compensation Board (WCB) to deny access to Ombudsman records, the WCB's solicitor-client records, and other records related to a worker's claim

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on June 18, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by an applicant for all records related to his claim with the Workers' Compensation Board (WCB).

2. Documentation of the inquiry process

On December 31, 1996 the Workers' Compensation Board received the applicant's request for "full and complete disclosure of any and all information" about his claim as held by the WCB. On February 19, 1997 the WCB disclosed a number of records in full. It also told the applicant that several other records were being severed, withheld in their entirety, or excluded from disclosure under sections 3(1)(c), 13(1), 14, and 22(1) of the Act. The WCB also explained to the applicant that section 3(1)(c) excluded correspondence between the WCB and the Office of the Ombudsman from the scope of the Act.

In mid-March 1997 my Office received the applicant's request for a review of the WCB's decision. During the review period, the applicant decided not to pursue the information withheld under section 22(1) of the Act. On May 26, 1997 the WCB disclosed most of the information it had withheld under section 13(1). On May 27, 1997 the Office notified the WCB, the applicant, and the Office of the Ombudsman that a written inquiry would take place on June 18, 1997. The WCB disclosed further records to the applicant on July 2, 1997.

3. Issues under review and the burden of proof

This inquiry examines the WCB's application of sections 13(1) and 14 of the Act to a series of records from the applicant's WCB claim file. In addition, it concerns the application of section 3(1)(c) to correspondence between the WCB and the Office of the Ombudsman. These sections read as follows:

Scope of this Act

- 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
- ...
- (c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

Policy advice or recommendations

- 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

Legal advice

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

Section 57 of the Act, which establishes the burden of proof on the parties in an inquiry, is silent with respect to a request for review about the application of section 3 to records in the custody or under the control of a public body. In Order No. 170-1997, June 12, 1997, I decided that since the public body, in this case the Workers' Compensation Board, is asserting that section 3 applies in these circumstances, it has the burden of proof.

Under section 57(1), where access to information in the records has been refused under section 13 or 14, it is up to the WCB to prove that the applicant has no right of access to the records or parts of the records.

4. The records in dispute

The records in dispute consist of:

- several items of correspondence exchanged between the WCB and the Office of the Ombudsman during the investigation of the applicant's complaint;
- a series of notes and memoranda, plus a few isolated phrases in other records; and

- a number of electronic mail messages, plus some individual phrases within other records.

5. The applicant's case

The applicant made an *in camera* submission. Most of it had nothing directly to do with this inquiry under the Act.

6. The WCB's case

The WCB made its submissions to me on an *in camera* basis, because to do otherwise would disclose the substance of the records in dispute to the applicant.

7. The Ombudsman's case

The Ombudsman reviewed her statutory responsibilities as an Officer of the Legislature and the importance of confidentiality in the conduct of that work. In her view, it is desirable to give "a broad and purposive interpretation" to section 3(1)(c) of the Act "to respect both the independence and autonomy of the Ombudsman, and to facilitate her working according to the terms of her statute." (Submission of the Ombudsman, paragraph 7) It is the Ombudsman's view that public bodies must be allowed "to have in-house discussions regarding work done by the public body in the course of an Ombudsman investigation, to respond candidly to Ombudsman inquiries, and to keep records regarding Ombudsman investigations without concern that those records may subsequently be the subject of an access to information request." (Submission of the Ombudsman, paragraph 10)

It is the Ombudsman's position that records numbered 1 through 163 in the present inquiry are excluded from disclosure on the basis of section 3(1)(c) of the Act.

8. Discussion

Almost all of the submissions in this inquiry were made on an *in camera* basis, which severely restricts my ability to render an Order that will be intelligible to readers other than, to a limited extent, the applicant and the other parties. None of the parties submitted a reply submission.

I have reviewed all of the records in dispute in this inquiry. I confirm that the records of interactions between the WCB and the Ombudsman are properly excluded from disclosure on the basis of section 3(1)(c) of the Act.

In Order No. 170-1997, I considered the application of section 3(1)(c) of the Act to records relating to the Ombudsman. The following quotation from page 5 of that Order is relevant to the present inquiry:

This section provides that the Act does not apply to the records of an Officer of the Legislature that relate to the exercise of that Officer's functions under an appropriate statute. In this inquiry, records of both the Ombudsman and my Office are at issue. The legislative intent is to protect the investigative and quasi-judicial core functions of an Independent Officer of the Legislature. (Submission of ICBC, paragraphs 16, 18; and Order No. 152-1997, March 4, 1997) In this regard, I agree with the submission of ICBC that 'regardless of who has the custody or control of a record created by an officer of the legislature, s. 3(1)(c) applies so long as the record was created by that officer,' or, I would add, a member of his or her staff. (Submission of ICBC, paragraph 20) I further accept that it is 'appropriate to interpret the term "custody" to include constructive possession and not just actual possession of a record'

I have reviewed a very small number of internal WCB records that are being withheld on the basis of section 13(1) of the Act and confirm that this is an appropriate basis for doing so.

I have reviewed a number of internal WCB records that are being withheld on the basis of section 14 of the Act and confirm that they are subject to solicitor-client privilege.

I therefore find that the WCB has discharged its burden of proof with respect to the application of sections 3(1)(c), 13, and 14 of the Act to the records under review.

9. Order

I find that the Workers' Compensation Board has properly applied section 3(1)(c) of the Act and is authorized to refuse access to the records withheld under that section. Under section 58(2)(b), I confirm the decision of the Workers' Compensation Board to refuse access.

I also find that the Workers' Compensation Board was authorized to refuse access to information in the records in dispute under sections 13 and 14. Under section 58(2)(b), I confirm the decision of the Workers' Compensation Board to refuse access.

David H. Flaherty
Commissioner

August 22, 1997