OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order No. 325-1999

INQUIRY REGARDING WORKERS' COMPENSATION BOARD INTEREST PAYMENT RECORDS

David Loukidelis, Information and Privacy Commissioner
October 12, 1999

Order URL: http://www.oipcbc.org/orders/Order325.html
Office URL: http://www.oipcbc.org

Summary: WCB withheld records dealing with WCB policy on payment of interest to employers when refunding to employers certain contribution overpayments. WCB withheld information under ss. 13(1), 14 and 17(1). WCB authorized to withhold record under first two sections, but not s. 17(1). No reasonable expectation of harm to WCB's financial or economic interests on basis information might be used by third parties in litigation against WCB. Section 13(1) in any case found to protect information to which WCB applied s. 17(1).

Key Words: Advice or recommendations – program – solicitor client privilege – harm to financial or economic interests – reasonable expectation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(2), 13(1), 13(2)(l), 14, 17(1). *Workers Compensation Act*, ss. 39(1)(e) & 82.

Authorities Considered: B.C.: Order No. 5-1994; Order No. 119-1996; Order No. 158-1997; Order No. 170-1997; Order No. 220, 1998; Order No. 323-1999. **Ontario:** Order 147.

1.0 INTRODUCTION

This case – which featured a flurry of procedural objections by both sides – involved approximately 5,402 pages of records that the Workers Compensation Board ("WCB") identified as being responsive to the February 9, 1998, access to information request made by the applicant, a corporate consulting firm, to the WCB. This notable tally of

responsive records resulted from the WCB's examination of an even more impressive total of some 12,000 pages of records, which various WCB departments had provided to the WCB's Freedom of Information and Protection of Privacy Office in response to the applicant's request.

The records relate to the WCB's adoption of a policy regarding repayment of interest to employers on over-contributions by employers to reserve funds established under s. 39(1)(e) of the *Workers' Compensation Act* ("WCA"). There appears to have been some disagreement between the WCB and some employers about the WCB's policy on the timing and calculation of such interest payments. According to the applicant, this issue has been alive since 1990; since then the WCB has developed and applied various policies. In 1996, the WCB initiated what the applicant's initial submission described as a "policy review". The applicant alleges the WCB at the time conducted two such reviews, one in which employer input was solicited and a further "behind the scenes" review that did not include employer input. After what the applicant again described as another "policy review" in 1997, the WCB published a draft policy on this issue. By an April 23, 1998, resolution of its Panel of Administrators, the WCB's interest repayment policy was established.

The WCB's response to the applicant's request came on January 7, 1999. The WCB disclosed many of the 5,402 responsive pages it had identified. As the WCB's response letter put it, "the vast majority" of the pages that were not disclosed were withheld under s. 13(1) of the *Freedom of Information and Protection of Privacy Act* ("Act"). The WCB also withheld a "few" pages under ss. 14, 17 or 22 of the Act. Last, the WCB withheld "[s]everal pages" on the ground they were outside the scope of the Act as set out in s. 3 of the Act.

This elicited a fairly prompt request by the applicant for a review, under s. 52 of the Act, of the WCB's decision. The fact report prepared for this inquiry by our office's portfolio officer indicates that considerably more information was disclosed to the applicant through mediation. As a result, only a fraction of the records originally in dispute is in issue in this inquiry. Further, the applicant agreed in mediation to not dispute the withholding of any information under ss. 21 or 22 of the Act. This means only ss. 13, 14 and 17 are relevant to the records withheld under the Act's exceptions to the right of access. There are also a few pages that the WCB withheld on the ground they are excluded from the Act's scope by s. 3.

2.0 ISSUES

Bearing in mind that the WCB bears the burden of proof on all issues in this inquiry, the question is whether the WCB was authorized to withhold information under ss. 13(1), 14 and 17(1) of the Act. It also must be determined whether the WCB was correct to withhold some pages on the ground s. 3 of the Act put them beyond the reach of the legislation.

3.0 DISCUSSION

3.1 Records Excluded From the Act's Scope

The WCB concluded that s. 3 of the Act excluded a small amount of information from the Act's scope, thus placing that information outside the Act's right of access. Although the WCB did not say so, it appears the WCB decided s. 3(1)(c) of the Act applied to this information. Section 3(1)(c) of the Act provides that the Act does not apply to

> … a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act.

I have reviewed the minor amount of information to which the WCB applied that section and have concluded the WCB's decision was correct. In coming to this conclusion, I considered, and agree with, the approach to this issue taken by the first commissioner in Order No. 170-1997.

3.2 Advice or Recommendations

Section 13(1) of the Act authorizes a public body to refuse to disclose to an applicant information that would reveal "advice or recommendations" developed by or for the public body or a minister. Section 13(2) lists a number of classes of "factual" information that a public body must not refuse to disclose. In this case, the WCB has applied s. 13(1) to many of the pages in contention and says that s. 13(2) does not apply to any of those records.

In its initial submission, the WCB said it had exercised the discretion inherent in s. 13(1) reasonably, by declining to disclose only advice or recommendations made to the WCB in confidence. It did this, the WCB said, to ensure the confidential policy advice process was not impaired. The WCB noted that many of the withheld documents are drafts, *i.e.*, "thoughts in process by policy analysts that may be inaccurate and hence are unreliable" (p. 2). The protection of s. 13(1) is appropriate here, the WCB said at p. 2, because it provides a "circle of confidentiality" necessary for free internal policy discussion. The same reasoning was advanced by the WCB in relation to other records which, while not drafts, contain advice or recommendations that are not "final positions or decisions of the public body" (p. 2). The WCB said that it had disclosed to the applicant "all records which disclose final positions or decisions" (p. 2). The WCB's final point was that none of the information withheld under s. 13(1) falls within the classes of information set out in s. 13(2).

In its response, the applicant argued that s. 13(2)(l) applies to the records. That section in effect prevents a public body from refusing to disclose

> … a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body.

The applicant argued that because the records relate to the April 23, 1998, resolution of the WCB's Panel of Administrators setting out the WCB's policy on interest payments, s. 13(2)(l) applies to the disputed records. (The April 23, 1998, resolution post-dates the applicant's access request.)

Not surprisingly, in reply the WCB disagreed with the applicant's characterization of the interest policy as a "program" for the purposes of s. 13(2). The WCB argued that, among other things, s. 82 of the *Workers' Compensation Act* ("WCA") distinguishes between policies and programs of the WCB. Of course, this does not mean the word "program" in s. 13 of the Act has the same meaning as that word in another statute such as the WCA. But the WCB also argued that the policy in issue here is merely the latest version of its policy on interest payments for the purposes of s. 39(1)(e) of the WCA.

In support of its s. 13(1) case, the WCB submitted three affidavits, sworn by Joseph Pinto, Susan Nickerson-Graham and Gerald Massing. Only the first two deal with s. 13 issues. Joseph Pinto's affidavit concentrated primarily on two points. First, he said that, based on a review of the records in issue, he was satisfied the WCB had not withheld any information which might fall under s. 13(2) of the Act (paragraph 4). This opinion on the part of Mr. Pinto is, of course, an issue to be decided in this inquiry. The affidavit of Susan Nickerson-Graham – who is a Policy Director in the WCB's Policy Bureau – was to the same effect; it repeats Joseph Pinto's opinion about the s. 13(1) and (2) issues.

In my view, the policy in issue here is not a "program" for the purposes of s. 13(2) of the Act. Bearing in mind the other classes of information described in s. 13(2), and the legislative intent underlying s. 13(1), I cannot agree that what the applicant has described as a WCB "policy review" process is a "program". To my way of thinking, a "program" for the purposes of s. 13(2) is an operational or administrative program that involves the delivery of services under a specific statutory or other authority. The term "program" does not, at the very least, encompass the kind of activity in issue here.

Section 13(1) is discretionary, *i.e.*, the head of a public body may decide to disclose information to which the section technically applies. Of course, many other exceptions in the Act are also discretionary in this sense. Since the Act's early days public bodies have been required to demonstrate a proper exercise of that discretion. In Order No. 5-1994, for example, the first commissioner remitted a matter to a public body so it could exercise its discretion under s. 14 (solicitor client privilege). This approach is consistent with the purpose of the Act found in s. 2(1): "to make public bodies more accountable to the public", including by "giving the public a right of access to records". It is also an approach followed in other jurisdictions. In Ontario, for example, their commissioner has required public bodies to exercise their discretion under comparable exceptions. See, for example, Ontario Order 147 (February 15, 1990).

In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception. The following

discussion – taken from pp. 4 and 5 of section C.4.4. of the Policy and Procedures Manual issued by the Provincial Government – is useful on this point:

> In exercising discretion, the head considers all relevant factors affecting the particular case, including:
>
> - the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;
> - the wording of the discretionary exception and the interests which the section attempts to balance;
> - whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
> - the historical practice of the public body with respect to the release of similar types of documents;
> - the nature of the record and the extent to which the document is significant and/or sensitive to the public body;
> - whether the disclosure of the information will increase public confidence in the operation of the public body;
> - the age of the record;
> - whether there is a sympathetic or compelling need to release materials;
> - whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and
> - when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.

Just to be clear, these considerations are relevant to the exercise by the head of a public body of discretion under *any* of the Act's discretionary exceptions to the right of access. It should also be emphasized that the Policy and Procedures Manual is not necessarily the definitive or only source of considerations of this kind. It is, however, a useful compendium of some of the considerations that may be relevant to a public body's exercise of discretion under the Act.

As was noted above, the WCB argued in this case (at p. 2 of its initial submissions) that it had exercised its s. 13(1) discretion "reasonably". It said that it had disclosed large amounts of information to the applicant and withheld only advice and recommendations "made on a confidential basis", the disclosure of which would "impair the confidential policy advice process" at the WCB. Having reviewed the records in dispute, I have decided the WCB was authorized under s. 13(1) of the Act to refuse to disclose to the applicant the records to which the WCB applied s. 13(1). The WCB has also established that it exercised its discretion under s. 13(1) of the Act.

As a closing point on s. 13(1), it should be noted that, in my view, the WCB's distinction between "draft" advice or recommendations and other advice or recommendations is not relevant to the s. 13(1) analysis. The only issue to be considered is whether a "record" contains information excepted, by s. 13(1), from disclosure. Section 12 of the Act refers to "draft" records of specialized kinds, *i.e.*, draft enactments. This emphasizes the point just made: s. 13(1) does not distinguish between drafts and final records.

3.3 Solicitor Client Privilege

Section 14 of the Act says a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege. As was noted in the affidavit of Gerald Massing, who is the WCB's Associate General Counsel, the records withheld by the WCB under s. 14 contain communications between the WCB and in-house legal counsel employed by the WCB. (In one case, the communications involved an outside lawyer retained by the WCB to provide legal advice.) At p. 3 of its initial submission, the WCB had the following to say about this:

> As Mr. Massing's affidavit points out, the WCB is relying on Section 14 only with respect to those records of communications between WCB staff (including managers, directors, executives) and the following barristers and solicitors … .
>
> Mr. Massing attests that all such communications were made on a confidential basis between WCB barristers and solicitors and WCB staff, and are properly the subject of solicitor/client privilege.

It is clear that any communications between a lawyer and public body client for the purpose of seeking or providing legal advice are protected under s. 14 of the Act. See, for example, Order No. 5-1994 and Order No. 220-1998. On the basis of the evidence and argument submitted by the WCB, I have decided the WCB was authorized under s. 14 to refuse to disclose to the applicant information to which the WCB applied s. 14.

3.4 Harm to the WCB's Financial or Economic Interests

Section 17(1) of the Act says that a public body may refuse to disclose "information the disclosure of which could reasonably be expected to harm the financial or economic interests of" the public body. In this case, the WCB says the information to which it has applied s. 17(1) "could be used in the lawsuit against the WCB" brought by one of the applicant's clients regarding payment of interest on over-contributions.

Joseph Pinto's affidavit dealt with the WCB's reliance on s. 17 of the Act. He noted, at paragraphs 5 and 6, that a corporate client of the applicant has sued the WCB, "seeking interest on retroactive assessment (premium) credits" on a basis different from that set out in the WCB's policy. He concluded that if the information the WCB withheld under s. 17(1) of the Act were disclosed, it "would likely be used in the lawsuit to harm the financial interests of the WCB and its stakeholders." (Of course, s. 17 does not protect the financial interests of third parties, to whom the word "stakeholders" apparently

refers.) He did not specify how this information could be "used in the lawsuit to harm" the WCB.

Gerald Massing's affidavit also speaks to the s. 17(1) issue. At paragraph 11, he says – with reference to the lawsuit brought by the applicant's client against the WCB – that the information withheld under s. 17(1)

> … might reasonably be used to formulate strategy in the lawsuit against the WCB, or to anticipate strategy of the WCB in defending the lawsuit, and to circumvent the rules and requirements and requirements of disclosure formulated by the Courts in the management of litigation.

In my view, the fact that information might be used in a lawsuit for "strategy" does not create a reasonable expectation of harm to the WCB's financial or economic interests within the meaning of s. 17(1). As has been said in earlier orders, the public body must establish a reasonable expectation of harm that is not merely fanciful or imaginary. See, for example, Order No. 323-1999.

In this case, I do not think the WCB has shown that any 'strategic' use of information raises a reasonable expectation of harm to its financial or economic interests. The fact that information is used for 'strategy' does not mean it will cause the feared harm or that it is likely to cause that harm. Strategies may be formulated and abandoned. They may be employed, but to no effect. They may be used to some effect, but not be a factor in any litigation victory. The information may be used to "anticipate strategy of the WCB in defending itself against the lawsuit, but that anticipation may not harm the WCB in any identifiable way. Further, there is no evidence before me that use of the information for strategic purposes will entail increased legal costs for the WCB or any other kind of financial or economic harm.

Having considered the WCB's evidence and argument on this point, I have concluded that it has not made its case under s. 17(1) and is therefore not authorized to refuse access under s. 17(1). Since the WCB applied ss. 13(1) and 17(1) to the same information, this finding does not – in light of my decision on s. 13(1) – result in the applicant being entitled to further information.

3.5 Litigation Discovery Processes and Access Under the Act

A closing comment is necessary about the contention in Gerald Massing's affidavit that s. 17(1) applies because the information would, if disclosed, "circumvent" the rules of disclosure of documents "formulated by the Courts in the management of litigation." Section 2(2) of the Act reads as follows:

> This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

On the one hand, this means the rules on disclosure of documents and examination for discovery of parties' representatives are not affected by the Act. Conversely, nothing in the *Rules of Court* or any other statute – including the Act – says that the right of access to information in the Act is to be denied, or diminished in any way, simply because parallel processes for discovery of information exist in the litigation context. Section 17(1) is a harm-based exception to the right of access. Yet the above contention by the WCB amounts to an indirect class-based exclusion of records where there happens to be litigation which involves the same records. In my view, s. 17(1) does not apply in cases such as this. This is a view shared by my predecessor. See Order No. 119-1996 and Order No. 158-1997, the latter of which involved a similar argument by the WCB.

4.0 CONCLUSION

For the reasons given above:

1. under s. 58(2)(b) of the Act, I confirm the decision of the WCB that it was authorized to refuse to give the applicant access to those parts of the records that were withheld by the WCB under ss. 13(1) and 14 of the Act; and

2. subject to paragraph 1, under s. 58(2)(a) of the Act, I require the WCB to give the applicant access to any portions of the records that were withheld by the WCB solely under s. 17(1) of the Act.

For clarity, portions of the disputed records withheld by the WCB under s. 17(1) were also withheld by it under s. 13(1). For this reason, the order made in paragraph 1, above, overrides the order made in paragraph 2, above, such that the WCB need not disclose any portions of a record to which s. 13(1) was also applied by the WCB.

David Loukidelis
Information and Privacy Commissioner
for British Columbia