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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 22-1994
September 1, 1994

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A Request for Access to Records of the Workers' Compensation Board of British Columbia

INQUIRY RE: A Request to Review a Decision by the Workers' Compensation Board of British Columbia to Disclose a Record

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 604-387-5629
Facsimile: 604-387-1696

1. Description of the Review

As Information and Privacy Commissioner, I conducted an oral inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on August 12, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arises out of two separate requests for review. Since the subject matter of both requests for review were interrelated, they were heard at one hearing.

The first request for review concerns records in the custody or under the control of the Workers' Compensation Board of British Columbia (the Board). The applicant is Larry Stoffman, Director, Occupational Health & Safety, United Food and Commercial Workers of British Columbia (UFCW).

The second request for review is from the Food Retailers Occupational Safety & Health Advisory (FROSHA) for a review of the Board's decision to release certain information requested by the UFCW.

In a series of requests dated February 11, March 8, April 14 and April 25, 1994, the UFCW requested access to several records pertaining to the unfunded liability of the

Board, assessment information, assessment rates, deposit account information, and claims cost information.

The Board provided a number of records to the UFCW in a series of disclosures. With respect to several of the requests, the Board then conducted third party consultations pursuant to section 23(1) of the Act. After considering the input from the third parties, the Board concluded that two records should not be provided to the UFCW, since the disclosure of such information would be harmful to the business interests of the third parties in accordance with section 21(1) of the Act.

The records in dispute are:

1) The experience-rated assessment rate (ERA) of Canada Safeway and Overwaitea/Save-On-Foods for each year 1988-1993.

2) The total assessment charged and collected for the above two firms for each year 1988-1993.

3) The total claims costs charged for assessment rating purposes for Canada Safeway and Overwaitea/Save-On-Foods for each year 1988-1993.

In addition to section 21(1), the Board also withheld the first two records under section 21(2) of the Act, which requires the head of a public body to refuse to disclose information gathered for the purpose of determining tax liability. The WCB argued that an assessment under the Workers' Compensation Act is a tax and therefore must be withheld under section 21(2).

The WCB intended to disclose the third record to the UFCW. However, the Food Retailers Occupational Safety & Health Advisory (FROSHA), representing the third parties, filed a request with the Information and Privacy Commissioner to review the WCB's decision to release this record. This is the subject of the second request for review. This third record remains withheld pending the outcome of this hearing.

2. Documentation of the Inquiry Process

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a three-page statement of facts (the fact report), which, after some amendments, was accepted by all parties.

Under subsection 56(3) of the Act, the Commissioner gave intervenor status to the B.C. Federation of Labour and to the Employers' Health & Safety Association of British Columbia. The UFCW and the B.C. Federation of Labour requested that the hearing be postponed, since they desired more time to prepare their cases. I denied these requests for an adjournment because a new hearing date could not be set within the 90-day decision-making period mandated by the Act (see section 56(6)). The B.C. Federation of Labour

subsequently stated that it would not be able to prepare either a written or oral presentation before the hearing date. However, at the hearing, the applicant stated he was also representing the B.C. Federation of Labour.

The applicant, the UFCW, was represented by Larry Stoffman, Director of Occupational Health & Safety. The public body's case was presented by Mark Powers, Information and Privacy Coordinator, Legal Services Division, WCB. The third party applicant, FROSHA, was represented by legal counsel, Norman Trerise, and Lance Ewing, Executive Director, FROSHA.

The WCB provided the Commissioner and all parties with a lengthy written submission prior to the hearing.

3. Issues under Review at the Inquiry

The focus of the Inquiry was the UFCW's request to access the two records withheld by the WCB and the one record that FROSHA does not wish disclosed. The issues in the inquiry pertain to the applicability of sections 21(1), 21(2), and 25 to the records in dispute.

The WCB believes that it acted correctly in denying the applicant's request for experience rates and for assessments charged and collected. It stated that the information requested met the three-part test set out in section 21(1) of the Act with respect to disclosures harmful to the business interests of a third party:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or

> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

The WCB also withheld the two assessment records in accordance with section 21(2) of the Act, which states:

> (2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

The position of the WCB is that employer assessments are taxes.

FROSHA is resisting the disclosure of a third record, which is the total claims costs charged for assessment rating purposes. FROSHA stated that this information also meets the three-part test set out in section 21(1) and therefore should not be disclosed.

The position of the UFCW is that as the union representing 20,000 employees, the information requested should be released under section 25 of the Act:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> (3) Before disclosing information under subsection (1) the head of public body must, if practicable, notify
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> (a) any third party to whom the information relates, and
>
> (b) the commissioner.
>
> (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form
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> (a) to the last known address of the third party, and
>
> (b) to the commissioner.

4. The Workers' Compensation Board's Case

The WCB took the position at this hearing that it was inappropriate for it to defend its decisions and thus support one of the parties, preferring to act as a "friend of

the court," not advocating one position over another: "The Board takes an active role in gathering evidence necessary for its decision making process. The information gathering role of the Board makes it critical for us to ensure that we do not appear to favor one side over the other." (WCB written submission, page 8).

The WCB believes that the three-part test in section 21(1) of the Act prohibits the release of the ERA rate and the assessments against employers. The WCB alleges that this is financial information that is supplied in confidence to the WCB. The WCB admitted in its May 13, 1994 letter to the UFCW that "[t]he third part of the test is the most difficult of the three to deal with." The main point is that the disclosure of such information could significantly harm the competitive position of an employer: "They [third parties] feel the release of this [derived payroll] information could significantly effect [sic] their competitive position.... The knowledge that the assessments of a competitor are lower may be sufficient to create a competitive advantage." (Letter from WCB to UFCW, May 13, 1994, page 3).

The WCB initially decided that the ERA rate and assessments thereby generated are tax information, which should be withheld under section 21(2) of the Act but took a less definitive position on this point at the oral hearing. It admitted then that the compensation system could also be viewed as an insurance scheme, no different from ICBC's. A 1936 Supreme Court of Canada case seems to establish that such assessments are taxes within the meaning of the *Constitution Act, 1867* (Royal Bank v. Workmen's Compensation Board, [1936] 4 D.L.R. 9 (S.C.C.)). In Re: Workers' Compensation Board of Ontario (Information and Privacy Commissioner of Ontario, November 24, 1992, Order P-373, under judicial review), it was found that assessments under the *Workers' Compensation Act* of Ontario were not a tax within the meaning of section 17(2) of the Ontario *Freedom of Information and Protection of Privacy Act*.

The WCB is of the opinion that it can disclose claims cost figures, because it is a figure that it calculates and it does not meet the three-part test under section 21(1) or the section 21(2) argument: "the Board has no information on which to draw a conclusion about the beneficial impact of the release of this type of information." (WCB written submission, page 19).

5. The Submissions of FROSHA and the Employers' Forum

FROSHA opposes the release of the total claims costs, experience rated assessments, and total assessments charged to retail food companies by the WCB. It submits that all of the information sought by the UFCW meets the three-part test in section 21(1) of the Act and thus falls under a mandatory exception to disclosure: it is financial and labour relations information; it is supplied implicitly or explicitly in confidence; and disclosure of the information could reasonably be expected to harm significantly the competitive position of the member companies and result in undue financial loss to these companies or gain to their competitors.

Counsel for FROSHA and the Employers' Forum (which I shall identify as FROSHA in the interests of brevity) led evidence by Lance Ewing, Executive Director, of FROSHA, a person with considerable experience in health and safety matters. He is also knowledgeable about the close connection between profit margins and health and safety experience in the retail food industry. The members of the latter cooperate only in the field of health and safety and otherwise compete on the basis of wages as a percentage of total sales; these are tracked weekly by store and departments within stores. A handful of buying groups among retail food companies that span North America seek to ensure a level playing field. The industry is ninety-nine percent unionized, and the contracts are very similar. Differences in the industry arise between full service and warehouse type of operations.

The point of Ewing's testimony is that small profit margins in the retail food industry mean that knowledge of a one-half percent difference in payroll, because of differences in health and safety costs, could result in a significant competitive advantage. Disclosure of the ERA rate may allow competitors to discern such information. It was argued that the information that the WCB has either released, or proposes to release, could allow another party to make an accurate inference of payroll information.

The WCB already releases or publishes: 1) the claims cost to payroll ratio of sub-class 621 that includes the retail food industry; 2) the accident frequency rates for individuals firms; 3) total wage loss claims per firm; and 4) and the average weekly wage used in WCB calculations. "It is this information, combined with the information sought to be revealed, that would lead to the further disclosure of confidential financial information that would harm the competitive and financial positions of the member companies in FROSHA." (FROSHA written submission, page 3)

FROSHA further argued that the interrelationship of claims costs charged for assessment purposes, total assessments charged, and ERA for each company is such that the release of any of these items has the effect of indirectly revealing the remainder. This would require certain calculations and data linkages with information already in the public domain or released/published by the WCB. Payrolls for individual companies would be specifically revealed. FROSHA is of the view that the risk of harm is so substantial, because "[p]ayroll is the most significant factor in determining the competitiveness within the industry... Payroll or wages as a percentage of sales is one of the most important factors leading to a company's industry-wide success." (FROSHA written submission, page 5) Counsel submitted that payroll information is provided to the WCB in confidence and has always been so treated.

FROSHA also argued that disclosure of the information in dispute could harm the negotiating positions of the member companies under section 21(1)(c)(i) of the Act : "The union could use the information sought to be disclosed to determine which employer has additional contributions to the health and safety union fund. Not only would this give the union a negotiating advantage over the company, but the knowledge

could be used to target particular companies in industries where pattern bargaining is taking place." (FROSHA written submission, page 7).

Lastly, FROSHA argued, the information in dispute is information that was "gathered for the purpose of determining tax liability or collecting a tax" and thus falls under the protection of section 21(2) of the Act (Isaac et al. v. Workers' Compensation Board of British Columbia, British Columbia Court of Appeal, unreported, July 12, 1994).

While I appreciate the arguments advanced by the Employer's Forum in this inquiry, they are, in my judgment, so similar to those of FROSHA, just canvassed, that I need not repeat them, nor point out minor differences in emphasis.

6. The Applicant's Case

The United Food and Commercial Workers argues that the information it has requested does not meet the three-part test under section 21(1) of the Act. Section 21(2) also does not apply: "The information requested was neither gathered nor used for the purpose of determining a tax liability or collecting a tax" (UFCW written submission, page 5). Finally, the UFCW is of the view that the WCB must disclose the requested information under section 25(1)(a) and (b), because it "is clearly in the public interest and particularly in the public interest of the group of people represented by the United Food and Commercial Workers" (UFCW written submission, page 5).

With respect to section 21(1), the UFCW's position is that the demerit /merit and claims costs information is not financial information of the third party and is not supplied in confidence, because it is the product of a calculation made by the WCB. This information cannot harm the competitive position or interests of the third party, because payroll calculated from it would not be the actual payroll or an accurate reflection of it.

The UFCW further argues that improved disclosure is necessary to fairly evaluate a firm's health and safety record. The UFCW's position is that "full disclosure regarding health and safety costs in the [retail food] industry, and a firm's position compared to others in the industry, can just as easily enhance competitive position and public image as do otherwise" (UFCW written submission, page 4).

The UFCW quoted from Ontario Order P-373, page 11, dealing with the disclosure of an employer's payroll, volume, and frequency of accidents, which concluded that affected persons and employer associations "have failed to bridge the evidentiary gap necessary to establish that disclosure of the records at issue in these appeals would reveal this type of information....In my view, the evidence [in this case] consists of generalized assertions of fact in support of what amounts to, at most, speculations of possible harm." The union's position is that the WCB's use of section 21(1) "is based, at most, on mere speculations as well" (UFCW written submission, page 4). With respect to its own rejection of the WCB's use of section 21(2), the UFCW noted

that the same Ontario decision stated that "assessments used to create and maintain compensation funds are not properly characterized as "taxes." (UFCW written submission, page 13)

The UFCW believes that section 25 "is of overwhelming significance in this case...." It needs the information in dispute "in order to properly assess the status of health and safety programming in the retail food industry and specifically the programs and effectiveness of the firms in question.... we could not serve our function as a trade union representing workers in the area of health and safety without full knowledge of the status of health and safety in the industry" (UFCW written submission, page 5).

A related argument is that the experience rating assessment systems and its operation in subclass 621, which includes the retail food industry, has a significant impact on the general public: "Class 621 has contributed over one quarter of the entire unfunded liability of the Board." Were the changes proposed to the Board actually made, "it would have a significant impact on all those employed in the province.... There would also be a significant impact on the public health system and create a burden on social assistance programs needed to care for the many injured and disabled workers who are unable to survive on reduced compensation benefits or unable to qualify under stricter rules" (UFCW written submission, page 6).

The UFCW stated that the primary purpose of the ERA system is health and safety. To support this view, the UFCW submitted WCB Decision No. 401, June 21, 1986, which stated "the purpose of an experience rating program is two-fold. It is, firstly, to promote improved workplace safety and, secondly, to provide improved assessment equity."

7. Discussion

Context

The context of this case is important for understanding the dynamics of what is happening. On November 24, 1993 the weekly "WCB Bulletin" listed the twenty-five "Top Claim Employers," those with the "most claims on which wage loss was paid in 1992." The names of actual employers were not released "to confirm with the spirit of the Freedom of Information and Protection of Privacy legislation." The UFCW subsequently was refused access to the names, but the President of the WCB later reversed this decision of the Freedom of Information Coordinator. The top claim employer was Canada Safeway; Overwaitea/Save-On-Foods was number five.

During the hearing, I asked the union representative for an explanation for what he thought was happening. In his view, employers have had most of the influence on developments in workers' compensation and in the work of the WCB. The WCB is now trying to involve both union and labour in its processes by being more democratic and open. Debate over the ERA is an example of such an issue. The union asserted that

employers want to suppress information on the unfunded liability of the WCB, because disclosure is not in the employers' interests. The unions represented at this hearing are opposed to the ERA system; they also want a lever to make Chief Executive Officers in the retail food industry pay more attention to the health and safety of their labour force.

The Role of the Workers' Compensation Board

While I understand the WCB's wish to take a neutral position at this inquiry, it has the burden of proof, under section 57(1) of the Act, to establish that the UFCW should not have access to the information in question.

The WCB does not view the current inquiry "as a case intrinsic to our jurisdiction." Because it believes that the issue of the relationship between the two parties to this hearing, the UFCW and FROSHA, "goes far beyond the workers' compensation hearing," the WCB believes that "the resolution of this type of issue should be dealt with by the Commissioner and the parties where the entire relationship can be considered" (WCB written submission, page 8). I have a different view of the matter. I would prefer that appropriate, timely, and relevant information about employers be disclosed to workers under the WCB's own law, policy, and regulations, in accordance with its own confidentiality clause and practices, and by as much agreement as possible between workers and employers. The issues facing the WCB at this inquiry are in fact specialized data protection and disclosure matters, where it has the admitted expertise. In keeping with my responsibilities under the *Freedom of Information and Protection of Privacy Act*, it is my intention to leave as much discretion and decision-making responsibility on these matters with the WCB itself, since it has both the depth of experience on these matters and includes representation of workers, employers, and the public among its governors.

In 1991, prior to the passage of this Act, the WCB instituted a policy of openness in the conduct of its business and of involvement of its stakeholders in the decision-making process. In light of this Act, "the Board decided that it would continue with its policy of openness and, where there was doubt on an issue, the Board would favor the release of information. At the same time we would attempt to protect personal privacy and financial business interests." I applaud this stance, since it reflects the kind of balancing of competing interests that underlies the legislation. It is equally important to acknowledge, however, that the Act puts the onus on the head of a WCB to make initial decisions on all matters, as has occurred with respect to the present inquiry. I hope the WCB will continue to amend its policies and procedures to customize the principles and practices outlined in the *Freedom of Information and Protection of Privacy Act*.

In its submission, the WCB has asked me to give it as much guidance as possible about the implications and ramifications of any decisions I make. However, my role as a decision-maker has its limitations. While I make decisions with some eye to their possible direct and indirect consequences, it is impossible to do more, in my view, than to make "decisions" on the precise case before me. It is really for others to interpret prior

decisions until related matters come before me in subsequent inquiries. One of the benefits of an emerging body of decisions from this Office it that it allows the Portfolio Officers who represent my Office, the Information and Privacy Branch of the Ministry of Government Services, and the Directors or Managers of Information and Privacy for public bodies, to follow the ramifications of my decisions as they interpret them in accordance with their various responsibilities under the Act.

The Section 21(1) Argument

1. *Financial Information of the Third Party*

In withholding the first two records, the ERA and the total assessments records, the WCB relied upon section 21(1) of the Act, stating that the information met the three-part test contained therein. FROSHA contends that the third record, the experience rated claims costs, also meets the three-part test.

The first part of the test is whether the information would reveal financial information of a third party. The question is whether the ERA, the total assessments, and the claims cost is "financial information of the third party"? One problem is that while the WCB does collect information, it calculates some of the data on its own on the basis of raw submissions.

The base assessment rate for a classification is calculated by the WCB at a level sufficient to meet the costs of all work-related accidents within a classification. The ERA is the rate an employer applies to the assessable payroll, which may vary above or below the base rate, according to the claims cost-experience of that employer relative to the larger classification. This rate, calculated by the WCB is not "financial information of a third party," and does not meet the first part of the test in section 21(1).

The calculation of the total assessments charged is the ERA applied to the employer's assessable (not actual) payroll. Employers calculate the assessment owing, using a formula supplied by the WCB. I refer to the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, Section C.14.12, page 10, where "financial information" is defined as "information relating to money and its use or distribution or to assets with monetary value, such as securities or stock options." I am not satisfied that the total assessments charged is financial information of the third party. I am supported on this point by Ontario Order P-373 at page 9, which states in part: "While it is true that information supplied by the affected parties [to the Board] on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected persons from the surcharge amounts themselves."

The WCB calculates the third record, the experience rated claims costs, using information from claim files and subtracting costs which may be attributed to occupational diseases, pre-existing conditions, or enhanced disabilities. While this

information is financial information, it is financial information of the WCB and not of the third party.

2. *Supplied in Confidence*

The second test is whether the information was "supplied in confidence." The first and third records, the ERA and the claims costs, were not supplied to the WCB by the third party. The second record, the total assessments charged, is a record supplied by the third party. The question is, was this information supplied "in confidence?" With respect to this issue, the WCB relied on section 95, "Secrecy," of the *Workers' Compensation Act*. The WCB submitted that section 95 establishes that "all information gathered by the WCB is to be kept confidential" (and thus meets the second part of the test under section 21(1)(b)). Section 95 reads in part:

> 95(1) Officers of the board and persons authorized to make examinations or inquiries under this Part shall not divulge or allow to be divulged, except in the performance of their duties or under the authority of the WCB, information obtained by them or which has come to their knowledge in making or in connection with an examination or inquiry under this Part.

My reading of this section is that it governs the disclosure/confidentiality rules for the WCB and not whether information "is supplied, implicitly or explicitly, in confidence" to the WCB (as in the second part of the test). The section promises respondents that the WCB will not divulge their information without authorization or for an approved purpose, but it does not promise that the WCB will treat all such information as confidential. It does not begin: "All information supplied to the WCB shall be kept confidential...."

It is my view that the neither the WCB nor FROSHA have been able to maintain the second part of the test specifically set out under this section 21(1) of the Act. I have just discussed the problematic character of whether the information was supplied in confidence. On this point, I do not accept the second part of the argument of FROSHA that "[t]here can be no doubt that the information sought by the UFCW is financial information provided to the WCB in confidence." Section 95 does not support the argument that the information was supplied implicitly in confidence. There is certainly no evidence that the information is explicitly provided in confidence. The forms that the WCB uses to gather the information do not contain any explicit statement of confidentiality. As I discussed in my Order No. 21-1994, August 15, 1994, the WCB should clarify in future on what basis it is collecting or receiving information of any type from employers, because of the requirements of section 22(1) of the *Freedom of Information and Protection of Privacy Act.* Information should only be collected in confidence when it is clearly necessary to do so.

3. *Harm/Undue Loss or Gain*

The third part of the test is whether the disclosure of the information would "harm significantly the competitive position or interfere with the negotiating position of the third party" (section 21(1)(c)(i)), or would "result in undue financial loss or gain to any person or organization" (section 21(1)(c)(iii)).

With respect to the ERA and the total assessments charged and collected, the WCB referred to section 21(1)(c)(iii). Its evidence on this point came from FROSHA and some of the other employers involved. The WCB admits that "[t]he evidence was not overwhelming, however it was felt that it was sufficient to meet the burden of the section. Since the WCB has not released this type of information in the past, we were left with limited information on which to base our decision as to whether or not harm would flow from the release of the information." With respect, the burden of proof faced by a public body rises to a higher level than what the WCB here summarizes in order to meet the statutory test.

A critical consideration under section 21 is whether it makes a difference that "[t]he assessable payroll of an employer multiplied by the ERA rate equals the assessments charged to a firm.... If this information is given out [the ERA rate and the amount of the assessments charged], it will allow the UFCW to determine the exact assessable payroll of the firms of question." The crucial consideration, in my view, is whether awareness of assessable payroll can result in undue financial loss, since it is not necessarily the same, for technical reasons, as actual gross payroll. Counsel for the WCB argued that assessable payroll is close to gross payroll only for small firms, but FROSHA disagreed.

I do not find this argument persuasive, at least as presented by the WCB. The specific statutory standard is whether the disclosure "could reasonably be expected to...harm significantly the competitive position" of the third party. I do not find detailed an convincing evidence that would allow me to accept that disclosure of the three records would result in "significant" harm to the "competitive position of the third party."

I am supported in my interpretation of the evidentiary threshold in section 21(1) by Ontario Order P-373 at page 11, as cited above.

Disclosure of Payroll Information

With respect to the risks of harm under section 21(1) of the Act, FROSHA emphasized that "[d]isclosure of information leading to payroll information will result in a business which has knowledge of the costs incurred by the competition, including and especially its payroll, having a vast advantage in knowing where to set its competitive pricing to cause the least harm to its business and the most harm to its competitor business." (FROSHA written submission, page 5)

The issue of course is that although the WCB does not disclose payroll information, other information that it has released, proposes to release, or may be ordered

to release may have the effect of revealing a close approximation to actual gross payroll information. FROSHA slighted the distinction between assessable and actual gross payroll and gave me no evidence on the matter, except for a casual remark by Lance Ewing that I have cited above.

The problem that faces us here is one of residual disclosure. Information already exists in the real world; an agency like the WCB releases more information and by a process of either linkage or inference, new knowledge becomes available, such as an approximation of the payroll of a specific company. Residual disclosure is a real problem, just as statistical inference and imputation is a science. If someone knows a set of data about any of us, but lacks certain variables, imputation allows someone with a comparable data base to predict the missing variables with a reasonable degree of accuracy.

What the WCB does need to be careful about is following at least elementary rules of the inadvertent disclosure of any information that is protected from disclosure under section 21. Thus it should not be releasing payroll information inadvertently, although the standards it has to meet as an administrative body are less stringent, in my view, than those of a statistical agency.

With respect to the third record, the total claims costs charged for experience rating purposes, FROSHA argued that releasing the total claims costs "combined with the information the Board has already disclosed, would lead to the revelation of the payroll and Experience Rated Assessment for each company." (FROSHA written submission, page 4)

By agreement of the parties, the WCB provided me with an affidavit from its Director of Statistical Services, which sought to refute FROSHA's argument about the implicit disclosure of payroll information arising from the release of any of the three items in dispute (see above). The thrust of the affidavit is that it is not possible to make an accurate inference of assessable payroll from the WCB's currently released information. FROSHA responded to this affidavit, and, in turn, the WCB responded to FROSHA. I am persuaded by the affidavits of the WCB and find in favor of its conclusions.

The Section 21(2) Argument

I do not accept the WCB's application of this section to withhold information requested by UFCW. Section 21(2) of the *Freedom of Information and Protection of Privacy Act* is as follows:

> 21(2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

Counsel for FROSHA has argued that the 1936 Supreme Court of Canada decision, Royal Bank v. Workmen's Compensation Board of Nova Scotia (1936), 4 D.L.R. 9 (S.C.C.)), is authoritative on the issue of whether or not WCB assessments are a tax. FROSHA contends that this case established a binding precedent that WCB assessments are a tax. It argues that because WCB assessments are a tax, and by the operation of section 21(2), I must refuse to disclose the assessment information to the applicant. Portions of the Royal Bank judgment seem to support FROSHA in its argument that the assessments are taxes. At page 13 of the decision, Mr. Justice Crocket for the majority stated:

> It is admitted by the appellant that the assessment authorized by s. 57 of the Workmen's Compensation Act, is a tax and we have no doubt that it is a direct tax upon the employer in each of the specified classes of industry, imposed for provincial purposes within the meaning of s. 92(2) of the B.N.A. Act.

However, I am not convinced that the Royal Bank is indeed authoritative on the issue. First, whether or not the assessments were a tax was not the main issue in the decision. The primary question was whether the Nova Scotia legislature had the power, under the *British North America Act, 1867*--now known as the *Constitution Act, 1867*--to undermine the Royal Bank's security by giving the WCB of Nova Scotia a first lien against the assets of a bankrupt company. It is apparent that the Royal Bank admitted that the assessment was a tax. The court assumed that, and decided that it was direct, rather than an indirect tax for the purposes of ruling on the constitutional validity of the provincial legislation. The discussion of the tax issue was, to use a legal term, obiter dicta, meaning they were remarks not directly on the issue before the Court. Remarks that are obiter dicta do not bind judges deciding subsequent cases.

Second, there are comments from another judge in the Royal Bank case which indicate that the Court did not make a decision on the tax issue, but assumed that it was a tax for the purposes of deciding the constitutional issue. Mr. Justice Davis concurred with the majority but in separate reasons stated on page 18 of the decision:

> Assuming, without so deciding, that the imposition of assessments under the Workmen's Compensation Act for the creation of a general fund available for distribution throughout the Province among workmen who suffer accidents in the course of their employment, is taxation....it is inappropriate that we should dispose of the matter on any hypothetical basis that it is direct taxation...

On the assumption that they were taxes, Mr. Justice Davis was satisfied that they were direct and within provincial competence. On page 20 of the decision, Mr. Justice Davis again indicated that the Court was assuming, and not deciding, that the assessments were a tax and decided that it was a direct tax:

> If the assessment and levy of these workmen's compensation dues is taxation, I am of the opinion that on the particular facts which are before us in this case, it is direct taxation within the Province and competent to the provincial Legislature.

Thus it is my opinion that the Supreme Court of Canada did not decide the issue of whether or not WCB assessments were a tax for all purposes.

My third reason for not accepting FROSHA's submission on the section 21(2) issue is that there has been no clear application of the Royal Bank decision in later court cases. In one case, a judge concluded that WCB assessments in Alberta were not a tax within the meaning of section 87 of the *Indian Act* (Auger v. Alberta (Workers' Compensation Board) (1989), 61 D.L.R. (4th) 666 (Alta. Q.B.)). In a recent case, the British Columbia Court of Appeal assumed, but did not decide, that they were a tax within the meaning of the *Indian Act* (Isaac v. Workers' Compensation Board , unreported, July 12, 1994, at page 30.) The inconsistency in these decisions, as well as ambiguity in another case which considered assessments as taxation (Massey-Ferguson Industries Ltd. v. Government of Saskatchewan (1981), 127 D.L.R. (3d) 513 (S.C.C.)), supports my belief that the Royal Bank case is not authoritative on the issue before me.

My fourth reason for not accepting FROSHA's submission is that even if Royal Bank offered a clear decision on the issue of whether WCB assessments are a tax, what may be a tax for the purposes of deciding a federalism issue under the *Constitution Act, 1867* is not necessarily a tax within the meaning of the *Freedom of Information and Protection Of Privacy Act*.

The mandatory duty to withhold, I note, only applies to "information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax." It seems clear to me that the WCB form is not a "tax return" within the commonly-held meaning of a tax return; even the WCB calls it an "assessment return." The form itself is called an "employer's payroll and contract labour report." (Brief of authorities, tab 11) The information is gathered not for the purpose of determining tax liability or collecting a tax, but to establish assessment amounts by a complex formula.

The context of section 21(2) in the entire Act suggests that the drafters were thinking about corporate and personal income tax returns. The government's own Manual supports this view (see Section C.4.12, pp. 19-20). It defines tax as meaning a provincial, municipal, or federal tax. The plain language meaning of "tax" also seems evident to me.

I am supported in my interpretation of section 21(2) by Ontario Order P-373 at page 13, as discussed above.

Section 25 Argument

In its discussion of my proposed ruling in this inquiry, the WCB reflected that the UFCW's current request is "in relation to approximately 25 major employers all of whom are limited companies. The number of workers involved is substantial and the public interest could be significant." The UFCW has 20,000 members in this province, three-quarters of whom work in retail food.

My first remark is that the public interest argument would be stronger if it was a matter of information being given to the public about accidents that happen to the public in retail food operations rather than unionized employees, as in the present case. A union's articulation or self-conception of the public interest may not rise to a high enough threshold to invoke section 25. It seems more difficult, for example, for a union acting on behalf of its own members, as in the current case, to build a successful public interest claim than a newspaper.

The union wants to use the data in dispute to change the WCB's assessment system; it is arguable that this should occur through direct access provided by the WCB and the political process. In this instance, the WCB itself appears to be turning to me for guidance, when it should be fully capable of addressing its own problems by disclosing necessary information, perhaps under controlled conditions with respect to re-disclosure.

To review the applicability of section 25 to the proposed disclosure in a more positive light, the language of section 25(1)(a) can apply to a union because it refers to "a risk of significant harm to the environment or to the health or safety of the public or a group of people...." The data at issue in this inquiry certainly concern "the health or safety" of "a group of people." Since they already know that the retail food industry is among the most hazardous workplaces in the province because of the risk of injuries, it is interesting to reflect on what more they could learn from the proposed disclosures. Would it reach the threshold of being "significant" in the language of section 25? It is also relevant that section 25(1)(a) does not specifically incorporate the public interest test that appears in 25(1)(b).

The language "without delay" in section 25 is somewhat problematic in this case, since it seems to presuppose an emergent problem that has just occurred such as a radioactive spill in a community. However, I do not rule out its possible application to the information of the type in dispute in this inquiry in this or future cases.

While I am moved by the public interest argument advanced by the UFCW, I intend to decide this case without relying on section 25(1) of the Act.

Proprietors as Employers

One issue that I have some difficulty with in this inquiry is whether information can be released on small employers such as sole proprietors, and those who are not

limited companies. The *Workers' Compensation Act* now covers almost all employers in British Columbia, whether large or small. The WCB believes that in cases where employers are sole proprietors, the information sought by the applicant "would be considered personal information [of the sole proprietor], and the restrictions on releasing the information would be greater" (Letter of May 13, 1994).

From a privacy perspective, I have long held the view that corporations and businesses have no "privacy interests" under section 22 of the Act (as opposed to confidentiality interests under section 21 of the Act). An expectation of privacy is a human characteristic and value. Thus, there must be a difference in treatment between personal information about "John Smith," individual employee, and information about the "John Smith Company Ltd." If an individual person carries on business as a personal corporation and is required to supply information to the government (e.g., business taxation), the corporation runs the risk of having information about its "business activities" disclosed to the public, in the same way some information about larger corporations may be disclosed.

The same applies to sole proprietors and business partnerships (e.g., chartered accountancy and law firms) who cannot expect the same privacy rights that protect personal information about the proprietors or partners to be extended to information about their business activities. The result is that applicants may be entitled to receive some information about a sole proprietor's or partnership's business (e.g., business address), but not *personal* information about the sole proprietor or partner (e.g., home address). This is so even though the person or persons in both cases is or are the same.

I think the issue is clear with respect to sole proprietors, business partnerships and limited companies (whether a personal corporation or a large corporation). The implication of sole proprietorship, partnership, or incorporation for the individual person is the absence of privacy rights in respect of the individual person's *business* activities. A fine distinction may exist, however, in cases where a sole proprietor works at home, thus blurring the line between personal information and business information. In such cases, public bodies must carefully balance the rights of an applicant to obtain information about the sole proprietor's business activities with the sole proprietor's right to privacy of his or her personal information.

The Risk of Abuses of Information

Several red herrings emerged at this hearing, among them the "argument" that the information requested by the UFCW should not be disclosed since the general public or segments thereof may either misuse the information or be misled thereby. Some of the information, even on health and safety issues, may be inaccurate, leading to the same consequences. According to FROSHA, "any of this information would be wrongly correlated to a company's health and safety record and consequently tar the company's public image." The frequency of accidents is an apparent example of inaccurate

information, but I was informed that unions already have access to such significant data by other means.

FROSHA sought to buttress its argument on this point by quoting from a 1994 speech by a labour representative on the Board of Governors of the WCB, which appears to call for consumer boycotts of goods and services produced by employers with poor safety records. According to FROSHA, "the correlation between a company's claims costs for assessment purposes and its health and safety record might be quite slim. To utilize this kind of information in such a misleading manner will have very serious financial consequences to any companies that are the target of such action." With respect, I find this argument especially unpersuasive, not least because it can be used to seek to suppress any kind of data, information, or records. I am supported on this point by Ontario Order P-373, at page 9. Companies try to shape their public image by controlling the flow of information they release to the media and the public. Public bodies, like the WCB, have a responsibility to provide the public with the best information available to serve the public interest. This clearly includes information about corporate health and safety records. If a company is concerned about adverse publicity arising from the disclosure of unfavourable information, this is a public relations problem and not an information and privacy problem.

The primary purpose of the *Freedom of Information and Protection of Privacy Act* is to create a more open and accountable society by disclosing records to the public. It will always be a matter of debate how much the public needs to know. But the legislature of this province has clearly set the balance in favour of greater disclosure of non-personal information.

8. Order

Under section 58(2)(a) of the *Freedom of Information and Protection of Privacy Act* I order the Workers' Compensation Board of British Columbia to give the United Food & Commercial Workers of British Columbia access to all of the records in dispute.

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David H. Flaherty
Commissioner

September 1, 1994