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**Office of the Information and Privacy Commissioner**
**Province of British Columbia**
**Order No. 54-1995**
**September 19, 1995**

**INQUIRY RE: A request for access to records of the Workers' Compensation Board**

**Fourth Floor**
**1675 Douglas Street**
**Victoria, B.C. V8V 1X4**
**Telephone: 604-387-5629**
**Facsimile: 604-387-1696**
**Web Site: http://www.cafe.net/gvc/foi**

## 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) in Victoria on June 23, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for the qualifications of a Vocational Rehabilitation Consultant (the employee) employed by the Workers' Compensation Board (WCB).

The applicant was injured in a work-related accident on July 9, 1990. She received benefits from the WCB for approximately four months and returned to work in November of 1990. In early 1991 she resigned from her job due to continued pain from the original injury and reapplied for compensation. From August of 1992 until March of 1995, the applicant was a client of a Vocational Rehabilitation Consultant of the WCB.

On January 30, 1995 the applicant made a request to the WCB under the *Freedom of Information and Protection of Privacy Act* (the Act) for "[the employee's] educational background, employment background, and qualifications for the present position he now holds. I also request information on any management reviews and/or disciplinary actions on [the employee's] file."

On February 8, 1995 the WCB denied the applicant's request, stating that this information was excepted from disclosure under section 22(3)(d) of the Act.

On February 15, 1995 the Office of the Information and Privacy Commissioner received a request from the applicant for a review of the decision by the WCB to deny her access to the qualifications of the employee.

Following the request for review, the WCB provided the applicant with documents which showed that the employee worked as a claims adjudicator from October 7, 1974 and that he became a WCB rehabilitation consultant on April 27, 1981. It also provided a copy of his job description for both positions including the required qualifications for both jobs.

## 2. Documentation of the inquiry process

The ninety-day period for this review began on March 7, 1995 and expired on June 5, 1995. On May 11, 1995 the Office issued a Notice of Written Inquiry to be held on May 31, 1995. On May 19, 1995 the Compensation Employees' Union, representing the third party, requested a three-week adjournment to "properly investigate the issues, seek legal counsel and prepare a submission." In the circumstances of this case, I decided that it was fair to grant the adjournment and schedule the inquiry for June 23, 1995.

Under section 56(3) and (4) of the Act, the Office invited written representations from the applicant and the WCB. Under section 54(b), the Office invited representations from the British Columbia Freedom of Information and Privacy Association (FIPA) and the United Association of Injured and Disabled Workers (UAIDW). The Compensation Employees' Union objected to the participation of the UAIDW. After careful consideration, I found it appropriate for the UAIDW to make representations during the inquiry. FIPA declined to participate.

The applicant represented herself. The public body was represented by Heather McDonald, Freedom of Information and Protection of Privacy Coordinator and Barrister & Solicitor. The third party and the Compensation Employees' Union were represented by F. Andrew Schroeder, Schroeder Pidgeon & Company. The United Association of Injured and Disabled was represented by Ralph Dotzler.

The Office provided all parties involved in the inquiry with a two-page statement of facts (the Portfolio Officer's fact report) which, after a few minor amendments, was accepted by all parties as accurate for purposes of conducting the inquiry.

## 3. Issue under review at the inquiry

The issue under review is the applicability of section 22 of the Act to the information in dispute, especially the following sections:

***Disclosure harmful to personal privacy [of third parties]***

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

> ...
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> ...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, and

....

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

...

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

...

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

....

Under section 57(2) of the Act, the burden of proof at this inquiry was on the applicant to demonstrate that disclosure of the personal information of the third party would not be an unreasonable invasion of his privacy.

**4. The record in dispute**

The record in dispute is information derived from the personnel records of the third party.

**5. The applicant's case**

The applicant argues that the disclosure she requests is relevant to subjecting the activities of the public body to scrutiny under section 22(2)(a). She also argues that she needs the record in dispute in order to assure a fair determination of her rights under section 22(2)(c).

The applicant argues that sections 22(4)(b) and (e) mandate the disclosure of the information she has requested. As noted below, she especially developed her argument on the second subsection. If the employee "possesses the qualifications to make these decisions [affecting her ability to work in certain jobs], which are in my opinion medical decisions that contravene other medical decisions on the file[,] I hereby request that I be informed of his educational qualifications for the position he now holds."

**6. The WCB's case**

The WCB emphasizes the extent of records about the employee that it has already disclosed to the applicant but refuses to give her details of his employment and educational history, on the basis that it would be an unreasonable invasion of his privacy. It relies especially upon section 22(3)(d) of the Act. (Submission of the WCB, pp. 1-2)

While minimum necessary qualifications in a formal written job description for an officer, employee or member of a public body fall within Section 22(4)(e) as information 'about an individual's 'position,' it is clear that particular details about an individual's personal employment and educational history do not qualify in any sense as information 'about' that individual's 'position.' Neither would they qualify as information about the individual's job 'functions' or 'remuneration.' Rather, there is no doubt that such information is 'about' the individual's personal life history, and as such, is subject to the statutory presumption against disclosure prescribed in Section 22(3)(d) of the Act. (Submission of the WCB, pp. 4-5)

The WCB emphasizes that the responsibilities of its Vocational Rehabilitation Consultants do not include making "medical decisions" on claims such as those of the applicant. These decisions are made by medical health professionals. (Final Submission of the WCB, p. 2)

In the interests of brevity, I present various aspects of the WCB's detailed arguments below as they appear to me to be relevant.

**7. The case of the third party and the Compensation Employees' Union (CEU) as an intervenor**

The CEU is the certified bargaining agent for the employees of the WCB. It argues that the employee, who is the third party in this case, has legal rights to privacy protected by various constitutional and legal provisions that would be violated if personal employment information about him was disclosed. (Submission of the CEU, pp. 5-7) It also questions various practices that the WCB has followed in its handling of the present matter. In CEU's view, "[t]here can be only one rule: no disclosure of a public servant's personnel file." (Submission of the CEU, p. 10)

In general, the CEU supports the basic position of the WCB in this inquiry. (Reply Submission of the CEU, p. 3) It regards the applicant's request for access to personnel information about the third party as "a completely unreasonable and unjustified invasion" of his rights under section 22 of the Act.

## 8. The case of the United Association of Injured and Disabled Workers (UAIDW) as an intervenor

The UAIDW argued for disclosure of the information in dispute under sections 22(2)(a), (b), (c), and (d) and 22(4)(b) and (e) of the Act. It rejects the WCB's reliance on section 22(3)(d) as inappropriate: "Failure by W.C.B. to release the curriculum vitae of the consultant involved further undermines his qualifications and unfairly damages the claimant[']s plea and ultimately prejudices the outcome."

## 9. Discussion

### *Other avenues open to the applicant*

One of the goals of the applicant is to be able to ascertain the qualifications of the employee for the decisions he has apparently taken on her claims files. As noted, she questions his qualifications to make these decisions. (Submission, pp. 2-3) For reasons given below, this is not a request for access to information that can be met under the Act, because of privacy considerations under section 22. While the applicant may have a right to obtain some information to establish the professional competence of the employee, at least in terms of learning by implication his qualifications for the job when he originally won it in 1981, she is not entitled to what may be characterized as his personal information under section 22.

Moreover, the applicant's right to contest the decisions affecting her can be more properly challenged under the appeal procedures of the WCB itself, where the kind of information she is currently requesting under the Act might in fact be disclosed to her. (WCB's Submission, pp. 12, 15; Final Submission of the WCB, pp. 3-4; see also Submission of the CEU, p. 8) See my Order No. 32-1995, January 26, 1995, p. 5.

I find the following general argument of the WCB quite compelling:

Public employees should not be subjected to invasion of their personal privacy. The governing statute of the public body, the *Workers' Compensation Act*, already provides legitimate legal avenues for a worker to challenge decisions made on his or her claim. To use the *Freedom of Information and Protection of Privacy Act* as a means of trying to invade the personal privacy of a public body employee[,] when legitimate statutory avenues of appeal have not been exhausted, is to bring the *Freedom of Information and Protection of Privacy Act* into disrepute. (Submission of the WCB, p. 13)

### *The record in dispute*

In connection with this inquiry, I reviewed the personnel file of the third party, which I obtained from the WCB, in order to ascertain whether there was anything in it that would be appropriately responsive to the applicant's request. The file contains a series of annual performance plans and reviews going back to the beginning of the third party's career with the WCB in 1974. There are also transcripts and related records of courses that he has taken since he joined the Board. This individual has had two different jobs at the Board. There is a résumé for each job application, the

latest one dating from 1981. It is not on a standard form. It includes education and courses since joining the board, employment history, and a listing by the applicant of his "particular qualifications for rehabilitation consulting."

There is nothing in the personnel file, in my view, that is appropriately responsive to the applicant's request. The WCB obviously does not require its employees to update their résumés on a regular basis, and there is nothing in the Act that would require them to do so. It is not my place to suggest to the WCB that it might be appropriate for such updating to occur. Absent such a practice, I think it would be contrary to section 22 to require the WCB to disclose what is essentially an outdated résumé.

There is another version of the record in dispute. In response to a request from my Office, the WCB prepared a one-page letter outlining the employee's qualifications for his current job in terms of education and on-the-job training. In effect, the WCB created a new record. The critical point is that the Board, in my view, is under no obligation, because of section 22(3)(d) of the Act (see the discussion below), to disclose this record to the applicant, although it can do so of its own accord and with the consent of the employee. It is my understanding that neither the WCB, nor the employee, wants this to happen.

***What has been disclosed to the applicant***

Under section 22(4) of the Act, the WCB has disclosed to the applicant job descriptions for both positions occupied by the subject of the access request, including the stated qualifications for the position. (Submission of the WCB, p. 1) It also suggested that the applicant obtain the employee's consent for further disclosures of personal information about him (which he refused). (Submission of the WCB, p. 1) I note that these position descriptions include the "function" of the post, a detailed listing of "responsibilities," reporting relationships, and a statement of education and experiential qualifications. From a practical perspective, the applicant can assume that the occupant met these prerequisites if he obtained the position. Thus in terms of the openness and accountability goals of the legislation, it is my determination that the WCB has met its responsibilities under the Act by means of what it has already disclosed. While the applicant may be disinclined to trust the WCB's selection process, this Act does not provide her with any other remedy in response to her request.

The applicant has sought in part to rest her case on the wide range of information, including copies of the pages of her personal diary and the name of her dog, that the WCB has requested and obtained from her. (Submission, p. 3) With respect, I regard this argument as irrelevant to the matter before me. (See Reply Submission of the CEU, pp. 2-3)

The fact that the employee has been in his current post for almost fifteen years and received annual performance reviews is relevant to my decision in this case. I would be more sympathetic to a request for access to the job qualifications of a recently-hired or promoted person, subject again to preserving the privacy interests of the successful candidate created under section 22.

***Section 22(2)(a): Public scrutiny***

In my Order No. 40-1995, April 28, 1995, p. 9, I found that the intent of this section "is to allow persons or organizations which are not public bodies to receive information that would allow public scrutiny of a public body itself, a role that the media evidently feels strongly about in this province." I am not persuaded by the applicant's effort to fashion a public scrutiny argument in the current inquiry with her concern that qualified individuals be appointed to public posts. (Submission, p. 1) I am confident that the operation of the *Public Service Act*, under the aegis of Public Service Employee Relations Commission, assumes that function on a normal basis. Those who do not get such jobs in a competition are also free to question the credentials of the successful applicant, if they feel so inclined to do so. (See my Order No. 52-1995, September 14, 1995)

I agree with the position of the WCB on the application of this section in practice:

A distinction must be drawn between the WCB's policies and practices being open to public scrutiny, which we recognize and accept; and the personal lives of employees being open to public scrutiny, which we submit was not the intention of the Legislature in enacting Section 22(4)(e) of the Freedom of Information and Protection of Privacy Act. (Final Submission of the WCB, p. 5)

***Section 22(2)(c): A fair determination of the applicant's rights***

As I found in Order No. 41-95, May 29, 1995, p. 7, I do not think that disclosure of the information in issue here is relevant to a fair determination of the applicant's rights. This does not depend upon the qualifications of the apparent adjudicator. It is as if a litigant sought to appeal a judicial decision on the grounds that the judge in his or her case lacked the qualifications for initial appointment to the bench. A patient being treated by a physician may seek assurances that he or she has a medical degree and the institution from which it was obtained (most professionals hang their certificates on their office walls), but it would be surprising if a patient requested a copy of the grades the physician achieved in medical school. In addition, the applicant's rights as a claimant before the WCB should be taken care of under the existing procedures of the Board under the *Workers' Compensation Act*, not under this Act, as is in fact occurring. (See WCB's Submission, p. 11; and Applicant's Submission, p. 3)

The WCB has made a compelling case that the application of this section is inappropriate in this case: "There is no evidence that [the employee's] personal educational and employment background is relevant to a fair determination of [the applicant's] legal rights." It emphasizes that the concern is for <u>legal</u> rights as opposed to the "mere subjective" assertion of rights. (WCB's Submission, pp. 9-10) Although the applicant may challenge the WCB's determination that medical background is not necessary for the position of Vocational Rehabilitation Consultant, she does not need to violate the privacy of the employee in order to do so. She could also request a different consultant to work with her, as has in fact occurred. (WCB's Submission, p. 11)

***Section 22(2)(f): Personal information supplied in confidence***

The WCB argued that the third party supplied it, in confidence, with the particulars of his educational and employment background. Further, Article 28.05 of the collective agreement

between the WCB and the Compensation Employees' Union specifies that the personnel record of an employee may not be revealed to anyone, without the express written consent of the employee, except in limited circumstances that would not include the applicant in this inquiry. The manager of Human Resource Operations at the WCB stated in her affidavit that it is WCB policy that information about an employee's educational and employment qualifications are treated as confidential. The notes that she prepared for trainers to teach WCB managers about the process to select candidates for WCB positions state that "[a]ll applications are submitted in confidence and should be treated as confidential by all parties involved in [the] selection process." (Affidavit of Louise Cook, Exhibits A and B; WCB's Submission, pp. 13-14)

I agree with the position of the WCB that section 22(2)(f) "mitigates against any decision in favour of disclosing the details of [the third party's] educational and employment qualifications to" the applicant.

***Section 22(2)(g): Personal information is likely to be inaccurate or unreliable***

The WCB correctly argues that the accuracy and/or reliability of personal information is a factor for it to consider with respect to possible disclosure to the applicant. Its view is that it would be unfair to both the third party and the applicant to disclose the outdated and incomplete résumé of the former, and "[t]here is no obligation under the Act for the WCB to cross-examine [the third party] about his current educational qualifications." (WCB's Submission, pp. 14-15) I agree with the WCB that the application of this section mitigates against disclosure.

***Section 22(3)(d): Employment, occupational or educational history***

I accept the Ministry's argument that disclosure of the employment and educational history of the employee would be contrary to the intent of this section of the Act. Moreover, the third party himself does not wish this information released. (Submission of the WCB, pp. 2-4) I agree with the WCB that the "legislature plainly intended to create a powerful privacy protection by creating the statutory presumption in Section 22(3)(d) against disclosure of personal employment and educational history." (Submission of the WCB, pp. 6, 13) My views on the meaning of this section are supported by the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, C.4.13 at p. 28.

***Section 22(4)(b): The health and safety of an applicant***

In my judgment, there are no "compelling circumstances affecting anyone's health or safety" in the present inquiry. The purpose of this section is clearly to permit a public body to release personal information about a third party in circumstances that meet a dictionary's definition of "compelling" circumstances, which has at least the connotation of some kind of health or safety emergency, such as is definitely not the case in the present matter. (See the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual at C.4.13, p. 37) I agree with the CEU and the third party on this point. (See Reply Submission of the CEU, pp. 1-2)

***Section 22(4)(e): The position and functions of an employee of a public body***

The applicant's case essentially revolves around the scope and application of this paragraph. I accept the view of the WCB that the information sought by the applicant does not fall within the language of the section. (Submission of the WCB, pp. 4-8) It has already disclosed records responsive to the requirements of this section.

I also accept a plain language interpretation and application of this section. Information about the "position, functions or remuneration" means general information about exactly that. The public has a right to know about job descriptions and job qualifications in general terms, not the private information of a public servant with respect to these topics. (See the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual at C.4.13, pp. 39-40)

***Section 57(2): The burden of proof on the applicant***

Following my analysis of this section as set out in Orders No. 17-1994, July 11, 1994; No. 24-1994, September 27, 1994; and No. 27-1994, October 24, 1994, I find that the balance of competing interests in the present case rests with preserving the privacy interests of the employee. In addition, I find the applicant's arguments unpersuasive with respect to the burden of proof that disclosure of the information in dispute would not be harmful to the privacy interests of the third party. (See Submission of the WCB, p. 2)

**10. Order**

Under section 58(2)(b) of the Act, I find that the Workers' Compensation Board was authorized to refuse to disclose the information in dispute. Therefore, I confirm the decision of the public body not to disclose the record in dispute to the applicant.

September 19, 1995

David H. Flaherty
Commissioner