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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 158-1997
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INQUIRY RE: A decision of the Workers Compensation Board to withhold disciplinary records pertaining to an applicant

Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: http://www.oipcbc.org

1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on December 12, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request by the Compensation Employees' Union (CEU), for a review of a decision by the Workers Compensation Board (WCB) to withhold records from an employee under sections 2(2), 3(2), 13, 14, and 17 of the Act.

2. Documentation of the inquiry process

On May 14, 1996 an employee of the WCB made a request for "any and all information the employer has pertaining to discipline investigations, meetings and discussions" about him. The WCB responded on July 12, 1996, disclosing a number of records but severing information pursuant to section 22. It withheld 436 pages in their entirety. The WCB stated that the records "were not available to you under the Act since you are a party to a proceeding taking place under the Labour Relations Code. These records are therefore subject to the established disclosure procedures of that process." Furthermore, the WCB stated that even if these records were subject to the Act, they would be withheld under sections 13 and 17 of the Act.

On August 12, 1996 the Compensation Employees' Union, on behalf of the applicant, requested a review of the decision by the WCB to withhold records. A Notice of Inquiry was issued on October 21, 1996 for a written inquiry to take place on November 12, 1996. At the request of the WCB, and with the consent of both parties, the inquiry was adjourned twice. On November 29, 1996 the Office of the Information and Privacy Commissioner received notice from the WCB that "the records in question would

also be subject to exemption under section 14 of the *Freedom of Information and Protection of Privacy Act*."

Two intervenors were invited to participate in this inquiry: the Public Service Employee Relations Commission (PSERC) and the British Columbia Government and Service Employees' Union (BCGEU). PSERC provided a submission with respect to the application of section 14 of the Act.

3. Issues under review at the inquiry and the burden of proof

The issues under review are the application of sections 2(2), 3(2), 13, 14, and 17 of the Act to the records in dispute. The applicable sections read as follows:

Purposes of this Act

2(2) 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.

Scope of this Act

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

Policy advice or recommendations

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

(2) The head of a public body must not refuse to disclosure under subsection

(a) any factual material.

....

Legal advice

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

Disclosure harmful to the financial or economic interests of a public body

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy
>
> ...
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

Section 57 establishes the burden of proof on parties in this inquiry. Under that section, at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part. In this inquiry, the WCB has the burden of proving that the applicant has no right of access to the records in dispute.

4. The records in dispute

The records in dispute are 436 pages of labour relations records pertaining to disciplinary investigations/actions related to the applicant. The records include handwritten notes from the applicant's supervisors and Human Resource Advisors, minutes and notations from disciplinary meetings, notes of interviews concerning specific complaints, a chronology of evidence, electronic mail between the supervisors and the Human Resource Advisors, and drafts of various letters addressed to the applicant.

5. Discussion

Because the issues in dispute in this inquiry are so specific, and the submissions quite substantial on both sides, I have decided to present and assess the positions of the parties here in connection with the appropriate section of the Act.

The context for this inquiry

The applicant, a former employee of the WCB who has been terminated, has five outstanding grievances with his former employer, which are proceeding to arbitration. His union, the CEU, has represented him in this inquiry. It submits that he requires access to the records in dispute in order to have some chance of regaining employment with the WCB. (Submission of the CEU, paragraph 3) These records were created by the applicant's supervisors, their superiors, and members of the Human Resources Department of the WCB. They were investigating complaints that the WCB had received about his performance as an employee in terms of his interactions with clients of the WCB and with fellow employees. (Submission of the WCB, p. 14)

At various, repeated points in its submissions, the WCB has essentially invited me to ignore or rewrite sections of the Act or to decline to exercise the jurisdiction conferred upon me by the Act, because labour relations is such a specialized field of endeavour with

its own law, practices, and rules. While I do not dispute the latter points, my obligation is to apply the Act and to comply with its requirements, which is what I do below with respect to the applicant's request to see his own information under the *Freedom of Information and Protection of Privacy Act*.

Section 2(2): Other procedures for access to information

The position of the WCB is that this section on the purposes of the Act means that it does not apply to the records in dispute, especially since the applicant wishes to use them in the grievance process to enhance his bargaining position and that of the CEU, his union. Thus, the WCB argues, records in the labour relations field should be exempt from disclosure under the Act. (Submission of the WCB, pp. 5-7)

The CEU submits that much of the WCB's argument on this point is irrelevant. It argues that my decision in Order No. 119-1996, August 29, 1996 is equally applicable in the current inquiry. In that matter I decided that the availability of the Rules of Court of the British Columbia Supreme Court to compel production of documents did not preclude an application for the same or other information under the Act. I agree with the CEU that the position of the WCB on the interpretation of this section is unsupported by a plain reading of the Act, especially the language of sections 4(1) and (2). (Submission of the CEU, paragraphs 5-11) Section 2(2) simply confirms that other procedures for access to information continue to exist; it does not limit my jurisdiction under the Act. As the CEU argues:

> The kind of clarifying statement found in s. 2(2) cannot, contrary to the WCB's assertion, be turned on its head and used as a limit on the right of access created very clearly by the Act.
>
> There is absolutely no support in the plain wording of the Act for the WCB's assertion that the clear right of access created by s. 4 is somehow limited by any of the Act's provisions, much less s. 2(2). (Submission of the CEU, paragraphs 12, 13)

I find that my ruling in Order No. 119-1996 should be affirmed here in relation to the information in question.

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

The WCB essentially argues that since the applicants have access to the information in dispute through the labour relations process, they should not have access under the Act: "Ordering the Board to release the Records could upset the balance between the Board and its union since the union is not subject to FIPP [the Act]." (Submission of the WCB, p. 2) The WCB essentially wishes me to decline jurisdiction in this inquiry so as not to upset the delicate balance between labour and management that

has been apparently established by labour arbitrators and labour relations boards over a number of years. In particular, it emphasizes that the CEU is not subject to the Act, whereas the WCB clearly is:

> It is submitted that the Commissioner should not assist the CEU in altering the negotiated position unless he is compelled to by FIPP. It is submitted that a fair and liberal approach to the interpretation of the legislation which keeps in mind the alternative remedies and the purposes of FIPP should result in the Commissioner declining jurisdiction. (Submission of the WCB, p. 10 and pp. 7-10)

The WCB argues that access to records related to an arbitration should be determined by the arbitrator.

I disagree with the submissions of the WCB on this section. (See the Submission of the CEU, paragraphs 14-17) The purpose of section 3(2) is simply to ensure that the Act "does not limit the information available by law to a party to a proceeding" in light of the exceptions to access set out in Part 2, Division 2 of the Act. A party to a proceeding may be entitled to records that may be inaccessible under the Act. This section confirms that the Act does not apply to limit access according to procedures in other venues. In essence, information available by law may be broader than information available under the Act; the Act cannot limit those rights.

I also agree with the detailed submissions of the CEU to the effect that I have no ability to decline to exercise jurisdiction in this matter, because of the requirements imposed on me and my Office under sections 52, 55, 56, and 58 of the Act. I find that I have no discretion not to proceed in this matter. (Submission of the CEU, paragraphs 18-22) The disposition of this request for access to the records in dispute must occur in compliance with the terms of the Act.

Section 13: Advice or recommendations

The submission of the WCB is that all of the records in dispute were created either to obtain or provide advice to it and are therefore subject to this exception from disclosure, although it agrees that this does not apply to "factual material" mentioned in section 13(2)(a). However, it appears to argue that in the labour relations field, which involves litigation, a "line by line review and severing of specific recommendations from other material should not take place." The WCB fears that a broad interpretation of section 13(2)(a) could reveal parts of its strategy and case or even advice. It also raises the spectre of a union harassing an employer with requests for access under the Act, a matter for which I note that there is a potential remedy under section 43. (Submission of the WCB, pp. 15-17; and see the Submission of the CEU, paragraphs 40-41) In my view, the fact that an employee and a union have remedies available to them under labour relations law does not preclude either from using the Act as well.

The CEU takes the position that section 13(1) cannot be applied to investigative notes, third-party complaints, and other discipline-related records and information compiled by an employer with respect to an employee, especially by a particular manager or supervisor as in the present inquiry. According to the CEU, the WCB cannot also withhold "factual information" from such records. (Submission of the CEU, paragraphs 27, 36-39)

In my view, there is an obligation on the WCB, as there is on all public bodies, to subject records in dispute to a line-by-line review as required by section 4(2) of the Act. (See the submission of the CEU, paragraphs 28-34)

The contents of the records in dispute that literally contain advice and recommendations to and within the WCB about the handling of these complaint investigations can be withheld under section 13, but that depends on a detailed review of the records that the WCB has an obligation to undertake.

Section 14: Solicitor-client privilege

The WCB did not rely on section 14 of the Act when it initially refused access to the records in dispute. It raised the application of this section after the inquiry process was underway. The CEU strongly objects to this argument being advanced at such a late stage in the process.

The WCB's position is that it should not be prohibited from raising an exception, which was missed through its counsel's misunderstanding of law, unless the delay in raising the grounds for refusing disclosure causes some prejudice to the applicant that cannot be cured. It submits that there is no prejudice to the applicant in this case that could not be cured by providing additional time to respond to the submissions.

While I agree with the CEU that the WCB should have provided full reasons for refusing disclosure under section 14, there has been no prejudice to the CEU, since it has been given adequate time to make submissions in response to the WCB's argument on the applicability of section 14. Further, it is my view that all of the issues should be dealt with in any inquiry, if possible. Thus I have allowed the WCB to make its section 14 submission. This approach is consistent with my previous orders (see Order No. 47-1995, July 7, 1995, p. 10; Order No. 89-1996, March 4, 1996, p. 3; Order No. 145-1997, January 27, 1997, pp. 1, 2)

The WCB's position on the actual application of section 14 is that this privilege extends to documents created in anticipation of litigation, including a labour grievance or arbitration, even though the WCB does not normally use a lawyer in the grievance stage but only when the matter goes to arbitration. (Submission of the WCB, pp. 2, 3, 10-15) It relies in this connection on my Order No. 6-1994, March 31, 1994, which did not distinguish the adjustment and litigation phases of settling an ICBC claim. I do not accept the parallel between that situation and the present inquiry in terms of establishing

some line of continuity for the application of section 14. (Submission of the WCB, pp. 12, 13, 15; see also Submission of the CEU, paragraph 67) The nature of the information collected in an employment context is different than that in a claims contract. In some cases, information will be prepared for the main purpose of assessing performance or establishing necessary remedial measures.

The vast majority of grievances filed by the CEU on behalf of an employee go to a full formal arbitration hearing: "This high incidence of disciplinary matters ultimately proceeding to grievance and arbitration has led the Board and its managers to anticipate litigation from the very moment that the possibility of disciplinary action is contemplated." This leads to the ongoing creation of records for that purpose. (Submission of the WCB, p. 14) Thus, the WCB essentially believes that grievance and arbitration proceedings are "litigation" for the purposes of section 14 and appears to be claiming that this section covers all of the records in dispute.

I agree with the following submission of the CEU:

> The CEU submits that before a communication is privileged under this rule [solicitor-client privilege], it must be shown that the communication was made or produced, for the *dominant purpose* of receiving or giving legal advice or to assist in the conduct of litigation either underway at the time the communication was made or produced or in reasonable prospect at that time. (Submission of the CEU paragraph 55)

As the CEU further submits:

> ... the WCB's own affidavit evidence demonstrates that any possible grievance or arbitration was little more than a theoretical possibility or a vague possibility, and there is no basis on which anyone can argue with any conviction that *all* of the records were produced for the *dominant purpose* of litigation then in *reasonable prospect*. (Submission of the CEU, paragraph 57; see also paragraphs 60, 62, 65, 66)

The CEU argues that the WCB is seeking to use the cloak of contemplated litigation privilege to cover all records of the WCB about its employees, whereas this inquiry stems from the applicant's request for access to his own information related to his employment and the discipline meted out to him by his employer. (Submission of the CEU, paragraph 58)

My examination of the records in dispute makes me skeptical that section 14 can be applied to all of them, especially in the expansive manner advanced by the WCB above. The WCB will have to establish that solicitor-client privilege applies to any or all of these records.

I have read the submission of the Public Service Employee Relations Commission (PSERC) to the effect that section 14 of the Act should apply to the contents of grievance files. While I appreciate the tenor of the general argument, PSERC "has no actual knowledge of the contents of the records" in dispute, which limits its ability to assist me with this particular inquiry.

Section 17: Disclosure harmful to the financial or economic interests of a public body

The WCB has given me the benefit of its analysis of the appropriate meaning and application of this section. (Submission of the WCB, pp. 17-19) The point appears to be that disclosure of the records in dispute might harm its negotiating position with the applicant and his union "with the possible consequential financial harm of a lost grievance or arbitration." The WCB argues:

> This could result in an order for reinstatement with back pay and an award of damages. The costs in future labour relations cannot be measured. Certainly arbitrators who are presumably reasonable people see a potential for harm to the entire labour relations setting if this type of information is released. The experience of arbitrators in the specialized area of labour relations should be considered as persuasive evidence by the Commissioner. (Submission of the WCB, p. 19)

The WCB did not provide me with any actual evidence on this point beyond its quoted assertions, but it did rely on my Order No. 75-1996, January 4, 1996, p. 4 for the appropriate interpretation of section 17 to cover labour negotiations. (See the Submission of the CEU, paragraph 48)

The CEU submits that section 17(1)(a) through (e) contain "examples of the classes of information that *might* qualify for protection under s. 17, so long as there is evidence of a reasonable expectation of harm." But it otherwise argues that the WCB's interpretation of this section is wrong. (Submission of the CEU, paragraphs 43-47)

I find it unnecessary to settle any possible disagreement between the WCB and the CEU on the meaning of section 17, beyond its specific application to the records in dispute, which the WCB has not in fact done and now needs to do.

Section 4(2): The obligation to sever

As noted above, I find that the WCB in this inquiry did not meet its obligation to sever records under section 4(2) in the process of applying claimed exceptions to them. See Order No. 20-1994, August 3, 1994, pp. 9-10. (See Submission of the WCB, pp. 20-21)

I am not pleased that the WCB has submitted a large number of records in dispute to me without indicating what sections apply to which pages of these voluminous records.

As the CEU suggested, "the WCB has approached this case as if the Act simply did not apply to the records." (Submission of the CEU, paragraph 69)

I have looked at the records in dispute and offer the following comments to the WCB as it undertakes the necessary task of applying specific exceptions in the Act to them. In particular, the applicant should receive his own personal information, including notes that others made about him in meetings with him of a disciplinary and supervisory nature. He should also receive the records of complaints made against him to his supervisors without the identities of the complainants, which of course may already be known to him by other means.

I am of the general view that the applicant or his union has no right of access to the WCB's records of its own planning and conduct of the complaint investigation and subsequent disciplinary proceedings. I have ruled in previous Orders that a public body should be able to conduct such matters within a zone of confidentiality, subject only to the obligation to provide the applicant with his or her own information. See, for example, Order No. 144-1997, January 17, 1997, pp. 12, 13.

Much of the information in the records in dispute appears to be drafts of records, sometimes in the form of letters to the applicant. Under the Act, all drafts that are in existence at the time of a request are records and must be disclosed, unless exceptions apply to all or part of the records. WCB staff are, of course, entitled to revise drafts in order to ensure accuracy and appropriateness in the contents of the letters or memoranda that they create in the course of normal business. Moreover, there is no obligation, under this Act, for drafts of such advice or recommendations to be retained.

8. Order

I conclude that the Act applies to the records in dispute. I find that the WCB has not performed its duties under the Act to review the records in dispute specifically to apply sections 13, 14, and 17 to the information in the records and, under section 4(2), to determine whether information covered by an exception can reasonably be severed.

Under section 58(3)(a) of the Act, I require the WCB to perform its duties under the Act to review the records in dispute on the basis that the Act applies to them, to consider the application of sections 13, 14, and 17, and to determine whether there is information excepted from disclosure that can reasonably be severed from any of the records in dispute.

Under section 58(4), the following conditions apply to this order:

a) the WCB complete its review of the records in dispute within 14 days of the date of this Order; and

b) on completion of the review, the WCB forthwith provide my Office with copies of the records indicating what exceptions it is applying and what information it has severed from any records to be disclosed.

Access has been refused in this case, and the main issues under the Act have not been determined. Thus this inquiry is not complete. Accordingly, I retain my jurisdiction to determine if the WCB is authorized to refuse access under sections 13, 14, or 17 of the Act, once it has complied with this Order.

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David H. Flaherty April 10, 1997
Commissioner