

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 239-1998
June 3, 1998**

INQUIRY RE: The adequacy of a search conducted by the Workers' Compensation Board for records requested by an applicant and the decision of the WCB to withhold records from him

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on January 27, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the response given by the Workers' Compensation Board (WCB) to the applicant's request for records concerning its investigation of him conducted by his manager. The applicant is an employee of the WCB.

2. Documentation of the inquiry process

On August 1, 1997 the applicant submitted a request under the Act to the WCB. On September 30, 1997 the WCB responded to the applicant's request by disclosing records and by withholding a three-page memorandum under section 13 of the Act. On November 24, 1997 the WCB disclosed approximately 11 additional pages to the applicant.

On October 6, 1997 the applicant submitted a request for review to my Office. He requested that the decision to withhold records under section 13 of the Act be reviewed; however, he stated that his most important concern was that several items responsive to his request had been withheld or concealed by the investigator.

On December 30, 1997 the applicant requested an extension of the inquiry deadline of January 5, 1998, to which the WCB submitted an objection. I decided that the inquiry would be held on January 27, 1998.

3. Issue under review and the burden of proof

The first issue before me is whether the WCB properly applied section 13 of the Act to the withheld record. The second issue is whether the WCB complied with section 6 of the Act in its search for records. Since part of the WCB's response to the issue of the adequacy of the search is that certain documents have been destroyed, this led the applicant to make reference to section 31 of the Act, although this was not identified as a separate issue at the outset of the inquiry.

The third issue, raised by the applicant in the course of the inquiry, and responded to by the WCB, is whether or not the WCB complied with its duty to retain records under section 31 of the Act.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under section 13, it is up to the public body, in this case the WCB, to prove that the applicant has no right of access to the record or part of the record.

Section 57 of the Act is silent with respect to a request for review about the issue of adequate search arising under section 6(1). As I decided in Order No. 103-1996, May 23, 1996, the burden of proof is on the public body.

The relevant sections of the Act are:

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Policy advice, recommendations or draft regulations

- 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 disclose under subsection (1)
 - (a) any factual material,
 - ...
 - (j) a report on the results of field research undertaken before a policy proposal is formulated,
 -

Retention of personal information

31. If a public body uses an individual's personal information to make a decision that directly affects the individual, the public body must retain that information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it.

4. The record in dispute

The applicant wishes to receive a copy of an internal memorandum withheld from him under section 13 of the Act. He also alleges that records have been withheld or concealed by the investigator, consisting of notes that the investigator made and used in the course of the investigation, as well as documents related to the investigation received from outside sources.

5. The applicant's case

The applicant outlined the nature of this inquiry which originated with a WCB investigation into his alleged misuse of a vehicle assigned exclusively to him, following receipt of an anonymous complaint on June 3, 1997. Although the investigation exonerated the applicant, he remains deeply concerned about certain issues regarding the WCB records.

The applicant has submitted to me the circumstances surrounding the apparent creation of four types of records by the WCB that have not been disclosed to him, including an anonymous complaint against him. I have not rehearsed these details in the body of this order. In general, the applicant suggests that an investigator for the WCB failed to retain records that he must have created or used during the investigation. The applicant submits that these practices are contrary to section 31 of the Act.

The investigation into the alleged misuse of the vehicle commenced in June 1997 and was finally resolved, in the applicant's opinion, only in October 1997. The applicant made his access request on August 1, 1997.

The applicant holds the view that the WCB has not searched adequately for the records he is seeking. Specifically, the applicant submits that the WCB must either produce, or provide sworn evidence, that the following records either never existed or were destroyed: (a) the record of an anonymous complaint received by the investigator that allegedly caused him to initiate the investigation; (b) a facsimile communication from the U.S. Border Patrol received June 3, 1997; (c) the investigator's handwritten prepared text and file notes used at a meeting on June 6, 1997; and (d) the investigator's handwritten notes taken at the meeting of June 6, 1997. If the records were destroyed, the applicant contends that the investigator failed to retain these records contrary to section 31 of the Act.

6. The Workers' Compensation Board's case

The WCB's response can be summarized as follows: (a) there was no record made of an anonymous complaint against the applicant; (b) a fax from the U.S. Border Patrol was destroyed by the investigator, but the relevant information in it was disclosed to the applicant in another WCB record; (c) the investigator discarded certain records after a meeting with the applicant "according to [the] routine record keeping practices by" this individual; and (d) the investigator also destroyed his notes of the June 6, 1997 meeting, apparently after checking with a Human Resources Operations Advisor "to ensure that her notes of the meeting coincided with his notes." (Reply Submission of the WCB, p. 3)

I have discussed below the specific aspects of the WCB's submission in this inquiry.

7. Discussion

Before turning to the issues of adequacy of search and destruction of records, I will deal with the three-page memorandum withheld under section 13 of the Act.

Section 13: Policy advice, recommendations or draft regulations

The WCB submits that the record in dispute in this inquiry was properly withheld on the basis of this section, since it involves advice and recommendations within the WCB about the management of a particular subject. The WCB investigator in this case sent this three-page memorandum to another WCB manager in October 1997.

While my review of this record indicates that it falls generally within the category of advice and recommendations, it is also evident to me that the author of the memorandum was responding to a set of queries in some kind of survey and that he interjects his own opinions with some additional factual information. While the content of the memorandum appears to be innocuous, the WCB may withhold those portions of the information that would reveal advice or recommendations developed by or for the public body. However, I do not accept that section 13 applies to the entire content of the memorandum.

The WCB submits that it conducted a line-by-line review of the memorandum and that it was apparent that the few factual sentences in the memorandum are so intertwined with advice and recommendations that no reasonable severing could be performed that would provide the applicant with meaningful information yet not secondarily disclose the nature of the advice or recommendations provided. (Submission of the WCB, p. 2)

I do not agree with the WCB's submission that it cannot reasonably sever this record. I have severed the memorandum so that the "factual information" is disclosed to the applicant. He will at least learn what the memorandum was about.

Both parties submitted replies to the reply submissions of each other on the application of section 13; I have accepted and reviewed both submissions.

Section 6: Duty to assist applicants

The WCB provided affidavits from Kate Beth Gross and Patricia Brownell who are both employed as analysts in the Freedom of Information and Protection of Privacy Office of the WCB, outlining the steps which were taken to respond to the applicant's request. I am satisfied on the basis of this affidavit evidence that the WCB has "made every reasonable effort to respond to the applicant openly, accurately and completely in its search for records that might meet his freedom of information requests." (See Submission of the WCB, pp. 2-4). The WCB disclosed more than 150 pages of records to the applicant and has offered to search elsewhere, if I were to recommend that it do so.

I accept on the evidence of the investigator that there was never any record of the anonymous complaint received on June 3, 1997. The evidence of the investigator also reveals that he destroyed the facsimile transmission from the U.S. Border Patrol and his own notes taken at the June 6, 1997 meeting with the applicant. He deposes in the affidavit that he destroyed these records on or about July 2, 1997, when it became clear that no further investigation of the applicant was required and that no disciplinary action would be pursued. The investigator explained that he discarded his handwritten notes of the June 6th meeting because a Human Resources Department advisor had also taken and retained notes of the meeting and it was, in his view, unnecessary to have two sets of notes of the same meeting. He discarded the U.S. Border Patrol facsimile because, in his view, it was also unnecessary to keep, given that the entire substance of the information was already summarized and disclosed to the applicant in another record. The investigator deposes that he did not discard records in order to avoid a potential freedom of information request but rather as a matter of simple records management and housekeeping completed shortly after concluding the investigation of the applicant.

The difficulty in this case stems not from the fact that the WCB failed to conduct an adequate search, but rather from the fact that the investigator discarded certain records to which the applicant seeks access. I recommend that the WCB review its policy regarding records retention in light of section 31 of the Act.

Individual employees should not set the standard for records retention practices at public bodies. This is particularly so given that the records in issue were not "superfluous, transient material," as suggested by the WCB. (Reply Submission of the WCB, p. 1) These were important records relating to a potential disciplinary matter that could have led to the dismissal of the applicant. It is no answer to say the records were "unnecessary" because other people had taken notes of the same meeting. There is no way for me or the WCB to verify after the fact that the notes and observations taken by the investigator were identical to those taken by the Human Resources Department advisor. It is not sufficient to say that the investigator's notes of the meeting "coincided" with the Human Resources Department advisor's notes.

The applicant further points out, on the basis of the WCB's submission, that information in the original record from the U.S. Border Patrol concerning the number of occupants in the vehicle, was not summarized in the record that was retained. (Reply Submission of the Applicant, pp. 2 - 3) The WCB submits that this was not personal information. I agree with the applicant that information associated with a WCB vehicle that was exclusively assigned to him is his "personal information" under the Act, since it qualifies, in my view, as "recorded information about an identifiable individual," particularly since the license number is "an identifying number, symbol or other particular assigned to the individual." (Schedule 1, "personal information," (d); and the Reply Submission of the Applicant, p. 2)

In summary, the particular records which were discarded were integral to the investigation and should have been retained in the appropriate file. I agree with the applicant that the investigator's status as the contact person for his department under the Act means that "he is aware of the Act's requirements with respect to my personal information, including evidentiary items, written notes and other documents pertaining to the investigation that he initiated into my conduct." (Reply Submission of the Applicant, p. 1)

There is a significant difference of opinion between the applicant and the WCB as to when the investigation against him was completed. The latter argues that it was "closed over a month before he made his freedom of information request." (Submission of the WCB, p. 4) The applicant believes the appropriate date was mid-October. The WCB's evidence is a July 2, 1997 letter to the applicant in which the WCB investigator clearly determined that no disciplinary action was necessary. But the applicant also swears that this July letter "was amended on September 19, 1997...." (Affidavit, paragraph 12) The applicant offers the telling point that his manager has extensive labour relations experience and is a former member of the executive of the Compensation Employees' Union and thus should have known that the July 2, 1997 letter "would not end the matter and that further dealings were inevitable." (Reply Submission of the Applicant, pp. 4-5)

The Role of the U.S. Border Patrol

The applicant sent additional material to me about the role of the U.S. Border Patrol, which stated in a letter to him on February 20, 1998 that it "does not maintain a database on vehicles entering the United States. The Border Patrol does however have access to such information...." The WCB submitted that I should not consider this information and then proceeded to supplement it with submissions and an affidavit to explain its apparent working relationship with the Border Patrol. More importantly, it discovered more records within the WCB that are responsive to the applicant's request and have disclosed them to him.

Since the role of the Border Patrol in all of this is peripheral to decisions I have to make in this inquiry, I have not gone into the issue in detail.

8. Order

Under section 58(3)(a) of the Act, I require the Workers' Compensation Board of British Columbia to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the search conducted was reasonable under section 6(1), and that the WCB has made every reasonable effort to assist the applicant, I find that the WCB has complied with this Order and discharged its duty under section 6(1) of the Act.

I find that the Workers' Compensation Board of British Columbia was not authorized or required to withhold parts of the record under section 13 of the Act. Under section 58(2)(a) of the Act, I require the Workers' Compensation Board of British Columbia to give the applicant access to parts of the record. I have prepared a severed copy of the record to indicate which parts of the record must be disclosed.

I also find that the Workers' Compensation Board of British Columbia was authorized to refuse access to parts of the record in dispute under section 13 of the Act. Under section 58(2)(b) of the Act, I confirm the decision of the Workers' Compensation Board to refuse access to parts of the record withheld on the basis of section 13.

David H. Flaherty
Commissioner

June 3, 1998