OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-38

INQUIRY REGARDING A WORKERS' COMPENSATION BOARD RECORD

David Loukidelis, Information and Privacy Commissioner
August 11, 2000

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Summary: Applicant union sought printed copy of WCB's electronic annotation of its collective agreement. WCB not justified in withholding entire record, but annotations could be withheld as advice or recommendations under s. 13(1). WCB's s. 14 case not adequately supported by evidence showing its application to any given part of the record. Sections 21 and 22 not shown to apply to information in record.

Key Words: advice or recommendations – solicitor client privilege – harmed financial or economic interests – reasonable expectation of harm – commercial or financial information – personal information – unreasonable invasion of personal privacy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 4(2), 13, 14, 17(1), 21 and 22, Schedule 1 (definition of "record").

Authorities Considered: **B.C.:** Order 324-1999; Order 00-06; Order 00-07; Order 00-08; Order 00-10; Order 00-24; Order 00-31. **Ontario:** Order P-227.

Cases Considered: *Slavutych* v. *Baker et al.*, [1976] 1 S.C.R. 254; *Hodgkinson* v. *Simms* (1998), 33 B.C.L.R. (2d) 129 (B.C.C.A.); *Hunt* v. *T & L plc* (1992), 68 B.C.L.R. (2d) 133 (S.C.) (aff'd (1993) 77 B.C.L.R. (2d) 391 (C.A.)); *Seller* v. *Grizzle* (1994), 95 B.C.L.R. (2d) 297 (B.C.S.C.); *Hatlen* v. *Hughes*, [1998] B.C.J. No. 767 (Q.L.) (B.C.S.C. Master); *British Columbia (Ministry of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.); *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860; *Ontario (Ministry of Finance)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [1997] O.J. No. 1465 (Ont. Gen. Div.); *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.); *Kranz* v. *Attorney General of Canada*, [1999] 4 C.T.C. 93 (B.C.S.C.); *Sutherland* v. *D. A. Townley & Associates Ltd.*, [1997] B.C.J. No. 471 (Q.L.) (B.C.S.C.); *S. & K. Processors Ltd. et al.* v. *Campbell Ave. Herring Producers Ltd. et al.* (1983), 35 C.P.C. 146 (B.C.S.C.).

1.0 INTRODUCTION

This order stems from an inquiry I held under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("Act") into a decision by the Workers' Compensation Board of British Columbia ("WCB") to refuse to disclose to the Compensation Employees' Union ("CEU") a copy of an annotated collective agreement ("annotated agreement") between the WCB and the CEU. That decision arose out of the July 14, 1999 request by the CEU for "a copy of the annotated agreement prepared by Gordon Van Dyck" for the WCB. The WCB declined to disclose any part of that record to the CEU, citing ss. 13(1), 14, 17, 21(1) and 22 of the Act. This prompted the CEU to seek a review, under s. 52 of the Act, of the WCB's decision. Because the matter was not settled during mediation, I held an inquiry under s. 56.

The WCB asked that the inquiry be oral because the disputed record exists in electronic form and, the WCB said, it was only possible to appreciate the force of its arguments against the disclosure if I were to view the electronic version of that record. Accordingly, I held an oral inquiry in Victoria. Both parties were represented by counsel and they both filed affidavits and argument in advance of the oral hearing.

2.0 ISSUES

The issues raised in this inquiry are as follows:

1. Did the WCB fulfil its duty to sever under s. 4(2) of the Act?

2. Was the WCB authorized by ss. 13(1), 14 and 17(1) of the Act to refuse to disclose information to the CEU?

3. Was the WCB required by s. 21(1) to refuse to disclose information to the CEU?

4. Was the WCB required by s. 22(1) of the Act to refuse to disclose personal information to the CEU?

Under s. 57(1) of the Act, the WCB bears the burden of establishing that it was authorized by ss. 13(1), 14 and 17(1), and required by s. 21, to refuse to disclose information in the record. Under s. 57(2) of the Act, by contrast, the CEU bears the burden of establishing that third party personal information can be disclosed to it without unreasonably invading the personal privacy of third parties.

3.0 DISCUSSION

3.1 Description of the Material In Dispute – Shortly before Gordon Van Dyck, the WCB's former Director of Labour Relations, left the WCB at the end of 1997, he was asked by the WCB to create an annotated version of the collective agreement between the WCB and the CEU, which represents the WCB's unionized employees. The annotations were to consist of Gordon Van Dyck's advice based on his past experience as a labour relations manager generally as well as his experience as a labour relations manager with the WCB. According to the WCB, at about the same time John McConchie – a labour

lawyer who provides legal services to the WCB from time to time – had been developing his own annotated version of that collective agreement. The WCB was aware of this and it was subsequently agreed that Van Dyck and McConchie would collaborate to create a single, electronically stored and retrievable annotated agreement. As appears in the discussion below, the WCB says McConchie reviewed, and provided advice to, Van Dyck about Van Dyck's contributions to the annotated agreement.

When completed, the annotated agreement was transferred by McConchie to the WCB for ongoing updating. Since then, the WCB's Labour Relations Department has, from time to time, updated the annotated agreement, under the direction and subject to the final approval of Vaughan Bowser, the WCB's Vice-President of Human Resources and Facilities (who is not a lawyer), and Beverly Burns, a WCB lawyer and the WCB's Director of Labour Relations.

Affidavits sworn by Vaughan Bowser and Beverley Burns establish that the annotated agreement has five main components, as follows:

1. The actual collective agreement provisions;

2. Extracts of the WCB's "published policy";

3. Annotations of the various collective agreement provisions;

4. Extracts of arbitration awards, Labour Relations Board and other legal decisions; and

5. A series of frequently asked questions and answers.

At the outset of the hearing, counsel for the CEU said that her client only seeks access to a paper print-out of the annotated agreement. The WCB then abandoned its argument that the electronic version of the annotated agreement is not a 'record' within the meaning of the Act.

In light of the Act's broad definition of the term 'record', this decision was well taken by the WCB. The WCB had contended, in its initial written submission in this inquiry, that the annotated agreement is not a record under the Act. Rather, it was said to be "a sophisticated electronic entity" that requires software in order to be "accessed and utilized". According to the WCB, this means the annotated agreement "has essentially no meaningful existence" without the software, which means the annotated agreement is an "electronic document", of some kind, and not a "record" for the purposes of the Act.

The definition of the term "record" in Schedule 1 to the Act clearly encompasses the annotated agreement as "any other thing on which information is recorded or stored by … electronic… means". I do not understand the WCB to be saying that the annotated agreement is, itself, a "computer program or any other mechanism that produces records". It seems to me that what the WCB described as the 'inextricable' relationship between information and the software associated with its storage and access is shared by other electronically recorded and stored records that are created, stored and retrieved using software. It seems to me, for example, that any document created, stored and

retrieved using Microsoft Word or Corel WordPerfect in some sense displays an inextricable relationship between the information and the software. This does not mean such documents are not records for the purposes of the Act.

I should note at this stage that during the hearing I took the opportunity to view various portions of the electronic version of the annotated agreement. I did this in the hearing room in the presence of the CEU's counsel, and representatives of the CEU, but in such a way they could not view the screen of the computer on which the copy was being displayed. I selected various portions of the annotated agreement at random, in order to get a sense of how the document worked in its electronic version.

For the purpose of my deliberations, the WCB, at my request and after the oral hearing portion of the inquiry, delivered to me a paper copy of the annotated agreement. I have used that copy in considering the evidence, and the arguments, in this matter. I describe it further below, in the discussion dealing with s. 13(1). I would say straight away, however, that each electronic entry for an entry is printed separately, with its pages being numbered "Page 1 of 1" or "Page 2 of 4", for example (depending on the length of each annotation). To my mind, the entry for each article of the Collective Agreement can be regarded separately for purposes of the Act.

3.2 Did the WCB Fulfil its Duty To Sever Records? – The first question I must consider concerns the WCB's approach to its duty under s. 4(2) of the Act. That subsection reads as follows:

> 4(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

In Order 00-31, I affirmed the duty of public bodies under s. 4(2) to review responsive records, sever from them any information excepted from disclosure under one of the Act's exceptions to the right of access and disclose the remainder of the responsive records.

During her submissions at the inquiry, the WCB's counsel said that components three through five of the annotated agreement, as described above, are those about which the WCB is concerned. In its original response to the CEU, the WCB pointed out that the CEU already had a copy of the collective agreement itself, so it did not disclose those portions of the requested record. Similarly, it appears that the extracts of "published policy" described above come from the WCB's corporate management policy guide, which is published by the WCB. The WCB did not make this component of the annotated agreement available to the CEU at the time of its response.

Paragraph 31 of the WCB's initial submission is as follows:

> The annotated Collective Agreement contains information that is public. That is, the 1998 Collective Agreement and the corporate manager's policy guides. If the text of the annotated Collective Agreement is taken and printed out, it is possible to sever the text of this portion from the remainder of the text. But this is a

> pointless exercise as the CEU already has this material. The remainder of the text material that can be printed out attracts the exceptions to disclosure discussed below.

In oral argument, counsel for the WCB reiterated that, although it "can be done", severing the requested record would have been "pointless" and should not be required.

It is not open to me to excuse the WCB from performing its obligation to sever a record under s. 4(2) where, as here, severance can be done – the Act gives me no authority to do that. I find therefore find that the WCB has failed to comply with its obligation under s. 4(2) to sever from the annotated agreement the information which it claims is excepted and disclose the remaining information to the CEU.

It should be said that in cases of this kind it may be possible for a public body to secure an applicant's agreement to amend the applicant's access request, to avoid the need for severance of information that is already available to the applicant. A public body cannot force an applicant to agree to this, but it offers a practical solution in such cases. Again, a public body cannot unilaterally decide that severance of a record is pointless and ignore its s. 4(2) duty.

3.3 Does the Annotated Agreement Contain Advice or Recommendations? – Section 13(1) of the Act says that 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". Again, two of the five components of the annotated agreement (the collective agreement and extracts of the WCB manager's policy guides) consist of information that the WCB acknowledges is not properly withheld under the Act. The WCB argues, relying on Order No. 324–1999, that s. 13(1) of the Act authorizes the WCB to refuse to disclose the information in the remaining three components of the annotated agreement. These components – which I will refer to collectively as the "annotation" – consist of annotations concerning the various provisions in the collective agreement, summaries of labour arbitration awards and other labour cases and a series of frequently asked questions and answers relating to the interpretation of particular provisions in the collective agreement.

I will first set out the parties' arguments on this issue.

WCB's Arguments

The WCB argues that the annotation was (and is) intended by those involved in its creation to "constitute both policy and legal advice to the WCB's management on labour relations". The WCB says, at paragraph 34 of its initial written submission, that this argument is supported by its affidavit evidence, in which various WCB staff depose to the role of the annotation in guiding the WCB "to appropriate courses of action, policy choices, and exercises of its powers, duties and functions in matters under the Collective Agreement" with the CEU.

The WCB goes further. It says, as part of its s. 13(1) argument, that the annotation "should attract the same degree of protection as that accorded to information cloaked by

solicitor client privilege". It cites in support the Supreme Court of Canada's endorsement – in *Slavutych* v. *Baker et al.*, [1976] 1 S.C.R. 254 – of Wigmore's four-part test for the establishment of a common law privilege separate from solicitor client privilege. It is convenient to deal with this argument at this point.

Privilege of the kind endorsed in *Slavutych* is not, in my view, recognized under s. 13(1) of the Act. Section 14 of the Act expressly incorporates one type of privilege – "solicitor client privilege" – into the Act's scheme. Section 13 (1) refers simply to "advice or recommendations developed by or for a public body or a minister". There is nothing in s. 13 to indicate, either expressly or impliedly, any legislative intent to incorporate a common law privilege of the type recognized by the Supreme Court of Canada in *Slavutych*. I therefore find that section 13 is not capable of being interpreted in the manner suggested by the WCB; the common law privilege recognized in *Slavutych* is not incorporated into s. 13.

Returning to the WCB's arguments on s. 13, it says disclosure would harm its interests – and those of the CEU, as well – for a number of reasons. The thrust of the WCB's harm argument – which also relates to its reliance on s. 17(1) – is found in paragraphs 15 through 18 of its initial written submission:

> 15. The management of the WCB expressly put their minds to and discussed the issue and implications of the CEU obtaining access to the annotated agreement. The management of the WCB concluded that this eventuality would be detrimental to the WCB for a number of reasons and accordingly, decided that it would not provide the CEU with such access.
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> *Affidavits of David Anderson, Vaughan Bowser, Beverley Burns*
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> 16. The reasons that provision of the annotated agreement to the CEU might be detrimental to the WCB, as well as the CEU, include:
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> - it would reveal the WCB's confidential legal and policy advice about labour relations matters under the Collective Agreement,
> - it would permit the CEU to anticipate the WCB's position on these sundry matters,
> - it would likely lead to misapprehensions on the part of the CEU about whether the content was in effect decided policy or enduring advice,
> - it would likely lead to grievances,
> - it would likely lead to an impression that the WCB had not been forthcoming during the development of the manager's policy manual.
> - this would lead to unnecessary cost and damaged relations between the WCB and the CEU,
> - this would prevent the Board and other bodies or persons from obtaining legal and policy advice in the form of the annotated Collective Agreement, and
> - this would result in more difficulty and cost in obtaining the same advice
>
> *Affidavits of David Anderson, Vaughan Bowser, Beverley Burns, Gordon Van Dyck, John McConchie*

> 17. The advice givers will not engage in and provide such services to their clients, it the product is to be disclosed. It also would permit [the] unscrupulous to take advantage of others' time and expertise at no cost.
>
> *Affidavits of Beverley Burns and John McConchie*
>
> 18. The annotated Collective Agreement contain[s] details of the personal and employment circumstances of those individuals whose disciplinary, grievance and arbitration proceedings are contained or dealt with therein, as well as the views of the advice givers on those matters.

CEU's Arguments

In response, the CEU contends, at paragraph 38 of its initial written submission, that the annotation is "factual information relating to the negotiations that concluded in the signing of the Collective Agreement and therefore falls within the provision of s. 13(2)(a)". Moreover, the CEU says (at paragraph 39), the annotation was "cited publicly" by the WCB at an arbitration, held in April and May of 1999, respecting interpretation of Article 35.09 of the Collective Agreement. This means the annotation is "factual information used as the basis for decision making and policy formulation" and it cannot, by virtue of s. 13(2)(m), be withheld under s. 13(1). The CEU "does not believe that testimony at the Arbitration accurately reflected the negotiation history of" the collective agreement and says that "the Annotated Agreement will provide important background interpretive information with respect to the Collective Agreement".

The CEU also says (at paragraph 40) that s. 13(2)(m) applies because a WCB manager disclosed "information contained in" the annotated agreement to a CEU member, "as evidence of the basis for decision making". This argument is addressed at a print-out of the annotation for Article 43.02 of the Collective Agreement.

The CEU's arguments here are based on s. 13(2), which provides that a public body "must not refuse to disclose" under s. 13(1) any "factual material" (s.13(2)(a)) or "information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy" (s. 13 (2)(m)).

According to the CEU, the policy underlying s. 13(1) is to protect advice and recommendations "in order to safeguard the internal nature of positions taken by those whose duties are to advise or influence decision-makers". In this case, the CEU says, there is no "question here of maintaining the integrity of a decision-making process involving a subordinate advisor and a decision-maker" (paragraph 43). In the alternative, the CEU says that, because portions of the annotated agreement have already been disclosed, " there is clearly no general interest in a blanket safeguard of the positions taken" in the annotated agreement (paragraph 45).

The WCB's Reply

In reply to the CEU's submissions on s. 13(2)(m), the WCB argued, in paragraphs 14 to 18 of its reply submission:

14. To begin, the Board does not know what the Applicant means in paragraph 39 of the Applicant's submission, wherein it states that 'the information contained in the annotated Collective Agreement was cited publicly as factual information used as the basis for decision making and policy formulation'. There is no evidence before this inquiry that Mr. Van Dyck relied on the specific content of the annotated Collective Agreement in the 1999 arbitration proceedings regarding Article 35.09. With respect, to suggest that he did so is to engage in speculation. These comments apply also to paragraph 45 of the Applicant's submission.

15. The Board does not know that the Applicant means in paragraph 43 of the Applicant's submission, wherein it states that Mr. Van Dyck was a "decision-maker". Mr. Van Dyck had no role as a "decision-maker" as would be contemplated by s. 13, either in the 1999 arbitration regarding Article 35.09 or in participating in the development of the annotated Collective Agreement.

16. In further response to paragraph 43, if the CEU wished to challenge the recollections that Mr. Van Dyck provided under oath in the 1999 arbitration proceeding regarding Article 35.09, it should have done so during that proceeding. It is submitted that the purpose of *the Freedom of Information and Protection of Privacy Act* (the "FIPPAct") is not to supply an alternate means to seek a remedy for such concerns.

17. Moreover, the CEU has presented no evidence that Mr. Van Dyck's recollections contradict anything that he contributed to the annotated Collective Agreement. This contention on the part of the CEU also is based on speculation. The Respondent submits that the Commissioner should not accept or treat such conjecture as evidence.

18. Thus there is no basis or compelling reason to require that the Board is not entitled to withhold under s. 13, the annotated Collective Agreement including that portion relating to clause 35.09 of the Collective Agreement.

The WCB also provided affidavit evidence of the WCB manager who provided a printout of a portion of the annotated agreement that dealt with the interpretation and application of Article 43.02 to a CEU shop steward. The manager deposed that she received a copy from the person who is, in turn, her manager and that when she disclosed it to the shop steward, she did not put her mind to the fact that the verbatim content of the annotated agreement was intended to be for managers only. Her manager also deposed in an affidavit that he did not know that she intended to give a copy of the printout to a CEU member. Finally, the Director of Human Resources and the Manager of Labour Relations provided affidavit evidence explaining that the annotated agreement consists of labour relations and human resources advice which is considered confidential and is intended only to be shared by the WCB's managers. The confidential nature of the information is stressed in WCB manager training sessions and is only accessible by managers on an electronic site called the "Manager's Site".

Discussion

In Order No. 324-1999, I expressed the view that s. 13(1) is intended, at the very least, to protect information that is advice or recommendations on "a course of action, a policy choice or the exercise of a power, duty or function". This is the order on which the WCB relies. I have carefully reviewed the annotation. Many of the annotations provide interpretations of the meaning of the related Collective Agreement provisions. Others suggest how WCB managers should apply certain provisions in their daily dealings with unionized employees. Some appear to summarize legal advice. An assessment of the implications of arbitration decisions or case law relevant to the provision itself, or issues with which it deals, is sometimes included. Also, questions and answers about the interpretation or application of a particular Collective Agreement provision are sometimes included. None of this information, in my view, can be characterized as "factual material" for the purposes of s. 13(2)(a) of the Act.

Having also reviewed the evidence, including the arbitration award dealing with the interpretation of Article 35.09 of the Collective Agreement, I agree with the WCB that the award, and the evidence before me, do not support the CEU's contention that the annotated agreement was relied on or cited by WCB witness Gordon Van Dyck or any other witnesses. Even if Gordon Van Dyk's testimony about negotiations could be characterized as "making a decision or formulating policy" – a proposition that I consider to be very questionable – there is no evidence that the annotated agreement was "cited publicly" in the arbitration. To the extent that an extract of the annotated agreement was provided on one occasion to a CEU shop steward, it is clear from the evidence that the person who disclosed it failed to put her mind to its confidential and advisory character. In these circumstances, I have concluded that s. 13(2)(m) does not apply to the annotation, either in whole or in part.

I have no doubt that the annotation contains advice or recommendations, developed by or for the WCB, respecting the Collective Agreement and its interpretation and application. I therefore find that the WCB properly withheld the annotation portion of the annotated agreement under s. 13(1) of the Act.

3.4 Is the Annotated Agreement Protected by Solicitor Client Privilege? – The WCB says the entire annotation is privileged, and therefore excepted from disclosure, under s. 14 of the Act. That section permits a public body to refuse to disclose to an applicant "information that is subject to solicitor client privilege". In light of my finding that s. 13(1) applies to the annotation, it is not, strictly speaking, necessary for me to go on to consider the application of s. 14 of the Act. However, I think it would be helpful to offer my views on this issue because it raises, from my perspective, some important questions about the application of s. 14 of the Act and the type of evidence that is needed to support a claim of solicitor client privilege.

The WCB relies here on the first branch of solicitor client privilege, which protects confidential communications between a lawyer and her or his client related to the seeking or giving of legal advice. It does not rely on the contemplated litigation privilege rule. The necessary components of the kind of privilege asserted here by the WCB were set out by Thackray J. in *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.), relying on the

Report of the Special Committee of the Canadian Bar Association – Ontario Regarding Solicitor-Client Privilege (1985*)*:

> The doctrine of solicitor-client privilege does not protect all communications between a solicitor and his client from disclosure. Certain communications between a solicitor and his client, while confidential, may be subject to compulsory disclosure under due process of law. Other communications are protected from disclosure by the rule of privilege provided, of course, that the communications themselves are not made in furtherance of a fraud or other crime.
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> It has been established for many years that in order for a privilege to exist, certain conditions must apply. The classic statement of those conditions is contained in 8 *Wigmore, Evidence*, Section 2285 (McNaughton rev. 1961) and may be summarized as follows:
>
> 1. the communications must originate in a confidence that they will not be disclosed;
> 2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
> 3. the relation must be one which in the opinion of the community ought to be sedulously fostered; and
> 4. the injury that would inure to the relation by the disclosing of the communications must be greater than the benefit thereby gained for the correct disposal of litigation (applied in *Slavutych* v. *Baker et al.* (1975), 55 D.L.R. (3d) 224, 228-9, (S.C.C.)).
>
> Because communications between a solicitor and his client fulfill these four conditions, the rule of privilege with respect to such communications has been established. The question then becomes to what extent does the privilege apply. As noted above, the privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
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> 1. there must be a communication, whether oral or written;
> 2. the communication must be of a confidential character;
> 3. the communication must be between a client (or his agent) and a legal advisor; and
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.
>
> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.
>
> It is these four conditions that can be misunderstood (or forgotten) by members of the legal profession. Some lawyers mistakenly believe that whatever they do, and whatever they are told is privileged merely by the fact that they are lawyers. This is simply not the case … .

The above passage was cited with approval by Burnyeat J. in *Kranz* v. *Attorney General of Canada*, [1999] 4 C.T.C. 93 (B.C.S.C.).

It is convenient, again, to first set out the parties' arguments on the solicitor client privilege issue.

WCB's Case for Privilege

The WCB's affidavit evidence establishes that Gordon Van Dyck was initially retained to create the annotated agreement. The evidence indicates the annotations were to consist of his confidential advice to WCB management as to how, in Van Dyck's opinion, it might approach the interpretation and application of the Collective Agreement's provisions. These annotations were to be based on his experience and perspective as a senior labour relations manager generally, including his experience as a WCB labour relations manager. The annotations were not intended to be a summary of the published policy or statements of the decided position of the WCB on any issue.

It was later agreed that Gordon Van Dyck would work with John McConchie, a labour lawyer who is frequently retained by the WCB in matters involving the CEU and the collective agreement. (John McConchie's affidavit indicates that, until the CEU's access request under the Act was made, he continued to develop further content for the project.) It was understood that the annotation would contain McConchie's legal advice to the WCB. Beverley Burns, a WCB lawyer and its Director of Labour Relations, deposed that:

> 6. It was agreed that the annotated Collective Agreement would be developed in electronic form that would provide users with easy access and search capability, and interlinks between the annotations and the Collective Agreement. This aspect is particularly helpful to management as it clearly and quickly imparts the legal and policy advice as to what provisions, issues and existing law or policy are relevant and related to a particular matter under the Collective Agreement.
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> 7. During my time as Manager of Labour Relations, I communicated directly with Mr. McConchie and Mr. Van Dyck about the annotated Collective Agreement. They met with Mr. Bowser and I on several occasions, to discuss and demonstrate the progress and direction of the project. Mr. McConchie and Mr. Van Dyck had completed their draft in or around the summer of 1998. After that date, my office, being the Labour Relations Department of the Board, largely took over the project.
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> 8. At this stage the annotated Collective Agreement was ready for use. My office continued to build the product by updating it. It includes the entire test of the 1998 Collective Agreement with the CEU, the Board's Managers Human Resources Policy Guide, and sample documents. These items are already public and the CEU already has them. It also contains selected Board grievance and arbitration cases, extensive annotations in the form of case comments, interpretations, experiences and advice about the issues to consider in dealing with a particular provision of the collective agreement.
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> 9. Since taking over the day to day responsibility for updating the annotated Collective Agreement, the Labour Relations Department has continued to build

> this product under direction from Mr. Bowser and myself. Mr. Bowser and I have made the decisions about the content. We generally identify what material, such as legal opinions, interpretations, arbitration decisions, agreements, or extracts thereof should be the subject of an annotation. I either write myself or ask Carolynn Ryan, the current Manager of Labour Relations to write the commentary or other advice that in my opinion should be the subject of an annotation. Ms. Ryan continues to add and edit annotations, again under my direction. This process does not involve any employees who are members of the CEU.

According to the WCB, the component of the annotated agreement that is 'policy advice' cannot be distinguished from that which is legal advice and, since the WCB's labour lawyer reviewed and advised Van Dyck about the content he provided before it was finalized, the whole of the annotation is privileged under s. 14. This argument is outlined in paragraphs 46 to 48 the WCB's initial submission:

> 46. The communication at issue here is the Annotated agreement. To the extent that it contains advice from counsel, it should attract the protection of solicitor client privilege. As the WCB and counsel have asserted at many points in this submission, the Annotated agreement consists largely of counsel's opinions, commentaries and selection of relevant cases expressly for the purpose of providing legal advice to the WCB.
>
> 47. With respect, it seems self evident that privilege must attach to that content that has been written or controlled by counsel.
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> 48. Some of the content that had discreet [*sic*] or independent existence prior to being selected by counsel for inclusion in the Annotated agreement. However, they [*sic*] have been selected using the skill and judgement of the WCB's counsel.

The WCB asks me to conclude that all of the annotation is shielded by the 'sanctity' of the solicitor's brief, which it says has always been 'inviolate'. It cites the British Columbia Court of Appeal decision in *Hodgkinson* v. *Simms* (1998), 33 B.C.L.R. (2d) 129 (B.C.C.A.), in support of this proposition, as well as three other British Columbia court cases: *Hunt* v. *T & L plc* (1992), 68 B.C.L.R. (2d) 133 (S.C.) (aff'd (1993), 77 B.C.L.R. (2d) 391 (C.A.)); *Seller* v. *Grizzle* (1994), 95 B.C.L.R. (2d) 297 (B.C.S.C.); and *Hatlen* v. *Hughes*, [1998] B.C.J. No. 767 (Q.L.) (B.C.S.C. Master). As the WCB put it, at paragraph 49 of its initial written submission, the

> … line of cases flowing from the *Hodgkinson* case establishes that although the individual materials are not privileged when they stand alone, the fact that they have been chosen by counsel to reside in the collection of materials that is included in the annotated agreement, is privileged. The privilege will attach where legal skill and judgement has [*sic*] been employed in the selection of the collected documents.

In response to a question I asked during the inquiry, counsel for the WCB argued that the solicitor's brief rule, affirmed in *Hodgkinson*, applies to the annotated agreement, even though there is no question of existing or anticipated litigation in this case. She cited, in support, the decision of Henderson J. in *Sutherland* v. *D. A. Townley & Associates Ltd.*,

[1997] B.C.J. No. 471 (Q.L.) (B.C.S.C.). The *Sutherland* decision concerned an appeal from a decision of a Master, who had refused to order production of documents (two sets of a lawyer's notes) in the context of litigation. Mr. Sutherland sought access to these notes on the basis that they were made in the context of a joint retainer. The case is unusual because, ordinarily, the existence of solicitor client privilege is asserted in order to protect disclosure of a communication. In the *Sutherland* case, however, it was being asserted by the plaintiff for the purpose of obtaining disclosure.

In *Sutherland*, Mr. Justice Henderson said the following, at para. 12:

> [12] While solicitor-client privilege is usually subdivided into two types, confidential communications and the contents of the solicitor's brief or the solicitor's work product, it is really one all-embracing privilege. It permits a client to speak in confidence to a solicitor to enable that solicitor to undertake such inquiries and collect such material as may be needed to advise the client and provide legal services without fear that either the communications or the work product will be disclosed to outsiders: *Hodgkinson* v. *Simms* (1988), 33 B.C.L.R. (2d) 129 at 136 (C.A.). The privilege exists for the protection of the client, not the solicitor. It is founded on the impossibility of conducting legal business without assistance and the need to secure full and unreserved communication between solicitor and client in order to make that assistance effectual: M.N. Howard, *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990) at 500. …

I do not take Mr. Justice Henderson's reference to the *Hodgkinson* case to stand for the proposition now advanced by the WCB. On the contrary, it is apparent to me that he cites *Hodgkinson* as authority for the proposition that an underlying purpose of both legal professional privilege and litigation privilege is to ensure a client can speak in confidence to his or her lawyer – in the case of the former kind of privilege, for the purposes of litigation.

The issue in *Hodgkinson* was described by Chief Justice McEachern, at p. 131, to be

> … concerned with an important practice question relating to the privilege of a solicitor's brief, particularly whether photocopies of documents collected by the plaintiff's solicitor from third parties and now included in his brief are privileged even though the original documents were not created for the purpose of litigation.

The majority of the Court in *Hodgkinson* concluded, with respect to litigation or "lawyer's brief" privilege that

> … the law has always been, and, in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief *for the purpose of advising on or conducting anticipated or pending litigation* he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse disclosure. [emphasis added]

The *Hunt, Grizzle, Hatlen* and *Sutherland* decisions are all cases that concern litigation or 'lawyer's brief' privilege and the application of the above principle established in

Hodgkinson. The 'lawyer's brief' principle established in *Hodgkinson* does not apply, in my view, to a record over which legal professional privilege is claimed, as in this case. That being said, I have no doubt that any documents gathered for or attached to a legal opinion prepared by a lawyer for the lawyer's client would be protected by solicitor client privilege. See *British Columbia (Ministry of Environment, Lands and Parks)* v. *British Columbia (Information and Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.). Similarly, the law is clear that all information provided by the client to the lawyer for purposes of obtaining legal advice is also privileged. See *Descoteaux* v. *Mierzwinski*, [1982] 1 S.C.R. 860 at 892; *Ontario (Ministry of Finance)* v. *Ontario (Assistant Information and Privacy Commissioner)*, [1997] O.J. No. 1465 (Ont. Gen. Div.).

In her oral argument at the inquiry, the WCB's counsel continued to maintain that the WCB could not identify for me those portions of the record that were prepared by John McConchie or Beverley Burns for the purpose of providing legal advice. In his affidavit, McConchie deposed that "*much* of the content was to be legal advice, presented in one form or another" (emphasis added). However, he only specifically identified one example of his adaptation of a legal opinion he had previously given to the WCB for use in the annotation. (At paragraph 9 of his affidavit, McConchie deposed that he created a collective agreement annotation for Article 23.05 of the Collective Agreement by using parts of an earlier opinion provided to the WCB on this topic).

In her oral submissions at the inquiry, counsel for the WCB told me that the fourth component of the annotation described above was originally prepared by McConchie and is now updated by WCB staff. She indicated that Beverley Burns is "responsible for" updating the annotation, although she did not specify which portions of the annotation she updated. She also said that Carolynn Ryan, who is not a lawyer, updates the annotated agreement under Beverley Burns' general supervision.

All of the WCB's evidence indicates that the annotation was to consist of *both* legal and policy advice and that this legal and policy advice was intended to be confidential and accessible only by WCB managers. The WCB's counsel claimed that because it is not possible to say who has been responsible for preparing specific parts of the annotation, it is not possible to say which parts constitute "policy" advice and which parts constitute "legal" advice. She also maintained that McConchie was giving legal advice when he contributed to the annotation. As is noted above, John McConchie's affidavit supports the broad assertion that "much" of what he contributed constituted legal advice. This evidence is not, of course, particularly helpful, since it does not assist me in determining which portions of the annotation (other than the portion relating to Article 23.05) he prepared and which might therefore qualify as confidential communications, from a solicitor to a client, relating to the giving of legal advice.

CEU's Arguments Against Privilege

The CEU argues that solicitor client privilege does not extend to the annotation because it is "neither a communication made between solicitor and client to which such privilege would apply nor a record created in contemplation of litigation" and says, in any case, that even if privilege applied, it has been waived by the WCB.

The CEU's counsel cites a decision under Ontario's access to information legislation – Order P-227 – which she says stands for the proposition that a mere vetting of a record by a lawyer that the lawyer did not create and that is, in itself, unrelated to the provision of legal advice, does not bring the record within s. 14. The CEU – which has not seen the annotated agreement, of course – argues that it merely "reflects the WCB's perspective, as recorded by Mr. Van Dyck, with respect to such matters as past practice, arbitration history, and grievance settlement history". It also argues that the WCB's lawyer did not generate the record, but rather merely vetted it and so the annotation does not represent the lawyer's legal opinion or advice.

The CEU says – relying on the affidavit of Bill Hawkins, its president – that Gordon Van Dyck's invoices to the WCB for his services establish that he "created the records and trained others in its use". The mere vetting of the record by a lawyer, John McConchie, "after the fact in order to use it as a basis for legal advice does not bring the record within the provisions of section 14". According to the CEU, if s. 14 were to apply in this case, "the result would be that any public body could prevent disclosure of information simply by having their legal advisors read the material".

The CEU also intimates that I should interpret the s. 14 exception narrowly, in light of the accountability goals of the Act.

Has Privilege Been Established?

It should be said right away that it is not open to me to interpret or apply s. 14 narrowly. This has been made clear by the courts. See, for example, *British Columbia (Ministry of Environment, Lands and Parks)*, above. Section 14 incorporates the common law principles of solicitor client privilege, which must be applied on the evidence in each case.

The burden lies on the WCB under s. 57(1) of the Act to establish that solicitor client privilege applies to the annotation. See Order 00-06. I have concluded, for the following reasons, that while the evidence establishes that s. 14 applies to some of the information in the annotation, the WCB has failed to meet its evidentiary burden of establishing that the whole of the annotation is clothed with solicitor client privilege.

As I noted in Order 00-08, a public body's reliance on s. 14 can only be tested against the evidence before me. The affidavits filed by the WCB attest to the intention or understanding of the deponent or, in several cases, other individuals that the annotated agreement was to be a combination of confidential legal and policy advice to the WCB. I accept that the record was intended to be confidential, in the sense that it was only to be available to, and used by, WCB managers. But evidence of such an intention on its own does not establish that the annotation is protected by solicitor client privilege. Such evidence does not shift the WCB's burden of establishing that the annotated agreement contains confidential communications from a lawyer that are related to giving legal advice.

The WCB has offered some evidence to the effect that legal advice is contained in the annotation, but that evidence can only be described as being of an extremely general

nature. It is apparent from the evidence that John McConchie's contribution to annotation has been noteworthy. However, the only specific reference to his inclusion of legal advice relates to Article 23.05. While counsel for the WCB asserted, in oral argument, that McConchie was responsible for the arbitration decision summaries, there is no clear evidence of that before me. Nor does it appear that attempts have been made to have McConchie identify which summaries (or other parts of the annotation) he prepared for the purpose of providing legal advice. Indeed, Gordon Van Dyck deposed, at paragraph 6 of his affidavit, that annotations he prepared include "such elements as arbitration decisions, grievance referrals, interpretation of the meaning of specific provisions, and discussion of bargaining experience". While it appears McConchie was developing his own version of an annotated agreement before he began working jointly with Van Dyck, both Van Dyck's and McConchie's evidence is no more precise than to say that the work product contained both McConchie's and Van Dyck's advice.

There is also some evidence that Beverley Burns has contributed directly to the case summary portion of the annotation. However, no specific examples of any such contributions are provided. Burns did not depose that she is unable to identify the legal advice she has incorporated into the annotation. McConchie did not depose that he is unable to identify the legal advice that he included in the annotation. Van Dyck did not depose that he is not able to identify the policy advice that he included in the annotation.

As is noted above, the WCB has argued that John McConchie's review of, and comments on, Gordon Van Dyck's contribution to the annotation clothes Van Dyck's policy advice with solicitor client privilege. I do not agree. Nor do I agree with the WCB's submission that the fact that Beverley Burns supervises or reviews the contributions of non-lawyers to the annotation necessarily transforms their policy advice into legal advice that would be protected by solicitor client privilege.

The WCB's case here is, in my view, impressionistic. It comes down to saying that, because a person who is a lawyer has to some undefined extent and in some general way, been involved in the annotated agreement project from time to time, the entire record is subject to solicitor client privilege. I find, however, that the fact that at various times a lawyer has been 'involved' in producing such a record does not, in the absence of better evidence, mean the entire record is privileged.

Conversely, the fact that some parts of the annotation are protected by solicitor client privilege does not cast such privilege over the whole annotation. I am not persuaded by the WCB's evidence that the whole of the annotation constitutes a confidential communication from a lawyer to the WCB, as client, of legal advice. I am also not persuaded by the WCB's evidence that the policy advice cannot be identified separately from the legal advice. In the absence of better evidence on this point from the contributors to the annotation, I cannot accept the WCB's submissions that the two are so inextricably intertwined as to make severance impracticable, if not impossible.

Has Any Privilege Been Waived?

To the extent that solicitor client privilege applies to some of the information that is contained in the annotation, I do not accept the CEU's contention that the WCB has waived that privilege.

Considerable effort was made by both parties, in their evidence and argument, to establish or refute a waiver of privilege by the WCB. The CEU says there has been a waiver in two ways. The first is said to arise as a result of the disclosure of a small extract of the annotation by one WCB manager to a CEU member. The second is said to arise as a result of Van Dyck's testimony at the 1999 arbitration referred to above during which, the CEU maintains, "information contained in the record" was disclosed. The arbitration dealt with the proper interpretation of one provision of the collective agreement. As the CEU put it, at paragraph 75 of its initial written submission, fairness dictates that the CEU should "have an opportunity to compare the Annotated Agreement with Mr. Van Dyck's oral testimony". The CEU maintains that these two instances, either alone or together, constitute a waiver by the WCB of any privilege over the whole of the annotated agreement.

In support, the CEU cites a number of court decisions dealing with waiver of privilege on the grounds of fairness, including *S. & K. Processors Ltd. et al* v. *Campbell Ave. Herring Producers Ltd. et al* (1983), 35 C.P.C. 146 (B.C.S.C.). The CEU also relies on J. Sopinka et al., *The Law of Evidence in Canada* (Toronto: Butterworths, 1992), at p. 665, where it is said that voluntary disclosure "of any material part of a communication" operates as a waiver of privilege over the whole.

In Order 00-07, I discussed the general principles governing waiver of solicitor client privilege and so I need not repeat them here. Suffice it to say that, having considered the evidence and the applicable cases and principles, I agree with the WCB on this issue. There is no evidence before me to support a finding that the WCB has intentionally waived privilege over the entire annotated agreement in either of the two instances advanced by the CEU. Nor does fairness dictate that the WCB's actions should be found to constitute a waiver of privilege over the entire record. Accordingly, to the extent that the annotated agreement contains information that is protected by solicitor client privilege, I find that this privilege has not been waived over the entire record.

3.5 Would Disclosure Harm the WCB's Financial Interests? – Again, while I need not make a determination about the WCB's s. 17 arguments, I feel compelled in this case to make a few observations about them.

Section 17(1) of the Act permits the WCB to refuse to disclose "information the disclosure of which could reasonably be expected to harm the financial or economic interests of" the WCB. The WCB bears the burden of establishing a reasonable expectation of harm as contemplated by that section.

Sections 17(1)(c), (d) and (e) read as follows:

> 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, including the following information: …
> …
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

As I observed in Order 00-24, to meet the test under s. 17(1), a public body must provide evidence the quality and cogency of which is commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The feared harm must not be fanciful, imaginary or contrived and – although it is not necessary to establish a certainty of harm – evidence of speculative harm will not satisfy the test.

Here the WCB says the "information at stake is of the nature contemplated by, or analogous to that in, the inclusive list of s. 17", in particular, ss. 17(1)(c), (d) and (e). The WCB claims that "the most compelling and likely harms are the increased cost of losing the timesaving source of advice and of unnecessary and likely protracted grievances by the CEU". It argues that the annotation consists of "information that relates to management of personnel that is not made public" and that its disclosure could lead to undue financial loss to a third party, McConchie, and to undue financial gain to "whoever might take advantage of his work product for their own gain". The WCB also says that the annotation consists of information about "negotiations" carried on by the WCB. In response, the CEU says the WCB has not provided sufficient evidence to establish, on an objective basis, a reasonable expectation of harm within the meaning of s. 17(1).

The WCB has not identified which portions of the disputed record qualify for protection under s. 17(1). It has, it seems to me, once again made rather an impressionistic argument that applies to the record in some general way. More specifically, the WCB has not identified portions of the annotated agreement which qualify as information described in any one or more of ss. 17(1)(c), (d) or (e).

On the first point, the WCB has not provided me with evidence or argument as to how any of the undisclosed information qualifies as "plans", within the meaning of s. 17(1)(c), relating to the "management of personnel of or the administration of a public body" that have not yet been implemented or made public. Nor has the WCB demonstrated how any

information in the disputed record could reasonably be expected to result in "undue financial loss or gain to a third party" within the meaning of s. 17(1)(d). At various points, the affidavit evidence and argument presented by the WCB speak to advantages that would accrue to the CEU, in the labour relations dealings it has with the WCB, of knowing what the WCB's managers know. But even if this knowledge could be characterized as a "gain" to the CEU, the WCB has not suggested how any such gain would be "undue" for the purposes of s. 17(1). Nor is the evidence persuasive enough to satisfy me that there is information in the annotation "about negotiations carried on by or for" the WCB, within the meaning of s. 17(1)(e).

Had it been necessary for me to reach a conclusion about the WCB's reliance on s. 17 of the Act, I would have been inclined to conclude that the evidence advanced by the WCB does not evince the necessary quality and cogency that is required to meet the test under s. 17(1).

3.6 Would Disclosure Harm Third Party Business Interests? – This aspect of the WCB's case is one that – were it necessary – I would have no hesitation in rejecting. Here, the WCB says disclosure of information in the annotation would harm John McConchie's "proprietary interests", such that s. 21(1) of the Act prohibits disclosure. It also argues that disclosure would harm the financial interests of those individual grievors named in the case summaries. It says the information is their "labour relations information" supplied in confidence and that they "enjoy a continued degree of privacy".

Section 21(1) requires a public body to refuse to disclose information:

> (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.

I will deal first with the WCB's claim, at paragraph 77 of its initial submission, that s. 21(1) applies to "the arbitration and grievance circumstances and case [*sic*] of individuals". The WCB has not made its case here. It has not identified specific information to which s. 21(1) supposedly applies. It has not identified the third parties whose interests are allegedly engaged. It has not provided any evidence at all to support the proposition that any of the three necessary elements of the s. 21(1) test – found in ss. 21(1)(a) through (c) – have been met. Moreover, to the extent the WCB refers here to a "continued degree of privacy" for individual third parties, it appears to conflate the tests under ss. 21 and 22 of the Act.

The WCB's case respecting John McConchie's business interests is also not persuasive. First, I cannot agree that any contributions he made to the annotation – and, as is noted above, the WCB has (with one exception) not specifically identified his contributions – can be reasonably be included in the Act's definition of a 'trade secret' for the purposes of s. 21(1)(a)(i). Nor has the WCB established that any such contributions qualify, within the meaning of s. 21(1)(a)(ii), as "commercial, financial, labour relations, scientific or technical information *of*" McConchie (emphasis added). In my view, the Legislature did not intend, for example, the s. 21(1)(a)(ii) concept of "labour relations" information to include a lawyer's work product, as opposed to information pertaining to the labour relations aspects of a business.

Nor has the s. 21(1)(b) test been met. The annotation does not contain information "supplied" by McConchie to the WCB. The annotation is, in some indeterminate way, his work product – he was (it is reasonable to conclude) hired by the WCB to participate in the project in some way. I am not persuaded that the end result of that engagement – the annotation itself – is something that was in this case supplied by a third party to a public body such that the third party, McConchie, can claim to protect the contents as information in which the third party retains an interest. The record before me suggests instead that the annotation belongs to the WCB and not McConchie.

While the WCB asserts there "is clear evidence" that disclosure is "likely" to cause "significant detriment" to McConchie's "financial and commercial interests", having reviewed the evidence on this point, I am not persuaded that – even if the first two elements of the s. 21(1) test had been met – disclosure of any of this information could reasonably be expected to either cause significant harm to McConchie's competitive position or his negotiating position or to cause him undue financial loss.

3.7 Was the WCB Required to Refuse to Disclose Personal Information? – I feel compelled to offer comment on the WCB's evidence and argument on this point as well. As with the other exceptions relied on, the WCB made no attempt to identify which parts of the annotation it says s. 22 applies to. Its argument on s. 22 is summed up as follows at paragraphs 82 to 84 of its initial submission:

> 82. The information at issue relates to various third parties' names and particular circumstances involved in their grievance and arbitration cases. A number of individual's cases are quoted, excerpted and discussed in the annotated Collective Agreement. It is submitted that an unreasonable invasion of

> privacy would arise from the disclosure of either the cases or annotations about the cases contained in the annotated Collective Agreement.
>
> 83. Though they are somewhat public records, most arbitration cases do not have wide exposure as few are actually published. Further, they are not necessarily shared widely within the CEU membership. Those individuals whose cases are not published enjoyed a continued degree of privacy. Further, the fact that such information is afforded the protection of s. 21 in so far as it is the information of a third party, is indicative and underscores its private and sensitive nature.
>
> 84. Considerations that are relevant to this issue include those expressly set out in s. 22(2). The desirability and need for public scrutiny is not served by disclosure of this information. The CEU does not need disclosure of the information as it already has the relevant cases to resort to when it wishes to refer to them in order to help determine its member's rights. Furthermore, the disclosure could damage the reputation of some of the individuals whose cases revolve around disciplinary proceedings. It would be unfair to those individuals, having been dealt with by the disciplinary process, to have them face this further ignominy.

Section 57(2) places the burden of proof on the applicant respecting s. 22, but a public body must have had a rational basis for deciding that s. 22 applies to information in a record in the first place. Here, aside from a complete lack of any evidence to address the alleged s. 22 privacy interests of third parties (including evidence that the third parties do not consent to disclosure of any of their personal information), the WCB's arguments on this point have an unreal air about them. The third party personal information is said to be contained in various labour decisions. The WCB says the CEU "does not need disclosure of the information as it already has the relevant cases to resort to". The labour cases referred to are cases where the third party grievors have been represented by the CEU. The CEU is a party to the arbitration proceedings. In these circumstances, to assert s. 22 as the basis for refusing to disclose these labour cases to the CEU is wholly misplaced. For these reasons, were it necessary for me to do so, I would be inclined to find that the CEU has discharged its burden of demonstrating that the disclosure of personal information in the annotated agreement would not constitute an unreasonable invasion of any third party's personal privacy.

4.0 CONCLUSION

I have concluded that the WCB failed to discharge its obligation under s. 4(2) of the Act to sever information that is properly withheld under s. 13(1) of that Act from the annotated agreement and disclose the remainder to the CEU. I have also concluded that the WCB has established that s. 13(1) of the Act applies to all of the information in the annotation. In light of my conclusions about the application of s. 13(1) of the Act to the annotation, and because the WCB does not assert that ss. 14, 17, 21 or 22 applies to the remainder of the annotated agreement (*i.e.*, the actual collective agreement provisions and the extracts from the WCB's "published policy"), it is unnecessary for me to make any order respecting the application of ss. 14, 17, 21 or 22 of the Act to the annotation.

For the reasons given above, the following orders are made:

1. Under s. 58(2)(b) of the Act, I find that the WCB is authorized under s. 13(1) of the Act to refuse to give access to the annotation comprised in the annotated agreement and I confirm the WCB's decision to refuse access to the annotation; and

2. Under ss. 58(2)(a) and 58(3)(a) of the Act, I find that the WCB is not authorized to refuse to give access to the portions of the annotated agreement to which s. 13(1) does not apply (*i.e.*, the actual collective agreement provisions and the extracts from the WCB's "published policy") and that, in refusing to disclose these portions of the annotated agreement, the WCB failed to comply with its obligation under s. 4(2) of the Act. I therefore require the WCB to sever the annotation from the annotated agreement and provide the CEU with the remainder of the annotated agreement.

August 11, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia