Order 01-33

WORKERS' COMPENSATION BOARD

David Loukidelis, Information and Privacy Commissioner
July 11, 2001

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Summary: Applicant sought his own claim file records from the WCB. WCB provided some records immediately and provided others later, in stages. WCB discovered and provided further records during the course of mediation by this Office. WCB found to ultimately have fulfilled its s. 6(1) search duty. Section 22(3)(a) found to apply to names and medical information of other WCB claimants in requested records.

Key Words: duty to assist – every reasonable effort – medical information.

Statutes considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 22(1) and 22(3)(a).

Authorities Considered: B.C.: Order 00-15, [2000] B.C.I.P.C.D. No. 18; Order 00-26, [2000] B.C.I.P.C.D. No. 29; Order 00-32, [2000] B.C.I.P.C.D. No. 35.

1.0 INTRODUCTION

[1] This decision deals with the adequacy of the responses by the Workers' Compensation Board ("WCB") to the applicant's requests, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for all records concerning one of his WCB claims. The chronology of the applicant's various requests is rather involved, but it is necessary to set it out in some detail in order to better understand the WCB's responses.

[2] The applicant first asked for his claim file, on three occasions, in September of 1999 and received copies of records from the WCB's Records Management Department

late the same month. These records were disclosed by the Records Management Department as part of the WCB's policy of routine disclosure to WCB claimants of their claim files. This request and disclosure is not at issue in this inquiry.

[3] The applicant then submitted a new request, this time under the Act, in December of 1999. The WCB acknowledged the request later in the same month and told the applicant that the Records Management Department would be dealing with the disclosure of his claim file in accordance with its normal-course-of-business process. The letter told the applicant that the WCB's Freedom of Information and Protection of Privacy ("FIPP") Office also would search for any records held, outside the claim file, by other departments.

[4] In the middle of January 2000, the WCB provided the applicant with a record from the WCB Ombudsman's office, together with some computer printouts regarding his claim. In February, it provided copies of MRI records inadvertently omitted from the January response.

[5] Late in January of 2000, the applicant made a further request for the same claim file, including any file tracking information. The WCB treated this as a repeat of the December request. The applicant requested a review of the WCB's responses late the same month, stating that he believed the WCB had records other than those he had received to date. Mediation by this Office led to the disclosure of more records after the applicant provided details of locations within the WCB from which he had received treatment and which he therefore believed would have records.

[6] The applicant made yet another request for the same claim file in late March of 2000. The WCB sensibly treated this as a request for updated disclosure, *i.e.*, a request for any records post-dating the December request. Once again, the WCB told the applicant that it had sent a copy of his request to the Records Management Department for disclosure of any relevant claim file records and that the FIPP Office would search for other records outside the claim file. In late April 2000, the FIPP Office provided copies of records that it had found in the WCB's Rehabilitation Centre, in the Office of the Panel of Administrators and in the Office of the President.

[7] The applicant continued to believe that further records existed and requested a new review of the WCB's latest response. Further mediation by this Office led to the location and disclosure of other records in May of 2000, including some duplicates of previously disclosed records. The WCB also applied s. 22 to some third-party personal information in the records it disclosed at that time.

[8] The applicant sent another request for his claim file in May 2000, providing details of other records he believed the WCB had on his claim but which the WCB had not yet sent to him. In mid-June 2000, the WCB responded by saying that it would treat this request as a request for updated disclosure and that it would combine this request with the March 2000 request. It also sent the applicant further records – specifically, handwritten nurses' notes – from which it severed some third party personal information

under s. 22 of the Act. It said that it had been able to locate these further records from information the applicant provided in his May request letter.

[9] In response to his repeated requests for file-tracking documents, the WCB told the applicant that, as his file was an electronic file (or "e-file"), there were no file-tracking records. The WCB told the applicant that, since authorized WCB staff are able to access e-files from their computers, it is not necessary to track access to such files. The WCB said that it maintains file-tracking records only in relation to its paper files. The WCB also provided some information on the names of WCB staff that it had inadvertently withheld earlier under s. 22.

[10] The applicant remained dissatisfied with the WCB's various responses and requested, in late June of 2000, that I deal with the issues in dispute in an inquiry. Accordingly, in July 2000, this Office issued a Notice of Written Inquiry to the parties.

2.0 ISSUES

[11] The issues to be decided in this inquiry are as follows:

1. Did the WCB fulfil its duty, under s. 6(1) of the Act, to make every reasonable effort to assist the applicant and to respond without delay openly, accurately and completely, in its search for records?

2. Was the WCB required under s. 22 to withhold third party personal information from some of the records?

[12] Although s. 57 of the Act is silent with respect a request for review respecting s. 6(1), previous orders have established that the burden of proof is on the public body. Under s. 57(2) of the Act, the applicant has the burden of establishing that disclosure of the severed information would not be an unreasonable invasion of a third party's personal privacy.

3.0 DISCUSSION

[13] **3.1 Duty to Assist** – Section 6(1) of the Act reads as follows:

> 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.

[14] I have discussed in a number of orders the obligations of a public body under s. 6(1) of the Act in searching for responsive records and the standards and the evidence that public bodies should provide in inquiries such as this. See, for example, Order 00-15, [2000] B.C.I.P.C.D. No. 18, Order 00-26, [2000] B.C.I.P.C.D. No. 29, and Order 00-32, [2000] B.C.I.P.C.D. No. 35. There is no need to repeat myself here.

[15] **3.2 Did the WCB Meet Its Search Obligations?** – The applicant says he is not satisfied that the WCB has thoroughly searched for records. It is clear the WCB's piecemeal discovery and disclosure of records, outlined above and below, has not inspired his confidence.

[16] For its part, the WCB submits that it has fully complied with the applicant's access request and has now located and disclosed all the records it has concerning the applicant's claim. In support of its case, the WCB filed an 18-page affidavit sworn by Kate Denby, an analyst in the WCB's FIPP Office, in which she described her responsibilities and the procedures she and a colleague followed in responding to the applicant's requests under the Act.

[17] It is necessary to summarize the contents of this affidavit at some length. Kate Denby deposed that she followed normal WCB procedures in referring parts of the applicant's requests to the Records Management Department and in the FIPP Office's handling the formal access requests, for records held outside the claim file. She deposed that, on the first occasion, she contacted the 16 departments within the WCB that normally hold records outside the claim files and that she had been told that only the WCB Ombudsman's office and its X-ray department had records. She went on to depose that the FIPP Office had treated the applicant's March 2000 request as a request for updated disclosure and that another FIPP analyst had handled the formal part of this request. As exhibits to her affidavit, she attached copies of e-mails between the FIPP Office and the 16 WCB departments, in the form of requests for records and responses.

[18] Kate Denby acknowledged in her affidavit that, in response to the applicant's March 2000 request, her colleague had obtained records which she had not received in response to internal requests for records respecting the applicant's December 1999 request. She explained that the applicant himself had sent these records to the relevant WCB departments after her December 1999 search. This is why they were not found originally.

[19] She also acknowledged that the WCB's Rehabilitation Centre had produced records in response to the March 2000 request which had not turned up in relation to the December 1999 request. This was because the applicant had, since the December request, revealed that he had received treatments of which the FIPP Office had been unaware (these treatments include acupuncture, follow-up nursing, physiotherapy and medical rehabilitation). The WCB staff who had provided these treatments had – through oversight, lack of resources and lack of awareness of WCB procedure – not arranged for the related paper-based treatment records to be scanned into the applicant's e-file. The FIPP Office subsequently obtained and disclosed these records, in some cases more than once, to the applicant. Other records in the e-file were revealed when a WCB employee, who was authorized to have access to the applicant's e-file but who had not received training in the use of e-files, learned how to locate the records.

[20] Other searches revealed that another record – a medical report requested by an outside therapist, which the applicant said the WCB should have – had never been sent to

the WCB, although the record itself indicated that it had been copied to the WCB. Kate Denby deposed that it was usual for the WCB to receive only "Intake and Discharge" reports from outside service providers, not interim medical reports to a claimant's personal physician.

[21] She also confirmed that she later had disclosed to the applicant the names of three WCB nurses whose names she had inadvertently severed in an earlier disclosure of nursing logs and that she had severed the names of other WCB claimants from other nursing records – nurses' handwritten notes – before disclosing them to the applicant.

[22] Kate Denby also deposed that the applicant had received full disclosure of his claim file from the Records Management Department on at least three separate occasions from October 1999 to March 2000.

[23] The WCB says in its initial submission that it believed it had located and disclosed all responsive records and had fulfilled its s. 6(1) duty to make reasonable efforts to locate the applicant's records. It says that, by following its normal search procedures and after making use of helpful information supplied later by the applicant, it believes it has discovered all responsive records. It says that it had not knowingly or deliberately withheld records from the applicant and had not withheld information on the existence of responsive records.

[24] At paras. 16-28 of its initial submission, the WCB addresses the thoroughness of its searches. While it acknowledges it was initially unable to locate certain records, it says this was neither intentional nor an attempt on its part to conceal records. Its inability to locate some records at the outset was due, rather, to "internal administrative issues of a more innocent nature, which were brought to the Board's attention through its efforts to assist the Applicant". The WCB also says it is taking steps to address these issues. It also admits these issues delayed its responses and might have given the applicant the impression that it was attempting to avoid disclosure of relevant records. It stresses this was not the case and that it had attempted to provide explanations on numerous occasions to the applicant, to which he was unreceptive.

[25] The applicant is, to say the least, not happy with the WCB's efforts to locate records. He argues, in his initial submission, that the WCB's process of disclosing claim files through its Records Management Department, with its FIPP Office dealing with other records, does not meet the requirements of s. 6(1) of the Act. He argues that the WCB should know where within its system it sent him for treatment and thus who has records outside the claim file. He says the WCB should not shift responsibility for finding his records onto him, by providing information that helps locate records. He claims there are still records he has not received from the WCB, referring principally to records created by two outside rehabilitation service providers.

[26] The applicant also does not accept the WCB's explanations for its initial inability to locate certain records – such as the acupuncture and nursing records – and also argues that the WCB has not complied with the Act's timelines for responding to requests. In

his reply submission, the applicant suggests that the FIPP Office deliberately limited its search for records to the e-file and a predetermined set of departments, a tack that would not yield all responsive records. His reply submission reiterates a number of points made in his initial submission and adds that he has not received all records from two named outside rehabilitation service providers. He says he received only the intake, interim and discharge reports from one service provider. He suggests that the WCB should have contacted these two service providers for records.

[27] The applicant's frustration with the WCB's search efforts and phased disclosures is understandable. An unfortunate series of circumstances made it appear that the WCB did not, initially, make every reasonable effort to search for requested records. I do not, however, agree with the applicant's contention that the WCB has been manipulative nor do I take up his hints that it has been acting in bad faith. The WCB has provided extensive and thorough affidavit evidence on the scope and nature of its search, from the person principally responsible for the searches, as outlined above. While I accept that the WCB initially failed to comply with its s. 6(1) duty in responding to the requests, I am satisfied that it eventually pursued all avenues that could reasonably be expected to yield responsive records and that it made every reasonable efforts to locate responsive records. I also accept the WCB's representation that it has taken steps to address the issues which led to the initial difficulties in locating some of the responsive records. Accordingly, although I must find that the WCB did not fulfill its s. 6(1) duty to make reasonable efforts to search for responsive records at the time it responded to the applicant, its subsequent search efforts have been satisfactory and no order is necessary under s. 58(3) of the Act.

[28] In arriving at this conclusion, I have considered the applicant's claim that there are still records he has not received, *i.e.*, treatment records created by the two outside rehabilitation service providers. The WCB does not address the issue of records held by these service providers, except to say that it normally receives only the intake and discharge reports from such service providers. I infer from this that the WCB regards any other treatment records in the hands of outside service providers as not in its control or under its control and thus not susceptible to an access request under the Act. It may well be that the applicant can obtain such records directly from the service providers, as he appears to have done on some past occasion (judging by his initial submissions and some of the records attached to it). At all events, the issue of custody or control is not before me in this inquiry.

[29] **3.3 Third-Party Privacy** – The WCB withheld, under s. 22(1) of the Act, information related to other claimants found in nurses' handwritten records of patient visits. The relevant parts of s. 22 read as follows:

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

> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
> >
> > (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
> >
> > (c) the personal information is relevant to a fair determination of the applicant's rights,
> >
> > (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,
> >
> > (e) the third party will be exposed unfairly to financial or other harm,
> >
> > (f) the personal information has been supplied in confidence,
> >
> > (g) the personal information is likely to be inaccurate or unreliable, and
> >
> > (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> > (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, … .

[30] The severed records consist of three pages of handwritten notes of visits to the WCB's nurses. Each page has several columns, with a line for the date, followed by separate lines for each person's visit. Each line related to a patient visit includes the patient's name, a brief note of the reasons for the visit and the initials of the treating nurse. The applicant received copies of the three pages containing the lines related to his own visits, together with the lines containing the dates of those visits. The WCB severed the lines of information on the visits of all other patients.

[31] The WCB did not argue a specific subsection of s. 22 in regard to its severing of these notes. My review of the unsevered records shows that the applicant received his own information and that s. 22(3)(a) applies to the withheld information, thus raising a rebuttable presumed unreasonable invasion of personal privacy of the other WCB claimants.

[32] The applicant says in his reply submission he is not interested in the information on the visits of others as recorded in these pages. He is interested in the nurses' logs. The severed information is, in this light, technically not responsive to his request. The applicant has not, in any case, attempted to rebut the presumed unreasonable invasion of personal privacy in this case. In my view, none of the s. 22(2) circumstances is relevant here and I cannot see how other circumstances might be relevant. Since I am satisfied that that s. 22(3)(a) applies to the severed information on these three pages, and since the presumption it raises has not been rebutted, it follows that the WCB correctly decided that s. 22(1) requires it to withhold this personal information.

[33] The applicant also appears to think that the WCB is still withholding the names of WCB nurses on other records, *i.e.*, individual computer log entries of his visits to the WCB nurses. The WCB's initial submission indicates that it has already disclosed this information to the applicant, which it had in any case withheld inadvertently. It is clear the WCB could not withhold, under s. 22, the names of those nurses who had treated the applicant.

4.0 CONCLUSION

[34] For the reasons given above, under s. 58(2)(c) of the Act, I require the WCB to refuse access to the third party personal information that it withheld under s. 22(1) of the Act in the handwritten nurses' notes.

[35] I have found that the WCB did not, at the time of its responses to the applicant, fulfill its duty, under s. 6(1) of the Act, to conduct an adequate search for records. Because I am satisfied that the WCB's efforts ultimately fulfilled its search obligations under s. 6(1), however, no order is necessary under s. 58(3) of the Act.

July 11, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia