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

Order 01-40

****** This Order has been subject to Judicial Review ******

WORKERS' COMPENSATION BOARD

David Loukidelis, Information and Privacy Commissioner
August 23, 2001

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Summary: As agent for an employer, the CLRA made 30 access requests for initial wage rates, and other financial information, from wage loss claims made by employees of the employer to the WCB. The applications arose out of concerns by employers generally that the WCB had, over a number of years, over-estimated initial wage rates for casual workers. WCB refused to disclose such information, relying on ss. 17 and 22. During the inquiry, the WCB abandoned its reliance on s. 17 and relied only on s. 22. The WCB is not required to refuse disclosure of the wage-related information, as disclosure would not, for a number of reasons, unreasonably invade the personal privacy of the employer's workers.

Key Words: personal privacy – unreasonable invasion – employment history – public scrutiny – fair determination of rights – unfair exposure to harm – supplied in confidence – inaccurate or unreliable personal information – unfair damage to reputation

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), (2)(a), (c), (e), (f), (g), (3)(b), (d), (f), (4)(a), (c), (j).

Authorities Considered: B.C.: Order 01-07, [2001] B.C.I.P.C.D. No. 7.

1.0 INTRODUCTION

[1] The right of access to records under the *Freedom of Information and Protection of Privacy Act* ("Act") is being used here to unearth information that may be used to argue that the Workers' Compensation Board ("WCB") should compensate hundreds of British Columbia employers. In the spring of 1998, the Director of Health and Safety for the Construction Labour Relations Association of British Columbia ("CLRA") reviewed a

claim file disclosed by the WCB and discovered what he considered to be an inconsistency between a WCB document known as Training Note 112, on the one hand, and the *Workers Compensation Act* ("WCA") and the WCB's policies on the other. According to the CLRA, the application of Training Note 112 by some WCB adjudicators, since 1979, may have resulted in over-compensation of hundreds of casual-hire construction workers. This is because WCB adjudicators allegedly had, applying Training Note 112, determined date-of-injury wage rates for many workers at levels higher than properly should have been the case under the WCA's and the WCB's policies.

[2] After its discovery of Training Note 112's apparent use, the CLRA asked the WCB to cease using Training Note 112 and to apply a credit to the claims-cost-based assessments levied against the employer of the worker whose disclosed file had revealed the use of Training Note 112. The CLRA says it also successfully appealed that case to the Appeal Division of the WCB. In May of 1999, the WCB announced that it would cease using Training Note 112, a decision that was confirmed in June of that year.

[3] The CLRA asked the WCB to review a group of 100 randomly selected temporary wage loss claims from the years 1979-1999, it appears with a view to evaluating the overall effect of Training Note 112 on over-assessments of employers. Apparently as a result of some discussions between the CLRA and various WCB representatives, the CLRA later changed its approach and asked that a series of individual claims, from just one employer and from between 1979-1999 period, be reviewed and that a decision letter be provided for each claim.

[4] The WCB responded, in September of 1999, by declining to undertake any historical review of claims files. It told the CLRA that – consistent with its general policy on reconsideration of claims – the WCB would, on request, "consider whether grounds for reconsideration exist on individual claims if an employer submits evidence that the claim was adjudicated under Training Note #112". The WCB, soon afterward, accepted the original file, described above, for reconsideration, although the CLRA claims that, at the date of this inquiry, a credit for the over-charge had yet to be applied to the affected employer's assessment rate.

[5] Because the WCB declined to review the representative sample of claims described above, the CLRA made an access request, under the Act, on October 19, 1999. The CLRA's access request took the form of 30 identical letters, each addressed to the WCB's Freedom of Information Coordinator, in which the CLRA requested (expressly on behalf of a named employer "client") the

> … disclosure of the initial wage rate selected for the above referenced claim, information as to whether the rate was based on day of injury earnings or with regard to earnings over a longer period of time and any other information specific to the rationale used in setting the rate.

[6] The request went on to say that, if the "claim's duration exceeded the time period for the wage rate review (8/13 weeks) we would also appreciate receiving identification

of the long term wage rate". The request covered 30 cases involving employees of a single employer.

[7] The WCB's Freedom of Information Coordinator forwarded these requests to the relevant WCB departments "for response under normal course of business procedure". A few months later, however, the WCB's Acting Freedom of Information Coordinator wrote the CLRA and indicated that the access request would be dealt with under the Act after all. Her letter, dated December 16, 1999, indicated she was aware that the CLRA's request had "for the most part received no response".

[8] In a letter to the CLRA dated January 26, 2000, the WCB's Freedom of Information Coordinator refused access to the requested information. She indicated, first, that the refusal stemmed from the fact that the "Board does not have such information". She went on to say, however, that

> … to the extent that the Board possesses information relating to the actual wage rates set on files, the relevant records are excepted from disclosure under sections 17 and 22 of the *Freedom of Information and Protection of Privacy Act*. They are excepted under s. 17 on the ground that their disclosure could reasonably be expected to harm the financial or economic interests of the Workers' Compensation Board. In addition, the information is the personal information of the respective workers in so far as it relates to their employment and wage histories. The Board would consider itself obligated, under s. 22(1) of the *Freedom of Information and Protection of Privacy Act*, to withhold the records on the ground that their disclosure would constitute an unreasonable invasion of privacy of those third parties.

[9] The CLRA promptly requested, under s. 53 of the Act, a review of the WCB's refusal to disclose the requested information. The CLRA also asked for a review of the WCB's alleged delay in responding to the access request. Because the matter did not settle during mediation, I held a written inquiry under s. 56 of the Act.

[10] After the close of the inquiry, I wrote to the WCB and asked it to deliver the responsive records to me. It replied by saying that it had actually retrieved records for only one of the 30 requests and by arguing that Investigation Report 96-006, issued by my predecessor, decided that, because an employer has a right of access to claimants' files through the WCB's appeals-related processes, the employer has no right of access under the Act. If the employer fails to avail itself of the right to disclosure under the WCB's policies, the WCB said, that is the end of it. (This argument is also advanced in the WCB's submissions in the inquiry.) On this basis, the WCB argued, it did not have to respond to any of the 30 requests.

[11] In response, I wrote to the parties on July 19, 2001 and required the WCB, under s. 44(2) of the Act, to deliver to me the records that respond to the one request just described, which the WCB did. I also set out in my July 19, 2001 letter the finding – which is repeated below – that Investigation Report 96-006 does not (and cannot) have the effect the WCB says it does. I therefore required the WCB to search for records that respond to the other 29 requests and said that – pending delivery of those records to me – I would issue an order relating to the one request. I told the parties that any order

necessary to deal with the remaining 29 requests would be issued on my review of the records ultimately delivered to me by the WCB. I have since received and reviewed the other 29 sets of records from the WCB and therefore dispose of all 30 requests in this order.

[12] It should be said at this stage that, although the WCB appears to treat the CLRA employee who signed the access requests as the applicant, the applicant is clearly the CLRA on behalf of one client employer.

[13] I also note here, in passing, that some e-mails disclosed by the WCB to the CLRA have the names of the e-mails' authors and recipients severed. The WCB appears to have applied ss. 17(1) and 22(1) of the Act in doing so. Although the circumstances of each will govern, I note in passing my (to say the least) extreme skepticism that it is, in general, appropriate, to sever the names of e-mail authors and recipients under either section (especially s. 17(1)) where, as here, they are WCB employees carrying out employment tasks.

2.0 ISSUES

[14] Although the CLRA raised the question of delay in its request for review, and the WCB initially took the position that it did not have the information requested by the CLRA, both of those issues fell by the wayside during mediation. The Notice of Written Inquiry says that the only issues to be considered in the inquiry are the WCB's reliance on ss. 17 and 22 of the Act. In its initial submission, however, the WCB says it "does not now rely on either section 6(2) or 17 of the Act" and that it "relies solely on s. 22". It is not, therefore, necessary for me to consider s. 17, although I consider the WCB's decision to abandon s. 17 was wise.

3.0 DISCUSSION

[15] **3.1 Merits of WCB's Past Decisions** – A considerable portion of the parties' submissions is devoted to debating the merits of the WCB's setting of wage rates for casual workers in the past. The rise and fall of Training Note 112 provide a prominent theme in both parties' contributions to that debate. None of this discussion is germane to the issues before me. As is discussed below, however, one aspect of this dialogue is relevant, namely the CLRA's contention that the employer on whose behalf it made the 30 requests may, depending on the evidence the CLRA uncovers, be entitled to a reconsideration of the WCB's wage rate decisions on the claims. Beyond that, though, I have nothing to say about whether Training Note 112 was right or wrong, whether it was a factor in the allegedly wrong decisions or whether the WCB has acted appropriately in such matters.

[16] **3.2 Irrelevance of Other WCB Access Procedures** – One theme that is interwoven throughout the WCB's s. 22 submissions deserves discussion before I turn to the s. 22 analysis itself. The WCB has argued that, because other access procedures are available to the employer as part of the WCB's ordinary appeal processes, access through

the Act is not available. The following discussion reproduces the reasons I gave for rejecting this argument in my July 19, 2001 letter to the parties.

[17] At para. 67 of its initial submission, the WCB says that the CLRA, "on behalf of the employer … it represents", wishes the WCB to review all of the claims described in the 30 access requests to determine whether the WCB erred in setting initial wage rates. At para. 68, the WCB acknowledges that it will review cases where the CLRA can "supply evidence to the Board that the claim was adjudicated using" Training Note 112. The WCB says, however, that it has no obligation to review claims, or even to review the 30 claims covered by the CLRA's access request, since the CLRA "has the onus to establish not only that the training note was used, but also that there are further grounds warranting reconsideration" (para. 69).

[18] The CLRA has requested access to information, on behalf of its client employer, so that it can, as the WCB requires, supply evidence that claims were or may have been adjudicated using Training Note 112. The WCB nonetheless seeks to cut off the flow of that very information on the basis, articulated at paras. 72 and following of its initial submission, that the

> … employers [*sic*] at one time could have established a right to the information sought. During the appeal period relating to the decision setting the wage rate and then only if the employer was a party to an appeal of that issue, an employer could receive the information pursuant to the rules of natural justice.

[19] The WCB says that "outside of that clear context, the employer does not have a right to the information sought". The WCB's position comes down to saying that, unless an employer seeks disclosure of information during an appeal period, the loss of that right ousts any access right under the Act. Some might observe that this threatens to make the WCB's commitment to reconsideration of such cases a hollow promise, not least because the issue regarding Training Note 112 may not have come to light until after any appeal periods are likely to have expired.

[20] At all events, the WCB's position is not tenable. Section 2(2) of the Act stipulates that the Act "does not replace other procedures for access to information". This ensures, in the context of the WCB's activities, that anyone involved in decision-making and appeal processes conducted by the WCB is not prevented from getting access to information through those processes on the basis that the person could or should seek access under the Act. By contrast, the WCB's position is that, because access to the requested information was (or may have been) available through WCB processes, access under the Act is now barred. This stands s. 2(2) on its head. Nothing in the Act supports this position and the WCB has not appealed to any statutory authority – which would have to expressly override the Act – to support its position.

[21] I also have no hesitation in concluding that the WCB's reliance on the Report is without merit. At para. 74 of its initial submission, it says that it "was established by the former Commissioner" in Investigation Report P96-006 that the employer "does not have a right to the information sought" outside the WCB's disclosure processes. It argues that

the need-to-know criterion articulated in the Report "should still be the standard for disclosure of a worker's personal information" for purposes other than "an existing appeal" and that there is no need for the employer here to know the requested information. The employer therefore should not be given access under the Act.

[22] There is no need to discuss the Report in detail. It addressed routine disclosure by the WCB of workers' personal information in claims files for the purposes of adjudications and appeals. My predecessor considered the WCB's then-existing policy on disclosure of claims file contents. The WCB at the time took the position that the Act did not apply to such disclosures. My predecessor concluded the Act did apply to the WCB's disclosure of personal information through such processes. He recommended that employers be given access to a worker's personal information only on a need-to-know basis, notably for the purposes of adjudications or appeals.

[23] The Report had nothing to do with disclosure of personal or other information in response to access requests under the Act. It certainly did not establish that the employer has no right of access under the Act. The Report simply does not deal with the present situation.

[24] Moreover, even if the WCB's contention about the Report was accurate, it would require me to accept that, in the absence of any evident statutory authority to do so, my predecessor's findings and recommendations in the Report have effectively ousted the explicit right of access under the Act. That view is not sustainable, since the Act does not give the commissioner the authority to decide that, because some kind of alternative process for disclosure exists, the right of access under the Act is vitiated. On this basis alone, I would decline to adopt the Report even if it says what the WCB contends it says.

[25] For the above reasons, I find that the Report does not somehow eliminate the WCB's clear statutory obligation to respond to the 30 access requests.

[26] A related point made by the WCB is that, because the monthly claims cost summaries that it routinely provides to employers supposedly contain the requested information – something the CLRA disputes – the CLRA has no need to "obtain personal information from claim files in order to obtain this information." It is, the WCB says, "already available to the employers."

[27] The WCB relies in this respect on the affidavit of Deepak Kothary, its Director of Assessments. According to Deepak Kothary, the WCB sends employers a monthly "statement of any workers compensation claims costs incurred in the previous month with respect to the employers' workers". He also deposed, at para. 3, that if

> … in any month any employee of a particular employer receives wage loss compensation from the Board, the employer receives notification of this fact, including the amount, in the next month's claims cost summary that is sent to that employer.

[28] The CLRA argues, at p. 2 of its reply submission, that monthly claims statements provide the total payments to workers for compensation and rehabilitation over the relevant period. It says it would be difficult for the employer to identify the actual wage rate used to set compensation because the aggregate sum includes this variety of components, which cannot separately be identified. The CLRA also points out that these statements do not include all of the information covered by the access requests in issue here. In any event, even if the WCB is correct in saying that the monthly claims statements provide the employer with the information that it seeks, the WCB's obligation to respond to the employer's request under the Act is not thereby eliminated.

[29] **3.3 Outline of Section 22** – The purpose of s. 22(1) of the Act is to prevent unreasonable invasions of the personal privacy of individuals whose personal information is covered by a request for access to records. The section does not protect against all invasions of personal privacy. It only guards against unreasonable invasions of personal privacy. Public bodies must conduct the analysis of whether disclosure of personal information will unreasonably invade an individual's personal privacy according to the criteria prescribed in s. 22. The relevant parts of that section read as follows:

> 22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
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> …
>
> (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
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> …
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the

> extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (d) the personal information relates to employment, occupational or educational history,
>
> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
>
> …
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> (a) the third party has, in writing, consented to or requested the disclosure,
>
> …
>
> (c) an enactment of British Columbia or Canada authorizes the disclosure,
>
> …
>
> (j) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the application for the benefit or is referred to in subsection (3) (c).

[30] Most of the focus in the following discussion necessarily falls on the relevant circumstances, including those set out in s. 22(2). Because the CLRA has raised three aspects of s. 22(4), however, I will deal with those first.

[31] **3.4 Does Section 22(4) Permit Disclosure?** – The CLRA argues that ss. 22(4)(a), (c) and (j) each permit disclosure of the disputed information. On the first point, the CLRA says that workers consent to disclosure to their employer of personal information relating to their claim when they apply for compensation. It points out that the WCB's application form, known as Form 6, provides that an applicant worker acknowledges that the WCB may "disclose information from my claim to my employer for purposes of appeal, or may disclose such information to others in accordance with the law, including the *Freedom of Information and Protection of Privacy Act.*" It also points out that the Form 6 gives the WCB authority to disclose the worker's claim information to a "designated advocate of my union or similar association."

Has the Affected Worker Consented to Disclosure?

[32] For its part, the WCB says s. 22(4)(a) does not apply "to the information relating to any particular claim" because the CLRA has "not established that any third party has

consented in writing to the release of their information" in the case before me. The WCB controls all of the information on this point – in the form of completed and signed Form 6 applications – but resists the application of s. 22(4)(a) on the basis that the CLRA has not proved consent by that means or otherwise. The CLRA has no means of getting access to the Form 6 applications, although individual employers may have some or all of the signed applications for their employees.

[33] Although I would be prepared to infer that, in the ordinary course of business, the WCB will not process a compensation application unless an application form has been signed by the worker, I am not prepared to infer that the workers in this case signed a Form 6 in the terms outlined above, as only 2 of the 30 sets of records the WCB provided to me included Form 6s. It is not, in any event, necessary for me to decide this point, since I have on other grounds decided that s. 22(1) does not require the WCB to refuse disclosure.

Does an Enactment Authorize Disclosure?

[34] I reject the CLRA's argument that the disputed information is covered by s. 22(4)(c), which provides that it is not an unreasonable invasion of a third party's personal privacy if "an enactment of British Columbia or Canada authorizes the disclosure." The CLRA bases this argument on the WCB's policy, as set out in its *Rehabilitation Services and Claims Manual*, and s. 90 of the WCA. Section 90 confers a right of appeal to the Workers' Compensation Review Board on workers, employers and others. The CLRA argues that these sources, in combination, entitle employers "to see the claim file under the rules of natural justice", at least to the extent that the employer requires access to relevant information in the claim file.

[35] The fairness considerations expressed through the rules of natural justice are accommodated by s. 22(2)(c) of the Act, but they do not trump s. 22(1), a fact that is implicitly acknowledged in the CLRA's submission on this point. In any case, neither the WCB's policy nor s. 90 of the WCA serves for the purposes of s. 22(4)(c). Section 22(4)(c) does not apply.

Is Compensation A Discretionary Benefit?

[36] Last, the CLRA argues that s. 22(4)(j) applies, on the ground that the disclosure would reveal "details of a discretionary benefit of a financial nature granted to a third party by a public body." I agree with the WCB that compensation of the kind in issue here is not a "benefit" within the meaning of s. 22(4)(j). It is a statutory entitlement that where a worker has established his or her right to compensation under the provisions of the WCA. For the same reason, it is not a "discretionary" benefit within the meaning of s. 22(4)(j).

[37] I note as well that the information sought by the CLRA would not reveal "details of" any benefit, *i.e.,* wage-loss compensation paid to the various workers. It would, instead, reveal details relevant to calculation of the wage-loss compensation. Section 22(4)(j) does not apply.

[38] **3.5 Unreasonable Invasion of Personal Privacy** – Although the CLRA contends that none of the presumed unreasonable invasions of personal privacy created by s. 22(3) applies, I agree with the WCB that s. 22(3)(d) applies. Because the requested personal information has to do with earnings and other employment-related information, I am persuaded that it is part of the employment history of the various workers. Section 22(3)(d) therefore applies. I also consider that s. 22(3)(f) applies, since the personal information in question describes, in part, information pertaining to the "income" of the various workers.

[39] Since two of the presumed unreasonable invasions of personal privacy apply under s. 22(3), it is necessary to consider whether any of the relevant circumstances – including those set out in s. 22(3) – favour disclosure of, or refusal to disclose, the personal information.

Would Disclosure Promote Public Scrutiny of the WCB?

[40] The CLRA claims disclosure of the information would promote public scrutiny of the WCB. It says, at p. 12 of its initial submission, that the WCB has

> … treated non-union claimants and union signatory employers in a discriminatory manner by subjecting unionized construction workers to a different standard than all other workers.

[41] It says this "has occurred as a result of adjudicators' use of a practice document", *i.e.,* Training Note 112. The WCB responds by arguing "there is no compelling reason" to disclose the information in order to subject the WCB to public scrutiny. It says the CLRA's concerns relate to a "training note and a policy that are already a matter of public knowledge" and that the CLRA's concern about them is "unfounded". (If this latter contention is correct, one wonders why the WCB has agreed to reconsider cases in which it is shown Training Note 112 was used to set date of injury wage levels.)

[42] Contrary to what the WCB says, nothing in s. 22(2)(a) requires there to be a "compelling reason" for disclosure in the service of public scrutiny before that relevant circumstance can apply. I do agree with the WCB, however, that the fact that its adjudicators in the past used Training Note 112 in a way that may, or may not, have adversely affected the interests of certain employers is already known. Disclosure of the personal information to the CLRA might advance the interests of affected employers, but would not advance public scrutiny of the WCB as contemplated by s. 22(2)(a). I find that s. 22(2)(a) is not a relevant circumstance in this case.

Fair Determination of Rights

[43] The CLRA argues that the personal information "is relevant to a fair determination of the applicant's rights" within the meaning of s. 22(2)(c). At p. 12 of its initial submission, the CLRA says the following:

> Incorrect wage rate setting has had a direct impact on union signatory construction employers' claims cost records and resultant assessment rates under the WCB's Experience Rating Assessment (ERA) program. When claimant wage rates are incorrectly set too high, the employer's assessment rate will also be incorrectly increased. This reduces the likelihood of the unionized construction employers to successfully bid on projects (labour costs are typically 40 - 60% of the cost of a project). We anticipate that further investigation will reveal that **at least 10 - 15%** of the affected employers left the industry as a result of being unable to successfully bid projects. [original emphasis]

[44] According to the WCB, neither the applicant nor the "employers he represents" have any "rights to be determined". The WCB says that the "employers [*sic*] at one time could have established a right to the information sought", during the appeal period provided by the WCB in relation to each decision setting a wage rate, but "then only if the employer was a party to an appeal of that issue" (para. 72, initial submission). At para. 80 of its initial submission, the WCB says the following:

> The Applicant, or the employers [*sic*] he represents, at one time had a right to appeal the wage rate decision and if the evidence supported it, to a finding that the initial wage rate should not stand. Had any employer filed such an appeal, they would have been entitled to obtain the information described in paragraph 37 above, as it would be relevant to a determination of that right. The Applicant has not established that any of the claims with respect to which he seeks information was the subject of an appeal at the time of his requests to the Board. Thus the Applicant has not established that the information is relevant to a determination of any "right" of an employer.

[45] Because the appeal periods have expired, the WCB argues, there are no existing rights of the employer that qualify for the purposes of s. 222(2)(c).

[46] As the WCB's inquiry materials confirm, the WCB has committed, by way of its September 15, 1999 letter to the CLRA, to consider whether grounds for reconsideration exist respecting individual claims. The relevant passage in the WCB's letter reads as follows:

> The Board has decided that no historical review of claim files such as you have requested should be undertaken. In keeping with its general reconsideration policies, the Board will upon request consider whether grounds for reconsideration exist on individual claims if an employer submits evidence that the claim was adjudicated under Training Note #112. If such grounds exist, the claim will be reconsidered on the merits of the case.

[47] Of course, in this case, the WCB seeks to resist disclosure of the very information the CLRA says it requires in order to fit within the confines of this earlier commitment by the WCB. At all events, I am satisfied that the employer-client on whose behalf the CLRA has requested the records in issue here has a 'right' within the meaning of s. 22(2)(c) and that the requested personal information is relevant to a fair determination

of that right through the process contemplated in the WCB's September 15, 1999 letter. I am also satisfied that, although the CLRA is the nominal applicant in this case, the employer on whose behalf it expressly made the request is to be treated as if it were the applicant for the purposes of the section. That employer's right to a reconsideration is, in my view, covered by the criteria I articulated in Order 01-07, [2001] B.C.I.P.C.D. No. 7, at para. 31. I have decided that s. 22(2)(c) is a relevant circumstance in this case and that it favours disclosure.

Unfair Exposure to Financial or Other Harm

[48] The CLRA contends that the third-party workers whose personal information is in issue will not be exposed unfairly to financial or other harm, which means that s. 22(2)(e) is not a relevant circumstance here. It says that, where the WCB has incorrectly relied on Training Note 112, the WCB would be unlikely to try to recover any overpayment from a worker, since the error would be the WCB's.

[49] In para. 92 of its initial submission, the WCB argues that disclosure of this information might result in "a prospective reduction in their compensation payments." It retracted this submission in its reply submission, since the wage loss payments in question are short term, not long term pension entitlements. In any case, I note that, at p. 90 of its initial submission, the WCB cited its RSCM Policy #48.41 and said that it would not in any case "attempt to collect any resulting overpayment from the worker." The WCB's policy of not attempting to collect overpayments from workers in cases such as this is sufficient to dispose of the contention that workers would unfairly be exposed to financial harm.

[50] Further, it is not clear to me how recovery of overpayments to workers would necessarily expose them to "harm", much less unfairly, as contemplated by s. 22(2)(e). If a public body pays money to someone who is not lawfully entitled to receive it, how is it (in general) harmful to the recipient for that payment to be recovered? How is it, at the very least, unfair to expose someone to recovery of an overpayment of public funds through disclosure of his or her personal information? This is not to say, of course, that recovery of overpayments would never be harmful. For example, a recipient might, acting reasonably, have changed his or her financial position in reliance on the overpayment. This is recognized as a defence against recovery of mistaken payments under the law of restitution. But it cannot plausibly be suggested that – aside from the WCB's policy not to recover overpayments – the prospect of recovery is, in general terms, an unfair exposure to harm for the purposes of s. 22(2)(e). I find that s. 22(2)(e) is not a relevant circumstance in this case.

Has the Personal Information Been Supplied in Confidence?

[51] According to the CLRA, wage information "is generally supplied to the Board by workers and employers" and only WCB employees, the worker, the worker's representative, the employer's representative and the employer have any right of access to that information for the purposes of the WCB's processes. The WCB did not directly address this point.

[52] It seems to me the wage-related information is information not generally, or publicly, available, but that does not necessarily mean it is "supplied in confidence" as contemplated by s. 22(2)(f). I note that this access request is made by the CLRA on behalf of the employer of those workers whose personal information is in dispute. I therefore have considerable hesitation in saying that the information is "supplied in confidence" as between the workers, on the one hand, and their employer on the other. In the absence of any better evidence on the point, however, I decline to make any finding on the relevance of s. 22(2)(f).

Inaccurate or Unreliable Information?

[53] According to the CLRA, the wage rate information is not likely to be inaccurate, for the purposes of s. 22(3)(g), since it is provided to the WCB by both the worker and the employer. It notes that the worker, in applying for compensation, certifies that the information given to the WCB for the purposes of the application is "true and correct".

[54] The WCB's submissions on s. 22(3)(g), in its initial submission, read as follows:

> 100. With respect to (g), the consideration as to whether the personal information is likely to be inaccurate or unreliable is relevant to the consideration of whether the presumption that disclosure of the information would constitute an unreasonable invasion of privacy can be rebutted.
>
> 101. The personal information may not be complete. The Board submits that the Applicant should have to establish that an adjudicator in any particular case had recorded their entire thought and analytical process. In other words, the Applicant should have to establish that the information sought included a clear description as to whether and how the adjudicator applied Board policy using their discretion.
>
> 102. It is submitted that the Applicant cannot do this and therefore cannot establish that the information is complete or accurate on that issue. Therefore the Board submits that this mitigates against the usefulness of the information to the Applicant.

[55] As I understand it, the WCB argues that the personal information requested by the CLRA may not be complete, which would (it seems) make it "inaccurate or unreliable" for the purposes of s. 22(2)(g). The WCB has not backed up this argument with any evidence or further argument. It seeks instead to burden the CLRA with the onus of establishing completeness. The WCB also seeks to require the CLRA to establish that the information withheld by the WCB includes some sort of "clear description" as to whether or how the WCB's own adjudicator applied WCB policy. Quite how the CLRA could do any of this without having access to the very information in dispute is not clear to me. I decline to do as the WCB asks. The WCB's contention that the CLRA should be required to show that an adjudicator has, in any given case, "recorded their [*sic*] entire thought and analytical process" is similarly untenable.

[56] Seeing nothing in the material to support the conclusion that the requested personal information is likely to be inaccurate or unreliable, I find that s. 22(3)(g) is not a relevant circumstance in this case.

[57] **3.6 Can the Information be Released?** – I have concluded that only the relevant circumstance described in s. 22(2)(c) applies here and that it favours disclosure of the personal information to the employer, through the CLRA. I am persuaded that this consideration alone is sufficient to rebut the presumed unreasonable invasions of personal privacy created by ss. 22(3)(d) and (f).

[58] I am also persuaded that the personal information can be disclosed to the CLRA, as agent for the employer, on a basis separate from this. It is relevant, in my view, that the personal information in question here is, while related to employment history and income, requested by the employer of the workers in question. It is also relevant that the requested information is, it appears, somewhat dated and is not current. In this light, I conclude that disclosure of this information to the employer would not unreasonably invade the personal privacy of the workers.

[59] I find that the WCB is not required by s. 22(1) of the Act to refuse to disclose the personal information.

[60] **3.7 Names of Workers' Health Practitioners** – When it sent me the records that respond to the first request for which it retrieved records, the WCB said the following:

> Please note that on the *Application for Compensation & Report of Injury or Industrial Disease*, the Board takes the position that the information under box # 8 must be withheld under s. 22(1) of the Act. That information sets out the names of the worker's health practitioners.

[61] The WCB did not say whether this argument is aimed at the privacy of the worker or of the health practitioner (in this case, a doctor whose name and business address are set out in box 8). It is far from clear how disclosure to the employer of the name of the worker's doctor, and the doctor's business address, would unreasonably invade the personal privacy of the worker. Nor is it at all clear how disclosure of this information to the employer of the worker would unreasonably invade the personal privacy of the doctor, since it merely gives the name and business address of the doctor. In any case, the CLRA has made it clear that it does not wish to have this kind of information, so it is not necessary for me to decide the issue.

4.0 CONCLUSION

[62] For the above reasons, under s. 58(2)(a) of the Act, I require the WCB to give the CLRA access to personal information in the 30 sets of responsive records consisting of the initial wage rates selected for the workers' claims, information as to whether the rates were based on date-of-injury earnings or with regard to earnings

over a longer period of time and any other information in the records that is specific to the rationale used in setting the rates.

August 23, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia