



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

Order 02-12

WORKERS' COMPENSATION REVIEW BOARD

David Loukidelis, Information and Privacy Commissioner
March 15, 2002

Quicklaw Cite: [2002] B.C.I.P.C.D. No. 12
Document URL: <http://www.oipcbc.org/orders/Order02-12.pdf>
Office URL: <http://www.oipcbc.org>
ISSN 1198-6182

Summary: The applicant requested all records relating to him at the WCRB. The WCRB correctly decided that certain of the responsive records are excluded from the Act's scope by ss. 3(1)(b) and (c). The WCRB's search for records was adequate and met its s. 6(1) duty. The WCRB also correctly decided that other records and information were excepted from disclosure by ss. 14 and 22 of the Act.

Key Words: duty to assist – adequacy of search – respond openly, accurately and completely – every reasonable effort – solicitor client privilege – personal privacy – unreasonable invasion – opinions or views – submitted in confidence – employment history – fair determination of rights – unfair damage to reputation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(b), (c), 6(1), 14 and 22.

Authorities Considered: B.C.: Order No. 226-1998, [1998] B.C.I.P.C.D. No. 19; Order No. 297-1999, [1999] B.C.I.P.C.D. No. 10; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 00-16, [2000] B.C.I.P.C.D. No. 16.

Cases Considered: *M.N.R. v. Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *Stark v. Auerbach et al.*, [1979] 3 W.W.R. 563 (B.C.S.C.).

1.0 INTRODUCTION

[1] On August 5, 1999, the applicant in this case made an access request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Workers' Compensation Review Board (WCRB) for "all records at the Review Board related to me." On April 20, 2000, the applicant made a request under the Act to the Ministry of

Skills Development and Labour (“MSDL”) and requested “a copy of all records concerning myself, and in particular but not specifically related to [*sic*] the Workers’ Compensation Review Board.” On September 11, 2000, the MSDL forwarded the applicant’s access request to the Ministry of Attorney General (“MAG”), which treated it as a new request as of that date.

[2] All three public bodies disclosed records to the applicant. In each case, the applicant was not satisfied with the public body’s decision to withhold some information or records and was not satisfied with the adequacy of their searches for records. The applicant lodged three requests for review with this Office and, mediation having failed to resolve the issues, the applicant and all three public bodies agreed to consolidate the three review processes into one inquiry under Part 5 of the Act. Because three separate public bodies are involved, however, and the issues involved differ slightly in some respects, this order sets out most of the relevant background and law applicable to all three requests, but disposes of those issues involving the WCRB only. The issues involving the MSDL and the MAG are disposed of in, respectively, Order 02-13, [2002] B.C.I.P.C.D. No. 13, and Order 02-14, [2002] B.C.I.P.C.D. No. 14, which I have released concurrently with this order.

[3] As for the WCRB’s handling of the applicant’s request, it responded to the applicant on December 14, 1999. It disclosed records to him, but severed information from some under ss. 3(1)(c), 13, 14 and 22 of the Act. The applicant then requested a review of the WCRB’s decision and, under s. 6(1), of the adequacy of its search for records.

[4] On February 14, 2000, the WCRB disclosed further records to the applicant, but withheld some under ss. 3(1)(b) (it now appears), 14 and 22. Four further disclosures by the WCRB occurred during September 2000 through January 2001. As a result of one of these disclosures, s. 13 is no longer in issue in this case.

2.0 ISSUE

[5] The issues in this inquiry are as follows:

1. Did the WCRB discharge its duty to assist the applicant under s. 6(1) by conducting an adequate search for records?
2. Are the records the WCRB says are excluded from the Act’s scope by ss. 3(1)(b) and (c) of the Act excluded by those sections?
3. Is the WCRB authorized to refuse to disclose information under s. 14 of the Act?
4. Is the WCRB required by s. 22 of the Act to withhold personal information?

[6] Consistent with previous orders, the WCRB has the burden of proof regarding the first two issues. Under s. 57(1) of the Act, the WCRB has the burden of proof with respect to the third issue, while s. 57(2) provides that the applicant has the burden of proof with respect to the last issue.

[7] At para. 8 of his reply submission the applicant asks that I “request the production of any and all legal opinions prepared or produced by the A.G. for the Review Board between 1990 and 1998”, apparently because the applicant “believes that there will be none other than ... [the] opinion which has become the subject of this inquiry.” This is, in effect, a new access request and I have not dealt with it in this inquiry. I will also note here that I have considered it neither appropriate nor necessary to consider the applicant’s argument, raised here apparently for the first time, that ss. 6(1) and 8 require the WCRB to provide him with a list of responsive records.

[8] I will note here that the applicant’s submissions in this inquiry included, in several places, copies of material generated during mediation, or information about mediation, by this Office. The WCRB’s submissions also referred to mediation-period communications. This is not permitted without the consent of all other parties, as the Notice of Written Inquiry and this Office’s policies and procedures for inquiries, make plain. Since there is no evidence that either party consented to inclusion of such material, I have not considered it in my deliberations here, or in Order 02-13 and Order 02-14, and it has not formed part of my decision in this or those other orders.

[9] I will also note here that, as is the case in Order 02-13, the WCRB interpreted the applicant’s access request to cover records relating to him in a personal capacity, as opposed to any records in which his name appears. The applicant has not challenged this, in my view, entirely reasonable interpretation of the request.

3.0 DISCUSSION

[10] **3.1 Adequacy of Search** – Section 6(1) of the Act requires public bodies to make every reasonable effort to respond openly, accurately and completely to an applicant’s access request. This duty includes an obligation to conduct an adequate search for responsive records.

[11] The standard to be met has been set out in many orders. Most recently, in Order 02-03, [2002] B.C.I.P.C.D. No. 3, I confirmed that the Act does not impose a standard of perfection when it comes to searching for records. It is well established, however, that a public body must, in searching for records, do that which a fair and rational person would expect to be done or consider acceptable. The search for records must be thorough and comprehensive. In an inquiry such as this, the public body’s evidence should describe all potential sources of records, identify those that were searched, and identify any that were not searched (in the last case, with reasons for not searching a source also being provided). The public body’s evidence should also describe how the searches were carried out and how much time the public body’s staff spent searching for records.

[12] The applicant – who does not bear the burden of proof under s. 6(1) – asserts that “documents which are supposed to come from” the WCRB are “[s]till outstanding” (para. 43, initial submission). He does not refer to any circumstances that support his apparent belief that outstanding records exist and have not been disclosed. He does say, however, that the WCRB should be required to “provide a complete list of all records in their possession, or ones that had been in their possession or control, with sufficient

particulars to identify them” (para. 46, initial submission). I will say at once that, although there may be an extra-ordinary case in which such a list is required, the Act does not require a public body to produce such a list. There is certainly no such duty here.

[13] For its part, the WCRB points out, at para. 5.04 of its initial submission, that from early on it told the applicant it was interpreting his access request “as referring to matters of a personnel or personal nature and not as a request for every document in which the Applicant’s name appeared.” The WCRB also points out that the applicant has not challenged that interpretation, which formed the basis for its response to his request. While the basis for the applicant’s contention that the WCRB has more records is not clear, if it is predicated on a belief that his access request should have been interpreted more broadly, it is too late for him to impose that belief on the WCRB in this inquiry.

[14] I do not propose to recite the particulars of the WCRB’s evidence in support of its position that it conducted an adequate search for records. In support of its position, the WCRB relies on affidavits sworn by the following individuals:

1. affidavit of Sarah Sleigh, who is an acting executive administrative assistant with the WCRB;
2. affidavit of Noni Yamake, who is an assistant to WCRB tribunal members; and
3. affidavit of Douglas Strongitharm, a WCRB Vice-Chair.

[15] WCRB staff searched the applicant’s personnel file, the WCRB’s general administrative files for 1998 and 1999, and its archived files “from previous years” (para. 5.07, initial submission). Despite this, a few more records were found during a second search of the WCRB’s files. It also appears that a number of other records were unearthed in later searches, searches prompted by the applicant’s ongoing concerns that not all records had been found.

[16] In the case of the further discoveries, however, the WCRB says the records it found and disclosed (in some cases subject to severing) were disclosed even though they did not, technically, respond to the applicant’s request as described above. It says it provided these additional records in the interests of assisting the applicant as much as possible, consistent with its general s. 6(1) duty to assist. The WCRB argues that it cannot be faulted for its initial search because it later found and disclosed records that went beyond the original request.

[17] Having reviewed the affidavit evidence and the disputed records at some length, I am persuaded that the WCRB has discharged its s. 6(1) obligation to conduct an adequate search for records.

[18] I have reached this conclusion despite the fact that additional responsive records were discovered during the WCRB’s second search. It is clear from the evidence that the few records that were discovered at that time were found in a location that could not

reasonably have been identified by a knowledgeable and diligent employee. Those records had not been entered into the WCRB's filing system and had, in effect, been (I accept, innocently) squirrelled away in the bottom of a filing cabinet. Although this may reflect poorly on the WCRB's past – and not, one would hope, present – records management practices, in the circumstances I am satisfied that the failure to discover them the first time around did not mean the WCRB failed in its s. 6(1) search duty. This is not to say that public bodies can expect to succeed under s. 6(1) simply because they have failed to adopt and implement proper record-keeping rules and practices. Such systemic lapses are not free passes from responsibility under s. 6(1).

[19] **3.2 Are Certain Records Excluded from the Act?** – Section 3(1) of the Act excludes certain records from the scope of the Act. The relevant parts of that section read as follows:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

- (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;
- (c) a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

[20] The WCRB says that ss. 3(1)(b) and (c) apply to certain of the records that are otherwise responsive to the applicant's access request.

Personal notes, communications or draft decisions

[21] The WCRB says s. 3(1)(b) applies to pp. 33, 90-92, 98-100, 104-105, 188-189, 210-214, 216-218, 219-220 and 221-223 of the records. It also says s. 3(1)(b) applies to a draft decision of the WCRB, a copy of which is found at Exhibit "J" to the affidavit of Douglas Strongitharm, a Vice-Chair of the WCRB. These records also include handwritten notes of members of a WCRB panel respecting particular WCRB hearings, various memorandums from members of the Criminal Injuries Appeal Committee to the Chair of that committee regarding concerns about an issue before a panel of that Committee and a memorandum setting out the author's views about the merits of a particular appeal.

[22] Relying on the criteria set out in *M.N.R. v. Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.) – which I adopted in Order 00-16, [2000] B.C.I.P.C.D. No. 16 – the WCRB says that its "operation" is quasi-judicial and that the Criminal Injuries Appeal Committee ("CIAC") performs quasi-judicial functions. It refers to the *Workers Compensation Act* ("WCA") and the Workers Compensation Act (Review Board)

Regulation, B.C. Reg. 32/86, as support for the conclusion that the WCRB “is an impartial tribunal that is bound by the rules of administrative fairness” (para. 5.27, initial submission). It notes that, in *Stark v. Auerbach et al.*, [1979] 3 W.W.R. 563 (B.C.S.C.), Legg J. (as he then was) held that the board of review formerly established under s. 76 of the WCA functioned in a manner similar to a court in reaching its decisions. The WCRB says that, as was the case with the former review board, WCRB members function in a quasi-judicial capacity when discharging their functions. It also argues that, under the *Criminal Injuries Compensation Act* (“CICA”), and other applicable legislation, the activities of CIAC members are quasi-judicial in nature. In so arguing, the WCRB refers to statutory functions of the WCRB under the CICA.

[23] Having regard to the *Coopers and Lybrand* criteria, and the relevant statutory framework in which the WCRB and CIAC functioned at the relevant times, I conclude that members of those bodies were acting in quasi-judicial capacities when discharging their adjudicative functions. Based on the evidence before me, including the Strongitharm affidavit and the contents of the records themselves, I am also satisfied that s. 3(1)(b) applies to the records the WCRB says it does.

[24] These consist of: hand-written notes setting out the views of a WCRB panel member about evidentiary issues that arose during the course of a WCRB hearing (even though the notes were made by someone other than the panel member, they record the member’s views and are properly characterized as a communication of a person acting in a quasi-judicial capacity); various memorandums to the Chair of the WCRB from members of the WCRB regarding, and containing particulars of, cases before the WCRB; memorandums from the applicant to the WCRB’s Chair regarding, and containing particulars of, cases before the WCRB; a memorandum from the CIAC’s Chair to the applicant about a case; a draft cover page of a WCRB decision, with hand-written notes and comments on it; notes made by a WCRB panel member during an appeal hearing; and a draft WCRB decision showing hand-written changes to the draft.

Records related to an Ombudsman investigation

[25] Section 3(1)(c) of the Act provides that the Act does not apply to a record that is

... created by or for, or is in the custody or control of, an officer of the Legislature and it relates to the exercise of that officer’s functions under an Act

[26] Having been given notice under s. 54(b) of the Act, the Office of the Ombudsman made representations in this inquiry. The material before me supports the finding that, at some point, the Ombudsman investigated a complaint, under the *Ombudsman Act*, respecting the applicant’s dealings with the WCRB. The affidavit of Lanny Hubbard, submitted in support of the Ombudsman’s representations, confirms that Keith Henders was employed by the Office of the Ombudsman as an Ombudsman Officer in 1997 and that Keith Henders at the time had delegated authority to investigate complaints and to receive information and copies of records for the purposes of such an investigation.

[27] The records to which WCRB has applied s. 3(1)(c) are copies of pre-existing records, from the WCRB's files, that were sent to Keith Henders under cover of a February 7, 1997 letter from the WCRB's Chair. The letter confirms that the copies were sent to Keith Henders at his request and the letter reminds the Office of the Ombudsman of the confidentiality requirement of the *Ombudsman Act* "with respect to documents obtained in the course of an investigation."

[28] Douglas Strongitharm's affidavit confirms that the applicant has received copies of all of the enclosures to the 1997 letter, subject to some severing, because "duplicates of those documents appear elsewhere" in the WCRB's files. Strongitharm also deposed as follows, at para. 34 of his affidavit:

All of the above documents have been disclosed to the Applicant (subject to severing), given that duplicates of those documents appear elsewhere in Board [WCRB] files. The Board has not, however, confirmed to the Applicant that the Review Board has previously provided the above records to the Office of the Ombudsman. The above duplicate records to which section 3(1)(c) has been applied has [*sic*] been kept separate and apart from the original copies housed in other Review Board files. That letter, and its attachments, were found in the Chair's file concerning the Applicant.

[29] The essence of the WCRB's position on this issue is found at para. 5.47 of its initial submission:

The Review Board does not dispute that the Applicant is entitled to access the records to which section 3(1)(c) has been applied in this case. Those records have been provided to him. What the Review Board does dispute is that the Act requires that the Review Board confirm to the Applicant which of those records were specifically requested by the Ombudsman's Office. That, the Review Board submits, would be inconsistent with the clear wording and intent of section 3(1)(c) of the Act. A finding that section 3(1)(c) of the Act only applies to records actually in the possession of the Ombudsman, but not to the copies of those same records held by a public body, would mean an applicant could determine, through making a request under the Act to a public body (as opposed to the Ombudsman's Office), which records had been requested by an Ombudsman's Officer during the course of an investigation. That would enable an applicant to scrutinize, through the Act, the investigative process of the Ombudsman's Office. The Review Board submits that this is exactly that sort of situation that section 3(1)(c) was meant to avoid.

[30] This argument was made before I issued Order 01-43, [2001] B.C.I.P.C.D. No. 45. At para. 34 of that decision, I said the following about reservations that my predecessor had expressed in Order No. 297-1999, [1999] B.C.I.P.C.D. No. 10, about the scope of s. 3(1)(c):

It should also be said, at this point, that I share his doubt that s. 3(1)(c) was intended to catch public body records created in the ordinary course of business, before an Ombudsman investigation began, simply because they have been copied to the Ombudsman in connection with an investigation. Any *copies* of such records that have been sent to the Ombudsman will be excluded under s. 3(1)(c) if

they are in the Ombudsman's custody or control and relate to the exercise of the Ombudsman's statutory functions, even where those copies are in a file kept by the public body for the Ombudsman's investigation. To be clear, the reach of s. 3(1)(c) almost certainly does not extend to records that came into existence in the ordinary course of a public body's activities simply because copies of those records are at some stage sent to the Ombudsman's office in connection with a complaint. Copies of those routine records kept in a separate public body file for the Ombudsman matter may well be excluded under s. 3(1)(c), but I very much doubt that originals or other copies located in regular public body files are protected. [original emphasis]

[31] As the above passage from Douglas Strongitharm's affidavit indicates, the records that were sent to the Ombudsman in 1997, for the purposes of the Ombudsman's investigation, were "kept separate and apart from the original copies" in other WCRB files. The 1997 letter, and enclosures, were kept in a separate file maintained by the WCRB's Chair regarding the applicant. For its part, the Office of the Ombudsman notes at para. 11 of its initial submission that

... access to the original material has not been restricted and so the only issue is whether or not the applicant gets to see copies of what the Ombudsman Officer has seen. This goes to the heart of the Ombudsman's investigative process and is what 3(1)(c) is intended to protect.

[32] The WCRB and the Ombudsman object only to the applicant finding out, in effect, which records were sent in confidence to the Ombudsman for the purposes of the Ombudsman's investigation.

[33] I am satisfied that copies of records sent to the Ombudsman in 1997, for the purposes of the *Ombudsman Act* investigation, are excluded from the scope of the Act by s. 3(1)(c). The WCRB's Chair created and maintained a separate file for internal matters involving the applicant including the Ombudsman investigation. This file, it appears, contained copies of records that were created in the ordinary course of WCRB activities, but were placed in the Chair's file for purposes that included the Ombudsman investigation. I find that the Act does not apply to the copies of records that were sent to the Ombudsman's office in 1997.

[34] This finding does not turn on the copies being located in a separate file. Even if the copies, which are attached to the transmittal letter described above, were located in the WCRB's main files, the copies and the transmittal would be covered by s. 3(1)(c). The original records, in the WCRB's operational files, would not be covered. The fact that copies may be found in separate files is merely a circumstance that helps support the WCRB's claim that s. 3(1)(c) applies.

[35] **3.3 Solicitor Client Privilege** – The WCRB says s. 14 of the Act, which authorizes a public body to refuse to disclose the information that is "subject to solicitor client privilege", applies to five records. These are described at para. 5.53 of the WCRB's initial submissions as follows:

- A facsimile cover letter from Michael O'Brien to Gordon Houston dated May 20, 1997;
- Memorandum from Michael O'Brien to Gordon Houston dated May 20, 1997;
- A draft letter dated May 20, 1997 addressed to Gordon Houston from Michael O'Brien;
- Memorandum from Gordon Houston to Michael O'Brien dated May 27, 1997; and
- A facsimile cover sheet from Gordon Houston to Michael O'Brien dated May 27, 1997.

[36] It is well established that s. 14 of the Act incorporates the two kinds of privilege recognized by Canadian law: (1) legal professional privilege protecting confidential communications between lawyer and client related to the seeking or giving of legal advice; and (2) litigation privilege. The WCRB argues, citing the judgement of Thackray J. (as he then was) in *B. v. Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.), that all five records are protected by legal professional privilege. It says they contain confidential communications for the purpose of seeking, formulating or giving legal advice. It says, at para. 5.54 of its initial submission, that the communications were

... the direct product of a solicitor-client relationship, namely, the relationship between Legal Services Branch [of the Ministry of Attorney General] as legal advisors to government, and the Review Board, as the client. The client, being the Review Board, has not waived that privilege.

Are the records privileged?

[37] The existence of a solicitor-client relationship between the WCRB and Gordon Houston, a lawyer employed in the Legal Services Branch of the MAG, is supported by the affidavit of Gordon Houston. That affidavit was submitted here, and also in support of the case for privilege in Order 02-13 and Order 02-14. Further evidence of that solicitor-client relationship is found in the affidavit sworn by Michael O'Brien. I will not recite the evidence of Mr. O'Brien or Mr. Houston, other than to say that they each give evidence that supports the finding that the WCRB and Gordon Houston were in a solicitor-client relationship at the time the disputed records came into existence. They also both give evidence that their communications were confidential and were for the purpose of giving and receiving legal advice.

[38] At para. 6 of his reply submission, the applicant suggests that it "would offend the Review Board's independence as an administrative tribunal, for it to receive legal advice from the Ministry." He also says, "there is no legislation or regulation that establishes the A.G. as legal counsel for the Review Board." I infer this to be an argument that a solicitor-client relationship could not have existed between the MAG and the WCRB, since any such relationship would be contrary to the WCRB's supposed independent status and could not arise without statutory authority for such a relationship. Quite apart from the issue of whether a solicitor-client relationship is always a pre-condition for

solicitor client privilege, I do not accept that the WCRB – even if one assumes it is in some sense independent of government – can only enter into a solicitor-client relationship with a lawyer employed by the MAG if it has statutory authority to do so. I note, in any case, that the MSDL has statutory responsibility for the WCRB’s administration. The applicant’s attempt to preclude solicitor client privilege from arising on these grounds is not persuasive.

[39] I have reviewed the records to which the WCRB has applied s. 14 and have no hesitation in concluding, in light of Houston’s and O’Brien’s evidence, that their contents are related to the giving or seeking of legal advice and that these records are privileged.

Has privilege been waived?

[40] At paras. 20-23 of his initial submission, the applicant argues that any privilege over the five records has been waived:

20. In any event, the MOL [MSDL] has by letter dated September 22, 2000 specifically confirmed a waiver as follows:

The Ministry has confirmed that the WCRB have waived privilege in a letter that the ministry previously withheld under s. 14. ...

21. Likewise, the AG in a letter dated December 18, 2000 specifically waived solicitor/client privilege, and stated:

Enclosed please find a copy of the records pertaining to you which the ministry had initially withheld under s. 13 (policy advice and/or recommendations) and s. 14 (solicitor/client privilege) of the *Act*. These records are now being released to you in their entirety.

Among the records produced under cover of that letter is a telephone memo which includes a note disclosing a legal opinion from Gordon Houston. This disclosure by itself constitutes a waiver of privilege by the AG.

22. The Applicant submits that once the AG waived its claim over solicitor/client privilege, it did so for all purposes and all records.
23. At the very least, these three public bodies must be seen to have waived privilege over Mr. O’Brien’s Memo dated August 8, 1996. It does not assist the AG to state that some of the information had been withheld under s. 14 of the *Act*, without specifying what information was withheld; presumably, the AG simply withheld Mr. O’Brien’s Memo.

[41] The protection of s. 14 will be lost if a public body has waived privilege in accordance with the common law rules on waiver. I discussed those rules at some length at pp. 5-11 of Order 00-07, [2000] B.C.I.P.C.D. No. 7, and will not repeat that discussion. It suffices to reproduce the following passage from R. Manes and M. Silver, *Solicitor-Client Privilege in Canadian Law* (1993, Toronto: Butterworths), at pp. 189 and 191:

Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.

...

Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.

[42] Further, the following passage from the reasons of McLachlin J. (as she then was) in *S & K Processors Ltd. v. Campbell Ave. Herring Processors Ltd.* (1983), 35 C.P.C. 146 (B.C.S.C.) is of assistance here:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Hunter v. Rogers*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Hunter v. Rogers*, supra, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, 14 C.P. C. 246, 11 C.C.L.T. 49, 106 D.L.R. (3d) 340n, 59 C.C.C. (2d) 87 (S.C.C.), it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use the privilege to prevent his opponent exploring its validity.

[43] In light of these principles, I have decided that the circumstances of this case, as they relate to the WCBR, MSDL and MAG, disclose neither an express nor implied waiver of privilege.

[44] First, I do not agree with the applicant's contention, at para. 22 of his initial submission, "that once the MAG waived its claim over [*sic*] solicitor client privilege, it did so for all purposes and all records." It appears the applicant believes that, because some information was released over which solicitor client privilege was or could have been claimed, any such privilege over all records, for all three public bodies, was waived. Even if one assumes that one or more records, or portions of records, that may have been protected by solicitor client privilege were released, it is not enough to support a finding that privilege has been waived over all other records. Release of one record, or part of one record, can waive privilege over other privileged documents, but I am not persuaded this has happened here.

[45] Second, the fact that some communications between the WCRB and the MAG may have come into the MSDL's hands does not mean privilege has been waived. The applicant seems to believe that, because the WCRB, MSDL and the MAG are separate public bodies for the purposes of the Act, it follows that disclosure of a record by one of them to one or more of the others waives privilege. I agree with the MAG's submission that, because the MSDL has statutory administrative responsibility for the WCRB, conveyance to the MSDL of communications between the WCRB and its lawyer at the MAG is not a disclosure outside of government. Even if disclosure to an outsider occurred, there is no basis in the material before me for a finding that there was an intention to waive privilege or that waiver should in fairness be implied.

[46] Third, I disagree with the applicant's contention that, because the s. 14 records are in some sense about him, they should be produced to him even if they are privileged. Nothing in the Act supports this proposition. If a record is privileged under s. 14, to the benefit of a public body, only the public body can decide to disclose the record by waiving the protection of s. 14. The fact that the record is about an applicant, in some sense, does not matter.

[47] **3.4 Third-Party Personal Privacy** – Section 22(1) of the Act requires a public body to refuse to disclose personal information where the disclosure would be an unreasonable invasion of a third party's personal privacy. The WCRB has withheld third-party personal information for the following reasons, as expressed at para. 5.59 of its initial submission:

- To protect the identity of appellants [to the WCRB]. This includes the names of the appellants/worker's [*sic*] themselves, as well as the names of employer's representatives, employers, physicians, and other third parties, along with the addresses of third parties. The names and addresses of third parties (i.e. other than the appellant/worker) and appeal and claim numbers have been withheld on the basis that the disclosure of such information could result in the identification of an appellant/worker;
- To protect the identity of individuals who have made complainants [*sic*] to the Review Board. The names of complainants (whether legal counsel, a representative or a party) have been withheld from the requested records.

[48] The WCRB says the presumed unreasonable invasions of personal privacy created by ss. 22(3)(a) and (d) apply here. Those sections read as follows:

(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,
- ...
- (d) the personal information relates to employment, occupational or educational history,

[49] With respect to s. 22(3)(a), the WCRB argues, at para. 5.69 of its initial submission, that

... because the records at issue provide considerable detail about the medical history, diagnosis, condition, treatment and evaluation of third parties, any disclosure of information that would identify those individuals is presumed by [s. 22(3)(a) of the] Act to be an unreasonable invasion of their personal privacy.

[50] Similarly, WCRB argues that, because the disputed records “provide considerable detail about the employment history of workers”, any disclosure of information that would identify the individuals would disclose their work history and this is presumed by s. 22(3)(d) to be an unreasonable invasion of their personal privacy.

[51] The Board argues that none of the relevant circumstances, including those set out in s. 22(2) of the Act, favour disclosure of this third-party personal information. It argues that two of the relevant circumstances found in s. 22(2) actually favour keeping the personal information from the applicant. The WCRB says, as regards s. 22(2)(a), only that it has no reason to believe that the disputed personal information is relevant to a fair determination of the applicant’s rights. It then argues, at some length, that the disputed personal information “has been supplied in confidence” for the purposes of s. 22(2)(f).

[52] According to the WCRB, all of the disputed personal information was supplied in confidence within the meaning of s. 22(2)(f) because s. 95 of the WCA contains a confidentiality provision in relation to the WCRB’s conduct of appeals. That section reads as follows:

95(1) Officers of the board and persons authorized to make examinations or inquiries under this Part must not divulge or allow to be divulged, except in the performance of their duties or under the authority of the board, information obtained by them or which has come to their knowledge in making or in connection with an examination or inquiry under this Part.

(1.1) If information in a claim file, or in any other material pertaining to the claim of an injured or disabled worker, is disclosed for the purposes of this Act by an officer or employee of the board to a person other than the worker, that person must not disclose the information except

- (a) if anyone whom the information is about has identified the information and consented, in the manner required by the board, to its disclosure,
- (b) in compliance with an enactment of British Columbia or Canada,
- (c) in compliance with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information, or
- (d) for the purpose of preparing a submission or argument for a proceeding under this Part or Part 3.

- (1.2) No court, tribunal or other body may admit into evidence any information that is disclosed in violation of subsection (1.1).
- (2) Every person who violates subsection (1) or (1.1) commits an offence against this Part.
- (3) The workers' advisers, the employers' advisers and their staff must have access at any reasonable time to the complete claims files of the board and any other material pertaining to the claim of an injured or disabled worker; but the information contained in those files must be treated as confidential to the same extent as it is so treated by the board.

[53] The WCRB also relies on s. 89(4) of the WCA, which requires the WCRB Chair and WCRB Vice-Chairs to take an oath of non-disclosure as a condition of appointment. That section reads as follows:

- (4) A person appointed under subsection [89](2) must, before acting in the office to which he or she is appointed, take and subscribe before a notary public or a Commissioner for Taking Affidavits in British Columbia, and file with the minister, an oath or affirmation of office in the following form:

I do solemnly swear that I will faithfully, truly and impartially, to the best of my judgment, skill and ability, execute and perform the office of of the Workers' Compensation Review Board, and will not, except in the discharge of my duties, disclose to any person any of the evidence or other matters brought before the review board.

[54] At para. 5.66 of its initial submission, the WCRB argues that

... because of the above provisions, the third parties to whom the information at issue relates had, and have, a reasonable expectation that the information supplied by them to the Review Board was supplied in confidence. As such, the Review Board submits that paragraph 22(2)(f) is a relevant factor in this case.

[55] The WCRB also relies on Order No. 226-1998, [1998] B.C.I.P.C.D. No. 19, for the proposition that "legislated confidentiality requirements are relevant in determining whether information was supplied in confidence for the purposes of s. 22(2)(f)" (para. 5.64, initial submission).

[56] On p. 9 of Order No. 226-1998, my predecessor found that s. 22(2)(f) was relevant because the third party whose personal information was in issue provided evidence "that he participated in the meetings before the Committee of the College [of Physicians and Surgeons] with the expectation that any information supplied would be kept in confidence." My predecessor went on to observe that this was "also in accordance with rules of the College under" the *Medical Practitioners Act*. That Act contained a non-disclosure requirement something like that found in s. 95 of the WCA.

[57] In this case, there is no evidence from any of the third parties that they had any reason to expect that information they supplied to the WCRB would be received and kept in confidence, or that they expected confidentiality. There is no evidence before me that the third parties were aware of s. 95 of the WCA, or the s. 89(4) oaths of confidentiality referred to by the WCRB, at the time they supplied their personal information. Nor is there any other evidence before me to support the WCRB's contention that there was a confidential supply of information in ways just described. The only evidence on this point is found in para. 36 of the Strongitharm affidavit, where it is said that Douglas Strongitharm

... felt that disclosing the identity of complainants would be an unreasonable invasion of their personal privacy, given that their reasonable expectations *would probably be* that such information was being supplied, and would be held, in confidence. [added emphasis]

[58] I am not prepared on the basis of the evidence before me to find that s. 22(2)(f) is a relevant circumstance. The section speaks of personal information that is "supplied in confidence". The fact that statutory confidentiality provisions apply to information that somehow comes into the hands of a public body is far from determinative of the question of supply in confidence. The "reasonable expectation" of third parties referred to by the WCRB strikes me as more an imputed expectation than one based on a third party's actual expectation, reasonable or otherwise.

[59] The applicant's s. 22 arguments in his initial submission read as follows:

37. The Applicant submits that the names of all complainants, and copies of their entire complaints without deletions, should be provided to the Applicant.
38. Although a complainant may strictly speaking be a "third party", the restrictions to disclosure within the statute concern only personal information of those third parties. A complaint about the Applicant is not personal information of third parties. Nor is the identity of third parties the type of personal information which is protected from disclosure. The Applicant relies on Order 00-23 (names not to be withheld); and Order 00-42 (no unreasonable invasion of privacy; at page 25, the Order finds that a complaint is personal information of the Applicant).
39. The Applicant therefore submits that the public bodies should disclose the names of all complainants, together with complete and un-severed copies of all their complaints, to the Applicant. [original emphasis]

[60] In his reply submission, the applicant argues as follows, at para. 28 and following:

28. Paragraph 5.59 of these Submissions suggest that one of the purposes of s. 22 is "to protect the identity of individuals who have made complaints...". The Applicant submits that this is contrary to the purpose and intent of the Act, and amounts to saying that anyone may wrongly

accuse an OIC appointee and/or file unfounded allegations or complaints without affording the appointee any opportunity to know his accuser, or to be able to defend himself. There is, among other things, a matter of the *Charter of Rights and Freedoms*, which expressly provides each person the right to know the case against him, and the right to a full answer and defence. These are precisely the matters which have been denied to this Applicant, and which these public bodies continue to deny to this Applicant, ironically using freedom of information legislation to do so.

32. Further, no one should expect to be able to malign, defame, insult, accuse or complain about a quasi judicial officer (OIC Appointment), and expect that to be kept from the subject of the complaint. Only matters of a truly personal nature about third parties can be withheld from the Applicant. The “intimate and sensitive nature” of the records suggested in paragraph 5.68 of these Submissions refers more accurately to the Applicant than it does to third parties who might complain about the Applicant. Further, there would be no point to a complaint if the subject of it did not know about it.

[61] It should be emphasized here that the WCRB has not withheld from the applicant the substance of the various complaints made about him. It has only withheld the identities of those who made the complaints.

[62] I agree with the WCRB’s argument, at para. 13 of its reply submission, that the applicant has not provided any basis for overcoming the presumed unreasonable invasions of personal privacy under ss. 22(3)(a) and (d) as they relate to personal information of workers who had appeared before the WCRB or who had active files with the WCRB. The WCRB is also correct to point out that the applicant has been given information about the complaints made against him, other than the identities of the various complainants. Accordingly, he has been given the personal information about himself – in the form of views or opinions expressed about him by others – and knows the substance of the complaints made against him.

[63] I am not persuaded that the presumed unreasonable invasions of personal privacy created by ss. 22(3)(a) and (d) have been rebutted here. In my view, s. 22 of the Act requires the WCRB to refuse to disclose the disputed personal information to the applicant.

4.0 CONCLUSION

[64] No order is necessary respecting my finding that ss. 3(1)(b) and (c) of the Act apply to the records that the WCRB decided are covered by those sections. Those records are excluded from the Act’s coverage.

[65] For the reasons given above, I make the following orders:

1. Under s. 58(2)(b) of the Act, I confirm that the WCRB is authorized to withhold the information that it withheld under s. 14 of the Act; and

2. Under s. 58(2)(c) of the Act, I require the WCRB to withhold the information that it withheld under s. 22 of the Act.

[66] For the reasons given above, no order is necessary under s. 58(3) regarding the adequacy of the WCRB's search for records under s. 6(1).

March 15, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia