



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

Order 02-13

MINISTRY OF ATTORNEY GENERAL

David Loukidelis, Information and Privacy Commissioner
March 15, 2002

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Summary: The applicant requested all records relating to him at the MAG. The MAG's search for records was adequate and met its s. 6(1) duty. The MAG also correctly decided that other records and information were excepted from disclosure by s. 14 of the Act.

Key Words: duty to assist – adequacy of search – solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6 and 14.

Authorities Considered: B.C.: Order 02-12, [2002], B.C.I.P.C.D. No. 12.

1.0 INTRODUCTION

[1] As I indicated in Order 02-12, [2002] B.C.I.P.C.D. No. 12, which I released concurrently with this order, this decision arises out of a single inquiry, under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act"), regarding the applicant's requests for access to records in the custody or under the control of the Ministry of the Attorney General ("MAG"), the Ministry of Skills Development and Labour ("MSDL") and the Workers' Compensation Review Board ("WCRB"). Order 02-12 deals with the issues relating to the WCRB's response to the applicant's access request to the WCRB, while Order 02-14, [2002] B.C.I.P.C.D. No. 14, addresses the issues arising out of the MSDL's response to the access request the applicant made to it.

[2] This order deals with the issues relating to the MAG's response to the applicant's access request, which the MAG received on September 11, 2000. On September 27,

2000, the MAG denied access to a single record that it had found, which was dated September 1996. It relied on ss. 13 and 14 of the Act in doing so. This led the applicant to request a review of the MAG's decision and a review of the adequacy of the MAG's search for records.

[3] The MAG searched for records again during mediation and found five more. It withheld all of them under s. 14 of the Act. On December 18, 2000, the MAG disclosed the September 1996 record to the applicant. Accordingly, only the five further records are in issue in this inquiry, as is the adequacy of the MAG's search for records. They are the same five records as are dealt with in Order 02-12 under the section addressing s. 14.

2.0 ISSUES

[4] The issues to be addressed in this inquiry are as follows:

1. Did the Ministry discharge its duty to assist the applicant under s. 6(1) by conducting an adequate search for records?
2. Is the MAG authorized to refuse to disclose information under s. 14 of the Act?

[5] Consistent with previous orders, the MAG has the burden of proof on the first issue and, under s. 57(2) of the Act, has the burden regarding the second issue.

[6] I will note here that, as is the case in Order 02-12, the MAG 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

[7] **3.1 Was the MAG's Search for Records Adequate?** – I have already set out, in Order 02-12, the test by which a public body's search for records will be measured for the purposes of s. 6(1). I do not propose to repeat that discussion here. The MAG says that its search for responsive records complied with its s. 6(1) obligations.

[8] In support of its s. 6(1) case, the MAG relies on affidavits sworn by Lori Bird, Rosemary Smith and Gordon Houston. Lori Bird is an Information and Privacy Analyst with the MAG, Gordon Houston is a lawyer employed by the MAG and Rosemary Smith is a legal secretary with the MAG. Rosemary Smith deposed that, in addition to her duties as a legal secretary, she is the Co-ordinator of Support Services for the Revenue,

Taxation Group of the MAG's Legal Services Branch. She deposed, at para. 3 of her affidavit, that her duties include the following:

- Setting up and maintaining the ARCS (Administrative Records Classification System) and the ORCS (Operational Records Classification System) records management system for the Revenue, Taxation Group. This includes ensuring that all files are indexed, current, and accurate; coordinating the storage and retrieval of documents, dealing with the destruction of files and documents when appropriate; and referring questions and concerns to the attention of the Ministry Records Officer.
- Coordinating responses to requests under the provisions of the *Freedom of Information and Protection of Privacy Act*, Client/Solicitor Privilege Policy, and government/Ministry/Branch policy and practice respecting confidentiality.

[9] She also deposed that her search for responsive records, which she conducted in September of 2000, was restricted to the volume of the MAG's WCRB file that spanned August 16, 1996 to August 6, 1998. It appears that Gordon Houston had told Rosemary Smith that any records relating to the applicant "would probably be in that file" (para. 4, Smith affidavit). One responsive record was found.

[10] Rosemary Smith undertook a second search in December of 2000, during which – again at Gordon Houston's suggestion – she searched files relating to workers' advisors and other WCRB and Workers' Compensation Board files. This search turned up the five records that the MAG says are privileged, as discussed below. A later search of MAG files for the WCRB, which the MAG had transferred to the British Columbia Archives, did not reveal any responsive records (although some non-responsive records were located).

[11] The MAG says that, despite the fact that responsive records were missed during the first search, I should find that it has discharged its s. 6(1) search obligation. It says the following, at para. 5.12 of its initial submission:

Workers' Advisors and Employers' Advisors are distinct groups identified in legislation. The Legal Services Branch [of the MAG] has separate files for the Review Board, Workers' Advisors and Employers' Advisors. The fact that the above records were filed in the Workers' Advisors file instead of the Workers' Compensation Review Board file was, in all likelihood, simply a filing mistake. Those records should have been filed in the Review Board file, not the "Worker's [sic] Advisors" file. That failure to file those records in the correct file is the reason why the above mentioned records were not located in the Public Body's initial search.

[12] The MAG says that workers' advisors and employers' advisors are "distinct groups identified in legislation", although it does not specify which legislation. I have determined that the legislation referred to is the *Workers Compensation Act* ("WCA").

Section 94 of the WCA gives Cabinet the authority to appoint both employers' and workers' advisors, who are to assist workers or employers in matters involving the WCB and assist in proceedings before the WCRB.

[13] In Order 02-12, I accepted that the WCRB had discharged its s. 6(1) search obligation despite the fact that its initial search failed to turn up records that had, apparently, never been entered into the WCRB's record system. Those records had been mis-filed, in the sense that they had never been appropriately entered into the WCRB's records system. In this case, it may appear, with the benefit of hindsight, that there is a sufficiently direct relationship between files relating to advisors and the WCRB that it would be reasonable to expect the MAG to search the advisors files for the same period as it searched the WCRB's files. The fact remains, however, that the advisors files contain records relating to officials who have broad functions in relation to the WCB and also matters before the WCRB. Although I have some hesitation, on balance I have decided that it would not be reasonable to expect MAG staff to search the advisors files for records relating to the applicant, and not an advisor.

[14] Of course, this finding, like all others, turns on the facts. Generally speaking, where a set of files can reasonably be said to bear a direct or close relationship or connection to files that are readily identifiable as possibly containing relevant records, the public body should search those other files. In this case, again, I do not think the connection was close enough that the MAG should have searched the advisors files in the first instance.

[15] I therefore find that the MAG met its s. 6(1) obligation to undertake an adequate search for records during its initial search. Even if I had found the initial search was not adequate, I would be satisfied, based on the MAG's affidavit evidence, that its subsequent search efforts were more than sufficient to satisfy its s. 6(1) search obligation. The MAG is, in fact, to be commended for having followed up on its initial search with a thorough effort to find more responsive records. In that light, no order under s. 58(3) would be necessary even if I had found that the initial search was not adequate.

[16] **3.2 Solicitor Client Privilege** – The MAG says that the same five records as were withheld by the WCRB under s. 14, in Order 02-12, are privileged in the MAG's hands. There is no point my repeating the discussion in that case of the relevant principles as set out in Order 02-12, or the discussion of the relevant evidence found in that case. It suffices to say that, for the reasons given in Order 02-12, based on the evidence before me, I find that the MAG is entitled to withhold these five records under s. 14 of the Act and that there has been no waiver of privilege.

4.0 CONCLUSION

[17] For the reasons given above, under s. 58(2)(b) of the Act, I confirm the decision of the WCRB that it is authorized by s. 14 to withhold the records it withheld under that section.

[18] Because I have found that the MAG's search for records satisfied its s. 6(1) duty, no order is necessary under s. 58(3) in that respect.

March 15, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia