

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-010

August 5, 1999

WORKERS' COMPENSATION BOARD

Review Number 1476

I. BACKGROUND

[para 1.] Since 1991, the Applicant has had a file with the Workers' Compensation Board (the "WCB") due to an injury sustained at the workplace. The WCB hired a Private Investigation company to conduct surveillance on the Applicant in March-April 1998.

[para 2.] The Applicant applied for disclosure of the records resulting from the surveillance.

[para 3.] The WCB disclosed the surveillance video and the surveillance reports, but have withheld information under the following exceptions under the Act: section 16(1) (personal information), 16(2)(g) (third party's name), 19(1)(c) (investigative techniques), 19(1)(d) (source of confidential information), 4(1)(b) (note of person acting in judicial capacity), 4(1)(h)(ii) (motor vehicle registry information), 26(1)(a) (informer's privilege) and section 15(1)(disclosure harmful to business interests of a third party).

[para 4.] The Applicant stated that the Applicant was not interested in the Private Investigator's salary information withheld under sections 15(1) and 16(1) of the Act. Therefore that information is no longer at issue. Consequently, I do not find it necessary to issue an Order concerning this information contained in Records PI-30, PI-31, PI-34, and PI-35.

[para 5.] At the inquiry, WCB also said that it had disclosed the records to which it had originally applied section 4(1)(b) (note of person acting in judicial capacity). Consequently, section 4(1)(b) is also not at issue.

[para 6.] An oral inquiry was held on March 10, 1999. At the conclusion of the inquiry, WCB provided the confirmation of the status of the Applicant's claim and a copy of a Special Constable Appointment granted to the Special Constables employed by the WCB.

[para 7.] Sections 19(1) and 16 of the Act have been amended as of May 19, 1999. These amendments do not apply to this Order since the inquiry was held March 10, 1999.

II. RECORDS AT ISSUE

[para 8.] In response to the Request, the WCB identified 44 records from four areas, including the Private Investigation Firm File. Each page has been numbered according to the area where it was located.

[para 9.] For the purposes of this Order, I will refer to these pages collectively as the "Records". Each page will be referred to as a "Record" although a number of them are attached and form multi-page documents.

[para 10.] Information was severed from the following pages.

- Case Information System Notes
 - CI-10
- Legal Services
 - LS-4, LS-9, LS-10, LS-11, LS-12, LS-14, LS-16, LS-17, LS-18, LS-19, LS-27, LS-30-32, LS-34, LS-48
- Office of the Appeals Advisor
 - AA-70, AA-473
- Private Investigation Firm's File
 - PI-2, PI-3, PI-4, PI-6, PI-7, PI-8, PI-9, PI-10, PI-12, PI-13, PI-14, PI-19, PI-21-23, PI-25, PI-28, PI-29, PI-30, PI-31, PI-32, PI-33, PI-34, PI-35, PI-36

III. ISSUES

[para 11.] There are six issues in this inquiry:

- A. Did the WCB respond to the Applicant openly, accurately and completely?
- B. Did the WCB correctly apply section 19(d) (identity of confidential source) to the Records?
- C. Did the WCB correctly apply section 26(1)(a) (informer's privilege) to the Records?
- D. Does section 16(2)(g) (third party name) apply to the Records?
- E. Does section 4(1)(h)(ii) (motor vehicle registry information) apply to the Records?
- F. Did the WCB correctly apply section 19(1)(c) (investigative techniques) to the Records?

IV. DISCUSSION

Issue A: Did the WCB respond to the Applicant openly, accurately and completely?

[para 12.] The Applicant questioned why, if it is WCB's policy to give full disclosure, some information was disclosed only after the inquiry date was set. The Applicant stated that it took almost a year to obtain the information requested, which is unfair given that the Applicant needs the investigative information for a WCB appeal hearing.

[para 13.] The Freedom of Information and Privacy Coordinator for the WCB gave evidence that she had recently started working for the WCB and that she was trying to initiate change within the organization. For example, a decision was made to make more routine disclosures of case information notes and certain appeals records. She also commented on the lack of staffing resources within the FOIP area of WCB.

[para 14.] While I encourage public bodies to make timely disclosures early on in the process, I also encourage parties to resolve their issues prior to the inquiry.

[para 15.] From listening to the parties and reviewing the Records, I find that the WCB made every reasonable effort to respond to the Applicant. For example, I note that the WCB went to the Private Investigator company and copied their whole file. I also note that the WCB has also agreed to withdraw section 4(1)(b) as a reason to withhold records. Therefore I find that the WCB responded to the Applicant openly, accurately and completely in accordance with section 9(1) of the Act.

Issue B. Did the WCB correctly apply section 19(1)(d) (identity of confidential source) to the Records?

[para 16.] The WCB applied section 19(1)(d) (identity of confidential source) to sever the name or initials of the investigator working for the Private Investigation company from the following Records:

LS-4, LS-9, LS-10, LS-11, LS-12, LS-14, LS-16, LS-17, LS-18, LS-19, LS-27, PI-2, PI-3, PI-4, PI-6, PI-7, PI-8, PI-9, PI-10, PI-12, PI-13, PI-14, PI-19, PI-25, PI-28, PI-29, PI-30, PI-31, PI-32, PI-33, PI-34, PI-35, PI-36

[para 17.] The WCB applied section 19(1)(d) to sever information regarding the identity of another individual from the following Records:

CI-10, AA-70, AA-473, LS-34, LS-48,

[para 18.] Section 19(1)(d) reads:

19(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(d) reveal the identity of a confidential source of law enforcement information.

[para 19.] For section 19(1)(d) to apply, there must be (i) law enforcement information, (ii) a confidential source of law enforcement information, and (iii) information that could reasonably be expected to reveal the identity of that confidential source.

(i) What is “law enforcement” information?

[para 20.] In this case, “law enforcement” means investigations that lead or could lead to a penalty or sanction being imposed”: see section 1(1)(h)(ii).

[para 21.] “Law enforcement” requires that both the public body’s investigative authority and the penalty or sanction be under the same statute.

[para 22.] The WCB has broad investigatory authority under section 12(5) and 12(6), 13, 15 and 32 of the *Workers’ Compensation Act*, R.S.A. 1980, c. W-16. The penalties or sanctions are contained in section 51 of the WCB Act.

[para 23.] To carry out its law enforcement mandate, there are eight Special Constables employed at the WCB. They are appointed under section 42 of the *Police Act* of Alberta for the purpose of laying informations on behalf of the Crown in matters relating to offences under the *Criminal Code* and the *Workers' Compensation Act*.

[para 24.] One of the Special Constables testified that the investigation conducted on the Applicant was a fraud investigation.

[para 25.] Evidence at the inquiry showed that as a result of the investigation the Applicant's benefits were terminated according to section 51 of the WCB Act.

[para 26.] Because the authority to investigate and the penalties or sanctions are contained in the same legislation, the information obtained by the WCB in its investigation meets the definition of "law enforcement information". Therefore all the Records except LS-34 and LS-48 meet the first criteria of section 19(1)(d).

[para 27.] Records LS-34 and LS-48 are dated prior to February 25, 1998. From the Records, it appears that the Private Investigator commenced his investigation on February 25, 1998. In Order 96-019, I said that law enforcement information does not include information that triggers an investigation, or information compiled in anticipation of an investigation. Consequently, Records LS-34 and LS-48 do not contain law enforcement information because the information on those Records was compiled before the investigation started.

[para 28.] The WCB argued that my interpretation in Order 96-019 was in error. There is nothing in section 19(1)(d) that limits the application of that section to information obtained after a Law Enforcement matter has begun.

[para 29.] In my view, the information contained in Records LS-34 and LS-48 was compiled before the investigation started; therefore, that information is not law enforcement information. Therefore, I find that all of the Records to which the WCB applied section 19(1)(d), except Records LS-34 and LS-48 meet the first criteria: they contain law enforcement information.

(ii) What constitutes a "confidential source" of law enforcement information?

[para 30.] The WCB submitted that there are two confidential sources of law enforcement information: the Private Investigator and another individual who is an employee of the WCB.

[para 31.] With respect to the records CI-10, AA-70, AA-473, LS-34, LS-48 which deal with the other individual, I have already determined that the information severed from Records LS-34 and LS-48 does not contain law enforcement information, therefore it could not be said that a confidential source was involved. As I stated in Order 96-019, the issue of confidential source cannot arise if the public body has not established that law enforcement information is involved.

[para 32.] In any event, I will still examine whether the individual named in those documents is a “confidential source” of law enforcement information.

[para 33.] The *Freedom of Information and Protection of Privacy Policy and Practices Manual* published by Alberta Labour (August 1998) says at page 92: “A *confidential source* is someone who supplies law enforcement information, as defined in the Act, to a public body on the assurance that his or her identity will remain secret”.

[para 34.] “Source” is defined by the Concise Oxford Dictionary, Ninth Edition as “a place, person, or thing from which something originates”.

[para 35.] The WCB stated that surveillance was authorized in this case because of the inconsistencies on the Applicant’s file. The WCB medical reports also support the need for surveillance. On this basis, the WCB says that it decided to investigate to see if those inconsistencies “pointed to anything.”

[para 36.] According to the Special Constable, because the WCB lacks the resources to conduct surveillance itself, it contracts out 90% of the surveillance work. The file in this case was not unique in that it too, was contracted out to a private investigation company.

[para 37.] I find that both the individual named in Records CI-10, AA-70, AA-473, LS-34, LS-48, and the Private Investigator referred to in the other Records (see page 4 of Order) are not “sources”. Both are collecting information on behalf of the WCB from a variety of sources as part of their job duties. They are not supplying information to a public body because they form part of the public body whether as an employee or as an independent contractor.

[para 38.] The Applicant submitted as Appendix A of its submissions a WCB policy document titled “Investigation Unit Referrals”. It says:

“Purpose: To ensure the consistent and efficient referral of claims to the Investigations Unit where there is a need for surveillance, fraud, or entitlement investigation.”

[para 39.] Under “Responsibility” it reads: “*Case Manager, Adjudicator, Claims Supervisor, Investigator, and Investigations Supervisor*”.

[para 40.] On page 3 of this document in the left column it says:

Surveillance or Fraud Investigation the Case Manager/Adjudicator identify the need for surveillance or fraud investigation.

[para 41.] In the right column it says:

Consider a referral to the Investigation Unit in the following situations:

- *Inconsistencies are noted on the claim (e.g. disability is purportedly much greater than the injury, indication the worker is working or participating in activities that confirm fitness for work or may prolong the disability).*
- *Information indicates the worker has received other benefits while in receipt of TTD benefits.*
- *There is a need for an external investigation. All external investigations will be arranged by the Investigations Unit.*
- *Information indicates the worker may have given false information on documents or used misrepresentation to gain benefits.*

[para 42.] I presume that this policy was followed by the WCB in the case at issue, although the WCB did not address this policy at the inquiry.

[para 43.] In my view, someone who is reviewing the file as part of their responsibilities such as the other individual, and refers it to surveillance in accordance with the public body’s policy is not a “source” of law enforcement information.

[para 44.] The second criterion requires that the “source” also be confidential. Even though the criterion for “source” has not been met, I intend to briefly deal with the “confidential” criterion.

[para 45.] The WCB stated that both the Private Investigator and the other individual were given assurances of confidentiality that their names would not be disclosed.

[para 46.] The WCB said that even though the Private Investigator company is disclosed, the identity of the Private Investigator is not disclosed. However, the Special Constable testified that the name could

be revealed if there was a court action or if the Appeals Commission issued a subpoena to the Private Investigator.

[para 47.] The Special Constable also said that the WCB releases the names of its own investigators. I understand that had the names of the in-house WCB investigators been on this file, their names would have been disclosed. Based on the evidence at the inquiry, I find that the assurance given to the Private Investigator that his or her identity would remain secret was equivocal, therefore not “confidential”. Moreover, there was no confidentiality clause for the Private Investigators in the contract between the Private Investigation Firm and the WCB.

[para 48.] The WCB also did not provide evidence that an assurance of confidentiality was given to the other individual. Given that the WCB policy states which individuals are responsible for referring files to surveillance, I do not find that the identity of those individuals to be confidential.

[para 49.] For these reasons, I am not persuaded that the Private Investigator or the other individual are “confidential” sources of law enforcement information in accordance with the second criterion.

iii) Could the information reasonably be expected to reveal the identity of a confidential source of law enforcement information?

[para 50.] Under this part of the test, the public body may refuse to disclose information that could reasonably be expected to reveal the identity of the confidential source.

[para 51.] I agree that the disclosure of the Records would reveal the identities of the Private Investigator and the another individual. However, since I have found that these two persons are not “confidential sources” of law enforcement, I do not find it necessary to consider the third criterion.

Conclusion Under Issue B

[para 52.] I find that the WCB did not correctly apply section 19(1)(d) to the information severed from the Records. Therefore, I do not uphold the WCB’s decision to withhold information severed from the following Records:

LS-4, LS-9, LS-10, LS-11, LS-12, LS-14, LS-16, LS-17, LS-18,
LS-19, LS-27, PI-2, PI-3, PI-4, PI-6, PI-7, PI-8, PI-9, PI-10, PI-12,

PI-13, PI-14, PI-19, PI-25, PI-28, PI-29, PI-30, PI-31, PI-32, PI-33,
PI-34, PI-35, PI-36

CI-10, AA-70, AA-473, LS-34, LS-48,

Issue C: Did the WCB correctly apply section 26(1)(a) (informer's privilege) to the Records?

[para 53.] It is WCB's position that section 26(1)(a) (legal privilege) specifically, informer privilege, applies to the identity of the other individual referred to in Records CI-10, AA-70, AA-473, LS-34, LS-48.

[para 54.] Section 26(1)(a) reads:

26(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege.

[para 55.] In *R. v. Liepert*, [1997] 1 S.C.R. 281, the Supreme Court of Canada affirmed that "police informer privilege", sometimes simply referred to as "informer privilege", is a legal privilege. The court said that this rule against disclosure of information was developed to protect citizens who assist in law enforcement and to encourage others to do the same.

[para 56.] Here, the WCB says that an informer provided the WCB with information about potential breaches of the WCB Act. An investigation was conducted on this basis. According to the WCB, whether the informer was internal or external is immaterial and that the informer deserves protection.

[para 57.] It is well established that the identity of an individual who provides information to the police in relation to criminal activity is privileged. The privilege afforded to police informers has been granted in order to give protection to this category of individuals who may very well be vulnerable to reprisals from those against whom they inform.

[para 58.] Over the years the rationale behind the police informer rule has been applied in civil matters also such as cases involving alleged child abuse (*D. v. National Society for Prevention of Cruelty to Children*, [1977] 2 W.L.R. 201 (H.L.)): see Order 96-020.

[para 59.] The file on the Applicant was dated since 1991. Over time the WCB found there to be inconsistencies between the doctor's diagnosis

and the Applicant's recovery process. An investigation was authorized in order to find out whether the Applicant was falsifying the symptoms and thus fraudulently collecting benefits. This type of situation cannot be equated to that of a police informer or someone providing information about child abuse.

[para 60.] In addition, police informers are members of the public informing the police. They are not the police officers themselves investigating the case. The rationale for granting privilege to police informers is to protect this source of information. Without the privilege the information would likely vanish and the end result would be that policing agencies would be handicapped in their efforts to detect and prevent crime.

[para 61.] I am not convinced by WCB's evidence regarding the general risk of harm to WCB employees by applicants where employees' names are disclosed in connection with the initiation or conduct of an investigation. I am not suggesting that this situation could never occur. However, there was no evidence to substantiate any possible harm to the employee in this case.

[para 62.] Even without the protection of confidentiality, WCB employees will continue to come forward to report possible cases of fraud. That is their job. They are professionals instructed to refer cases to investigation for surveillance when certain circumstances are present in an applicant's file.

[para 63.] Likewise, an applicant can reasonably anticipate that the WCB will take the necessary steps to ensure that the WCB Act is being properly administered and that benefits are not being improperly awarded.

[para 64.] If one cannot establish that a factual situation clearly grants an individual the protection of a police informer or child abuse reporter, they can attempt to claim a privilege under the Wigmore criteria. I would normally consider whether the WCB can claim a privilege under the Wigmore test as adopted by the Supreme Court of Canada in *Slavutych v. Baker* (1975), 55 D.L.R. (3d) 244 (S.C.C.): see Order 96-020. However, the WCB has not argued that the Wigmore test applies. Because this is a discretionary exception, I will not go through it.

[para 65.] Therefore, I find that section 26(1)(a) does not apply to the information severed from Records CI-10, AA-70, AA-473, LS-34, LS-48. For this reason I do not uphold WCB's decision to withhold information severed from those Records.

Issue D. Does section 16(2)(g) (third party's name) apply to the Records?

[para 66.] The WCB applied section 16(2)(g) to the initials of the secretarial staff on the following Records:

LS-9, LS-11, LS-14, LS-16, LS-17, LS-19, LS-27, PI-2, PI-6, PI-7, PI-9, PI-28, PI-29, PI-30, PI-31, PI-32, PI-33, PI-34, PI-35

[para 67.] Section 16(2)(g) says

16(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) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(g) the personal information consists of the third party's name when

- (i) it appears with other personal information about the third party, or*
- (ii) the disclosure of the name itself would reveal personal information about the third party.*

[para 68.] Going on the presumption, that these individuals are not known by their initials, I am not satisfied that the initials are "names" to meet the criteria of section 16(2)(g). However, I think that section 16(1) applies. Section 16(1) says:

16(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.

[para 69.] In making a determination under section 16(1) one must consider the relevant circumstances under section 16(3). No evidence was presented regarding the circumstance, therefore on balance I will side on protecting the individuals' privacy.

[para 70.] Therefore, I uphold WCB's decision to refuse access to this information under section 16(1).

Issue E. Does section 4(1)(h)(ii) (motor vehicle registry information) apply to the Records?

[para 71.] The WCB applied section 19(1)(c) to Records LS30-32, PI21-23. The WCB claimed both section 4(1)(h)(ii) and section 19(1)(c) applied to these records. However, to the Applicant, WCB said it was claiming only section 19(1)(c). WCB did not want to say it was claiming section 4(1)(h) because, according to WCB, it would reveal that the WCB uses the Motor Vehicle Registry to check people's addresses.

[para 72.] As Commissioner, I cannot apply section 19 to a section 4 record. A section 4 record is excluded from the Act's jurisdiction. Section 4(1)(h)(ii) applies to Records LS30-32 and PI21-23.

[para 73.] Therefore, section 4(1)(h)(ii) excludes Records LS30-32 and PI21-23 from the Act's application. Consequently, I have no jurisdiction over these Records.

Issue F. Did the WCB correctly apply section 19(1)(c) (investigative techniques) to the Records?

[para 74.] The WCB applied section 19(1)(c) to information contained in the following Records:

LS-30-32, PI-21-23, PI-31 and PI-35

[para 75.] Section 19(1)(c) reads:

19(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

[para 76.] I have already determined that Records LS30-32 and PI21-23 are excluded from the Act. Therefore, I have no jurisdiction over those Records. Consequently, I cannot say whether a public body has correctly applied an exception of the Act to those Records.

[para 77.] For this reason, I will only deal with whether the WCB correctly applied section 19(1)(c) to information severed from Records PI-31 and PI-35.

[para 78.] Section 19(1)(c) permits a public body to refuse disclosure of information that could harm the effectiveness of investigative techniques used in law enforcement. The harms test contained in this exception precludes the refusal of basic information about well-known investigative techniques. The focus in this exception is on the refusal of information

on investigative techniques and procedures that relate directly to their continued effectiveness.

[para 79.] Records PI-31 and PI-35 are timesheets from the Private Investigator. On the bottom of the Record, there is a listing of areas or searches commonly used by Creditors to verify individuals' address, phone number, personal liabilities, real property, etc. This information was severed on the basis of section 19(1)(c). The disclosure would in WCB's view, compromise this "investigative tool". According to the WCB, harm will result because people may start giving wrong addresses to mislead others.

[para 80.] Given the ubiquitous nature of these searches, I do not believe the disclosure would harm the effectiveness of the investigative technique employed by the Private Investigator on behalf of the WCB. These are standard methods everyone uses.

[para 81.] Therefore, I do not uphold the WCB's decision to withhold this information under section 19(1)(c).

V. ORDER

[para 82.] I make the following Order under section 68 of the Act.

Issue A: Did the WCB respond to the Applicant openly, accurately and completely?

[para 83.] The WCB met its duty to respond to the Applicant openly, accurately and completely under section 9(1) of the Act.

Issue B: Did the WCB correctly apply section 19(d) (identity of confidential source) to the Records?

[para 84.] The WCB did not correctly apply section 19(1)(d) to the information severed from the following Records:

LS-4, LS-9, LS-10, LS-11, LS-12, LS-14, LS-16, LS-17, LS-18,
LS-19, LS-27, PI-2, PI-3, PI-4, PI-6, PI-7, PI-8, PI-9, PI-10, PI-12,
PI-13, PI-14, PI-19, PI-25, PI-28, PI-29, PI-30, PI-31, PI-32, PI-33,
PI-34, PI-35, PI-36

CI-10, AA-70, AA-473, LS-34, LS-48,

[para 85.] Therefore, the WCB is not authorized to refuse access on those grounds. Under section 68(2)(a) of the Act, I order that the WCB give the Applicant access to the information severed from those Records.

Issue C: Did the WCB correctly apply section 26(1)(a) (informer's privilege) to the Records?

[para 86.] The WCB did not correctly apply section 26(1)(a) to the information severed from the following Records:

CI-10, AA-70, AA473, L-34, LS-48

[para 87.] Therefore, the WCB is not authorized to refuse access on those grounds. Under section 68(2)(a) of the Act, I order that the WCB give the Applicant access to the information severed from those Records.

Issue D: Does section 16(2)(g) (third party name) apply to the Records?

[para 88.] Section 16(2)(g) does not apply, however section 16(1) applies to the information (secretarial staff initials) severed from the following Records:

LS-9, LS-11, LS-14, LS-16, LS-17, LS-19, LS-27, PI-2, PI-6, PI-7, PI-9, PI-28, PI-29, PI-30, PI-31, PI-32, PI-33, PI-34, PI-35

[para 89.] I uphold the WCB's decision to refuse the disclosure of the information severed from those Records. I order that the WCB not disclose this information.

Issue E: Does section 4(1)(h)(ii) (motor vehicle registry information) apply to the Records?

[para 90.] The following information severed from Records LS30-32, PI21-23 are excluded from the application of the Act by section 4(1)(h)(ii). Consequently, I have no jurisdiction over that information contained in those Records.

Issue F: Did the WCB correctly apply section 19(1)(c) (investigative techniques) to the Records?

[para 91.] The WCB did not correctly apply section 19(1)(c) to the information severed from Records PI-31 and PI-35. Therefore, I order that the WCB give the Applicant access to the information severed from those Records.

[para 92.] I further order that the Public Body notify me in writing, within 30 days of being given a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information & Privacy Commissioner