

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2003-012

December 15, 2004

WORKERS' COMPENSATION BOARD

Review Numbers 2335 and 2447

Office URL: www.oipc.ab.ca

Summary: The Applicant applied to the Workers' Compensation Board ("WCB" or the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act") for an update of information about his WCB claim. When the Public Body withheld some information, the Applicant requested a review. The Applicant also questioned whether the Public Body conducted an adequate search for further records. The Adjudicator ordered the Public Body to disclose to the Applicant some of the information it withheld, but found that the Public Body properly withheld other information. The Adjudicator also found that the Public Body conducted an adequate search for further records.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4(1)(d), 10(1), 17, 24(1)(a), 27(1), 27(1)(a), 27(1)(b), 27(2), 72; *Ombudsman Act*, R.S.A. 2000, c. O-8, s. 25(3).

Authorities Cited: AB: Orders 96-020, 97-020, 99-002.

I. BACKGROUND

[para 1] The Applicant applied to the Workers' Compensation Board ("WCB" or the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Applicant said "Please provide an update of all the FOIP files under this

claim since the last filing.” The Applicant provided his WCB claim number on the first page of his request. When provided with records, the Applicant requested that this Office review whether certain information withheld from him should have been disclosed to him (Review Number 2335).

[para 2] The Applicant also requested a copy of any medical reports that corresponded to a number of invoices on his WCB claim file. The Public Body provided an explanation as to why there were no medical reports. The Applicant was not satisfied with the explanation and asked this Office to review whether the Public Body conducted an adequate search for responsive records (Review Number 2447).

II. RECORDS AT ISSUE

[para 3] The records at issue are set out under the discussion of the specific issues.

III. ISSUES

[para 4] There are three issues in this inquiry:

A. Is the information/record(s) responsive to the Applicant’s access request?

B. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/records?

[para 5] Issues A and B apply to Review Number 2335.

C. Did the Public Body meet its duty to the Applicant by conducting an adequate search for responsive records, as provided by section 10(1) of the Act?

[para 6] Issue C applies to Review Number 2447.

IV. DISCUSSION OF THE ISSUES

Preliminary issue

[para 7] The Notice of Inquiry stated that I would be hearing this case. The Applicant then sent a letter to the Commissioner. Part of that letter stated:

It has been noted that Mr. Dave Bell, Adjudicator has been assigned to this case. To clarify, Mr. Dave Bell has been previously involved in assessing a request for documents [Applicant’s identification of a named organization and the Public Body, a case involving the Public Body in which I acted as a Portfolio Officer for this Office] which resulted in a positive decision before requiring an inquiry by the Commissioner. The decision provided this applicant with a full copy of the records from the [named organization] instead [sic] the \$1 dollar per page cost attributed to the access [sic].

A fellow injured worker was attempting to obtain documents from the [named organization] and the [named organization] was and did charge them \$1 dollar per page despite the decision from this applicant's agreement with the Public Body (WCB) and understanding that this would also become part of the FOIP requests an injured worker files (Public Body has control of the records). This applicant instructed the fellow injured worker to call Dave Bell and inform him of the continued refusal by the [named organization] through the Public Body to provide the medical documents within a FOIP request and not charge the \$1 dollar per page fee. The fellow injured worker was informed by Dave Bell that the decision under the FOIP investigation (1999) and decision was only related to this applicant's request.

For purpose of an independent review of this applicant's FOIP request review and the circumstances that Dave Bell, Adjudicator has previously provide [sic] misinformation to a fellow injured worker regarding a FOIP investigation that resulted in a positive manner, the decision to allow Mr. Dave Bell, adjudicator [sic] to continue considering the conflict of interest issues stated above, a decision is being requested from your office.

[para 8] I replied by letter:

...

Secondly, you have raised the issue that I am in a conflict of interest in relation to the matters in this inquiry and have requested that I not hear this case. In support of this concern, you related in your letter that I previously dealt with an access request between you and Workers' Compensation. The result, through mediation, was that you received all the records you requested from the [named organization] without the usual cost. Later you referred another injured worker to me who wanted similar records. You indicate that I told the other worker that the mediated decision on your access request was specific to your request. I am in agreement with the general circumstances that you have related in your letter.

When your current issues with this office first came up for inquiry, I satisfied myself that the issues and records for this inquiry were not related to any matter in which I had previously been involved. Likewise, I do not have a personal interest or involvement in any of the matters in this inquiry. Previous professional involvement with one or more of the parties to an inquiry does not constitute a conflict of interest. If this were the case, it would be impossible for a tribunal to deal with matters involving parties who come before it more than once.

I have decided to continue with this inquiry. Your concerns and my decision will be noted in the Order. If you have further concerns, you may raise them in your submission.

[para 9] The Applicant's initial written submission provides page 2 of an otherwise unidentifiable letter, in which the Applicant says:

*It is being requested that a [sic] Dave Bell not have access to this request or assist in any manner due to his providing false statements & information during the last FOIP investigation request and recent conversation of clarification of a document and FOIP decision.

[para 10] The Applicant says nothing further on this issue. Therefore, what I said in my letter to the Applicant is still my response to the Applicant. I do not have a conflict of interest in hearing this inquiry.

ISSUE A: Is the information/record(s) responsive to the Applicant's access request?

[para 11] The records at issue are:

Legal Services Records, pages 19-21, 42-65 and 66
Office of the Chair – Board of Directors Records, pages 15-38
Customer Service Records, pages 1, 2, 3-19 [not 3, 19, as stated in the Notice of Inquiry] and 22

[para 12] “Responsiveness” refers to anything that is reasonably related to an applicant’s access request (see, for example, Orders 97-020 and 99-002).

[para 13] The Public Body says it interpreted the Applicant’s access request as being a request for his personal information relating to his WCB claim since the date of his last FOIP request. I find that the Public Body reasonably interpreted the Applicant’s access request as being a request for his own WCB claim information, given the wording of the Applicant’s access request and the fact that the Applicant provided his own WCB claim number.

[para 14] In the Legal Services Records, the Public Body withheld as non-responsive a fax cover sheet (page 66) and fax header information, which appears on two letters the Applicant wrote to the Public Body (pages 19-21 and 42-65). The fax cover sheet and the fax header information contain the personal information of an individual other than the Applicant. It is evident from the other information the parties provided for the inquiry that the fax cover sheet and the fax header information are the personal information of an individual whom the Applicant represents before the Public Body in matters relating to the individual’s WCB claim.

[para 15] The Applicant indicates at the end of each letter that he faxed it. I conclude that the Applicant used the individual’s fax machine to fax the two letters to the Public Body.

[para 16] The Applicant’s two faxed letters are responsive to the Applicant’s access request. Since the Applicant faxed those two letters to the Public Body, I find that the fax cover sheet and the fax header information are also responsive to the Applicant’s access request.

[para 17] The Public Body did not indicate whether any exceptions under the Act would apply to the fax cover sheet and the fax header information, should there be a finding that the information is responsive. Consequently, I have considered whether section 17 of the Act would apply to that information, which I have said is an individual’s personal information. The Applicant argues that disclosure would not be an unreasonable invasion of the individual’s personal privacy under section 17.

[para 18] The evidence is that the Applicant represents the individual whose personal information appears on the fax cover sheet and in the fax header information. By using the individual’s fax machine, the Applicant has provided the individual’s personal information to the Public Body. In these circumstances, I find that disclosure of the individual’s personal information to the Applicant would not be an unreasonable invasion of the individual’s personal privacy under section 17. Therefore, I intend to

order the Public Body to disclose to the Applicant the fax cover sheet (page 66) and the fax header information on pages 19-21 and 42-65 of the Legal Services Records.

[para 19] Similarly, I find that the information withheld from pages 15-38 of the Office of the Chair – Board of Directors Records is also responsive, for the same reasons stated above. Section 17 of the Act does not apply to that information, also for the same reasons stated above. Therefore, I intend to order the Public Body to disclose to the Applicant the information withheld from pages 15-38.

[para 20] However, I find that the Customer Service Records, which the Public Body withheld in their entirety, are non-responsive as the information is not reasonably related to the Applicant’s access request for his own WCB claim information. Most of the information is about other WCB claimants whom the evidence indicates the Applicant represents. One other page concerns an individual about whom there is no evidence the Applicant represents.

[para 21] As pages 1, 2, 3-19 and 22 of the Customer Service Records are non-responsive to the Applicant’s access request, the Public Body is not required to disclose those pages to the Applicant.

ISSUE B: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/records?

[para 22] The records at issue are pages 68 and 75-77 of the Legal Services Records, which the Public Body withheld in their entirety. The Public Body says that section 27(1)(a) of the Act applies to page 68, and section 27(1)(b) of the Act applies to pages 75-77.

1. Application of section 27(1)(a)

[para 23] Section 27(1)(a) reads:

27(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 24] The Public Body says that page 68 relates to an Ombudsman’s investigation. The Public Body submits that page 68 falls under the legal privilege established in what is now section 25(3) of the *Ombudsman Act*, and would therefore be exempt under section 27(1)(a) of the Act.

[para 25] In Order 96-020, the Commissioner discussed the meaning of “legal privilege” under what is now section 27(1)(a) of the Act. He said that a “legal privilege” can be a privilege established by a statute. He also said that if information is “privileged”, it does not have to be disclosed.

[para 26] Section 25(3) of the *Ombudsman Act* reads:

25(3) Anything said or any information supplied or any document, paper or thing produced by any person in the course of any inquiry by or proceedings before the Ombudsman under this Act is privileged in the same manner as if the inquiry or proceedings were proceedings in a court.

[para 27] Section 25(3) of the *Ombudsman Act* establishes in statute a legal privilege for information in the course of an inquiry by or proceedings before the Ombudsman under that legislation.

[para 28] Page 68 of the Legal Services Records meets the requirements of section 25(3) of the *Ombudsman Act* as it is “anything said...by any person...in the course of any inquiry...before the Ombudsman...” Therefore, page 68 falls within section 27(1)(a) of the Act as being information that is subject to a legal privilege.

[para 29] The Office of the Ombudsman is a public body as defined by the Act. Since section 27(2) applies only if the information relates to a person other than a public body, section 27(2) does not apply to page 68.

[para 30] Section 27(1)(a) of the Act provides a discretionary exception to disclosure for information such as that set out in section 25(3) of the *Ombudsman Act*. In my view, section 27(1)(a) encompasses information that does not meet the requirements for exclusion under section 4(1)(d) of the Act, which excludes only a record created by or for or is in the custody or under the control of an officer of the Legislature, including the Ombudsman.

[para 31] It is evident from the page numbers of the records at issue that the Public Body disclosed a considerable amount of information to the Applicant. Therefore, I am satisfied that the Public Body properly exercised its discretion in withholding page 68 under section 27(1)(a). I find that the Public Body properly applied section 27(1)(a) of the Act to page 68 of the Legal Services Records.

2. Application of section 27(1)(b)

[para 32] Section 27(1)(b) reads:

27(1) The head of a public body may refuse to disclose to an applicant

...

(b) information prepared by or for

(i) the Minister of Justice and Attorney General

(ii) an agent or lawyer of the Minister of Justice and Attorney General, or

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services,...

[para 33] I am satisfied that pages 75-77 of the Legal Services Records meet the requirements of section 27(1)(b) of the Act. These pages are information prepared by a lawyer of the Public Body, in relation to a matter involving the provision of legal services.

[para 34] Once again, given the amount of information the Public Body disclosed to the Applicant on his access request, I am satisfied that the Public Body properly exercised its discretion in withholding pages 75-77 under section 27(1)(b). I find that the Public Body properly applied section 27(1)(b) of the Act to pages 75-77 of the Legal Services Records.

ISSUE C: Did the Public Body meet its duty to the Applicant by conducting an adequate search for responsive records, as provided by section 10(1) of the Act?

[para 35] The Applicant believes that the Public Body withheld medical reports that correspond to the following billing dates: two billings dated October 25, 2001; two billings dated October 29, 2001 [not 2002, as stated in the Notice of Inquiry]; two billings dated October 30, 2001; October 31, 2001; November 1, 2001; November 2, 2001 and November 5, 2001.

[para 36] For the inquiry, the Applicant provided records the Public Body produced to him to document the payments to the named physician. The Public Body provided evidence that it conducted two searches, and confirmed with the named physician that no medical reports were provided.

[para 37] The Applicant thinks that medical reports should have been created. The Public Body says:

The applicant contends that reports must have been generated as a result of [name of physician] invoicing the WCB. The WCB does not require a report for all matters. Where a physician is required to spend time responding to a complaint by a worker to the physician's professional association, it is the WCB's normal practice that no reports are generated and the physician's bills are charged to the relevant worker's claim file. In this case there were several discussions between the WCB's Senior Medical Advisor and [name of physician] concerning FOIP issues as well which also result in physician time being expended and hence a fee in respect of which the WCB also does not require a report.

[para 38] Whether medical reports should have been created is not an issue for this inquiry. The issue is whether the Public Body conducted an adequate search. Considering the Public Body's evidence that it conducted two searches and consulted with the named physician, I find that the Public Body met its duty to the Applicant by conducting an adequate search for responsive records, as provided by section 10(1) of the Act.

Other matters

[para 39] The Public Body says that it also applied section 24(1)(a) of the Act to pages 76 and 77 of the Legal Services Records. However, given my finding above, I do not find it necessary to consider whether section 24(1)(a) also applies to pages 76 and 77.

[para 40] The Applicant provided arguments and documents that he said would bring into question the credibility of the Public Body's statements about complying with the Act and properly refusing access to information. Having reviewed what the Applicant provided, the records at issue, the criteria set out in the relevant provisions of the Act and the Public Body's arguments and evidence, I find no reason to question the Public Body's credibility in this inquiry.

V. ORDER

[para 41] I make the following Order under section 72 of the Act.

[para 42] The information the Public Body withheld from pages 19-21, 42-65 and 66 of the Legal Services Records and pages 15-38 of the Office of the Chair – Board of Directors Records is responsive to the Applicant's access request. As the Public Body did not apply any exceptions to that information, and as I find that section 17 of the Act does not apply, I order the Public Body to disclose that information to the Applicant.

[para 43] I also order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

[para 44] Pages 1, 2, 3-19 and 22 of the Customer Services Records are non-responsive to the Applicant's access request. The Public Body is not required to disclose those pages to the Applicant.

[para 45] The Public Body properly applied section 27(1)(a) of the Act to page 68 of the Legal Services Records. I uphold the Public Body's decision to refuse to disclose page 68 to the Applicant.

[para 46] The Public Body properly applied section 27(1)(b) of the Act to pages 75-77 of the Legal Services Records. I uphold the Public Body's decision to refuse to disclose pages 75-77 to the Applicant.

[para 47] The Public Body met its duty to the Applicant by conducting an adequate search for responsive records, as provided by section 10(1) of the Act.

Dave Bell
Adjudicator