

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-003

October 27, 2010

WORKERS' COMPENSATION BOARD

Case File Number F4411

Office URL: www.oipc.ab.ca

Summary: The Complainant requested that the Commissioner review the Workers' Compensation Board's (the Public Body) practices relating to collecting earnings information from principals and partners of businesses when they file annual returns.

The Adjudicator determined that the Complainant was an organization and therefore lacked standing to bring a complaint regarding the collection of personal information. However, in the event that she was wrong regarding the identity of the Complainant and the nature of the complaint, and the complaint was, in fact, made by a partner of the Organization regarding the collection of his own personal earnings information, she found that the evidence did not establish that this kind of information had been provided to, or collected by, the Public Body.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 65, 72; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 152.1(1)

I. BACKGROUND

[para 1] On February 29, 2008, an agent for the Britmar Group (the Complainant) made a complaint to the Commissioner. The complaint states, in part:

I represent the above named firm, which is an unincorporated partnership active in the business of finishing carpentry, and which does have a valid and proper WCB Account, and which has filed the Annual Report according to its obligations under the Act.

Under the terms of the WCB Act, that Board has a valid requirement for information related to “insurable earnings” and the job classification by industry for the business and any of its employees.

Furthermore under the Act, principals and partners are exempted from the mandatory provisions of the Act, although they are permitted to carry “voluntary” coverage, which this firm does have for one of its two partners...

...

The WCB in my view is exceeding [its] mandate and is engaged in administrative fishing expeditions in what might be termed a “data mining operation” because it seeks to collect a great deal of information that is irrelevant to its central function of insuring job site injuries of workers. [emphasis in original]

...

For the 2007 Annual Return, I filed an amount of \$20,000 as the earnings of The Britmar Partnership, although that is not the actual amount that will be accurately reflected in the T2124 filings with the [last name of the partners of the Britmar Group] T1 General Returns for this year. I filed this figure, because this is the amount of “voluntary coverage” agreed by the firm that I am acting for and which accurately reflects the WCB “exposure”.

I therefore seek from your office a ruling or an “order” restraining the WCB to collecting ONLY that information that is properly required to maintain an accurate actuarial basis for the system, and that these current information reporting practices are curtailed to the actual information required for the WCB to operate the system, AND NO MORE. [emphasis in original]

Specifically, in the case of partners and directors of companies, they should not be obliged to report their actual income in these Annual Returns, since this is not relevant to the administration of the WCB, and AT MOST, the only matter that should be provided is either “\$0.00” or in the case of “voluntary coverage” the amount actually reflecting the exposure of the WCB... [emphasis in original].

...

In my view, the WCB is not entitled to ANY information relating to the earnings of directors or partners, and they are not entitled to any information about actual salaries that exceed the maximum amount that they are covering per worker, which amounts to \$68,500 for the current year.

[para 2] The Commissioner authorized mediation to resolve the Britmar Group’s complaint. As mediation was unsuccessful, on April 1, 2009, the Britmar Group requested an inquiry. The Britmar Group stated the following:

I am now formally requesting the Office of the Information and Privacy Commissioner to open an Inquiry into the data mining activity of WCB in which that organization is improperly collecting confidential Income Tax Information about employers and employees that it cannot legally access from Revenue Canada and for which it has no legitimate requirements...

...

As employers, we have no objection to providing more precise information for the Board compared to what it now gathers in terms of the actual employee “exposure” to jobsite hazards, by explicitly identifying the individuals with the actual work he is primarily performing.

We object to any and all penalties imposed regarding annual estimates for the third category, because “casual labour” is never known “a priori”; it can only be established after the fact since it is “market driven”. Furthermore, the Annual Report should operate like the current T1 General Income Tax Return in that any shortages can be paid at the time of filing, and any overpayments are refunded.

We also do not agree with any requests by WCB, in audits or otherwise, that have the effect of “involuntary disclosure” of confidential information of third parties and their confidential information filed with Revenue Canada such as T5018 returns for the Construction Industry.

[para 3] On April 23, 2009, a partner with the Britmar Group provided this office with notice that he had appointed Britmar Group’s representative to act as his agent in all privacy matters arising with respect to the Workers’ Compensation Board and the Information and Privacy Commissioner. This letter states:

I do hereby formally appoint [name of representative] to act as my agent in all privacy matters arising with respect to the Workers’ Compensation Board and the Information and Privacy Commissioner.

This letter does not include a complaint that the partner’s own personal information has been collected by the Public Body nor does it refer to the partner’s personal information.

[para 4] On March 11, 2010, in response to a request for confirmation from this office as to its address of service, the Complainant listed its name as “The Britmar Group”. It also stated the following in an attached letter:

Furthermore, the Britmar Group submits that it is fundamental bad public policy to mine personal information that is not directly required by the WCB for its work, because it highly concentrates valuable information in a single location where breaches in data security can have immediate and direct harm to individuals. One has only to consider the grave consequences with breaches in the computer security of credit cards for instance, where large numbers of accounts are compromised at one single place. In our view, public policy would suggest that “decentralization” of critical legal, medical, and technical personal information is the best possible safeguard to protect the public interest and limit damage when it does take place.

[para 5] The matter was then scheduled for a written inquiry. A notice of inquiry was sent to the parties identifying the following as the issue for inquiry:

Did the Public Body collect the Complainant’s personal information in contravention of Part 2 of the Act?

The background of the notice of inquiry indicates that it arises from a complaint that the Public Body collected and used income information about the Complainant via its on-line annual reporting form in contravention of the Act.

[para 6] The parties exchanged initial submissions. The Complainant also provided a rebuttal submission. On June 16, 2010, I wrote the parties to inform them that I did not need to receive any further submissions and would proceed to make a decision based on the evidence and submissions before me.

II. ISSUE

Issue A: Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?

III. DISCUSSION OF ISSUE

Issue A: Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?

Preliminary Issue

[para 7] Before I can consider the issue identified for inquiry, I find it necessary to address issues regarding the identity of the Complainant and the standing of the Complainant to request review under section 65(3) of the *Freedom of Information and Protection of Privacy Act*.

[para 8] Section 65(3) of the FOIP Act is the provision of the Act under which a complaint regarding the collection, use, or disclosure of personal information may be brought. This provision states:

65(3) A person who believes that the person's own personal information has been collected, used or disclosed in contravention of Part 2 may ask the Commissioner to review that matter.

[para 9] Section 65(3) establishes that only a person whose own personal information has been collected, used, or disclosed can make a complaint to the Commissioner regarding its collection, use, or disclosure. Moreover, section 1(n) of the FOIP Act defines personal information. It states:

1 In this Act,

(n) "personal information" means recorded information about an identifiable individual, including

- (i) the individual's name, home or business address or home or business telephone number,*
- (ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
- (iii) the individual's age, sex, marital status or family status,*

- (iv) *an identifying number, symbol or other particular assigned to the individual,*
- (v) *the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
- (vi) *information about the individual's health and health care history, including information about a physical or mental disability,*
- (vii) *information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
- (viii) *anyone else's opinions about the individual, and*
- (ix) *the individual's personal views or opinions, except if they are about someone else;*

[para 10] From the context in which it is used in section 1(n), the term "individual" necessarily excludes entities such as corporations, partnerships, or other kinds of organizations. For example, organizations do not have fingerprints or biometric information, nor can they have health information. As a partnership, the Britmar Group is not an individual under the FOIP Act and therefore does not have personal information.

[para 11] The phrase "the person's own personal information" in section 65(3) indicates that only the person whose personal information has been collected, used, or disclosed in contravention of Part 2 of the FOIP Act may make a complaint to the Commissioner under this provision.

[para 12] In its letter of February 29, 2008, the Britmar Group does not complain that its own personal information has been collected, used or disclosed, nor could it, given that a partnership does not have personal information as defined by section 1(n) of the FOIP Act. Rather, it complains that the Public Body requires earnings information of partners and directors that the Britmar Group argues is unnecessary. However, only a partner or director who believes that his or her personal information has been collected in contravention of Part 2 of the FOIP Act could bring a complaint regarding collection of that information. I therefore find that the Britmar Group does not have standing to request review under section 65(3). I also find that none of the other provisions of section 65 authorize the Britmar Group to request that the Commissioner review the issues raised in its complaint.

[para 13] As noted above, a partner from the Britmar Group authorized the representative who wrote the letter of February 29, 2008 "to act as his agent in all privacy matters arising with respect to the Workers' Compensation Board and the Information and Privacy Commissioner." The question becomes whether this authorization can be construed as a complaint from an individual that the individual's own personal information was collected, used, or disclosed by the Public Body, or clarifies that the letter of February 29, 2008 is a complaint regarding the collection of his own personal information. In my view, neither interpretation can be supported.

[para 14] The initial complaint letter states that it is made on behalf of the Britmar Group. In addition, the representative signed it “For the Britmar Group.” Moreover, the partner who provided the authorization referred to above, is not mentioned in the complaint letter of February 29, 2008, nor is his personal information. Rather, the representative who wrote the complaint letter refers only to the Britmar Group and to its partners acting collectively as the Britmar Group. The representative does not refer to personal information of the partner that has been collected by the Public Body, but to information about the Britmar Group that he has sent to the Public Body. For example, the representative states:

For the 2007 Annual Return, I [the representative] filed an amount of \$20,000 as the earnings of The Britmar Partnership, although that is not the actual amount that will be accurately reflected in the T2124 filings with the [last name of all the partners of the Britmar Group] T1 General Returns for this year. I [the representative] filed this figure, because this is the amount of “voluntary coverage” agreed by the firm that I am acting for and which accurately reflects the WCB “exposure”.

The complaint of February 29, 2008 does not raise any issues regarding the partner’s personal information or its collection, but rather, it raises the collection of the Britmar Group’s personal information. Moreover, the paragraph above suggests that the representative chose not to provide the Britmar Group’s actual earnings to the Public Body, but substituted a figure that the firm had agreed to.

[para 15] I find that the effect of the authorization of April 23, 2009 is to authorize the representative to argue the issues raised in the letter of February 29, 2008 on behalf of the partner as well as the Britmar Group. However, the issues raised in the February 29, 2008 letter do not include or refer to a complaint that the partner’s personal information was collected by the Public Body contrary to Part 2 of the FOIP Act.

[para 16] I also find that the letter authorizing the Britmar Group’s representative to represent a partner of the Britmar Group in matters before the Commissioner cannot be construed as a complaint that the partner’s personal information has been collected, used, or disclosed by the Public Body. The letter of authorization indicates only that the representative is representing both the Britmar Group’s and the partner’s interests raised by the complaint of February 29, 2008. However, as noted above, the letter of February 29, 2008 does not complain about or describe a collection of the partner’s personal information.

[para 17] As the complaint before me was not made by an individual who believes his or her personal information has been collected contrary to Part 2 of the FOIP Act, I conclude that I do not have jurisdiction to address it. However, if I am wrong in arriving at this conclusion, I will consider whether the submissions made by the representative of the Britmar Group establish that the partner’s personal information was collected by the Public Body in contravention of Part 2 of the FOIP Act.

Substantive Issue

[para 18] The representative provided an Annual Return for 2008 prepared by the Public Body which refers to “Earnings for Directors, Proprietors, or Partners” as \$20,000, “Casual Labour” as \$20,000 and “Coverage Amount.” I understand from the representative’s submissions that the \$20,000 figure does not represent the partner’s earnings or the Britmar Group’s actual earnings, but is, rather, an amount that the Britmar Group considered reflected the amount of personal coverage sought. I therefore find that the representative did not disclose the personal earnings information of the partner to the Public Body. It follows then, that I also find that the Public Body did not collect personal information about the partner of the Britmar Group.

[para 19] The Public Body states in its submissions that it does not require employers without workers, i.e. employers with personal coverage only, to submit Annual Returns. The Britmar Group does not have workers other than workers with personal coverage. The Public Body states:

Moreover, it is noteworthy that the information collected by the WCB in the Annual Return was provided voluntarily by Britmar, not under any compulsion by the WCB. As stated earlier, employers, who do not have workers, and therefore, who have personal coverage only, are not required to submit Annual Returns to the WCB. For this reason, the WCB does not provide passwords to “Personal Coverage only” employers, nor did it in 2008. However, some employers, even though they are “personal coverage only” opt to submit an Annual Return to have a record on file, as seemingly was the case in this instance.

[para 20] In response to this statement, the Applicant argues:

At its root the WCB uses legal coercion in its drive for “data mining”. Most small businesses are told in no uncertain terms that they must comply or face the following penalties taken right out of the Act itself.

Administrative Penalty

152.1(1) Where the Board is of the opinion that a person has contravened section 19, 33(1), 87, 103, 105, 106, 108, 109, 110, 138, 139, 140, 140.1, 145, 147(3) or 151.1, the Board may by notice in writing given to that person require that person to pay to the Board within the time specified in the notice an administrative penalty in respect of each contravention in the amount set out in the notice...

...

Secondly, the WCB has a well earned and deserved reputation for dealing in “bad faith”. It is common knowledge among employers that WCB regularly goes on “fishing expeditions” through employer’s files looking of anything it wishes under the guise of an “audit” and for which it routinely results in breaches of the privacy provisions of the Income Tax Act as well as breaches of the Alberta Privacy Act.

We wish the Commissioner to understand that it is against this background, that small business people like the Britmar Group operate when they file Annual Returns. Even if some operative in the WCB says that an Annual Return is not required, it’s not “safe” to take this advice because of actual Board Practices. Thus filing “unnecessary” returns would at least “prove” compliance in the event of future “administrative penalties.”

It is this kind of “legislated penalty” that is intimidating to small unincorporated businesses like The Britmar Group who have essentially “unlimited liability” for such “administrative penalties”. Clearly unincorporated businesses feel intimidated and are bullied into breaking other privacy provisions of the law.

[para 21] I understand the Complainant to argue that it is aware that, as a company without workers, filing an annual return was unnecessary. However, the Complainant chose to do so because the *Workers’ Compensation Act* contains provisions authorizing the Public Body to assess administrative penalties, and it is of the view that filing an annual return would prevent the Public Body from assessing administrative penalties against it under section 152.1(1).

[para 22] I do not read section 152.1(1) as compelling employers without workers to file annual returns. Moreover, this provision does not indicate that such an employer would be subject to administrative penalties if it does not file an annual return, or that it would be immune from administrative penalties if it files an annual return voluntarily. If the Complainant does not wish to answer the questions on the annual return, it may choose not to file a voluntary annual return.

[para 23] While the Complainant apparently chose to file an annual return, this filing did not include anyone’s personal information. Thus, as I have already found, the Public Body did not collect any personal information in any event.

IV. ORDER

[para 24] I make this Order under section 72 of the Act.

[para 25] As the Complainant lacks standing to request review there is no order that I can make.

[para 26] If I am wrong in my conclusion as to the Complainant’s standing, I find that the Public Body did not collect personal information. Therefore, it did not contravene Part 2 of the FOIP Act.

Teresa Cunningham
Adjudicator