ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-010

May 26, 1998

WORKERS' COMPENSATION BOARD

Review Number 1309

BACKGROUND

(para1) As Information and Privacy Commissioner, I conducted an inquiry on March 12, 1998, under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The inquiry arose out of the Applicant's request for a review of several matters.

(para2) First, the Applicant requested a declaration that a correction to the Applicant's personal information undertaken by the Workers' Compensation Board (the "Public Body") was not in accordance with section 35(1) of the Act. The Applicant initially requested a correction to a phrase in an internal Public Body memo (record #1) which stated that his benefits ceased on the basis of "fraud". In response to this request, the Public Body amended record #1 by replacing the term "fraud" with the term "deliberate misrepresentation". The Applicant states that since there is no proof that he was fraudulent, the term fraud should not have been replaced with words of similar meaning such as deliberate misrepresentation.

(para3) Second, the Applicant requests three corrections to his personal information. The first two correction requests refer to record #1. The Applicant requests the deletion of the phrase, previously "corrected" by the Public Body, that now states the Applicant's benefits ceased on the basis of "deliberate misrepresentation", as well as the deletion of a statement which refers to an admission allegedly made by the Applicant that he "rode his bicycle for 30 miles" the day after an accident. The third correction request is in regards to a statement in a letter sent by the Public Body to the Applicant (record #3), which denies the Applicant's claim for psychiatric disability payments because of the lack of information supporting this claim. The Applicant requests a correction to this statement which would essentially reverse the Public Body's decision to deny the claim.

(para4) Third, the Applicant requests a declaration that the Public Body breached the Applicant's privacy when it attempted to send to a former accident employer a copy of a letter (record #2) which detailed some of the Applicant's more recent injuries.

(para5) Mediation in regards to these issues failed, and the matter was set down for written inquiry on March 12, 1998. The parties submitted written briefs regarding the correction requests and breach of privacy claim on February 9, 1998, and submitted rebuttal briefs regarding these issues on February 18, 1998. Furthermore, this Office requested and received additional written briefs regarding the appropriateness of the correction procedure undertaken by the Public Body. This Office received the additional written brief from the Public Body on March 20, 1998, and from the Applicant on March 26, 1998.

(para6) It should be noted that this Order will only deal with a portion of the issues initially raised by the Applicant. The Applicant's initial written brief outlined numerous additional issues which the Applicant later decided not to include in this inquiry, but which may be the focus of a future inquiry. The Applicant decided not to include these additional issues as many of the them would first have to be addressed by the Public Body at a department level, and would therefore postpone the hearing of this inquiry.

RECORDS

(para7)
Record #1: Public Body 's internal memo dated December 1, 1994;

Record #2: Letter dated January 16, 1996 from the Public Body, addressed to the Applicant's former lawyer, but which the Public Body attempted to send to the Applicant's former accident employer;

Record #3: Letter dated April 16, 1997 from the Public Body to the Applicant.

ISSUES

(para8) There are several issues and sub-issues to be addressed:

1) Did the Public Body act appropriately in response to a correction request received from the Applicant under section 35(1)?

Sub-issue A: When the Applicant requested a correction to the record, was there a duty on the Public Body to seek clarification of the request?

Sub-issue B: Did the Public Body have a duty or a right to replace the term "fraud" with the words "deliberate misrepresentation" under section 35(1)?

2) Are there errors or omissions in records #1 and #3 which should be corrected pursuant to the Applicant's request under section 35(1), or in the alternative, should the Public Body annotate or link the Applicant's request for correction pursuant to section 35(2)?

3) Did the Public Body disclose the Applicant's personal information to the Applicant's former accident employer, and, if so, was the disclosure in accordance with section 3(a) or 38(1)(e) of the Act?

DISCUSSION

Issue #1 - Did the Public Body act appropriately in response to a correction request received from the Applicant under section 35(1)?

Applicant's Position

(para9) The Applicant submits the term "correction" means a change in information which reflects the truth. As such, a change to information should only be made if there is evidence which supports the correction. The Applicant submits that in this inquiry, there was no evidence that he was fraudulent and therefore the term "fraud" should not have been corrected with a similar term such as "deliberate misrepresentation". The Applicant raised but did not make submissions regarding the Public Body's duty to seek clarification of the correction request.

Public Body's Position

(para10) The Public Body submits that because the term "correction" is not defined in the Act, it must be given its ordinary meaning. The Public Body submits the ordinary meaning of the term is "something that is substituted or proposed for what is wrong".

(para11) The Public Body also proposes that the following process should be followed when a correction is requested:

> A) The Public Body has a positive duty under section 34 to ensure personal information is accurate and complete, if that information will be used to make a decision that directly affects an individual. This is true whether or not a request for a correction is received.
>
> B) If a request is received, the Public Body has a "duty to assist" under section 9(1) to ensure it understands the request, and to seek advance approval of the Applicant prior to making a correction.
>
> C) The Public Body's decision to annotate or correct is a discretion that should be exercised in good faith without prejudging the issue, and without bias.
>
> D) If a correction to an opinion is sought, the only obligation and only recourse to the Public Body is to annotate the record as is required by section 35(2).

E) If a correction request concerns background facts which will be used to make decisions, the Public Body has an obligation to ensure the information is accurate and complete as per section 34. Furthermore, if the Applicant seeks a correction to a factual matter, the Public Body may correct the information in a manner different from the correction request, as long as it annotates or links the original request, or any inconsistency between requested correction and the correction actually made.

F) Public Bodies have a discretion to make administrative decisions as to how they will annotate. There are however a couple of general principles found in B.C. Order 124-1996 that should be followed:

> 1) Annotations should be apparent in the file. The Public Body should not try to hide or bury an Applicant's request for correction. The annotations should be visible and accessible as the information under challenge, and should be retrieved with the original file.
>
> 2) The Public Body should not however be forced to comply with unreasonable demands of an Applicant who, " in voluminous material and in nuisance fashion" insists the documents be edited in exactly the way he wishes. Rather, annotations should be made in a fair manner. What is considered "fair" will depend on the type of records involved, the length of the correction requested by the Applicant, the Applicant's other avenues of redress within the Public Body (such as appeals), and the administrative resources of a Public Body.

(para12) In its written submission, the Public Body states that though its correction which replaced the term "fraud" with the term "deliberate misrepresentation" was made in a good faith attempt to reach an amicable solution, it nevertheless admits it erred by making such a correction. It states that the reference to the Applicant's "fraud" was a statement which accurately reflected the opinion of the author, and therefore the Public Body should not have made this correction.

Sub-issue A: When the Applicant requested a correction to the record, was there a duty on the Public Body to seek clarification of the request?

(para13) In my view, the Public Body has a duty to seek clarification from an Applicant, if it does not understand the Applicant's request. This duty

arises under section 35(1) read in conjunction with section 51(2)(d). Section 35 and the relevant portion of section 51 states:

> *35 (1) An applicant who believes there is an error or omission in the applicant's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.*
>
> *(2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate or link the information with the correction that was requested but not made.*
>
> *(3) On correcting, annotating or linking personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year before the correction was requested that a correction, annotation or linkage has been made.*
>
> *(4) On being notified under subsection (3) of a correction, annotation or linkage of personal information, a public body must make the correction, annotation or linkage on any record of that information in its custody or under its control.*
>
> *(5) Within 30 days after the request under subsection (1) is received, the head of the public body must give written notice to the individual that*
>
> > *(a) the correction has been made, or*
> > *(b) an annotation or linkage has been made pursuant to subsection (2).*
>
> *(6) Section 13 applies to the period set out in subsection (5).*
>
> *51(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that...*
>
> > *(d) a correction of personal information requested under section 35(1) <u>has been refused without justification</u>, ...*

(emphasis added)

(para14) Though section 35(1) in itself does not state whether there is a duty on the Public Body to understand or seek clarification regarding an Applicant's correction request, section 35(1) read in conjunction with section 51(2)(d) gives rise to this duty.

(para15) Section 51(2)(d) states that the Commissioner has the jurisdiction to investigate and resolve complaints that a correction has been "refused without justification". By implication then, a Public Body should have "justification" or, in other words, a sufficient reason, to refuse a correction request. It then logically follows that before a Public Body can be "justified" in refusing a request, the Public Body must first and foremost ensure it understands the request.

(para16) In this inquiry, it is my view that the Public Body did not act appropriately, as it did not understand the Applicant's request, and there is no evidence that it sought clarification. The lack of the Public Body's understanding is seen in the contradictory statements found in the Public Body's written argument. In paragraph 3, it states it "surmised" that changing the term "fraud" to "deliberate misrepresentation" would achieve an amicable solution, and, in retrospect, it believes that the only "correction" that would have been satisfactory to the Applicant, would have been a removal from the records, of any reference to wrongdoing. The Public Body then contradicts itself in paragraph 5, and indicates that at the time of the request, it believed the Applicant wanted all references to wrongdoing removed from his file.

(para17) The Public Body suggested in its written brief that a public body's duty to understand and seek clarification arises under the "duty to assist" provision in section 9(1). As I have found a duty on the Public Body to understand and seek clarification of a correction request under section 35(1) read in conjunction with section 51(2)(d), I find it unnecessary to address whether this duty also arises under section 9(1).

Sub-issue B: Did the Public Body have a duty or right to replace the term "fraud" with the words "deliberate misrepresentation" under section 35(1)?

Burden of Proof

(para18) Section 67 outlines the burden of proof in regards to an inquiry regarding a request for access to information. However, the Act is silent regarding who has the burden of proof in regards to the correction requests

which are addressed in section 35. It is therefore my responsibility to determine who should have the burden of proof in such a case.

(para19) As I stated in Orders 97-004 and 97-020, where the Act is silent as to the burden of proof, I will consider, among others, the following criteria:

i) who raised the issue?
ii) who is in the best position to meet the burden of proof?

(para20) Two requirements must be met for section 35(1) to apply: (i) there must be personal information about an Applicant, and (ii) there must be an error or omission in the Applicant's personal information. As an Applicant is in the best position to meet these two requirements, I find that an Applicant should have the burden of proof under section 35(1).

(para21) When an Applicant makes a request to a Public Body under section 35(1), it is up to a Public Body to decide whether or not to correct the Applicant's personal information. Under section 35(2), if a Public Body does not correct the Applicant's personal information, it must either annotate or link the information with the correction that was requested but not made. As a Public Body is in the best position to speak to the reasons why it decided to correct or not to correct personal information under section 35(1), and to annotate or link instead under section 35(2), I find that a Public Body should have the burden of proof regarding a decision to correct or not to correct under section 35(1) and a decision to annotate or link under section 35(2).

Discussion

(para22) In order to decide whether the Public Body properly corrected record #1, it must first be established whether the term "fraud" is subject to correction at all. If the term "fraud" is not subject to correction, then any correction made by the Public Body would have been inappropriate, whether the term was replaced with the words "deliberate misrepresentation" or some other phrase.

(para23) In order to prove a term should be corrected under section 35(1), the Applicant must fulfill a two-part test. He must be prove that the information which is the subject of the correction is personal information, and that there is an error or omission in that information.

(para24) In my view, part 1 of the test is fulfilled as the information at issue is personal information. Section 1(1)(n) of the Act defines "personal information". In particular, section 1(1)(n)(viii) states:

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

(viii) anyone else's <u>opinions</u> about the individual,...
(emphasis added)

(para25) In this case, the statement in record #1, which said that the Applicant's benefits ceased on the basis of his "fraud", was a recorded opinion about the Applicant, and therefore was the Applicant's "personal information" pursuant to section 1(1)(n)(viii).

(para26) However, in my view, part two of the test is not fulfilled. The term "fraud" in record #1 is not "an error or omission". As the terms "error" and "omission" are not defined in the Act, I have used the ordinary dictionary definitions to define these terms. The Concise Oxford Dictionary, Ninth Edition, defines "omission" as something missing, left out or overlooked. "Error" is defined to mean a mistake, or something wrong or incorrect. Furthermore, the Concise Oxford Dictionary defines "incorrect" to mean not in accordance with fact, or wrong, while the term "correct" is defined as meaning, to set right, amend, substitute the right thing for the wrong one.

(para27) In Order 97-020, I stated that an opinion which accurately reflects the views of the author at the time it was recorded cannot be considered an "error" or an "omission", and therefore is not subject to correction. In my view, this includes the opinion of the Public Body's claim adjudicator, whether or not the opinion was supported by fact. As stated by the B.C. Commissioner in Order 124-1996, correction provisions "should not be used as a means of attempting to appeal decisions and opinions of adjudicators with which the worker does not agree."

(para28) In this inquiry, the Public Body's statement in record #1 which referred to the Applicant's benefits ceasing on the basis of "fraud" was an opinion of the Public Body, which I accept accurately reflected the views of the author at the time it was recorded. As such, the word "fraud" was not a term which was subject to correction, and, therefore, the Public Body erred when it replaced this term with the words "deliberate misrepresentation".

(para29) In my view, I have the discretion to remedy this error and reverse the Public Body's correction under section 62(1), read in conjunction with section 68(3)(d). These sections state:

62(1) A person who makes a request to the head of a public body for access to a record or for correction of personal

information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.

[68]*(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:...*

(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;...

(emphasis added)

(para30) Section 62(1) states that a person who asks the head of a Public Body for a correction of personal information may ask me to review the head of a Public Body's decision, act or failure to act in regards to that correction request. In my view, this clearly includes a review of a correction which the Public Body has made in error. If this section is then read in conjunction with section 68(3)(d), it is clear that my jurisdiction to "specify how personal information is to be corrected" under section 68(3)(d) should be interpreted to include a discretion to remedy a correction which was made in error.

(para31) However, though I have established my jurisdiction to reverse the correction made by the Public Body, I will not exercise this discretion as I do not think it would be in the Applicant's best interest that I do so. In my opinion, remedying the error by once again replacing the term "deliberate misrepresentation" with the word 'fraud" would be of no benefit to the Applicant.

Issue #2 - Are there errors or omissions in records #1 and #3 which should be corrected pursuant to the Applicant's request under section 35(1), or in the alternative, should the Public Body annotate or link the Applicant's request for correction pursuant to section 35(2)?

Applicant's Position

(para32) The Applicant requests several corrections to his personal information. First, he requests a deletion in record #1 of the reference to his "deliberate misrepresentation" . Second, he requests the deletion of a statement in record #1 which refers to his alleged admission that he "rode his bicycle for 30 miles" the day after an accident. Third, he requests a correction to a statement in record #3 which denies his claim for psychiatric disability benefits because of the lack of information to support the claim. In regards to the third correction request, the Applicant requests a correction which would

essentially reverse the decision of the Public Body denying his claim to the benefits.

(para33) In regards to the first and second correction request, the Applicant's argues:

> A) That he cannot be found "criminally guilty" of deliberate misrepresentation without a trial;
>
> B) That the Public Body has no evidence to support either of the statements in the memo, and the errors in the Public Body 's affidavits are proof that the Public Body is generating "false and contradictory information"; and
>
> C) That the Public Body based its decision on incomplete information, which is due in large part to its refusal to accept reports from his physician.

(para34) In regards to the third correction request, the Applicant argues a correction should be made, as the portion of record #3, which states "there is no information" to support the Applicant's claim for the disability benefits, directly contradicts other evidence on file, including medical opinions and other internal Public Body memos.

Public Body's Position

(para35) The Public Body opposes any correction to the records. In regards to the first and second correction requests, it submits:

> A) That section 35 of the Act cannot be used to correct opinions, such as the reference to the Applicant's "fraud", if the recorded opinion properly expresses the view of the author at the time it was recorded. Furthermore, the Public Body briefly submits that its recollection of the Applicant's admission regarding his 30-mile bicycle ride the day after the accident is not a piece of information which can be "corrected" under section 35;
>
> B) That section 12 of the Workers' Compensation Act (WCA) gives the Board the exclusive jurisdiction to inquire into and examine all matters and questions arising under its Act, and, therefore, I do not have

jurisdiction to decide whether the Public Body correctly withheld compensation from the Applicant.

C) That it did not overstep its jurisdiction by finding the Applicant guilty of civil fraud.

(para36) In regards to the third correction, the Public Body argues that, pursuant to section 12 of the WCA, this decision is within the exclusive jurisdiction of the Public Body, and, therefore, the decision to accept or deny the claim for psychiatric disability benefits is beyond my jurisdiction. In any event, the Public Body argues it was justified in denying psychiatric disability payments because the preconditions found in its policy were not met.

Discussion

(para37) As previously mentioned, in order for a term to be subject to correction, a two-part test must be fulfilled. It must be proven that the information which is the subject of the correction is personal information and that there is an error or omission in that personal information.

(para38) In my opinion, the first part of the test has been fulfilled. All three pieces of information which are the subject of the correction request are "personal information" of the Applicant. Sections 1(1)(n)(vi) and 1(1)(n)(viii) of the Act define "personal information" as:

> *(n) "personal information" means recorded information about an identifiable individual, including...*
>
> > *(vi) information about the individual's health and health care history, including information about a physical or mental disability,...*
> >
> > *(viii) anyone else's opinions about the individual...*

(para39) It is my opinion that the reference to the Applicant's "deliberate misrepresentation" in record #1 falls under both 1(1)(n)(vi) and 1(1)(n)(viii), as it was the Public Body's opinion that the Applicant deliberately misrepresented the extent of his injury.

(para40) Similarly, reference to the Applicant's alleged admission regarding his "30-mile bicycle ride" is personal information under section 1(1)(n). As I stated in Orders 96-010, 96-019, and 96-021, events and facts discussed, observations made, the circumstances in which information is given, as well as

the nature and content of information, may be personal information if it is shown to be recorded information about an identifiable individual as set out in the initial part of 1(1)(n). In my view, the information regarding the alleged admission of the Applicant falls into this category.

(para41) Furthermore, the Public Body's decision to deny psychiatric disability payments in record #3 falls under both 1(1)(n)(vi) and 1(1)(n)(viii) of the Act as the decision is an opinion regarding an alleged disability.

(para42) However, in my view, part two of the test is not fulfilled. None of the pieces of personal information can be considered "an error or omission". As previously mentioned, opinions, including those of the claim adjudicators, cannot be considered in error or an omission if they accurately reflect the views of the author at the time they were recorded, whether or not these opinions are supported by fact. In this inquiry, the Public Body's reference to the Applicant's "deliberate misrepresentation" in record #1 and the Public Body's statement in record #3 denying psychiatric disability payments to the Applicant, were opinions of the Public Body, which the Applicant has not disputed as accurately reflecting the views of the author. Neither of these statements can be considered an error or omission and therefore are not subject to correction. Rather, pursuant to section 35(2), the Applicant's correction request should be annotated or linked to the file.

(para43) Furthermore, the reference to the Applicant's admission regarding his 30-mile bicycle ride can not be corrected as it is a "disputed" error in factual information. A disputed error in factual information arises when the burden of proof in regards to the correction request has not been discharged by the Applicant.

(para44) Ontario Order M-227 dealt with a similar situation. In that inquiry, the Appellant appealed the City of Toronto's decision not to correct a record. The Appellant argued that a statement in the City's records, which indicated that her supervisor had shared an employee evaluation with her, was incorrect. She submitted that her employee evaluation had not been shared with her, and therefore requested the record be changed. After reviewing the record and representations, the Commissioner did not order a correction. The Commissioner held that the Appellant had not discharged its burden of proof by providing sufficient evidence to prove the entry by the Supervisor was false or inaccurate.

(para45) This situation is similar to Ontario Order M-227 as the Applicant has not discharged his burden of proof and proved that a factual piece of information recorded on his file is in error. The Applicant has not provided sufficient evidence to prove that he did not make the admission which is

documented in the record, and therefore that an error exists. Pursuant to section 35(2), a duty is therefore imposed on the Public Body to annotate or link the file with the Applicant's correction request.

(para46) In Order 97-020, I held that the word "annotate" in section 35(2) means that the actual correction that was requested should be written on the original record close to the information under challenge by the Applicant, and be signed and dated. I interpreted the word "link" to mean that the correction requested be attached to, or joined or connected with the original record containing the information under challenge.

(para47) In making an annotation to the file, the Public Body has a discretion to make administrative decisions as to how it will proceed. However there are a few general principles found in B.C. Order 124-1996 which should be followed.

(para48) First, it is important that the annotations be apparent in the file. The Public Body should not try to hide or bury the Applicant's request for correction. The correction request should be as visible and accessible as the information under challenge, and should be retrieved with the original file.

(para49) Second, the Public Body should not be forced to comply with unreasonable demands of an Applicant who, " in voluminous material and in nuisance fashion" insists the documents be edited in exactly the way he wishes. Rather, the annotation or linkage should be made in a fair manner. What is considered "fair" will depend on the type of records involved, the length of the correction requested by the Applicant, the Applicant's other avenues of redress within the Public Body (such as appeals), and the administrative resources of a Public Body.

(para50) As I have upheld the Public Body's decision not to make the aforementioned corrections, I find it unnecessary to address the Public Body's other arguments and decide whether the Public Body has the exclusive jurisdiction to adjudicate claims or whether it has the jurisdiction to declare an Applicant guilty of civil fraud.

(para51) Furthermore, in response to the Applicant's concern regarding criminal liability, I want to emphasize that I do not have jurisdiction to determine criminal liability, nor have I attempted to do so in this Order. In regards to correction requests, my jurisdiction is limited under section 51(2)(d), and 68(3)(d). Under section 51(2)(d) my jurisdiction is limited to determining whether a correction of personal information requested under section 35(1) has been refused without justification, while my jurisdiction pursuant to section 68(3)(d) is limited to confirming a decision not to correct personal information

or alternatively, specifying how personal information should be corrected. In this Order I am not determining or implying that the Applicant is liable for criminal fraud.

Issue #3 - Did the Public Body disclose the Applicant's personal information to the Applicant's former accident employer, and if so, was the disclosure in accordance with section 3(a) or 38(1)(e) of the Act?

Applicant's Position

(para52) The Applicant argues the Public Body breached the Applicant's privacy when it attempted to disclose information regarding a 1992 injury to his former 1984 accident employer ("former accident employer"). The Applicant argues that the information regarding his recent injury should not have been disclosed to his former accident employer especially since the recent injury occurred after the former accident employer's file was closed.

Public Body's Position

(para53) The Public Body argues it did not breach the Applicant's privacy. It submits:

A) There was no breach of privacy because the former accident employer did not actually receive the letter which included the information regarding the recent 1992 injury.

B) Alternatively, even if the former accident employer received the letter, section 3(1) [should read 3(a)] of the Act permits the disclosure. Section 3(a) states:

> *This Act (a) is in addition to and does not replace existing procedures for access to information or records,...*

C) In the further alternative, even if the letter was disclosed to the former accident employer, there was no breach of privacy because section 38(1)(e) of the Act permits a Public Body to disclose personal information:

> *(e) for the purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure.*

The Public Body argues that the Workers' Compensation Act (the "WCA") is a example of an "enactment" referred to in section 38(1)(e). And in particular, it argues sections 30, 39, 141(1)(2)(3) of the WCA are relevant to this situation as they allow the information regarding recent injuries to be sent to former accident employers:

> *30 On the written request of the employer of an injured worker, the Board shall provide the employer with a report of the progress being made by the worker.*
>
> *39 On the making of a determination as to the entitlement of a worker or his dependant to compensation under this Act, the employer and the worker or, in the case of his death, his dependant, shall, as soon as practicable, be advised in writing of the particulars of the determination, and shall, on request, be provided with a summary of the reasons, including medical reasons, for the determination.*
>
> *141(1) No member, officer or employee of the Board and no person authorized to make an investigation under this Act shall, except in the performance of his duties or under authority of the Board, divulge or allow to be divulged any information obtained by him in making the investigation or that comes to his knowledge in connection with the investigation.*
>
> *(2) No member or officer or employee of the Board shall divulge information respecting a worker or business of an employer that is obtained by him in his capacity as a member, officer or employee unless it is divulged under the authority of the Board to the persons directly concerned or to agencies or departments of the Government of Canada, the Government of Alberta or another province.*
>
> *(3) Notwithstanding subsections (1) and (2) and section 29(3), where a matter is being reviewed or appealed under section 40 or 116,*
>
> > *(a) the worker, or the workers personal representative or dependant in the case of the death or incapacity of the worker, or the agent of any of them, and*
> >
> > *(b) the employer or his agent*
>
> *are entitled to examine all information in the Boards files that is relevant to the issue under review or appeal, and those persons shall not use or release that information for any purpose except for the purpose of pursuing the review or appeal.*

(para54) Specifically, the Public Body argues:

> i) That section 141(2) of the WCA allows the Public Body to divulge information to "persons directly concerned", such as an employer. Furthermore, the Public Body claims they have the right under section 12 of the WCA to decide who "is a person directly concerned";
>
> ii) That the recent injury is relevant to "all subsequent decisions relating to ongoing entitlement", and, therefore, section 39 of the WCA requires this disclosure, without specific request, to an employer; and
>
> iii) That, in any event, an employer requesting information under section 141(3) of the WCA would be entitled to access the information.

Burden of Proof

(para55) Section 67 outlines the burden of proof in regards to an inquiry regarding a request for access to information. However, the Act is silent regarding who has the burden of proof when a breach of privacy claim is made, and it is therefore my responsibility to determine who should have the burden of proof in such a case.

(para56) In my view, the burden of proof regarding the alleged breach of privacy falls on the Applicant. In Order 97-004, I addressed a similar breach of privacy claim and held that when an Act is silent as to the burden of proof, I will generally consider the following criteria:

> (i) who raised the issue?
> (ii) who is in the best position to meet the burden of proof?

In Order 97-004, the Public Body was accused of disclosing information in violation of Part 2 of the Act. The Commissioner held the Applicant had the burden of proof because the Applicant raised the issue, and was in the best position to meet the burden of proof, as only the Applicant knew the reasons for the concern on these issues.

(para57) Similarly, in this inquiry, I believe the burden of proof regarding the breach of privacy claim should fall on the Applicant since the Applicant raised all the issues, and since the Applicant has the greatest knowledge as to the importance of these issues.

Discussion

(para58) In my view, the Applicant has not discharged his burden of proof regarding the alleged breach of privacy. Evidence submitted by the Public Body of the returned unopened envelope is sufficient to conclude the Applicant's personal information was not disclosed to the former accident employer.

(para59) I will, nevertheless, address whether disclosure to the former accident employer would have been permitted under section 3(a) or 38(1)(e) of the Act. An attempt was made to disclose this information, and I therefore think it is important to clarify the duty and rights the Public Body had in regards to record #2.

(para60) In regards to section 3(a), the Public Body argues that because they have a system or procedure in place which discloses information to former accident employers, section 3(a) of the Act permits the Public Body to continue disclosing the information as it sees fit.

(para61) I disagree with the Public Body's argument. The issue before me is whether the disclosure to the former accident employer was permitted under the Act. Section 3(a) does not assist in the determination of this issue as it addresses other procedures available to access information. It does not address the issue of disclosure.

(para62) I also do not agree with the Public Body that section 38(1)(e) permits the Public Body to disclose information regarding a recent injury to a prior accident employer. In order for a disclosure to fall under section 38(1)(e), the information which was disclosed must be considered "personal information", and it must have been disclosed for the purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure. While it is my opinion that the information is personal information, I do not think it fulfills the second requirement.

(para63) The term "personal information is defined under section 1(1)(n) of the Act. Specifically, subsections 1(1)(n)(vi) and 1(1)(n) (viii) of the Act define "personal information" as:

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

> *(vi) information about the individual's health and health care history, including information about a physical or mental disability, ...*
>
> *(viii) anyone else's opinions about the individual,...*

(para64) Because the content of the record at issue dealt with both the Applicant's more recent injuries (health) and the Public Body's opinions about the Applicant's health, the information in the letter constitutes "personal information" as found in subsections 1(1)(n)(vi) and 1(1)(n) (viii).

(para65) However, I do not agree that the information was disclosed in accordance with an enactment of Alberta or Canada that authorized or required the disclosure. It is true that the WCA is one of the enactments referred to in section 38(1)(e) of the Act; however, I do not think sections 30, 39, or 141(1)(2)(3) of the WCA give the Public Body the authority to release information regarding this employee's recent injuries to his former accident employer.

(para66) After carefully reviewing the aforementioned sections of the WCA, I found a great deal of ambiguity in these sections:

> 1) Section 39 of the WCA stipulates that as soon as practicable, the employer should be given "particulars of the determination" regarding the worker's entitlement to benefits. It is unclear whether the phrase "particulars of determination" refers only to the initial decision regarding benefits, or whether it also refers to continuous updates on a worker's subsequent accidents;
>
> 2) Section 141(2) of the WCA states the Board may divulge information "to persons directly concerned". It is unclear whether this phrase would include only current accident employers, or former accident employers as well;
>
> 3) Section 141(3) of the WCA states that if a matter is being reviewed or appealed under section 40 or 116 of the WCA, the worker and the employer are "entitled to examine the information in the Board's files that is relevant to the issue under review or appeal". It is however unclear whether the phrase "entitled to examine" entitles the Public Body to send information to a prior employer on their own initiative; and
>
> 4) It is unclear whether the word "employer" in s. 39 and s.141(3) of the WCA refer only to the current employer or to former accident employers as well.

(para67) The only section which was unambiguous was section 30 of the WCA. Section 30 states that the Public Body must disclose a report regarding the injury of the worker if the employer makes a written request. However, as there is no evidence in this case that the Public Body received a written request from the former accident employer, the section cannot be used to justify the Public Body's attempted disclosure.

(para68) The modern rule of statute interpretation which states that one must look at the object or scheme of an Act to determine the proper interpretation. As Justice Kerans of the Alberta Court of Appeal in *Jahnke* v. *Wylie* 119 D.L.R. 4th 385 (Alta. C.A.) at page 390 stated in regards to the interpretation of the Workers' Compensation Act:

> In my view, we should make this statute work by determining the object of scheme of the Act and then by giving the words the meaning that best advances that object or scheme, provided only that the actual words under review can reasonably bear that interpretation. That approach has been called the "modern" rule of interpretation: see Ruth Sullivan, *Driedger on the Construction of Statutes,* 3rd ed. (Toronto: Butterworths, 1994) at p. 131... (emphasis added)

(para69) In my view, the "object" or reason why the WCA permits the Public Body to disclose a worker's medical information to employers is to equip the employer with the information it needs to appeal a decision made by a claims adjudicator regarding an Applicant's entitlement to compensation under section 40(1), or to appeal an increased assessment under section 116 of the WCA . It therefore follows that a disclosure of a recent injury to a former accident employer would only be proper if the disclosure assisted or was relevant to a former accident employer's decision to appeal a Public Body's decision under these sections.

(para70) An employee's recovery from an injury may be affected by subsequent injuries. A prior accident employer would therefore want, and should receive, information regarding a subsequent, more recent injury, if his employee was still recovering from the first injury at the time of the second.

(para71) The same is not however true if the employee's first injury claim is no longer active. If the first claim is no longer active at the time of the subsequent, more recent injury, information regarding this subsequent, more recent injury would not assist in establishing the severity of the first injury, and therefore would not be relevant to an appeal which the former accident employer might undertake.

(para72) In this case, it is my view that a disclosure of the information regarding a subsequent, more recent injury to the former accident employer, would have breached the privacy provisions of the *Freedom of Information and Protection of Privacy Act*, as the information would not have assisted the former accident employer in an appeal. In this case, I accept, and the Public Body does not dispute, evidence presented by the Applicant that the Applicant 's file regarding his 1984 injury was closed and no longer considered active after July 7, 1992. As such, information regarding the subsequent, more recent injury which occurred on September 30, 1992, would not have been relevant to establish the severity of the first injury, and therefore would not be relevant to an appeal which the former accident employer might undertake.

ORDER

(para73) I find the Public Body violated the provisions of the Act by failing to seek clarification of the Applicant's correction request and improperly correcting record #1. However, I will not use my discretion under section 68(3)(a) to require the Public Body to seek clarification of the Applicant's prior request for correction, as, for obvious reasons, it would not be of benefit to either party at this point. Furthermore, I will not use my discretion found in section 68(3)(d) and order the Public Body to reverse the correction by changing the term "deliberate misrepresentation" to "fraud", as, in my view, a reversal of this correction would not be in the best interest, nor of any benefit, to the Applicant.

(para74) In regards to the Applicant's three correction requests, I find that the Public Body's acted in accordance with section 35(1) of the Act. Therefore, pursuant to section 68(3)(d), I confirm the Public Body's decision not to correct the personal information. However, pursuant to sections 35(2) and 68(3)(a), I order the Public Body to annotate or link the Applicant's requests for correction to each of the respective records to which the requests correspond, in a manner consistent with the general principles of annotation and linkage which I have outlined in this decision. Furthermore, I order the Public Body, not later than 30 days after being given a copy of this Order, to provide the Applicant and myself with a copy of the annotated records, or, alternatively, if the Public Body chooses to link the correction requests to the records, to notify both the Applicant and myself, in writing, of the existence and manner in which a linkage has been made.

(para75) Lastly, I find the Public Body's attempted disclosure to the Applicant's former accident employer was not successful, and, as such, there was no improper disclosure of the Applicant's personal information in violation of Part 2 of the Act. I therefore make no order in this regard. I want to however emphasize to the parties that if the Public Body's attempted disclosure had been successful, I would have found a breach of the privacy provisions in the Act for the aforementioned reasons set out in this Order.

Robert C. Clark
Information and Privacy Commissioner