ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-020

March 19, 2001

WORKERS' COMPENSATION BOARD

Review Number 1697

Office URL: http://oipc.ab.ca

Summary: The Applicant asked for access to all personal information relating to the Applicant held by the Workers' Compensation Board (the "WCB"), and then requested a review of the WCB response. The Commissioner found that the WCB largely properly applied the Act. However, the Commissioner ordered the WCB to review certain records withheld under s.4 (1)(1), sever them and provide a copy of the severed records to the Applicant.

Statutes Cited: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c. F-18.5, ss. 4(1)(h)(ii), 4(l)(i), 4(l)(ii), 5(2), 6(1), 9(1), 16, 26(1)(a), 67; *Alberta Health Care Insurance Act*, R.S.A. 1980, c. A-24, s. 13.

Authorities Cited: AB: Orders 96-017, 96-020, 97-003, 97-007, 98-002, 99-034, 2000-013

I. BACKGROUND

[para. 1.] The Applicant filed an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") with the Workers' Compensation Board (the "Public Body" or the "WCB") in late 1997, asking for all of the Applicant's personal information held by the Public Body. The Applicant reviewed the records produced.

[para. 2.] In a letter received by the Public Body on April 6, 1999, the Applicant filed a second access request (the "request") with the Public Body. The Applicant wanted to view:

> … any and all information that the WCB has about me, including printed documents, X-rays, surveillance tapes, audio tapes, photographs, and all other items, dating from March 1991 to the current time, that being up to the date when I come to review the files.

[para. 3.] The Public Body clarified the request and advised the Applicant that certain records could be obtained through routine disclosure processes. A time extension was needed to process the request.

[para. 4.] On June 11, 1999, the Public Body notified the Applicant that some 1100 responsive records had been found. Under section 11(2) of the Act, the Public Body refused to confirm or deny whether it held any responsive investigation records.

[para. 5.] The Applicant's readers viewed the records.

[para. 6.] On September 2, 1999, the Applicant wrote a letter to my Office, asking for a review of the actions of the Public Body in relation to both the request and personal information that the Public Body had released some years earlier to third parties to evaluate the Applicant's WCB claim. The Applicant raised two grounds of review:

> 1. [I] appeal the incomplete disclosure of information provided by the WCB, following my request for full disclosure of records.
>
> 2. Invasion of Privacy by the WCB.

[para. 7.] Mediation was authorized, but was unsuccessful.

[para. 8.] On April 27, 2000, a Notice of Inquiry was issued concerning the first ground of review. A written inquiry was held on July 12, 2000.

[para 9.] As the Notice of Inquiry did not specifically refer to one set of allegedly missing records, I adjourned the inquiry and invited supplementary submissions. On August 9, 2000, I concluded the inquiry.

II. RECORDS AT ISSUE

[para. 10.] The Public Body severed information from the Applicant's Employer Services files, Claimant Services file, and Legal Services files as non-responsive. The records that were severed under a particular section of the Act are summarized in the following table:

RECORDS	**SECTION OF THE ACT CITED AS AUTHORITY FOR SEVERING OR WITHHOLDING THE RECORDS**
Legal Services file vol. 1: pp. 48-57, pp. 100-102 pp. 111-114	 s. 5(2) s. 26(1)(a) s. 5(2)

Legal Services file vol. 2, p.55	s. 16(2)(a)(g)(i)
Board of Directors file: pp. 3,5,6	s. 16(2)(a)(g)(i)
Special Investigations Unit file: Pages 22-25	s. 4(1)(h)(ii)
Government Relations file: Vol. 1: pp. 1,2,4 Vol. 2: pp.42-47, pp. 53,57,58 pp. 119, 122-159, 161, 181-190,207-208, 212-216, 223	 s. 16(2)(a)(g)(i) s. 4(1)(l) s. 16(2)(a)(g)(i) s. 4(1)(l)

[para. 11.] The Applicant alleged that the following responsive records were missing or not accounted for:

> -videotapes and records from the Special Investigations Unit
> -correspondence between the Applicant's employer and the Public Body
> -a copy of a cheque to a physician ("Dr. X") from the Public Body
> -a report by a physician ("Dr. Y") to the Public Body
> -x-rays provided to the Public Body
> -copies of all medical information provided to medical consultants to assess the Applicant's claim
> -correspondence between the Public Body and a physician ("Dr. Z")
> -records from the Office of the Appeals Advisor, the Millard Rehabilitation Centre, the Director of Claimant Services, Government Relations

[para. 12.] The Public Body numbered the pages of each responsive record in each of its files sequentially. In this Order I will refer to the responsive records collectively as the "records". I will also refer to each set of records severed under a particular section of the Act as the "records."

III. PRELIMINARY ISSUE

[para. 13.] The request's open-ended time frame is unworkable. An Applicant cannot indefinitely extend the timelines of an access request by asserting that time runs until the Applicant decides to view the records. In this case, the Public Body is entitled to treat the date that it received the request as the outer time limit.

IV. ISSUES

[para. 14.] There are five issues:

A. Did the Public Body discharge its duty under section 9(1) of the Act?

B. Do sections 4(1)(h)(ii) and (l)(i) and (ii) apply to the records?

C. Does section 5(2) apply to the records?

D. Does section 16 apply to the records?

E. Did the Public Body properly apply section 26(1)(a) to the records?

Burden of Proof

[para. 15.] The burden of proof is on a balance of probabilities. The Public Body has the burden of proof for issues A, B, C, and E. If section 16 applies to the records, then the Applicant bears the burden of proof for issue D under section 67(2).

ISSUE A. Did the Public Body discharge its duty under section 9(1) of the Act?

(a.) Discussion

[para. 16.] The duty of a public body to assist an applicant is found in section 9(1) of the Act, which reads:

> 9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para. 17.] In previous Orders I have stated that how a public body fulfills that duty will vary according to the facts of each request and the sophistication and knowledge of an applicant. An adequate search has two elements: 1) every reasonable effort is made to search for the actual record requested, and 2) the applicant is informed in a timely fashion of what has been done. The standard directed by the Act is not perfection, but what is "reasonable." In Order 98-002, I adopted the definition of "reasonable" in Black's Law Dictionary: "fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view."

[para. 18.] When examining the adequacy of a search I consider all steps taken to locate responsive records and account for missing records. In this inquiry, I must determine whether the evidence and submissions indicate that responsive records are likely missing from the Applicant's files, and, if so, whether the Public Body has properly accounted for them. I will assess each of the Applicant's complaints on point.

(i.) Videotapes and records from the Special Investigations Unit

[para. 19.] The Applicant claims that the Public Body has not provided all of the videotapes and records from the Special Investigations Unit.

[para. 20.] The Public Body argues that the only responsive tape held by the WCB was a surveillance tape. That videotape, along with 49 pages of records, was sent to the Applicant after the Public Body's investigation closed. In its submission, the Public Body said that it provided the entire file to the Applicant.

[para. 21.] However, the Public Body's own records show that the Public Body withheld pages 22 to 25 of the Special Investigations Unit file, as provided by section 4(1)(h)(ii) of the Act. This information is found in a copy of a cover letter to the Applicant, dated March 1, 2000, that the Public Body sent along with the released records from the Special Investigations Unit file. The Public Body provided proof of the Applicant's receipt of that package of records for my review.

[para. 22.] After reviewing the evidence and the submissions, I am satisfied there is no evidence that the Public Body withheld any responsive records relating to the activity of the Special Investigations Unit, other than the responsive records withheld under section 4(1)(h)(ii) of the Act, which I will deal with later in this Order.

(ii.) correspondence between the Applicant's ex-employer and the Public Body

[para. 23.] The Applicant claims to have a copy of a letter from the ex-employer to the Public Body that is not on the Applicant's file. The Applicant did not produce this letter at inquiry, or show that the letter was not among the records provided to the Applicant or the Applicant's readers.

[para. 24.] The Public Body relies upon its searches, and says that all correspondence between it and the Applicant's ex-employer is on the Applicant's file.

[para. 25.] After reviewing the records and the submissions by the parties, I find that there is no evidence of missing records as alleged. Therefore, I accept the Public Body's argument that there are no such missing records.

(iii.) cheque issued to Dr. X

[para. 26.] The Applicant argues: "I have a copy of a [Public Body] report that refers to notes between [Dr. X's] office and the [Public Body]. Therefore, there is evidence that a cheque was issued [by the Public Body to Dr. X]."

[para. 27.] The Public Body says that no payment was made to Dr. X after the Public Body determined that Dr. X's office had no record of treating the Applicant.

[para. 28.] The records I reviewed included contemporaneous internal file notes which show that Dr. X's office advised the Public Body that it had no record of the physician ever treating the Applicant. There is no evidence that Dr. X prepared a report pertaining to the Applicant for the Public Body. I accept the Public Body's claim that it did not issue a cheque to Dr. X to pay for such a report.

(iv.) Dr. Y's report

[para. 29.] The Public Body relies on its searches and denies that Dr. Y produced a written report as alleged. It says that Dr. Y provided only a verbal opinion to the Public Body, as noted in the records released to the Applicant.

[para. 30.] After reviewing the records and the submissions of the parties, I find no evidence of a missing record as alleged. I accept the Public Body's claim that there is no such report.

(v.) correspondence involving the Public Body and Dr. Z

[para. 31.] The Applicant says that the records fail to include a report from Dr. Z (the "second report").

[para. 32.] The Public Body argued that it had provided the Applicant with a copy of all records relating to Dr. Z when it provided the Applicant with a copy of the Applicant's claim file. The Public Body presented a memo resulting from an additional search for the records conducted in July 2000. The Public Body admits that it requested another report, but argued that it had no record of receiving the second report.

[para. 33.] The records I reviewed show that Dr. Z had provided an earlier opinion to the Public Body about the Applicant when he practiced in Alberta. Dr. Z subsequently moved to the United States of America. The Applicant assumes in effect that because a copy of the Applicant's x-rays were sent to Dr. Z, who then returned them from his office in the United States, Dr. Z must have prepared the second report and sent it to the Public Body.

[para. 34.] I find that there is no evidence that the Public Body had a second report. I accept the Public Body's claim that Dr. Z simply returned the x-rays without preparing the alleged second report.

(vi.) X-rays

[para. 35.] The Public Body says it sent all of the Applicant's x-rays to the Applicant by double registered mail in October 1997 and provides supporting documentation of the delivery of the records to the Applicant.

[para. 36.] The Applicant admits that the Applicant received x-rays from the Public Body in 1997. However, it appears that the Applicant again asked for x-rays because the Applicant did not know if all of the x-rays had been provided to the Applicant in 1997. In the records and submissions, I found a 1997 Public Body file note commenting that all x-rays had been sent to the Applicant by registered mail. The Public Body appended proof of delivery and file notes on point in its submission.

[para. 37.] After reviewing the records and the submissions, I find no evidence of missing x-rays from the Applicant's files. I accept the Public Body's argument that all x-rays were sent to the Applicant.

(vii.) Medical information provided to consultants

[para. 38.] The Applicant says that the Public Body did not provide a copy of all medical information provided to medical consultants hired by the Public Body to assess the Applicant's claim. The Applicant does not particularize the allegation.

[para. 39.] The Public Body says that all medical information provided to consultants is in the Applicant's claim file, as that is the source from which medical information is taken for review by consultants. The Applicant has a copy of the claims file, and so has all of the medical information provided to the consultants. The Public Body says that it does not have a specific record of what information was submitted to each consultant. At inquiry it submitted a standard checklist of documents sent to consultants to indicate the type of medical information that would be sent to medical consultants. This checklist was used at the time the Applicant had a claim with the Public Body. The Public Body did not, at that time, keep a list of the records reviewed by a consultant.

[para. 40.] There is no evidence that the Public Body failed to produce the medical information at issue. I accept the Public Body's explanation.

[para. 41.] However, adequate record management involves keeping track of all internal uses and external disclosures of records and information. As part of an adequate record management system under the Act, I suggest that the Public Body keep a precise list of what records are provided for, or are summarized for, a consultant's review in evaluating a claim.

(viii.) Remaining issues

[para. 42.] I have reviewed the evidence and submissions on the remaining issues. I find that the Public Body repeatedly informed the Applicant that responsive records were available from a number of sources, including the Millard Rehabilitation Centre, through a routine disclosure process outside of the FOIP process. I accept the Public Body's argument that the Applicant advised that she did not need copies of records from either the Office of the Appeals Advisor or Claimant Services. I am satisfied that responsive records were either provided or accounted for from the Government Relations area. I am satisfied that the Public Body properly severed non-responsive information under the Act. In summary, I am satisfied that the Public Body has provided, or accounted for, all responsive records, including videotapes, print file and image file records, and informed the Applicant in a timely fashion of what had been done.

(c.) Conclusion under section 9(1)

[para. 43.] I conclude that the Public Body has discharged its duty to assist the Applicant under the Act.

ISSUE B. Do sections 4(1)(h)(ii) and (l)(i) and (ii) apply to the records?

(a.) Discussion

[para. 44.] There are two sets of records to consider under section 4: those from the Special Investigations Unit, and those from the Government Relations file. I will deal with each set of records separately.

[para. 45.] The relevant provisions of section 4(1) state:

> 4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
> ….
> (h) a record made from information
> ….
> (ii) in the office of the Registrar of Motor Vehicle Services
> ….
> (l) a record created by or for
> (i) a member of the Executive Council,
> (ii) a Member of the Legislative Assembly…
>
> that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly

[par. 46.] After reviewing the Special Investigations Unit records on a document-by-document basis, I find that each one contains information originally in the office of the Registrar of Motor Vehicle Services. I find that the Public Body correctly applied section 4(1)(h)(ii) to each of the records for which the section was claimed. The records fall outside of the Act, and I have no jurisdiction over the records. The Applicant cannot get access to the records under the Act.

[para. 47.] The Government Relations records cannot be dealt with so neatly. Under s. 4(1)(l) written communications between specified classes of government members are excluded from the application of the Act. The purpose of that provision is to allow the persons listed to communicate among themselves freely, without fear that they will be accessed under the Act. In Order 96-020, I clarified that a record created by a person who acts on behalf of one of the classes of the enumerated members of government is also excluded under Section 4(1)(l). However, section 4(1)(l) does not include records that were simply sent to one of the listed persons.

[para. 48.] In Order 97-007, I said that the proper interpretation of "by or for" in section 4(1)(l) was that one of the persons listed in section 4(1)(l) was the source of the record; that is, that person created or produced the record directly, or the record was produced on behalf of that person. In Order 2000-013, I stated that an attachment to a record authored by a person listed in section 4(1)(l) must be individually tested to see if it fulfills the

requirements found in this section. The legislature did not intend that any record could be shielded from the Act simply by attaching it to a record that is exempt from the Act under section 4(1)(l). Finally, this section requires that a record will be excluded from the application of the Act only if the record has been sent, or is to be sent, to one of the same classes of persons listed in section 4(1)(l) (i) to (iii).

[para. 49.] After reviewing the records and applying the criteria set out above to each record, I find that pages 42, 119, 122, 123, 161, 181, 182, 207, 208, 212, 213, and 223 of the Government Relations file, volume 2, fall into section 4(1)(l)(i) or (ii). I have no jurisdiction over those records. The rest of the records in that file do not fall within section 4(1)(l)(i) or (ii). These records are subject to the Act, and must be released, subject to any severing required under the Act.

(b.) Conclusion under section 4(1)(h)(ii), (l)(i)(ii)

[para. 50.] I find that pages 22 to 25 of the Special Investigations Unit records are excluded from the application of the Act, as provided for by section 4(1)(h)(ii). I have no jurisdiction over these records.

[para. 51.] I find that pages 42, 119, 122, 123, 161, 181, 182, 207, 208, 212, 213, and 223 of the Government Relations file, volume 2, are excluded from the application of the Act, as provided by section 4(1)(l)(i) or (ii). I have no jurisdiction over these records.

[para. 52.] I find that Section 4(1)(i) or (ii) does not apply to pages 43 to 47, 124 to 159, 183 to 190, and 214 to 216 of the Government Relations file, volume 2. The Act applies to these records. I intend to return those records to the Public Body. I will order the Public Body to release those records to the Applicant, subject to any severing required under the Act.

ISSUE C. Does section 5(2) apply to the records?

(a.) Summary of the arguments of the parties

[para. 53.] The Applicant made no submission on this issue.

[para. 54.] The Public Body argues that it severed codes found on pages 48-57, and pages 111-114 of the Legal Services file, volume 1, pursuant to section 13(4)(e) of the *Alberta Health Care Insurance Act*, which is paramount to the Act.

(b.) Discussion

[para. 55.] The Applicant's request was made under section 6(1) of the Act:

> 6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[para. 56.] Section 5(2) of the Act states:

5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless

(a) another Act, or
(b) a regulation under this Act

expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.

[para. 57.] Section 15(2)(a) of Alta. Reg. 200/95, (the "FOIP Regulation") states:

The following prevail despite the *Freedom of Information and Protection of Privacy Act*:

(a) *Alberta Health Care Insurance Act* and the regulations made under it;

[para. 58.] Section 13 of the *Alberta Health Care Insurance Act* is at issue. The relevant provisions read:

13(1) The Minister and every person employed in the administration of this Act shall preserve secrecy with respect to all matters that come to his knowledge in the course of his employment and shall not communicate any of those matters to any other person except as otherwise provided in this section.
….

(4) The Minister or a person employed in the administration of this Act authorized by the Minister may furnish information pertaining to the date on which health services were provided and a description of those services, the registration number of the person who received the services, the benefits paid for those services and the person to whom they were paid, but the information may be furnished only
…
(e) to the resident…who received the services…

[para. 59.] In Order 99-034, I said that for section 5(2) to be engaged, there must be an actual conflict in operation between the two enactments: that is, compliance with one enactment would involve breaching the other. In this inquiry, for section 5(2) to be engaged, there must be an actual conflict in operation between the Act and a provision of the *Alberta Health Care Insurance Act*.

[para. 60.] Section 6(1) of the Act creates a general right of access to records in the custody or control of a public body. Section 13(1) of the *Alberta Health Care Insurance Act* is a general provision that prohibits the disclosure of information created in relation to the administration of the *Alberta Health Care Insurance Act*. Section 13(4)(e) permits specified exceptions to that general rule. It sets out the kinds of information that can be disclosed to a resident under the *Alberta Health Care Insurance Act*. (The Applicant is a resident for the purposes of that Act.)

[para. 61.] After reviewing the records, I find that the severed information falls within section 13(1) of the *Alberta Health Care Insurance Act*. The Act's general right of access to records under section 6(1) conflicts with the implied unconditional prohibition against

disclosure of the severed information to the Applicant in the *Alberta Health Care Insurance Act*. Therefore, there is a conflict in operation between section 6(1) of the Act and section 13(1) of the *Alberta Health Care Insurance Act*. Pursuant to section 5(2) of the Act and section 15(2)(a) of the FOIP Regulation, section 13(1) prevails. I have no jurisdiction over the severed information.

(c.) Conclusion under section 5(2)

[para. 62.] Section 5(2) of the Act applies to the severed information in pages 48-57 and pages 111-114 of the Legal Services file, volume 1. I have no jurisdiction over that information. The Applicant cannot get access to that information under the Act.

ISSUE D. Does section 16 apply to the records?

(a.) Discussion

[para. 63.] The relevant portions of section 16 read:

> (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. 64.] Section 16 only applies to third party personal information that is responsive to an access request. My review of the records indicates that the severed information goes to other WCB claimants and is not interwoven with the Applicant's personal information.

[para. 65.] The severed information is non-responsive to the Applicant's request, and can be removed from the records. As the removal of non-responsive information is not "severing" under section 16 or any other provision of the Act, I do not find it necessary to consider section 16.

(b.) Conclusion under section 16

[para. 66.] Section 16 does not apply to the information in these records, because the severed information is non-responsive to the Applicant's request. However, as the information is non-responsive, the Public Body properly removed that information from the records.

ISSUE E. Did the Public Body properly apply section 26(1)(a) to the records?

(a.) Discussion

[para. 67.] Section 26(1)(a) states:

> 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…

[para. 68.] In Order 97-003, I adopted the common law test for solicitor-client privilege set out in *Solosky v. The Queen* [1980] 1 S.C.R. 821 ("*Solosky*"), which must be met on a document-by-document basis:

a) the document must be a communication between a solicitor and client,
b) which entails the seeking or giving of legal advice, and
c) which is intended to be confidential by the parties.

[para. 69.] "Legal advice" has been defined as a "legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications." (Order 96-017 at para. 23)

[para. 70.] After reviewing the records and applying the test for solicitor-client privilege set out in *Solosky*, I find that solicitor-client privilege can be claimed for the records on a document-by-document basis. As I have found that the solicitor-client privilege is properly claimed for each of the records, the next question is whether the Public Body exercised its discretion reasonably to claim the privilege and withhold the records.

[para. 71.] The Public Body says that it considered the following factors in deciding against disclosure. The records deal with procedural and legal aspects pertaining to the relationship between the Public Body and a third party; the matter remains outstanding between the Public Body and that third party; the matter does not impact the adjudication of the Applicant's claim with the Public Body; and disclosure of the memo could jeopardize continuing settlement negotiations and disclose privileged communications.

[para. 72.] I find that the Public Body reasonably exercised its discretion to withhold the records. The Public Body properly applied s. 26(1)(a) to the records numbered as pages 100-102 in the Legal Services file, volume 1.

(b.) Conclusion under section 26(1)(a)

[para. 73.] I find that the Public Body properly applied s. 26(1)(a) to the records numbered as pages 100-102 in the Legal Services file, volume 1.

V. ORDER

[para. 74.] Under section 68 of the Act, I make the following Order:

1. I find that the Public Body discharged its duty under section 9(1) of the Act.

2. I find that section 4(1)(h)(ii) applies to pages 22-25 of the Special Investigations Unit file. I have no jurisdiction over these records. The Applicant cannot get access to these records under the Act.

3. I find that section 4(1)(l) (i) or (ii) applies to pages 42, 119, 122, 123, 161, 181, 182, 207, 208, 212, 213, and 223 of the Government Relations record, volume 2. I have no jurisdiction over these records. The Applicant cannot get access to these records under the Act.

4. I find that neither section 4(1)(i) nor (ii) applies to pages 43-47, 124-159, 183-190, and 214-216 of the Government Relations file, volume 2. I find that I have jurisdiction over these records. I order the Public Body to release these records to the Applicant, subject to any severing required under the Act, within 50 days of receipt of this Order. I further order the Public Body to provide me with written notice that it has complied with this portion of the Order.

5. I find that section 5(2) of the Act applies to pages 48-57, as well as pages 111-114 of the Legal Service file, volume 1. I have no jurisdiction over these records. The Applicant cannot get access to these records under the Act.

6. I find that section 16 does not apply to the information severed from the following records: page 55 of the Legal Services file, volume 2; pages 3, 5, 6 of the Board of Directors file; pages 1,2 and 4 of the Government Relations file, volume 1, as well as pages 53, 57 and 58 of the Government Relations file, volume 2. The severed information is non-responsive to the Applicant's request. However, as the information is non-responsive, the Public Body properly removed that information from the records.

7. I find that the Public Body properly applied section 26(1)(a) of the Act to the records and I uphold its decision to withhold pages 100-102 of the Legal Services File, volume 1.

Robert C. Clark
Information and Privacy Commissioner