ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-041

July 26, 2002

WORKERS' COMPENSATION BOARD APPEALS COMMISSION

Review Number 1411

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Summary: The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Workers' Compensation Board (the "WCB") for all information relating to him or his WCB claims, including communications between the WCB legal department and the Appeals Commission. The WCB coordinated its response with that of the Appeals Commission, locating 1891 pages of records, and severing some. Acting Commissioner Frank Work, as he then was, held that the WCB did not respond to the Applicant openly, accurately and completely, or conduct a thorough search for records. The WCB did properly exempt records from disclosure on the basis of solicitor-client privilege and non-responsiveness. The Acting Commissioner held that the Appeals Commission responded to the Applicant openly, accurately and completely, conducted a thorough search for records, and properly exempted a record from disclosure on the basis of solicitor-client privilege.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, section 4(1)(b), section 10(1) [previously section 9(1)], section 17 [previously section 16], 27(1)(a) [previously section 26(1)(a)], section 72 [previously section 68].

Orders Cited: AB: Orders 96-015, 96-017, 97-011, 97-020, 98-002, 99-005, 99-011, 99-039.

Cases Cited: *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) (S.C.C.) *Solosky v. The Queen*, [1980] 1 S.C.R. 821 ("*Solosky*"); *Alberta Egg Producers Board v. Giberson,* [2001] A.J. No. 195 (Kenny J.).

I. BACKGROUND

[para. 1.] In a letter received on February 9, 1998, the Applicant, a WCB claimant who had filed an application for judicial review in relation to a claim with the Workers' Compensation Board (the "WCB") in 1996, made an access request (the "request") under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the WCB. The substance of the request was this:

> I am requesting full and complete disclosure of any and all information held by, generated by, and/or known to the WCB, or anyone acting on the Boards [sic] behalf…relating to me, or my claims…including…any information or record of all correspondence and communications between the WCB legal dept and the Appeals Commission and WCB.

[para. 2.] The WCB sent a copy of the request to the Appeals Commission (jointly, the "Public Bodies"). The Public Bodies conducted searches and retrieved a total of 1891 pages of records. The WCB coordinated the response for both Public Bodies, as was the practice at the time. The WCB notified the Applicant of the results of the search, and told the Applicant that his claim file, and his records in the WCB Millard Rehabilitation Centre, could be accessed through a routine disclosure process and were not included in the request. The Applicant attended the WCB and viewed the records. As recounted in the WCB letter of March 13, 1998, after viewing the records, the Applicant asked for copies of 179 pages of records, which were provided to him at a cost of 25 cents per page, for a total cost of $44.75.

[para. 3.] The Applicant filed a request for review under the Act, writing:

> I strongly feel that the WCB is deliberately not providing a complete disclosure of my claim/record by setting forthe [sic] many excuses and making attempts of not providing a complete record before proceedings with the appeal……I request you, to refer the matter to the Provincial Ombudsman Office to execute the 'WCB Executive Over-ride Act' and refer the matter to the COURT'S [sic] for the review and assessment of my WCB appeal/claim.

[para. 4.] Mediation was authorized, but failed. The matter was set down for a written inquiry. The Applicant asked for a number of extensions of time to prepare for the inquiry, which were granted. A final extension was issued that ran until December 5, 2000. On December 6, 2000, a Notice of Inquiry (the "Notice") was issued, setting down a written inquiry.

[para. 5.] Following further search activity, on April 25, 2001, the WCB released 63 additional pages of records to the Applicant, which came from the office of the former WCB President and CEO, Dr. John Cowell. These records were duplicates of those on the Applicant's claim file. On May 7, 2001, the Appeals Commission released two records, totaling 14 pages, of the Appeals Commission's Registrar's notes to the Applicant. The notes had not been destroyed, as the Appeals Commission had told the Applicant sometime prior to his request.

[para. 6.] The inquiry was rescheduled to December 2001 when Commissioner Clark retired as the Information and Privacy Commissioner. The inquiry concluded in mid January 2002. On January 1, 2002, the Revised Statutes of Alberta 2000 came into force. Although this did not result in substantive changes to the Act, various sections of the Act were renumbered. The submissions of the parties refer to the previous section numbers of the Act. For ease of reference, in this Order I will refer to both the current and the previous applicable section numbers of the Act.

II. RECORDS AT ISSUE

[para. 7.] The records directly at issue are these: one record (two pages) severed under section 27(1)(a) of the Act [previously section 26(1)(a)]; one record (one page) severed under section 17 of the Act [previously section 16]. There are also 14 pages of records withheld under section 4(1)(b) of the Act, then released to the Applicant before the inquiry.

III. PRELIMINARY ISSUES

[para. 8.] In his submission the Applicant raised several matters, and requested several remedies, that could only be dealt with by a court. I am not a judge. I have no authority to deal with the completeness of the record filed with the court in the judicial review, to review the conduct of the WCB outside of the Act, or to reopen the Applicant's WCB claim. I will deal with the matters that are within my jurisdiction.

[para. 9.] The Applicant's submission asked for changes to the inquiry procedure set out in the Notice, including leave to make an "oral representation" *in camera* to me. He also asked me to grant him an "Examination of Discoveries and the Right to Cross Examine."

[para. 10.] The Notice set out the inquiry process, which stated that the Applicant could file a written *in camera* submission. I find no basis for an oral *in camera* session: the written *in camera* submission process is sufficient, but the Applicant did not use it, despite filing an extensive written submission. The Notice is also quite clear that there is no examination for discovery process, and no cross-examination, in this inquiry. Instead, the parties make an initial submission, which includes relevant documents, and there is the opportunity for a rebuttal submission to challenge the submissions. I see no basis for departing from the process that was set down in the Notice, as it is adequate and appropriate. I denied the Applicant's requests for procedural changes.

[para. 11.] In his submission, the Applicant raised many new issues that were not set down in the Notice. These issues were raised very late. I see no reason to add any of them to this inquiry. Consequently, I will only deal with the issues set out in the Notice.

[para. 12.] The Appeals Commission raised its own preliminary issue. It argued that because it had released its Registrar's handwritten notes to the Applicant before the inquiry, one of the issues stated in the Notice was "no longer an issue" (i.e. moot):

-Did the Appeals Commission properly apply section 4(1)(b) of the Act in refusing to disclose 2 records [the Registrar's notes] to the Applicant?

[para. 13.] It is my view that there is another issue stated in the Notice that may be moot because of the release of the Registrar's notes: Are the Registrar's handwritten notes transitory records that can be destroyed under the Act?

[para. 14.] An issue is "moot" when there is no longer a live dispute between the parties that could affect the rights of those parties when the decision-maker is called upon to consider the issue: see Order 99-005. In that Order, Commissioner Clark applied the test found in *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) (S.C.C.) ("*Borowski*") to determine whether he should deal with an issue: 1) is the issue moot?; 2) if so, should the decision-maker nevertheless exercise his discretion to hear the case?

[para. 15.] I find that both issues set out above are moot, as the Appeals Commission disclosed the Registrar's handwritten notes to the Applicant outside of the Act, and a decision by me on the second issue would have no practical effect on the rights of the parties. I see no reason to entertain either of these moot issues. Following the test in *Borowsk*i, I will not consider these issues in the inquiry.

IV. ISSUES

[para. 16.] The remaining issues in this inquiry are:

A. Did the WCB respond to the Applicant openly, accurately and completely, as set out in section 10(1) of the Act [previously section 9(1)]?

B. Did the WCB conduct a thorough search for records?

C. Did the WCB properly apply section 27(1)(a) of the Act [previously section 26(1)(a)] to the record?

D. Does section 17 of the Act [previously section 16] apply to the record?

E. Did the Appeals Commission respond to the Applicant openly, accurately and completely, as set out in section 10(1) of the Act [previously section 9(1)]?

F. Did the Appeals Commission conduct a thorough search for records?

G. Did the Appeals Commission properly apply section 27(1)(a) of the Act [previously section 26(1)(a)] to the record?

V. DISCUSSION OF THE ISSUES

A. Did the WCB respond to the Applicant openly, accurately and completely, as set out in section 10(1) of the Act [previously section 9(1)]?

B. Did the WCB conduct a thorough search for records?

1. The Law

[para. 17.] Issues A , B, E and F raise section 10(1) [previously section 9(1)] of the Act, which reads:

> *10 (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.*

2. Summary of arguments of the parties

[para. 18.] The WCB argued that it followed its usual practice at the time and provided a record showing the areas it searched. The WCB admitted that, at the time of the request, some areas were not routinely searched for records. The WCB did another search for responsive records on February 9, 2001, and found 63 additional pages of records, which proved to be duplicates of records on the Applicant's claim file. The WCB provided a record showing the areas searched, and the results of that second search.

[para. 19.] The WCB maintained that there are no more missing records, or records that are not accounted for. The WCB argued that it performed an adequate search and responded openly, accurately and completely to the Applicant. The WCB argued that if the Applicant is concerned that the record the WCB returned to the Court of Queen's Bench is inadequate, the proper remedy is to apply to the Court for further disclosure. In its reply, the WCB also responded to arguments about what records were on the Applicant's claim file, which are not at issue here.

[para. 20.] The Applicant argued that the WCB search was inadequate, identifying numerous records that were alleged to be missing, including transitory records. The Applicant argued, on numerous grounds, that the WCB failed to assist him. For example, it did not give him medical interpretations of certain records; further information to clarify the information in the records (e.g. the name of a medical advisor mentioned in a letter); or provide a legal explanation of why certain records were missing. The Applicant also complained that the WCB did not provide some requested information "in coded form", and did not provide an index to the documents disclosed.

3. Discussion

[para. 21.] The time frame for considering the conduct of the WCB and the Appeals Commission for issues A, B, E and F is from February 9, 1998, until March 20, 1998, when the request for review was filed with my Office: see Order 99-039.

[para. 22.] An adequate search for records under the Act has two components. A public body must: 1) make every reasonable effort to search for the record requested; and 2) the applicant must be told, in a timely fashion, what the public body has done to respond to the request. The Act requires a public body to make every "reasonable" effort to search for the record requested. It is important to emphasize that the standard for an adequate search is not perfection, but what is "reasonable." In Order 98-002, Commissioner Clark 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. 23.] How a public body fulfills its duty to assist will vary according to the fact situation of each request: see Order 99-011. I must consider all steps taken by a public body to locate responsive records and account for missing records before an Applicant makes a request for review. An inadequate search can be remedied by further searches completed before a request for review is made.

[para. 24.] The WCB submission in effect admitted that its original search was less than adequate, stating in its submission:

> As a result and in response to this IPC Review, on February 9, 2001, the WCB's FOIP Office initiated a further search for records focussing on the areas now routinely searched upon the receipt of a personal information request but not searched at the time of the original request.

[para. 25.] The WCB acted too late to cure the inadequacy of its original search. On the basis of the evidence, I find that the WCB failed to conduct an adequate search for records under section 10(1) of the Act [previously section 9(1)].

4. Conclusion for issues A and B

[para. 26.] A failure to conduct an adequate search for records means that a public body did not respond openly, accurately, and completely to an applicant. Given my finding that the WCB search was inadequate, issues A and B must be answered in the negative.

5. Should I order a further search?

[para. 27.] The duty to assist is less onerous than the Applicant contends. It does not require that public bodies provide medical or legal interpretations of the information in records, or provide more information to clarify the information in the records. In this case, where the vast bulk of the records were disclosed to the Applicant, I will not find that the duty to assist requires the WCB to provide an index of the records. Given the evidence, I am satisfied that the WCB tried to assist and to respond openly, accurately, and completely to the Applicant. However, because of the inadequate search in 1998, the WCB did not meet its obligations under section 10(1) [previously section 9(1)]. The real issue, then, is whether to order that the WCB do a further search for records. Before I set out my decision, I will review some of the arguments about records that capture the flavour of the respective positions of these parties.

Records of all communications between the WCB Legal Department and the Appeals Commission from January 7, 1997 to December 22, 1997

[para. 28.] The WCB position is that it has accounted for these records. The WCB provided correspondence showing that in November of 1999, the responsible Portfolio Officer from my Office contacted the WCB, passing on the Applicant's repeated request for the records in question. The WCB responded and again provided a copy of its records. The WCB continued to exempt the record that is dealt with later in this Order under issues C and G. The WCB also noted that it filed a return to the Court of Queen's Bench, along with a Certificate attesting to the completeness of the record, as part of the judicial review in which the parties are involved.

[para. 29.] The Applicant argued that more undisclosed records, particularly records of telephone conversations, verbal communications and meetings, as well as personal notes, must exist, and the WCB had a practice of maintaining such records.

[para. 30.] The Applicant failed to produce any persuasive evidence or rationale as to why more transitory records documenting these communications must exist. There may have been additional communications between the WCB and the Appeals Commission, but they were not necessarily documented. In Order 97-011, Commissioner Clark considered an applicant's bare allegation that there were missing records in light of the evidence of the searches done, and found that he was satisfied that the searches would have located additional records, if they existed. This is a similar situation. Given the evidence, I prefer the position of the WCB and accept that there are no more such records.

Records listed in the Applicant's letter of February 14, 2000, responded to by the Portfolio Officer's letter of April 27, 2000

[para. 31.] The records provided by the Applicant show that the Applicant wrote to the Portfolio Officer responsible on February 14, 2000, raising concerns about the disclosure of records provided to him by the WCB. The Applicant wrote: "further review of my claim file reveals, that the following documents are also missing…" A detailed list of records follows. On April 27, 2000, the Portfolio Officer wrote back to the Applicant, advising him that he had obtained copies of almost all the records identified from the WCB claim file for the Applicant, and that the WCB had provided an explanation why it did not supply the remaining records purportedly in its custody and control.

[para. 32.] In his submission, the Applicant nonetheless argued that the WCB records identified in the Portfolio Officer's letter of April 27, 2000, were not provided to him in 1998. He wrote: "I would like to advise you that these records were not on file as well as other documentation identified during the disclosure proceedings before the court…"

[para. 33.] On balance, I prefer the evidence of the WCB as far as issues A and B are concerned. I am left with the impression that the Applicant is confused about what records were produced during the search, which records were on his claim file, which

records fall under FOIP, and which do not. I am also left with the impression that the Applicant's allegations about missing records amount to a moving target.

[para. 34.] After weighing the evidence, the arguments, and considering the relevant circumstances, I have decided that I will not order an additional search. The relevant circumstances that tip the scale against ordering another search are these: 1) the fact that the WCB and the Appeals Commission had already searched for responsive records to prepare for the Applicant's judicial review before the request was made; 2) the large volume of records provided to the Applicant in response to his request (nearly two thousand records); 3) the additional search performed by the WCB in 2001; 4) the open and helpful conduct of the WCB to search and supply further records during the request for review phase, 5) the fact that when the Applicant viewed the records in March of 1998, he did not obtain a complete copy of the records, from which he could reliably judge what was produced as a result of the search.

C. Did the WCB properly apply section 27(1)(a) of the Act [previously section 26(1)(a)] to the record?

G. Did the Appeals Commission properly apply section 27 (1)(a) of the Act [previously section 26(1)(a)] to the record?

[para. 35.] The same record is involved in issue C and G, so I will determine these issues together.

1. The Law

[para. 36.] section 27(1)(a) of the Act [previously section 26(1)(a)] reads:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege…*

2. Summary of the Arguments of the parties

[para. 37.] The Public Bodies submit that the record is correspondence between the Appeals Commission and the WCB Legal Department on a legal matter, when the WCB Legal Department provided legal advice to the Appeals Commission on judicial reviews of decisions relating to WCB claims. The Public Bodies argued that the record consists of legal advice to a client, is covered by solicitor-client privilege, and falls within section 27(1)(a) [previously section 26(1)(a)]. The WCB included one paragraph in its submission, submitted *in camera*, which explained the policy basis for not disclosing the record.

[para. 38.] The Applicant submitted:

> Since the Appeals Commission has had ongoing communication with the WCB legal department throughout the appeals proceedings, it cannot be said to be 'independent and impartial', because

> the legal department falls under the WCB and therefore, those communications and or records can't be protected under the solicitor-client privilege of section 26(1)(a) of the FOIP Act, as it amount to a 'serious conflict of interest issues [sic] and questions the independency [sic] of the appeals commission' and raises a question of due process of law, fairness and Natural Justice.
> ….
> I sincerly [sic] request, that the commissioner must consider all compelling and relvant [sic] circumstances, and impose a 'duty to be fair' to 'disclose all the 'record' [sic], thereby providing me with a fair opportunity to know the exact case against me so that I can make a fair question and answer.

3. Discussion

[para. 39.] The WCB admitted that in 1997, the WCB Legal Department sent a letter containing legal advice about the Applicant's judicial review to the Appeals Commission, as the WCB routinely acted in that capacity for the Appeals Commission.

[para. 40.] It is well established that public bodies, such as the WCB and the Appeals Commission, are entitled to claim solicitor-client privilege: see *Alberta Egg Producers Board v. Giberson,* [2001] A.J. No. 195 (Kenny J.) at paragraph 13:

> [a]lthough the Applicant is a public body, there has been recognition of solicitor-client privilege in the context of public administration of Canada. See, e.g. *Idziak v. Canada* (1992), 77 C.C.C. (3d) 65 (S.C.C.) and *Whitley v. United States of America* (1996), 104 C.C.C. (3d)

The relationship between the public bodies at the time the advice was provided does not prevent the Public Bodies from claiming the privilege.

[para. 41.] The elements of solicitor-client privilege have been set out in numerous Orders, including 96-015 and 96-017. If the privilege applies, it applies to the whole record.

[para. 42.] To correctly apply solicitor-client privilege, a public body must meet the common law test for the privilege on a document-by-document basis. That test is set out in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 ("*Solosky*"):

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

[para. 43.] After reviewing the record, I find that the criteria in *Solosky*, and consequently the objective criteria for applying section 27(1)(a) of the Act [previously section 26(1)(a)], are met. I am also satisfied that the Public Bodies maintained the privilege.

[para. 44.] As the application of the provision is discretionary ("may") under the Act, I have to determine if the WCB and the Appeals Commission properly exercised their discretion not to disclose the record. The record provided a legal opinion and advice to the Appeals Commission from the Department, in the context of a judicial review and a statutory appeal. I accept the policy arguments of the WCB and the Appeals Commission.

I am satisfied that the WCB and the Appeals Commission properly exercised their discretion to refuse to disclose the record.

Conclusion under issues C and G

[para. 45.] I find that the WCB, and the Appeals Commission, properly applied section 27(1)(a) of the Act [previously section 26(1)(a)] to the record.

D. Does section 17 of the Act [previously section 16] apply to the record?

1. Arguments of the parties

[para. 46.] The WCB volunteered in its submission that the record at issue is a copy of a facsimile transmission report. The WCB first applied section 17 of the Act [previously section 16] to the record. At inquiry, it argued that the severed portions of the record are not responsive to the request, as the information pertains to WCB matters unrelated to the Applicant. In the alternative, it said that section 16 "is not necessarily applicable because the document only discloses fax numbers of recipients of information from the WCB's Legal Department."

[para. 47.] The Applicant did not make a submission on this issue.

2. Discussion

[para. 48.] A public body should remove any personal information that is non-responsive to an applicant's request before deciding to disclose or sever information under the Act. In Order 97-020, Commissioner Clark held that "responsiveness" means anything that is reasonably related to an applicant's request for access:

> ". In determining "responsiveness", a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant's request for access will be "non-responsive" to the applicant's request.

[para. 49.] Having reviewed the record, I find that the severed portions of the record are not responsive to the Applicant's request. Consequently, I do not need to determine whether section 17 [previously section 16] applies to the record.

E. Did the Appeals Commission respond to the Applicant openly, accurately and completely, as set out in section 9(1) of the Act?

F. Did the Appeals Commission conduct a thorough search for records?

[para. 50.] I will consider issues E and F together.

1. The Law

[para. 51.] The applicable law, and Orders on point, is set out at paragraphs 21 through 23.

1. Arguments of the parties

[para. 52.] The Appeals Commission maintained that, through the WCB, it responded to the applicant openly, accurately and completely. It made a thorough search for records. The Appeals Commission submitted one contemporaneous e-mail from 1998 to the WCB as evidence of its search and the results. The Appeals Commission argued that it properly determined that the Act did not apply to the Appeal Commission's Registrar's notes, and that it properly exempted the correspondence dated July 8, 1997, which is involved in issues C and G. The Applicant was informed of these determinations.

[para. 53.] The Applicant maintained that the Appeals Commission failed to identify and provide all records in response to his request. The Applicant also claimed that the WCB response did not disclose the existence of the Registrar's notes, which is proof of an inadequate search. He also makes several points in relation to communication between him and the Appeals Commission about the Registrar's notes before the request was filed, that I will not summarize, as they have no bearing on this issue.

2. Discussion

[para. 54.] The WCB responded to the request on behalf of the Appeals Commission, as was the practice at the time. When the Appeals Commission received the Applicant's request, it had already prepared the records relating to the Applicant's claim for the judicial review. The WCB response, dated March 10, 1998, noted that two Appeals Commission records, totaling 14 pages, were not included in the request under section 4(1)(b) of the Act, and one record (two pages) was exempted from disclosure under section 26(1)(a) of the Act. Subsequently, the Appeals Commission released 14 pages of records to the Applicant, which proved to be the Registrar's notes.

[para. 55.] The Applicant was concerned that the Appeals Commission had not disclosed the existence of the Registrar's notes in the response of March 10, 1998, to his request. However, the Act does not require a public body to disclose the nature or contents of withheld records in a response to an access request. Therefore, the Appeals Commission did nothing wrong under the Act when it decided not to tell the Applicant that the records were the Registrar's notes.

[para. 56.] On the basis of the evidence relating to the search, and the submissions of the Appeals Commission, I am satisfied that the Appeals Commission responded openly, accurately, and completely to the Applicant, and conducted an adequate search for records.

V. ORDER

[para. 57.] I make the following Order under section 72 [previously section 68] of the Act:

1. With respect to issue A, I find that the WCB did not respond to the Applicant openly, accurately and completely, as set out in section 10(1) of the Act [previously section 9(1)].

2. With respect to issue B, I find that the WCB did not conduct a thorough search for records. In the circumstances, I will not order a further search.

3. With respect to issue C, I find that the WCB properly applied section 27(1)(a) of the Act [previously section 26(1)(a)] to the legal correspondence. I uphold the decision of the WCB not to disclose that record.

4. With respect to issue D, I find that the information in the facsimile transmission report is not responsive to the Applicant's request. Therefore, I do not need to decide if section 17 of the Act [previously section 16] applies to that record.

5. With respect to issue E, I find that the Appeals Commission responded to the Applicant openly, accurately and completely, as set out in section 10(1) of the Act [previously section 9(1)].

6. With respect to issue F, I find that the Appeals Commission conducted a thorough search for records.

7. With respect to issue G, I find that the Appeals Commission properly applied section 27(1)(a) of the Act [previously section 26(1)(a)] to the legal correspondence. I uphold the decision of the Appeals Commission not to disclose that record.

Frank Work, Q.C.
Information and Privacy Commissioner