

**ALBERTA**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**

**ORDER F2005-002**

February 3, 2006

**WORKERS' COMPENSATION BOARD**

Review Number 2841

**Office URL:** <http://www.oipc.ab.ca>

**Summary:** The Workers' Compensation Board (the "Public Body") disclosed the Complainant's personal information to the Appeals Commission for the Workers' Compensation Board, regarding an allegation of a reasonable apprehension of bias concerning the Complainant. The Complainant objected to the disclosure of personal information and also to the extent of personal information disclosed. The Public Body argued that it was authorized to disclose the personal information pursuant to section 40(1) of the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Commissioner held that the Public Body was authorized to disclose the personal information under section 40(1)(j) (enforcing a legal right) of the Act. The Commissioner further determined that the extent of the disclosure was necessary to enable the Public Body to carry out the purposes of section 40(1) in a reasonable manner.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, Part 2, ss. 1(n), 40(1), 40(1) (i), (j), (v), (x), 40(4). *Workers' Compensation Act*, R.S.A. 2000, c.W-15, ss. 13.1, 13.1(3), 13.1(5), 13.2(6), 13.3(1).

**Authorities Cited:** *Blacks' Law Dictionary*, 8<sup>th</sup> ed. (St. Paul: West Corp. 2004) at pages 569, 1162 and 1348.

**Cases Cited:** *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 S.C.R. 623, *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311.

**Orders Cited:** **AB:** 97-004, 98-028, 2003-017, M2004-002.

## **I. BACKGROUND**

[para 1] The Complainant was appointed as a part-time Commissioner with the Appeals Commission for Alberta Workers' Compensation (the "Appeals Commission"). Subsequently, legal counsel for the Workers' Compensation Board (the "Public Body" or "WCB") contacted legal counsel at the Appeals Commission expressing concern with the Complainant's appointment due to a reasonable apprehension that the Complainant was biased against the Public Body. The President of the Public Body set out the basis for such an allegation in a letter to the Chief Appeals Commissioner. The Chief Appeals Commissioner subsequently requested further details which were provided to him by the Public Body's legal counsel. That letter contained the following enclosures: an email from the Complainant to the President of the Public Body, notes of a telephone conversation between the Complainant and an employee of the Public Body, a copy of the Complainant's Alberta Human Rights and Citizenship Commission (the "Human Rights Commission") complaint against the Public Body and the Public Body's reply to the Human Rights Commission. The Complainant objected to the Public Body's disclosure to the Appeals Commission on the basis that such disclosure was contrary to the *Freedom of Information and Protection of Privacy Act* (the "Act").

## **II. RECORDS AT ISSUE**

[para 2] The records that were disclosed are as aforementioned. As the matter involves the authority for disclosure of personal information, the records themselves are not directly at issue.

## **III. ISSUE**

[para 3] The one issue for this inquiry is: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?

## **IV. DISCUSSION OF THE ISSUE**

[para 4] The Act is silent as to which party has the burden of proof where the issue is the improper disclosure of personal information under Part 2. Order 97-004 stated that the decision-maker may determine who has the burden of proof by considering who raised the issue and who is in the best position to meet the burden. In Order 2003-017, the Adjudicator determined that it was the Complainant who had the initial burden to establish that personal information was disclosed, and then the burden shifts to the Public Body to justify disclosure under the Act.

[para 5] In this instance, the Public Body has admitted disclosing the information. The information itself is “personal information”, as defined under section 1(n) of the Act, in that it contains the Complainant’s name, health and employment history. Accordingly, it is the Public Body who must justify disclosure under the Act.

[para 6] The Complainant submits that the Public Body’s legal counsel should not have disclosed personal information, without consent, to the Appeals Commission’s legal counsel. Secondly, the Complainant objects to the amount of personal information disclosed to the Chief Appeals Commissioner, in particular, the release of the Public Body’s reply to the Human Rights Commission.

[para 7] The Public Body submits that disclosure was in accordance with sub-sections 40(1)(i), (j), (v) and (x) of the Act, which read:

40(1) A public body may disclose personal information only

- (i) to an officer or employee of a public body or to a member of the Executive Council, if the disclosure is necessary for the delivery of a common or integrated program or service and for the performance of the duties of the officer or employee or member to whom the information is disclosed,
- (j) for the purpose of enforcing a legal right that the Government of Alberta or a public body has against any person,
- (v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party,
- (x) for the purpose of managing or administering personnel of the Government of Alberta or the public body,

[para 8] At the outset, I will deal with the applicability of section 40(1)(j). For disclosure to be permitted under this section, the Public Body must demonstrate that disclosure of personal information was only for the purpose of enforcing a legal right against a person.

[para 9] The Public Body submits that disclosure was pursuant to enforcing its legal right to raise the issue of whether a reasonable apprehension of bias existed with regard to the Complainant. The Public Body states that as a party with a direct interest in the Appeals Commission hearings, it has a legal right to question the impartiality of a Commissioner.

[para 10] For section 40(1)(j) to be applicable three criteria must be fulfilled:

- (a.) a public body has a legal right;

(b.) that legal right is against a person;

(c.) disclosure of the personal information was made for the purpose of enforcing that legal right.

[para 11] Section 13.1 of the *Workers' Compensation Act* (the "WCB Act") states that the Appeals Commission has, inter alia, exclusive jurisdiction to determine appeals made from the decisions of WCB review bodies concerning workers' claims and employers' premium assessments. In accordance with sections 13.1(3) and 13.1(5), the Appeals Commission may make its own procedure governing appeals and has the same powers as the Court of Queen's Bench for compelling the attendance of witnesses.

[para 12] That the Public Body is directly affected by the Appeals Commission's decisions is evident from section 13.3 (1) which states that the Public Body itself is bound by a decision of the Appeals Commission and has a duty to implement its decisions. The Public Body, however, is allowed standing to appear before the Appeals Commission in accordance with section 13.2(6) of the WCB Act. Section 13.2(6) states:

13.2(6) In the hearing of an appeal under this section, the Appeals Commission

(c) shall permit the Board to make representations, in the form and manner that the Appeals Commission directs, as to the proper application of policy determined by the board of directors or of the provisions of this Act or the regulations that are applicable to the manner under appeal,

[para 13] In *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311, the Supreme Court of Canada recognized that all administrative bodies, no matter what their function, owed a duty of fairness to the parties whose interests they must determine. In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 S.C.R. 623, Cory J. stated at paragraph 22:

Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of all administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

[para 14] *Black's Law Dictionary* (St. Paul, Minnesota, West Corp., 8<sup>th</sup> ed., 2004) at page 1348 defines "legal right" as: "1. A right created or recognized by law. 2. A right historically recognized by common-law courts. Cf. *equitable right*" 3. The capacity of asserting a legally recognized claim against one with a correlative duty to act."

[para 15] In Order 98-028, the former Commissioner defined “legal right” as a right “drawn from the common law or statute, as opposed to a non-legal right based only on moral or ethical grounds”. Although the former Commissioner was considering a different provision of the Act, I accept that definition of “legal right” here.

[para 16] By section 13.2(6) of the WCB Act, the Public Body is a party to the proceedings before the Appeals Commission. In accordance with section 13.3(1), the Public Body is bound by the Appeals Commission’s decisions. From the case law cited it is clear that the Appeals Commission owes a common law duty of fairness to the parties whose interests it must determine. The duty of fairness includes an unbiased appearance of the Appeals Commission when the WCB is before it. I find, therefore, that the Public Body has a legal right, that is, a common law right, to appear before unbiased members of the Appeals Commission.

[para 17] I now turn to the second requirement that the legal right be against a person. “Person” is not defined in the Act. However, I note in Order M2004-002 that the Adjudicator accepted the definition of “person” as set out in *Black’s Law Dictionary* (St. Paul, Minnesota, West Corp., 7<sup>th</sup> ed.1999) at page 1162 that defines : “person” as: “an entity (such as a corporation) that is recognized by law as having the rights and obligations of a human being”. The Appeals Commission is an administrative tribunal established under the WCB Act as a final level of appeal for workers’ compensation matters in Alberta; it is accorded under that Act legal rights and obligations. Accordingly, I find that the Appeals Commission is a “person” for the purposes of the second requirement under section 40(1)(j).

[para 18] The final requirement is that disclosure must be made for the purpose of enforcing a legal right.

[para 19] *Blacks’ Law Dictionary* (St. Paul, Minnesota, West Corp., 8<sup>th</sup> ed., 2004) at page 569 defines: “enforce” as “to give force or effect to (a law, etc.): to compel obedience to.” The initial letter from the President of the Public Body to the Chief Appeals Commissioner made reference to a possible apprehension of bias existing and proposed that the Appeals Commission entertain a court application with the Public Body being a party to the proceedings. The Public Body also reserved its right to make its own court application to decide the question of bias, if it deemed it appropriate. The Public Body’s second letter provided documentation, at the request of the Appeals Commission, that it felt underpinned this legal right. It is clear that the intent of this correspondence was to inform the Appeals Commission of the Public Body’s view that its legal rights were being compromised and to advise of possible legal proceedings, if a solution was not forthcoming.

[para 20] Section 13.2(6) of the WCB Act makes the Public Body a party to every appeal heard by the Appeals Commission. Given the nature of the legal right involved, which could potentially impact upon every appeal the Complainant would be empanelled to hear, it was reasonable that the Public Body initially correspond with the Appeals Commission apprising them of the situation prior to commencing proceedings. I find that the correspondence was the first step in enforcing the Public Body's legal right, since, given the issue of law involved, that had a solution not been forthcoming, litigation would have followed. I therefore conclude that the Public Body disclosed the personal information for the purpose of enforcing a legal right. I find that the Public Body had authority to disclose the personal information under section 40(1)(j).

[para 21] Having found that section 40(1)(j) applies, I need not consider the application of sections 40(1)(i),(v) and (x).

[para 22] The final issue to consider in relation to the disclosures is the applicability of section 40(4) of the Act, which reads:

40(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in sections (1),(2) and (3) in a reasonable manner.

[para 23] Firstly, the Complainant submits that the Public Body's legal counsel should not have initially communicated its concerns with the Appeals Commission's legal counsel. With regard to this disclosure, the Public Body states that at all material times, legal counsel acted on its behalf. The Complainant has not provided any evidence to support a contention that this was not the case. Given the nature of the issue involved, I find that it was reasonable that initial disclosure, which amounted to an expression of general concern, was made between the respective legal counsels of the public bodies, acting for those public bodies. However, this is an argument that goes to section 40(1)(i), which I don't have to decide. It is not applicable to section 40(4).

[para 24] The Complainant, while admitting that documents the Complainant prepared might be reviewed for bias by the Appeals Commission, further objects to the disclosure of the Public Body's reply to the Human Rights Commission, which the Complainant submits is outside the scope of disclosure necessary to determine bias.

[para 25] I have reviewed the records disclosed. Both letters from the Public Body were addressed to the Chief Appeals Commissioner. The initial letter gave only an outline of the Public Body's concern. The second letter made no representations at all, but merely stated that the documents enclosed were self-explanatory.

[para 26] As for those documents, the allegation of a reasonable apprehension of bias was based not upon the existence of a human rights complaint, but upon the Complainant's expressed personal views with regard to the Public Body. It was reasonable that the Public Body's reply and the other records were disclosed, so that the Chief Appeals Commissioner could properly weigh the Complainant's views and determine whether they could form the basis for a reasonable apprehension of

bias. I therefore find the Public Body's disclosure of the personal information in question was to the extent necessary to enable the Public Body to carry out the purposes of section 40(1)(j) in a reasonable manner, as provided by section 40(4) of the Act.

## **V. ORDER**

[para 27] I find that the Public Body had the authority to disclose the Complainant's personal information under section 40(1)(j) of the Act. The Public Body also complied with section 40(4) of the Act. Therefore, the Public Body did not disclose the Complainant's personal information in contravention of Part 2 of the Act.

Frank Work, Q.C.  
Information and Privacy Commissioner