

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2006-028

December 5, 2006

WORKERS' COMPENSATION BOARD

Case File Number 3420

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

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to the Workers' Compensation Board for access to a number of records including the Applicant's entire treatment file held by another organization, the Columbia Rehabilitation Centre.

In response to the access request, the Workers' Compensation Board provided the Applicant with access to several records but did not obtain the Applicant's entire file from the Columbia Rehabilitation Centre. The Workers' Compensation Board told the Applicant that it did not have custody or control over records held solely by the Centre.

At the time of inquiry, the issue before the Commissioner was whether the records, solely in the possession of the Columbia Rehabilitation Centre, were in the custody or under the control of the Workers' Compensation Board as provided by section 4(1) of the *Freedom of Information and Protection of Privacy Act*. At the request of the WCB, the Commissioner also addressed whether he would authorize the WCB to disregard the Applicant's access request as frivolous or vexatious under section 55.

The Commissioner held that the records at issue were not in the custody or under the control of the Workers' Compensation Board under section 4(1). The Commissioner also found that the Applicant's access request was not frivolous or vexatious under section 55 of the *Freedom of Information and Protection of Privacy Act*. The Commissioner denied the WCB's request to disregard the request.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(e), 3(a), 4(1), 6, 33, 35(a), 55, 72; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, ss. 17(1), 17(5), 18.

Authorities Cited: **AB Orders:** 97-009, 99-032, 2000-003, 2000-021, F2002-006, F2002-014.

I. BACKGROUND

[para 1] The Applicant attended the Columbia Rehabilitation Centre ("Columbia") for treatment of a work related injury. The Workers' Compensation Board (the "WCB") paid for the treatment.

[para 2] On June 10, 2005, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") to the WCB for a number of records including the Applicant's entire treatment file held by Columbia.

[para 3] On June 22, 2005, the WCB responded to the access request. The WCB told the Applicant that, in the process of adjudicating the Applicant's claim, it had already requested and obtained from Columbia several, but not all, of the records on the Applicant's treatment file. The WCB told the Applicant that it would not request the remaining records from Columbia. The WCB told the Applicant that he should contact Columbia directly for access to the remaining records on the file.

[para 4] The Applicant subsequently wrote to the WCB on a number of occasions requesting that the WCB obtain his entire treatment file from Columbia. The Applicant stated that the WCB had control over this file and, thus, had the authority to obtain the file on the Applicant's behalf.

[para 5] On September 8, 2005, the WCB provided the Applicant with access to several records. The WCB did not, however, obtain the Applicant's entire file from Columbia and once again suggested that the Applicant contact Columbia directly.

[para 6] On September 12, 2005, the Applicant requested a review of the WCB's decision not to obtain the entire treatment file from Columbia. Mediation was authorized but was unsuccessful in resolving this issue. The matter was set down for a written inquiry. The WCB, the Applicant and Columbia each submitted an initial submission. The WCB and the Applicant each submitted a rebuttal. In addition, I also accepted an addendum from the Applicant which was included as part of the Applicant's initial submission.

II. RECORDS AT ISSUE

[para 7] The records consist of the Applicant's treatment file which is held by Columbia.

III. PRELIMINARY ISSUE – Section 55 Request

[para 8] In the WCB's submission, the WCB requests the authority to disregard the Applicant's access request under section 55 of the FOIP Act. The WCB states that the access request is frivolous and vexatious because the Applicant insists on using the FOIP process even though the records are available through Columbia's information disclosure process. In addition, the WCB states that the access request is frivolous and vexatious because the Applicant has already obtained the records at issue through the civil litigation process.

[para 9] Section 55 reads:

55(1) If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) if

(a) because of their repetitious and systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or

(b) one or more of the requests are frivolous or vexatious.

[para 10] While it is not the norm for a public body to make a request under section 55 in the course of an inquiry, I will make a decision under section 55 because the WCB has requested it. A decision under section 55 is not an order under the FOIP Act, but it is nevertheless a decision of the Commissioner.

[para 11] I find that the Applicant's decision to use the FOIP process instead of Columbia's information disclosure process does not make the Applicant's access request under the FOIP Act frivolous or vexatious. Section 6 of the FOIP Act gives an applicant a right of access under the FOIP Act. The FOIP Act does not limit this right of access if another access process exists outside of the FOIP Act. Furthermore, section 3(a) clearly provides for a dual process, and states that the FOIP process is in addition to other existing procedures for access to information. Section 3(a) reads:

3 This Act

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

[para 12] Similarly, I find that the Applicant's decision to obtain information through the litigation process does not make the Applicant's access request under the FOIP Act frivolous and vexatious. In Order 97-009, the former Commissioner addressed an applicant's right to use the litigation process in addition to the FOIP process. The Commissioner referred to section 3(a) of the FOIP Act. The Commissioner held that the Rules of Court do not prevent an applicant from making a request for information under the FOIP Act, nor does the FOIP Act prevent an applicant from making an application for

information when an applicant uses the discovery process under the Rules of Court to get the same information.

[para 13] I deny the WCB's request to disregard the Applicant's access request.

IV. ISSUE

[para 14] The issue in this inquiry is as follows:

Are the records in the custody or under the control of the WCB as provided in section 4(1) of the FOIP Act?

[para 15] In the Applicant's submission, the Applicant repeatedly expresses a concern that his personal information on the WCB adjudication file is not accurate or complete. The Applicant states that the WCB should request the entire treatment file from Columbia to ensure that it has a complete adjudication file which is free from inconsistencies or errors.

[para 16] Whether the adjudication file is accurate and complete is an issue that falls under section 35(a) of the FOIP Act. Section 35(a) is not identified as one of the issues in this inquiry and, therefore, I will not address that issue in this inquiry.

V. DISCUSSION OF THE ISSUE

[para 17] The first part of section 4(1) reads:

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:...

A. Custody

[para 18] Prior Orders 2000-003 and F2002-006 have held that a public body will have custody of a record if it has physical possession of the record.

[para 19] The WCB does not have physical possession of the records at issue. I find that the WCB does not have custody of the records.

B. Control

[para 20] In Order F2002-014, I said that the word "control" refers to the authority of a public body to manage, even partially, what is done with a record. I said that a public body's right to demand possession of a record or to authorize or forbid access to a record points to a public body having control of a record.

[para 21] In Orders 99-032 and 2000-021, the former Commissioner identified a number of non-exhaustive criteria relevant to the issue of control. I have outlined the criteria and each of the relevant arguments of each party below.

1. Was the record created by an officer or employee of the public body?

[para 22] I find that this criterion is fulfilled. The records were created by Columbia, which according to section 1(e) of the Act, is an employee of the WCB. Section 1(e) defines an employee as a person who performs a service under contract with the public body. Section 1(e) reads:

I In this Act,

(e) “employee”, in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body;

[para 23] Columbia performs a service for the WCB under a contractual relationship. As such, I find that Columbia is, for the purposes of section 1(e), an “employee” of the WCB.

[para 24] I find that this criterion weighs in favour of a finding that the WCB has control of the records at issue.

2. What use did the creator intend to make of the record?

[para 25] I find that this criterion is not fulfilled.

[para 26] Columbia and the WCB have entered into an agreement which addresses the WCB’s right to access the treatment records created by Columbia. This agreement contains a confidentiality clause which states that the WCB may only request those treatment records that it requires to fulfill a duty or make a decision under the Workers’ Compensation Act (“WCA”). The confidentiality clause reads as follows:

11.00 CONFIDENTIALITY

11.01 The WCB agrees that the File shall be the property of and under the control of the Contractor, however, the Contractor, without any further fee or cost whatsoever to the WCB, shall:

a) unconditionally provide the WCB with a copy of the File or any portion thereof forthwith upon request where the WCB determines that the File or portion thereof is required by it in order to fulfill any duty or make any decision under the Act upon which the WCB may make further copies and allow access to the File in accordance with the Act;

b) maintain the File for at least seven years after the provision of Services to a Worker has concluded; and

c) protect the same from unauthorized disclosure. Notwithstanding the foregoing, the Contractor may provide a Worker or that Worker's representative with copies of Files or other information relating to that Worker in its possession.

11.02 The Contractor agrees and acknowledges that it will be entrusted with confidential and personal information during the performance of this Agreement, and that the Contractor shall comply with all relevant and applicable privacy and related legislation.

[para 27] I find that this agreement shows that Columbia intended to provide the WCB with only that information that the WCB requires to fulfill a duty or make a decision under the WCA. The agreement shows that Columbia did not intend to provide the WCB with full access to its records.

[para 28] I find that this criterion weighs against a finding that the WCB has control of the records at issue.

3. Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

[para 29] I find that this criterion is not fulfilled. The WCB does not have possession of the records.

[para 30] I find that this criterion weighs against a finding that the WCB has control of the records at issue.

4. If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?

[para 31] I find that this criterion is not fulfilled. I find that the records are not held by an officer or an employee of the WCB for his or her duties as an officer or employee. Although Columbia is an "employee" of the WCB for the purposes of section 1(e), Columbia is not holding the records at issue as an employee. Columbia is holding the records at issue for its own purposes and has not given the WCB access to these records.

[para 32] I find that this criterion weighs against a finding that the WCB has control of the records at issue.

5. Does the public body have a right to possess the record?

[para 33] In Order 2000-021, the former Commissioner said that in order to fulfill this criterion, a public body must have some legal authority to exercise a degree of control over the records. In Order F2002-006, the Adjudicator expanded on the prior order and held that other factors may also be relevant to this criterion. In that Order the Adjudicator held that if a public body requests a record be created for its use, and subsequently obtains a copy, it will, in the absence of any contractual or statutory authority that says otherwise, have a right to possess the record.

[para 34] I find that this criterion is not fulfilled. I find that the WCB does not have a right to possess the records. As previously mentioned, the WCB and Columbia have entered into an agreement regarding access to records. This agreement contains a confidentiality clause which states that the WCB may only request those treatment records that it requires to fulfill a duty or make a decision under the WCA. The WCB states that it does not require the records at issue for those purposes. I accept the WCB's submission on this point. I find that the WCB's position is supported by the fact that the WCB has not included these records on its adjudication file.

[para 35] In addition, I find that section 33 of the FOIP Act does not permit the WCB to collect the personal information in the records at issue. Section 33 states that the WCB may only collect personal information for one of three purposes. I find that none of the three purposes are fulfilled. Section 33 reads as follows:

33 No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,

(b) the information is collected for the purposes of law enforcement, or

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

Section 33(a) - Collection Expressly Authorized by an Enactment

[para 36] I find that the collection of personal information in the records at issue is not expressly authorized by the WCA. The Applicant states that the WCB's collection of information from Columbia is authorized by the WCA. The Applicant specifically refers to sections 17(1) and 17(5) of the WCA and has attached a copy of other provisions of the WCA to his submission.

[para 37] Section 17(1) of the WCA gives the WCB the exclusive jurisdiction to determine all matters under its Act. It reads as follows:

17(1) Subject to section 13.1, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act or the regulations and the action or decision of the Board on such matters and questions is final and conclusive, and is not open to question or review in any court.

[para 38] This provision does not, however, expressly give the WCB the ability to collect personal information that it does not require to adjudicate a claim or fulfill another duty under its legislation.

[para 39] Similarly, section 17(5) of the WCA gives the WCB the ability to compel records. It reads as follows:

17(5) The Board has the same powers as the Court of Queen's Bench for compelling the attendance of witnesses and of examining them under oath and compelling the production and inspection of books, papers, documents and things.

[para 40] This provision does not, however, expressly give the WCB the ability to compel records that it does not require to adjudicate a claim or fulfill another duty under its legislation.

[para 41] I have also reviewed the other provisions of the WCA raised by the Applicant. I find that these provisions also do not provide the WCB with the authorization it requires under section 33(a) of the FOIP Act.

Section 33(b) - Collection for the purposes of law enforcement

[para 42] I find that the criteria under section 33(b) of the FOIP Act is not fulfilled. There is no evidence before me that the WCB collected the information for the purposes of law enforcement.

Section 33(c) - Collection relates directly to and is necessary for an operating program or activity

[para 43] I find that the criteria under section 33(c) of the FOIP Act are not fulfilled. Section 33(c) gives the WCB the ability to collect information that relates to and, is necessary for, an operating program or activity. The WCB states it does not require the personal information in the records for either of these purposes. I accept the WCB's submission on this point.

[para 44] I find that this criterion weighs against a finding that the WCB has control of the records at issue.

6. Does the content of the record relate to the public body's mandate and functions?

[para 45] I find that this criterion is not fulfilled. I find that the records do not relate to the WCB's mandate and functions. I accept the WCB's submission that the records are not necessary for claim adjudication or the assessment or collection of employer premiums.

[para 46] I find that this criterion weighs against a finding that the WCB has control of the records at issue.

7. Does the public body have the authority to regulate the records' use?

[para 47] In Order F2002-006, the Adjudicator defined the word "regulate" to mean "govern or control by law; subject to esp. legal restrictions".

[para 48] I find that the WCB does not have the authority to regulate the use of the records. The WCB/Columbia agreement states that the WCB may not access the records and therefore, regulate the records, unless it requires access to fulfill a duty or make a decision under the WCB Act. The WCB states that it does not require the records at issue for any of those purposes.

[para 49] I also find that the FOIP Act limits the personal information the WCB may collect and, therefore, regulate. Section 33 of the FOIP Act states that a public body may only collect personal information for one of three purposes. As previously mentioned, I do not find that any of these purposes are fulfilled.

[para 50] I find that this criterion is not fulfilled and therefore weighs against a finding that the WCB has control of the records at issue.

8. To what extent has the record been relied upon by the public body?

[para 51] I find that this criterion is not fulfilled. I accept the WCB's submission that it does not have possession of the records at issue nor are the records part of the adjudication file. I find that the WCB has not relied on the records.

[para 52] I find that this criterion weighs against a finding that the WCB has control of the records at issue.

9. How closely is the record integrated with other records held by the public body?

[para 53] I find that this criterion is not fulfilled. The WCB does not have possession of the records and, therefore, the records have not been integrated with other records held by the WCB.

[para 54] I find that this criterion weighs against a finding that the WCB has control of the records at issue.

10. Does the public body have the authority to dispose of the record?

[para 55] I find that this criterion is not fulfilled. The WCB does not have possession of the records. In addition, there is no evidence before me that the WCB has the authority to dispose of the records.

[para 56] I find that this criterion weighs against a finding that the WCB has control of the records at issue.

11. Conclusion

[para 57] Given my findings under the above criteria, I find that, on balance, the WCB does not have control of the records at issue.

C. Additional arguments

[para 58] The Applicant made several additional arguments to this Office. I have addressed each of these arguments below.

1. Prior decision by the WCB

[para 59] As part of the Applicant's submission, the Applicant provided evidence that the WCB had previously obtained records from Columbia on behalf of another applicant. The Applicant suggests that the WCB should also, similarly, obtain records on his behalf. The Applicant also states that the WCB made the decision to obtain records on behalf of a prior Applicant from outside the WCB even though the decision did not conform to the WCB's stated process outlined in Order 98-002.

[para 60] I find that the WCB's decision to obtain records from Columbia on behalf of a prior applicant is irrelevant to the issue in this inquiry. The issue before me is whether the WCB has control of the records at issue. This issue must be determined on the basis of the 10 factors previously discussed. The decision by the WCB to obtain similar information from Columbia on behalf of a prior applicant was based on a set of circumstances that existed in the past. That decision does not determine whether the WCB has control of the records today.

[para 61] For these same reasons, I find that the WCB's stated process outlined in Order 98-002 is not relevant to the issue at hand.

2. Disclosure of progress reports

[para 62] The Applicant states that the WCB recently obtained three progress reports from Columbia and provided them to the Applicant. The Applicant states that by

obtaining the reports, the WCB shows that it also has control over the records held by Columbia and has the ability to, similarly, obtain the records at issue.

[para 63] I do not agree with the Applicant's argument. Although the information submitted by the Applicant shows that the WCB obtained several progress reports from Columbia, there is insufficient evidence that the WCB requested and obtained the progress reports solely in response to and on behalf of the Applicant, and not for its duties under the WCA.

[para 64] In any event, even if the WCB obtained these reports solely at the request of the Applicant, this factor would not determine who has control of the records at issue. Whether the WCB has control of the records must be determined after a review of the 10 criteria previously discussed.

3. Missing progress reports

[para 65] The Applicant states that the WCB did not provide him with a full set of progress reports from Columbia. The Applicant states that the WCB provided him with only three of seven progress reports and that there were no signatures on those three progress reports.

[para 66] I find that these factors are irrelevant to the issue before me regarding control of the records.

4. Millard Rehabilitation Centre records

[para 67] The WCB states that it will process a FOIP request for treatment records from the Millard Rehabilitation Centre. The Applicant states that the WCB should, similarly, process and provide access to the treatment records held by Columbia.

[para 68] I find that the WCB's practice of processing a FOIP request for Millard Rehabilitation Centre records is irrelevant to the issue of who has control of Columbia's treatment records. The Millard Rehabilitation Centre is owned and operated by the WCB. As such, it follows that the WCB would process an access request for Millard Rehabilitation Centre records. Conversely, Columbia is an independent entity. As such, it follows that the WCB must have custody or control of those records before the WCB can provide access to those records. In this Order I found that the WCB does not have custody or control of the Columbia records that are at issue in this inquiry.

VI. ORDER

[para 69] I make the following Order under section 72 of the Act.

[para 70] I find that the records at issue are not in the custody or under the control of the WCB pursuant to section 4(1) of the FOIP Act. Consequently, the Applicant cannot get access to those records under the FOIP Act.

[para 71] In the course of this inquiry, the WCB requested the authority under section 55 of the FOIP Act to disregard the Applicant's access request. For the reasons stated, I deny the WCB's request to disregard the Applicant's access request.

Frank Work, Q.C.
Information and Privacy Commissioner