ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-20

June 28, 2013

WORKERS' COMPENSATION BOARD

Case File Numbers F6112 and F6152

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Workers' Compensation Board (the Public Body) for statistics regarding the number of appeals conducted by the Dispute Resolution and Decision Review Body addressing a specific policy (the request for statistics). The Applicant also requested correspondence regarding the Workers' Compensation Board's decision to provide services at Millard Health to benefit claimants under Policy 04-06 rather than Policy 04-05 (the request for correspondence).

The Public Body responded that there were no records that were responsive to the Applicant's request for statistics. It located responsive records related to the request for correspondence but withheld all of the records under sections 17 (invasion of third party privacy), 24 (advice from officials), and 27 (privileged information).

The Applicant requested a review of the Public Body's response, arguing that the Public Body ought to have had responsive records or ought to have been able to create responsive record in relation to the request for statistics. She also requested a review of the Public Body's application of the exceptions to access.

The Public Body argued that it had responded to the Applicant on one of her requests under a process other than the FOIP Act and therefore the Adjudicator did not have jurisdiction to review its response to the Applicant with respect to that request.

The Adjudicator found that she had jurisdiction to review the Public Body's response to the Applicant regarding both requests. She found that the Public Body fulfilled its duty to assist the Applicant with respect to the request for statistics, and that it did not have a duty to create a record for the Applicant.

With respect to the request for correspondence, the Adjudicator found that most of the information in the records at issue was not responsive to the Applicant's request. The Adjudicator found that the Public Body properly applied the exception to access for information protected by solicitor-client privilege to the remaining responsive information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 17, 24, 27, 72, **BC**: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, ss. 6, **Ont:** *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. F.31, s. 2, *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. M.56, s. 2.

Authorities Cited: AB: Orders 96-017, 97-020, 98-002, F2003-005, F2007-014, F2007-029, F2009-005, F2009-009, F2009-017, F2010-007, F2010-036, F2011-R-001, F2012-08, **BC**: Order F10-30, **Ont**: Orders MO-2130, P-880.

Cases Cited: In *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565; *Solosky* v. *The Queen* [1980] 1. S.C.R. 821;

I. BACKGROUND

[para 1] An individual made two separate requests to the Workers' Compensation Board (the Public Body) for access to

1. Information regarding the number of appeals conducted by the Dispute Resolution and Decision Review Body in the past five years addressing Policy 05-02, Part II, Application I, Q3, "worker error in judgement" (the request for statistics); and
2. correspondence regarding the Workers' Compensation Board's decision to provide services at Millard Health under Policy 04-06 rather than Policy 04-05 (the request for correspondence).

[para 2] Regarding the request for statistics, the Public Body informed the Applicant that information of that kind, if producible, is provided routinely by the Public Body's Financial Planning and Analysis area. In further correspondence, the Public Body stated that it did not have information at the level of detail requested.

[para 3] Regarding the request for correspondence, the Public Body located responsive records, but refused access to the records under sections 17, (disclosure harmful to personal privacy), 24(1)(a), 24(1)(b) (advice and recommendations), and 27(1)(a), (b), and (c), (privileged information).

[para 4] The Applicant requested a review from this office. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful and the Complainant requested an inquiry.

II. RECORDS AT ISSUE

[para 5] As there were no records created in response to the request for statistics, the only records at issue are the 7 pages withheld in response to the request for correspondence.

III. ISSUES

[para 6] The issues as set out in the Notice of Inquiry are as follows:

1. **Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist)?**

2. **Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?**

3. **Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

4. **Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/record(s)?**

By letter dated January 29, 2013, I added the following issue:

> **Does section 10(2) of the Act (duty to assist applicants) require the Public Body to create a record for the Applicant?**

[para 7] I will discuss the issues in the following order:

1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist)?
2. Does section 10(2) of the Act (duty to assist applicants) require the Public Body to create a record for the Applicant?
3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/record(s)?
4. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
5. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

IV. DISCUSSION OF ISSUES

Preliminary issue – jurisdiction regarding request for statistics

[para 8] The Public Body argues that the Applicant's request for statistics is not a request under the FOIP Act and therefore that I lack jurisdiction to review the Public Body's response with respect to that request.

[para 9] The Applicant made the request for statistics on January 18, 2012. The Public Body's FOIP Coordinator sent a letter dated February 1, 2012, to the Applicant, stating the following:

> Our office has confirmed that the information you are seeking, if producible, can be provided to you routinely, without a FOIP Request, by the WCB's Financial Planning and Analysis area. As they will be responding to your request; your FOIP request file has now been closed.
>
> …
>
> Under section 65 of the *Freedom of Information and Protection of Privacy Act*, you may ask the Information and Privacy Commissioner to review any matter concerning the response provided by the WCB. To request a review, you must complete and deliver a *Request for Review* form within 60 days from the date of this notice to the Commissioner…

[para 10] The Public Body also returned the Applicant's $25 cheque that accompanied her FOIP request.

[para 11] The Public Body states that usually when a FOIP request can be satisfied "by routine disclosure practices", the FOIP office contacts the Applicant to discuss the request and confirm that he or she agrees to use the routine process and withdraw the FOIP Request. However, because the Public Body has dealt frequently with this Applicant, the Public Body "felt it was sufficient to provide a written explanation only." The Public Body also points out that the Applicant did not raise any concerns with the Public Body processing the request "routinely."

[para 12] The Public Body also cites Order 98-002, which states:

> As provided by section 3(a) of the Act, the Act is in addition to and does not replace existing procedures for access to information or records. Therefore, the Public Body's dual process for providing records is not in violation of the Act. Consequently, there cannot be a breach of the duty to respond to an applicant completely under section 9(1) [now section 10(1)] if what an applicant gets on an internal request for the applicant's claim file is different from what an applicant gets on a request for access under the Act. The matter of what is and is not on an applicant's claim file is more properly an issue under section 34 of the Act.

> I would caution the Public Body and other public bodies that, if a dual process is in place for accessing information, a public body meets its duty to assist an applicant under section 9(1) [now 10(1)] only if it informs the applicant that such a dual process is in place. In this case, I confirmed that the Applicant was aware of the dual process.

(at paras. 46-47)

[para 13] In that order, the applicant had received different records in response to his FOIP request than he had received in response to his request for his claim file, which was provided by the public body routinely. In this case, the Public Body received a FOIP request, but intended to respond to the request routinely, which would take the request outside of the FOIP Act.

[para 14] In this case, the Public Body *affirmed* the Applicant's right to bring a request for review to this office. With respect to this point, the Public Body argues that

> Although [the Applicant] was advised in our letter of February 1, 2012, that she could request the OIPC review any matter concerning the response provided by WCB, the WCB respectfully submits that the request ceased to be a request under the FOIP Act and the Commissioner does not have jurisdiction over the routine process used to respond to the applicant's request. It must be noted that upon receiving, [sic] the February 1, 2012, closure letter the applicant did not object to utilizing the routine process.

[para 15] I conclude in this case that the Public Body failed to properly remove the Applicant's request from the FOIP process even though it is clear that the Public Body intended to remove the request from the FOIP process.

[para 16] While I agree with the former Commissioner in Order 98-002, that a public body has to inform the applicant of a dual process for access, I do not understand the former Commissioner to be saying that informing an applicant of a dual process is always the only thing a public body must do.

[para 17] The right of review by this office is a significant aspect of the FOIP request process; it is not the public body's right but the right of an applicant. In my view, an applicant can give away this right and agree to a routine process outside of the FOIP Act only if the applicant is *aware* that the right is being given up.

[para 18] In my view, in order to take the Applicant's request outside of the FOIP Act so that it may respond routinely, the Public Body has to inform the Applicant that processing the request routinely will mean that a request for a review of the Public Body's response cannot be made to this office and that there must be a new FOIP request before a review can be requested.

[para 19] To be clear, my conclusion is not that I have jurisdiction to review the Public Body's response to the Applicant's request for statistics *merely because* the Public Body told the Applicant that she has a right of review by this office. Had the Applicant not

made a FOIP request at the outset (for example, had she made an informal request during a telephone conversation), I would not have jurisdiction to review the response simply because the Public Body indicated that a review could be requested.

[para 20] I note that in its submission, the Public Body asked that even if I agree with the Public Body that I do not have jurisdiction to review its response to the Applicant, that

> a decision be rendered on the secondary issue [the Public Body's duty to assist under section 10] in order to ensure some degree of closure with respect to this matter. If a decision on this issue is not made, the Applicant could simply make a request under FOIP and this matter would essentially resurrect itself.

[para 21] Given this request, and Public Body's above-cited letter to the Applicant, I feel obliged to remind the Public Body that the Commissioner (and I as her delegate) cannot exercise authority under the FOIP Act to review actions of a public body that are not subject to the FOIP Act. As stated above, if a public body responded to a request for information that was properly made outside of the FOIP Act process, the Commissioner would not have authority to review that response. Had I determined that the Public Body's response to the Applicant in this case was outside of the FOIP Act, I would not have authority to make a decision as to whether the response would be proper under the FOIP Act. The Public Body expressed concern that the Applicant could simply make a new request under the FOIP Act in order to ultimately seek a review by this office; however, in my view, that would be the appropriate step for the Applicant to take (in order to eventually seek a review).

[para 22] In any event, I reject the Public Body's argument and find that I have jurisdiction to review the Public Body's response to the Applicant's request for statistics.

Preliminary issue – responsiveness of information in records at issue

[para 23] The Public Body has severed a large amount of information in the records relating to the Applicant's request for correspondence as "not responsive."

[para 24] In Order 97-020 former Commissioner Clark adopted an analysis on the responsiveness of records from the Ontario office:

> In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about 'responsiveness':
>
> > In my view**, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request**. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, 'relevancy' must mean 'responsiveness'. That is, by asking whether information is "relevant" to a request, one is really asking whether it is 'responsive' to a request. While it is admittedly difficult to provide a precise

> definition of 'relevancy' or 'responsiveness', I believe that the term describes anything that is reasonably related to the request.

(at paras. 32, my emphasis).

[para 25] In this case, the Public Body states that

> since receiving the Notice of Inquiry we have reviewed the records again and determined that pages 1 to 3 and 5 to 6 should not have been included as responsive records. The records are notes (both handwritten and typed) drafted by a WCB lawyer in preparation for hearings. Although they contain statements regarding the services at Millard, they are not emails or memos and do not document communications respecting a WCB decision that the provision of rehabilitative services at Millard Health falls under Policy 04-06 (Medical Aid) rather than 04-05 (Return to Work Services).

[para 26] I agree with the statement in Ontario Order P-880, that determining what records are responsive to a request "is a fundamental first step in responding to the request." It is therefore unclear to me why the Public Body considered pages 1-3, 5, and 6 to be responsive to the request at the time it responded to the request and during the mediation/investigation process involving this office, but reconsidered this decision while preparing for this inquiry. The best time to determine whether records, or portions of records, are responsive to a request is during the processing of the request, when a public body can contact the applicant to confirm and clarify the scope of the request.

[para 27] By letter dated February 7, 2013, I asked the Public Body to provide further support for its claim that the information identified as "non-responsive" on the records was is in fact non-responsive. The Applicant had an opportunity to reply as well.

[para 28] The Public Body stated that in processing the Applicant's request, it was determined that some of the information in pages 1-3, 5 and 6 related to programs at Millard, and that

> information determined to be non-responsive in most of the records is personal information of the claimants whose claims were under review. The applicant was not looking for personal information; in fact she reconfirmed this in her rebuttal submission of January 15, 2013. Therefore, the information more specifically related to the claimants was removed as non responsive. The balance of the information removed as non responsive is entirely unrelated to the access request.

[para 29] The Public Body's review of the records while preparing for the inquiry presumably led to the conclusion that *none of* the information in these pages is responsive.

[para 30] The Public Body's original determination of responsiveness of information in the records is somewhat perplexing. For example, the name of the claimant in one of the records is severed under section 17, but the name of the employer is severed as non-

responsive. The claim file number was neither severed under section 17 nor considered to be non-responsive.

[para 31] There is little sense in determining whether the Public Body properly applied exceptions to access to information in which the Applicant has made clear she has no interest. I accept the Public Body's characterization of pages 1-3, 5 and 6 as the lawyer's notes to himself, as opposed to correspondence with others. I also agree that the Applicant is not interested in the specifics of claim files. She states that

> the information I am requesting is specific to the WCB's 'interpretation' of how a vocational rehabilitation program constitutes 'medical aid'. I am not requesting information that would be (17.1) [sic] 'an unreasonable invasion of a third party's personal privacy', nor did I request information that would reveal (17(1)(4)(a) 'personal information (that) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment of [sic] evaluation'. Indeed, Section 17 of the FOIPP Act doesn't appear to apply at all.

[para 32] I find that some, but not all of the information in pages 1-3, 5 and 6 is reasonably related to the Applicant's request. I have taken into account the Applicant's confirmation that she is not interested in personal information relating to the claims. I find the following portions of the records to be responsive:

- the bottom two paragraphs on page 1 are responsive (these were not originally noted as "non-responsive"),
- the information on page 2 is responsive except what is already noted as being non-responsive or subject to section 17,
- the middle paragraph on page 3 (not originally noted as "non-responsive");
- the bottom of page 3 (originally noted as "non-responsive");
- page 4 in its entirety; and
- page 7 except the items originally noted as "non-responsive".

While this may not be the specific information the Applicant is seeking, I have determined on a broad interpretation of her request that it is reasonably related as it communicates general views of the Public Body in relation to the subject matter the Applicant is interested in. None of pages 5 or 6 is responsive as these pages consist only of a list of facts associated with a specific claim.

[para 33] The Public Body's submissions indicate that the records at issue relate to WCB claims and Appeals proceedings in which the Applicant was involved as an employer representative. The Applicant argued that if the records at issue "were developed in response to my appeal arguments, I believe I'm even more entitled to them."

[para 34] I do not know whether the information in pages 1-3, 5 and 6 was specifically developed in response to the Applicant's submissions made at an Appeal proceeding; even if it was, I do not agree that this fact would 'entitle' the Applicant to the information

if it did not relate to her request. The Applicant's request was for correspondence relating to a Public Body policy, not the Public Body's submissions made at an Appeals proceeding. An applicant cannot alter his or her access request at the point of inquiry.

1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist)?

[para 35] A public body's obligation to respond to an applicant's access request is set out in section 10, which states:

> *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) The head of a public body must create a record for an applicant if*
>
> > *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
> >
> > *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 36] An adequate search requires a public body to take every reasonable effort to search for the actual records requested. Where appropriate, the public body must inform the applicant what steps have been taken to search for the requested records, in a timely manner (see Order F2009-017, at para. 53).

[para 37] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced

(Order F2007-029, at para. 66)

[para 38] The Public Body states that because the requested information was specific to the Dispute Resolution and Decision Review Body (DRDRB), the request was

forwarded to a Team Lead in the relevant area of the Public Body. The Team Lead responded that "eCO [Electronic Claim Organization] does capture the policy used in a decision, however it doesn't go down to the level of application and question, so to my knowledge this is not something we can report on."

[para 39] I gather from the Public Body's submissions that "eCO" is the name for the Public Body's electronic claim file system, which may include file notes, scanned image documents etc. for each claim file.

[para 40] Following this response from the Team Lead, the Public Body's FOIP area followed up with a Senior Researcher and Data Analyst (Analyst), who conducted a search on the Public Body's data warehouse. The point of this search seems to have been to determine whether the Public Body could create the statistics requested by the Applicant; that search therefore relates to the Public Body's duty to create a record in certain circumstances under section 10(2) and will be discussed in more detail under that issue.

[para 41] The Public Body provided an email sent from the Team Lead to the Applicant in response to a question from the Applicant related to her request. In that email, the Team Lead mentioned another database (AMS) that is used by the DRDRB. The Applicant argues that the Public Body did not search this database. However, in that email, the Team Lead also states that the AMS database does not capture policy information; I infer from this that a search of this database would be fruitless given that the Applicant is seeking information on decisions relating to a specific policy.

[para 42] The Applicant's submissions focus on statistics that she believes the Public Body can produce. Further, her request states that she wants "the number of appeals conducted…" and the correspondence between the Applicant and Public Body, copies of which were provided to me in submissions, indicate that the Applicant is seeking information specifically on statistics. Neither I, nor apparently the Public Body, have interpreted the Applicant's request to be for copies of all of the DRDRB decisions in which worker error in judgement has been considered as an issue. Although the Applicant has not indicated this, it is possible that if the requested statistics cannot be produced, the Applicant intended her request to encompass a request for copies of all relevant DRDRB decisions.

[para 43] As the Applicant has not indicated that this is an option, I have not considered whether the Public Body ought to have offered to fulfill such a request.

[para 44] I am satisfied with the Public Body's explanation that it does not have records in its custody or control containing the specific statistics requested by the Applicant.

2. Does section 10(2) of the Act (duty to assist applicants) require the Public Body to create a record for the Applicant?

[para 45] Section 10(2) states the following:

> *10(2) The head of a public body must create a record for an applicant if*
>
> *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
>
> *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 46] Section 10(2) requires a public body to create a record if that record can be created from another record that is in in electronic form using the public body's normal computer hardware and software, and its expertise. This requirement is subject to the limit in section 10(2)(b) (unreasonable interference with public body operations). The duties imposed by section 10(2) have been described as "electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants" (see Order F2011-R-001, reconsideration of Order F2009-005, at para. 19).

[para 47] In Order 2011-R-001the adjudicator provided a thorough analysis of the manner in which section 10(2) operates. She stated:

> The phrase, "created from a record from a record that is in electronic form" as it appears in section 10(2), could, in the abstract, refer to any of the following actions:
>
> - Making a copy (reproducing) in the same medium (e.g. electronic to electronic) to give to the applicant
> - Making a copy in a different medium (converting) - (e.g. electronic to paper) to give to the applicant
> - Converting records into a different electronic format (but with the same content and organization) (e.g. decompressing or unencrypting) in order to locate or obtain particular records or to see if they exist. (The applicant may ultimately be given all such records, only a part, or none, if no responsive records exist among the converted ones.)
> - Electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants.
>
> Thus, in the abstract, section 10(2) could be taken to limit the duty to produce copies for an applicant, as well as the duty to search for responsive records, if fulfilling either of these duties could not be done within the terms of section 10(2)(a). In my view, as explained below, the better interpretation of the legislative scheme in the FOIP Act is that section 13, (but not section 10(2)), speaks to the first two bullets, section 10(1), (but not section 10(2)), speaks to the third, and section 10(2) speaks only to the last bullet.

(at para. 19)

[para 48] A similar provision to section 10(2) exists in the BC legislation (section 6(2) of that Act). With respect to the application of that provision to an access request made to a government department asking for a record that correlates data from a Public Accounts database with other information not in that database, an order from the BC Office of the Information and Privacy Commissioner states

> … s. 6(2)(a) does not obligate the Ministry to undertake five days or one day of manual adjustments to create the record. Section 6(2)(a) requires the Ministry to create a record when it can do so using its normal computer software, hardware and technical expertise. There may be occasions when some element of manual processing is incidental to a public body's obligations under s. 6(2)(a). However, this is not one of them. This finding is consistent with Order F10-16 and other previous orders.

(Order F10-30, at para. 18)

[para 49] Similar decisions have been made with respect to Ontario's legislation as well (section 2(1) of the provincial and municipal Acts) (see Order MO-2130).

[para 50] In my view, the above-cited orders come to a very similar conclusion. Where a public body can create a record from information currently existing in electronic form by essentially manipulating the data, it has an obligation to do so in response to an access request, as long as it can be done using the public body's normal hardware, software and technical expertise and where creating the record would not unreasonably interfere with the public body's operations. Some incidental manual input may be required in order to do this, but such incidental input does not necessarily negate the duty.

[para 51] The Public Body explained that the data warehouse searched by the Analyst

> only contains "contextual information pertinent to internal business processes. The WCB maintains that it does not capture the specific question that relates to "worker error in judgement"; therefore, the only possible method to search for potentially responsive records would be to conduct a manual review of each claim file with an appeal issue for the 5 year time period stipulated in the [Applicant's] request.

[para 52] Policy 05-02 relates to claims from employers for cost relief. According to Question 3 in Policy 05-02, Part II, Application I, one of the bases for which cost relief could be granted by the Public Body is where there has been a worker error in judgement that delays the worker's recovery. The Public Body's Analyst conducted a search under Policy 05 for "error in judgement" within all records containing "Cost Relief" as the issue code. The Analyst created a table that indicates that for every claim an open Issue Description was included that allows for additional relevant comments, and it appears that it is within this open Issue Description field that the Analyst searched for "error in judgement." The search returned 23 records; the data warehouse holds over twenty thousand records. The Analyst concluded that the small number of results indicated that the search was not reliable (possibly he means that it is not comprehensive).

[para 53] By letter dated February 7, 2013, I asked the Public Body the following question (emphasis added):

> It is not clear to me from this explanation why the result is unreliable such that the Applicant's request cannot be fulfilled. **Can the Public Body please explain *why* the small number of decisions arising from that search indicates that the result is unreliable?** Is there reason to expect that the number of results from the search should be much different? If so, what are those reasons? (emphasis added)

[para 54] The Public Body included in its response what appears to be a transcription of a statement made by the Analyst; the text appears in italics within the submission and is written as though by the analyst (in other words, the Public Body did not tell me whether the text was in fact written by the Analyst). Providing a sworn document, a copy of an email written by the Analyst, or some similar direct evidence, would have been preferable. In any event, the (apparent) response of the Analyst was not overly useful in deciding the matter:

> Of the several thousand number of non-unique records I found, the limited number containing the phrase "error in judgement" (less than 30) **I felt may not be entirely representative given the larger population size; however I cannot speak to this as an authority as I would not know how many cases typically the DRDRB would manage regarding 'worker error in judgement'**. (emphasis mine)

[para 55] It would have been helpful to have evidence from someone within the Public Body who *is* an authority on how many cases the DRDRB would manage regarding 'worker error in judgement'.

[para 56] The transcription also states that the Analyst's search for "error in judgement" does not directly relate to the Applicant's request, but that "worker error in judgement" (which is the phrase in the Applicant's request) would have elicited even fewer results. I have reviewed the record of the 23 results gathered by the Analyst that contain the phrase "error in judgement" in the open Issue Description field. Many, but not all of these description fields refer to a *worker* error in judgement. However, the words "worker", "worker's", "claimant", "wkr", "wkr's", "IWK", "clmt", and in one instance a claimant's name, all occur to denote "worker". The Public Body confirms that "the information requested is not entered into the WCB's electronic systems as a data field." In other words, even if the Public Body conducted subsequent searches for worker error in judgement using all of the various terms for "worker," there seems to be no way to be certain that those searches would yield all of the relevant decisions. The Public Body's database is clearly set up for its own internal uses, and not to conduct searches such as that requested by the Applicant.

[para 57] I do not know how many of cases the Public Body reviews relate to "error in judgement" so I do not know that 23 records resulting from a search for the phrase is not representative of the actual number of cases reviewed. However, if the database holds

over twenty thousand records, I agree with the Analyst's conclusion that the 23 records found seems like too small a number to be representative. If the 23 results of the Public Body's search are in fact representative of the number of cases involving a worker error in judgement, the record created by the Public Body of these 23 results have already been provided to the Applicant.

[para 58] If these 23 results are not representative, I conclude from the evidence provided by the Public Body that the information in the database is not recorded in a manner that would allow the Public Body to search for and identify all of the cases relating to a worker error in judgement, without more than merely incidental manual input by the Public Body. I base this conclusion on the statements from the Team Lead that decisions are recorded based on the policy number but not down to the level of detail requested by the Applicant, as well as on the apparent lack of a standard method of recording in the database whether a case considered the issue of a worker error in judgement. It seems that it would be difficult to perform an electronic search of the database that would result in a reasonably accurate or representative number of cases relating to a worker error in judgement as there are no clear terms for which to search.

[para 59] I find that the Public Body does not have a duty under section 10(2) to create the requested record for the Applicant.

3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information/record(s)?

[para 60] The Public Body applied sections 27(1)(a) and (b)(iii) to pages 1-3, 5, and 6 of the records at issue, and sections 27(1)(a) and (c)(iii) to pages 4 and 7. I found that none of the information on pages 5 and 6 is responsive so I will not consider the application of section 27 to those pages.

[para 61] Section 27(1)(a) states the following:

> *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 or parliamentary privilege*
>
> *...*

[para 62] That Applicant argued that the information she is seeking is regarding the Public Body's interpretation of Policy 04-05 and Policy 04-06, which is an "interpretive" issue, and not an issue of legal advice and representation. I am not sure I understand the Applicant's distinction; a public body may seek legal advice from its counsel regarding the interpretation of legislation or policy as much as it can on another legal matter.

[para 63] The Applicant raised the following concerns in her initial submission regarding the Public Body's application of section 27(1)(a):

1. The WCB has previously released information through a FOIP request on other WCB matters, that included exchanges between the WCB's solicitor and other WCB personnel.
2. I do not accept that there is no correspondence specific to my request that doesn't include a solicitor's comment.
3. I don't see how a WCB employee, who happens to be a lawyer, enjoys the same solicitor/client privilege as contemplated in the traditional sense, especially when it is specific to how the WCB 'interprets' their own legislation and policy.

[para 64] With respect to the first concern, the Public Body notes that it may have waived its privilege in other instances but that it has not waived its privilege with respect to the records at issue. I agree that the Public Body, as a client, can choose to waive privilege in whatever circumstances it deems appropriate. It does not follow that the Public Body cannot subsequently claim privilege over different information in response to a different request.

[para 65] With respect to the second concern, adequacy of search is not an issue in regards to the Applicant's request for correspondence. The Public Body has indicated, and I accept, that all of the responsive records involve comments from its in-house counsel. Whether privilege attaches to each of these records is the issue I will determine here.

[para 66] Finally, with respect to the Applicant's third concern, the Public Body stated "the fact that counsel are also staff has no bearing whatsoever on the issue of privilege. Many companies and public bodies have in house legal representatives and there is no rationale or indeed authority that suggests that privilege ought to apply differentially in such cases."

[para 67] I agree with the Public Body on this last point. In *R. v. Campbell*, 1999 CanLII 676 (SCC), [1999] 1 SCR 565, the Supreme Court of Canada stated:

> Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. One thing is clear: the fact that Mr. Leising is a salaried employee did not prevent the formation of a solicitor-client relationship and the attendant duties, responsibilities and privileges. This rule is well established, as set out in *Crompton (Alfred) Amusement Machines Ltd. v. Comrs. of Customs and Excise (No. 2)*, [1972] 2 All E.R. 353 (C.A.), *per* Lord Denning, M.R., at p. 376:
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> > Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position

> from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges.... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned.

(at para. 50)

[para 68] Following this authority, it does not matter whether the Public Body's counsel is in-house or external; if the information meets that test for legal privilege then section 27(1)(a) is applicable.

Solicitor-client privilege

[para 69] The Supreme Court of Canada stated in *Solosky* v. *The Queen* [1980] 1. S.C.R. 821 that in order to correctly apply solicitor-client privilege, the following criteria must be met:

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 70] The Public Body has also cited Orders F2003-005 and F2009-009, which state that

> Privilege also attaches to information passing between a lawyer and his or her client that is provided for the purpose of giving the advice, as part of the continuum of solicitor-client communications.

(at paras. 39 and 119, respectively)

[para 71] I accept that the correspondence between the in-house counsel and other Public Body employees on pages 4 and 7 were created as part of giving legal advice and meet the test for solicitor-client privilege such that section 27(1)(a) applies to these records. The records indicate a clear request for legal advice, as well as the advice itself.

[para 72] The Public Body has described pages 1-3 of the records at issue as "notes or working papers of a WCB lawyer used as preparation for responding to issues of hearings being conducted. These records state facts in relation to which the advice was sought, thus forming part of the 'continuum of communications' in the giving or seeking of advice." The hearings were appeals of a Public Body decision made to the Appeals Commission under the WCA.

[para 73] Past orders of this office have concluded that working papers of counsel that are directly related to the giving or seeking of legal advice meet the criteria for solicitor-client privilege (see Order 96-017, at para. 30).

[para 74] I accept that notes of counsel prepared for a proceeding – i.e. that reflect the preparation of the Public Body's strategy – are protected under solicitor-client privilege. Such notes would be a continuation of counsel's advice to the Public Body regarding its approach to the proceeding. In my view, it does not matter if the notes were prepared prior to, or during, the proceeding.

[para 75] The Public Body's explanation that the notes "state facts in relation to which the advice was given" is not entirely satisfactory; a related fact may be as general as the date of a legal proceeding written on a calendar. I do not believe that information is privileged merely by virtue of it containing statements of facts that are the same as statements of facts that appeared in advice. I have found that the factual information in these pages is not responsive to the Applicant's request and the Public Body can withhold that information; however, a better explanation from the Public Body regarding the entire contents of each page would have helped me understand whether the remaining information at issue is privileged. It is often helpful to provide further support for a claim of privilege, such as the context of the information in the record at issue, especially where the relationship between the information at issue and the advice provided by counsel is not clear or obvious to an unrelated third party.

[para 76] That said, having reviewed the records, I am satisfied that the information in pages 1-3 consists of counsel's thoughts regarding the issues to be argued before the Appeals Commission and anticipated strategy for the proceeding.

Section 27(1)(a) – exercise of discretion

[para 77] With respect to the exercise of discretion under section 27(1)(a), withholding information that is subject to solicitor-client privilege is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036). The adjudicator in Order F2012-08 stated (citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), 2010 SCC 23):

> the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will always outweigh the interests associated with disclosing them.

(at para. 78)

[para 78] As I have found that the information withheld on pages 1-3, 4 and 7 of the records at issue is subject to solicitor-client privilege, I conclude that the Public Body properly exercised its discretion to withhold the information it withheld under section 27(1)(a).

Section 27(1)(b) and (c)

[para 79] As I have already found that the information at issue in pages 1-3, 4 and 7 are properly withheld under section 27(1)(a), I do not need to consider the application of other provisions to these pages.

4. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

[para 80] The Public Body applied section 24(1)(a) and (b)(i) to information on pages 4, and 7 of the records at issue. As I have already found that those pages are properly withheld under section 27(1)(a), I do not need to consider the application of this provision.

5. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 81] All personal information in the records to which the Public Body applied section 17 is information that is either non-responsive or is information to which section 27(1)(a) applies. Therefore I do not need to consider the application of this section.

V. ORDER

[para 82] I make this Order under section 72 of the Act.

[para 83] I find that the Public Body met its duty to assist under section 10(1) of the Act.

[para 84] I find that the Public Body does not have a duty to create a record under section 10(2) of the Act.

[para 85] I find that the Public Body properly applied section 27(1)(a) to information at issue in pages 1-3, 4 and 7 of the records.

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Amanda Swanek
Adjudicator