



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Order 02-29

**WORKERS' COMPENSATION BOARD**

David Loukidelis, Information and Privacy Commissioner  
June 27, 2002

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**Summary:** The applicant made an access request to the WCB for records related to the evaluation of proposals that contractors submitted to a society in response to a request for proposals the society had issued. The WCB disclosed portions of some records that it possessed, but said that other responsive records, which the society had in its possession, were not in the WCB's custody or under the WCB's control. The Act does not apply to those other records, as the WCB does not have control of them.

**Key Words:** public body – custody or control.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1).

**Authorities Considered: B.C.:** Order No. 11-1994, [1994] B.C.I.P.C.D. No. 14; Order No. 95-1996, [1996] B.C.I.P.C.D. No. 21; Order No. 114-1996, [1996] B.C.I.P.C.D. No. 31; Order No. 115-1996, [1996] B.C.I.P.C.D. No. 42; Order No. 144-1997, [1997] B.C.I.P.C.D. No. 26;  
**Ontario:** Order 120, [1989] O.I.P.C. No. 84; Order P-1069, [1995] O.I.P.C. No. 488; Order P-1999, [1996] O.I.P.C. No. 217

**Cases Considered:** *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.); *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640; *Canada Post Corporation v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242, [1995] F.C.J. No. 241; *Ontario (Criminal Review Board) v. Doe* (1999), 47 O.R. (3d) 201, [1999] O.J. No. 4072; *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611; [1997] O.J. No. 2485 (C.A.).

## 1.0 INTRODUCTION

[1] The applicant, a company that apparently provides consulting services, made an access request to the Workers' Compensation Board ("WCB"), under the *Freedom of Information and Protection of Privacy Act* ("Act"), for records relating to certain activities of the Industrial Musculoskeletal Injury Reduction Program Society ("society"). The request was for certain records relating to two requests for proposals ("RFP") issued in respect of what is called the Industrial Musculoskeletal Injury Reduction Program ("program"). The request referred to a 1997 "sawmill IMIRP project" RFP and an "early 2000 RFP for a logging IMIRP project." The request sought all "forms, checklists, etc." used by WCB employees, described by the applicant as being the WCB's representatives "on the IMIRP Society", to evaluate "proposals received in response to the late 1997 sawmill project" RFP and the 2000 RFP. It also covered all records provided to or received from the society by WCB employees or officials respecting the preparation of RFPs and the evaluation of proposals received in response to RFPs.

[2] The WCB responded by disclosing some records, from which it severed information under ss. 13(1) and 22(1) of the Act. The applicant relies on some of these records in this inquiry. The WCB told the applicant that it did not "hold any records used to evaluate the IMIRP logging project RFP", *i.e.*, the 2000 RFP referred to in the applicant's request. The WCB took the position that, because it did not have custody or control of these records, they are not covered by the Act.

[3] The applicant requested a review of the WCB's decision under Part 5 of the Act. Because the matter did not settle in mediation, I held a written inquiry under Part 5 of the Act. This Office gave the society notice of the inquiry, under s. 54(b) of the Act, and it made submissions.

## 2.0 ISSUE

[4] The only issue in this case is whether records responsive to the applicant's request are "under the control" of the WCB for the purposes of ss. 3(1) and 4(1) of the Act. Section 57 of the Act is silent respecting the burden of proof in such cases, although previous orders have established that the public body has the burden of proof. See, for example, Order No. 115-1996, [1996] B.C.I.P.C.D. No. 42.

## 3.0 DISCUSSION

[5] **3.1 Procedural Matters** – The applicant's initial and reply submissions raise a number of procedural matters that I will address before I turn to the merits. First, at p. 4 of its initial submission, the applicant argues that, because the society's initial submission arrived less than one hour after the noon deadline for delivery of initial submissions, I should not consider that submission or the society's reply submission. The applicant responded to the society's initial submission.

[6] This Office received the society's initial submission less than one hour after the noon deadline on the relevant day. This Office faxed a copy of that submission to the applicant two hours later. It is not clear whether the society's initial submission arrived late because it was sent late or because the fax machine in this Office was busy, thus delaying receipt. At all events, the applicant has not shown any prejudice to its right to have a reasonable opportunity to be heard on the merits of the issue before me, so I decline to do as the applicant asks.

[7] Second, the applicant asks me, citing Order No. 144-1997, [1997] B.C.I.P.C.D. No. 26, to compel the society to produce the responsive records for my review. Even assuming that I have the authority under the Act to compel production of records in a third party's hands, where the Act's application to those records is in issue, I decline to do so here. Given the evidence before me, it is not necessary for me to know the contents of the records to determine the control issue. See, for general reference on this point, *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.) (a successful application for judicial review of Order No. 144-1997).

[8] The applicant has also asked me to compel the WCB and the society to produce, for my examination, all documents related to a federal goods and services tax ("GST") matter in which the WCB and the society became involved. Again assuming that I have the authority to compel production of records by the society in this case, I decline to do so for the above reasons.

[9] Last, the applicant asks me to require all of the society's directors, and the WCB's former program manager, to submit to an "oral examination", which I take to mean testimony under oath. On p. 14 of its initial submission, the applicant argues that this might yield answers to a number of "important questions". The questions the applicant lists largely relate to whether or not an RFP process in which the applicant participated was influenced by the WCB's representative. The answers to these questions would not necessarily assist in my understanding of facts relevant to the control issue before me. I do not consider that oral testimony would add to my understanding of the situation, which is established through affidavits submitted by the WCB and the society and through the applicant's submissions. I decline to do as the applicant asks.

[10] **3.2 Criteria for Determining Control** – The Act only applies to records that, as provided in s. 3(1), are "in the custody or under the control of a public body" such as the WCB. Section 4(1) of the Act provides that anyone who makes an access to information request under s. 5 "has the right of access to any record in the custody or under the control of a public body". In this case, where it is acknowledged that responsive records are in the society's possession and not the WCB's, the issue is whether those records are nonetheless "under the control" of the WCB for the purposes of the Act.

[11] Guidance on how to approach the control issue is found in a number of quarters. My predecessor considered the control issue in a number of decisions and Ontario's Information and Privacy Commissioner has looked at this issue many times. The issue

has also figured in two British Columbia court decisions and a number of Ontario and federal court rulings.

[12] An appropriate starting point is the decision of Dorgan J. in *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640, which was an application for judicial review of Commissioner Flaherty's decision, on the control question, in Order No. 115. That case involved a school counsellor's notes, which she said were not in the custody or control of her employer, a public body covered under the Act. At para. 27, Dorgan J. acknowledged that s. 12 of the *Interpretation Act* requires that the Act be given a fair, large and remedial interpretation. She also noted that the Federal Court of Appeal said, in *Canada Post Corporation v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242, [1995] F.C.J. No. 241, that access to information legislation should be interpreted liberally, specifically on the issue of what is meant by the term "control", in light of "Parliament's intention to give the citizen a meaningful right of access under the Act to government information" (para. 33, Q.L.). At paras. 32 and 33 of *Canada Post*, Letourneau J.A. said the following:

The notion of control referred to in subsection 4(1) of the *Access to Information Act* (the Act) is left undefined and unlimited. Parliament did not see fit to distinguish between ultimate and immediate, full and partial, transient and lasting, or "de jure" and "de facto" control. Had Parliament intended to qualify and restrict the notion of control to the power to dispose of the information, as suggested by the appellant, it could certainly have done so by limiting the citizen's right of access only to those documents that the Government can dispose of or which are under the lasting or ultimate control of the Government.

It is, in my view, as much the duty of the courts to give subsection 4(1) of the *Access to Information Act* a liberal and purposive construction, without reading in limiting words not found in the Act or otherwise circumventing the intention of the legislature ... It is not in the power of this Court to cut down the broad meaning of the word "control" as there is nothing in the Act which indicates that the word should not be given its broad meaning. On the contrary, it was Parliament's intention to give the citizen a meaningful right of access under the Act to government information. [footnotes omitted]

[13] In *Ontario (Criminal Review Board) v. Doe* (1999), 47 O.R. (3d) 201, [1999] O.J. No. 4072, the Ontario Court of Appeal approved of the *Canada Post* interpretive approach and specifically agreed with the passage from *Canada Post* just quoted.

[14] In Order No. 11-1994, [1994] B.C.I.P.C.D. No. 14, my predecessor had to decide whether a policy and procedures manual, and related records, of a long-term care facility under contract with the Ministry of Health were under the control of that Ministry for the purposes of the Act. At p. 12 of Order No. 11-1994, Commissioner Flaherty said the following:

As a preliminary matter, it is important to define the meaning of "control." Does it mean only the right to have access to a document? Or does it mean the right to have a say in the contents, use, or disposition of the document? In my view, where a public body does not have the right to have custody of a record, "control" means

the latter. It must derive from a contractual or specific statutory right to review records of a contractor which relate to the services being provided, as well as a right to have a say in the content, use, or disposition of the document.

[15] At pp. 13 and 14, he set out, and indicated he had applied, the criteria suggested in the *Policy and Procedures Manual* for the Act that is now issued on-line by the Ministry of Management Services. In *Greater Vancouver*, Lynn Smith J. adopted the *Policy and Procedures Manual* criteria in dealing with the control issue. The section of the *Policy and Procedures Manual* that deals with “control” now reads as follows:

“**control**” (of a record) means the power or authority to manage the record throughout its life cycle, including restricting, regulating and administering its use or disclosure.

Where the information in a record directly relates to more than one public body, more than one public body may have control of the record. The public body with the greater interest processes the request for information.

The following are some of the factors indicating that a public body has control of a record:

- the record was created by a staff member, an officer, or a member of the public body in the course of his or her duties;
- the record was created by an outside consultant for the public body;
- the record is specified in a contract as being under the control of a public body;
- the content of the record relates to the public body’s mandate and functions;
- the public body has the authority to regulate the record’s use and disposition;
- the public body has relied upon the record to a substantial extent;
- the record is closely integrated with other records held by the public body; or,
- the contract permits the public body to inspect, review, possess or copy records produced, received or acquired by the contractor as a result of the contract.

[16] A note of clarification is in order here. The *Policy and Procedures Manual* reference to control as “the power or authority to manage the record throughout its life cycle, including restricting, regulating and administering its use or disclosure” was referred to with approval in *Greater Vancouver*, at para. 49 (Q.L.). Did the Legislature intend that a public body must have managerial control over a record “throughout its life cycle”, as described in the *Policy and Procedures Manual*, before it will have “control”? I have considerable doubt that such a potentially restrictive meaning was intended or is

appropriate. I consider that other factors can enter into the mix in determining the control issue.

[17] Accordingly, I agree with my predecessor, in Order No. 11-1994, that the following comments of Commissioner Linden (as he then was) in Ontario Order 120, [1989] O.I.P.C. No. 84, at p. 7 (Q.L.), are relevant in addition to the *Policy and Procedures Manual* factors mentioned in *Greater Vancouver*:

In my view, it is not possible to establish a precise definition of the words “custody” or “control” as they are used in the Act, and then simply apply those definitions in each case. Rather, it is necessary to consider all aspects of the creation, maintenance and use of particular records, and to decide whether “custody” or “control” has been established in the circumstances of a particular fact situation.

[18] I also agree with my predecessor that the following control indicators, taken from p. 7 (Q.L.) of Ontario Order 120, are useful in deciding the control issue in cases under our Act:

... I believe that consideration of the following factors will assist in determining whether an institution has “custody” and/or “control” of particular records:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution’s mandate and functions?
7. Does the institution have the authority to regulate the record’s use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

These questions are by no means an exhaustive list of all factors which should be considered by an institution in determining whether a record is “in the custody or under the control of a institution”. However, in my view, they reflect the kind of considerations which heads should apply in determining questions of custody or control in individual cases.

[19] Some of the factors articulated in Ontario Order 120 and the *Policy and Procedures Manual* obviously overlap; factors 1, 6, 7-9 and 10 from Order 120 are found in the *Policy and Procedures Manual*. The factors set out in both sources will be useful, though by no means exhaustive, criteria in determining whether records are “under the control of” a public body for the purposes of the Act and I have applied those factors in this case.

[20] **3.3 Evidence Regarding Control** – The society is a non-profit society that was incorporated under the *Society Act* in 1998. The WCB describes the society as a

... three-way initiative between the sawmill industry – the Council of Forest Industries (“COFI”), the Industrial Wood and Allied Workers’ Union (“IWA-Canada”) and the Workers’ Compensation Board ... .

[21] The society is, the WCB says, the vehicle through which these parties implement the program. As the WCB describes it, in para. 2 of its initial submission,

... IMIRP’s mandate is to reduce the number of Musculoskeletal Injury claims through program development, [and] lower the cost of claims, promote early return to work and assist the sawmill sector with compliance with the Occupational Health and Safety Regulation.

[22] In 1997, the WCB approved funding for the program “to perform certain functions in relation to occupational safety and health in provincial sawmills” (para. 15, WCB initial submission). The WCB provides all of the funding, with the money coming from “added assessments on the classification unit, employers in the sawmill industry, and not from public funds” (para. 15, WCB initial submission). The WCB’s board approved five years of funding for the society, in an annual amount of approximately \$500,000, effective June 24, 1997.

[23] That approval was based on a 1997 memorandum of understanding (“MOU”) among program participants, COFI, the IWA and the WCB. As contemplated by the MOU, the society was incorporated in early 1998 as a vehicle for implementing the program. According to para. 2(g) of the MOU, the society’s participants agreed that its board of directors was to govern “independently from COFI, IWA and the WCB”. The members of the society are COFI and IWA, but not the WCB. While COFI and the IWA each have two directors on the society’s board, the WCB is allowed only a non-voting advisory representative, whom the WCB designates in writing from time-to-time. Section 6.12 of the society’s bylaws reads as follows:

The WCB Representative shall be entitled to notice of and to attend at, whether in person or by telephone, all meetings of Directors. The WCB Representative shall not be entitled to vote at any meeting of Directors, and approval of the WCB Representative of a matter upon which unanimous approval of the directors has been obtained shall not be required. Copies of all resolutions in writing signed by all of the Directors shall be provided to the WCB Representative.

[24] The reference in this section to “approval” of the WCB’s representative not being “required” where the board unanimously approves a matter is, on the material before me, curious. On one interpretation, it implies that, in cases where the directors cannot unanimously agree, the WCB’s representative has some say in the matter. Section 6.10 of the society’s bylaws provides, however, that all questions arising at a board meeting “shall be decided by a unanimous vote” of, obviously, the directors. If unanimity cannot be achieved, there is a deadlock. Nothing in the bylaws, the MOU or the 2000 agreement between the society and the WCB, described below, suggests that the WCB’s representative has any approval authority respecting the society’s decisions or actions. Even if that authority existed, by virtue of the WCB having a director on the board itself, it would not necessarily follow that the WCB has control over the requested records. I am satisfied that s. 6.12 does not support a finding of control.

[25] The president and vice-president of the society are appointed by COFI and the IWA on an alternating basis, *i.e.*, in a given year one of them gets to appoint the president and the other appoints the vice-president, with the reverse happening in the following year, and so on. The president of the society is its chief executive officer.

[26] According to the WCB, it “monitors the administration of the contracts” entered into between the society and the WCB. This role is set out in the MOU, the society’s constitution and “in any contracts entered into” between the society and the WCB (para. 16, WCB initial submission).

[27] By an April 26, 2000 agreement between the society and the WCB (“program agreement”), the society agreed to provide services to the WCB in implementing the musculoskeletal injuries program. The program agreement committed the WCB to provide funding to the society, which is described in the program agreement as a “contractor”, in exchange for provision of services by the society. The contractual nature of the service relationship between the society and the WCB is also acknowledged in para. 8 of the MOU. Sections 4, 8 and 9 of the program agreement are relevant here. Those sections read as follows:

4. RECORD KEEPING BY THE CONTRACTOR: Responsibilities of the Contractor [society] with respect to keeping records including the following:
  - a) The Contractor shall keep records of all fees, costs and expenses for which it has invoiced the WCB and the WCB shall have free access at all reasonable times to these records for the purposes of reviewing or copying them.
  - b) The WCB will have access at all reasonable times and under reasonable notice to the personnel, books, records and other documents pertaining to the Services provided under the Project for the purposes of auditing any accounts invoiced under the Agreement.
  - c) The Contractors shall preserve all those documents for seven years after the termination of the Project.

...

8. CONFIDENTIALITY AND FREEDOM OF INFORMATION:

- a) The Contractor will treat as confidential and will not, without the prior written consent of the WCB disclose or permit to be disclosed, the information supplied to the Contractor by the WCB as a result of this Agreement. The Contractor recognizes that all material and other information referred to above is protected by the provisions of the BC Freedom of Information and Protection of Privacy Act (“FIPPA”) and agrees not to use or disclose any such material or information except as permitted by the FIPPA.
- b) Each of the parties shall use reasonable efforts to protect from disclosure the information of the other Party. Each of the parties shall divulge such Confidential Information only to its employees or agents for the purposes of this Agreement. “Confidential Information” for the purposes of this Agreement includes all data and information relating to the business and management of either party, including proprietary and trade secrets, know-how, technology and accounting records to which access is obtained hereunder by the other party, provided, however, that Confidential Information shall not include any information which:
  - i. is or becomes publicly available through no fault of the other party,
  - ii. is already in the rightful possession of the other party prior to its receipt from the other party,
  - iii. is independently developed by the other party,
  - iv. is rightfully obtained by the other party from a third party,
  - v. is disclosed with the written consent of the party whose information it is; or,
  - vi. is disclosed pursuant to court order or other legal compulsion.
- c) The Contractor recognizes that any information it provides to the WCB may be subject to disclosure under the FIPPA.

9. INDEPENDENT CONTRACTOR: The Contractor is an independent contractor and is not the servant, employee, or agent of the WCB.

[28] Paragraph 2 at the bottom of p. iii of the Component Services Schedule to the program agreement deals with the WCB’s funding for the program. It reads as follows:

Funding will be provided in installments subject to the receipt [by the WCB from the society] of Project budget status reports and monthly progress reports, provided that in the opinion of the WCB progress is being made on the work plan.

[29] As regards the MOU, para. 6(g) reads as follows:

6. Funding

...

- g) COFI and IWA shall keep records of all fees, costs and expenses for which they invoice the WCB and the WCB shall have free access at all reasonable times to those records for the purposes of reviewing or copying them. The WCB will have access at all reasonable times and under reasonable notice to the personnel, books, records and other documents pertaining to the services provided under the project for the purposes of auditing any accounts invoiced under the Agreement. COFI and IWA shall preserve all those documents for three years after the termination of the project.

[30] Paragraphs 7(f) and (g) of the MOU read as follows:

- f) The program will produce an annual report on the progress and findings-to-date, which will be available to the public.
- g) The program will produce a report of the evaluation of the pilot study which will be available to the public.

[31] Paragraph 3 of the MOU provides for a program steering committee:

3. Steering Committee

- a) Each party, including the WCB who will serve in an advisory capacity only, will appoint one person to a Steering Committee.
- b) Responsibilities of the Steering Committee shall include:
- i) development of criteria to be used in the tendering process, including a description of services which will be required;
  - ii) review and approval of a detailed operating plan, strategy, structure and financial plan to cover the program project;
  - iii) monitoring of the performance and providing instructions and directions to individuals and organizations engaged in the program project; and
  - iv) providing written reports to each of the parties hereto on a monthly basis, or more frequently if appropriate or necessary.
- c) The Steering Committee shall at all times operate under and be subject to the directions and approval of each of the parties hereto.

[32] It appears the steering committee has not been superseded in function by the society's board of directors, although it is not clear what the relationship is between the committee and the society's board. In his affidavit, Patrick Thomas, an industry services manager in the WCB's Prevention Division and the WCB's advisory representative to the

society, deposed as follows regarding the steering committee's role in the RFPs of interest to the applicant:

13. My role as the Board's liaison to IMIRP is to serve in an advisory capacity only. I represent the Board's interests in monitoring and administering the IMIRP contracts. I do not vote on decisions made by IMIRP's Board. The four voting Directors on program's Board are entrusted with the responsibility of making policy and management decisions.
14. As the Board's representative on the Steering Committee I was involved in evaluating the proposals received in response to the IMIRP Logging Project RFP. I received copies of the various proposals, reviewed them and prepared my evaluations. The Steering Committee met at the IMIRP office to discuss our evaluations of proposals. All of the evaluation materials and related documents were left at the IMIRP office. I had no direct involvement in the preparation of the RFPs other than to review and to comment on the Board's interests.

[33] Both the society and the WCB argue that the above evidence leads to the conclusion, applying criteria set out above, that the WCB does not have the requested records under its control. The society relies on an affidavit sworn by Ian May, a COFI vice-president and the society's director, to support this argument. In relation to the requested records, Ian May deposed as follows:

11. Nothing in the Bylaws of the IMIRP Society permits the WCB to compel IMIRP to provide copies of any records held or produced by IMIRP. With respect to the question of whether the WCB has "custody" and/or "control" of the IMIRP records requested by the Applicant, I make the following comments:
  - (a) the WCB Representative to IMIRP completed evaluation sheets of the proposals received in response to the IMIRP Logging Project RFP; the evaluation sheets themselves, the RFPs and other evaluations were prepared by IMIRP;
  - (b) records were created by IMIRP in order to maintain a file for the Society while the WCB Representative produced records in his advisory capacity to IMIRP;
  - (c) I am not aware of whether the WCB has possession of any IMIRP records;
  - (d) I understand that the WCB Representative on IMIRP does not keep IMIRP records in his possession;
  - (e) WCB does not have a right to possession of any records of IMIRP except as provided in Article 6.12 of the IMIRP Society Bylaws;
  - (f) the requested records relate to the mandate and functions of IMIRP, not the WCB;
  - (g) the WCB is without authority under the IMIRP Bylaws to regulate the use of the requested records;

- (h) the WCB has the authority to dispose of any copies of the requested records that it may have; it certainly does not have the right to dispose of records in the possession of IMIRP.

[34] The WCB, in similar vein, adds the following at para. 13 of its initial submission, supported by Patrick Thomas's affidavit:

1. The Board's liaison advisor to IMIRP created evaluation sheets of the proposals received in response to the IMIRP Logging Project RFP.
2. These records were created for the purpose of putting forward his opinion, as the Board's representative, of the proposals at the Steering Committee meetings.
3. All of the records created by the Board respecting the Logging Project RFP were left at IMIRP's office.
4. An officer or employee of the Board is not holding the records.
5. These records belong to IMIRP and it is believed that the Board does not have the right to possession of them.
6. The contents of the records relate to IMIRP's mandate and functions and are not directly related to the Board's mandate and functions.
7. It is the Board's position that it does not have the authority to regulate the records' use.
8. No Response.
9. The records are background materials for the IMIRP Logging Proposal.
10. The Board does not have the authority to dispose of the records.

[35] The applicant refers to the approach taken by my predecessor in Order No. 11-1994, and also relies on Order No. 95-1996, [1996] B.C.I.P.C.D. No. 21, and Order No. 114-1996, [1996] B.C.I.P.C.D. No. 31. At p. 7 of its initial submission, the applicant suggests that the WCB has engineered the society's creation "as a means of insulating records from the scope of the Act". (I return to this allegation at the end of this decision.) The applicant also makes a number of arguments that relate to the fairness of the RFP processes referred to above and not to the control issue before me.

[36] On the merits of the control issue, the applicant says (at p. 8 of its initial submission) that, in order for a public body to have control of records,

... it must have a contractual or specific statutory right to review records of a contractor which relate to the services being provided, as well as a right to have a say in the content, use, or disposition of the document.

[37] Acknowledging that agreements between the WCB and the society are relevant to the control issue, the applicant contends that records dealing with GST issues are also relevant in determining whether the society is independent of the WCB.

[38] The applicant argues that some of the records it has received disclose that, by contract, the WCB has control over the responsive records. Each of the records to which the applicant refers – including resolutions of the WCB’s governing board, minutes of WCB board meetings, letters from WCB employees and the MOU itself – mentions that the operation of the program and the society is “subject to audit by the WCB”. According to the applicant, at p. 9 of its initial submission, this demonstrates that the WCB

... has the right to free access to documents at all reasonable times for the purposes of review or copying, that it has the right to access for the purposes of conduct audits, and the COFI and IWA are contractually bound to preserve documents for a period of three years after termination of the project.

[39] The applicant also argues, in its reply submission, that s. 6 of the program agreement supports the control argument. Section 6 reads as follows:

6. OWNERSHIP: The WCB has the right to use, duplicate or distribute any report/document/training material or finding produced as a consequence of this Agreement at any time and in any manner it considers useful or helpful to the administration of the Workers Compensation Act. The Contractor shall have the right to apply for copyright or patent of this material, but upon dissolution of the Contractor all such rights will be transferred to the WCB unless other arrangements are agreed to in writing by the WCB. The Contractor shall, upon request of the WCB at any time, provide a copy of any report/document/training material or finding to the WCB at no cost to the WCB.

[40] The applicant contends that the presence of the WCB’s representative at meetings of the society’s board of directors gives the WCB “actual control over the functioning of IMIRP by the influence of its designate director” (p. 10, initial submission). The applicant also relies on the fact that IMIRP’s funding “comes entirely from the WCB”, which it says further enhances the influence of the WCB’s designated representative (p. 10, initial submission). This amounts, the applicant contends, to a statutory right on the part of the WCB to control the responsive records.

[41] Last, the applicant submits that the WCB has a say in the content, use or disposition of the responsive records, giving it control over those records. The applicant cites excerpts from a number of records in which WCB employees have participated in the preparation of RFP documents or have commented on such documents. I will now describe these records, all of which pre-dates the society’s incorporation and the program agreement.

[42] One record is a November 19, 1997 memorandum, from a WCB employee to a program representative, enclosing draft evaluation criteria that “may be used in conjunction with” a RFP process. The memorandum notes that the criteria weighting are “only *suggestions*”, which the society should review (original italics). Another record is a December 4, 1997 memorandum from a WCB employee to a program representative. In it, the WCB employee says the WCB’s in-house lawyers have reviewed a RFP

document and confirmed that it can be issued to interested parties. The memorandum offers “guidelines” on how to administer a RFP process. It also says the WCB will “act in an advisory role during the RFP process for your assistance.” Another record is a December 15, 1997 fax message from a WCB employee to a program representative. It indicates that the proposal of a particular company could not be considered because the company did not attend a mandatory meeting for proponents. According to the applicant, these records show that the WCB “had considerable input” into the content of RFP-related documents, and the use of those records, which means the WCB has control of the requested records.

[43] **3.4 Does the WCB Have Control of the Records?** – I am not persuaded, for the reasons given below, that the records are “under the control of” the WCB as contemplated by the Act.

*Do the records relate to the WCB’s mandate and functions?*

[44] I will first note that, in my view, this control factor generally will not weigh as heavily as other factors. As for the facts of this case, it appears the WCB has, in helping to establish the program and the society and in funding the work of the program, devolved to the society, as the WCB’s contractor, a program that would otherwise fall under the WCB’s mandate under the WCA. The evidence before me suffices to establish that the responsive records relate to program services and activities.

[45] I disagree, therefore, with the WCB’s contention that the records do not relate at all to the WCB’s mandate or functions. It may be that the relationship of the records in dispute to the WCB’s mandate and functions is not as direct as would be the case with the end-product of any program activity, *e.g.*, a research report into musculoskeletal injuries in sawmills. But the fact that the relationship here is not as direct does not mean the requested records have no relevance to the WCB’s functions or mandate. All the same, the relevance of the records to the WCB’s mandate and functions is far from sufficient, in my view, to lead to a finding that the WCB controls the records.

*WCB does not possess the records*

[46] There will be cases in which it is alleged that, although a public body physically possesses records, it does not control them. They may, for example, be personal records of a public body employee that happen to be located in the public body’s offices, but are not integrated into its records. In this case, the evidence establishes that the WCB does not have copies of the requested records in its files, as part of its records, so this factor is not present.

[47] The applicant attempts, at p. 3 of its reply submission, to make something of the fact that the WCB’s representative allegedly had possession of some or all of the responsive records “for a period of weeks or months and even took these materials out of the country.” The applicant contends that these materials “were not continuously left at the program office, although they may well have been returned there at some point.” Patrick Thomas deposed, at para. 16 of his affidavit, that, as regards what he calls the

“Society’s Logging Proposal”, all records that he created were “left at the society’s office at their request.”

[48] Assuming it is true that some or all of the records were outside the society’s premises and in the possession of one or more WCB employees for a period of time, I do not agree that this establishes the WCB had, at the time of the access request, control of the requested records. In this case, I find it neither surprising nor problematic that the WCB’s representative, and other WCB employees, possessed and used RFP-related records for RFP-related purposes. That transitory, limited-purpose possession does not, in this case, lead to a finding of control for the purposes of the Act.

[49] This is not to say, of course, that possession and use of records by a public body employee is not enough to establish control (or custody) of records. I am not persuaded in this case, however, that the possession and use alleged by the applicant would justify a finding of control. In reaching this conclusion, I have kept in mind cases, notably from Ontario, in which the possession of records by public body employees, on-site, has not been enough to establish public body control. See, for example, *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611; [1997] O.J. No. 2485 (C.A.).

#### ***WCB’s funding of the program***

[50] The next question is what, if any, significance there is in the fact that the WCB provides all of the funding for the program. Without that funding, one might surmise, the program would not exist (or might exist as an in-house WCB program). The WCB’s funding, one could argue, must give it some substantial say in the activities of the society and in the program’s implementation. Even if there are no legal strings attached in any legal instruments – such as the MOU or the program agreement – surely the WCB’s money gives it control over these records? As tempting as this argument may be, I believe it ignores the legal independence of the society from the WCB and the service relationship between the WCB and the society.

[51] This is not to say funding will never be a control factor. It may be enough that, for example, a contractor or other service provider has created the very record the public body paid to have created, or has created a record that is directly related to contracted services. In such a case, the public body’s payment for the records or services may raise the question of whether the contract for services provides for control implicitly, even if it does not address it explicitly. I will return to the contractual control issue below.

#### ***No WCB control of society’s governance***

[52] As I noted earlier, the WCB is not a member of the society and is not represented on its board of directors. The WCB’s representative is only entitled to receive notice of board meetings and to attend them. There is no indication the WCB’s representative has any formal say in the society’s decisions. While one would expect the WCB’s representative to participate in discussions and have some influence on decisions, the fact remains that she or he has no vote. The same is true of the program steering committee, assuming it still functions as contemplated by para. 3 of the MOU. The WCB’s

representative on that committee serves, as para. 3 stipulates, “in an advisory capacity only”.

[53] The nature of the WCB’s participation in the society’s governance, and on the program steering committee, is not enough to support a finding that the WCB has control of the requested records. Nor would it necessarily follow, even if the WCB were a society member or appointed a voting member of the society’s board, that the WCB had control of the records. Membership on the board of directors would not, on its own, necessarily give the WCB control of the particular records in issue here.

#### *Statutory or contractual control*

[54] Does the WCB have a contractual or statutory right that suffices to establish control of the requested records? There is no suggestion that the WCA or any other statute, including the *Society Act*, gives the WCB any statutory control over the records.

[55] On the contractual control issue, the materials – especially the provisions of the program agreement – indicate that the WCB’s rights of access to records and copying of records are limited. The program agreement gives the WCB a right of access to records for the purpose of auditing the society’s provision of services in implementing the program. It also contemplates that, as a condition of ongoing funding, the society will provide the WCB with budget status reports and monthly progress reports on the program’s work plan.

[56] The mere fact that there is a contractual relationship between the WCB and the society – under which the society is an “independent contractor” providing services to the WCB – does not establish that the WCB has control over the requested records. Those records relate to a RFP process, particularly to evaluation of proposals made to the society by third parties. The program agreement does not give the WCB any express general right of access to, or other control over, society records. Nor is there any express contractual right for the WCB to use or dispose of such records. The program agreement only gives the WCB limited rights regarding specific records.

[57] First, s. 4 of the program agreement gives the WCB a limited right of access to records for the purpose of financial auditing. Section 6 of the MOU contains a similar right of access for financial auditing purposes. These provisions do not establish that the WCB controls the requested records, which relate to evaluation of RFP proposals. This view is consistent with at least two Ontario decisions on the control issue. In Order P-1069, [1995] O.I.P.C. No. 488, the Ontario Ministry of Social Services (“Ministry”) had provided funding to the Children’s Aid Society (“CAS”), a society that provides social services to children and families in Ontario. The funding agreement between CAS and the Ministry gave the Ministry a right of access to certain kinds of records for the purpose of ensuring financial accountability. This was not enough to establish control over records more generally, although client files were not in issue there.

[58] A similar case is Order P-1999, [1996] O.I.P.C. No. 217, where the Ontario Ministry of Northern Development and Mines, in connection with its funding of the

Northern Ontario Training Opportunities Program, had a contractual right of access to records for auditing purposes. This access right for auditing purposes was not enough to establish control over the responsive records for the purposes of s. 10(1) of the Ontario *Freedom of Information and Protection of Privacy Act*.

[59] Section 6 of the program agreement also cuts against any conclusion that the WCB and the society have agreed to give the WCB contractual control over the requested records. That provision, which I quoted above, provides that the WCB is entitled to use certain program work-products – *i.e.*, “any report/document/training material or finding produced” through the program – without interference from the society, which retains intellectual property rights until its dissolution. While this may suffice to give the WCB control over program work products such as those just described, it does not establish that the WCB has control of the requested records. This limited contractual right supports the view that the WCB does not have a broader, implicit contractual control over other records produced for or by the society, but not mentioned in s. 6.

[60] Nor do I think the above-described memorandums of November and December 1997 indicate WCB control of the records actually in issue here. These records indicate that in 1997, before the society was incorporated and before the program agreement was entered into, WCB staff provided support services to the program in its conduct, under the MOU, of a RFP process that pre-dates the one in issue here. The memorandums speak to advice and support offered by the WCB, including legal review of RFP documents. They do not establish WCB control over the records requested here.

[61] I will note here that silence in a contract on the control issue will not necessarily mean the public body has no control over any records produced under the contract. It may be that, even in the absence of a clause such as s. 6 of the program agreement, a public body can be found to have control over the very work-product that it bargained for under the contract. An example would be where a public body has hired a consultant to produce a report. If the public body receives the report but for some reason discards it, while the consultant retains it, the consultant’s copy might be under the public body’s control even if has no express contractual right to require a further copy to be produced to it. Such an implied term would not, of course, apply to all contractor records. In many cases, for example, it would be difficult to identify any records that could be said were intended to form the ‘work-product’ under the contract. Although this is not such a case, there may be some cases where such an approach is warranted.

[62] In *Neilson*, Dorgan J. rejected the argument that, because the employer of the school counsellor did not explicitly require her to keep notes, the employer did not have control of the notes she kept. At para. 31, Dorgan J. noted that,

... as a counsellor and teacher within the School District, she [the counsellor] is required to write reports in respect of the children she counsels. Presumably, such reports are prepared in part by relying on the notes she keeps and therefore the notes are implicitly required to be taken and retained.

[63] At para. 35, Dorgan J. noted that the notes were required to create reports, which the counsellor was required to create as part of her employment, during the course of her employment duties. In other words, given the nature of the counsellor's duties, the employment relationship between the school district and the counsellor implicitly required her to keep the records, such that they were under the public body's control. In the *Neilson* case, therefore, the employment contract between the parties implicitly provided for control given the relationship of the notes to the counsellor's employment duties.

[64] Although Dorgan J. noted, in *Neilson*, that the case involved a public body employee and not an independent contractor, there will be cases in which records kept by an independent contractor are under the public body's control even though the contract for services is silent on the control issue. The Ontario Court of Appeal decision in *Criminal Review Board* illustrates this. The Court referred to Dorgan J.'s approach in *Neilson* and applied her reasoning to records created by an independent contractor. In that case, a request had been made to Ontario's Criminal Review Board ("CRB") for a copy of a backup tape of board proceedings. The tape was made by a court reporter retained by the board to transcribe the proceedings and was in the reporter's possession. The CRB said that it did not have control of the tape for the purposes of Ontario's *Freedom of Information and Protection of Privacy Act*. In rejecting this argument, O'Connor J.A. said the following, at para. 35:

The Board has argued throughout this proceeding that if it is ordered to make access to the backup tapes available to the John Does [the requesters], it will be unable to comply because it is not able to compel the court reporter to deliver the backup tapes to it. I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to fulfill its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the Act by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the Act.

[65] It is clear that the Court was greatly influenced by its finding that the tape was part of the record of proceedings that the *Criminal Code* required the CRB to keep. O'Connor J.A. considered, therefore, that the CRB could not place such a record outside the Ontario access law by saying that it had not explicitly addressed the matter in its contract with the court reporter.

[66] Last, I do not understand the reasoning or outcome in *Greater Vancouver* to be inconsistent with the view that a contractor's records may implicitly be under the control of a public body even where the contract for services is silent on the control issue. The outcome in that case turned on the fact that there was no proper evidentiary basis for a

finding that the public body had a right to require the society to turn over a copy of the psychiatrist's report even if the society itself had a copy.

### *Alternative service delivery*

[67] Although there will be other cases in which implicit contractual control exists, the *Neilson* and *Criminal Review Board* decisions underscore the desirability of public bodies ensuring that contracts for services explicitly address the control issue. Nothing in this decision should be read as suggesting that a public body can incorporate a subsidiary or a society for the purpose of performing public body functions free from scrutiny under the Act. The applicant contends this is why the WCB created the society, but there is no evidence to support this argument. To the contrary, the evidence suggests that the WCB created the program, and incorporated the society, in an attempt to co-operatively work with employers and workers in combating musculo-skeletal injuries.

[68] There may be cases, however, in which the evidence indicates that a public body has incorporated a subsidiary, or society, for the purpose of evading scrutiny under the Act. It may be that, in such a case, applicable legal principles justify ignoring the subsidiary's separate corporate existence for the purposes of the Act. This would result in the subsidiary being treated as if it were the public body. There may even be cases in which a public body's subsidiary has been incorporated for legitimate business reasons, but is so completely under the public body's domination that its separate corporate existence should be ignored for the Act's purposes. I should be clear that only in the clearest of cases will it be appropriate even to consider whether a subsidiary's separate corporate existence can be ignored on either of the grounds just mentioned.

[69] This issue is important because public bodies may adopt alternative methods of providing services to the public or of performing public body functions. Where private sector service providers carry out functions, or provide services, under a contractual or other service arrangement, it is important that the Act's goals of openness and accountability not be thwarted. This is especially so because many of these functions and services will affect public health or safety.

[70] Accordingly, I urge public bodies to ensure, in entering into alternative service delivery arrangements, that they retain control, by contract, of records related to the services provided, or functions performed, by the service provider. The public body should have the right to receive copies of such records promptly after an access request is received. (This is not to suggest that the public body's right should include private records of the service provider, *e.g.*, internal financial records or personnel records.) The public body would then respond to the request in the ordinary course. There should be meaningful sanctions if the service provider fails to deliver requested records as and when required.

#### **4.0 CONCLUSION**

[71] For the reasons given above, I find there is no contractual, statutory or other basis for concluding that the requested records are under the WCB's control within the meaning of ss. 3(1) and 4(1) of the Act. Accordingly, the WCB is not required to respond to the applicant's access request and, under s. 58(3)(a) of the Act, I confirm that the WCB has complied with its duties under the Act in responding to the applicant.

June 27, 2002

#### **ORIGINAL SIGNED BY**

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David Loukidelis  
Information and Privacy Commissioner  
for British Columbia