Order 01-25

WORKERS' COMPENSATION BOARD

David Loukidelis, Information and Privacy Commissioner
June 4, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 26
Order URL: http://www.oipc.bc.ca/orders/Order01-25.html
Office URL: http://www.oipc.bc.ca
ISSN 1198-6182

Summary: Applicant requested records related to calculation of benefits expected after WCB decision. WCB refused disclosure of most information, under ss. 13, 14, 17 and 22. Sections 14 and 17 found not to apply, as WCB has not established that solicitor client privilege applies nor that disclosure could reasonably be expected to harm its financial interests. Section 13(1) found not to apply, except for one item, as records do not contain advice or recommendations. Because s. 22(4)(e) applied to information the WCB had withheld under s. 22, that information must be disclosed except for one item to which section 22(3)(g) applies. No waiver of privilege found.

Key Words: advice or recommendations – harm to financial interests – solicitor client privilege – waiver – functions of an employee of a public body.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 14, 17(1), 22(1), 22(3)(g), 22 (4)(e).

Authorities Considered: B.C.: Order No. 193-1997, [1997] B.C.I.P.C.D. No. 54; Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-24, [2000] B.C.I.P.C.D. No. 27; Order 00-53, [2000] B.C.I.P.C.D. No. 57; Order 01-15, [2001] B.C.I.P.C.D. No. 16; Order 01-17, [2001] B.C.I.P.C.D. No. 18; Order 01-20, [2001] B.C.I.P.C.D. No. 21

1.0 INTRODUCTION

[1] This case has its origins in an accident that occurred in 1937, when the applicant's father fell 30 metres from a tree and suffered serious injuries, for which the Workers' Compensation Board ("WCB"), the public body in this case, awarded him a pension. The father died in 1955 and, in 1956, his widow applied to the WCB for a survivor's pension, on the ground that the death was the result of the injuries for which the WCB had awarded him a pension. The WCB denied the widow's application on the basis that death was not caused by work-related injuries. The WCB confirmed this decision in 1957.

[2] In the late 1990s, the applicant requested his father's WCB claim file, with a view to applying for a reconsideration of the WCB's decision on the application by his mother – who died in 1997 – based on new medical evidence. In 1998, the applicant sought a reconsideration of the WCB's 1950s decisions. Early in 2000, the WCB's Appeal Division ruled that the father's death had been work-related. This led the applicant to expect that his mother's estate would soon receive from the WCB retroactive benefits, and interest, covering the 45-year period since his father's death. When no payment had arrived after some weeks, the applicant made inquiries of the WCB. He learned that the WCB had determined no compensation was payable as a result of the decision on the reconsideration and that the WCB had doubts about the decision itself. The WCB also took steps to ensure that its computerized payment system would not issue any payments to the estate. I am told by the WCB that a later Appeal Division reconsideration decision has overturned the 2000 decision. This has no effect on my decision here.

[3] The applicant began to correspond with the WCB, and others, in an attempt to obtain the compensation to which he believes his mother's estate is entitled. He also filed a new freedom of information request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for records showing the calculation of the award and for copies of communications between three named senior WCB officials from February 1, 2000 onwards, as well as any related documents to or from the compensation services/fatal claims area of the WCB. The WCB responded by providing some information. It also refused access to other information under ss. 13, 14 and 17 of the Act.

[4] The applicant requested a review of this decision and, during mediation, received some more information. The WCB also added s. 22 to some information. Mediation was otherwise unsuccessful and I held a written inquiry under s. 56 of the Act to deal with the WCB's application of ss. 13, 14, 17 and 22 to the records in dispute. The records consist of 10 records related to the calculation of the pension award (which the WCB withheld in full) and two internal memoranda (both of which were severed and partially disclosed).

2.0 ISSUES

[5] The first issue before me in this inquiry is whether the WCB was authorized to withhold the information in dispute under ss. 13, 14 and 17 of the Act. Under s. 57(1) of the

Act, the WCB has the burden of proof regarding these sections.

[6] The second issue is whether the WCB was required by s. 22 of the Act to refuse access to certain personal information. Under s. 57(2) of the Act, the burden is on the applicant to show that disclosure of this information would not result in an unreasonable invasion of third-party personal privacy.

3.0 DISCUSSION

[7] **3.1 Background** – The WCB acknowledges that it calculated retroactive payments following the 2000 reconsideration decision, but says it soon determined that no compensation was payable as a result of that decision. It nevertheless retained the records related to the calculations. The WCB says the applicant has been exerting pressure on it to pay compensation as a result of the reconsideration decision and that he is alleging improprieties on the part of the WCB in its refusal to make any such payments.

[8] The WCB suggests that the applicant may escalate his activities and that he would probably use the withheld records in a threatened legal action against the WCB. It says that the applicant is not entitled to any compensation, but that it has already been forced into negotiating with him, despite the lack of merit to his claim, and that it may be forced to pay the applicant's mother's estate a considerable sum in order to resolve the current dispute with the applicant. This could, the WCB argues, lead to other estates coming forward with similar demands for payment, to the WCB's financial detriment (paras. 6, 11 and 19-22, initial submission).

[9] The applicant's lengthy submissions relate almost entirely to his position that the WCB should be paying retroactive benefits. Very little of his submission is relevant to the issues before me. To summarize his position, however, the applicant is of the view that the reconsideration decision should have led to a retroactive payment by the WCB. He believes that the calculation of benefits "was and is a proper entitlement due as a result of a decision of the Appeal Division" and that "the payment of our award has been blocked". The applicant says payment has been blocked "by the administration of the WCB, notwithstanding the legal authority of the Appeal Division".

[10] He goes on to say that he believes

... the material requested is germane to our case and should be part of the claim file. Without knowing exactly what action has been taken or recommended by the senior officials of the WCB, I cannot establish whether or not they have (unlawfully?) conspired against the payment of our award.

[11] He suggests that he is entitled to full disclosure of the claim file, in accordance with the WCB's own disclosure policies.

[12] The applicant also points out that I found, in Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, that possible use of information for strategy in a lawsuit does not

create a reasonable expectation of financial or economic harm. He says that, with the WCB's accident fund holding approximately $7 billion, payment of the award to his mother's estate cannot possibly lead to financial harm to the WCB. He also believes ss. 13(2)(a) and (n) apply to the information in this case.

[13] I note here that nothing said in this order can be interpreted as commenting on any aspect of the applicant's dispute with the WCB. This order is concerned only with the issues set out above, not the merits of that dispute.

[14] **3.2 Records in Dispute** – The records in this case are numbered 1 through 12. Record 1 is a memorandum dated March 3, 2000, from a WCB employee to the president of the WCB. The WCB disclosed most of the first page, which outlines the history of the claim, beginning with the father's accident, pension award and death, and moving on to the mother's unsuccessful application for a survivor's pension. Under ss. 13, 14 and 17 of the Act, the WCB withheld the remaining four short paragraphs (approximately 13 lines of text). It also withheld the signature block of the employee who wrote the memorandum under the same three sections and under s. 22.

[15] Records 2-10 and 12 relate to benefit and interest calculations covering the period from the father's death onwards. Record 11 is an internal memorandum of March 7, 2000, from the president and chief executive officer of the WCB to the chair of the WCB's Panel of Administrators. The WCB disclosed the top part of p. 1 of this item (the portions showing who wrote and received the memorandum, the date and the subject line), a subject line at the top of p. 2 and the signature block at the bottom of p. 2. It withheld approximately 11 paragraphs (about 46 lines of text) on pp. 1-2. The WCB applied ss. 13, 14 and 17 to records 2-12 and also applied s. 22 to some portions of records 4 and 11.

[16] **3.3 Advice or Recommendations** – The WCB applied s. 13(1) to all of the withheld information. This section permits public bodies to withhold information that "would reveal advice or recommendations developed by or for a public body or a minister". I have dealt with this section on a number of occasions, most recently in Order 01-15, [2001] B.C.I.P.C.D. No. 16, and Order 01-17, [2001] B.C.I.P.C.D. No. 18. I confirm the views I expressed in those orders about the interpretation of s. 13(1) and apply the same reasoning here.

[17] The WCB says records 1 and 11 "should fall within the ambit of the advice or recommendations" contemplated by s. 13. It says that s. 13(1) applies to records 1 and 11, as the withheld information was "clearly generated to offer advice to the Board about the effect of and therefore a course of action with respect to the February 16, 2000 Appeal Division matter" (paras. 30-31, initial submission). It goes on, in passages that merit quotation at some length, as follows:

32. The Board submits that the identity of the author of record 1 is excepted from disclosure under section 13. That is because the document inherently recommends that one option available to the Board is that the author or the author's office take certain actions with respect to the Appeal Division matter.

33. Similarly, the Board submits that the names or initials of any Board employees identified in documents 2 to 10 and 12 [are] excepted from disclosure under s. 13. This is because Record 1 inherently recommends that one option available to the Board is that those persons take certain actions indicated by Records 2 to 10 on behalf of the Board with respect to the Appeal Division matter. Further, Record 1 makes a suggestion to the Board that it seek advice about those actions. In both ways, recommendation or advice has been developed by and for the Board, the substance of which should fall within the ambit of [s.] 13(1).

...

35. In the course of business, recommendations can be made from time to time for a course of action that is perceived to be appropriate given the information that is available at the time it is made. Such recommendations might be in the nature of whether and in what amount the Board should pay compensation. In the interest of efficiency, the Board must accept and act on such recommendations up to a point.

36. But the Board should still have the ability to resile from such recommendations, where there is sound reason to do so. The soundest reason of all would be that the Board was able to detect that it has somehow acted in error. Until the Board has made a final decision and clearly taken final steps to implement such matters, such calculations and related information are in the nature of a recommendation.

37. Thus for the reasons above, it is submitted that the information withheld by the Board under section 13 does constitute advice or recommendations as contemplated by that provision.

[18] The WCB also argues that advice and recommendations should be subject to the degree of protection given to confidential advice that meets the four classic Wigmore conditions for common law privilege (which is broader than the solicitor client privilege protected under s. 14).

[19] Continuing on this theme, the WCB suggests that the advice and recommendations which it says exist in the withheld material meet these conditions. With respect to records 1 and 11, the WCB says,

... it is inherent that the memos were intended to be and to convey their contents, in confidence. This is clear on the face of their content, and implicit with their very nature. Moreover the Board has adduced evidence that this is what the Board intended.

[20] The WCB is of the view that it is essential to keep details of any incomplete and unimplemented actions in the strictest confidence. It suggests, at para. 40 of its initial submission, that releasing this type of information would lead to the misapprehension that the WCB has made decisions about entitlement:

This would lead to unwarranted controversy and disruption of the Board's ability to carry on the business of reaching final decisions. This would be particularly true with respect to calculations that have not been finalized.

[21] The WCB argues that confidentiality is essential to the effective and efficient working of the WCB and its relations with its employees. It says that it is in the interest of the community served by the WCB that it continue to be able to obtain advice on a confidential basis from its employees. At para. 42 of its initial submission, it says the following:

With particular reference to the employer community, there is clear evidence set out above that the potential injury to both the Board and the employers that could result from disclosure establishes that there is a potential for detrimental consequences that far outweigh the benefits of disclosure.

[22] Turning to the merits of these submissions, I reject the WCB's argument that the Wigmore conditions have any role under the Act, including in relation to advice or recommendations. Section 14 of the Act incorporates common law solicitor client privilege and nothing more. That section, and all of the Act's provisions, must be applied based on their plain language. The Legislature has not, through s. 14 or s. 13(1), chosen language that imports any further 'privilege' based on the Wigmore conditions.

[23] Returning to the general s. 13(1) issue, the WCB supplied *in camera* and public affidavits from its president and another WCB employee in support of its various arguments that the records reveal advice and recommendations to WCB officials. The affidavit evidence of Ralph McGinn, president and chief executive officer of the WCB, states that record 1 was generated to provide policy advice to the WCB and to seek policy and legal advice for the WCB. He is not the author of record 1. Ralph McGinn also deposed that his purpose in receiving and obtaining advice *about* this record (and its attachments, records 2-10) was to meet his duty of care to the WCB, in that he had to determine whether compensation was properly payable and, if so, how much (paras. 20-21, McGinn affidavit). He also deposed, at para. 23, that records 2-10 were attached to record 1 and the "provision and request for advice in Record No. 1" included and essentially incorporated records 2-10.

[24] Pamela Cohen, the WCB's Client Services Manager, Fatal and Sensitive Claims, Long Term Disability deposed that she met in March of 2000 with Ralph McGinn regarding records 1 to 10, since the applicant was anxious to receive payment following the February 16, 2000 reconsideration decision, and that she asked Ralph McGinn to sign record 4. Ralph McGinn also deposed as follows:

18. ... there is an established Board practice that my approval as the chief signing officer of the Board is required for payment of amounts over a certain threshold. Thus these matters [the Appeal Division decision and the applicant's subsequent attempts to obtain payment] as a matter of course are, as the matter in this case was, brought to my attention.

19. It was in this context that on or about March 3, 2000, Pamela Cohen and I met in my

office, where she presented and discussed with me, Records 1 to 10 ...

[25] This is consistent with my reading of record 1, which indicates that its purpose was to obtain Ralph McGinn's approval to pay a certain sum of money, since only Ralph McGinn had the authority to approve payments over certain amounts. There is no support for the contention that this record, as the WCB puts it, "inherently" discloses advice or recommendations. Despite paras. 20 and 21 of Ralph McGinn's affidavit, cited above, the evidence of Pamela Cohen, paras. 18 and 19 of Ralph McGinn's affidavit and my own reading of the record amply support the conclusion that the record had nothing to do with giving the WCB president advice or recommendations or having him seek advice or make recommendations. I will now explain this conclusion in more detail.

[26] There is one withheld word in paragraph 4 of record 1 which is neither advice nor recommendations but simply a description of the documentation of the father's claim. Section 13(1) does not apply to this word. The rest of the information withheld in record 1 flows from the disclosed portions which, as noted above, outline the history of the claims in this case. The withheld information at the bottom of page 1, which (among other things) sets out events subsequent to the WCB's decision on the applicant's mother's application for survivor's benefits, is strictly factual. It contains no advice or recommendations, implicit or explicit, and nothing before me (or in the record) indicates that one could one infer advice or recommendations from that factual material. As s. 13(2)(a) makes plain, the WCB must disclose this "factual material".

[27] The first withheld paragraph on page 2 of record 1 concerns certain other factual matters. Again, there is no advice or recommendations, implicit or explicit, in this paragraph and there is no indication one could infer any such advice or recommendations. The second (and last) withheld paragraph on page 2 is simply a statement of the purpose of the memorandum and a suggestion that the president may wish to do something, which the WCB describes in its submissions as a suggestion that he seek advice on a certain matter. In my view, this item also does not contain any implicit or explicit advice or recommendations. Nor do I regard the suggestion in that paragraph as advice, or a recommendation, to seek other advice, as the WCB argues. The statement is simply to the effect that the WCB's president may decide to seek advice or not if he so chooses. It is, in other words, a statement along the lines of 'It is up to you to decide what you would like to do about getting advice'.

[28] With regard to the signature block in record 1, the WCB argues that this item falls under s. 13(1) and its Table of Withheld Information confirms this, although the copy of the severed record the WCB provided indicates that it did not apply s. 13(1) here. It instead applied, it appears, ss. 14, 17 and 22. In any case, I reject the WCB's argument that s. 13(1) applies to the identity of the employee who wrote the memorandum on the basis that, as the WCB puts it, the "document inherently recommends that one option available to the Board is that the author or the author's office take certain actions with respect to the Appeal Division matter". Even if the record did contain advice or recommendations, which it does not, I fail to see how the identity of the employee who wrote the memorandum "inherently" reveals advice or recommendations.

[29] I note that my predecessor rejected such an argument on similar grounds in Order No. 193-1997, [1997] B.C.I.P.C.D. No. 54, at p. 8:

> The applicant submits that this section cannot be used to protect the names of public servants who may have participated in a meeting, or their names generally, from government records. (Reply Submission of the Applicant, pp. 11, 12).
>
> The Ministry replies that disclosing the names and positions may reveal "a recommendation that a matter be dealt with at a particular level." (Second Reply of the Ministry, paragraph 4.01) The Ministry has not provided any evidence as to how the disclosure would reveal recommendations in this case. I note that names of public servants were disclosed to the applicant. The fact that a particular person provided advice or recommendations does not, in this case, in and of itself reveal the advice or recommendations. There may be sensitive issues where the very fact that a particular person has given advice on a particular date reveals the advice or recommendations. I am unable to conclude that in this case the names and positions withheld would reveal advice or recommendations.

[30] Turning now to records 2-10 and 12, the WCB says, in para. 34 of its initial submission, that it produced the calculations to which these records relate under the misapprehension that compensation monies were payable as a result of the Appeal Decision. It says it quickly detected its mistake, never completed the calculations and never reached a final decision that would lead to payment.

[31] As with record 1, I reject the WCB's argument that the information in these records implicitly or explicitly reveals advice or recommendations. These are calculations that the WCB produced, respecting compensation, as a result of the reconsideration decision in 2000. The calculations do not reveal the methods used to arrive at the resulting figures. Nor is there any suggestion that the figures were in the nature of a recommended offer of compensation, as might happen in a negotiation situation. They set out the compensation that had been calculated as being payable, or possibly payable, according to law, in light of the reconsideration decision.

[32] Even if I accept the WCB's argument that it produced these calculations under some kind of mistake, this does not make them advice or recommendations. The information in records 4-9 and 12 is factual material within the meaning of s. 13(2)(a). The information withheld from records 2, 3 and 10 consists of instructions. By no stretch do these records, on their own or as attachments to record 1, consist of or reveal, inferentially or otherwise, advice or recommendations. As with record 1, I also reject the argument that the names or initials of WCB employees, wherever they occur in these records, are advice or recommendations of any kind.

[33] To summarize, I find that s. 13(1) does not apply to records 1-10 and 12.

[34] With respect to record 11, the WCB says, at para. 31 of its initial submission, that the

withheld information in it was

... clearly generated to offer advice to the Board about the effect of and therefore a course of action with respect to the February 16, 2000 Appeal Division matter.

[35] It also says it is clear on the face of the record that it was intended to be confidential and to convey its contents in confidence. These claims are not at all evident on a review of the record. Further, the WCB's only evidence in support of its s. 13(1) argument regarding record 11 is found in para. 25 of Ralph McGinn's public affidavit:

25. Record 11 was drafted by Mr. Bates as General Counsel to the Board. My intent with the letter was to convey Mr Bates' legal advice from the most senior possible level of the Board to the Chair of the Panel of Administrators. That is because this is a matter of considerable importance to the Board. It was my intent at all times that the entire content of the document would serve as a conduit of the advice to the governing arm of the Board.

[36] It is not clear what section this paragraph addresses but it strikes me more as support for the WCB's argument that s. 14 applies to this record rather than s. 13(1). In any case, I do not read the majority of the withheld information as advice or recommendations, implicit or explicit. Rather, it consists of an analysis of the Appeal Decision and Ralph McGinn's concerns with various aspects of that decision. Section 13(1) does not apply to the withheld information in this record with the exception of the last sentence on p. 2, which may be said to be advice. I find that s. 13(1) applies to this one sentence only.

[37] As I noted earlier, the applicant suggests that ss. 13(2)(a) and (n) apply to the withheld information. These sections state that public bodies must not refuse to disclose under s. 13(1)

(a) any factual material,

...

(n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[38] The applicant argues that the pension calculation information is factual material, as contemplated by s. 13(2)(a). He also argues that the withheld information is a decision which affects his rights. I agree with the WCB that s. 13(2)(n) does not apply here. I do not view the withheld calculations and related information (records 2-10 and 12), or the withheld portions of records 1 and 11, as a decision of any kind, still less a decision that affects the rights of the applicant. I do consider, however, that s. 13(2)(a) applies to almost all of the information to which the WCB applied s. 13(1), as I have already noted above.

[39] **3.4 Financial Harm to the WCB** – The WCB applied s. 17(1) to all of the withheld information except the first withheld word in record 1. Section 17(1) of the Act permits a

public body to withhold information where its disclosure "could reasonably be expected to harm the financial or economic interests of a public body ". I have considered s. 17(1) in a number of cases, most recently in Order 01-20, [2001] B.C.I.P.C.D. No. 21, where I said the following (at para. 57):

As I observed in Order 00-10, [2000] B.C.I.P.C.D. No. 11, Order 00-24, [2000] B.C.I.P.C.D. No. 27, and other orders, the standard of proof for harms-based exceptions is to be found in the wording of the Act. The standard in s. 17(1) and s. 21(1) is a reasonable expectation of harm. The harm feared must not be fanciful, imaginary or contrived. Evidence of speculative harm will not satisfy the test, but it is not necessary to establish a certainty of harm. The quality and cogency of the evidence presented must be commensurate with a reasonable person's expectation that disclosure of the disputed information could cause the harm specified in the exception.

[40] The WCB's arguments (in paras 61-72) on s. 17 can be summarized as follows. The calculation information is incomplete. It would therefore be premature to disclose it. This is particularly so given what the applicant intends to do with the information: allege further improprieties on the part of WCB staff, place inappropriate pressure on the WCB to pay compensation and possibly also institute legal proceedings against the WCB. The WCB might then have to pay money to the applicant, even if compensation is not properly payable. The WCB will have to consume resources in dealing with these various issues, resulting in undue financial impacts upon it and employers in the logging industry, who would have to make up the money in future assessments. Other estates, going back as far as 1917, the inception of the WCB, will also come forward and expect to receive compensation on the basis that a modern medical opinion now shows that death was work-related. The WCB will have to pay these estates as well, out of a need to be even-handed. If only some such cases came forward, the WCB could expect to pay upwards of $17 million, again resulting in an undue financial impact on the WCB and the logging employers of British Columbia.

[41] In his public affidavit, Ralph McGinn deposed that he has, in other cases, authorized payment of larger amounts than are involved in this case and that he has not refused or delayed payment here because of the amount involved. In para. 34 of this affidavit, he deposed that the WCB "has not completed calculations of such a sum. However, the Board knows that a monthly pension amount retroactive to 1955 with interest would be well in excess of $ 1,000,000." He also says that, even if the WCB refused the feared demands from other estates, it would face protracted and costly battles, including some court challenges (paras. 22, 29-36, public affidavit).

[42] In support of the WCB's submissions that the applicant has alleged wrongdoing by WCB employees and would use the records in ways detrimental to the WCB, the WCB provided me with copies of correspondence between the applicant, the Industrial, Wood and Allied Workers of Canada, various politicians, WCB officials and others. The correspondence revolves generally around the applicant's position that the WCB should be paying retroactive benefits as a result of the 2000 Appeal Division decision. Ralph McGinn and Ed Bates, the WCB's general counsel (who also swore an affidavit) both vehemently

deny having said or done anything improper as alleged by the applicant.

[43] The applicant's submissions on s. 17 are brief. He notes that, in Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, I rejected the WCB's argument that, because the applicant there could use disclosed information in an unspecified way in a lawsuit against the WCB, disclosure could reasonably be expected to cause the WCB financial harm. At p. 7, I said that

... the fact that information might be used in a lawsuit for 'strategy' does not create a reasonable expectation of harm to the WCB's financial or economic interests within the meaning of s. 17(1). As has been said in earlier orders, the public body must establish a reasonable expectation of harm that is not merely fanciful or imaginary.

[44] The applicant says the following, at p. 3 of his initial submission:

The WCB obviously feels that this is an "estate issue" and will open the doors to similar requests for reconsideration that may lead to an "allow" for the Appeal Division to hear the matter. Fear based (imaginary) decisions should not preclude the release of information to me that reflects a payment of an award flowing from a decision of the Appeal Division that is an entitlement under the Act ... Surely, with the WCB's accident fund sitting at 7 billion dollars (+/-), it is impossible to view how the release of the calculation of payment or our award could cause any harm to the WCB or the province!

[45] The WCB's arguments on s. 17(1) are, in my view, wholly speculative, including as regards to the amounts of subsequent claims supposedly at risk here. As the applicant points out in his reply submission, the WCB has not, among other things, submitted any actuarial analyses or underlying assumptions to support its statement that subsequent estate claims would cost the WCB $17 million. In addition, it seems to me that other workers' estates are free to submit claims for reconsideration based on modern medical evidence relevant to those cases, regardless of whether the applicant receives the records in dispute in this case or obtains compensation. If other estates do come forward with claims, one would expect that the WCB would, in accordance with applicable law, consider each claim on its own merits and award retroactive benefits only where warranted and lawful, rather than out of a need to be 'even-handed' in some ill-defined way.

[46] The WCB does not say how the applicant could use the calculation information to harm its financial interests nor why it would be forced into making some kind of payment to him, when it maintains that he has not established any entitlement to payment. I also fail to see how the supposed incompleteness of the calculations is relevant to their possible use or misuse by the applicant. It is not clear to me how knowing the exact amount of the possible payment would be useful to the applicant in pursuing his claim and thus be harmful to the WCB's financial interests. The applicant appears quite capable of pursuing his claim without knowing the amounts calculated by the WCB (which it says are incomplete). In any case, I note that the WCB has admitted in its submissions that the possible payment is over $1,000,000. If information of this kind would, in fact, be useful to the applicant, he now knows it (at least in general terms). Again, even if the applicant does not know the precise

amount, it is difficult to conceive of how disclosure of the detailed calculations could be harmful to the WCB.

[47] I am not in the least persuaded that the applicant's pressure tactics and actions, including supposed allegations of impropriety on the part of the WCB or threats of legal action, combine to support a s. 17(1) case respecting disclosure of this (it must be said, innocuous-seeming) information. I also reject any notion that this kind of pressure by an applicant could cause the WCB to pay a pension that is not properly payable at law (presumably violating the *Workers Compensation Act* in the process), in turn supposedly having an undue financial impact on the logging industry. All of the WCB's argument and evidence on this point is speculation.

[48] I find that s. 17(1) does not apply to any of the withheld information in records 1-12.

[49] **3.5 Harm to Personal Privacy** – The WCB applied s. 22 to the signature block in record 1 and, it says, to one employee's name in record 4. It also withheld some remarks in record 11 about certain identifiable people. Section 22(1) of the Act requires public bodies to withhold information where its disclosure would result in an unreasonable invasion of third-party privacy.

[50] The WCB argues that the information to which it applied s. 22 in records 1 and 4 does not fall into s. 22(4)(e) of the Act, which reads as follows:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> ...
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff, ...

[51] The WCB acknowledges that the information might appear at first to fall into that category, but says that s. 22(4)(e) does not apply because the information goes beyond information relating to the parties' positions or functions as WCB employees. According to the WCB, the information in record 1 identifies that person as having taken certain actions with respect to the record, "taking it well beyond what is contemplated by even a broad interpretation" of s. 22(4)(e). The WCB also suggests that the applicant's likely view of the meaning of the information and his likely use of the information – the WCB says he would make allegations of bad faith against this employee – are other reasons why s. 22(4)(e) should not apply to record 1. It makes similar suggestions about an employee name in record 4. It also argues that s. 22(4)(e) encompasses only an employee's name, position title and job description (paras. 87-95, initial submission). The WCB provides some *in camera* affidavit evidence, which it says supports its case, to the effect that WCB employees are concerned that the applicant will make allegations and demands about them, as he has about

others.

[52] I reject the WCB's application of s. 22(1) to records 1 and 4. The names of the WCB employees appear on these records in the context of performing their functions as employees of the public body and clearly fall within the category of information covered by s. 22(4)(e). I made a similar finding in Order 00-53, [2000] B.C.I.P.C.D. No. 57, regarding information about an employee's work-related activities. In that case, the public body had disclosed the employee's name, but withheld information on certain work-related actions. In Order 01-15, [2001] B.C.I.P.C.D. No. 16, I found that information on the names and work-related actions of public body employees fell under s. 22(4)(e). Since I find that s. 22(4)(e) applies to this information, there is no need to consider the WCB's other s. 22 arguments regarding these two records. I note, however, that it is difficult to conceive how it would be an unreasonable invasion of personal privacy for the applicant to know who wrote and signed record 1.

[53] I do, however, agree with the WCB's arguments in para. 94 and in the first paragraph numbered 102 in its initial submission (there are two such paragraphs) that s. 22(4)(e) does not apply to the last paragraph on page 1 of record 11. I also agree that s. 22(3)(g) does apply to this information. Section 22(3)(g) reads as follows:

> 22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> ...
>
> (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party, ...

[54] The information in that paragraph consists of comments about the abilities and work performance of the individuals mentioned. The WCB suggests, in para. 25 of its initial submission, that release of this information would disclose "highly confidential personal information about other employees of the Board". This is not the test under s. 22(1) – the test is whether disclosure would be an unreasonable invasion of third-party personal privacy. Nevertheless, the applicant has said nothing to rebut this presumption and I have no doubt that s. 22(3)(g) applies to the last paragraph on page 1 of record 11. I find that the WCB is required to withhold this information.

[55] **3.6 Solicitor Client Privilege** – The WCB argues that s. 14 applies to records 1-11, though not to record 12. The WCB argues that it has established that record 1 was generated and used for the purpose of seeking legal advice to the WCB.

> 47. ... It is also appropriate and consistent that an employee seeking legal advice about a matter of considerable importance to the Board would articulate and convey that decision to and through the President, for example, in a memo and wording such as that contained in

Record 1.

48. Ultimately, there has been a confidential written communication that flowed from the client, the Board to the advisor, the General counsel to the Board. And the communication was for the purpose of seeking legal advice.

49. The legal advice sought by the Record 1 included advice about the content of Records 2 to 10. The Board could have withheld the fact that the advice was sought, but chose to [be] open about it. The Board submits that the privilege should attach to the details or precise content of any subject with respect to which legal advice has been sought, including that within Records 2 to 10.

50. Lastly, the Board has shown that Record 11 itself constituted legal advice. The evidence is that the General Counsel for the Board drafted the document for the President, and that the document contains the legal advice or strategy from the General Counsel. The content was put over the President's signature to convey the information from the most senior employee of the Board, to the governing arm of the Board. That does not diminish the fact that it was a confidential written communication that ultimately flowed from the General Counsel as legal advisor, to the Board as client.

[56] In the portion of her public affidavit that deals with this issues, Pamela Cohen deposed that she met with Ralph McGinn, the WCB's president, presented records 1-10 to him, asked him to sign record 4 and told him that the calculations to which records 2-10 relate were not complete. She also deposed that the president told her shortly after this meeting that the WCB's general counsel, Ed Bates, was to review and provide advice on records 1-10.

[57] Ralph McGinn deposed in his public affidavit that he and Pamela Cohen met regarding records 1-10 and that – although he was not its author – record 1 was generated in part for the purpose of seeking policy and legal advice for the WCB. As he put it, in para. 20 of his public affidavit:

The decision to seek legal advice about the matter was made by and politely articulated in Record 1, by a subordinate employee. That decision was brought to me for my consideration. In this case, I ultimately decided that the Board indeed should obtain legal advice.

[58] He deposed, in para. 23 of his public affidavit, that he understood the request for legal advice in record 1 to include records 2-10. He also deposed, at para. 25, that Ed Bates, as the WCB's general counsel, drafted record 11 for him and that his intent in that letter was to convey Ed Bates's legal advice from

... the most senior level possible of the Board to the Chair of the Panel of Administrators. That is because this is a matter of considerable importance to the Board. It was my intent at all times that the entire content of the document would serve as a conduit of the advice to the governing arm of the Board.

[59] He also stated that the WCB decided to waive privilege over the first part of record 1 in the interests of being open with the applicant, but that the WCB did not intend to waive privilege over the rest of the document. Although an employee of the WCB had informed the applicant that Ralph McGinn was writing to the Panel of Administrators (it appears that Ralph McGinn refers to record 11 here), the applicant was not aware of its contents and the WCB did not intend to waive privilege over that record. Ralph McGinn refers to an attached letter from the applicant, in which he says he did not receive a copy of this letter (para. 28). (Although Ralph McGinn did not specify which letter he meant, there is a letter from the applicant in which he says he was not able to obtain a copy of this item.) Affidavit evidence from other employees of the WCB shows that they carried out a series of calculations and generated records 2-10 as a consequence of the Appeal Division decision of February 16, 2000, in the belief that the decision meant that the WCB would be paying compensation.

[60] Section 14 protects the two kinds of solicitor-client privilege recognized at common law. The WCB clearly relies here on the first kind of privilege recognized by s. 14, solicitor-client (or legal professional) privilege. In Order 00-08, [2000] B.C.I.P.C.D. No. 8, I set out the following four elements of the test for solicitor-client communications privilege, which I took from the decision of Thackray J. in *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.):

1. there must be a communication, whether oral or written,
2. the communication must be of a confidential character,
3. the communication must be between a client (or his agent) and a legal advisor, and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[61] On its face, record 1 is not a communication between the WCB and its legal advisor. Nor am I persuaded that the evidence supports any contention that record 1was sent to Ralph McGinn as agent for the WCB's legal advisor. Nothing before me establishes that it was normal to seek legal advice in such circumstances or through these means. The WCB has not persuaded me that this record is a communication between it and its in-house lawyer. As it appears to be, this is a communication between one WCB employee and the WCB's president.

[62] I am also not persuaded that the communication was, in any case, directly related to the seeking, formulating or giving of legal advice. The affidavit evidence attempts to support the argument that record 1 had the dual purpose of giving policy advice and seeking legal advice through Ralph McGinn. But the evidence also speaks to the purpose of record 1 as being to seek Ralph McGinn's approval to pay compensation, in accordance with normal WCB procedures in such significant cases. The contents of record 1 support this. Among other things, the WCB's contention that the last paragraph of record 1 amounts to a suggestion that Ralph McGinn seek legal advice is not actually framed that way. As I noted above, it is, rather, a statement along the lines of 'It is up to you to decide what you would like to do about getting advice'. I note, also, that Ralph McGinn deposed that he decided to seek legal advice, but did so later.

[63] Last, although the WCB says record 1 was "intended" to be confidential, and that the WCB never let the applicant see it, nothing in the record itself suggests that it was of a confidential character. The fact that it is an internal WCB communication does not, on its own, mean it is a confidential communication for the purposes of s. 14.

[64] I am also not persuaded that records 2-10 are protected by s. 14. These records consist of standard form documents generated by a department of the WCB. As the WCB's public material in the inquiry indicates, these forms set out calculations of benefits and interest. While the WCB's president may have, at some later date, provided copies of these same records to the WCB's general counsel when seeking legal advice, a fact disclosed here by the WCB, this does not turn them into a communication from client to lawyer that is directly related to the seeking or giving of legal advice. On the contrary, the evidence shows these are records prepared by WCB employees in the ordinary course of their duties, on the understanding that the WCB would be making a payment in the normal course of events as a result of the 2000 Appeal Division reconsideration decision.

[65] I also do not accept that record 11 is privileged. This record, signed by Ralph McGinn, contains an assessment of the Appeal Division decision. The evidence before me is that the document was, in fact, drafted by Ed Bates, the WCB's general counsel. The WCB contends this makes it privileged. Ralph McGinn deposed that he always intended this record to be a conduit for Ed Bates' legal advice to the WCB's Panel of Administrators. None of this is evident on the face of the record, which is from Ralph McGinn and signed by him. In my view, once he put his name to the document and signed it, he adopted its contents. It became his communication. It is not a communication between a lawyer and client and it is not privileged.

Was Any Privilege Waived?

[66] I have found that s. 14 does not apply to the disputed records. Assuming for the purposes of argument that the records are privileged, I would find that the WCB has not waived privilege over them. The WCB argues that it has not waived privilege by its having acknowledged the existence of record 11 and the calculations or by its having disclosed part of record 1. It says the applicant was not aware of record 1 until he filed his access request. It says no employee of the WCB was aware of the existence of legal privilege over the calculation records nor did they expressly intend to waive privilege. Nor is there any evidence that the calculations themselves were disclosed. Only the fact that they had been done, to some degree, was disclosed.

[67] I discussed the general principles governing waiver of solicitor client privilege in Order 00-08, [2000] B.C.I.P.C.D. No. 8, and will not repeat them here. I have considered the evidence and the applicable cases and principles. There is no evidence before me to support a finding that the WCB has intentionally waived privilege over the records. Nor does fairness dictate that the WCB's actions should be found to constitute a waiver of privilege over the entire record.

4.0 CONCLUSION

[68] For the reasons given above, I make the following orders:

1. Under s. 58(2)(a) of the Act, subject to the orders in paragraphs 2 and 3 below, I require the WCB to give the applicant access to all of the information it withheld under ss. 13, 14, 17 and 22 in records 1-12,

2. Under s. 58(2)(b) of the Act, I confirm the WCB's decision to refuse access to the last sentence on p. 2 of record 11 under s. 13(1) of the Act, and

3. Under s. 58(2)(c) of the Act, I require the WCB to refuse access to the last paragraph on page 1 of record 11 under s. 22(1) of the Act.

June 4, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 01-25

CORRECTION

WORKERS' COMPENSATION BOARD

David Loukidelis, Information and Privacy Commissioner

June 5, 2001

To the Parties:

It has come to my attention that there are two typographical errors in Order 01-25 that should be corrected:

1. In the fifth line of para. 45, "$17 billion" is corrected to read "$17 million", and

2. In the fourth line of para. 54, "person information" is corrected to read "personal information".

Replacement pages are enclosed for substitution in your copies of the order. The corrections will be reflected in the version of the order posted on our website.

June 5, 2001

David Loukidelis
Information and Privacy Commissioner
for British Columbia

June 5, 2001
Information and Privacy Commissioner of British Columbia