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

Order 02-14

MINISTRY OF SKILLS DEVELOPMENT AND LABOUR

David Loukidelis, Information and Privacy Commissioner
March 15, 2002

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Summary: The applicant requested all records relating to him at the MSDL. The MSDL's initial search for records was not adequate, but its later search efforts met its s. 6(1) duty. The MSDL correctly decided that the one record in dispute is excepted from disclosure by s. 14 of the Act.

Key Words: duty to assist – adequacy of search – solicitor client privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1) and 14.

Authorities Considered: B.C.: Order 00-32, [2000] B.C.I.P.C.D. No. 35; Order 02-12, [2002] B.C.I.P.C.D. No. 12.

1.0 INTRODUCTION

[1] As I indicated in Order 02-12, [2002] B.C.I.P.C.D. No. 12, which I released concurrently with this order, this decision arises out of a single inquiry, under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act"), regarding the applicant's requests for access to records in the custody or under the control of the Ministry of the Attorney General ("MAG"), the Ministry of Skills Development and Labour ("MSDL") and the Workers' Compensation Review Board ("WCRB"). Order 02-12 deals with the issues relating to the WCRB's response to the applicant's access request to it and Order 02-13, [2002] B.C.I.P.C.D. No. 13, addresses the issues arising out of the MAG's response. This order deals with the issues relating to the MSDL's response to the applicant's request.

[2] Much of the relevant background to this decision is set out in Order 02-12 and I will not repeat it here. In this case, the applicant made an access to information request to the MSDL by a letter dated April 20, 2000. As was the case in Order 02-12, the request was for

> … all records concerning myself, and in particular but not specifically related to the Workers' Compensation Review Board.

[3] The MSDL responded, on June 1, 2000, by disclosing some records and by refusing access to six pages of records under s. 14 of the Act. It also withheld some information under s. 22(1) of the Act. During mediation by this Office, nine further pages of records were found. They were disclosed to the applicant on September 22, 2000. Some information was severed from those records under ss. 13(1) and 14 of the Act. The MSDL at that time also disclosed a two-page record that it had withheld, under s. 14, from its initial response in June of 2000. Because the matter did not settle in mediation, I held a written inquiry under Part 5 of the Act. The parties agreed to consolidate the inquiry with those for the request for review leading to Order 02-12 and Order 02-13.

[4] The only record in dispute here is an August 8, 1996 memorandum to file from Michael O'Brien, the Chair of the WCRB. This record was also in issue in Order 02-12 and Order 02-13.

2.0 ISSUES

[5] The issues to be addressed in this inquiry are as follows:

1. Did the MSDL discharge its duty under s. 6(1) of the Act to assist the applicant by conducting an adequate search for records?

2. Is the MSDL authorized to refuse to disclose information under s. 13 of the Act?

3. Is the MSDL authorized to refuse to disclose information under s. 14 of the Act?

[6] The MSDL's decision to withhold certain third party personal information under s. 22 of the Act is not in issue here.

[7] In his initial submission, the applicant contends that MSDL should not have taken a time extension in order to respond to his request. This issue was not raised in his request for review regarding the MSDL's response to his request and there is no indication he raised it during mediation by this office. I have not considered it here.

[8] Consistent with previous orders, the MSDL has the burden of proof on the first issue and, under s. 57(2) of the Act, also has the burden regarding the second and third issues.

3.0 DISCUSSION

[9] **3.1 Was the MSDL's Records Search Adequate?** – The standards required of a public body in searching for records have been recited in Order 02-12. I will not repeat them here. I have applied the test articulated there to the evidence before me about the MSDL's search for records.

[10] In support of its s. 6(1) case, the MSDL argues, at para 5.08 of its initial submission,

> … that the evidence demonstrates that it has made every reasonable effort to locate and retrieve records responsive to the Request that are within its custody and under its control. The searches that have been conducted were carried out by experienced staff members with intimate knowledge of the records in their respective areas. The Public Body is confident that all responsive records have been located.

[11] The MSDL relies on the affidavits of Carole Shave, Jocelyn Pletz and Margaret Ketchen. Carole Shave is an Information and Privacy Analyst and is responsible for processing the applicant's request. She deposed that, in organizing the initial search for responsive records, she contacted Katherine Cotie, who is or was an Executive Assistant in the office of the Deputy Minister of the MSDL. She asked Katherine Cotie to search for records that responded to the applicant's request. According to Shave's evidence, Cotie told her "that she would search the files of the Assistant Deputy Minister, Labour Relations, for records responsive to the Request" (para. 7, Shave affidavit).

[12] This search was supplemented by, Carole Shave deposed, a search that Jocelyn Pletz conducted in records within the MSDL's Human Resources Branch. These searches yielded responsive records, which were disclosed to the applicant (with some severing) on June 1, 2000.

[13] Citing Order 00-32, [2000] B.C.I.P.C.D. No. 35, the MSDL argues that I should, "in making a determination with respect to the section 6 issue", consider its later search efforts, which turned up further records. Order 00-32 does not support the MSDL's position. In that case, I acknowledged that a public body's later search efforts can be relevant to any order that I might make, under s. 58(3) of the Act, with respect to its duty under s. 6(1) to search for records. As I pointed out in Order 00-32, the Act requires a public body to discharge its obligation to search for records at the time of response to an applicant. I said the following on this point at p. 9 of Order 00-32:

> It can still meet its s. 6(1) duties after an applicant makes a request for review under s. 52 of the Act: any steps taken by a public body after its initial search and response – including during the review and inquiry processes – will be relevant to any order I might make. But the first question to be considered in an inquiry such as this is whether, at the time it responded to an applicant's access request, the public body met its duty to "make every reasonable effort to assist" the applicant and to "respond without delay … openly, accurately and completely" to the applicant.

[14] The issue is whether, at the time it responds to an applicant, the public body has discharged its s. 6(1) duty to undertake an adequate search for records. It is not open to me, in an inquiry such as this, to cure – after the fact – the public body's initial failure to search properly. The adequacy of any subsequent search efforts can only bear on my determination, in all of the circumstances, whether a further search should be ordered under s. 58(3). If a public body has cured its initial failure to search adequately for records by the time of the inquiry – a determination that I will make based on the evidence before me – an order under s. 58(3) would be pointless and I will make none.

[15] I consider that the MSDL's initial failure to find responsive records in the office of the Assistant Deputy Minister of Labour Relations means that it failed to conduct an adequate search for records under s. 6(1). Again, Katherine Cotie told Carole Shave that a search would be done of the Assistant Deputy Minister's files. It is clear that responsive records in those files were overlooked, since the MSDL acknowledges that a further search in the files of the Assistant Deputy Minister of Labour Relations turned up three additional records.

[16] Katherine Cotie did not swear an affidavit, so it is not clear how those responsive records were missed during the first search. The responsive records that were discovered during the second search were, according to Carole Shave's affidavit, found in a file labelled with the applicant's name and the year 1996. As Shave deposed, it "is unclear as to why those records were not located and retrieved in the previous search for responsive records." This is not sufficient to discharge the MSDL's burden to show that its record search discharged its s. 6(1) duty.

[17] While I acknowledge that the obligation to search for records does not, as the MSDL points out, impose a standard of perfection, the MSDL's oversight, during its initial search for records, in not locating a clearly-labelled file and the records it contained in my view falls short of the standard of search required by s. 6(1). Accordingly, I find that the MSDL failed to discharge its s. 6(1) duty when it conducted its initial search for records.

[18] When the MSDL was notified of the applicant's contention that there had been an inadequate search for records, it undertook further searches. The MSDL looked elsewhere within the Ministry for records. I will not recite the MSDL's evidence on the scope of these searches or the variety of locations searched. I am satisfied that the further searches were thorough and comprehensive and met the standard required under s. 6(1). I have arrived at this conclusion despite the fact that, as Jocelyn Pletz acknowledges, it was only during those searches that she thought to disclose notes in her personal notebook that pertain to the applicant. Those notes (which appear not to have been extensive by any means) were disclosed to the applicant. Despite this oversight, I consider the MSDL's later searches met the standard required under s. 6(1).

[19] In light of the extensive – indeed, exhaustive – search efforts by the MSDL after the applicant's request for review, I am satisfied that the MSDL's s. 6(1) obligation was later satisfied. Accordingly, no order under s. 58(3) is called for.

[20] **3.2 Issues Under Section 13 and 14** – In Order 02-12, I have found that an August 6, 1996 memorandum to file from the WCRB's Chair, a copy of which is in the MSDL's files, is protected under s. 14 of the Act. The MSDL says here that s. 13 protects the same record. Section 13 authorizes a public body to refuse to disclose advice or recommendations developed by or for a public body. The MSDL says the following at para. 5.24 of its initial submission:

> The Public Body submits that disclosing the information withheld from the Memorandum to File would, explicitly or implicitly reveal advice prepared for a public body (the Workers' Compensation Review Board). The Information withheld under section 13 constitutes recommended courses of action that were to be ultimately accepted or rejected by the recipient of the advice (the Chair of the Review Board). The disclosure of the severed information would clearly reveal the suggested courses of action. The Public Body submits that the severed information is precisely the type of information that section 13 was intended to protect from disclosure.

[21] I do not need to consider whether s. 13(1) applies to the contents of the memorandum. This is because I have already found in Order 02-12 that it is protected by solicitor client privilege under s. 14 of the Act and, for the reasons given there, I make the same finding under s. 14 in this case.

4.0 CONCLUSION

[22] For the reasons given above, under s. 58(2)(b) of the Act, I confirm the MSDL's decision that s. 14 authorizes it to refuse to disclose the August 8, 1996 memorandum to the applicant.

[23] Despite its initial failure to conduct an adequate search for records, in light of the MSDL's later search efforts, no order is necessary under s. 58(3) respecting the MSDL's search for records.

March 15, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia