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

Order 02-34

MINISTRY OF SKILLS DEVELOPMENT & LABOUR

David Loukidelis, Information and Privacy Commissioner
July 16, 2002

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Summary: The applicant requested copies of notes taken by members of a WCB medical review panel constituted and sitting under the *Workers Compensation Act*. The Ministry correctly decided that the notes are excluded from the Act under s. 3(1)(b).

Key Words: scope of the Act – excluded records - judicial or quasi-judicial capacity.

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

Authorities Considered: B.C.: Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 02-01, [2002] B.C.I.P.C.D. No. 1.

Cases Considered: *Minister of National Revenue* v. *Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *Hoem* v. *Law Society of British Columbia*, [1985] B.C.J. 2300 (C.A.).

1.0 INTRODUCTION

[1] In a letter dated April 13, 2001, sent to what is now the Ministry of Skills Development & Labour ("Ministry"), the applicant requested, under the *Freedom of Information and Protection of Privacy Act* ("Act"), records that included the following:

- copies of all WCB Medical Review Panel Certificates; and
- the Medical Review Panel's notes pertaining to the examinations and writing of the narrative reports.

[2] By a letter dated April 23, 2001, the Ministry told the applicant that the portion of his request relating to Workers' Compensation Board Medical Review Panel ("MRP") certificates had been transferred to the Workers' Compensation Board ("WCB") under s. 11 of the Act, which provides for the transfer of requests in certain circumstances. (The Ministry indicates in its initial submission that it understands the WCB has responded to the portion of the applicant's request that dealt with MRP certificates and the "itinerary list", which the Ministry says are records that are routinely releasable under the WCB's policies. The applicant did not take issue with this.)

[3] In a further letter of May 30, 2001 to the applicant, the Ministry told him that it would not give him access to MRP notes pertaining to his examinations by the MRP. This decision was based on s. 3(1)(b) of the Act.

[4] The applicant requested a review of the Ministry's decision and, because the matter did not settle in mediation, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[5] The only issue in this case is whether notes made by MRP members of MRP examinations of the applicant are excluded from the application of the Act by virtue of s. 3(1)(b) of the Act. The public body accepts that it has the burden of proof in this case.

3.0 DISCUSSION

[6] **3.1 Meaning of Section 3(1)(b)** – Section 3(1)(b) excludes certain records from the scope of the Act. It reads as follows:

> **Scope of this Act**
>
> 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> …
>
> (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity; … .

[7] In Order 00-16, [2000] B.C.I.P.C.D. No. 19, I adopted the test set out in *Minister of National Revenue* v. *Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.), for determining whether someone is acting in a "quasi judicial capacity" for the purpose of s. 3(1)(b) of the Act. Those criteria, as I set them out in Order 00-16, are as follows:

> (1) Is there anything in the language in which the function is conferred, or in the general context in which it is exercised, which suggests that a hearing is contemplated before a decision is reached?

(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?

(3) Is the adversary process involved?

(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

[8] I also applied these criteria in Order 02-01, [2002] B.C.I.P.C.D. No. 1. See, also, Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34, in which my predecessor applied the *Coopers and Lybrand* criteria.

[9] As all of these decisions indicate, an individual may be acting in a quasi-judicial capacity even where he or she is not exercising any adjudicative functions. See, also, *Hoem* v. *Law Society of British Columbia*, [1985] B.C.J. 2300 (C.A.).

[10] **3.2 Does the Section Apply?** – Turning to the parties' arguments, the Ministry contends, at para. 5.07 of its initial submission, that MRPs are, as the *Workers Compensation Act* ("WCA") indicates,

> … required to investigate medical facts, or ascertain the existence of medical facts, hold hearings, and draw conclusions from them (about the existence or not of medical conditions), as a basis for their official action (i.e., certification), and to exercise discretion of a judicial nature.

[11] The Ministry also argues that the *Coopers and Lybrand* criteria have been met, as indicated in the relevant WCA provisions, because MRPs have all of the following characteristics:

1. a hearing is contemplated before a decision of a medical review panel is reached

2. a medical review panel's decision affects the rights of the worker and the obligations of the employer

3. the adversary process is involved between worker and employer

4. there is an obligation on medical review panels to apply substantive rules in many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense.

[12] I do not propose to set out here all of the WCA provisions on which the Ministry relies. It refers to ss. 58 through 65 of the WCA (as well as the predecessors to those sections, as they existed in 1997 and 1998). MRP members, who are appointed by Cabinet, are responsible for examining workers in relation to medical findings or decisions that have been made under the WCA. I am readily satisfied, based on my review of the statutory provisions under which MRPs function, that individual members of a MRP are acting in a quasi-judicial capacity. My reading of the relevant WCA

provisions leads me to conclude that the Ministry's characterization of MRP functions is accurate.

[13] The applicant contends this cannot be so, since MRP members "do not have legal credentials to practice law" – they are doctors who are "not qualified judges, lawyers, barristers or solicitors" (p. 1, reply submission). It is abundantly clear that it is not necessary for an individual to be a lawyer or a judge before the individual can act in a quasi-judicial capacity.

[14] I will note here that the applicant's additional argument, that s. 4(1) of the Act gives him a right of access to his own personal information and that this section should lead to disclosure of the notes to him, cannot prevail. This is because the right of access to records under the Act only applies to records that are covered by the Act. Section 3(1)(b) excludes from coverage under the Act any records of a kind described in that section.

[15] At para. 2.01 of its initial submission, the Ministry says the following about the responsive records:

> The Ministry was informed by WCB that four different medical review panels had been convened at different times (September 8, 1997; October 16, 1997; February 13, 1998; and May 6, 1998) in respect of the Applicant. The Ministry obtained, from the Medical Review Panel Office of WCB, the notes of the members of those found [sic] panels (the "Notes").

[16] Apart from the contents of the disputed records themselves, this is the only support in the Ministry's submissions for its case that s. 3(1) be applied. I have, however, determined, based on the material before me, including my review of the disputed records, that they are personal notes or draft decisions of MRP members who were acting in a quasi-judicial capacity at the time the records were created.

4.0 CONCLUSION

[17] For the reasons given above, I find that the disputed records are excluded from the Act's scope under s. 3(1)(b) of the Act and therefore, under s. 58(3)(a) of the Act, confirm that the Ministry has performed its duties under the Act in responding to the applicant as it did.

July 16, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia