Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER 52

Appeal 880099

Workers' Compensation Board

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987 (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head under the Act to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On January 7, 1988, a request was made to the Workers' Compensation Board (the "institution") for access to details on the Vocational Rehabilitation Job System; Rehabilitation staff salaries; the policy and procedures for the Workers' Compensation Board; the requester's security file held by the Workers' Compensation Board; and the transcript for the requester's hearing in Claim #C10133998.

2. By letter dated February 1, 1988, the institution's Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") informed the requester that the institution employed approximately 160 Rehabilitation Counsellors at a salary range of $30,000 _ $40,000 per annum. The Co_ordinator also advised the requester that arrangements had been made for him to view the institution's policy and procedures manuals at its Hamilton office.

3. In the same letter, the Co_ordinator denied the requester access to his security file, claiming exemption from disclosure under subsections 14(1)(b) and (e) of the Act.

4. In addition, access to the hearing transcript was denied on the basis that no transcript existed. The reason given by the institution was that no one had requested transcription at the time of the hearing, and the reporter who might have retained notes of the proceeding could not be located.

5. On March 18, 1988, the requester asked for access to the institution's liability insurance policies, and reiterated his request for access to the transcript for the hearing in Claim #C10133998.

6. On March 22, 1988, the requester also sought access to information relating to a lawyer employed in the government.

7. By letter dated April 18, 1988, the institution denied access to the liability insurance on the basis of subsection 18(1)(e) and section 19 of the Act, and reaffirmed its previous reason for denying access to the hearing transcript. Access to information concerning the government lawyer was denied because the request did not provide sufficient detail to identify the record. The Co_ordinator suggested that the requester contact her in order to provide additional details about this request, but no further contact was made by the requester.

8. On April 29, 1988, the requester appealed the institution's decisions and I gave notice of the appeal to the institution.

9. A partial settlement was effected by the Appeals Officer during mediation.

10. Because some matters remained unresolved, on July 18, 1988, I sent notice to the institution and the appellant that I was conducting an inquiry to review the decision of the head. Enclosed with this letter was a report prepared by

the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to that appeal. The Appeals Officer's Report indicates that the parties, in making representations to the Commissioner, need not limit themselves to the questions set out in the Report.

11. By letter dated August 12, 1988, I invited the appellant and the institution to submit written representations to me on the issues arising from the appeal.

12. On August 18, 1988, the Co_ordinator informed both the appellant and my office by letter that most of the security file previously requested would be released to the appellant, although certain records were being withheld on the basis of the exemptions found in subsection 18(1)(e) and section 19 of the Act.

13. Subsequently, the institution agreed to release its liability insurance policy to the appellant in its entirety.

14. On September 9, 1988, I received written representations from the institution indicating that the sole ground for claiming exemption for the undisclosed records in the appellant's security file was section 19 of the Act.

15. On September 22, 1988, I wrote to the institution asking for further submissions on the criteria used by the decision_maker in the exercise of her discretion under section 19.

16. By letter dated December 6, 1988, I also requested further submissions from the institution on the issue of the hearing transcript; the system for producing such transcripts; and the institution's past and current policies governing the creation and retention of such records.

17. Submissions were received from the institution and the appellant, and I have considered them in making this Order.

The issues arising in this appeal are as follows:

A. Whether the institution has custody or control of the notes of the hearing held in connection with Claim #C10133998.

B. Has the institution taken all reasonable steps to locate the notes of this hearing.

C. Whether the undisclosed records contained in the appellant's security file fall within the discretionary exemption provided by section 19 of the Act.

D. If the answer to Issue C is in the affirmative, whether the decision maker properly exercised her discretion in denying access to these records.

It should be noted, at the outset, that the purposes of the Act as set out in subsections 1 (a) and (b) are:

> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> ...
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head.

ISSUE A: Whether the institution has custody or control of the notes of the hearing held in connection with Claim #C10133998.

Subsection 10(1) of the Act sets out a person's right of access to records as follows:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

In order for the appellant to derive a right of access to the hearing notes in this case, the notes must qualify as "records", and, if they do, it must be established that the institution has either "custody" or "control" of them.

Subsection 2(1) of the Act defines "record" as follows:

> "Record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
>
> (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution. (emphasis added)

In my view, the notes at issue in this appeal fall squarely within the Act's definition of "record".

Turning now to the question of custody or control of the record, in my view, it cannot be successfully argued that the hearing notes are in the custody of the institution. Evidence gained by the Appeals Officer and provided by the institution clearly demonstrates that custody of these notes rests with the court reporter who took them. There has been no suggestion that the notes were delivered to the institution, or even the reporter's employer for that matter.

In considering the issue of control, it is necessary to review the procedures employed by the institution in conducting hearings.

Section 80 of the Workers' Compensation Act R.S.O. 1980, c.539 requires the institution to give applicants a full opportunity for a hearing. However, the proceedings and decisions of the institution are not governed by the Statutory Powers Procedure Act R.S.O. 1980, c.484; rather, subsection 79(1) of the Workers' Compensation Act permits the institution to determine its own practice and procedure in relation to applications and proceedings. In accordance with subsection 79(1), the institution has created an internal adjudication and appeals structure which has undergone periodic revision.

In 1984, when the hearing in this appeal was conducted, the institution had a four tiered structure for claims adjudication. The appellant had reached the third tier, which provided for a hearing conducted by a single Appeals Adjudicator. All third tier hearings are prima facie open to the public. However, if

either of the parties (i.e. the worker, the employer and/or their representatives) objects to the presence of any other persons at the hearing, they are asked by the Appeals Adjudicator to leave.

The institution's practice for all third tier hearings is to create a record of the proceedings through use of a private court reporter. The reporter produces a verbatim record of the hearing by means of either shorthand notes or tape recorder, but only transcribes the record in two circumstances: if there is a further appeal, in which case the institution pays for the transcript; or if one of the parties requests a transcript, in which case that party is charged for transcription costs.

The question of "control" of these notes and transcripts turns on the question of who is able to obtain a transcript. Clearly, if persons other than the institution and the parties to the hearing can independently obtain a transcript from the reporting service, it would be difficult to argue that the institution has "control" over these records. On the other hand, if production and distribution of transcripts requires the approval of the institution, in my view, this is sufficient to establish "control" as envisioned by subsection 10(1) of the Act.

In this case, the reporting service responsible for the preparation of the appellant's hearing transcript has since gone out of business, with the exception of a skeleton staff which attempts to provide transcripts for past hearings, with the approval of the institution. Neither the institution nor a representative of this service could definitively state whether

or not third parties could independently obtain copies of hearing transcripts at the time of the appellant's hearing. Therefore, in the peculiar circumstances of this case, in my view, it cannot be established whether the institution had "control" of the record at issue.

As far as current practice by the institution is concerned, its present reporting service will not release transcripts to anyone other than the institution or the parties to the hearing, without the prior approval of the institution. (I should note that, although both the institution and the reporting service confirmed this policy, it does not form part of the contract between these two organizations.) The individual reporter's notes and/or tapes are stored on computer, and these notes are the property of the reporting service, not the individual reporter. Because the institution "controls" access to notes and/or tapes in the custody of the reporting service, in my view, it would have control for the purposes of the Act.

A number of issues have been raised by this appeal which relate to the adequacy of procedures employed by the institution in retaining control of records relating to hearings under the Workers' Compensation Act, and for this reason I have asked the Compliance Branch of my office to conduct a full investigation of these procedures to ensure compliance with the provisions of the Freedom of Information and Protection of Privacy Act, 1987.

ISSUE B: Has the institution taken all reasonable steps to locate the notes of this hearing.

In this case, the individual court reporter, not the court reporting service, retained custody of the hearing notes. This

has been confirmed to me in writing by both the institution and the reporting service.

In its submissions, the institution outlined its unsuccessful attempts to contact this court reporter, and I am satisfied that the institution has taken all reasonable steps to locate the notes of the hearing.

ISSUE C: Whether the undisclosed records contained in the appellant's security file fall within the discretionary exemption provided by section 19 of the Act.

The records withheld from disclosure in this appeal consist of: an Occurrence Report; two witness reports; one examination report by a physician; two internal memoranda by and from institution staff; and four photographs.

Section 19 of the Act reads as follows:

> A head may refuse to disclose a record that is subject to solicitor_client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section provides an institution with a discretionary exemption covering two possible situations: (1) a head may refuse to disclose a record that is subject to the common law solicitor_client privilege; or (2) a head may refuse disclosure if a record was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. A record can be exempt under the second part of

section 19 regardless of whether the common law criteria relating to the first part of the exemption are satisfied.

The institution submits that the records contained in the appellant's security file fall within the second branch of the section 19 exemption. Specifically, that they were prepared for Crown counsel in contemplation of litigation".

To meet the requirements for inclusion under this second branch, the institution must demonstrate two things:

(1) that the records in question were prepared for "Crown counsel"; and

(2) that they were prepared "in contemplation of litigation".

I will discuss each of these requirements separately.

The institution has argued that the term "Crown counsel" should be read expansively to include any legal advisor to any institution covered by the Act. In the institution's view, if the term was restricted to employees of the government holding specified positions of "Crown counsel", this would create inequities among the various ministries, agencies and other institutions covered by the Act; those regularly relying on "Crown counsel" for litigation purposes would be able to claim the section 19 exemption, whereas those who employ their own in_house counsel or retain counsel from the private bar would not.

I agree with the institution's submission, and feel that the proper interpretation of "Crown counsel" under section 19 should include any person acting in the capacity of legal advisor to an institution covered by the Act.

The question of what constitutes "in contemplation of litigation" has frequently been considered by the courts, and continues to evolve. The institution has properly identified the two current common law requirements for according a record privileged status on the basis of having been prepared in contemplation of litigation. They are:

(a) the dominant purpose for the preparation of the document must be contemplation of litigation; and

(b) there must be a reasonable prospect of such litigation at the time of the preparation of the document _ litigation must be more than just a vague or theoretical possibility.

In order to decide whether these two requirements have been satisfied in the present case, it is necessary to review the circumstances surrounding the preparation of the records being withheld by the institution. As with any claim for exemption under section 19, the institution has the burden under section 53 of establishing that the requirements for exemption are present.

After reviewing these records and considering the submissions of the institution, I feel that they qualify as being prepared "for Crown counsel... in contemplation of litigation", and are therefore eligible for exemption under section 19 of the Act.

Although the completion of an Occurrence Report by the institution is standard practice for all Workers' Compensation incidents, the institution has presented evidence which indicates that the Report in this case is not routine: it is more detailed than normal; it includes witness statements and memoranda from institution staff; and it is accompanied by photographs of the area where the accident took place. In my view, this is sufficient under the circumstances to establish that the dominant purpose for preparing the documents was the contemplation of litigation.

The institution has also presented evidence to support its allegation that there was a reasonable prospect of litigation at the time the record was prepared and, as such the documents were prepared for Crown counsel. Immediately prior to the accident

which gave rise to the claim, the appellant had allegedly threatened to "get" the institution; and following the accident the appellant demanded that he be allowed to remove some "evidence" from the accident scene. In my view, it was reasonable for the institution to conclude that litigation was more than just a vague or theoretical possibility at the time the record was being prepared.

Although I have decided that the requirements for exemption under section 19 have been satisfied in this case, I want it to be clear that Occurrence Reports and other similar classes of documents routinely completed by this and other institutions will not automatically qualify for exemption. The appropriate tests for exemption must be applied to the specific records at

issue in each individual appeal, and the eligibility for exemption will always be made on a case_by_case basis.

ISSUE D: If the answer to Issue C is in the affirmative, whether the decision_maker properly exercised her discretion in denying access to these records.

The exemption provided by section 19 is discretionary in nature, and the decision_maker must exercise this discretion with respect to the disposition of all records which satisfy the requirements for exemption.

The institution was asked to provide an outline of the factors considered by the decision_maker in exercising her discretion not to disclose the records in this case. The following factors were considered relevant by the institution:

(a) the appellant had initiated a claim against the government in respect of the incident which is discussed in these records;

(b) based on the appellant's prior conduct, there were reasons to believe that release of the severed material might result in harassment of the individuals who provided the information contained in the records.

(c) the portions of the records directly related to the law suit were of a particularly sensitive nature.

I have taken the position in all of my Orders which deal with discretionary exemptions that, as long as there is nothing improper or inappropriate in the exercise of a decision_maker's

discretion, it should not be interfered with on appeal. Applying this standard to the circumstance of the present case, I would not interfere with the decision to withhold these records from disclosure under section 19 of the Act.

In summary, I find that the institution has taken all reasonable steps to locate the notes of the hearing. I also find that the other records in issue in this appeal fall within the discretionary exemption provided by section 19 of the Act. I therefore uphold the decision of the head in refusing to disclose the records contained in the appellant's security file.

Original signed by: April 12, 1989
Sidney B. Linden Date
Commissioner