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

ORDER P-373

Appeal Numbers P-910306, P-910307, P-910308,
P-910309 and P-910310

Workers' Compensation Board

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

ORDER

BACKGROUND:

The Workers' Compensation Board (the Board) received a request under the Freedom of Information and Protection of Privacy Act (the Act) "[f]or the year 1990, ... the names, addresses and any other available information for any companies who have been penalized, fined, penalty rated or were caused to be charged additional funds by the Board" under the Board's programs known as the New Experimental Experience Rating Program (NEER), the Construction Experience Rating Program (CAD 7), the WORKWELL Program (WORKWELL), the Section 91(7) Penalties Program (SECTION 91(7)), and the Voluntary Experience Rating Program (VER).

The Board provided a separate decision letter for each program. The decision in all cases was to deny access to all responsive records, pursuant to sections 17(1)(a) and (c), and 17(2) of the Act.

The requester appealed the Board's decisions. Separate appeal files were opened for each decision; however, because all of the appeals were filed by the same appellant and the issues are essentially the same, this order will dispose of the issues raised in all five appeals.

During the course of mediation, the appellant narrowed his request as follows:

> For the NEER, CAD 7, and VER programs: the names, addresses and amounts of surcharge, penalty or fine for the fifty companies with the highest penalties, fines or penalty ratings, for the year 1991, and
>
> For the WORKWELL and SECTION 91(7) programs: only the names, and addresses of the fifty companies with the highest penalties, fines or penalty ratings, for the year 1990.

Further mediation was not successful, and notice that an inquiry was being conducted to review the Board's decisions was sent to the appellant, the Board, and each of the 247 employers whose names appear in the records (the affected persons). In addition, five employer associations were notified of the appeal and provided with an opportunity to submit representations.

Written representations were received from the Board, 59 affected persons and all five employer associations. Of the 59 affected persons who provided representations, two consented to the disclosure of the information relating to them, and the remaining 57 objected to any disclosure. One hundred eighty-eight affected persons did not respond.

The records at issue in this appeal are:

Record 1 A six-page computer-generated list of the names, addresses and surcharge amount of fifty employers in the NEER program, ordered by surcharge amount from greatest to least.

Record 2 A three-page computer-generated list of the names and surcharge amounts for fifty employers in the CAD 7 program, ordered by amount of surcharge from greatest to least; and fifty pages containing the addresses of the employers on the list.

Record 3 A three-page computer-generated list of the names and surcharge amount for fifty employers under the VER program, ordered by surcharge amount from greatest to least; and fifty pages containing the addresses of the employers on the list.

Record 4. A four-page computer-generated list of the names and addresses of all forty-five employers covered by the WORKWELL program, ordered by surcharge amount from greatest to least. This record does not contain the actual amounts of surcharge.

Record 5 A three-page computer-generated list of the names of fifty employers subject to the SECTION 91(7) program, ordered by surcharge amount from greatest to least; and a one-page document containing the addresses of the employers on the list. This record does not contain the actual amounts of surcharge.

Copies of Records 1, 2, 3 and 5 forwarded to this office by the Board contain information not responsive to the request, such as the amount of an employer's regular contribution (assessment) under the Workers' Compensation Act (the WCA), its account number, and credit rating. I find that this information falls outside the scope of the request and should not be released.

In order to gain an understanding of the issues in these appeals, I thought it would be useful to provide some general background information about the various programs, and the creation and use of the records. The following information was obtained from the representations submitted by the Board and certain affected parties and employer associations.

The Board is responsible for administering a workers' compensation system established under the WCA, which provides compulsory, employer financed, "no-fault" accident insurance to injured workers in Ontario.

Under this system, each employer pays a premium/contribution to the Board, based on the type of industry the employer is engaged in, the size of its payroll, and other criteria. Benefits paid to workers injured on the job are paid out of funds pooled from all employers.

The WCA permits the implementation of a system of experience rating. Under experience rating, an employer's assessment is adjusted on the basis of the employer's accident record, which may consist of accident costs or both costs and frequency of accidents. Experience rating is used primarily as an incentive for improved occupational safety, since an employer with a good record will pay less and one with a poor record will pay more.

The WCA also permits the Board to impose surcharges (additional contributions) on employers that do not maintain safe and healthy environments, or employers who contravene safety regulations. The Board may surcharge or refund an employer based on payroll adjustments, changes in industry classification, the merit/demerit rating, experience rating of the employer, and other factors. Employers are required to supply the Board with certain information by completing various forms. The formulae and criteria used by the Board to calculate surcharges or refunds is known in the industry, and the WCA provides an appeal mechanism for employers disputing the surcharges.

At the time of the appellant's request, the Board administered the five experience related programs which are the subject of the these appeals.

Under the NEER program, a firm's accident cost and/or frequency record is compared to the average for the industry in which it is registered. If its record is better than the industry average, it receives a refund on its initial assessment; if the firm's experience is worse than the industry's average, a surcharge is levied.

The CAD 7 program is restricted to employers in the construction industry. Under this program, the expected accident costs and the expected number of injuries are determined on the basis of the employer's payroll and assessments. These expected values are then compared to the firm's actual accident costs and actual number of injuries to determine refunds and surcharges.

Under the WORKWELL program, the Board identifies employers who have particularly poor accident records for their rate group in terms of accident cost, accident frequency and/or accident severity. The evaluation process involves on-site visits by Board evaluators who review the occupational health and safety program at the work site, examine documentation, observe the employer's practices and procedures in action, tour the work site and conduct random interviews with workers. Employers who do not meet the required standards are given 90 days to improve health and safety shortfalls prior to re-evaluation. If, at the conclusion of the second evaluation the employer fails to achieve the standards, an additional levy is applied.
The SECTION 91(7) program is intended for employers whose accident costs and frequency of lost time injuries are consistently poorer than average. The record for a three-year period is used in determining the employer's eligibility for this penalty.

The VER program recognizes high or low cost experience of employers within a rate group classification. (Employees are divided into rate groups based on the end product manufactured or service provided). A comparison is made between an individual employer's three-year average cost rate and the three-year average cost rate of all the eligible employers in the rate group. VER then reduces or increases an individual employer's rate of assessment, based on its accident record. (The Board has advised that this plan was discontinued, effective January 1, 1992, when all VER program employers were transferred to the New Experimental Experience Rating Plan).

PRELIMINARY MATTERS:

In their representations, some of the affected persons and employer associations raise objections to certain procedures employed by this office in processing these appeals. These objections may be summarized as follows:

1. The time period allowed for submitting written representations was unreasonable.

2. This office did not properly define "affected persons" in the context of these appeals. Some of the affected persons claim that the appellant was "persuaded to artificially adjust the nature of the request for reasons related to the administration of the appeal, and not for reasons related to the justice of the case". They submit that all employers in Ontario covered by the five programs (18,000 employers according to one affected person) should have been notified as affected persons in these appeals, despite the fact that the appellant decided to limit his request to 50 employers in each program.

With respect to the first objection, all parties to these appeals were initially given three weeks to submit written representations. Those who asked for more time were given a one-week extension, and those who asked for a further extension were asked to provide reasons, and were then given reasonable further extensions.

As far as the second objection is concerned, all employers whose names appeared in the five records were notified of the appeal and invited to submit representations. In addition, a number of employer associations were notified and given an opportunity to make representations, despite the fact that they have no direct interest in the outcome of these appeals.

It is the responsibility of the Appeals Officer assigned to any appeal to attempt to effect a settlement through mediation. The appellant's initial request covered all employers in all of the programs; however, during mediation, the appellant agreed to narrow his request, and the Board agreed to generate the information responsive to the narrowed request from data already existing in its computer systems. The narrowing of the request was done with the consent of the appellant and the agreement of the Board, as part of the normal mediation process. I find nothing improper in the narrowing of the request or in the manner it was done.

In Order 164, former Commissioner Sidney B. Linden stated:

> ... while the Act does contain certain specific procedural rules, it does not in fact address all of the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process.

In my view, the authority to set time limits for the receipt of representations and to implement procedures for identifying and notifying affected persons is included in the implied power to

develop and implement rules and procedures for the parties to an appeal. In my view, the procedures followed for setting time limits for receipt of their representation and the identification of parties was appropriate, in the circumstances of these appeals.

Some of the affected persons submit in their representations that section 14 of the Act applies to the records. Section 14 is a discretionary exemption that may be claimed by the Board. The Board has not cited this section as the basis for exempting any of the records, and I find that it is not at issue in these appeals, and will not be addressed in this order.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether the mandatory exemption provided by sections 17(1)(a) and/or (c) of the Act applies to any of the records.

B. Whether the mandatory exemption provided by section 17(2) of the Act applies to any of the records.

C. If the answer to Issues A and/or B is yes, whether the provisions of section 23 of the Act apply in the circumstances of this appeal.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemption provided by sections 17(1)(a) and/or (c) of the Act applies to any of the records.

The Board and certain affected persons and employer associations claim that sections 17(1)(a) and (c) of the Act apply to all of the records. These sections read as follows:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In order to qualify for exemption under sections 17(1)(a) and/or (c), the following three-part test must be satisfied:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the Board in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure must give rise to a reasonable expectation that one of the types of injuries specified in subsection 17(1)(a) and/or (c) will occur.

Failure to satisfy the requirements of any part of this test will render the section 17(1) claim invalid [Order 36].

PART ONE

RECORDS 1, 2 and 3

These records contain the amount of surcharge, levy or penalty the named employers were assessed under the WCA. In my view, this information qualifies as financial information, thereby satisfying the first part of the test.

RECORDS 4 and 5

The representations of the Board, affected parties and employer associations address part one of the test as it relates to all five records, and do not specifically comment on its application to Records 4 and 5.

These parties claim that the records contain financial information, because they "reflect" payroll information and the fact that an employer is liable to pay additional assessments; commercial information, because they indicate that an employer may have higher costs as a result of a poor accident record, and an "unsafe" workplace; and labour relations information, because they relate to the safety record of a workplace and the volume of injuries to workers. In addition, they argue that "the information that a firm may have a poor safety record and higher costs is considered a trade secret by business ..."; and that the records reveal the pricing structure of the employers, which they claim is also a trade secret.

Copies of the Firm's Registration form, the Employer's Statement of Payroll form and the Employer's Report of Accidental Injury or Industrial Disease form were submitted by the Board and the affected parties. According to the parties resisting disclosure, the information provided

on these forms qualifies as the type of information contained in section 17(1) of the Act, and would be revealed if the records at issue in these appeals are disclosed.

A review of these forms indicate the following:

The Firm Registration form must be completed by all employers subject to the WCA. It contains the employer's identification, including the corporate registration or ownership name and mailing address of the employer, branch location, the type of industry the employer is engaged in, the end product or service it provides, and a description of the process and equipment used in providing the service or product. Under a heading entitled "Management Information", the form requires the names, Social Insurance Numbers, home addresses of the owner or partners of the employer. The form also requires the employer to provide information about the total number of workers it employs, and the estimated amount of its payroll. The form stipulates that "all information is strictly confidential".

The Employer's Statement of Payroll form must be submitted along with the Firm Registration form. Part one of this form contains the name and address of the employer, employees' earnings, and the names of the employer's executive officers, owners, and partners. Part two of the form records changes in the status of the employer, such as industry change, whether the business was sold or discontinued, and the location of any newly established branches.

The Employer's Report of Accident Injury or Industrial Disease form, which employers are required to complete and submit to the Board after an occurrence of an occupational injury or disease at the work site, contains the name and address of the employer, the name, address and other information about the injured worker, the history of the accidental injury or disease, and earnings and lost time information.

Records 4 and 5 contain only the names and addresses of the employers who have been assessed the highest penalties under the WORKWELL and SECTION 91(7) programs. These records do not contain the amounts of surcharge, payroll, or the nature and volume of accidents; nor would disclosure of the names and addresses reveal this information. In my view, disclosure of Records 4 and 5 would not permit the drawing of accurate inferences as to any information supplied to the Board on the aforementioned forms, with the exception of the names and addresses of the listed employers.

Disclosure of Records 4 and 5 would reveal that the employers on the list were the subject of levies or fines under the WCA in 1990. In addition, because the list is arranged in descending order based on the amount of penalty, disclosure would also reveal the rank of an employer relative to others on the list with respect to amounts of surcharges for 1990. However, in my view, it is not accurate to characterize the names and addresses contained in Records 4 and 5 as commercial, financial or labour relations information, or a trade secret, as those terms are used in section 17(1) of the Act.

Therefore, I find that the first part of the test for exemption under section 17(1) has not been established with respect to Records 4 and 5.

PART TWO

The Board and certain affected persons and employer associations submit that disclosure of the records would reveal information which was supplied to the Board explicitly in confidence. They claim that the names and addresses of the employers, as well as payroll and accidental injury information, were supplied to the Board on the forms referred to above, which explicitly assure confidentiality.

I do not accept this position.

Records 1, 2, and 3 list the names and addresses of the employers with the fifty highest surcharges in 1991, together with the amount of surcharge for each employer. Records 4 and 5 list only the names and addresses of the employers with the highest penalties in 1990 under the relevant program.

In my view, the surcharge amounts were not "supplied" to the Board by the affected persons; rather, they were calculated by the Board. While it is true that information supplied by the affected parties on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected persons from the surcharge amounts themselves.

As to the claim that the names and addresses of the employers were supplied in confidence, in my view, information that an employer operates within an industry which falls within the jurisdiction of the WCA, and therefore must register with the Board, submit certain forms and participate in certain programs, is a function of the industry in which it operates. I do not agree that the names and addresses of the employers were supplied to the Board in confidence. In my view, it is the financial, commercial and personal information contained on the forms which was supplied in confidence, and none of this information would be revealed through disclosure of the records at issue in these appeals.

Therefore, I find that part two of the test for exemption under section 17(1) has not be established with respect to Records 1, 2, 3, 4 or 5.

PART THREE

Having found that Records 4 and 5 do not satisfy the first part of the section 17(1) exemption test, and that all of the records fail to qualify under the second part of the test, it is not necessary for me to determine whether the requirements of the third part of the test have been satisfied. However, in the circumstances of these appeals, I feel it would be useful to comment on this part of the test, since the Board and certain affected parties and employer associations have made extensive representations on the issue.

To discharge the burden of proof under the third part of the test, the parties resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed [Order 36].

I have received representations from the various parties that the release of the records could be expected to result in: significant prejudice to the employers' competitive position or contractual or other negotiations; undue loss to the employers; and undue gain to others. These representations place heavy emphasis on the possible misuse and/or misinterpretation of the information contained in the records.

The Board states that "the fact that a firm is surcharged ... does not ipso facto mean that the firm is a poor performer, 'unsafe', a poor risk or makes unsafe products". The Board's concern is that "the fact that a firm is surcharged (and on this list) creates an unnecessary negative image and causes the loss of business, revenue, profitability, and higher costs based on information that is potentially misleading, unfair and in 10%-50% of the cases, inaccurate. Yet the firm would still be prejudiced by the stigma of being considered an unsafe work place and would have no avenue to vindicate its record with the public, suppliers, customers, etc".

The representations of one of the affected persons state:

> The information in the record (Record 3) can easily mislead anyone who is not very familiar with the W.C.B and its methods. The [affected party] has one of the 50 largest V.E.R surcharges ... but this is not at all reflective of our recent accident record. The large surcharge is part of a function of the size of our organization. A much smaller company with a worse record and a higher surcharge rate could have a lower actual surcharge due to a smaller assessable payroll".

This affected person indicates that the surcharge applied to it relates in large part to costs for individuals injured in the past, and submits:

> ... if the record is released, or if the public learns that [the affected party] was one of the companies with the largest V.E.R surcharges in [a given year], then the public, or members of the public, will believe that the [affected party] has an ongoing, poor record concerning workplace health and safety. [It] will be required to expend further time, money and other resources in order to publicize our actual safety record, in order to correct the impression that would be created by disclosure of the record, or any part."

Whereas the Board and certain affected persons and employer associations have advanced general arguments as to how disclosure of an employer's payroll, volume and frequency of accidents, and its safety record might be harmful to its competitive interest, they have failed to bridge the evidentiary gap necessary to establish that disclosure of the records at issue in these appeals would reveal this type of information.

I find the evidence regarding harm that could result from a negative interpretation of the information contained in the records is not sufficient to establish the third part of the section 17(1) exemption test. In my view, the evidence consists of generalized assertions of fact in support of what amounts to, at most, speculations of possible harm.

Therefore, I find that the third part of the section 17(1) exemption test has not be established with respect to any of the five records.

In summary, I find that the Board and/or the affected persons and employer associations have failed to establish the requirements of all three parts of the test for exemption under sections 17(1)(a) and/or (c) with respect to Records 4 and 5, and parts two and three of the test with respect to Records 1, 2 and 3. Accordingly, none of the records at issue in these appeals qualify for exemption under sections 17(1)(a) or (c) of the Act.

ISSUE B: Whether the mandatory exemption provided by section 17(2) of the Act applies to any of the records.

Section 17(2) of the Act reads as follows:

> A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

The Board and certain affected persons and employer associations claim that disclosure of the records would reveal information "... gathered for the purpose of determining tax liability or collecting a tax" and that such disclosure would be in contravention of the mandatory exemption under section 17(2) of the Act. They also claim that assessments and surcharges under the WCA constitute "tax liability" or "tax" within the meaning of section 17(2).

Certain affected persons also cite section 114 of the WCA, and state that employees of the Board "are precluded from releasing information obtained during the performance of their duties".
When the Act originally came into force on January 1, 1988, it contained section 67, which read as follows:

> (1) The Standing Committee on the Legislative Assembly shall undertake a comprehensive review of all confidentiality provisions contained in Acts in existence on the day this Act comes into force and shall make recommendations to the Legislative Assembly regarding,
>
> (a) the repeal of unnecessary or inconsistent provisions; and
>
> (b) the amendment of provisions that are inconsistent with this Act.

> (2) This Act prevails over a confidentiality provision in any other Act unless the other Act specifically provides otherwise.
>
> (3) Subsection (2) shall not have effect until two years after this section comes into force,

In accordance with section 67(1), the Standing Committee on the Legislative Assembly undertook a comprehensive review of approximately 130 confidentiality provisions contained in various statutes, including section 114 of the WCA, and made recommendations to the Legislative Assembly regarding the repeal of unnecessary or inconsistent provisions. As part of the Standing Committee's review, it examined a report by the Management Board of Cabinet, and heard submissions from representatives of Management Board and several ministries, including the Ministry of Revenue.

After completing its review, the Standing Committee submitted a report to the Legislative Assembly. In its report, the Committee recommended that certain confidentiality provisions should continue to prevail over the Act. This recommendation was adopted by the Legislature, and is reflected in the current section 67(3) of the Act. It should be noted that section 114 of the WCA is not included in section 67(3).

However, the Standing Committee also concluded that, in the majority of the cases, adequate protection of the interests which the confidentiality provisions aimed to protect, could be ensured by amending existing exemptions contained in the Act. One such area identified by the Committee was information protected by confidentiality provisions identified in 11 tax statutes, and the Committee recommended that a new section be introduced in the Act to address the various tax statutes identified during the review. To that end, Management Board of Cabinet proposed an amendment to section 17(2) of the Act, which was ultimately adopted by the Legislature and is currently in force.

In explaining the reasons for proposing the amendment, the then Chairman of the Management Board of Cabinet and the Minister responsible for the Act stated:

> There are eleven confidentiality provisions in statutes administered by the Ministry of Revenue which provide for the secrecy of information submitted on tax returns and other records relating to the tax liability of taxpayers. With respect to individual taxpayers, such information is strongly protected from disclosure in s.21(3)(e) of the Freedom of Information and Protection of Privacy Act. However there is no similar provision in the Freedom of Information and Protection of Privacy Act for taxpayers other than individuals (e.g., corporations). ... Furthermore, the applicable exemption in the Freedom of Information and Protection of Privacy Act - s.17 - is limited since the harms tests of the section are very difficult to apply to the raw financial data contained on such records.
>
> ... [T]he type of information to be protected could be described and included as exempt records in a new subsection 17(2).

The legislative history of this section clearly indicates that the information the Legislature intended to protect from disclosure under section 17(2) was relatively narrow, and was restricted to the type of tax information that was supplied under the tax statutes administered by the Ministry of Revenue. In my view, the information provided by employers to the Board pursuant to the requirements of the WCA is not the type of information which was intended to be covered by section 17(2).

I am supported in my view by a number of court decisions which have determined that assessments used to create and maintain compensation funds are not properly characterized as "taxes".

Chief Justice Laskin of the Supreme Court of Canada considered the issue in the case of Massey-Ferguson Industries Ltd. et al. v. Government of Saskatchewan et al., (1981), 127 D.L.R. (3d), 513, where he states at page 528:

> I am not persuaded that the assessments to create and maintain a compensation fund should be characterized as taxes within s.92(2) of the British North America Act, 1867. The levies, as monetary exactions, are liquidating premiums to satisfy farmers' claims under s. 6D and the policy of the Act is to relate the assessments to the compensation awards and to administrative expenses. They are designed to support a limited form of insurance for the benefit of farmers who purchase agricultural implements, related to their use of such implements. There is here no collection of money to go into a consolidated revenue fund which is then chargeable with satisfying awards of compensation. Although the scheme is a public one, created under a public statute, its beneficiaries and obligors are circumscribed by the particular activity or enterprise in which they are engaged.
>
> ... The distributors who are subject to the levy are under an additional cost of doing business in Saskatchewan, but this does not mean that they are being taxed in a constitutional sense.

The Massey-Ferguson case was referred to and the same approach was adopted by Justice Holmes of the Alberta Court of Queen's Bench in Re Auger and Workers' Compensation Board; Attorney-General for Alberta, Intervener (1989), 61 D.L.R. (4th) 660, where he states at pages 667-7:

> ... I am satisfied that assessments levied under the Workers' Compensation Act, 1981 of Alberta should not be characterized as a tax. The Massey-Ferguson case is analogous ...
>
> Similarly, in the case of assessments levied under the Workers' Compensation Act of Alberta, the funds raised are in the nature of insurance moneys used solely to

administer and pay workers compensation claims and have no connection with the general revenue funds of the province.

I find that the assessment of surcharges and penalties under Ontario's WCA cannot properly be considered information which is "gathered for the purpose of determining tax liability or collecting tax" under section 17(2) of the Act; to find otherwise, in my view, would be inconsistent with the legislative intent of section 17(2) and existing jurisprudence.

Therefore, I find that none of the records at issue in these appeals qualify for exemption under section 17(2) of the Act.

Because of the manner in which I have disposed of Issues A and B, it is not necessary for me to consider Issue C.

ORDER:

1. I order the Board to disclose to the appellant the names, addresses and surcharge amounts for employers listed in Records 1, 2 and 3, and the names and addresses of the employers listed in Records 4 and 5.

2. I order the Board to disclose the records listed in provision 1 of this order to the appellant within 35 days of the date of this order and **not** earlier than the thirtieth (30th) day following the date of this order.

3. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, only upon my request.

Original signed by: November 24, 1992
Tom Mitchinson
Assistant Commissioner