



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

# ORDER P-660

Appeal P-9400005

Workers' Compensation Board



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# ORDER

On March 28, 1994, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

## BACKGROUND:

The Workers' Compensation Board (the Board) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information relating to a named Board solicitor's involvement, as the Board's solicitor, in the re-employment hearings of the requester.

The Board located 154 pages of records responsive to the request and denied access in full pursuant to section 19 of the Act. The requester appealed the denial of access.

Mediation was not successful and notice that an inquiry was being conducted to review the Board's decision was sent to the appellant and the Board. Representations were received from both parties.

The Board administers the Workers' Compensation Act in an adjudicative capacity. The records requested relate directly to the appellant's application made to the Board around March, 1993 under section 54 of the Workers' Compensation Act for a determination on whether the Board, as the appellant's former employer, had breached its re-employment obligations.

I have categorized the records into the following groups:

Category A: internal Board memoranda (one in draft form) either to or from the named solicitor;

Category B: handwritten notes and typewritten notes of the named solicitor, and other internal documents and draft questions prepared for the appellant's re-employment hearing.

## ISSUES:

The issues to be addressed in this appeal are:

- A. Whether the information contained in the records qualifies as "personal information" as defined by section 2(1) of the Act.
- B. Whether the discretionary exemptions provided by sections 19 and 49(a) of the Act apply.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the information contained in the records qualifies as "personal information" as defined by section 2(1) of the Act.**

Section 2(1) of the Act defines "personal information", in part, as "recorded information about an identifiable individual". I have carefully reviewed each document and find that all the records contain the personal information of the appellant only.

Some of the records also contain information about other individuals. I am satisfied, however, that this information pertains to these individuals acting in either their professional capacities or in the execution of their employment responsibilities. On this basis, such information does not qualify as personal information for the purposes of the Act (Orders P-369, P-377 and P-427).

**ISSUE B: Whether the discretionary exemptions provided by sections 19 and 49(a) of the Act apply.**

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 consists of two branches, which provide a head with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); **and**
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Board submits that the records in Category A are exempt under Branch 1 and that the records in Category B are exempt under both Branches 1 and 2. I will consider the application of Branch 2 to the records.

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be met in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

It has been previously established that "Crown counsel" includes any person acting in the capacity of legal advisor to an institution covered by the Act (Order 52). As part of its representations, the Board has provided the sworn affidavit of the named solicitor who attests to the fact that her responsibilities as senior counsel include giving legal advice to the Board as employer and representing the Board's interest in litigation and before administrative tribunals. I accept that the named solicitor functions in the capacity of Crown counsel for the purposes of the first criterion.

I have carefully reviewed the records and I find that all of the records in both Categories A and B have been either prepared by or for the named solicitor and, therefore, meet the first criterion.

In his representations, the appellant states that there was no litigation ongoing during the time of his re-employment application nor was there any litigation contemplated at that time. In my view, there should be no distinction between matters in dispute heard before a court and those heard before administrative tribunals (Order M-162). I find that in the present case, re\_employment hearings considered by an administrative tribunal of the Board are properly classified as litigation matters.

In the affidavit provided by the Board in support of its submissions, the named solicitor states that all of the records at issue were prepared by or for her in preparation for the re-employment hearings. In my view, it is clear that the records were prepared for use in litigation and/or in contemplation of litigation.

Accordingly, I find that all the records are exempt under Branch 2 of section 19 of the Act.

Under Issue A, I found that the records contain the personal information of the appellant. I have also found the records to be properly exempt from disclosure under section 19 of the Act.

Section 47(1) of the Act gives individuals a general right of access to any personal information about themselves in the custody or under the control of institutions covered by the Act. However, this right of access is not absolute. Section 49 provides a number of exceptions to this general right of access, including section 49(a) which reads as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information; [emphasis added]

Section 49(a) of the Act provides the Board with the discretion to refuse to disclose an appellant's personal information where section 19 otherwise applies to the information. I have reviewed the factors considered by the Board regarding its exercise of discretion in favour of refusing to disclose the records. I find nothing improper in the determination which has been made and would not alter it on appeal.

**ORDER:**

I uphold the Board's decision.

Original signed by: \_\_\_\_\_  
Mumtaz Jiwan  
Inquiry Officer

\_\_\_\_\_ April 21, 1994