

Order No. 07-005

Re: Workers Compensation Appeal Tribunal

**Prince Edward Island Acting Information and Privacy Commissioner
Karen A. Rose**

July 10, 2007

I. BACKGROUND

This review arises out of a request by an applicant under the *Freedom of Information and Protection of Privacy Act* (the “*FOIPP Act*”) to the Workers Compensation Appeal Tribunal (the “Public Body”) on August 24, 2006, for access to all of the decisions of the Public Body from 1995 to the date of the request. In order to fulfil this request, the Public Body notified each individual third party whose personal information is contained in the requested Workers Compensation Appeal Tribunal decisions (the “WCAT decisions”).

On October 25, 2006, the Public Body notified a third party (the “Third Party Applicant”) of the request to access information under the *FOIPP Act* and advised the Third Party Applicant of the third party rights contained in section 15 of the *FOIPP Act*, providing a copy of that section of the *FOIPP Act* with its correspondence. The Third Party Applicant was also provided with a copy of the WCAT decision in question. The Public Body highlighted those portions of the decision that would be severed of identifying personal information before disclosing the record to the applicant. The Public Body provided an opportunity for the Third Party Applicant to submit input before making its decision of whether to disclose the record requested.

The Third Party Applicant responded in writing to the Public Body on November 4, 2006, objecting to the release of the WCAT decision in its entirety. On November 21 2006, the Public Body acknowledged receipt of the response and advised the Third Party Applicant that upon consideration of the Third Party Applicant's views and other relevant factors it had made a decision to provide partial disclosure of the record at issue to the applicant. The Public Body informed the Third Party Applicant of the 20 day time limit within which a request for review of the decision by the Information and Privacy Commissioner can be made.

On December 7, 2006, this office received a facsimile of the decision letter that the Public Body had sent to the Third Party Applicant dated November 21, 2006, which contained a hand-written request of the Third Party Applicant that the Information and Privacy Commissioner review the decision of the Public Body to provide partial disclosure of the record to the applicant.

By letter dated December 18, 2006, this office requested that the records pertinent to this review be forwarded to us by the Public Body. The Public Body was asked to consider a preliminary issue pursuant to subsection 64.1(a) of the *FOIPP Act*, namely, whether the same subject matter of this request for review had been dealt with in Order 05-005, issued April 19, 2005, between the Public Body and another applicant. This office received the requested documents on January 2, 2007, and the Public Body's submissions regarding the preliminary issue were received on January 15, 2007.

On January 17, 2007, this office forwarded a severed copy of the Third Party Applicant's Request for Review to the original applicant and advised the applicant of the Public Body's position that I refuse to conduct an inquiry based on the fact that the subject matter of the request has been dealt with in a previous order. By correspondence dated January 17, 2007, this office advised the Third Party Applicant of the Public Body's position, provided the Third Party Applicant with copies of the Public Body's submissions and a copy of Order 05-005, and requested that the Third Party Applicant review the documentation and respond with written submissions. On January 29, 2007, this office received a hand-written response upon a copy of the letter of January 17, 2007, from the Third Party Applicant, reiterating the fact that the Third Party Applicant does not agree to disclosing any of the information contained in the record at issue.

II. RECORD AT ISSUE

The record at issue in this review is a decision of the Workers Compensation Appeal Tribunal dated December 2005, involving the Third Party Applicant and the Workers' Compensation Board of Prince Edward Island.

III. REFUSAL TO CONDUCT AN INQUIRY

Section 64.1 of the *FOIPP Act* states:

- 64.1. The Commissioner may refuse to conduct an inquiry pursuant to section 64 if, in the opinion of the Commissioner,
- (a) the subject matter of a request for a review under section 60 has been dealt with in an order or investigation report of the Commissioner;
 - or
 - (b) the circumstances warrant refusing to conduct an inquiry.

IV. BURDEN OF PROOF

Section 65(3) of the *FOIPP Act* states:

65. (3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove the disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

The initial burden of proof lies with different parties, depending upon which exception of the *FOIPP Act* is claimed. If this review proceeds to an inquiry on the merits that the Public Body has severed the third party personal information from the record at issue, it will be up to the Third Party Applicant to prove that the applicant has no right of access to the record at issue.

At this time, where the Public Body has requested that I exercise my discretion to refuse to conduct an inquiry under section 64.1 of the *FOIPP Act*, the burden of proof lies with the Public Body, as it is the party which has raised this preliminary issue. As is noted above, each party provides submissions to support their position, and all submissions are then considered by the Commissioner.

V. ISSUES

1. Pursuant to subsection 64.1(a) of the *FOIPP Act*, has the subject matter of this request for review under section 60 been dealt with in a previous order, namely, Order 05-005, issued April 19, 2005, between the Public Body and another applicant?
2. If so, should the Information and Privacy Commissioner exercise her discretion and refuse to conduct an inquiry of this request for review, pursuant to subsection 64.1 of the *FOIPP Act*?

VI. DISCUSSION OF ORDER 05-005

Order 05-005, issued on April 19, 2005, also involved a request to the Workers Compensation Appeal Tribunal (“the Tribunal”) for all of its decisions from 1995 to the date of the request. Affected third parties were notified and one third party applied to the Office of the Information and Privacy Commissioner for a review of the Tribunal’s decision to grant partial access to the record, severing identifiable personal information of the third party based on section 15 of the *FOIPP Act*. As in the review before me, the third party wished to have the record withheld in its entirety. The Tribunal acknowledged that information contained in the record at issue fell under the definition of “personal information” as found at subsection 1(i) of the *FOIPP Act*, including the third party’s name, the case identification number, information about the third party’s health and health care history; as well as employment history about the third party. Being aware of this, the Tribunal proposed to sever the personal information from the record at issue prior to providing access to the applicant.

In Order 05-005, I agreed with the Tribunal's argument that once the personal information was severed from the records at issue, the remaining information did not constitute personal information and was not considered recorded information about an "identifiable individual" as required under the definition. The Tribunal cited the case of Ontario (A.G.) v. Ontario (Information and Privacy Commissioner) [2001] O. J. No. 4987, which set out a test of whether an individual can reasonably be expected to be identified:

The test then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the record.

I adopted the above Ontario test as a reasonable approach to section 1 of the *FOIPP Act*. After considering the submissions of the parties and considering the small province in which we live in the context that sometimes a small amount of information can identify an individual, I concluded that the third party could not reasonably be identified from the information remaining in the record after the identifying personal information of the third party had been severed. I found that the Tribunal properly applied sections 1 and 15 in its decision to disclose the severed record.

VII. SUBMISSIONS OF THE PARTIES

The Public Body submits that the subject matter of the request has been dealt with previously in Order 05-005. Based on this submission, the Public Body asks that the Information and Privacy Commissioner exercise her discretion to refuse to conduct an inquiry pursuant to clause 64.1(a) of the *FOIPP Act*.

In the review now before me, in order to satisfy the requirements contained in section 15 of the *FOIPP Act* to allow access to the record at issue, the Public Body decided to sever all third party personal information pursuant to subsection 1(i) of the *FOIPP Act* prior to release of the record to the applicant. The information to be severed includes: the name of the Third Party Applicant and representative, pursuant to 1(i)(i); case identification numbers, pursuant to section 1(i)(iv); information relating to the Third Party Applicant's health and health care history, pursuant to 1(i)(vi); employment history of the Third Party Applicant and a fourth party, pursuant to 1(i)(vii); and information about the Third Party Applicant's claim, pursuant to section 1(i).

In comparing the present review with that of Order 05-005, the Public Body states:

In both applications, the record under consideration was or is a Tribunal decision. In both applications, the subject matter of the review is whether the public body is in compliance with the Act in deciding to grant partial access to the records after personal information has been severed as the disclosure of the remaining information would not be an unreasonable invasion of the Third Party's personal privacy. With the exception of information about the Third Party's claim, the categories of personal information in the present application are identical to those found in Order 05-005.

To further support its decision, the Public Body provided a copy of a ruling letter of the Information and Privacy Commissioner of Alberta dated August 18, 2003, wherein he refused to conduct an inquiry into two identical cases, stating that "the subject-matter of the requests for review has been dealt with in Order 2001-07". As well, the Public Body provided a copy of Order F05-08, University of British Columbia (Re) [2005] B.C.I.P.C.D. No. 47, wherein the Commissioner of British Columbia noted that, with regard to the matter being dealt with, he was satisfied that the issues were "the same in nature" as those considered in a previous order, and he decided to exercise his discretion to not hold an inquiry.

The Public Body also submitted that in exercising my discretion to refuse to conduct an inquiry into this matter, my refusal would have the effect of providing the applicant with the record at the earliest possible date, which is in keeping with the purpose of the *FOIPP Act*, namely, to provide a right of access to records in the custody or under the control of a public body subject to the exceptions set out in the *FOIPP Act*. Further, the Public Body states that my refusal would save the parties from providing submissions for an inquiry, the subject of which has already been decided.

The Third Party Applicant objected to the release of the decision in its entirety and did not provide any supporting documentation or refer to any supporting legislation.

VIII. FINDINGS OF THE COMMISSIONER

In reaching my decision on this matter, I have considered all of the parties' submissions and reviewed all of the documentation provided. I have also reviewed the file material relating to Order 05-005. During my analysis, I have been mindful of the intent of section 64.1 of the *FOIPP Act*. I note that in British Columbia, orders which have resulted in the Information and Privacy Commissioner's refusal to conduct a formal inquiry have been decided without an equivalent to section 64.1 in their legislation. Instead, decisions have been based on the common law doctrine of *issue estoppel*. In the review before me, it is not necessary to conduct such an analysis. I have only to consider the requirements of section 64.1, which explicitly states that I may exercise my discretion to refuse to conduct an inquiry if a specified threshold has been passed. I must be satisfied that the *subject matter* of this review has been dealt with in a previous order of my office.

I find that the subject matter of this review is whether severing the third party personal information from the record at issue permits the Public Body to provide access to the record at issue to someone who requests it. I further find that this identical issue was dealt with in Order 05-005. I agree with the Public Body that in Order 05-005 the request to access information which commenced that review contained almost identical wording to that of the request to access information in the case at hand. The issues which I reviewed to come to my decision in Order 05-005 are identical to those which apply to this review, and the submissions of the Third Party Applicant did not contain any new facts which would set this review apart from that of Order 05-005. The third party personal information which was severed from the records at issue in Order 05-005 falls under the same categories as in this present review. Further, once the personal information was severed from the records at issue in the previous case, the remaining information did not constitute personal information and was then not recorded information about an “identifiable individual” as required under the definition. Such is the case at hand. Based on all of these factors, I find that there is sufficient grounds to exercise my discretion as to whether to refuse to conduct an inquiry into this matter.

I have given careful consideration to the objects and purposes of the *FOIPP Act* in exercising my discretion in this matter. As always, I have been cognizant of the goal of open access to government information, as well as protecting the personal information of our citizens. I have also considered the extent to which this subject matter had been dealt with in Order 05-005. It is upon this basis that I have decided to refuse to conduct an inquiry into this matter. In my view, it would serve no useful purpose to conduct a formal inquiry in this instance. If the Third Party Applicant were questioning which information was severed by the Public Body as personal information, my decision might well be different. The Third Party Applicant, like the third party in Order 05-005, wishes to withhold the entire decision. This subject matter has already been dealt with quite thoroughly.

IX. ORDER

I have found that pursuant to subsection 64.1(a) of the *FOIPP Act*, the subject matter of this request for a review under section 60 has been dealt with in Order 05-005, issued April 19, 2005, between the Public Body and another applicant.

Based on this finding, I have exercised my discretion to refuse to conduct an inquiry of this request for review, pursuant to subsection 64.1 of the *FOIPP Act*.

I thank all parties for their submissions, and once again I congratulate the Public Body for its efforts in protecting the privacy of the Third Party Applicant while still offering access to its decisions. As I stated in Order 05-005, one of the great challenges of the *Freedom of Information and Protection of Privacy Act* is finding a fair balance between freedom of information with protection of privacy.

In accordance with section 68(1.1) of the *Freedom of Information and Protection of Privacy Act*, the head of the Public Body shall not take any steps to comply with this order until the end of the period for bringing an application for judicial review of the order under the *Judicial Review Act*.

Karen A. Rose
Information and Privacy Commissioner