# REPORT
## Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-07-32

**Report Release Date**: April 22, 2008

**Public Body**: The Workers' Compensation Board of Nova Scotia

**Issues:** Has the Public Body properly applied s. 20 and s. 21 of the *Act* to sever portions of the Applicants' access request? In particular, can the Public Body, the WCB, withhold the firm and/or division name of companies, found in a listing of "the 25 companies which have the highest number of injuries", under section 21 of the *Act*?

**Summary:** The Applicants requested a Review of the WCB's decision to grant partial access to their initial request for information including, but not limited to, the 25 companies with the highest injury claims, types of accidents reported and the cost in claims paid by the WCB. The WCB withheld certain information citing sections 20 and 21. Mediation was unsuccessful and the file was forwarded for formal Review.

The Review Officer found that the records requested did not contain any personal information, as defined by the statute, therefore, s. 20 of the *Act* does not apply. As well, the Review Officer found that the WCB could not prove that the information sought was provided by the Third Parties under the notion that it was strictly confidential, therefore s. 21 of the *Act* does not apply and the information in its entirety should be released to the Applicants.

**Recommendations:** 1. The WCB should release the requested information in its entirety including the names of the employer companies and the divisions. In other words, the Record created by the WCB that is responsive to the Requests #1, #3, #4 and #5 should be released in full;
2. The WCB should charge the Applicants the fee now known to them as a result of creating this Record. The WCB

could give consideration to waiving the fee altogether, given the delay in providing this Record to the Applicants that could have been created when the original access request was made;
3. Given the information age and the electronic environment in which all public bodies are now operating, in the future, public bodies, as part of the duty to assist, must give consideration at the outset to its ability to create a record from its databases that is responsive to an access request.

**Key Words**: burden of proof, creation of a record, duty to assist, fee estimate, firms and/or divisions, identifiable individual, media, paramount, personal information, record, supplied in confidence

**Statutes Considered**: *Nova Scotia Freedom of Information and Protection of Privacy Act s. 2, 3(1)(i), 3(1)(k), 4A(2), 5(2), 7(1), 8(3)(a),8(3)(b), 20(1), 20(2)(e), 20(2)(g), 20(2)(h), 20(3)(f), 21(1)(a)(i), 21(1)(a)(ii), 21(b), 21(1)(c)(i), 21(1)(c )(ii) 21(1)(c )(iii) 21(1)(c)(iv), 22(1A), 45(1); Workers' Compensation Act s. 192(b).*

**Case Authorities Cited**: *NS Report FI-05-70; Atlantic Highways Corporation v. Nova Scotia, (1997), 162 N.S.R. (2d); NS Report FI-O7-12; ON Order P-373.*

# REVIEW REPORT FI-07-32

## BACKGROUND

On February 21, 2007, the Applicants from a media outlet requested access to information by submitting a Form 1 to the Workers' Compensation Board of Nova Scotia ["the WCB"], which reads as follows:

> *We are requesting:*
> - *The names of the 25 companies which have the highest numbers of injuries, including fatal injuries, in the province for the years 2004, 2005 and 2006 [1];*
> - *Size of their workforces during 2004, 2005 and 2006 [2];*
> - *the numbers and types of accidents reported by the 25 firms during 2004, 2005 and 2006 [3];*
> - *costs in claims paid out by the Workers [sic] Compensation Board of Nova Scotia in compensation for workplace injuries at those 25 companies in 2004, 2005 and 2006 [4];*
> - *how each firm's safety rating compares with their industry's averages [5].*

After receiving the original request on February 26, 2007, the WCB provided a decision to the Applicants in the letter of March 22, 2007, which provided as follows:

*We have reviewed you're [sic] application and are able to provide much of the information you have requested. In some instances we are not able to do so and have offered to provide what information we can share. . .*

1. *The WCB is unable to provide the information requested relating to the names of the 25 companies with the highest negative safety records. Our interpretation is that this information is protected, confidential information under section 21 of the FOIPOP Act. The WCB feels that if the negative safety records of these employers were released, there is risk their competitive positions could possibly be harmed and their reputations permanently damaged. Therefore, we will not provide the names of the specific employers (personally identifying information) and risk exposing them to financial harm (see s. 20(1)(e) of the FOIPOP Act). We will, however, provide the number of fatalities in relation to the 25 companies and believe this aggregate data provides adequate information to promote public health and safety.*
2. *The WCB is not in a position to provide the size of the workforce of the companies noted in number 1 above in the years 2004, 2005 and 2006. The WCB does not gather or maintain this information, however, we could provide the assessable payroll for these 25 employers for the three years requested. Again, we would not name the individual 25 companies.*
3. *The WCB will provide the number and types of accidents for the 25 companies with the highest numbers of injuries for the years 2004, 2005 and 2006. Please note, the figures for the year 2006 are relatively new and will be provided on an "unofficial" basis only (we can later confirm the figures when the data matures).*
4. *The WCB can provide the claims costs paid out by the Workers" Compensation Board in compensation for workplace injuries in relation to these 25 unnamed companies in 2004 and 2005 and unofficial statistics for 2006 (to be provided officially when available).*
5. *The WCB will not be able to provide each firm's safety rating compared to their industry average as we have no such safety rating.*

The decision letter goes on to provide the Applicants with a fee estimate for the work to generate the requested data. As the WCB is refusing to release the names of the 25 firms as requested, no Third Party notices were sent. Section 22(1) that requires a public body to send a notice to a third party where the information requested must be refused under s. 20 or s. 21, does not apply if s. 22(1A) applies, which provides:

*Notwithstanding subsection (1), that subsection does not apply if*
*(a) the head of the public body decides, after examining the request, any relevant records and the views or interests of the third party respecting the disclosure requested, to refuse to disclose the record;*

On May 3, 2007, the Review Office received a Form 7 from the Applicants requesting a Review of the March 22, 2007 decision by the WCB. The Applicants requested that the Review Officer recommend:

*that the head of the public body give access to the record as requested in the Application for Access to a Record.*

On May 31, 2007, the WCB provided a detailed explanation of its response to the Applicants, details of which will be discussed in the Public Body's submission below.

On August 30, 2007, the Review Office was advised by the Applicants that they were satisfied that Request #2 involving the number of employees for the highest-injury rate companies was not information gathered by the WCB. The information gathered to calculate premiums was based on payroll for the company and the number of reported injuries. The Applicants were satisfied and agreed to remove Request #2 from their access request. The WCB advised the Review Office by letter dated October 4, 2007 that the Applicants had agreed to limit the items under Review to Requests #1, #3, #4, and #5.

On September 7, 2007, the WCB submitted a request to file a late exemption. Referring to their May 31, 2007 correspondence to the Review Office in which it referenced s. 20(1)(e), s. 20(1)(g), s. 20(1)(h), s. 21(a)(ii), and s. 21(c)(i) of the *Act*, the WCB sought to rely on the following exemptions:

- Section 20(2)(h) – noting in the May 31, 2007 correspondence there was a typographical error referring instead to s. 20(1)(h)
- Section 20(2)(e)
- Section 20(3)(f)
- Section 20(2)(g) – noting in the May 31, 2007 correspondence there was a typographical error referring instead to s. 20(1)(g)
- Section 21(a)(ii) [sic]
- Section 21(c)(i) [sic]

Though not particularized in this amended list of exemptions, the WCB in its May 31, 2007 letter cited s. 20(1)(e) which was not on the new list but they had added s. 20(2)(e), presumably replacing it. The last two sections are intended to refer to s. 21(1)(a)(ii) and (c)(i). The WCB argues in support of its late exemption claim that the May 31, 2007 letter to the Review Office was provided in its entirety to the Applicants and their interests, therefore, have not been prejudiced by the delay. In addition, they argue that they were not in receipt of the procedure memorandum dated May 23, 2007 from me with respect to claims for late exemptions as they were not on the Review Office list-serve to receive it. The WCB seemed to confuse the Time Extension Policy [dated May 23, 2007] and the Late Exemption Policy [2004] that has been posted to the website and is referred to in the provincial government's FOIPOP Procedures Manual [2005]. I find the Applicants have not been prejudiced by any late exemptions claimed by the WCB and, therefore, all of the exemptions claimed will be considered in this Review.

On October 4, 2007, the Review Office requested that the WCB forward a copy of all information responsive to the four remaining Requests. As this required that the information be retrieved from the WCB database, they were given an extended period in which to respond. The WCB asked for a further extension of time in which to respond. The complete set of Records was received on November 7, 2007.

The Review Office prepared an Index of the Record, a copy of which was supplied to the Applicants with the consent of the WCB. The actual Record provided by the WCB to the Review Office consists of 12 database queries totalling 92 pages.

The WCB is prepared to release the Record in severed form, claiming exemptions under s. 20 and s. 21 of the *Act*, withholding the Firm names and/or Division names from each entry in the Record. The issue in this Review is whether or not the Applicants are entitled to access the exempted information.

On December 12, 2007, the Review Office advised the WCB that s. 20 of the *Act* did not apply to the facts of this case. The WCB was also advised in regards to section 21. Not only did the WCB claim just two parts of a three part test, the part they did not claim (part b) appears not to be applicable as the Records were created by the WCB and therefore, were not supplied by the Third Parties. As all three parts must apply for the exemption to stand, it did not appear to apply in this case. The WCB responded on January 2, 2008 with a further explanation for the rationale behind their decision, which will be considered in the Public Body's submission below.

On January 25, 2008, both parties were provided with a copy of the Investigative Findings and invited to bring any errors or omissions to the attention of the Review Office at which time an amended version would be circulated. The WCB responded on February 4, 2008 that "[T]he facts, as set out, appear to be accurately reflected."

The matter was referred to mediation on February 4, 2008. The mediation was unsuccessful and the matter was referred to formal Review on March 10, 2008.

**RECORD AT ISSUE**

The Record provided by the WCB was identified as follows:

*For each of the years 2004, 2005 and 2006 the information is categorized by:*

*a. The 25 SCB Firms with the Most Registered Claims (answers questions 1 and 4)*
*b. The 25 Firms with Most Registered Claims – Broken out by Division for Rate Comparison purposes (answers question 5 – please note that firms may have a number of divisions and therefore, the information is provided at the division level in the manner in which it is stored with the WCB operating systems).*
*c. The 25 WCB Firms with Most Registered Claims – Top 3 Natures of Injury by Firm (answers to question 3)*
*d. The 25 WCB Firms with Most Registered Claims – Top 3 Parts of Body Firm (also answers question 3)*

At the time of its decision, the WCB provided the Applicants with a fee estimate. The Applicants did not take issue with the calculation of the fee and the fee estimate is not under Review. However, the estimate should be revisited when this Review Report is issued. Since that estimate was created, the Regulations under the *Act* have been

amended to provide that the first two hours of search time are to be free. In addition, as a result of the Review Request, the Record that is responsive to the access request has been assembled so the actual time and cost associated with their response should be known to the WCB.

**APPLICANTS' SUBMISSION**

The Applicants were notified that they were entitled to make a submission to the Review Officer, however no submission was received. They were contacted at the outset of the formal Review and they confirmed they did not intend to file any submissions during the formal Review process. The Applicants indicated that the Investigative Findings accurately reflect their position with respect to their access request. The Applicants consented to being referred to as media.

**PUBLIC BODY'S SUBMISSION**

When the Record was provided to the Review Office on November 7, 2007, the WCB also included the following explanation:

> *The portion of the enclosed information that is highlighted in orange is that which the WCB seeks to have severed pursuant to sections 20(2)(e), 20(3)(f), 20(2)(g), 20(2)(h), 21(a)(ii) [sic], and 21(c)(i)[sic] of the Freedom of Information Protection of Privacy Act, the reference for which is found on the top right corner on the front page of the materials.*

On January 2, 2008, the WCB made the following points in response to the investigation:

1. The WCB is not in a position to release the requested information because the *Workers' Compensation Act* holds them accountable to their stakeholders, both employers and employees, and makes it mandatory for employers to provide certain information.
2. The purpose of the mandatory collection and retention of the data in a database is to appropriately calculate assessment premiums.
3. When the assessments are reviewed, the WCB takes steps to ensure employers with a negative safety record receive safety targeted services to decrease workplace injury and enhance safe and timely return to work.
4. The WCB feels strongly that it has an obligation to uphold the sanctity and security of the information to prevent improper use or interpretation, as the information involves many complex factors.
5. The WCB believes that identifiable employers with negative safety records could be adversely impacted by the release on the information. The negative outcomes would include permanent damage to their reputations or they may suffer financial/economic harm.
6. The WCB believes that the level of trust and spirit of cooperation with their stakeholders would be lessened by releasing the information.

7. The release of the information could interfere with its ability to carry out its prevention mandate under the governing statute and its attempt to work with stakeholders to achieve its goals, particularly a safe and timely return to work for injured workers.
8. The WCB has attempted to provide the Applicants and the Review Office with background information to better understand that a poor safety record needs to be considered in context.
9. The WCB acknowledges that the *Act* attempts to hold public bodies accountable, open and transparent with a goal of providing access to information with limited exceptions. It also submits that a key component is the protection of privacy of information.
10. The other intent of the legislation is to provide public access to information but the WCB submits that the release of the responsive record in this case is not necessary to inform public participation or ensure fairness in decision-making.
11. Though employers are under a legislated obligation to provide the information at issue (acknowledging the position of the Review Office that the information is not supplied in confidence), the WCB's stakeholders expect the information to be retained with appropriate discretion.
12. The WCB believes the release of the information is against the interests of the WCB and its stakeholders and is contrary to the goals of the *Workers' Compensation Act.*

On March 26, 2008, the WCB provided a submission as part of the formal Review process, which can be summarized as follows:

1. With due respect to the Review Office's investigative findings, the WCB takes the position that the information being requested can be exempted from disclosure under the *Act.*
2. The WCB is accountable to its stakeholders by statute, which makes it mandatory for employers to provide certain information to the WCB. With this information, the WCB uses any negative safety record to target services to decrease workplace injury.
3. The WCB feels it has an obligation to uphold the sanctity and security of the information to prevent improper use or interpretation.
4. The WCB feels strongly that the release of the names of these companies will jeopardize their relationship and interfere with the spirit of cooperation they now share.
5. The WCB attempted to provide the Applicants with background information and in particular, the Employer Information Guide. The submission goes on in some detail to discuss the Guide, which detail does not need to be repeated here as the Guide has nothing to do with the access to information request.
6. The WCB argues that there ***may*** be very negative consequences to the employers or the companies ***could be harmed. [Emphasis added].***

**7.** Despite the fact that an employer has no choice to report workplace injuries and accidents, the WCB submits that employers would be less likely to cooperate with the WCB if such information is released.

**DISCUSSION**

The purpose of the *Act*, which has been a broad and purposeful interpretation, provides:

> *2 The purpose of this Act is*
> *(a) to ensure that public bodies are fully accountable to the public by*
> *(i) giving the public a right of access to records,*
> *(ii)giving individuals a right of access to, and a right to correction of, personal information about themselves,*
> *(iii) specifying limited exceptions to the rights of access,…*
> *(b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to*
> *(i) facilitate informed public participation in policy formulation,*
> *(ii) ensure fairness in government decision-making,*
> *(iii) permit the airing and reconciliation of divergent views;*
> *(c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.*

The Applicant has a right of access to any record in the custody or under the control of a public body pursuant to s. 5, once a request has been received. Section 3(1)(k) of the *Act* defines record as follows:

> *"record" includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;*

The original decision by the WCB to the Applicants attempted to provide a summary of the information with an explanation for why some information could not be released. No actual Record was created at the time the access request was received. The WCB is under a duty under s. 8(3) of the *Act* to create a Record, which provides:

> *The head of a public body shall create a record for an applicant if*
> *(a) the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and*
> *(b) creating the record would not unreasonably interfere with the operations of the public body.*

The WCB did provide the Record to the Review Office during the investigation that it created as responsive to the access request, with the exception of Request #2 which

the Applicants consented to withdraw, with the exemptions being claimed duly noted on the Record.

The WCB has relied on two exemptions in the *Act* to support severing the Record. Each of these will be dealt with in turn. Subsection 45(1) of the *Act* provides for who bears the burden of proof and reads as follows:

> *At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.*

Section 20 of the *Act* provides for the protection of personal information contained in a Record. The section and subsections relied upon by the WCB read:

> *(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
> *(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether…*
> *(e) the third party will be exposed unfairly to financial or other harm;*
> *(g) the personal information is likely to be inaccurate or unreliable; and*
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.*
> *(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if. . .*
> *(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;*

Personal information is defined in s. 3(1)(i) as follows:

> *"personal information" means recorded information about an identifiable individual, including*
> *(i) the individual's name, address or telephone number,*
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
> *(vi) information about the individual's health-care history, including a physical or mental disability,*
> *(vii) information about the individual's educational, financial, criminal or employment history,*
> *(viii) anyone else's opinions about the individual, and*

*(ix) the individual's personal views or opinions, except if they are about someone else;*

There is no personal information contained in the Record. The names of companies and information about their safety performance do not fit within the definition of "personal information" under the *Act.*

The Review Officer had a previous case in 2005 involving the same public body that is on all fours with this Review. In that case, the Review Officer stated:

> *"Personal information" is defined in Section 3(1)(i) as "recorded information about an identifiable* ***individual****." It provides some examples, such as name, address, telephone number, race and ethnic original of an* ***individual****. (Emphasis added). Although this list is not exhaustive, it is useful in helping to determine whether or not the information sought meets the definition.*
>
> *I have concluded that the information does not meet the definition even if the company name were to bear the name of the employer. In that case the name would be regarded as "business information" to which Section 21 could apply if all the conditions of that exemption were met.*
> *[NS Report FI-05-70]*

I agree. There is no personal information contained in the Record and, therefore, the WCB's reliance on s. 20 exemption under the *Act* fails as it is inapplicable where there is no identifiable individual.

Section 21 of the *Act* is a mandatory exemption. Once the terms of the section are established, the public body must refuse to disclose the information and has no discretion to release. Section 21 reads as follows:

> *Confidential Information*
> *21(1) The head of a public body* ***shall refuse to disclose*** *to an applicant information*
> *(a) that would reveal*
> *i. trade secrets of a third party, or*
> *ii. commercial, financial, labour relations, scientific or technical information of a third party;*
> *(b) that is supplied, implicitly or explicitly, in confidence; and*
> *(c) the disclosure of which could reasonably be expected to*
> *i. harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
> *ii. result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
> *iii. result in undue financial loss or gain to any person or organization, or*
> *iv. reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.*
> ***[Emphasis added]***

The provisions set out in s. 21(1)(a), (b) and (c) are conjunctive and, therefore, once it is established that the subsections apply to a record, the head of a public body must refuse to release a record.

> *I therefore conclude that s. 21(1) should be read conjunctively and that a party seeking to apply it to restrict information must satisfy the relevant authority or the court that the information satisfies each of the lettered subsections of s. 21(1). [Atlantic Highways Corporation v. Nova Scotia, at para 28]*

Where the information requested is only partly subject to an exemption, the public body must, where it is severable, provide disclosure to the remaining information that is the subject of the Application for Access to a Record pursuant to s. 5(2) of the *Act*.

> *5(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.*

In this case, the WCB produced a Record responsive to the access request and made a decision to provide some information but excluded all the names of the firms referred to in the database queries. In another Review that considered s. 21, it was stated:

> *Section 21 embodies one example of when the statutory right of access should be curtailed. The legislation seeks to protect a record held by a public body when a third party's interests could be seriously affected because the information was provided on a confidential basis, could reveal trade secrets, commercial, financial or labour relations and the disclosure could reasonably be expected to significantly harm the competitive or negotiating position or result in undue financial loss.*
> *[NS Report FI-07-12]*

Interestingly enough, when the WCB cited the exemptions it wished to rely upon, including on the Record itself, it cited two subsections of s. 21 – commercial, financial and significant harm – and made no reference to s. 21(1)(b) – the requirement for the information to be supplied on a confidential basis.

> *The Nova Scotia courts have made it patently clear that under our generous access to information legislation it is not sufficient for a public body to claim a record as confidential in order to shield it from the public eye. [O'Connor v. Nova Scotia, 2001 NSCA 132; 2001 NSCA 132 (CanLII)]. In that case, Justice Saunders cautioned to be wary of traps such as how something has been described:*
>
> > *…no government can hide behind labels. The description or heading attached to the document will not be determinative…There is no shortcut to inspecting the information for what it really is and then conducting the*

> *required analysis…The Review Officer must always be wary of such traps before embarking on the necessary inquiry.*
> *[O'Connor, at para 94]*

*Simply labelling something "confidential", therefore, does not necessarily make it so for the purpose of the Act. The Supreme Court, similarly, has rejected a blanket exemption with respect to business information under s. 21 of the Act.*

> *It is accepted that a broad exemption for all information relating to business would be both unnecessary and undesirable. Many kinds of information relating to business concerns can be disclosed without harmful consequences to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served.*
> *[Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Nova Scotia Department of Health, 2004 NSSC 54; 2004 NSSC 54 (CanLII), at para 18]*
> *[NS Report FI-07-12]*

The WCB did not provide any argument or evidence that employers (the Third Parties) supplied the information from which the Record was created or that it was supplied on a confidential basis. Nowhere on the Employer Registration form for the Assessment Services Department is there mention of confidentiality. In fact, in Section 5 of the Registration form the following statement is included just before the Section where the Employer provides its signature:

> *The Workers' Compensation Board of Nova Scotia* ***is subject to, and complies with,*** *the provisions of the Freedom of Information and Protection of Privacy Act.* ***[Emphasis added]***

The s. 21 exemption has no application in this case as the three part test has not been satisfied.

Although not required to go further once a determination has been made that one of the three-part test has not been met, as here in the case of the confidentiality requirement, it is important to comment on the first part of the test. The only portion of the Record that the WCB wishes to withhold is the firm and/or division names for the companies referred to therein. Using the statutory category definitions of "commercial, financial, labour relations, scientific or technical information" as set out by the Ontario Office of the Information and Privacy Commissioner in *ON Report PO-2010* , the firm and/or division names for the companies do not fit within the definitions of any of these categories.

A very similar case on the facts was a matter considered by the Ontario Court of Appeal. In that case, the applicant had made an access request of the Ontario Workers' Compensation Board for extensive information with respect to employers having the highest penalty ratings based on their accident experiences. The Commissioner held that

the statutory exemptions claimed by the Ontario WCB did not apply and ordered the release of the information. An Application for Judicial Review was granted by the Divisional Court and the Commisioner's order to release was quashed. The Ontario Court of Appeal upheld the Commissioner's Order. The original decision by the Commissioner stated:

> *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…*
>
> *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 with 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.*
> *[ON Order P-373]*

In its submission, the WCB argued that portions of the Record ***could*** be withheld under s. 20 or s. 21 of the *Act.* There is clearly a misunderstanding on the part of the WCB with respect to these exemptions. Both are mandatory and under them the public body has no discretion. The exemptions either apply or they do not. If they do, the public body has no discretion. If the exemptions apply, the Record must be withheld from the Applicants. The word "***shall***" should be given determinative meaning. If the sections apply, the Record must be withheld. If they do not apply, the Record ***must*** be released.

The WCB argues that there may be very negative consequences to the employers or the companies could be harmed. As the WCB knows the Applicants are media, it is reasonable to assume that the information requested could be made public. Again, the purpose for which the Applicants intend the information is irrelevant as to whether or not they are entitled to it.

The WCB argues that the *Act* attempts to hold public bodies accountable, open and transparent by allowing access with limited exceptions. The reality is that such information being made public may, if reported accurately and contextually, embarrass an unsafe workplace. Accessing such information is consistent with one of the main

purposes of access to information legislation as it would enable people to make informed decisions regarding where they choose to work based on safety concerns.

The WCB argues that any interpretation given to the information that is the subject of this access request regarding corporate safety records must be done by putting the information into context. The WCB submits that the statistical information may be misinterpreted by the Applicants and, in fact, may not be indicative of a poor safety record in the workplace. First and foremost, as I have held in prior Reviews, the intentions of the Applicants or the uses to which he or she may put are irrelevant. Second, the WCB has argued consistently that there is room for error in interpreting the information contained in the Record, that the statistics regarding safety records must be considered in context.

In that regard, s. 7(1) of the *Act* imposes a duty on all public bodies and reads as follows:

> *Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made* ***shall***
> ***(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;***
> ***[Emphasis added]***

This statutory duty contemplates that it is open to and appropriate for a public body to assist an applicant with respect to their access request. It is the opinion of this Review Officer that the duty to assist contemplates this situation – where it is open to a public body to provide access to the Record requested and to put the information into context, particularly where, as here, the WCB is adamant that the statistics need to be provided along with a further explanation.

The WCB also submits that provisions with the *Workers' Compensation Act* should, in essence, override the *FOIPOP Act* in order to ensure it is able to fulfil its statutory mandate. If this had been the intended result, the House of Assembly would have included a specific reference to that effect in s. 4A(2), which provides:

> *The following enactments that restrict of prohibit access by any person to a record prevail over this Act:*
> *[A list of statutes follows and it makes no reference to the Workers' Compensation Act]*

In addition, s. 192 of the *Workers' Compensation Act* provides as follows:

> *No person who is…*
> *(b) an officer or employee of the Board;…*
> *shall release any information obtained by virtue of the person's office or employment* ***except in accordance with the Freedom of Information and Protection of Privacy Act****. . .*
> ***[Emphasis added]***

The argument by the WCB essentially poses the following question - does the WCB's accountability to its stakeholders, under the *Workers' Compensation Act*, override its accountability to the public, under the *Freedom of Information and Protection of Privacy Act*? The WCB argues that the release of the information will have a negative impact on its relationship with employers, yet nowhere on the Employer Registration Form for the Assessment Services Department is there any opportunity given by the WCB for employers to indicate if any information should remain confidential. Indeed, it states clearly that the WCB is subject to the *Act.* Employers are more than aware that the WCB will be subject to access requests and are unlikely to blame the WCB for any negative attention resulting from a successful access request.

The WCB could have put more energy into organizing the Record and providing the Applicants with contextual information to ensure accurate conclusions were reached. It is not for the WCB to refuse access because of the potential for improper interpretation. If they feel it needs interpretation, they could provide this as a service to the Applicants, under its duty to assist. The WCB is also aware that the access request is from the media who could be referred to as a sophisticated applicant and who as a professional will be prudent in their interpretation of the information.

**FINDINGS:**

1. The WCB did not cite the full exemption under s. 21 of the *Act* excluding the subsection requiring the information be provided in confidence. The WCB made no argument that the information contained in the Record had been provided on a confidential basis either implicitly or explicitly by the 25 firms.
2. The *Workers' Compensation Act* requires employers to provide the data from which the Record was created. It is mandatory for firms to report injuries in the workplace. The information is not provided on a confidential basis and is provided subject to the *Act*.
3. The actual Record was not supplied by the Third Parties, it was created by the WCB with information supplied by the Third Parties.
4. Names and information about companies do not fall within the definition of "personal information" for the purpose of the *Act*. Section 20 has no application to this case.
5. The *Workers' Compensation Act* is not paramount to the *Freedom of Information and Protection of Privacy Act.*
6. Given that the exemptions in s. 20 or s. 21 of the *Act* do not apply to this case, it is not necessary for the WCB to give notice to the 25 companies as Third Parties.

**RECOMMENDATIONS:**

1. The WCB should release the requested information in its entirety including the names of the employer companies and the divisions. In other words, the

Record created by the WCB that is responsive to the Requests #1, #3, #4 and #5 should be released in full;

2. The WCB should charge the Applicants the fee now known to them as a result of creating this Record. The WCB could give consideration to waiving the fee altogether given the delay in providing this Record to the Applicants that could have been created when the original access request was made;
3. Given the information age and the electronic environment in which all public bodies are now operating, in the future, public bodies, as part of the duty to assist, must give consideration at the outset to its ability to create a Record from its databases that is responsive to the access request.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia