Order No. 03-004

Re: Prince Edward Island Workers Compensation Board

Prince Edward Island Information and Privacy Commissioner
Karen A. Rose

August 19, 2003

I. BACKGROUND

On December 6th, 2002, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Prince Edward Island Workers Compensation Board (the "Public Body") for access to the following information:

> "1. Alphabetical list of all employees of WCB, including salary and job title."

The time period of the records requested was from January 2001 to present. The Applicant also requested a waiver of all fees, as provided for under section 76(4) of the Act, which request the Public Body denied.

On January 23, 2003, this Office received the Applicant's Application for Review dated January 21, 2003. The investigation process began on February 27th, 2003 regarding the fee waiver.

By letter dated April 4th, 2003, the Public Body advised the Applicant that it had reconsidered its position with respect to the Applicant's request for a fee waiver. The Public Body decided to process the application without requiring the payment of the fee as outlined in its fee estimate. The Public Body stated that the decision was made in an effort to expedite the processing of the request taking into consideration the amount of fees payable in relation to it and should not be seen as an admission by the Public Body that the subject matter of the request relates to a matter of public interest.

By letter dated April 28th, 2003, the Public Body advised the Applicant: "The specific records you have requested cannot be provided to you as the disclosure would constitute an unreasonable invasion of a third party's personal privacy under the *Freedom of Information and Protection of Privacy Act* (the 'Act')." The Public Body applied section 15(4)(e) of the *Act* and provided the Applicant with a partial response to his request, namely, the position titles of employees and salary range. The names of employees and specific salary were not provided.

On April 29th, 2003, this Office received an Application for Review from the Applicant requesting that I review the Public Body's decision and that I order the Public Body to give access to the record as requested in the Request to Access Information.

On May 2, 2003, I wrote to the Head of the Public Body to request the records which are the subject of this Application and the formal review process began.

I received written submissions from the Applicant on June 24, 2003 and from the Public Body on June 27th, 2003. Each parties' submissions were provided to the other and each party was given an opportunity to respond to the other's submissions. A brief response to the Public Body's submissions was received from the Applicant on July 2, 2003. Reply submissions were received from the Public Body on July 29, 2003.

II. RECORDS AT ISSUE

The Public Body has provided this Office with two sets of records which were not provided to the Applicant. The first set of records is entitled Workers Compensation Board of PEI Employee - 2001 Annual Salaries. These records consist of four pages and indicate the individual names of employees, their working title and their 2001 annual salary broken down into three time periods, namely, January - March, April - September, and October - December. The second set of records is entitled Workers Compensation Board of PEI Employee - 2002 Annual Salaries. These records also consist of four pages and indicate the individual names of the employees, their working title and their 2001 annual salary broken down into three time periods, namely, January - March, April -

September, and October - December.

III. ISSUE

Did the Head of the Public Body properly apply section 15 of the *Act* in her decision to refuse to disclose personal information to an applicant because it would be an unreasonable invasion of a third party's personal privacy?

IV. BURDEN OF PROOF

Section 65(2) of the Act states as follows:

> 65.(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.
>
> *(2) Notwithstanding subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*
> ...

Under section 65(2), once it is determined that the record contains personal information of a third party, the Applicant has the burden of providing an argument that the disclosure of personal information of a third party is not an unreasonable invasion of privacy. Therefore, it is up to the Applicant to provide an argument under section 15(4). In addition, if a presumption is raised by the public body under section 15(2), it is up to the Applicant to put forward an argument setting out all the relevant factors under section 15(3) which would support disclosure. This section 15 analysis is described in greater detail below.

V. DISCUSSION OF SECTION 15

The relevant provisions of Section 15 of the Act to this Application are as follows:

> 15.(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) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> ...
> (d) the personal information relates to employment or educational history;
> ...
> (g) the personal information consists of the third party's name when
> (i) it appears with other personal information about the third party, or
> (ii) the disclosure of the name itself would reveal personal information about the third party;
> (3) In determining under subsection (1) or (2) 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
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Prince Edward Island or a public body to public scrutiny;
> ...
> (g) the personal information is likely to be inaccurate or unreliable;
> ...
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
> ...
> (e) the information is about a third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council;
> ...
> (h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body;

Section 15(1) of the *Act* contains a mandatory exception, so that the Public Body must not disclose

personal information to an applicant if it would be an unreasonable invasion of a third party's personal privacy. As I have advised the parties previously, before reaching a conclusion under this section, the public body should follow a process with two distinct steps:

1. First, the Public Body should determine whether the requested information is personal information within the meaning of section 1(i) the Act.

2. Secondly, the Public Body should determine whether disclosure of the personal information will constitute an unreasonable invasion of privacy. This step may involve two separate analyses:

   (a) If the Applicant wishes to raise Section 15(4), it should be dealt with first. This is, in essence, a deeming provision so that certain circumstances are deemed not to be an unreasonable invasion of a third party's personal privacy. If one of the exceptions in section 15(4) is found to apply, the analysis need go no further and the information should be disclosed. There would be no further step.

   (b) The next analysis is only reached if section 15(4) does not apply. If applicable, this analysis involves determining whether a section 15(2) presumption has been rebutted by the applicant. If one or more of the presumptions listed in section 15(2) does apply, then disclosure of the information at issue is presumed to constitute an unreasonable invasion of the privacy of the third party to whom the information relates. However, this does not mean that a factor under section 15(3) or a combination of factors favouring disclosure (including the other circumstances set out below) could not rebut a presumption in section 15(2). If no presumption as set out in section 15(2) applies, then the public body must balance any and all relevant factors favouring disclosure against those favouring nondisclosure and make a decision whether or not to release the information, in accordance with section 15(3). I have relied on the guidance set out by the Nova Scotia Court of Appeal in *French* v. *Dalhousie University* [2003] N.S.J. No. 44, (N.S.C.A.), and *Dickie* v. Nova Scotia

[1999] N.S.J. No. 116 (N.S.C.A.). Nova Scotia's legislation sets out a similar process to ours, with a deeming provision, a presumption provision, and a balancing provision.

Other Circumstances for Section 15(3) Analysis

Since 1996, the Alberta Commissioner has identified the following relevant circumstances that are not specifically listed in our section 15(3), but which are factors which may be relevant in this case in making a decision under section 15(3):

a. disclosure of the information would promote the objective of providing citizens of the Province with an open, transparent and accountable government;
b. the fact that an applicant is not required to maintain the confidentiality of personal information once it has been released to them;
c. the fact that personal information is available to the public;
d. the fact that the applicant was previously given some other information;
e. whether, under the circumstances, it is practicable to give notice to the third parties is a relevant circumstance that weighs in favour of not disclosing the personal information of those third parties;
f. the fact that the names of individuals requested by the applicant were provided solely in their professional capacity;
g. the nature and content of the records;
h. the fact that the applicant has no pressing need of the third party personal information.

Please note that the above list is certainly not exhaustive, and either party may have considered other distinct factors which may be given weight in a section 15(3) determination. I will discuss the parties' arguments in this regard below.

VI. ARGUMENTS OF THE PARTIES

The Applicant acknowledges that a name does constitute personal information. However, the parties are in disagreement regarding whether a job title and salary constitutes personal information. The Public Body submits that job title and salary information is part of "employment history" as set out in the definition of "personal information" in the Act.

The Public Body relies on the definition of personal information as follows:

> 1(i) "personal information" means recorded information about an identifiable individual, including
>
> (i) the individual's name, home or business address or home or business telephone number,
>
> ...
>
> (vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

The Public Body cites Alberta Order 2001-020 where the Commissioner found that the individual's job title or position constituted personal information of the individual under that provision as did the severance paid to that individual (paragraphs 11, 12 and 13).

The Applicant argues under Section 15(4)(e) that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy since the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council.

The Applicant relies on the practices of Alberta and Nova Scotia. The Applicant states that in Alberta, it is standard policy to release name, salary range and classification for all public servants, with one exception. In the case of senior bureaucrats, specific salaries are released, rather than

salary ranges, through such means as annual reports. In Nova Scotia, the Applicant states that *The Supplement to the Public Accounts* publishes names and salaries of provincial civil servants $25,000 and over, travel expenses over $2,500 and all other payments of $5,000 and over.

The Applicant also argues as follows:

> Tradition demands release of government employee and salary lists. For more than 30 years, our papers have routinely obtained name, specific salary and classification information through the PEI Legislature. The lists were published. There is no evidence to suggest the lists were inaccurate or unreliable, exposed those listed to financial or other harm, or that the reputation of anyone listed was damaged.

The Applicant asks that the information not only be released as requested, but that it includes specific salary details, rather than simply salary ranges. He states that this will allow for maximum scrutiny and accuracy.

The Public Body also cites Alberta Order 96-019, where the Commissioner states:

> ..., an employee's personal information is to be treated in the same manner as any other individual's personal information under the Act. As such, the public body would consider section 16(2), section 16(3) and section 16(4) to determine whether release of an employee's personal information would be an unreasonable invasion of the employee's personal privacy.

The Public Body submits that section 15(4)(e) requires the release of the job title of each employee and the salary range associated with the position, but it does not authorize the release of the third party's name or the exact salary paid to the employee. The Public Body states: "It is the Board's submission that this strikes a balance between accountability to the public and the personal privacy of third parties."

The Public Body relies heavily upon Alberta Order 2001-020, *supra*, where the Commissioner upheld the City of Calgary's decision not to disclose the name of each third party employee to the

Applicant, but did decide that clause 16(2)(e) of their Act (our section 15(4)(e)) applied to the job titles or positions and that the disclosure of this information would not be an unreasonable invasion of the third party's personal privacy.

The Public Body also relies on the presumption set out at subsection 15(2)(g) as follows:

> 15(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
> ...
> (g) the personal information consists of the third party's name when
> (i) it appears with other personal information about the third party, or
> (ii) the disclosure of the name itself would reveal personal information about the third party; or
> ...

"It is the Board's submission that the above noted clause is applicable to the present case and that the disclosure of each third party's name is presumed to be an unreasonable invasion of their personal privacy under clause 15(2)(g) as the employee's name, if disclosed, would appear with other personal information about them."

The Public Body states that it has provided to the Applicant information regarding job titles within the Board, the number of persons employed in each position and the corresponding salary range. The Public Body states that actual names of the individuals employed in each position would not contribute further to public scrutiny of the Board's activities. Also, each year, the Board publishes in its Annual Report expenditures made by the Board including the total amount of salaries paid to staff members. As this information is available to the public, the Board's activities as they relate to salary expenditures presently are subject to public scrutiny.

The Public Body concludes:

> It is the Board's submission that in providing to the Applicant the job title of each position within the Board, the number of persons employed and the salary range corresponding to each position, the Board has promoted the objective of providing citizens with an open,

> transparent and accountable government. Providing the actual names of persons performing in those job titles does not provide additional openness, transparency or accountability. Rather, the release of this information would result in an invasion of each employee's personal privacy.

VII. FINDINGS

The role of the Commissioner under section 15 is to see that the public body has used the right process in deciding that the release of personal information would be an unreasonable invasion of a third party's personal privacy (Alberta Orders 96-020[220], 97-011[50].

Step One - *Do job title and salary information constitute personal privacy?*

I agree with the Public body that both job title and salary information form a part of an individual's employment history, and therefore satisfy the definition of "personal information" under the Act. I find that job title and salary are obvious basic elements of one's employment history, in accordance with the ordinary meaning of the term.

Therefore, the first step of the two step process for section 15 is satisfied in the Public Body's favour, and step two must now be considered.

Step Two - *Would disclosure of the information constitute an unreasonable invasion of personal privacy?*

The Applicant relies on the practice of Alberta and Nova Scotia with regard to release of salary information. The Public Body urges caution with this approach, as the legislation of these provinces differs from ours.

Nova Scotia's Act differs from ours with regard to release of this type of information. The subsection similar to our 15(4)(e) states as follows:

> **20.(4)** A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> ...
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

"Remuneration", and not "salary range" is referred to in the above section. Therefore, it is not helpful to look to Nova Scotia for interpretation of this particular subsection.

Subsection 15(4)(e)

Our Act is based on that of Alberta, whose section 17(2)(e) (formerly section 16(2)(e)) is identical to our section 15(4)(e). Therefore, cases which have considered this section in Alberta are instructive.

In Alberta Order 98-020[52], the Commissioner considered whether the names and job titles of government employees should be disclosed. He concluded that a job title or position would be considered "employment responsibilities" for the purposes of subsection16(4)(e). Therefore, disclosure of job titles or the positions of government employees would not be an unreasonable invasion of their personal privacy. The employee's name was not subject to disclosure with the job title or position as it was held to be an unreasonable invasion of personal privacy. This conclusion was reiterated in Alberta Order 2001-01 [40].

Certainly, the above reasoning would also apply to the "salary range" of specific public body employees. The disclosure of the employee's job title and their salary range is deemed not to be an unreasonable invasion of personal privacy in accordance with the wording of subsection 15(4)(e).

Therefore, in accordance with section 15(4)(e), I find that the employee's job title and salary range may be disclosed by the Public Body as they are deemed not to be an unreasonable invasion of personal privacy. However, the question still remains–can the specific employee name and salary

be disclosed as well?

As noted above, in the analysis of section 15, if subsection 15(4) applies, then the analysis need go no further and the information should be disclosed. However, as it is only the position and salary *range* which must be disclosed pursuant to subsection 15(4)(e), the analysis must move on to subsections 15(2) and 15(3).

Subsection 15(2)

I agree with the Public Body that subsection 15(2)(g)(i) applies to the employees' names in this case. There is no other conclusion one could reach, upon a reading of this subsection. Given that a name, a job title, and salary information are all personal information, combining the name with either of the other two items of personal information satisfies the presumption in subsection 15(2)(g)(i). Therefore, disclosure of the employees' names is presumed to be an unreasonable invasion of personal privacy. This presumption is rebuttable, and I must, therefore, analyse the submissions of the Applicant under subsection 15(3).

Subsection 15(3)

In support of his argument, the Applicant has submitted that this information has been released in the PEI Legislature in the past. The fact that a public body has released a third party's personal information in the past does not mean that it will be required to re-release it later (Alberta Order 97-011 [55-58]). I agree with the Public Body that the Act now applies, despite past practice, and the provisions contained in the Act must be followed. However, evidence of past practice does indicate that government, in the past, associated some degree of accountability with the employee salary information.

In response to questions from this office, the Public Body has advised that the rules for establishment of salaries are contained in Union Collective Agreements (for Union positions) or are simply based upon the classification level for the particular job assigned to an employee. This

classification system ensures that salaries are paid for the position and not for the specific individual assigned to that position. The salary scale of the Chief Executive Officer is governed by the provisions of the Senior Compensation Plan as approved by the President of the Executive Council for Prince Edward Island. The salaries of all other senior management employees of the Public Body follow the guidelines within the Terms and Conditions of Employment for Excluded Supervisory and Confidential Employees of the Province of Prince Edward Island. Presumably, such a system ensures some consistency and transparency with the salary setting mechanisms for the employees of the Public Body.

The Public Body cites Alberta Order 2001-020. I agree with the Alberta Commissioner in that Order that one of the purposes of section 16(2)(e) [our section 15(4)(e)] is to allow the release of information about the employment benefits and responsibilities of public employees, allowing a degree of transparency in relation to the compensation and benefits provided to public employees. [paragraph 20]

I conclude that the Applicant has not met the burden of proving that disclosure of the employee name and specific salary are not an unreasonable invasion of the employee's personal privacy. The level of transparency and accountability achieved by the Public Body in disclosing the employee's job title and salary range is sufficient to promote the objectives of the Act while still protecting some privacy of the employees.

VIII. ORDER

Based on the foregoing reasons, I find that the Public Body properly applied section 15 of the Act in its decision to disclose job titles and salary ranges of its employees, and in its decision not to disclose employees' names and exact salaries.

Karen A. Rose
Information and Privacy Commissioner