

**ALBERTA
INFORMATION AND PRIVACY COMMISSIONER**

**Report on the Investigation into Complaint
Regarding the Disclosure of Personal Information
by a Public Body**

October 29, 1998

Workers' Compensation Board

Investigation #1403

The Complaint

On March 10, 1998, the Office of the Information and Privacy Commissioner received a written complaint that personal information had been disclosed by the Workers' Compensation Board (the "WCB") in violation of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act").

The Complainant indicated that WCB breached the Complainant's privacy by disclosing information relating to the Complainant's WCB claim, including correspondence and medical information, to parties named as defendants by the Complainant in a civil law suit.

The Commissioner authorized an investigation pursuant to section 51(2)(e) of the FOIP Act which states:

51(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that

(e) personal information has been collected, used or disclosed by a public body in violation of Part 2.

This report outlines the findings and recommendations of the Portfolio Officer assigned to investigate this case.

Background

In March of 1995, the Complainant submitted a claim to the Claimant Services Department of WCB for compensation. The Complainant's claim indicated that exposure to certain chemicals at work was the cause of the Complainant's inability to work.

The Claimant Services Department denied the Complainant's claim in September 1995. Upon receipt of additional medical reports, the Claimant Services Department reassessed the claim and advised the Complainant in May 1996 that its initial decision to deny the claim remained unchanged.

In June 1996, the Complainant and a number of co-workers, who also submitted similar WCB claims, filed a lawsuit against the Employer and other parties alleging negligence and breach of contract. In addition, the Complainant submitted an appeal with the Claims Services Review Committee (the "CSRC") in March 1997 in relation to the denial of the Complainant's WCB claim. The CSRC is a

department of WCB and is the first level of appeal for injured workers who do not agree with the Claimant Services Department's decision on a claim.

The civil proceedings were placed in abeyance until the Complainant's appeal had been completed.

An oral hearing was conducted by the CSRC in August 1997. Parties named as defendants in the Complainant's Statement of Claim were invited by the CSRC to attend the hearing as "interested parties". The CSRC issued its decision denying the Complainant's appeal in December 1997.

Issue: Did WCB disclose personal information in violation of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the "Act")?

What Information was disclosed by the CSRC and to whom?

The defendants named in the Complainant's lawsuit include the following:

- the Employer and a number of its employees;
- three provincial government bodies;
- 2 companies incorporated in the Province of Alberta;
- 2 companies with head offices in other provincial jurisdictions; and
- 2 companies with head offices outside Canada.

On May 7, 1997, the CSRC wrote to the Employer and all defendants to advise that a hearing into the Complainant's appeal had been scheduled. The letter indicated that, as the parties are defendants in a lawsuit, they may wish to attend the hearing. The letter also stated:

"The Committee asks that if any party has additional information they wish the Committee to consider, their written submission must be forwarded by June 30, 1997 and the information will be shared with all parties attending the hearing".

The following parties attended the hearing:

- the Complainant and the Complainant's solicitor;
- two solicitors representing the Employer;
- an employee of the Employer (this individual is responsible for safety administration and was not named as a defendant in the civil suit filed by the Complainant);
- legal representatives for three companies named as defendants in the Complainant's Statement of Claim (one company having its head office in another provincial jurisdiction and two companies having their head offices outside Canada); and
- two observers (on the request of the Complainant).

In September 1997, the CSRC provided the hearing minutes to the parties who attended the hearing. The CSRC also indicated it requested additional medical information and that upon receipt of this information, the CSRC would present the information to "*all interested parties*". This information was sent out in November 1997 to the parties who attended the hearing.

The CSRC issued its Memorandum of Decision to the Complainant in December 1997. A copy of the Memorandum of Decision was also sent to the Complainant's solicitor and the parties who attended the hearing.

Copies of the minutes of CSRC's hearing and its Memorandum of Decision were sent in March 1998 to a defendant who did not attend the hearing. This defendant was a company incorporated in Alberta.

Is the information disclosed “personal information”?

“Personal information” is defined in section 1(1)(n) of the FOIP Act. The relevant portions of section 1(1)(n) read:

1(1)(n) “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,*
- (iii) the individual’s age, sex, marital status or family status,*
- (iv) an identifying number, symbol or other particular assigned to the individual,*
- (vi) information about the individual’s health and health care history, including information about a physical or mental disability,*
- (vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given.*

The Portfolio Officer finds that the information disclosed by the CSRC to the defendants is personal information in accordance with section 1(1)(n) of the FOIP Act.

Does WCB have the authority to disclose the Complainant’s personal information?

The disclosure of personal information by a public body is set out in section 38 of the FOIP Act, which states, in part:

38(1) A public body may disclose personal information only

(e) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,

During the investigation, WCB initially claimed that section 9(4) of the *General Regulations* under the *Workers’ Compensation Act* provides the CSRC with authority to disclose information to interested parties. Section 9(4) states:

9(4) The Assessment Review Committee, the Claims Services Review Committee or the Appeals Commission shall inform any interested party involved in the review or appeal of the facts in its possession that are contrary to the interest of that party in sufficient detail to permit the parties to understand them.

The term “interested party” is not defined under the *Workers’ Compensation Act* or the *General Regulations*. During the investigation, the CSRC indicated there were no written procedures regarding the basis for allowing parties other than the injured worker or the Employer to attend a hearing. In addition, there were no written guidelines regarding the limitation of information that those parties could access. The decision as to who attends the hearing and what information is provided to the parties before and after the hearing rests with the CSRC members reviewing that particular appeal.

The CSRC indicated it generally considers the injured worker and the injured worker's Employer as the interested parties. However, the CSRC may consider other parties as "interested parties" if these parties have a "vested" interest i.e. a direct financial interest in the outcome, including when a party is being sued by the claimant and is interested in the causation of the injury or disability.

The mandate of the CSRC is set out in the *Workers' Compensation Act*. Section 40 of the *Workers' Compensation Act* outlines the process for appealing a claim for compensation. Section 9 of the *General Regulations* confirms and further elaborates the process outlined in the *Workers' Compensation Act*. Therefore, the Portfolio Officer believes that the interpretation of "interested parties" referred to in section 9(4) of the *General Regulations* should be consistent with the intent or objective of the *Workers' Compensation Act*.

Section 141(3) of the *Workers' Compensation Act* authorizes the disclosure of information when a review or an appeal has been submitted pursuant to section 40 or section 116.

Under section 40(1) of the *Workers' Compensation Act*, only a person who "has a direct interest in a claim for compensation" may request an appeal to the CSRC. The parties who can submit an appeal pursuant to section 40 are typically the injured worker and the injured worker's Employer. The injured worker has a direct interest as a decision on the claim for compensation determines whether or not the worker receives benefits. The worker's Employer has a direct interest as a decision on the claim could impact on the Employer's accident experience rating and premiums charged by WCB.

In some circumstances, WCB may determine that an employer other than the worker's Employer is liable for costs relating to the work related injury. Under the WCB Policy 01-02 (Application 1: General, Item 8) an Employer liable for costs would have the same rights as the injured worker's Employer. In the Portfolio Officer's opinion, this is consistent with section 40(1) of the *Workers' Compensation Act* – when WCB determines an employer, other than the worker's Employer, is liable for costs associated with a work-related injury, that employer has a direct interest in the claim for compensation for the same reasons as the worker's Employer.

Section 116 of the *Workers' Compensation Act* outlines the review or appeal process for the Assessment Review Committee. The Assessment Review Committee is separate from the CSRC and is the first level of appeal for an employer under the *Workers' Compensation Act* who is not satisfied with a decision regarding the employer's WCB account.

All employers covered by the *Workers' Compensation Act* must establish and maintain an account with WCB. The WCB account includes how a business is classified; the premiums charged to the account by WCB to cover the costs of insuring work related injuries; an employer's accident experience rating; and payment arrangements.

Section 116 of the *Workers' Compensation Act* states that anyone who has a "direct interest in an assessment made under this Act" may request a review from the Assessment Review Committee. Item 7 of WCB's Policy 01-02 provides examples of persons, other than the employer, who may have a direct interest in the employer's account e.g. a third party held liable for premiums owed by the employer.

The key requirement for section 9(4) of the *General Regulations* and section 40, section 116 and section 141(3) of the *Workers' Compensation Act* is that the parties must have a "direct interest" in the review or appeal process.

Therefore, the Portfolio Officer concludes that section 9(4) of the *General Regulations* limits "interested parties" to:

1. parties who are involved in the review or appeal process; and
2. parties that are directly impacted by the decision of the CSRC, the Assessment Review Committee or the Appeals Commission.

For an appeal to the CSRC under section 40 of the *Workers' Compensation Act*, interested parties would include the injured worker and the worker's Employer. An employer other than the worker's Employer may be an interested party only in cases where WCB determined that the other employer is liable for costs associated with the claim for compensation. Therefore, a number of the defendants would not be "interested parties".

Consequently, WCB did not have authority to disclose the Complainant's personal information under its own legislation and it did not meet the requirements of section 38(1)(e) of the FOIP Act.

WCB acknowledged error made in granting interested party status to defendants

In a letter dated July 14, 1998 to the Portfolio Officer, WCB indicated it erred in granting interested party status to defendants who were not employers under the *Workers' Compensation Act*. Upon reviewing the matter, WCB determined that parties who were not employers under the *Workers Compensation Act* would not be "*adversely affected by a finding that the worker's claim was or was not compensable*".

However, WCB argues that, while it may have erred in granting interested party status to defendants outside the *Workers' Compensation Act*, it was justified in disclosing the Complainant's claim file to these parties because:

1. The Janke v. Wylie ruling applied; and
2. The defendants could get that information anyway, presumably through the plaintiff through the discovery process.

The Portfolio Officer finds that the Jahnke v. Wylie ruling cannot be applied to the Complainant's case. Unlike Jahnke v. Wylie, WCB is not a party to the action against the defendants. Further, WCB is not named as a defendant in the action by the Complainant, and has not been ordered to produce records by the court. The court will order the WCB to provide documents only when the WCB is a party to the action. In addition, whatever documents the court may order the plaintiff to produce in the action does not absolve the WCB of its duties regarding disclosure of personal information under Part 2 of the FOIP Act.

Conclusion

The Portfolio Officer concludes that WCB disclosed personal information in violation of Part 2 of the *Freedom of Information and Protection of Privacy Act*.

The Portfolio Officer noted with interest that the Appeals Commission has ruled differently from the CSRC on the issue of interested party status. Subsequent to the CSRC's decision to deny the Complainant's appeal, the Complainant submitted an appeal to the Appeals Commission. The Appeals Commission is independent of the WCB and is the final level of appeal for disputes regarding compensation claim decisions.

The Appeals Commission received a request to grant “interested party” status to four defendants named in the Complainant’s lawsuit. In its April 2, 1998 decision on the issue of interested party, the Appeal Commission wrote:

....the commissioners have decided that, in order to be granted status as an interested party, the decision made by the Appeals Commission must directly affect the applicant...

...The parties in question requesting status are involved in a lawsuit as defendants and the workers in question are the plaintiffs. As the Appeals Commission is only dealing with the issue of causation and not negligence, the parties in question, if affected at all, may only be indirectly affected by the Appeals Commission Decision.

.... As the workers files contain confidential medical information which is quite personal, the right to privacy of the workers must only be compromised where it is essential to do so. For example, it would be essential for an employer to have disclosure of the file in order to “meet the case” against the employer.

Given the above, the commissioners decided not to grant status as an “interested party”, and therefore, will not be providing any material from the workers files to the parties in question.”

The Appeals Commission initially granted “intervenor” status to the four defendants requesting status. As intervenors, these parties were granted the right to observe the hearing and make submissions. However, the workers expressed concerns to the Appeals Commission that they were uncomfortable with discussing their personal medical information in front of the intervenors. As a result, the Appeals Commission reconsidered its decision to permit the intervenors to observe the proceedings, and denied the defendants intervenor status. The Appeals Commission wrote on June 10, 1998:

...the granting of the right to observe might offer the intervenors a chance to obtain information about the workers which they might attempt to use in a civil proceeding which has commenced against the intervenors by the workers. The panel recognized that sections 141(3) and 142 of the Workers’ Compensation Act restricts the use of information obtained in such a manner. The panel, however, felt that once information is known to exist, it is almost impossible to resist attempting to use it if it is helpful in another matter. Information for the use in civil proceedings must be obtained in accordance with the normal discovery process.

The panel also recognized that the Freedom of Information and Protection of Privacy Act imposes a duty to keep personal information confidential where possible....

The panel then considered the reason for the hearing, the purpose being to allow the worker and his/her employer the opportunity to address whether the worker’s claim for compensation is acceptable pursuant to the Workers’ Compensation Act.

The panel determined it is a fundamental principle of natural justice that a party is offered the opportunity to fully present its case....the workers expressed their reluctance to fully disclose personal medical information with lawyers for the intervenors present. The panel determined that a party’s liability to present his or her case should not be affected by those who do not have status as a party.

Recommendations

1. The Portfolio Officer recommends that the CSRC adopt the interpretation of the Appeals Commission regarding interested parties and that this be reflected accordingly in WCB's written policies and procedures.

The Portfolio Officer understands the CSRC is currently reviewing this matter and initiatives similar to that proposed by the above recommendations may have commenced.

2. The WCB may wish to reconsider its position regarding the Janke v. Wylie decision. What may or may not be disclosed through the discovery process is separate from and does not take the place of the WCB's duties relating to disclosure of personal information under section 38 of the *Freedom of Information and Protection of Privacy Act*.

Submitted by:

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