

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2006-026

January 23, 2007

WORKERS' COMPENSATION BOARD

Case File Number 3413

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Summary: The Workers' Compensation Board (WCB) disclosed personal information, including medical information, relative to a WCB claim made by the former owner of a business, to the person to whom the business had been sold. The new owner had not requested the information. The former owner brought a complaint about the disclosure under the *Freedom of Information and Protection of Privacy Act*.

The Adjudicator held that because the business maintained the same WCB account and experience record after the change in ownership, the WCB was authorized by its statute to disclose a small part of the disclosed information (particulars of decisions as to the Complainant's entitlement to compensation) to the new owner. It would have been authorized to disclose further information (a summary of the reasons for such decisions) on request, but there had been no request. Thus the WCB did not have authority to disclose most of the information it disclosed, and with respect to these disclosures, it was in contravention of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(vi), 1(n)(viii), 40(1), 40(1)(e), 40(1)(f), 40(4), 72; *Workers' Compensation Act*, R.S.A. 2000, c. W-1, ss. 35, 44, 46, 46(1), 95(1), 147(2), 147(3); Workers' Compensation Board Policy 01-02, Part 1, "Access and Privacy".

Authorities Cited: AB: Order 98-010.

I. BACKGROUND

[para 1] In April, 1998, the Complainant, while working in her own daycare business, sustained an injury relative to which she made a claim to the Workers' Compensation Board ("WCB" – "the Public Body").

[para 2] In October, 1998, the Complainant sold the business to a new owner. In the period between August, 1999 and September, 2005, approximately 13 items of correspondence sent by the Public Body to the Complainant relative to her claim were copied to the new owner. These items included highly detailed medical information of the Complainant, as well as a considerable amount of other personal information.

[para 3] In September of 1999, the new owner contacted the Public Body indicating that she had been receiving correspondence relating to the WCB claim of the former owner.

[para 4] In July, 2002, the Complainant contacted the Public Body to express concern that the information regarding her claim was being provided to the new owner of the business. She indicated on a number of occasions that she did not want her information shared in this way.

[para 5] On August 31, 2005 the Complainant complained to this Office that the release of information had been in contravention of the *Freedom of Information and Protection of Privacy Act* (the "Act" or the "FOIP Act").

[para 6] A mediator was appointed. On November 7, 2005, pursuant to discussions with the Public Body, the new owner provided a letter to the Public Body asking it to cease providing her with information respecting the Complainant's claim. A "stop correspondence alert" was placed on the claim file.

[para 7] However, the Complainant did not regard the matter as fully resolved, and it was brought to inquiry.

II. RECORDS AT ISSUE

[para 8] There are no records directly at issue in this inquiry.

III. ISSUE

[para 9] There is one issue for the inquiry:

Did the Public Body have the authority to disclose the Complainant's personal information as provided by section 40(1) of the Act?

IV. DISCUSSION OF THE ISSUE

[para 10] The Public Body has now apparently ceased to copy the claim-related correspondence to the new owner of the business. However, it says that according to its own legislation and policies, together with the FOIP Act, it is entitled to share information in this way.

[para 11] Section 40(1) of the FOIP Act permits a public body to disclose personal information only where authorized by legislation, as follows:

40(1) A public body may disclose personal information only...

(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17¹, ...

(e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada, ...

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

[para 12] The term "personal information" is defined under section 1(n) of the Act. Specifically, subsections 1(n)(vi) and 1(n) (viii) of the Act define "personal information" as:

1(n) "personal information" means recorded information about an identifiable individual, including

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(viii) anyone else's opinions about the individual,

[para 13] In light of this definition, I find that a large part of the information of the Complainant that the Public Body disclosed was her personal information.

[para 14] The Public Body's rationale for disclosing the information to the new owner is that when the new owner acquired the business, she maintained the existing WCB

¹ Section 17(2) provides:

17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if ...

(c) an Act of Alberta or Canada authorizes or requires the disclosure.

account and experience record, including the existing claim made by the former owner. Therefore, decisions made relative to the Complainant's claim could affect the new owner's WCB premium rates. In this regard, the Public Body points to its policy 07-02 Part II, App 4, which states:

Corporations that are registered to operate a business are considered to own the business. Shareholders, in turn, own shares in the corporation. Therefore, in the situation of the sale or transfer of shares in a corporation, or a change in the composition of a partnership, the WCB does not recognize this as a change in ownership of a business. Therefore, a new account and experience record are not created.

[para 15] The Public Body asserts that the purchase of the business was of "the legal entity itself". It points out that a " 'Change of Director/Shareholder' was filed with Alberta Corporate Registries, resulting in [the new owner] becoming the sole owner of the corporation".

[para 16] In response to this aspect of the Public Body's argument, the Complainant argues that the sale of her business was in fact the sale of the facility, and that her business operation was in essence "legally dissolved", and the new owner "developed a new business under a new name [adding the word "Inc."], new procedures, new programs and new building improvements". She also notes that her WCB claim has had no apparent effect on the new owner's experience and premium rating.

[para 17] In order to decide if section 40(1) of the FOIP Act authorizes the disclosures in question, I must decide if the provisions of the *Workers' Compensation Act* (WCA) that permit disclosures apply in the present circumstances. Most of the provisions relied on by the Public Body (quoted below) permit disclosures of the information of a *worker* to an *employer*. The Public Body does not explain precisely how the relationship between the current and former owners can be regarded as an 'employer – worker' relationship. I assume its reliance on these provisions is based on the idea that when the former owner applied for WCB coverage, she was deemed a "worker" of the business (a corporation). The corporation was an "employer" under the WCA definition section 1(1)(j)(i).² Despite transfer of the business, the legal entity (the corporation) did not change, and thus though the corporation has a new owner, it continues to be an "employer" relative to the former owner (as a deemed "worker"). The new owner, acting as director of the corporation, is thus the employer.

[para 18] To decide if I accept this analysis (and thus that the language of the WCA applies to this situation), I must first decide if I accept that the business continued as the same legal entity after the transfer of ownership. In support of their opposing positions on this question, the Public Body points to a 'Change of Director/Shareholder' filed with Alberta Corporate Registries, while the Complainant points to a (minor) change in the name of the business, and asserts that new procedures and programs were adopted. The

² Under this definition, "employer" includes a corporation that has or is deemed to have one or more workers in its service.

Complainant also says the new owner's premium rates were not affected by her claim. The last of the Complainant's points is not relevant in the absence of evidence that claim determinations such as those made in her case would affect premium rates in the usual course. In my view, the Public Body's evidence on the 'legal entity' issue is more persuasive. On the basis of the evidence before me, I find the business (the corporation) continued as the same legal entity after it changed hands. Thus I can conclude that the terms "employer" and "worker" in the WCA can be applied to the new owner (acting as director of the corporation), and the former owner, respectively.

[para 19] Despite this, I am of the view that the Public Body has failed to show it was authorized to make most of the disclosures in question.

[para 20] I will look more closely at each of the provisions of the WCA on which the Public Body relies to support its position that it was authorized to disclose the information. These are sections 35, 44, 46(1), 95(1), and 147(2). It also refers to its Policy 01-02, Part 1, "Access and Privacy".

[para 21] Section 35 of the WCA provides:

35 *On the written request of the employer of an injured worker, the Board shall provide the employer with a report of the progress being made by the worker.*

[para 22] This provision does not apply. There was no request, written or otherwise, for a progress report. Further, much or all of the information that was disclosed could not be characterized as "a report of the progress" of the Complainant.

[para 23] Section 44 of the WCA provides:

44 *On the making of a determination as to the entitlement of a worker or the worker's dependant to compensation under this Act, the employer and the worker or, in the case of the worker's death, the worker's dependant, shall, as soon as practicable, be advised in writing of the particulars of the determination, and shall, on request, be provided with a summary of the reasons, including medical reasons, for the determination.*

[para 24] This provision requires the Public Body to provide an employer with the particulars of a determination as to a worker's entitlement to compensation. A small part of the disclosed information falls within the phrase 'particulars of a determination as to entitlement'. Examples are: the first paragraph, and the first two sentences on page 3, of the Public Body's letter to the Complainant of August 29, 2005; the last sentence under bullet 5 on page 5, and the last two sentences under bullet 6, of the decision of the Decision Review Body of April 14, 1998. I find the Public Body was authorized to disclose such information.

[para 25] However, most of the information does not fall within the scope of the phrase mentioned in the preceding paragraph. The reasons for the determination, including medical reasons, are to be provided only *on request*. There is no evidence that there was a

request, and there is evidence suggesting there was no request. According to both parties, when the new owner began to receive the information, she called to inquire why she was receiving it. She was told that the Complainant's claim could affect her experience rating, and that she should keep the information. A note of this conversation made by the WCB staff member with whom she spoke concludes with the comments: "Adv'd it may be to her best interest to keep the claim information and review to ensure her knowledge of the case - she [the new owner] will keep a file". However, while this may have indicated willingness on the part of the new owner to collect the information, that is not the same thing as her having requested the reasons for a particular determination relative to the claim. Thus, in the absence of any evidence or any suggestion by the Public Body that there was such a request or requests, I find there were not any.³

[para 26] Furthermore, even if requested, such information is to be in the form of a summary. Though some of the disclosed documents constitute the reasons for determinations as to entitlement, they are the full reasons, not "a summary" of the reasons or medical reasons.

[para 27] Section 46(1) of the WCA provides:

46(1) Where a person has a direct interest in a claim for compensation in respect of which a claims adjudicator has made a decision, that person may, within one year from the day the decision was issued by the claims adjudicator, seek a review of the decision by the review body appointed under section 45.

The remaining subclauses of section 46 set out the procedure for such a review. This provision gives the new owner (as a person with a direct interest) a right to appeal a particular claim determination made relative to the Complainant, but it says nothing about sharing information. Presumably, the provision just discussed above - section 44 - is intended to provide interested persons (at least those who are "employers") with the information they need to decide whether to bring an appeal.⁴ However, as already discussed, the legislation authorizes provision of the additional information relative to a particular determination (the summary of the reasons) only *on request*, and there was no request in this case.⁵

[para 28] Section 95(1) of the WCA relates to the duty of the WCB to maintain separate experience accounts in respect of different employers and does not bear on information sharing.

³ A similar conclusion respecting "requests" was reached in Order 98-010.

⁴ As well, section 147(3) gives such persons the right to obtain information (all information relevant to the issue under review) that they need to participate in a review. However, in the present case, the new owner did not participate in any review, and did not seek such information.

⁵ The amount of information the Public Body could provide is also limited by section 40(4) of the FOIP Act, which provides a public body may disclose personal information only to the extent necessary to carry out the purposes described in section 40 in a reasonable manner. In my view, much of the personal information that was provided was not necessary to achieve the purposes of the cited provisions of the WCA - of enabling an employer to decide whether to request a review of a determination as to entitlement.

[para 29] Finally, section 147(2) provides:

147(2) No member or officer or employee of the Board shall divulge information respecting a worker or the business of an employer that is obtained by that person in that person's capacity as a member, officer or employee unless it is divulged under the authority of the Board to the persons directly concerned or to agencies or departments of the Government of Canada, the Government of Alberta or another province or territory

[para 30] In my view, other than the limited types of information already discussed, this provision does not permit disclosure of the information in this case. I believe reliance on this provision by the Public Body is meant to suggest that the disclosure in this case was permitted under the Act on the basis it was done “under authority of the Board”. Under this interpretation, any information sharing (to directly concerned persons) done by a WCB staff member as an employee or agent of the Board would be “under the Board’s authority” on the basis that such a person made the decision to share it.⁶

[para 31] I reject such an interpretation of section 147(2). The WCA specifically authorizes the Board to share specific information. The suggested interpretation would make the specific information-sharing provisions in the WCA redundant and meaningless. It would also conflict with the Public Body’s stated “Access and Privacy” policy that “The WCB collects, uses and discloses only information necessary to administer and interpret the *Workers’ Compensation Act* (“the Act”) and only when authorized by the Act, the *Freedom of Information and Protection of Privacy Act* (“FOIP”) and the *Health Information Act*.⁷ In my view “under the authority of the Board” means ‘under the authority given to the Board by the WCA’ – in other words, in accordance with the specific provisions of the WCA and the policies of the WCB that authorize the sharing of specified information in specified circumstances. The purpose of section 147(2) is to make it a contravention of the Act to share information *other than that the Board is authorized to share under the WCA*. The “Access and Privacy” policy confirms this limitation.

⁶ “Board” under the WCA refers to the “Workers’ Compensation Board”. It does not refer to the Board of Directors or to any other particular person or entity in the organization. Therefore, in my view, actions done by staff of the Board in fulfilling their employment responsibilities are actions of the Board. There is no particular person or classes of persons named in the Act who has the Board’s general “authority”, or who has the power to authorize particular information-sharing activities on a case-by-case basis, other than in accordance with the provisions of the WCA and the WCB policy.

⁷ I note that an earlier WCB policy with respect to information sharing (which may have been in effect at the time some of the information in this case was shared) provided that information on a claim or employer account file could be shared in the following circumstances: requests under s. 141(3) [now section 147(3)], when an adjudicative decision or decision affecting premiums is under review or appeal; information on an appeal issue to an interested party, under s. 9 of the General Regulations; requests under s. 141(2) [now section 147(2)], for reasons other than a review or appeal of a decision. (Section 1.0 of Policy 01-02 Part 1 (dated November 26, 1996).) The first two sets of circumstances do not apply as there was no appeal. The third seems unduly broad in light of the restrictive nature of other two. However, I do not need to decide what could formerly have been disclosed under the last of the three provisions, because it is triggered by a request, and there was no request in this case.

Conclusion

[para 32] I find the Public Body was authorized to disclose only the particulars of any determinations as to the Complainant's entitlement to compensation. Some of the remainder of the information that the Public Body disclosed would have to be requested, and much of it was not the kind of information that could be disclosed even on request. Therefore, with the exception of the particulars about particular entitlement decisions (which I take to refer to the conclusions about which part of the claim was accepted⁸), I find the WCA did not authorize the Public Body to disclose the Complainant's personal information that it provided to the new owner. Therefore, the remaining disclosures were not authorized by section 40(1) (b)⁹, (e) or (f) of the FOIP Act.

V. ORDER

[para 33] I make this Order under section 72 of the Act.

[para 34] I find the Public Body did not have authority to disclose most of the Complainant's personal information that it disclosed. This disclosure was in contravention of the FOIP Act.

[para 35] I recognize the Public Body has ceased making the disclosures complained of. However, it maintains that it is entitled to make them. I therefore order the Public Body to cease disclosing all information relative to the Complainant except the following: the information it is permitted to disclose under section 44 – particulars of any determinations as to entitlement to compensation, and the further information which may, as specified in the provision, be provided on request if such a request is made; and information provided according to section 147(3) in the event of a review.

Christina Gauk, Ph.D.
Director of Adjudication

⁸ Examples of the type of information that, in my view, falls into this category were given at paragraph 24 above. As all the information has already been disclosed, it is not necessary to review each item in detail to identify which parts fall within the category. I emphasize, however, that "particulars of the determination" is not the same as "the reasons for the determination".

⁹ The fact the disclosures were not authorized under the WCA means that section 40(1)(b) of the FOIP Act does not provide the necessary authority, since the disclosures did not fall under section 17(2)(c).