

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2013-52

December 19, 2013

WORKERS' COMPENSATION BOARD

Case File Number F5771

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) that the Workers' Compensation Board (the Public Body) had collected and used information regarding an injury unrelated to his Alberta workers' compensation claim and disclosed it to his employer in contravention of Part 2 of the FOIP Act.

The Adjudicator found that the Public Body had complied with the provisions of Part 2 of the FOIP Act when it collected and used the Complainant's personal information. However, she found that the Public Body contravened Part 2 of the FOIP Act when it provided the Complainant's claim file to his employer for its use in a hearing before the Appeals Commission for Alberta Workers' Compensation. She ordered the Public Body to cease disclosing the Complainant's personal information without authority.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 33, 34, 39, 40, 41, 72 *Workers Compensation Act* R.S.A. 2000, c. W-15, ss. 13.1, 13.2, 17, 18, 34, 35, 36, 38, 44, 46, 120, 147

Authorities Cited: AB: Orders F2006-018, F2006-026, F2008-029, F2009-041, F2010-014, F2011-006, F2011-007, and F2013-11

I. BACKGROUND

[para 1] The Complainant was involved in a work-related accident in 1989. The Workers' Compensation Board (the Public Body) accepted responsibility for disability associated with a lumbar spine injury at the L4-5 level. In 2005, the Complainant sought to reopen the claim. The Public Body sought health records from physicians who had treated the Complainant between 1989 and 2005 and placed these records on the Complainant's claim file. Some of these records contained information about internal surgery the Complainant had undergone and others contained information about a work-related injury involving the shoulder and thoracic and cervical areas of his spine.

[para 2] The Complainant made a complaint to the Commissioner under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) that the Workers' Compensation Board (the Public Body) had collected and disclosed his personal information in contravention of Part 2 of the FOIP Act. Specifically, he complained that the Public Body had collected information about injuries he had reported in relation to an Ontario workers' compensation matter, and then disclosed this information to his employer.

[para 3] The Commissioner authorized a mediator to investigate and attempt to settle the complaint. However, mediation did not settle the matter and it was scheduled for a written inquiry.

II. INFORMATION THAT IS THE SUBJECT OF THE COMPLAINT

[para 4] The Complainant complains that information unrelated to his Alberta workers' compensation claim was collected by the Public Body and placed on his claim file. The Complainant also complains that his entire claim file, including the information he argues is unrelated to his Alberta workers' compensation claim, was provided to his former employer.

III. ISSUES

Issue A: Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?

Issue B: Did the Public Body use the Complainant's personal information in contravention of Part 2 of the Act?

Issue C: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?

[para 20] Section 1(n) of the FOIP Act, (previously section 1(1)(n)), defines “personal information” in the following way:

I In this Act,

(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,

(ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual’s age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(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,

(viii) anyone else’s opinions about the individual, and

(ix) the individual’s personal views or opinions, except if they are about someone else[...]

[para 5] “Personal information” under the FOIP Act is not defined exhaustively and includes information about an identifiable individual that is recorded in some form.

[para 6] The information that the Complainant argues was collected, used, and disclosed by the Public Body contrary to Part 2 of the FOIP Act consists of information about entitlement decisions, his health and health care history, and his work history. The information is therefore his personal information within the terms of section 1(n) of the FOIP Act, and is specifically information falling under subclauses 1(n)(vi), 1(n)(vii) and 1(n)(viii).

[para 7] Section 33 FOIP Act imposes restrictions on the ability of a public body to collect personal information. This provision states:

33 No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,

(b) that information is collected for the purposes of law enforcement, or

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

[para 8] The Complainant complains that the Public Body collected information unrelated to the injuries for which the Public Body has accepted responsibility and that it contravened Part 2 of the FOIP Act by doing so.

[para 9] The Public Body argues that sections 17(5), 18(2), 34, and 36 of the *Workers' Compensation Act* (WCA) authorize its collection of the Complainant's personal information in this case and that its collection of the Complainant's personal information complies with subsections 33(a) of the FOIP Act because of this authorization. In the alternative, the Public Body argues that its collection complies with section 33(c) of the FOIP Act.

[para 10] The Public Body did not provide argument or explanation as to why it believes the provisions it cited from the WCA provide express authorization to collect the health information of workers from their physicians. I was unable to identify a provision among them that expressly authorizes the Public Body to obtain a worker's personal information from a treating physician as it did in this case. I must therefore consider whether section 33(c) authorizes the Public Body's collection of the Complainant's personal information.

[para 11] I note that section 17(1) of the WCA states:

17(1) Subject to section 13.1, the Board has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act or the regulations and the action or decision of the Board on such matters and questions is final and conclusive, and is not open to question or review in any court.

[para 12] From the foregoing provision, I conclude that the Public Body has exclusive jurisdiction to determine whether workers are entitled to compensation under the WCA.

[para 13] While I find that this provision does not provide *express* authority within the terms of section 33(a) of the FOIP Act to collect the Complainant's personal information as it did, this provision does, in my view, establish that the Public Body has authority to decide a worker's entitlement to compensation, given that the WCA addresses entitlement to compensation and gives jurisdiction to the Public Body to make such decisions. Moreover, determining entitlement to compensation is an activity of the Public Body within the terms of section 33(c) of the FOIP Act.

[para 14] I find that section 33(c) of the FOIP Act provides authority for the Public Body's collection of the Complainant's personal information in this case. It is clear from the case manager's correspondence, which the Public Body submitted for my review, that

the case manager collected the Complainant's personal information in order to determine whether the Complainant was experiencing disability as a result of the injuries the Public Body had previously determined to be work-related. The case manager obtained the information in order to determine the Complainant's entitlement to compensation, which is an activity of the Public Body.

[para 15] That some of the information collected by the Public Body related to injuries other than those accepted by the Public Body does not mean that the information was unnecessary for, or did not relate directly to, the purpose for which it was collected within the terms of section 33(c) of the FOIP Act. The case manager's letter of March 13, 2008, (Tab 12 of the Public Body's initial submissions) indicates that she collected the Complainant's medical history from 1989 to 2008, in order to trace the origin of the current symptoms for which the Complainant was seeking compensation under the WCA so that she could determine whether they were related to the 1989 injury and to exclude the possibility that they were related to another injury.

[para 16] In my view, the collection of information in this case related directly to and was necessary for an operating program or activity of the Public Body, that is, determination of the Complainant's entitlement to compensation under the WCA.

Did the Public Body comply with the terms of section 34 of the FOIP Act?

[para 17] Section 34 of the FOIP Act requires public bodies to collect personal information directly from the individual who is the subject of the information, except in specific circumstances.

[para 18] I turn now to the question of whether the Public Body was required to collect the Complainant's personal information directly from him, or was authorized by section 34 to collect it from physicians who treated him. The Public Body collected the Complainant's personal information from physicians who had treated him, rather than directly from the Complainant himself. As the Public Body collected the Complainant's personal information indirectly, I must consider whether section 34 authorizes this collection.

[para 19] Section 34 states, in part:

34(1) A public body must collect personal information directly from the individual the information is about unless

(a) another method of collection is authorized by

(i) that individual,

(ii) another Act or a regulation under another Act [...]

[...]

(k) the information is necessary

(i) to determine the eligibility of an individual to participate in a program of or receive a benefit, product or service from the Government of Alberta or a public body and is collected in the course of processing an application made by or on behalf of the individual the information is about, or

(ii) to verify the eligibility of an individual who is participating in a program of or receiving a benefit, product or service from the Government of Alberta or a public body and is collected for that purpose [...]

(2) A public body that collects personal information that is required by subsection (1) to be collected directly from the individual the information is about must inform the individual of

(a) the purpose for which the information is collected,

(b) the specific legal authority for the collection, and

(c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection.

[para 20] Unless one or more of the circumstances enumerated in section 34(1) applies, a public body must collect personal information directly from the person the information is about and comply with the terms of section 34(2). (See Orders F2011-007 and F2010-014.)

[para 21] The Public Body points to sections 34(1)(a)(ii) and (k) as authority to collect the Complainant's personal information from parties other than the Complainant.

[para 22] The Public Body did not provide argument or explanation with regard to its argument that an Act or Regulation provides authority for its collection of personal information from someone other than the Complainant. In the absence of evidence or argument on this point, I am unable to identify any legislative authority within the terms of section 34(1)(a)(ii) for the Public Body's indirect collection of the Complainant's personal information.

[para 23] The case managers' correspondence indicates that they obtained information from the Complainant as to the physicians he saw. It appears that there may have been an agreement between the case managers involved in the Complainant's claim and the Complainant that the case managers would obtain his personal information directly from the physicians in order to adjudicate the claim. If that is so, then section 34(1)(a)(i), which permits indirect collection if doing so is authorized by the individual,

would authorize collecting the Complainant's personal information from his physicians. However, there is insufficient evidence before me to draw an inference that the Complainant authorized the case managers to collect the personal information that was collected from his physicians.

[para 24] I must therefore consider whether section 34(1)(k) provides the necessary authority to collect the Complainant's personal information indirectly.

[para 25] I find that the Public Body collected the Complainant's personal information from his physicians in order to determine his eligibility for workers' compensation benefits. Section 34(1)(k) of the FOIP Act authorizes a public body to collect personal information indirectly when the information is necessary to verify the eligibility of an individual to receive a benefit provided by the public body. In my view, it was necessary for the case managers to obtain the personal information they did in order to make decisions regarding his entitlement to benefits effectively. I therefore find that section 34(1)(k) provides the necessary authority for the Public Body to collect the Complainant's personal information from his treating physicians and not the Complainant himself.

Conclusion

[para 26] For the reasons above, I find that the Public Body complied with Part 2 of the FOIP Act when it collected the Complainant's personal information.

Issue B: Did the Public Body use the Complainant's personal information in contravention of Part 2 of the Act?

[para 27] Section 39 of the FOIP Act imposes limits on the ability of a public body to use personal information. This provision states, in part:

39(1) A public body may use personal information only

(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or

(c) for a purpose for which that information may be disclosed to that public body under section 40, 42 or 43.

[...]

(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

[para 28] A Public Body may use personal information for purposes that are consistent with the purpose for which information was collected or compiled. A Public Body may also use personal information if the individual has consented to the Public Body using the information in a particular way, or for purposes for which the information may be disclosed to that Public Body under specific provisions of the FOIP Act. In this case, the Public Body argues that section 39(1)(a) authorizes its use of the Complainant's personal information.

[para 29] Section 41 of the FOIP Act defines the term "consistent purpose" for the purposes of sections 39(1)(a) and section 40(1)(c) of the FOIP Act. It states:

41 For the purposes of sections 39(1)(a) and 40(1)(c), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure

(a) has a reasonable and direct connection to that purpose, and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

If the Public Body used the information for a purpose reasonably and directly connected to its purpose in collecting it, and its use of the information was necessary for performing its statutory duties, then the Public Body will have satisfied the requirements of section 39(1)(a).

[para 30] The Public Body states:

Section 39(1) outlines those circumstances in which personal information may be used. In this case the use of [the Complainant's] personal information was permitted under section 39(1)(a).

[...]

The medical records collected were used to make decisions on [the Complainant's] claim regarding time loss and mileage benefits and regarding the hernia that occurred in August 2007. He specifically sought those benefits and the WCB is required to make an informed decision regarding his request.

In this case, the conditions not accepted by the WCB, the T12 fracture, and neck and shoulder injury that were noted in the records provided, affect the same part of the body as the work injury and are relevant to the management of his claim; therefore they remain on the claim file. The non-compensable conditions (the T12 fracture and neck and shoulder injury) could:

- have a direct impact on the work injury
- affect decisions being made regarding the treatment being provided for the work injury, and
- affect the recovery period.

The operation of the Workers' Compensation system is [dependent] on the WCB obtaining a clear understanding of all surrounding facts. Decisions regarding what the WCB is responsible

for, whether a worker may return to work and what work a worker may safely perform cannot occur in a vacuum. The degree to which the WCB must appreciate a worker's non-compensable conditions will vary from case to case. If a worker is an airline pilot and has an addiction issue unrelated to a compensable work related accident, the WCB cannot safely return the worker to work without addressing that issue. The scope of the WCB's role is not to only pay wage loss, and out of pocket medical expenses, but it is also rehabilitation with a focus to return to work. The WCB is charged with making decisions about the character, sufficiency and necessity of medical aid (s.80 of the WCA), those decisions too cannot be made in a vacuum and often require knowledge of conditions that may impact compensation, recovery, and treatment of work related accidents. As demonstrated above, the WCB has been given clear and exclusive authority to "examine, inquire into and determine all matters and questions arising under the Act" (s.17(1) of the WCA).

[para 31] The Public Body argues that it used the Complainant's personal information for the purpose for which it was collected, or alternatively, a use consistent with that purpose within the terms of section 39(1)(a). While I take the Public Body's point that decisions regarding entitlement to compensation cannot be made without evidence, I note that some of the Public Body's arguments do not accurately describe the use the Public Body made of the information they collected, or the decisions it made.

[para 32] There is no indication in the evidence before me that the case managers who gathered information regarding the Complainant's medical history considered his shoulder, thoracic or cervical spine injuries to affect the same part of the body for which responsibility had been accepted. Moreover, there is no indication that the information was collected in order to determine whether these injuries were affecting recovery or had an impact on the L4-5 injury. Rather, the information was collected in order to determine whether the Complainant had ongoing disability related to the L4-5 injury during the time that his file was inactive. Information regarding the absence of symptoms relating to an L4-5 injury would arguably be as relevant to that determination as information regarding the presence of such symptoms.

[para 33] The letter of the March 13, 2008 from the case manager to the Complainant contains the case manager's decision that the Complainant's hernia was unrelated to the L4-5 aggravation injury for which the Public Body had accepted responsibility in 1989. In arriving at this decision, the case manager created a timeline of events from all the information that had been gathered. The events recorded in the time line include any symptoms the Complainant reported to his physicians.

[para 34] The case manager was not asked to accept responsibility for shoulder, cervical or thoracic spine injuries, and she does not refer to them other than to note that the Complainant experienced neck, right shoulder and back symptoms on May 15, 2001. Instead, the case manager used the Complainant's health information, including information about the injury neck, cervical and thoracic injuries, in order to determine whether there was continuity in the symptoms the Complainant was experiencing, such that she could find that the hernia was a continuation or aggravation of the original injury that had been accepted.

[para 35] The case manager reviewed all the medical information available to her and found that it did not establish a relationship between the original injury and the current symptoms.

[para 36] The case manager's decision letter of March 13, 2008 establishes that she used the Complainant's personal information, including the information about the shoulder, and cervical and thoracic spine injuries, for the purpose of adjudicating his entitlement to compensation. This is a purpose directly and reasonably connected with the Public Body's purpose in collecting the information.

[para 37] I also find that it was necessary for the Public Body to use the Complainant's personal information in order to adjudicate his claim for compensation.

[para 38] In Order F2008-029, the Director of Adjudication interpreted the meaning of "necessary" within the terms of section 41(b). She said:

In the context of section 41(b), I find that "necessary" does not mean "indispensable" - in other words it does not mean that the CPS [the Calgary Police Service] could not possibly perform its duties without disclosing the information. Rather, it is sufficient to meet the test that the disclosure permits the CPS a means by which they may achieve their objectives of preserving the peace and enforcing the law that would be unavailable without it. If the CPS was unable to convey this information, the [domestic violence] caseworkers would be less effective in taking measures that would help to bring about the desired goals. Because such disclosures enable the caseworkers to achieve the same goals as the CPS has under its statutory mandate, the disclosure of the information by the CPS also meets the first part of the test under section 41(b).

[para 39] I agree with the reasoning in Order F2008-029. Information that is necessary for performing statutory duties is not information that is indispensable, but information that is necessary for performing statutory duties effectively or in a reasonable way. In this case, the case manager who made the decision of March 13, 2008, reviewed the Complainant's health history and traced the origin of symptoms he had reported in order to decide whether the disability he was experiencing was related to the work-related accident that had been accepted in 1989. In my view, it was necessary within the terms of section 41(b) for the case manager to review this information in order to make her decision.

[para 40] As I have found that the requirements of both sections 41(a) and (b) have been met with regard to the Public Body's use of the Complainant's personal information, it follows that I find that the Public Body used the Complainant's personal information, including information regarding conditions for which the Public Body has not accepted responsibility, for purposes consistent with the purpose for which it was collected within the terms of section 39(1)(a) of the FOIP Act.

Section 39(4)

[para 41] Section 39(4), cited above, requires a public body to use only that personal information that is necessary to enable it to carry out its purpose in a reasonable manner. In order for a public body to demonstrate that its use of personal information meets the

requirements of Part 2 of the FOIP Act, it must demonstrate that its use complies with this provision, in addition to the terms of section 39(1).

[para 42] I note that the parties have not addressed section 39(4) of the FOIP Act in their submissions. I also note that the Notice of Inquiry issued by this office cites only section 39(1) as relevant to the determination of whether the Public Body's use of personal information conforms to the requirements of Part 2 of the FOIP Act.

[para 43] I considered whether to ask the parties questions regarding the application of section 39(4); however, I believe that my finding in relation to section 41 of the FOIP Act that the Public Body's use of all the Complainant's personal information that it had gathered was necessary for it to perform its statutory duties also serves to answer the question of whether the Public Body complied with section 39(4). Given that I have already found in my consideration of section 41 that it was necessary for the Public Body to use the information to make a reasonable decision, it follows that I find it was also necessary for it to do so in order to meet its purpose in a reasonable way, within the terms of section 39(4).

[para 44] For these reasons, I find that the Public Body complied with Part 2 of the FOIP Act when it used the Complainant's personal information.

Issue C: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?

[para 45] The Complainant complains that the Public Body disclosed his personal information in contravention of Part 2 of the FOIP Act when it provided his entire claim file to his employer prior to an Appeals Commission hearing. He argues that some of the information on the claim file relates to a claim from another province, and should not have been provided to the employer.

[para 46] The Public Body points to sections 40(1)(b), (c), (e), (f) and (l) of the FOIP Act as its authority for providing the entire claim file to the employer. It argues:

In order to participate in an appeal an interested party must submit a completed "Intention to Participate" form. On August 27, 2009, [the Complainant's employer] submitted the Intention to Participate form to the Appeals Commission and requested a copy of [the Complainant's] claim file from the WCB. The WCB provided [the Complainant's employer] with a copy of the claim file on September 8, 2009. The WCB submits that a right to appeal and participate in an appeal is an illusory right at best if the party cannot access information related to the appeal.

Disclosure for the purpose of the Appeal

The WCB is charged with the statutory duty of paying injured workers lost income compensation, medical costs associated with the injury, and, if required, rehabilitation costs. Employers fund the entirety of the system, and, as a result, their interest in compensation claims and their right to obtain information is a fundamental component of the system. Both workers and employers have a right of appeal under section 46 of the [WCA]. Section 46 states:

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 s. 45.

Section 147(3) of the [WCA] permits an employer to access information for the purpose of a review or appeal. Sections 147(2) and (3) state:

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.

147(3) Notwithstanding subsections (1) and (2) and section 34(4), where a matter is being reviewed or appealed under section 46 or 120,

(a) the worker, or the worker's personal representative or dependant in the case of the death or incapacity of the worker, or the agent of any of them, and

(b) the employer or the employer's agent

are entitled to examine all information in the Board's files that is relevant to the issue under review or appeal, and those persons shall not use or release that information for any purpose except for the purpose of pursuing the review or appeal.

The WCB's Access to Information areas is primarily responsible for disclosing information from claim files and individual documents to injured workers, employers and interested parties for the purpose of review or appeal and to injured workers and employers for reasons other than appeal. The process for releasing claim file documents is outlined in detail in WCB Business Procedure 20.1. This procedure includes limitations that may apply to disclosures for both employers and workers and also provides direction to WCB Access to Information Review Clerks on the processing of these types of requests.

While the right for an employer to obtain all relevant information to a claim is considered a fundamental component of the system, it is important to note that the Access to Information area exercises discretion when disclosing claim file information to the employer. In this case, before disclosing a copy of the claim file to [the Complainant's employer], some information in the records was temporarily blacked out. The information blacked out consisted of [the Complainant's] rate of pay with a different employer, other non-relevant financial information, third party personal information (reference made to his wife and son), the names of his other employers, his Ontario WCB claim number and his Saskatchewan claim number. As well, information regarding a psychosocial assessment, background information from a vocational evaluation, and much of a psychology intake report were blacked out.

Section 40 of the *Freedom of Information and Protection of Privacy* (FOIP) Act permits a public body to disclose information in certain circumstances. In this case, sections 40(1)(b), (c), (e), (f) and (l) of the FOIP Act permit the WCB to disclose personal information in the circumstances noted above.

[para 47] As the Public Body notes in the foregoing excerpt from its submissions, section 40(1) describes the circumstances in which a Public Body may disclose personal information. The relevant provisions of section 40(1) are the following:

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 17,

(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

[...]

(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,

[...]

(l) for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit [...]

Section 40(1)(b)

[para 48] The Public Body points to section 17(2)(c) of the FOIP Act as establishing that section 40(1)(b) of the FOIP Act authorizes its disclosure.

[para 49] Section 17(2)(c) states:

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[...]

[para 50] I presume the Public Body refers to sections 147(3) of the WCA as providing authorization for the disclosure within the terms of section 17(2)(c), as it refers to this provision in its submissions addressing sections 40(1)(e) and (f), although not specifically in relation to its argument regarding the application of section 17(2)(c). More importantly, the Public Body provides no explanation as to why it believes this provision authorizes or requires disclosure in this case.

[para 51] I am unable to find that sections 147 (3) of the WCA authorized or required the Public Body to disclose the Complainant's claim file to employer as it did.

[para 52] Section 147 of the WCA states:

147(1) No member, officer or employee of the Board and no person authorized to make an investigation under this Act shall, except in the performance of that person's duties or under authority of the Board, divulge or allow to be divulged any information obtained by that person in making the investigation or that comes to that person's knowledge in connection with the investigation.

(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.

(3) Notwithstanding subsections (1) and (2) and section 34(4), where a matter is being reviewed or appealed under section 46 or 120,

(a) the worker, or the worker's personal representative or dependant in the case of the death or incapacity of the worker, or the agent of any of them, and

(b) the employer or the employer's agent

are entitled to examine all information in the Board's files that is relevant to the issue under review or appeal, and those persons shall not use or release that information for any purpose except for the purpose of pursuing the review or appeal.

[para 53] Section 46 of the WCA, to which section 147(3) refers, states, in part:

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.

[para 54] Section 120 of the WCA, to which section 147(3) also refers, states, in part:

120(1) Where a person has a direct interest in an assessment made under this Act, that person may, within one year from the day that a decision was made in respect of the assessment, seek a review of the decision by the review body appointed under section 119.

[para 55] In Order F2009-041, I acknowledged that section 147(3) appears intended to ensure fairness. I said:

The WCB argues that section 147(3) enables it to ensure that procedural fairness is met in relation to requests for review made under section 46, and authorizes it to provide information relevant to a worker's appeal to both a worker and to the worker's employer for the appeal. The WCB correctly points out that section 147(3) does not differentiate between a worker's file and an employer's file, but refers to all information relevant to an issue under review or appeal in the Board's possession.

I agree that section 147(3) of the WCA appears intended to promote procedural fairness when a matter is being reviewed or appealed by a worker or an employer. However, the question is whether this provision authorized the WCB to disclose the Complainant's entire claim file to Canada Post once Canada Post requested the file.

[para 56] In that case, I found that section 147(3) authorized the Public Body to disclose relevant information in the claim file to the employer to prepare for an appeal made under section 46 of the WCA. However, I found that this provision did not authorize providing an entire claim file to the employer unless a determination was made that the information being provided was relevant to the appeal.

[para 57] In the current case, the Public Body states that it did not provide the entire claim file to the employer, but severed information regarding the Complainant's family and earnings information and information from a counselling intake form which it did not consider to be relevant.

[para 58] In my view, section 147(3) of the WCA does not authorize the Public Body's disclosure of any of the information in the Complainant's claim file to the employer for the purposes of an Appeals Commission hearing. The application of section 147(3) of the WCA is limited to appeals made under section 46 or 120 of the WCA. Appeals to the Appeals Commission are not made under section 46 or 120, but under section 13.2 of the WCA. As a result, section 147(3) cannot supply the necessary authority for the Public Body to disclose personal information to an employer when a matter is appealed to the Appeals Commission, given that it authorizes disclosure to an employer only in relation to appeals made under sections 46 and 120.

[para 59] Moreover, section 147(3) authorizes the Public Body to provide to an employer only the information that is *relevant* to the appeal. The Public Body severed some personal information from the records that it considered irrelevant and then provided the remainder to the employer. However, the Public Body was not in a position to make that determination in this case. The Appeals Commission had the sole responsibility of determining relevance in the appeal before it. That this is so is established by section 13.1 of the WCA, which states:

13.1(1) Subject to sections 13.2(11) and 13.4, the Appeals Commission has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Act and the regulations in respect of

(a) appeals from decisions under section 46 made by a review body appointed under section 45,

(b) appeals from decisions under section 120 made by a review body appointed under section 119,

(c) appeals from determinations of the Board under section 21(3), and

(d) any other matters assigned to it under this or any other Act or the regulations under this or any other Act,

and the decision of the Appeals Commission on the appeal or other matter is final and conclusive and is not open to question or review in any court.

[para 60] Whether evidence is relevant to an appeal is a decision within the exclusive jurisdiction of the Appeals Commission to decide, given that it has exclusive jurisdiction to determine all matters and questions in respect of appeals under the WCA. Under section 13.2(6)(c) of the WCA the Public Body is permitted to make submissions to the Appeals Commission at an appeal; however, the Public Body is not granted any authority under the WCA to determine the relevance of evidence at an appeal before the Appeals Commission. To put it simply, the Public Body is not in a position to determine the relevance of evidence, or to determine whether fairness requires disclosure of information, in an appeal where it is not the decision maker.

[para 61] Moreover, I note that Rule 2.15 the “2013 Appeal Rules”, published by the Appeals Commission, establishes that the Appeals Commission has its own process for ensuring that parties to an appeal have access to the documents that will be considered by the Appeals Commission at the appeal. This provision states:

2.15 The Appeals Commission must send to every party to an appeal a dated letter enclosing an Appeal Documents Package composed of the documents it considers to be related to the appeal from the record received from the Board.

[para 62] While the hearing in question took place prior to 2013, the Appeals Commission’s letter of August 20, 2009 to a representative of the Public Body, located at Tab 12 of the Public Body’s submissions, states:

Once all of the parties in the appeal have been properly identified and notified, the Appeals Commission will prepare an Appeals Document Package (ADP) and forward it to each of the parties participating in the appeal.

This letter confirms that the Public Body had a similar practice in 2009 of sharing documents relating to an appeal with parties to the appeal. This letter also confirms that the Public Body was advised by the Appeals Commission that the parties to the appeal would be receiving documents relating to the appeal.

[para 63] Given the exclusive jurisdiction of the Appeals Commission to decide appeals made under section 13.1 of the WCA, and given that it has a process in place for ensuring that parties to an appeal receive information relating to an appeal, I must reject

the Public Body's argument that it is a "fundamental component of the system" for the Public Body to provide personal information to an employer when there is an appeal before the Appeals Commission.

[para 64] For the reasons above, I find that section 17(2)(c) of the FOIP Act has not been established as applying to the disclosure of the Complainant's personal information. As the application of section 17(2)(c) was the Public Body's sole argument in relation to the application of section 40(1)(b), I find that it has not been established for this inquiry that section 40(1)(b) authorizes the disclosure.

Sections 40(1)(e) and (f)

[para 65] Cited above, section 40(1)(e) authorizes disclosure of personal information for the purpose of complying with an enactment of Alberta, while section 40(1)(f) authorizes disclosure for any purpose in accordance with an enactment of Alberta that authorizes or requires the disclosure.

[para 66] The Public Body argues that its disclosure of the claim file to the employer was required by section 147(3) of the WCA, and is therefore authorized by sections 40(1)(e) and (f) of the FOIP Act.

[para 67] I have already found that the application of section 147(3) of the WCA is limited to appeals made under section 46 or 120 of the WCA. The appeal for which the Public Body disclosed the Complainant's claim file to his employer was made under section 13.2 of the WCA. I therefore find that section 147(3) does not authorize the Public Body's disclosure of the personal information in the Complainant's claim file to his employer.

[para 68] Although the Public Body did not raise sections 35, 44, and 147(2) of the WCA in its arguments, I note that its "Request for Claim File Information" form, which the Complainant's employer completed, and which was the basis for the Public Body's decision to provide the Complainant's claim file to the employer, cites these provisions as authority for disclosing a claim file to an employer in circumstances where section 147(3) would not provide authority. I will therefore consider whether these provisions of the WCA authorize the disclosure within the terms of sections 40(1)(e) and (f) of the FOIP Act.

[para 69] Section 35 of the WCA states:

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.

Section 35 authorizes an employer to request a report of progress. This provision does not authorize the disclosure of the claim file. The employer did not make a request, written or otherwise, for a progress report. Further, the information that was disclosed could not be characterized as "a report of the progress" of the Complainant.

[para 70] Section 44 of the WCA states:

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 71] As the Adjudicator noted in Order F2006-026, this provision requires the Public Body to provide an employer with the particulars of a determination as to a worker's entitlement to compensation on the making of a determination. It also authorizes providing a summary of reasons, including medical reasons, for the determination if one is requested. I find that section 44 does not authorize the disclosure in this case, as the claim file was not supplied for the purpose of advising of the particulars of a determination, and most of the information that was disclosed to the employer is not a determination regarding compensation.

[para 72] Section 147(2), cited above, states:

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 73] Past orders of this office have interpreted this provision as a prohibition regarding unauthorized disclosure. For example, in Order F2006-026, the Director of Adjudication said:

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.

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. [...] 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*. [Emphasis in original]

[para 74] I agree with this reasoning. I note that the Director of Adjudication's interpretation of section 147(2) of the WCB has been followed in Orders F2006-018, F2009-041, F2011-006, and F2013-11. Section 147(2) is a prohibition on the disclosure of information, rather than an empowering provision. The intent of this provision is to ensure that employees of the Public Body do not disclose information obtained in the course of their duties unless specifically authorized to do so under the WCA, and only to persons who are authorized under the WCA to receive the information.

[para 75] Moreover, there would be no reason for section 147(3) to apply notwithstanding section 147(2), if section 147(2) were not a prohibition on disclosure of information other than that specifically authorized by other provisions of the WCA.

[para 76] I find that section 147(2) cannot authorize the disclosure of a claim file to an employer, as was done in this case, in the absence of specific authority under the WCA to disclose a claim file in the circumstances.

[para 77] As sections 35, 44, 147(2) and 147(3) of the WCA do not authorize disclosing a claim file to an employer, and the personal information it contains, as was done in the circumstances of this case, I find that it has not been established that section 40(1)(e) or 40(1)(f) of the FOIP Act provide authority for the disclosure.

Section 40(1)(l)

[para 78] Cited above, section 40(1)(l) of the FOIP Act authorizes disclosure of personal information "for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit".

[para 79] Other than to cite section 40(1)(l), the Public Body made no other reference to this provision. I am therefore left to guess what its rationale for citing this provision might have been.

[para 80] There is no evidence before me to establish that the Public Body disclosed the Complainant's personal information for the purpose of determining his entitlement to a benefit. The records the Public Body supplied at Tab 17 of its submissions, and its arguments, establish that the Public Body provided the claim file to the employer because the employer had completed a Notice of Intention to Participate form for a hearing at the Appeals Commission, and had also completed a Request for Claim File Information form. There is simply no evidence before me that employees of the Public Body provided the claim file to the employer for any other reason than the fact that the employer had completed these two forms and it is its standard practice to provide the claim file to an employer who has done so.

[para 81] Section 40(1)(l) of the FOIP Act does not state, and cannot reasonably be interpreted to mean, "for the purpose of enabling participation in a process by which an individual's suitability for a program or benefit will be determined or verified."

[para 82] Moreover, the Public Body was not the decision making body responsible for determining the Complainant's entitlement to compensation at the time it provided his claim file to his employer. Rather, the Public Body's evidence establishes that the Appeals Commission was responsible for making this decision. As the Public Body was not the decision maker, it was not in a position to determine whether the information that was disclosed would serve the purpose of determining eligibility for benefits.

Conclusion under section 40(1)

[para 83] I find that the Public Body has not established that its disclosure of the Complainant's claim file to the Complainant's employer was authorized by a provision of section 40(1) of the FOIP Act. I therefore find that this disclosure does not comply with the requirements of Part 2 of the FOIP Act.

Section 40(4)

[para 84] Section 40(4) limits the ability of a public body to disclose personal information to that which is necessary to enable the public body to carry out its purposes in disclosing the information in a reasonable way. It states:

40(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 85] In order for a public body to demonstrate that its disclosure of personal information meets the requirements of Part 2 of the FOIP Act, it must demonstrate that its disclosure complies with this provision, in addition to the terms of section 40(1).

[para 86] I note that the parties have not addressed section 40(4) of the FOIP Act in their submissions. I also note that the Notice of Inquiry issued by this office cites only section 40(1) as relevant to the determination of whether the Public Body's use of personal information conforms to the requirements of Part 2 of the FOIP Act.

[para 87] Given my finding that the Public Body contravened part 2 of the FOIP Act in relation to section 40(1), I need not decide the issue of its compliance with section 40(4). However, if I am wrong in my finding that the Public Body did not comply with section 40(1), it would be necessary for me to decide the issue of whether it complied with section 40(4) when it provided the Complainant's personal information to his employer.

V. ORDER

[para 88] I make this Order under section 72 of the Act.

[para 89] I confirm that the Public Body collected the Complainant's personal information in compliance with Part 2 of the FOIP Act.

[para 90] I confirm that the Public Body used the Complainant's personal information in compliance with Part 2 of the FOIP Act.

[para 91] I order the Public Body to cease disclosing the Complainant's personal information in contravention of Part 2 of the FOIP Act.

[para 92] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator