

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2013-55

December 24, 2013

WORKERS' COMPENSATION BOARD

Case File Number F6371

Office URL: www.oipc.ab.ca

Summary: An individual had an ongoing claim with the Workers' Compensation Board (the Public Body) under the *Workers' Compensation Act* (the "WCA") relating to a workplace injury.

The Complainant made a complaint to this office, stating that the Public Body collected, used and disclosed her personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (FOIP Act). Specifically, she complained that the Public Body is not authorized (or ought not to be authorized) to rely on the opinion of medical consultants in making a determination regarding her claim.

The Public Body argued that the information collected, used and disclosed by the Public Body, and specifically the medical consultants within the Public Body, was for the purpose of making a determination regarding the Complainant's injury claim, and was therefore authorized under the FOIP Act.

The Adjudicator agreed that the Public Body had authority to collect, use, and disclose the Complainant's personal information, including the collection, use and disclosure by the medical consultants.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 33, 34, 39, 40, 41, 72, *Workers' Compensation Act*, R.S.A. 2000, c. W-15, ss. 17, 18, 34, 80.

Authorities Cited: AB: Order F2001-004.

Cases Cited: *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62.

I. BACKGROUND

[para 1] An individual had an ongoing claim with the Workers' Compensation Board (the Public Body) under the *Workers' Compensation Act* (the WCA) relating to a workplace injury; the extent of the Complainant's injury and her ability to return to work were relevant to the claim. In making determinations about the Applicant's claim, the Public Body received medical information and opinions from various health practitioners that the Applicant had seen regarding her injury. The Public Body also obtained opinions from medical consultants that the Applicant had not seen. The Applicant objects to the Public Body's practice of obtaining and relying on medical opinions from consultants who have not seen the Applicant.

[para 2] The Applicant made a complaint to this office that the Public Body collected, used and disclosed her personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (FOIP Act) when it obtained opinions from medical consultants.

[para 3] The Complainant requested a review from this office. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful; the Complainant requested an inquiry and the matter was set down for a written inquiry.

II. INFORMATION AT ISSUE

[para 4] The information at issue is the Complainant's personal information collected, used and disclosed by the Public Body – specifically, the personal information shared between the claim decision makers and the medical consultants.

III. ISSUES

[para 5] The Notice of Inquiry sent September 11, 2013 lists the issues as follows:

- 1. Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?**
- 2. Did the Public Body use the Complainant's personal information in contravention of Part 2 of the Act?**
- 3. Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?**

IV. DISCUSSION OF ISSUES

Scope of the inquiry

[para 6] The Complainant states that the “intention of [the] Inquiry is to forever end the recruiting, gathering and disclosure by the WCB of personal health and claim information to WCB Consulting Doctors and Physiotherapists to be used to write reports requested by the WCB called ‘medical evidence’ for deciding decisions.” Presumably the Applicant believes that the Public Body was not authorized to disclose her personal information to the consultants, collect her personal information from the consultants, or use her personal information collected from the consultants, nor were the consultants authorized to collect, use, or disclose her personal information.

[para 7] The Complainant also states that the “Supreme Court of Canada ruled this November 2013, that Alberta’s PIPA is unconstitutional and the Alberta Government has one year to rewrite FOIP privacy legislation in this province regarding the protection of privacy of [an] individual’s personal information.” She states that this supports her contention that the “WCB FOIP privacy legislation” is outdated and ought to be amended, and that “Constitutional law supports that the services of medical consultants to fulfill the WCB mandate are not to be considered legally necessary as [they] are not.”

[para 8] The Supreme Court of Canada decision cited by the Complainant is *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62. This decision found that the *Personal Information Protection Act* is unconstitutional with respect to certain union activities. However, this legislation applies to private-sector organizations, not to public bodies to which the FOIP Act applies. The decision is not relevant to the issues in this inquiry.

[para 9] I do not have jurisdiction to review the Public Body’s processes for managing worker claims, other than to review whether the Public Body has complied with the FOIP Act in doing so. In other words, whether the Public Body’s use of medical consultants is appropriate is not a matter that can be decided in this inquiry.

[para 10] The Complainant also raises concerns about the statutory structure under which the Public Body operates and argues that the *Workers’ Compensation Act* (WCA) ought to be amended; these concerns are also beyond the scope of this inquiry.

1. Did the Public Body collect the Complainant’s personal information in contravention of Part 2 of the Act?

Is the information at issue personal information of the Complainant?

[para 11] The FOIP Act defines personal information as follows:

1 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 12] The above is not an exhaustive list. The information at issue is medical information about the Complainant, including medical opinions about her injury. This is personal information of the Complainant under the FOIP Act.

[para 13] A public body may collect personal information only as authorized under section 33 of the Act:

- 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 14] The Complainant argues that medical consultants are not employees of the Public Body. She states:

WCB Consulting Doctors and Physiotherapists are currently legislated as being “Employees” of the WCB but are not “Employees” of the WCB. These persons are “Consultants” not “Employees” who work in their own private practices recruited by the WCB to write reports of the WCB about persons the Consultants

will never see which is illegal to do. These persons who are named as WCB Consultants are 4th party strangers to the Claim and not WCB “Employees”.

[para 15] The Public Body states that “Medical Consultants are contracted employees of the WCB and have the same legislated authority, and are subject to the same responsibilities, as any staff member of the WCB, in regards to the handling of personal information.” The Public Body also states that the medical consultant contract says “the WCB requires the services of medical consultants in fulfilling its mandate under the legislative authority of the *Workers’ Compensation Act* of Alberta consistent with the WCB mission and vision.”

[para 16] The Complainant provided me with a copy of most or all of her claim file from the Public Body, including memos written by medical consultants. I note that these memos are written on letterhead of the Medical Services area of the Public Body. While these medical consultants may be contract employees rather than salaried employees, these consultants are performing functions of the Public Body on behalf of the Public Body. I have no reason to believe that these medical consultants have a different status than other Public Body employees for the purposes of the FOIP Act, such that a collection of personal information by a medical consultant would *not* be a collection by the Public Body.

[para 17] Based on the records provided to me by the Complainant, the Public Body medical consultants involved in the Complainant’s claim have collected the Complainant’s personal information in the course of performing their job duties. I conclude that the collection of the Complainant’s personal information by medical consultants is a collection by the Public Body.

[para 18] The Public Body states that Claim Owners (adjudicators or case managers who make entitlement decisions) request medical opinions from medical consultants “on specific issues through posed questions for them to answer.” The medical consultants review the information on the claim file and provide opinions on diagnoses, fitness for work, and medical treatment plans. Claim Owners consider opinions of the medical consultants along with the other information on the claim file (including medical information from health care professionals treating a claimant) in making an entitlement determination.

[para 19] The Public Body has provided me with Business Procedure 40.1, which outlines when and how medical consultants are involved in a claim by the Claim Owner, including factors to consider in determining whether an opinion from a medical consultant may be required. In the Complainant’s case, the Public Body states that there were conflicting medical opinions regarding the Complainant’s injury; therefore, the case manager sought an opinion from a medical consultant.

[para 20] The Public Body states that a medical consultant refers to information in a claimant’s file and may also contact the claimant’s health care providers in order to provide an informed medical opinion. In this case, a medical consultant contacted one of the Complainant’s physicians in order to clarify a treatment plan.

[para 21] The Public Body cites both sections 33(a) and 33(c) of the FOIP Act as authority to collect the Complainant's personal information. It also points to sections 17(1) and (5), 18(2), 34(1) and 80(1) of the WCA as authority to collect.

[para 22] In my view, section 17(1) of the WCA is relevant. This provision 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 23] Determining an individual's entitlement to compensation under the WCA is clearly a matter concerning the administration of that Act; therefore the Public Body has exclusive jurisdiction to make a determination regarding the Complainant's entitlement to compensation.

[para 24] The Public Body states that in order to determine a claimant's eligibility for compensation, it is necessary to collect the necessary medical information. I accept the Public Body's reasons for collecting the Complainant's personal information, and that the collection was necessary to allow the Public Body to make a determination regarding the Complainant's claim, which is an activity of the Public Body. I find that the collection was therefore authorized within the terms of section 33(c) of the FOIP Act, which permits collection that relates directly to and is necessary for an operating program or activity of the Public Body. As such, I do not need to consider whether the WCA provides express authority to collect the information.

Indirect collection

[para 25] Collection from a source other than the individual the personal information is about is authorized in the circumstances set out in section 34(1). The following are the relevant sections:

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

...

(ii) another Act or 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 or receiving a benefit, product or service from the Government of Alberta or a public body and is collected for that purpose...

[para 26] The FOIP Act authorizes the indirect collection of personal information for the purpose of determining or verifying eligibility for a benefit. The Public Body cited section 34(1)(k)(ii) as its authority to collect the Complainant's personal information indirectly, as the Complainant is already receiving a benefit (compensation) and the issue appears to be the ongoing nature or level of that benefit.

[para 27] The Public Body was authorized to collect personal information as required to properly investigate and make a determination with respect to the Complainant's claim; the personal information collected must therefore be related to the determination of the claim. The Public Body cited Order 2001-004, in which former Commissioner Clark stated:

In Order 98-002, I said that the Public Body's legislative authority to collect personal information under section 32(a) [now 33(c)] of the *FOIP Act* is contained in sections 29 [now section 34] and 31 [now section 36] of the *Workers' Compensation Act*. Furthermore, in Order 98-002, I said that section 31 of the *Workers' Compensation Act* only gives the Public Body the authority to collect information if the information relates to both the "disability" and the "compensation" of the disability. In that Order, I also said that the use of the phrase "that it considers necessary" in section 31 of the *Workers' Compensation Act* implies that the Public Body has the discretion to decide what information is necessary relative to the disability and compensation. As such, I said that I would give the Public Body considerable latitude in deciding whether the collection of personal information is necessary relative to the disability and compensation.

[para 28] The Complainant raises concerns about the legitimacy of the medical consultants' opinions, in the face of differing opinions from her treating physicians. The Complainant might be arguing that the opinions of the medical consultants' were not necessary to determine the Complainant's eligibility to receive benefits, since the Complainant's medical information had been provided to the Public Body by her treating physicians.

[para 29] I agree with former Commissioner Clark that the Public Body ought to be given deference in determining what information is necessary in order to properly determine a claim. In this case, the Public Body states that the communications between the Public Body and her treating physicians was necessary to determine the level of compensation owed to the Complainant. I find that the indirect collection of the Complainant's personal information was authorized under section 34(1)(k) of the Act.

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

[para 30] A public body may use personal information in the following manner:

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 31] The Complainant is concerned about the use of the medical consultants' opinions to make a determination about her claim. She is also concerned about the use of her personal information by the medical consultants.

[para 32] Regarding the decision-maker's use of the medical consultants' opinions, I do not know to what extent these opinions were considered. Nevertheless, based on the policies and procedures explained by the Public Body, it seems that the Claim Owner specifically sought out opinions from medical consultants. Even if these opinions were given little or no weight in reaching a decision about the Complainant, they were incorporated into the Complainant's claim files; I find that the opinions were used for the purposes of the FOIP Act.

[para 33] Regarding the use of the Complainant's personal information by the medical consultants, the Public Body states that the medical opinions were sought because of conflicting medical opinions regarding the Complainant's disability. The medical consultants used the information provided in the claim file (and presumably information collected from the Complainant's treating physicians, as discussed above) to form an opinion about the Complainant's injury. The Public Body states that this use of the Complainant's personal information is consistent with the purposes for which the information was collected, pursuant to section 39(1)(a) of the FOIP Act.

[para 34] Section 41 of the Act sets out when a use or disclosure of personal information is consistent with the purposes for which it was collected. 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.*

[para 35] I agree with the Public Body that the use of the Complainant's personal information by the medical consultants to form an opinion regarding her injury is authorized under section 39(1)(a) of the Act; the collection and use of the Complainant's personal information by the medical consultants was to enable them to form an informed opinion regarding her injury, which is directly related to the Public Body's legislated function. The use of the medical consultants' opinions by the Claim Owner was also for the purpose of making a determination about the Complainant's claim. I agree with the Public Body that there is no evidence to suggest that the Public Body used the Complainant's medical information in an unauthorized manner. There is also no reason to expect that the Public Body (including the Claim Owners and medical consultants) used the Complainant's personal information beyond the extent necessary make a determination about the Complainant's injury, in contravention of section 39(4).

3. Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?

[para 36] A public body may disclose personal information in accordance with section 40 of the Act. The relevant provisions are as follows:

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

...

(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,

...

(h) to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member,

...

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

...

(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 37] The Public Body states that the Complainant's personal information was disclosed to the Complainant's treating physicians by the medical consultants in order for the consultants to form an informed opinion regarding the Complainant's injury. This included clarifying the status of non-work related medical conditions, inquiring into the Complainant's improvement and her ability to participate in rehabilitation, and discussions regarding the Complainant's physical ability level. The Public Body states that these disclosures occurred for the same purpose for which the information was collected and used.

[para 38] The Public Body argues that the disclosures of the Complainant's personal information by the medical consultants were directly related to the purpose of forming a medical opinion, and were necessary for performing the Public Body's statutorily mandated function. It further states that

communication between medical practitioners should not be unnecessarily curtailed. Doctors must have the ability to freely discuss diagnoses, treatment plans, opinions and conditions with other practitioners to ascertain best practices and ensure that patients receive the best care possible... As previously noted, the process of returning an injured worker to suitable employment necessitates the cooperation of, and communication with the WCB, the Claimant, and their treatment providers in terms of securing safe, modified work, or gradual return to work initiatives. This open communication is critical, as the WCB Claim Owner must evaluate each Claimant's individual needs and their progress in order to ensure that they are receiving the appropriate services and benefits.

[para 39] As stated above, I agree with the Public Body that deference must be given to those in the Public Body making determinations about a claimant's eligibility for compensation, including medical consultants providing medical opinions about the claimant. I accept the Public Body's explanation for disclosures of the Complainant's information to her treating physicians. Nothing in the copies of the Complainant's claim file provided to me by her indicates that the medical consultants disclosed information for purposes other than as necessary to help them form an opinion as to her injury and abilities.

[para 40] The Complainant is also concerned about the disclosure of her information by the Claim Owners to the medical consultants. As discussed above, the Complainant argues that the medical consultants are not employees of the Public Body.

[para 41] The medical consultants are contracted employees of the Public Body. I have found above that it was reasonable for the Public Body to seek the opinions of medical consultants in coming to a determination regarding the Complainant's claim. The Complainant's information would have been necessary to allow the medical consultants to perform their job duties; therefore the disclosure by the Claim Owners to the medical consultants was authorized under section 40(1)(h). The same analysis applies to the disclosure by the medical consultants to the Claim Owners.

[para 42] Section 40(4) limits a public body's disclosure to what is necessary to meet the purpose of the disclosure. Nothing in the submissions indicates that the Public Body (including the Claim Owner and medical consultants) disclosed more of the Complainant's information than was required.

V. ORDER

[para 43] I make this Order under section 72 of the Act.

[para 44] I find that the Public Body was authorized to collect, use and disclose the Complainant's personal information under Part 2 of the Act.

Amanda Swanek
Adjudicator