

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-37

October 5, 2021

WORKERS' COMPENSATION BOARD

Case File Number 005715

Office URL: www.oipc.ab.ca

Summary: An individual (the Complainant) made a complaint on her own behalf and that of her minor children, that the Workers' Compensation Board (the Public Body), had collected and disclosed her personal information, and that of her minor children, by accessing her Facebook account, printing off pictures of the Complainant and her minor children, and providing the pictures to various members of the Public Body and to her employer, in contravention of the *Freedom of Information and Protection of Privacy Act* (the Act).

The Adjudicator found that the Public Body collected the Complainant's images and her minor children's images from the Complainant's public Facebook account and that the images were the personal information of the Complainant and her minor children. The Adjudicator found that the collection was authorized under sections 33(a) and (c) of the Act.

The Adjudicator determined that the collection by the Public Body of the Complainant's images from her public Facebook page was a direct collection in compliance with section 34(1) of the Act and that section 34(3) of the Act applied. In the event it was not a direct collection, the Adjudicator found that it was an indirect collection in compliance with section 34(1)(k)(i) of the Act.

The Adjudicator found that the Public Body did not use the Complainant's images or her minor children's images to make a decision regarding the Complainant's claim for benefits under the *Workers' Compensation Act* and therefore, the Public Body did not contravene section 39 of the Act. If, however, the act by the claims investigator of reviewing the images to determine their relevance to the Complainant's claim for benefits under the *Workers' Compensation Act* was

considered to be a use of this information, then the Adjudicator found that the use was in compliance with sections 39(1)(a), 39(4) and 41 of the Act.

The Adjudicator also found that the provision of the Complainant's and her minor children's images by the Public Body's claims investigator to the Public Body's FOIP office to enable the Public Body to comply with its responsibilities and respond to the Complainant's access request under the Act, did not contravene the Act.

The Adjudicator found that there was no information to support the Complainant's complaint that the Public Body had disclosed the Complainant's or her minor children's images to the Complainant's employer. Accordingly, the Adjudicator found that the Public Body did not contravene section 40(1) of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 33, 34, 39, 40, 41, 72, 84; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, ss. 17, 18, 20, 36.

Authorities Cited: AB: Orders 2001-004, F2002-001, F2006-018, F2012-05, F2013-55, F2014-37, F2018-12, F2018-13, F2018-79, and F2020-16.

I. BACKGROUND

[para 1] An individual (the Complainant) complained that the Workers' Compensation Board (the Public Body) had contravened the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) by accessing and printing off pictures of her, and her minor children, which were posted on her Facebook account. She also complained that the Public Body had provided the pictures to various members of the Public Body and to her employer in contravention of the Act.¹

[para 2] The Commissioner authorized a Senior Information and Privacy Manager to investigate and attempt to settle the matter; however, the matter was not resolved.

[para 3] The Complainant requested and the Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

II. ISSUES

The Notice of Inquiry set out the issues for this inquiry as follows:

¹ Complainant's Request for Review/Complaint. I have assumed for the purposes of this inquiry that at the time the Complainant made the complaint on behalf of her minor children, at the time the inquiry was confirmed, and during the course of this inquiry, the criterion under section 84(1)(e) of the Act were met. Even if this was not the case, my analysis and conclusion that the collection of the children's personal information in these circumstances did not contravene the Act would remain the same.

- 1. Did the Public Body collect the Complainant's personal information and that of her minor children? If yes, did it do so in compliance with or in contravention of section 33 of the Act?**
- 2. Did the Public Body collect the Complainant's personal information directly or indirectly? If indirectly, did it do so in compliance with or in contravention of section 34 of the Act?**
- 3. Did the Public Body use the Complainant's personal information and that of her minor children? If yes, did it do so in compliance with or in contravention of section 39(1) and 39(4) of the Act?**

If the Public Body is relying on section 39(1)(a), the parties should also make submissions as to whether the requirements of section 41 are met.

- 4. Did the Public Body disclose the Complainant's personal information and that of her minor children? If yes, did it have the authority to do so under sections 40(1) and 40(4) of the Act?**

[para 4] I note that the Complainant made a number of additional complaints in her Request for Review/Complaint, such as that an organization and the Complainant's employer disclosed personal information about her minor children to the Public Body, which, while within the jurisdiction of this Office, do not form part of this inquiry. Other complaints raised by the Complainant, such as her complaint that the disclosure of the pictures of herself and her minor children by the Public Body to her employer contravened another piece of legislation that had not yet come into force, likewise do not form part of this inquiry.

[para 5] Along with the pages from her Facebook account, the Complainant also attached other records she received from the Public Body, including pages from other internet sites; however, as she only specifically complained about the Public Body accessing and printing the pictures of her, and of her minor children, from her Facebook account, and providing these pictures to various members of the Public Body and to her employer in contravention of the Act, this inquiry will not consider whether the Public Body collected personal information about the Complainant or her minor children from these other internet sites in contravention of the Act.

III. DISCUSSION OF ISSUES

- 1. Did the Public Body collect the Complainant's personal information and that of her minor children? If yes, did it do so in compliance with or in contravention of section 33 of the Act?**

[para 6] In the Complainant's Request for Review/Complaint she stated:²

WCB illegally access [sic] my facebook account printed pictures of myself/children →
Received in my FOIPP pkg. May 3/17.

² Complainant's Request for Review/Complaint at page 3.

[para 7] The Complainant further stated in her Request for Review/Complaint:³

Printed and disbursed [sic] to various members of WCB + [Complainant's employer]. WCB printed pictures of my children without my knowledge or consent printed and distributed again received in my FOIPP pkg. May 3.17. Also can see sent to my employer. My children have no business dealings with WCB, therefore [they] should not even have access to their AHC#, names D.O.B. or pictures. (AHC#, names, DOB) supplied by [organization] and [Complainant's employer]. Breach [sic] of my childrens [sic] privacy.

[para 8] The definition of "personal information" is set out in section 1(n) of the Act 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 9] Prior Orders of this Office have held that photographs of an individual, where the individual is identifiable, is personal information about an individual, even if the person's name does not appear with the photograph (see, for example, Orders F2002-001 at para. 10, F2014-37 at para. 8, and F2020-16 at paras. 28 and 31 – 33).

³ *Ibid.*

[para 10] The Complainant submitted that in response to an access request she made to the Public Body, the Public Body provided her with copies of pictures of herself, and pictures of her minor children, which the Public Body had collected from her Facebook account. She provided copies of the pages with the pictures with her Request for Review/Complaint.

[para 11] Based on the submissions of the parties in this inquiry, I understand that the pictures of the Complainant and her minor children which the Complainant complains the Public Body collected, were collected by the Public Body online from the Complainant's public Facebook account.

[para 12] The Public Body did not make any arguments in its submission that the photographs of the Complainant and of her minor children were not their personal information.

[para 13] The copies of the pictures submitted by the Complainant with her Request for Review/Complaint are in black and white and of very poor quality. While it is difficult from some of these copies for me to make out the facial features, or even the presence of people in some of the photographs, I accept the Complainant's submission that the photographs the Public Body collected from the Complainant's public Facebook account and provided to the Complainant in response to her access request, are photographs of the Complainant, and of her minor children, and that they could be identifiable by someone who knew them. Accordingly, I find that the images of the Complainant are her personal information, and the images of her minor children are their personal information under the Act.

[para 14] Section 33 of the Act 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 15] In its initial submission, the Public Body stated:⁴

On February 22, 2016, [name of doctor] submitted a medical report to WCB indicating [the Complainant] was seen by him for [medical information] due to [medical information] at work that have been ongoing for the last [period of time]. The symptoms were listed as [medical information].

[para 16] The Public Body stated that the Complainant was asked to submit a Worker Report of Injury or Occupational Disease regarding her injury to WCB (the Report). The Report was received by the WCB on the February 24, 2016. In its initial submission, the Public Body

⁴ Public Body's initial submission at page 3.

provided the information the Complainant included on her Report regarding her injury, and the Complainant's stated causes of her injury. The Complainant stated on her Report that there were certain witnesses to the actions she described.⁵

[para 17] The Public Body stated:⁶

[The Complainant] sent a 14 page letter to WCB, dated February 20, 2016, detailing alleged events that she experienced while in the course of her employment with [name of employer]. She indicated she had witness statements relative to her complaint but refused to provide them to WCB.

The WCB claim owner needed to make an informed decision as to [the Complainant's] entitlement to WCB benefits and/or services as a result of her reported workplace [cause] leading to [medical information].

The claim owner required the assistance of a claims investigator to obtain details relative to the complainant's submission to WCB. WCB Business Procedure 20.6: Investigation Unit Referrals (Tab 1) deals with referral of claims to the Investigations Unit, where the claim owner requires more information in order to make an entitlement decision. On March 9, 2016, a referral was made and a claims investigator assigned to collect personal information relative to her claim for compensation.

On December 1, 2016, the claim owner informed [the Complainant] that she was unable to accept her claim (Decision letter – Tab 2).

[para 18] With respect to its authority to collect the Complainant's personal information under section 33 of the Act, the Public Body stated (emphasis in submission):⁷

The WCB is specifically charged with the duty to ensure workers receive the benefits and services that they are entitled to. That determination cannot occur in a vacuum and the WCB necessarily requires the ability to verify allegations and claims, especially when faced with inconsistent evidence. In order to ensure claims are accepted as work related appropriately, it is necessary to gather the relevant evidence, including the details of the work incident, worker statements, and witness statements.

Section [sic] 17, 18, 20 and 36 of the Workers' Compensation Act authorize the WCB to examine all matters arising under the *WC Act* and conduct investigations into matters concerning the administration of the *Act*.

Section 17(1) of the *WC Act* states:

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.

⁵ *Ibid.*, at pages 3 and 4.

⁶ *Ibid.*, at page 4.

⁷ *Ibid.*, at pages 4 and 5.

Section 18(2) of the *WC Act* states:

The Board or a person authorized in writing by the Board for the purpose may on its or the authorized person's own initiative or on complaint of a person interested, investigate any matter concerning the due administration of this Act.

Section 20 of the *WC Act* states:

For the purposes of conducting an investigation under this Act, the Board or other person conducting the investigation has all the powers, privileges and immunities of a commissioner appointed under the Public Inquires Act.

Section 36 of the *WC Act* states:

The Board may require from any person entitled to compensation, whether a worker or dependant, particulars of that person's place of residence, address and other information relative to the disability and compensation, that it considers necessary, and pending the receipt of those particulars, the Board may withhold compensation payments.

Based on WCB's authority under section [sic] 17, 18, 20 and 36 of the *WC Act*, the *FOIP Act* allows for the collection of [the Complainant's] personal information under section 33(a).

The information obtained during the investigation was collected for the purpose of clarifying the complainant's activity level, work activity level and state of mind in relation to the relevant time line, in order to assist the adjudicator [to] establish whether [the Complainant's] [medical information] was work related and make a decision regarding entitlement. Therefore, the *FOIP Act* allows for the collection of [the Complainant's] personal information by the WCB under sections 33(a) and (c).

[para 19] The Public Body further submitted:⁸

The following Order from the OIPC has previously established that considerable latitude is given by this Office to the WCB in deciding whether the collection of personal information is necessary.

[para 20] The Public Body then referenced the former Commissioner's comments in Order 2001-004, in which the former Commissioner discussed the Public Body's legislative authority to collect personal information under section 32(a) (now section 33(a)) of the Act. At paragraph 18, the former Commissioner stated:⁹

[para 18] In Order 98-002, I said that the Public Body's legislative authority to collect personal information under section 32(a) of the *FOIP Act* is contained in sections 29 and 31 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

⁸ *Ibid.*, at page 5.

⁹ *Ibid.*, at page 6. The Public Body noted that section 29 of the *WC Act* is now section 34, and section 31 of the *WC Act* is now section 36.

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 21] In conclusion on this issue, the Public Body stated:¹⁰

In order for the WCB to properly adjudicate and manage workers’ compensation claims, it must rely on the collection of information from various sources. In this case, the collection of information from the on-line sites was authorized under the WC Act and was related to making a determination on the claim. Although the information was not included in the final investigation report prepared by the investigator, the information collected by the claims investigator was relevant to her investigation as it pertains to [the Complainant’s] activity level, work level and emotional state from the established timeframe of events leading up to the submission of her claim to WCB. Therefore, the collection of information by the claims investigator related to [the Complainant’s] activity levels, both in and out of work was permitted under sections 34(3) [sic] of the FOIP Act.

[para 22] The Public Body subsequently clarified that its reference to “sections 34(3)” in the last sentence of the paragraph reproduced in paragraph 21 above was a typographical error and that it had intended to reference sections 33(a) and (c).¹¹

[para 23] The Public Body further submitted that while the information collected was ultimately held to be “non-responsive” to the question before the [WCB] adjudicator and hence not referenced in the claim investigator’s report, “[t]hat is invariably an after-the-fact analysis, which does not render the process of collection invalid or unauthorized.”¹²

[para 24] In support of its position, the Public Body cited the comments of the adjudicator in Order F2012-05 at paragraph 30:¹³

[para 30] I note that the Public Body does not need to rely on all information collected when making a determination under the WCA, in order for that collection of information to be authorized under the FOIP Act. Often at least some of the information collected will not ultimately be relied on to make the determination; part of a case manager’s job is to sort through the information that they have sought out or that is presented to them, to decide what is relevant. It would not be practical to thwart the work of investigators carried out in good faith, by the prospect that after the fact, what they collect will be judged, with hindsight, to be irrelevant as evidence and the collection to have been unauthorized. In my view, the investigator may collect any information that could reasonably be said to be related to the matter under investigation and potentially relevant. It need not ultimately be proven to be relevant in fact.

¹⁰ *Ibid.*, at page 6.

¹¹ Public Body’s email dated August 18, 2021.

¹² Public Body’s initial submission at page 6.

¹³ *Ibid.*

[para 25] I also note that in Order F2018-79, the adjudicator said this with respect to a review by this Office of the Public Body's compliance with the Act:

[para 30] Previous Orders have also stated that deference must be given to those in the Public Body making determinations about a claimant's eligibility for compensation (see Orders 2001-004, F2013-55). This deference extends to determining what information to disclose to an examining physician in order to obtain an opinion.

[para 26] In my view, taking into account the previous Orders of this Office mentioned above, deference should be given to those in the Public Body making decisions about what information to collect, and the manner in which to collect that information in light of the circumstances, in order to make a determination about a claimant's entitlement to benefits and/or services under the *Workers' Compensation Act*, R.S.A. 2000, c. W-15 (the *WC Act*).

[para 27] I further note the following comments of the adjudicator in Order F2018-12, which involved the Public Body, with respect to the collection of personal information by a public body under section 33:

[para 12] I take the Complainant's point that there may have been other ways for the Public Body to conduct its investigation in relation to her husband reasonably, without gaining access to her financial records. However, section 33 of the FOIP Act does not limit the amount of information a public body may collect, or require a public body to obtain personal information in a less intrusive manner. Provided that a public body's purpose in collecting personal information falls within the terms of section 33(a), (b), or (c), the public body's collection of personal information will not contravene the FOIP Act. As noted above, the Public Body's collection in this case was for the purpose of an investigation and falls within the terms of section 33(b).

[para 28] Additionally, I note the following comments of the adjudicator in Order F2018-13, which also involved the Public Body, regarding the collection of personal information by a public body under section 33(b) (collection for the purposes of law enforcement) of the Act:

[para 12] The Complainant's argument appears to be that the Public Body should have known that he had not committed fraud and therefore should not have conducted the investigation it did. Further, he questions the extent of the personal information the Public Body collected in conducting the investigation. Section 33 of the FOIP Act does not give me jurisdiction to review whether a public body *should* have conducted a law enforcement investigation, only whether it collected personal information for the purpose of a law enforcement investigation. In this case, the Public Body clearly exercised its authority to conduct such an investigation.

[para 13] Further, section 33 of the FOIP Act does not impose limits on the amount or kind of personal information a public body may collect or require a public body to collect personal information in the least intrusive manner possible. Rather, if information is collected for the purposes of law enforcement, the collection is authorized by section 33(b).

[para 29] In summary, Orders F2018-12 and F2018-13 establish that if a public body's purpose in collecting personal information falls within the terms of sections 33(a), (b) or (c), the public body's collection of personal information will not contravene the Act. Furthermore,

section 33 of the Act does not impose limits on the amount or kind of personal information a public body may collect or require a public body to collect personal information in the least intrusive manner.

[para 30] In this case, the Public Body submitted that the Complainant “indicated she had witness statements relative to her complaint but refused to provide them to the WCB”. The Public Body submitted that “[t]he WCB claim owner needed to make an informed decision as to the Complainant’s entitlement to WCB benefits and/or services as a result of the Complainant’s reported workplace [cause] leading to [medical information]”. The Public Body submitted that “[t]he claim owner required the assistance of a claims investigator to obtain details relative to the Complainant’s submission to the WCB”.¹⁴

[para 31] As noted in paragraph 18 above, the Public Body submitted that “[t]he information obtained during the investigation was collected for the purpose of clarifying the complainant’s activity level, work activity level and state of mind in relation to the relevant time line, in order to assist the adjudicator [to] establish whether [the Complainant’s] [medical information] was work related and make a decision regarding entitlement.”

[para 32] In Order F2012-05, the adjudicator stated (my emphasis):¹⁵

[para 25] Determining an individual’s entitlement to compensation under the WCA is clearly a matter concerning the administration of that Act; an investigation undertaken to make that determination is authorized under section 18(2) of the WCA. The ability to compel any documents the Public Body requires in conducting an investigation (section 20 of the WCA and the *Public Inquiries Act*) and the authority to request any information relative to compensation that the Public Body considers necessary from an individual who is entitled to that compensation (section 36 of the WCA) permits the Public Body to collect the Complainant’s personal information for the purpose of determining whether she was entitled to compensation as a “dependant” under the WCA. The collection was therefore authorized within the terms of section 33(a) of the FOIP Act, which permits collection that is expressly authorized by an enactment.

[para 33] Section 33(a) of the Act allows a public body to collect personal information where the collection of that information is expressly authorized by an enactment of Alberta or Canada. The Complainant had applied for benefits under the *WC Act*. In my view, the sections of the *WC Act* relied on by the Public Body in this inquiry authorized the Public Body to collect the Complainant’s personal information.

[para 34] Section 33(c) of the Act allows a public body to collect personal information where that information relates directly to and is necessary for an operating program or activity of the public body. The Public Body has explained that the Complainant was not being forthcoming with information it required in order to determine the Complainant’s entitlement to benefits and/or services. The Public Body explained that it sought information in order to determine the Complainant’s eligibility for benefits, which is an operating program or activity of the Public

¹⁴ *Ibid.*, at page 4.

¹⁵ See also Order F2013-55 at paragraphs 22 – 24.

Body. I find that in this case, the Public Body was also authorized under section 33(c) of the Act to collect the Complainant's personal information.

[para 35] With respect to the collection of the Complainant's minor children's images on the Complainant's public Facebook page, the Public Body made the following submission:¹⁶

As part of the investigation into WCB claim file matters, some images and personal information of other individuals, including the Complainant's children, were collected incidentally. The other individuals were not the focus of the investigation. The search conducted by the investigator was not based on name(s) of other individuals or family members associated with the worker.

[para 36] The Public Body submitted that its authority to collect this information was related to the authority to collect the Complainant's personal information in order to determine her eligibility for benefits.¹⁷

[para 37] In Order F2014-37, an individual complained that the Public Body collected her image in contravention of Part 2 of the Act when she was videotaped by an investigator with the Public Body who was conducting video surveillance on her mother, a WCB claimant, while she accompanied her mother in a store.

[para 38] As noted by the adjudicator in Order F2014-37 at paragraph 11:

[para 11] The Complainant's expectation of privacy is not the issue in this inquiry. The issue is whether the Public Body has authority to collect the Complainant's personal information. That is, whether or not the Complainant had an expectation of privacy because she was in a public place, the Public Body still requires authority under the FOIP Act to collect her personal information; it is this authority that is the issue in this inquiry.

[para 39] Likewise, the Complainant's minor children's expectation of privacy is not the issue in this case. The issue is whether the Public Body had the authority to collect the Complainant's minor children's personal information. That is, whether or not the Complainant's minor children had an expectation of privacy when their images were posted on the Complainant's public Facebook page, the Public Body still requires authority under the Act to collect their personal information; it is this authority that is in issue in this inquiry.

[para 40] At paragraph 12 of Order F2014-37, the adjudicator stated:

[para 12] That said, I agree that the Public Body's authority to collect the Complainant's personal information is related to its authority to collect the Claimant's personal information
...

[para 41] At paragraph 19 of Order F2014-37, the adjudicator stated:

¹⁶ Public Body's initial submission at page 7.

¹⁷ *Ibid.*, at page 8.

[para 19] As noted, section 33(b) authorizes the collection of personal information if that collection is for the purposes of law enforcement; this provision does not limit information that may be collected under it to information about the *subject* of a law enforcement investigation.

[para 42] At paragraph 20 of Order F2014-37, the adjudicator concluded that the purpose for which the personal information of the complainant (who was the daughter of the individual making a WCB claim) was collected by the Public Body in the surveillance tape was a law enforcement investigation. The adjudicator concluded in paragraph 26 that the Public Body was authorized to collect the complainant's personal information under Part 2 of the Act.

[para 43] The Complainant in this case had made an application for benefits under the *WC Act*. Applying a similar analysis as the adjudicator in Order F2014-37, I find that sections 33(a) and (c) of the Act do not limit the information that may be collected under these sections to information about the person making the claim for benefits under the *WC Act*, when the Public Body is determining that person's entitlement to benefits and compensation under the *WC Act*.

[para 44] I find that the collection of the Complainant's minor children's images by the Public Body from the Complainant's public Facebook page occurred incidentally during the course of the collection of the Complainant's personal information for the purpose of determining the Complainant's entitlement to benefits and compensation under the *WC Act*. I find that the collection was permitted under sections 33(a) and (c) of the Act.

2. Did the Public Body collect the Complainant's personal information directly or indirectly? If indirectly, did it do so in compliance with or in contravention of section 34 of the Act?

[para 45] Section 34(1) of the Act requires a public body to collect personal information directly from the individual the information is about, unless one of the subsections of section 34(1) applies.

[para 46] Section 34(2) of the Act states that 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 47] Section 34(3) states:

- (3) *Subsections (1) and (2) do not apply if, in the opinion of the head of the public body concerned, it could reasonably be expected that the information collected would be inaccurate.*

[para 48] The Public Body submitted that the collection of online information from a worker's online site and postings was a direct collection and analogous to collection by surveillance, which had been held by this Office to be a form of direct collection. It cited the following comments of the adjudicator in Order F2014-37 in support of its position:¹⁸

[para 23] The Public Body states that the collection of the Complainant's personal information was a direct collection. I agree. Indirect collection is collection from a source other than the individual the information is about. It seems somewhat unusual to say that an individual can provide information directly to a public body without knowing it; nevertheless, this lack of awareness does not mean that the collection is indirect. Previous Orders of this Office have also concluded that video surveillance is a direct collection (see Orders F2006-018, at para. 22; P2008-008, at para. 90).

[para 49] The Public Body stated "It is her information that she posted and hence directly from her".¹⁹

[para 50] The Public Body further argued that section 34(3) applied in this case. It stated:²⁰

It is reasonable to expect that if an investigator informed an individual they were referencing their on-line social media accounts in order to review their activities as they compare to their stated activity levels, the individual may alter their postings, suspend their accounts, hide them from view by changing privacy settings or delete them entirely, thereby rendering the information unavailable or inaccurate. Thus, to inform here would likely and reasonably nullify the utility of that part of any investigation.

[para 51] I note the following comments of the adjudicator in Order F2006-018, which also involved the Public Body:

[para 22] The Public Body submits that the video surveillance was a direct collection of the Complainant's personal information under section 34(1) of the Act. I agree. It has previously been concluded that an individual's image captured on video is personal information, and that videotaping is a collection of information directly from the individual the information is about (Report F2003-IR-005 at paras. 11 and 17). I also note a B.C. Order in which it was determined that information is collected directly from an individual when the disclosure to the public body occurs as a result of the individual's own activities (B.C. Order F07-18 at para. 104). I therefore find that the information on the surveillance videotape and in the video surveillance report was collected directly from the Complainant.

[para 23] The Complainant states that she did not consent to the collection of her personal information by way of video surveillance and did not know it had been done until November 2002. In Order F2006-019 (at para. 32), I conclude that whenever a public body chooses to collect information directly from an individual, it is required to fulfill the notice requirements set out in section 34(2) of the Act, even if the collection could have been done indirectly under section 34(1). Section 34(2) requires the public body to inform the individual of the purpose for the collection, the legal authority for it, and contact information

¹⁸ *Ibid.*, at page 7.

¹⁹ *Ibid.*

²⁰ *Ibid.*

of an officer or employee of the public body who can answer questions. There is an exception to this where section 34(3) applies because it could reasonably be expected that, if the individual were informed about the collection, the information collected would be inaccurate.

[para 24] Here, the Public Body collected the information on the surveillance videotape and in the video surveillance report directly from the Complainant. It submits that the exception to informing the Complainant about the collection applies because if individuals were informed that they were the subject of an investigation and were going to be videotaped, they would alter their actions thereby rendering the collected information inaccurate. I agree that this could reasonably be expected and therefore do not find that the Public Body had to fulfill the notice requirements set out in section 34(2) of the Act.

[para 25] As the video surveillance was conducted in a manner that fell under the exception set out in section 34(3) of the Act, the manner of collection of the Complainant's personal information on the videotape and in the accompanying report was in accordance with the Act, even though it was a direct collection and the Complainant was not informed about it.

[para 52] The information before me is that the photographs the Complainant complains the Public Body collected from her Facebook account, were publically available on her Facebook account. There is no evidence before me that the photographs the Complainant complains the Public Body collected from her public Facebook account were posted by anyone other than the Complainant.

[para 53] Taking into account the prior Orders of this Office referenced herein, I agree with the Public Body's submissions and find that the collection of the Complainant's images from her public Facebook account was a direct collection by the Public Body under section 34(1) of the Act, and that section 34(3) applies in this case.

[para 54] If I am incorrect in my determination that this was a direct collection, I will also consider whether the collection was permissible as an indirect collection.

[para 55] I note that in Order F2012-05, the adjudicator found that the collection by the Public Body of the complainant's personal information from a source other than the complainant, was permitted under section 34(1)(k)(i) of the Act. Section 34(1)(k) states:

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

...

(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 public body and is collected for this purpose.*

[para 56] In Order F2012-05, the adjudicator stated:²¹

[para 25] Determining an individual's entitlement to compensation under the WCA is clearly a matter concerning the administration of that Act; an investigation undertaken to make that determination is authorized under section 18(2) of the WCA. The ability to compel any documents the Public Body requires in conducting an investigation (section 20 of the WCA and the *Public Inquiries Act*) and the authority to request any information relative to compensation that the Public Body considers necessary from an individual who is entitled to that compensation (section 36 of the WCA) permits the Public Body to collect the Complainant's personal information for the purpose of determining whether she was entitled to compensation as a "dependant" under the WCA. The collection was therefore authorized within the terms of section 33(a) of the FOIP Act, which permits collection that is expressly authorized by an enactment.

[para 26] As the collection is to determine entitlement to compensation, section 34(1)(k) authorizes the indirect collection of personal information for that purpose. The Public Body cited section 34(1)(k)(ii) even though it appears that the Complainant was not receiving spousal benefits from the WCA at the time of her claim. I will assume the Public Body made an error and intended to cite section 34(1)(k)(i), which encompasses the application for a 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 an order from this office, in which former Commissioner Work stated,

In Order 98-002, I said that the Public Body's legislative authority to collect personal information under section 32(1) [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 and relative to the disability and the 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.

...

²¹ See also Order F2013-55 at paragraphs 25 - 29.

[para 30] I note that the Public Body does not need to rely on all information collected when making a determination under the WCA, in order for that collection of information to be authorized under the FOIP Act. Often at least some of the information collected will not ultimately be relied on to make the determination; part of a case manager's job is to sort through the information that they have sought out or that is presented to them, to decide what is relevant. It would not be practical to thwart the work of investigators carried out in good faith, by the prospect that after the fact, what they collect will be judged, with hindsight, to be irrelevant as evidence and the collection to have been unauthorized. In my view, the investigator may collect any information that could reasonably be said to be related to the matter under investigation and potentially relevant. It need not ultimately be proven to be relevant in fact.

[para 57] As noted in paragraph 21 above, the Public Body stated in its submission:

In order for the WCB to properly adjudicate and manage workers' compensation claims, it must rely on the collection of information from various sources. In this case, the collection of information from the on-line sites was authorized under the WC Act and was related to making a determination on the claim. Although the information was not included in the final investigation report prepared by the investigator, the information collected by the claims investigator was relevant to her investigation as it pertains to [the Complainant's] activity level, work level and emotional state from the established timeframe of events leading up to the submission of her claim to WCB. Therefore, the collection of information by the claims investigator related to [the Complainant's] activity levels, both in and out of work was permitted under sections 34(3) [sic] of the FOIP Act.²²

[para 58] If I consider the Public Body's collection of the Complainant's personal information from her public Facebook account to be an indirect collection of her personal information, then given the explanation that the Public Body provided as to the purpose for which it collected the information from the Complainant's public Facebook account, in my view section 34(1)(k)(i) applied to permit the Public Body to collect this information indirectly.

3. Did the Public Body use the Complainant's personal information and that of her minor children? If yes, did it do so in compliance with or in contravention of section 39(1) and 39(4) of the Act?

If the Public Body is relying on section 39(1)(a), the parties should also make submissions as to whether the requirements of section 41 are met.

[para 59] Sections 39(1), 39(4) and 41 of the Act state:

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,

²² As previously noted, the Public Body subsequently advised that the reference to "sections 34(3)" was a typographical error and it meant to reference "sections 33(a) and (c)".

- (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.*

...

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 60] The Public Body stated in its submission that the information collected was ultimately held to be “non-responsive” to the question before the (WCB) adjudicator and hence was not referenced in the claim investigator’s report.

[para 61] The Public Body submitted that it did not use the information it collected from the on-line sources. It stated:²³

The WCB submits that it did not use the information it collected from the on-line sources. None of that information was ultimately used to make decisions respecting her claim for benefits.

[para 62] In Order F2012-05, the adjudicator considered a similar argument by the Public Body. At paragraphs 41 – 44, the adjudicator stated:

[para 41] Under the FOIP Act, a public body may use personal information for the purpose for which it was collected (section 39(1)(a)). Although the Public Body argues that it did not use the particular information at issue, I have found that it *was* used, either in making the determination about the Complainant’s status, or at least to thoroughly document what evidence had been reviewed. Both of these activities are logically related to the purpose for which the information was collected; in other words, the information as collected as part of the investigation into the Complainant’s claim under the WCA, and was used by the case manager in her resulting determination and in preparing the related letter. The case manager would equally have been “using” the information at issue had she explained in her letter why she was rejecting the information as a basis for making her decision (had that in fact been the case), and in my view she would be authorized to do so.

²³ Public Body’s initial submission at page 8.

[para 42] If this office were to make decisions as to whether the use of information was authorized based on whether or not it agreed that the particular information was a relevant item of evidence in the Public Body's process, it would be treading on the jurisdiction and work of the Public Body and the WCA. In my view, certainly so long as these bodies are gathering and evaluating evidence in good faith and the belief that it may be or is relevant, it is not my role to second-guess their performance of these duties. Given, as I have found that the collection of the information was authorized, whether the case manager accepted or rejected it as relevant, or whether she was right to do whichever of these things she did, does not bear on my determination. As long as she was using the information in the good faith performance of her duties, she was using it for the purposes for which it was collected, and was authorized to do so by section 39(1)(a). If her conclusions were wrong in law, the appeal process was the means by which this could be rectified. It is not the role of this office to provide a mechanism for a collateral attack on the Public Body's processes and the case manager's decision.

[para 43] The same points apply to whether the terms of section 39(4) of the FOIP Act were met. This provision requires a public body to use personal information only to the extent necessary to fulfill its purpose in a reasonable manner. The case manager considered the information that had been presented to her by the claims investigator to enable her to make her determination and issue her decision, as she was entitled to do. There is nothing to suggest that she used the information for any extraneous or bad-faith purpose. She did not need to have been correct as a matter of law as to the significance to be accorded the information in order for her performance of this function to have been done in a reasonable manner.

[para 44] I find that the Public Body's use of the information was authorized under sections 39(1)(a) and 39(4).

[para 63] The facts before me are not exactly the same as the facts before the adjudicator in Order F2012-05. As I understand the Public Body's submission, the claims investigator did not include the Complainant's or her minor children's photographs collected from the Complainant's public Facebook account in the final investigation report prepared by the claims investigator. As I understand the Public Body's submission, the images were not provided by the claims investigator to the claim owner, who was ultimately responsible for making a decision regarding the Complainant's entitlement to benefits under the *WC Act*. On this basis, I accept the Public Body's submission that it did not use the Complainant's images or the images of her minor children to make a determination regarding the Complainant's claim for benefits, and conclude therefore that there was no contravention of section 39 of the Act.

[para 64] If, however, I am incorrect and the claims investigator's review of the images the claims investigator collected in order to determine whether the images were relevant to the Complainant's claim for benefits, constituted a "use" of that information by the Public Body, then following the reasoning applied by the adjudicator in Order F2012-05, I find that the use complied with sections 39(1)(a) and 39(4) of the Act, as well as with section 41 of the Act. There is nothing before me to suggest that the claims investigator collected or used the Complainant's or her minor children's images for any extraneous or bad-faith purpose.

4. Did the Public Body disclose the Complainant’s personal information and that of her minor children? If yes, did it have the authority to do so under sections 40(1) and 40(4) of the Act?

[para 65] Section 40(1) of the Act sets out the circumstances in which a public body may disclose personal information. Section 40(4) of the Act states that 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 66] The Complainant complained that the images of her and her minor children from her public Facebook account were printed and distributed by the Public Body to various members of the Public Body and to her employer in contravention of the Act. She stated “Also can see sent to my employer”.²⁴

[para 67] In its initial submission the Public Body advised that it confirmed with the claims investigator that the images the claims investigator printed from the internet were not disclosed to other members of the WCB (other than to the Public Body’s FOIP office) or to the Complainant’s employer.²⁵

[para 68] The Public Body stated:²⁶

Hence there was no disclosure. The WCB submits that a disclosure of personal information to the Complainant, to the WCB’s FOIP office to permit it to respond to a FOIP Request and complaint and finally to the OIPC in dealing with a complaint is not the ambit of section 40 of the FOIP Act.

[para 69] The provision by the Public Body’s claims investigator of the Complainant’s and her minor children’s images to the Public Body’s FOIP office in order to enable the Public Body to comply with its responsibilities and respond to the Complainant’s access request under the Act, does not contravene the Act.

[para 70] I do not see anything in the information provided by the Complainant which would support her allegation that the Public Body disclosed her images or the images of her minor children to her employer. Accordingly, I find that the Public Body did not contravene section 40(1) of the Act.

IV. ORDER

[para 71] I make this Order under section 72 of the Act.

[para 72] I find that the Public Body collected the Complainant’s and her minor children’s images from the Complainant’s public Facebook account and that the images are the personal

²⁴ Complainant’s Request for Review/Complaint at page 3.

²⁵ Public Body’s initial submission at page 8.

²⁶ *Ibid.*

information of the Complainant and her minor children. I find that the collection was in compliance with sections 33(a) and (c) of the Act.

[para 73] I find that the Public Body's collection of the Complainant's images from her public Facebook account was a direct collection of her personal information in compliance with section 34(1) of the Act and that section 34(3) applied in this case. If I am incorrect in this finding, I find that an indirect collection of the Complainant's personal information was in compliance with section 34(1)(k)(i) of the Act.

[para 74] I find that the Public Body did not use the Complainant's or her minor children's images to make a determination regarding the Complainant's claim for benefits under the *WC Act*, and I therefore find that there was no contravention of section 39 of the Act. If, however, the act by the claims investigator of reviewing the images to determine their relevance to the Complainant's claim for benefits under the *WC Act* is considered to be a use of this information, then I find that the use was in compliance with sections 39(1)(a), 39(4) and 41 of the Act.

[para 75] I find that the Public Body did not disclose the Complainant's or her minor children's personal information in contravention of section 40 of the Act.

Carmen Mann
Adjudicator
/kh