ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-041

November 30, 2010

WORKERS' COMPENSATION BOARD ALBERTA

Case File Number F4546

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that the Workers' Compensation Board (the WCB) had contravened Part 2 of the *Freedom of Information and Privacy Act* (the FOIP Act) when it used his personal information to make decisions regarding entitlement to compensation. He also complained that the WCB had disclosed his information to his employer, Canada Post, when his case manager had copied Canada Post on correspondence and provided it with a copy of his claim file. He also complained that the Claims Services Review Committee (CSRC), a review body established by section 46 of the *Workers' Compensation Act*, had disclosed his personal information when it sent a copy of its decision to Canada Post. Finally, he complained that the WCB had used inaccurate personal information to make decisions regarding his entitlement to compensation.

The WCB raised the issue of whether the FOIP Act applied to the Complainant's complaint, given that the Complainant's employer is a federal entity and the jurisdiction of the Public Body arises under the *Government Employees Compensation Act* (GECA), which is federal legislation.

The Adjudicator determined that she had jurisdiction to address the Complainant's complaint, as GECA does not have the effect of changing the provincial character of the WCB. She therefore found that the FOIP Act applied to its collection, use, and disclosure of personal information.

She found that the Public Body had not used the Complainant's personal information contrary to Part 2 of the FOIP Act, as the *Workers' Compensation Act*, and by implication, GECA, authorized the WCB to use the Complainant's personal information. However, the Adjudicator found that the WCB had not established that the Complainant's personal information had been disclosed in accordance with Part 2 when the WCB gave the Complainant's claim file to Canada Post. She ordered the Public Body to ensure that it complies with the provisions of Part 2 of the FOIP Act in relation to any future disclosures of the Complainant's personal information.

The Adjudicator found that there were inaccuracies in the Complainant's personal information regarding his work history and that the WCB had used this information to make a decision. She ordered the WCB to ensure the accuracy of this information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 5, 17, 33, 35, 39, 40, 67, 72 ; *Personal Information Protection Act* S.A. 2003, c. P-6.5; *Workers' Compensation Act*, R.S.A. 2000 c. W-15 s. 13, 13.2, 35, 38, 44, 45, 46, 56, 120, 147; Workers' Compensation Regulation A.R. 427/81 s. 9; Workers' Compensation Regulation A.R. 325/2002 s. 11 **CA:** *Government Employees Compensation Act*, R.S.C. 1985, c. G-5, s. 14; *Privacy Act* R.S.C. 1985, c. P-21

Authorities Cited: AB: Orders 99-028, F2006-026, F2007-025, F2008-012, P2006-008

Sopinka, John, et al. *The Law of Evidence in Canada* 2nd ed. Markham: Butterworths, 1999

Cases Cited: *Canada Post Corp. v. Smith* [1998] O.J. No. 1850; *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112; *Caritas Health Group v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 186

I. BACKGROUND

[para 1] On June 13, 2008, the Complainant made a complaint to the Commissioner that the Workers' Compensation Board of Alberta (the WCB) collects and discloses personal information contrary to the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). In particular, he complained that the WCB had disclosed information to his employer, Canada Post. These documents included decisions made by a case manager regarding the Complainant's entitlement to compensation, in addition to medical reports, employment information, and assessments, and a decision made by the CSRC.

[para 2] The Complainant also complained that the WCB had used inaccurate personal information when making decisions on his claim.

[para 3] The Commissioner authorized mediation to resolve the complaint. As mediation was unsuccessful, the matter was scheduled for a written inquiry. On July 2,

2009, a notice of inquiry was sent to the parties. The following issues were identified for the inquiry:

> Did the Public Body use the Complainant's personal information in contravention of Part 2 of the Act?
>
> Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?
>
> Did the Public Body fulfill its duty under section 35(a) of the Act to make every reasonable effort to ensure the personal information it used to make decisions that directly affected the Complainant was accurate and complete?

[para 4] The parties provided initial and rebuttal submissions. In its initial submissions, the WCB raised the question of whether the *Privacy Act* R.S.C. 1985, c. P-21 applies to Applicant's complaint. However, I lack jurisdiction to determine whether federal legislation applies to a complaint. I therefore added the following issue to the inquiry:

> Does the *Freedom of Information and Protection of Privacy Act* apply to the Complainant's complaint?

[para 5] On April 6, 2010, I provided notice to the parties that I had added this issue to the inquiry and provided them with an additional two weeks to make submissions in relation to it. However, neither party chose to make submissions in relation to this question.

[para 6] On June 24, 2010, I asked the WCB the following questions I had regarding its submissions:

A. How would the CSRC decision, for which the Public Body provided Canada Post the Complainant's claim file, have affected Canada Post financially, if at all? Please provide affidavit or other direct evidence to support this answer.

B. I ask the Public Body to provide further explanation for its position that having a direct interest makes Canada Post an employer for the purposes of section 147(3) of the WCA.

C. Does section 147(3) authorize providing information in a worker's claim file to an employer? If so, does it also authorize providing information in an employer's assessment file to a worker? If not, why not?

D. If section 147(3) authorizes disclosure of information relevant to an issue under appeal from a worker's claim file to an employer, and assuming that Canada Post was entitled to receive information relevant to an issue under appeal under section 147(3), how was providing the Complainant's entire claim file to Canada Post authorized by this provision?

E. If section 147(3) authorizes the Public Body to provide all the information in a worker's claim file to an employer so that the employer may use it at a CSRC hearing, how does this purpose correlate to section 9(4) of the Workers' Compensation Regulation, which appears to limit the information to which the parties to an appeal are entitled?

F. Is Canada Post's interest a "direct interest" such that the principles of natural justice required it to be given the Complainant's claim file? For example, does policy 04-02 require a decision maker to consider an employer's premiums when making a decision regarding entitlement to temporary total disability benefits? If not, is the *Nabor's* decision (*supra*) authority for the position that an employer has a direct interest in a worker's appeal if its premiums will increase as a result of the appeal?

G. If natural justice required the Public Body to provide the Complainant's claim file to Canada Post, what provision of section 40 of the FOIP Act would this disclosure fall under?

H. Section 17(5)(1)(c) of the FOIP Act is a factor weighing in favor of disclosure of a third party's personal information if the personal information is relevant to a fair determination of an applicant's rights. Section 40(1)(b) authorizes a public body to disclose information if it would not be an unreasonable invasion of a third party's personal privacy under section 17. Does section 17(5)(1)(c) have any application in the present case? Paragraph 55 of Order F2008-012 contains the criteria for section 17(5)(1)(c).

I. If the Complainant's claim file was provided to Canada Post under the authority of a business procedure or a policy, what provision of section 40 of the FOIP Act would this disclosure fall under?

Following receipt of these questions, the WCB argued that Canada Post and the Minister of Labour were affected by the request for review for the purposes of section 67 and should be notified of the inquiry. I decided to give notice to these parties of the inquiry and invited them to participate. Canada Post initially decided that it would participate at the inquiry but then did not make submissions.

[para 7] The uses and disclosures that are the subject of the Complainant's complaint took place in 2001 and 2002. Consequently the versions of the *Workers' Compensation Act* (WCA) and the FOIP Act in force at the time of the uses and disclosures that are the subject of the complaint are applicable. As the parties referred to the current legislation in their arguments, and as this decision will be published, I have decided to refer to the current provisions where the wording of the previous legislation is the same and to indicate the previous section number in parentheses. Where the previous legislation is different, I will refer to that provision by the original number and reproduce the wording.

[para 8] Although it is customary to refer to public bodies under the FOIP Act as "the Public Body" in orders of this office, for the sake of clarity, I have decided to refer to the WCB as the WCB in this order to distinguish its actions from those of the CSRC, a review body created by section 45 of the WCA. However, in the "order" portion of this Order, I will refer to the head of the Public Body.

II. ISSUES

Issue A: Does the *Freedom of Information and Protection of Privacy Act* apply to the Complainant's complaint?

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?

Issue D: Did the Public Body fulfill its duty under section 35(a) of the Act to make every reasonable effort to ensure the personal information it used to make decisions that directly affected the Complainant was accurate and complete?

III. DISCUSSION OF ISSUES

Issue A: Does the *Freedom of Information and Protection of Privacy Act* apply to the Complainant's complaint?

[para 9] As noted above, in its initial submissions, the WCB raised the issue of whether the FOIP Act applies in this case. It raised this issue because the Complainant is an employee of Canada Post, which is a federal undertaking, and because the Public Body was acting under the authority of the *Government Employees Compensation Act* (GECA), when it adjudicated the Complainant's claim.

[para 10] While the WCB raised the jurisdictional issue, it conceded in its arguments that the FOIP Act applies to any use and disclosure of personal information made by the WCB relating to the Complainant's claim. In his submissions, the Complainant also expressed the view that the FOIP Act applies to his complaint.

[para 11] I am not aware of any cases that would suggest that a provincial workers' compensation board loses its provincial character when it adjudicates claims under GECA and the parties have not brought any to my attention. On the contrary, I note that in *Canada Post Corp. v. Smith*, [1998] O.J. No. 1850. Abella J. (as she then was), speaking for the Ontario Court of Appeal, discussed the scheme created by GECA in the following way:

> The workplace entitlements of Canada Post's employees are covered by, among other statutes, the *Government Employees Compensation Act*, R.S.C. 1985, c. G-5 (GECA). The GECA provides in s. 4(2) that a federal employee covered by it and injured in the course of employment, is entitled to the "compensation" available pursuant to the laws of the province in which the employee usually works. Section 4(2) states:
>
>> 4.(2) The employee or the dependants referred to in subsection (1) are, notwithstanding the nature or class of the employment, entitled to receive compensation at the same rate and under the same conditions as are provided under the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen, employed by persons other than Her Majesty, who
>>
>> (a) are caused personal injuries in that province by accidents arising out of and in the course of their employment;
>>
>> (b) are disabled in that province by reason of industrial diseases due to the nature of their employment. [Emphasis added.]
>
> "Compensation" is defined in s. 2 of the GECA as follows:

> "compensation" includes medical and hospital expenses and any other benefits, expenses or allowances that are authorized by the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen. [Emphasis added.]
>
> The actual compensation is to be determined by the relevant provincial bodies under provincial legislation regulating injured workers. In Ontario, those bodies are the Workers' Compensation Board (the Board), and, on appeal, the Workers' Compensation Appeals Tribunal (the Tribunal). [My emphasis]

[para 12] The Ontario Court of Appeal determined that the Ontario Workers' Compensation Appeals Tribunal was entitled to the same curial deference when evaluating federal claims as it was when determining the claims for compensation of provincial workers, as provincial laws determined the standard of deference. The Court concluded:

> The various provincial laws, not the GECA, set out the relevant boundaries of the compensation schemes for injured workers. The GECA is merely the statutory vehicle for transferring authority over these issues to the appropriate provincial bodies (s. 4(3)), thereby inferentially absorbing all compensation-related rights and benefits provisions in provincial statutes (s. 4(2)). As the expert body and designated interpreter of this legislation in Ontario, the Tribunal's decisions in this regard are entitled to curial deference absent clear irrationality. [My emphasis]

[para 13] The WCB is a public body as defined by section 1(p)(ii) of the FOIP Act and is therefore subject to the FOIP Act. The FOIP Act imposes duties regarding the collection, use, and disclosure of personal information on the Public Body when it adjudicates claims for compensation. Moreover, by virtue of section 5 of the FOIP Act, those duties are paramount over provisions in the WCA in the event of conflict. As the Ontario Court of Appeal held in *Canada Post Corp*., when a provincial workers' compensation board, such as the WCB, adjudicates the claims of federal workers, it applies provincial legislation. The limits on its authority are similarly established by provincial legislation. Adjudicating claims for compensation under the provincial workers' compensation legislation necessitates collecting, using and disclosing the personal information of workers, and the WCA and the FOIP Act contain express provisions regarding the collection, use, and disclosure of such information. As the adjudication of claims for workers' compensation is governed by provincial laws, I find that the FOIP Act applies to the Complainant's complaint that his personal information was improperly used and disclosed.

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

[para 14] The Complainant argues that GECA limits the WCB's authority to use personal information to making determinations regarding the amounts of compensation payable to a worker entitled to compensation. He reasons that the WCB lacks authority to use personal information for the purpose of making other kinds of decisions, such as determining entitlement to compensation or fitness for work, which he believes are

decisions within the exclusive jurisdiction of his employer. He makes the following argument:

> I argue the WCB's only right to the collection of my personal information is clearly for determining compensation payments. On page 13 of my submission I state "The WCB should only use collected personal medical information to determine the amount of injury insurance benefits the worker is entitled to and as such restrict the release of such information." I have included the *Government Employees Compensation Act* … with this response and it clearly shows what authority has been transferred to the provincial compensation boards. This document clearly communicates the limitations of this transfer. There is no provision in GECA for the WCB to assist the employer in administering employee relations and certainly not the right to assist with disciplinary procedures. This is exactly what the WCB case manager was doing with her collection of information, release of documents and opinions.
>
> Canada Post as the employer has the obligation to collect its own medical reports and opinions to determine fitness to work and the type of work that may be done and when. GECA does not transfer this function to the WCB, but this has become the norm at Canada Post and is clearly an abuse. This is happening due to the overzealous approach of the WCB when collecting medical information and its release. Canada Post has become complacent. Supervisors and management are content to let the WCB do their work for them and manage employment conditions through the collection of WCB documents. The relationship between the two goes far beyond that of the WCB being the administrator of compensation claims only.

[para 15] The Complainant argues that the WCB should not have used the information of its medical advisors to make decisions regarding his entitlement. He argues:

> The employer should be responsible for obtaining it own medical opinion on modified duties with regards to my employment. The WCB should only use collected personal medical information to determine the amount of injury insurance benefits the worker is entitled to and as such restrict the release of such information.

[para 16] As noted above, I agree with the view of the Ontario Court of Appeal in *Canada Post Corp.* that the effect of GECA is to transfer the authority to adjudicate federal workers' compensation claims to provincial boards under their home statutes. Consequently, the authority of the WCB to use a worker's personal information in order to adjudicate a claim for compensation will lie in the WCA and not GECA. Whether the Public Body has used the Complainant's personal information in accordance with Part 2 of the FOIP Act is determined by section 39 of the FOIP Act (previously section 37 of the FOIP Act).

[para 17] Section 39 of the FOIP Act, sets out the circumstances in which a Public Body may use personal information. It 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) 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 18] Section 39(1)(a) must be read in conjunction with section 33, which limits the purposes for which a public body may collect the personal information it uses. Section 33, (previously section 32), states in part:

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.

A public body may use information for the purpose for which it was collected under section 39(1)(a), provided that it was collected for a purpose enumerated in section 33.

[para 19] Section 38 of the WCA, (previously section 33 of the WCA) authorizes the WCB to require workers to undergo medical examinations and provide results to it in order for it to fulfill its function in determining entitlement to compensation. Section 38 states in part:

38(1) A worker claiming compensation or to whom compensation is payable under this Act shall, if the Board requires it, undergo a medical examination by a physician selected by the Board and at a time and place determined by the Board and the Board shall pay the costs of that examination.

(2) If a worker contravenes subsection (1) or in any way obstructs an examination,

(a) the worker's right to compensation is suspended until the examination has taken place, and

(b) the worker's condition as found by the examination is, unless the Board otherwise directs, deemed to have been the worker's condition at the date for which the examination was called.

(3) If a worker claims compensation under this Act the Board, in order to assist it in determining the worker's entitlement to compensation, may

(a) require that a medical investigation be conducted in respect of the worker in the manner it considers necessary, or
(b) accept the results of a medical investigation already conducted in respect of that worker,
and, in either case, the Board may pay the costs of the investigation…

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

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…

"Personal information" under the FOIP Act is not defined exhaustively and includes information about an identifiable individual that is recorded in some form.

[para 21] The information that the Complainant argues was used by the WCB contrary to Part 2 of the FOIP Act consists of opinions about the Complainant's medical condition and fitness for work, and is therefore his personal information under section 1(n) of the FOIP Act. I note that the records submitted by the Complainant indicate that a case manager and a CSRC member used this information to make decisions regarding his entitlement to compensation.

[para 22] The evidence before me supports a finding that the WCB used the Complainant's personal information for the purpose for which it was collected;

specifically, the case manager and the CSRC member used the information obtained through medical investigation to determine entitlement to compensation under the WCA, which was the WCB's reason for collecting the information. Further, the WCB collected information that it is expressly authorized to collect under an enactment of Alberta for the purposes of section 33 of the FOIP Act, namely section 38 of the WCA.

[para 23] In his submissions, the Complainant also complains about his employer's use of his personal information at a labour arbitration. However, the scope of this inquiry is limited to reviewing the WCB's treatment of the Complainant's personal information, and not that of Canada Post.

[para 24] I therefore find that the WCB's use of the Complainant's personal information was in compliance with section 39 of the FOIP Act, and therefore, Part 2 of the FOIP Act.

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

[para 25] In Order P2006-008, the Commissioner explained the burden of proof in relation to complaints made under PIPA in the following way:

> Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information. This initial burden is what has been termed the "evidential burden". As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act.

[para 26] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, Yamauchi J. approved this approach to the burden of proof in complaints made under the FOIP Act. He said:

> FOIPPA s. 71 deals with the burden of proof when a person seeks access to records. In some cases, the burden rests on the applicant. In others, the burden rests on the head of the public body. However, FOIPPA does not contain any provision that tells us on whom the burden of proof rests when a person lodges a complaint with the OIPC alleging that they believe a public body has used or disclosed their personal information in contravention of FOIPPA Part 2. Thus, the usual principle of "he who alleges must prove" applies. The OIPC takes this approach on these types of matters, see *e.g.* Order F2002-020: *Lethbridge Police Service* (August 7, 2002) at para. 20, which said:
>
>> ... in this inquiry, the Complainant has the burden of proving that his personal information was disclosed by the Public Body. The Complainant has not met this burden of proof. Before I am able to find that a breach of Part 2 of the Act has occurred, there must be a satisfactory level of evidence presented in support of the allegation. If this were not the case, a public body could be put into the untenable position of proving a negative (e.g. that a breach did not occur) based on any allegation raised by a complainant.

> But see, Order P2006-008: *Lindsay Park Sports Society* (March 14, 2007)at paras. 9-21, where the OIPC said that complainants under FOIPPA do not have a legal burden, but an evidential burden. Once the complainant satisfies the evidential burden, the burden shifts to the public body to show "that it has the authority ... to collect, use or disclose personal information," at para. 20. Because of FOIPPA's structure, this Court agrees with the *Lindsay Park* analysis of the burden of proof and evidentiary burden.

[para 27] The authors of *The Law of Evidence* 2nd Edition describe the evidential burden in the following way:

> A party… may satisfy an evidential burden without doing anything; for example, a witness called by the Crown testifies to facts, which raise the issue of self-defence. Thus, a party may discharge an evidential burden by pointing to some evidence already on the record. In these circumstances, the defendant does not adduce evidence but rather, the issue is raised by the evidence…
> The term "evidential burden" means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

[para 28] A complainant bears the initial burden of adducing or pointing to evidence that establishes his or her information was collected, used or disclosed, depending on the nature of the complaint.

[para 29] In the present case, the Complainant argues that the WCB disclosed his personal information in contravention of Part 2 of the FOIP Act. Consequently, the Complainant bears an initial evidential burden of establishing that the WCB disclosed his personal information.

[para 30] The Complainant argues:

> … the WCB went way too far in its involvement with my employment by collecting and releasing personal medical information and opinions to Canada Post that was not appropriate. This information was used to terminate my employment and then at the employment arbitration two years later as evidence.

[para 31] The Complainant points to records he received from Canada Post at an arbitration hearing that establish that three distinct kinds of disclosures were made to Canada Post:

(1) the case manager's letters of March 12, 2001, May 3, 2001, August 17, 2001, and May 2, 2002 were copied to Canada Post
(2) the Complainant's claim file was provided to Canada Post on February 4, 2002
(3) the Claims Services Review Committee copied its decision of April 8, 2002 to Canada Post

[para 32] In its submissions, the WCB concedes that it disclosed the Complainant's personal information to Canada Post:

> On February 1, 2002 Canada Post contacted the WCB Customer Contact Center and requested a complete copy of [the Complainant's] claim file for appeal purposes… A complete copy of the

claim file was disclosed to the employer on February 8, 2002. To date, no other copies of the claim file have been request by Canada Post.

[para 33] I find that the Complainant has met the evidential burden of establishing that the WCB disclosed his personal information by copying letters to Canada Post, and by providing his claim file to Canada Post. The burden now shifts to the Public Body to prove, on the balance of probabilities, that its disclosures of the Complainant's personal information were made in compliance with Part 2 of the FOIP Act.

[para 34] Section 40 of the FOIP Act (previously section 39) sets out the circumstances in which a public body may disclose personal information in accordance with Part 2 of the FOIP Act. The WCB argues that the following provisions of section 40 apply to its disclosure of the Complainant's personal information in its arguments:

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) or the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit…*

(These provisions were previously sections 39(1)(a.1), (b), (d), (e), and (j) of the FOIP Act respectively.)

[para 35] Section 40(4) of the FOIP Act, (previously section 39 (2)), authorizes a public body to disclose information under section 40(1), but only to the extent necessary to meet its purposes under those subsections 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.

By implication, it would be a contravention of this provision, and therefore of Part 2 of the FOIP Act, if a public body disclosed more information than is necessary for meeting the purposes contemplated by section 40(1) in a reasonable way.

[para 36] I will therefore consider whether the provisions of section 40(1) of the FOIP Act on which the WCB relies authorize the disclosure of the personal information in the Complainant's claim file to Canada Post. If so, I will consider whether it disclosed only the personal information necessary to meet its purposes in a reasonable manner under section 40(4) of the FOIP Act.

Was the disclosure of the Complainant's personal information an unreasonable invasion of the Complainant's personal privacy within the terms of section 17 of the FOIP Act?

[para 37] Section 40(1)(b) authorizes a public body to disclose personal information if it would not be an unreasonable invasion of a third party's personal privacy to do so. Section 17 of the FOIP Act, (previously section 16), establishes the circumstances when it is, and when it is not, an invasion of a third party's personal privacy to disclose the third party's personal information.

[para 38] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if...*
>
> *...*
>
> *(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,*
>
> *...*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation...*
>
> *...*
>
> *(d) the personal information relates to employment or educational history...*
>
> *...*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party...*

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

> …
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights…*

[para 39] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information in certain circumstances is not an unreasonable invasion of personal privacy. If, as the WCB argues, disclosing the Complainant's claim file had the effect of disclosing information about a discretionary benefit of a financial nature granted by the WCB for the purposes of section 17(2)(h), then disclosing that information would not be an invasion of the Complainant's personal privacy.

[para 40] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. In the present case, some of the Complainant's personal information in his claim file falls under section 17(4)(a) of the FOIP Act, as it refers to his medical condition, diagnosis, treatment and evaluation. An example of a record containing this kind of information is the memorandum of the medical advisor dated April 30, 2001. Other information falls under section 17(4)(g) of the FOIP Act as it contains the Complainant's name in the context of other personal information about him. An example of a record containing this kind of information is the case manager's letter of August 17, 2001. Personal information regarding the Complainant's employment and educational history is contained in the Work Assessment Centre Medical Status Examination form. This personal information is subject to the presumption raised by section 17(4)(d) of the FOIP Act.

[para 41] To determine whether disclosure of personal information subject to a presumption under section 17(4) would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application) applies. Section 17(5) is not an exhaustive list and any other relevant circumstances must also be considered and weighed.

[para 42] As section 17(5)(c) requires a public body to consider whether disclosing personal information would be relevant to a fair determination of an applicant's rights, and as the WCB had argued in its initial submissions that principles of fairness necessitated its disclosure of the Complainant's case file to Canada Post, I asked it to provide submissions regarding the application of this provision in the context of sections 17(5)(c) and 40(1)(b) of the FOIP Act. The WCB provided arguments in relation to section 17(5)(c).

[para 43] If section 17(5)(c) applies to the information in the Complainant's claim file, and if this factor outweighs the presumption established by sections 17(4)(a), (d) and (g), then it would not be an unreasonable invasion of the Complainant's personal privacy to disclose this information to Canada Post.

[para 44] In Order 99-028, the former Commissioner considered the meaning of the phrase "the personal information is relevant to a fair determination of the applicant's rights" as it appears in section 17(5)(c) and adopted the following interpretation:

> In Order P-312 (1992), the Ontario Assistant Commissioner stated that in order for the Ontario equivalent of section 16(3)(c), (now 17(5)(c), to be a relevant consideration, all four of the following criteria must be fulfilled:
>
> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
> (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
> (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
> (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing

This interpretation of section 17(5)(c) was also applied in Order F2008-012. In *Caritas Health Group v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 186 the Alberta Court of Queen's Bench determined that this interpretation of section 17(5)(c), (previously section 16(5)(c)), as applied in Order F2008-012, was reasonable.

[para 45] The WCB provided arguments regarding section 17(5)(c) in its additional submissions of November 1, 2010:

> The right that an employer may seek to enforce is a legal right, a right to appeal decisions made by the WCB respecting their workers, hence the right relates to a proceeding. It is not necessary that an appeal actually be brought but that it is contemplated. It is difficult to imagine any meaningful contemplation of an appeal without having the background information available for review. The personal information relates to that information used by the WCB to adjudicate the worker's claim for compensation and hence bears on possible appeals. Finally, employers require that information to prepare for appeals or at least contemplate them.

[para 46] In its rebuttal submissions, the WCB stated:

> In order for an employer to know if they have a reasonable appeal, they must have access to the information upon which decisions were made.
>
> Based on the employer's right to know if they have a reasonable appeal, they must have access to the information upon which decisions were made.

[para 47] In its additional submissions, the WCB provided additional reasons for its view that disclosing the Complainant's claim file to Canada Post was to enable

Canada Post to determine whether it wished to appeal decisions regarding cost relief or cost transfers.

> The worker was claiming a right to TTD [temporary total disability] benefits. As a result, his entire medical background was relevant, as was prior claim adjudication. The WCB released claim information to Canada Post so that could ascertain if they wished to appeal any decision made and determine if they wished to [pursue] cost relief or cost transfer applications pursuant to the WCA and WCB Policies. These rights cannot be exercised in a vacuum and require that Canada Post have access to full claim information.

I understand "cost relief" to be a discretionary policy created by the WCB that enables it to refund claims costs to employers in situations where the WCB finds that a pre-existing injury has contributed to the costs of the claim. I note that this policy expressly excludes federal employers from its application. I understand the WCB's reference to cost transfers to refer to Board Policy 07-02. An employer may be eligible for a cost transfer in a situation where a worker's injury, and therefore claims costs, has been caused by the negligence of another employer.

[para 48] It is unclear to me why the WCB would argue that the claim file was provided to Canada Post so that it could determine whether it wished to obtain cost relief, given that federal employers are expressly excluded from the application of this policy. It is also unclear why it refers to cost transfers, given that there is no indication that another employer caused or contributed to the Complainant's injuries through its negligence.

[para 49] Nevertheless, I understand the WCB to argue that section 17(5)(c) would be a factor weighing in favor of disclosure of the Complainant's claim file to Canada Post because providing the entire file to Canada Post would enable Canada Post to decide whether there were any decisions affecting its rights that it could appeal and that the Complainant's claim file was provided to it for that reason.

[para 50] I find that the WCB did not provide the Complainant's claim file to Canada Post so that it could determine whether there were decisions it should appeal. The only appeal I find reference to in the evidence before me is that of the Complainant, who appealed a decision of the WCB to deny payment of temporary total disability benefits. Moreover, the case manager's notes of February 1, 2002, which the WCB included as an exhibit in its submissions, indicate that the claim file was provided to Canada Post because the CSRC was scheduled to review the Complainant's appeal on March 27, 2002. These notes state:

> File Note – Insured Requests File
> …
> Requestor Company: CANADA POST complete
> File/Updated File: COMPLETE Reason for Request: APPEAL
> Date of Appeal Hearing if Confirmed: March 27, 2002
> …
> DOA Employer Request File

[para 51] Copies of the case manager's decisions of May 3, 2001 and August 17, 2001 had already been provided to Canada Post under the authority of section 44 of the

WCA, (previously section 39), prior to Canada Post's request for the claim file. Consequently, there was no need to provide the Complainant's claim file to Canada Post to inform it of these decisions, as the WCB argues. In addition, there is nothing in the evidence before me to suggest that Canada Post was appealing the case manager's decisions of May 3, 2001 or August 17, 2001 or contemplated appealing them. Under the WCB's theory that an employer is successful when a decision is made to deny a worker benefits, there would have been nothing for Canada Post to appeal.

[para 52] Alternatively, the WCB argues that the following rights were at stake for Canada Post and that Complainant's entire claim file was provided to it in recognition of those rights:

> In this case and in all GECA matters, ANY and ALL cost to the WCB, such as, TTD, medical aid, vocational rehabilitation and transportation, are born directly by the worker's employer. Their interest could not be more direct. As a further analogy, suppose you have a motor vehicle accident and believe you are not at fault yet your insurer determines you are and pays the other party's claim. Your insurer advises you your premiums will not go up. Do you no longer have an interest in that damage claim? The WCB submits, that just because premiums do not increase, employers maintain a direct interest. Employers have an interest in assuring that their staff makes proper claims and that those claims are properly paid. [emphasis in original]

[para 53] The test set out by the former Commissioner in Order 99-028 requires that any personal information disclosed must relate to the right being decided. From the evidence before me, I understand that the right being decided at the CSRC hearing was the Complainant's right to receive additional TTD benefits, which required the CSRC to determine whether the Complainant continued to be totally, temporarily disabled. However, given that Canada Post was invited to participate at the CSRC hearing, the CSRC presumably determined that Canada Post was an interested party to its decision regarding these rights, and presumably for the reason put forward by the WCB, that is, that its claims costs would be potentially affected by its decision. Had the WCB provided only the personal information with a bearing on, or that was significant to, the determination of the rights to be decided by the CSRC, then, arguably, section 17(5)(c) may have applied. The WCB provided the Complainant's entire claim file to Canada Post, regardless of whether the information had a bearing on the rights to be decided. Consequently, I find that while section 17(5)(c) may potentially apply to some of the information disclosed, I have no basis on which to find that it applies to all of it.

[para 54] In any event, I note that section 17(5)(c) refers to information that is "relevant to a fair determination of the *applicant's* rights." In the context of section 17, an applicant refers to a person who has made a request for access to information under the FOIP Act. It is by no means clear that in a situation such as the present, (in which section 17 is being considered for the purpose of deciding whether section 40(1)(b) authorized the WCB to disclose personal information), Canada Post is to, in effect, step into the shoes of person who would be an applicant in an access request within the terms of section 17(5)(c). There is no evidence that Canada Post made an access request for the Complainant's claim file under the FOIP Act. Consequently, it is unclear whether section 17(5)(c) can be a factor that is relevant for determining whether section 40(1)(b) of the FOIP Act authorizes the disclosure of the Complainant's personal information.

[para 55] For the above reasons, I find that the WCB has not established that section 17(5)(c) applies to its disclosure of the Complainant's claim file. Consequently, section 17(5)(c) is not a factor that may be considered in weighing the presumptions established in section 17(4).

[para 56] As noted above, the WCB also argues that the information in the Complainant's claim file is personal information relating to a discretionary benefit of a financial nature that it granted to the Complainant. It states:

> All compensation benefits are discretionary, of a financial nature and granted to a third party (the worker) with the applicant being the employer) by the public body, being the WCB.

[para 57] In Order F2007-025, I considered the meaning of "grant" in section 17(2)(h). I said:

> The term "grant" has a range of meanings. The *Canadian Oxford Dictionary* provides the following: "consent to fulfill (a request, wish, etc.,) allow, give (rights, property etc.)" *Black's Law Dictionary* 8th Edition offers the following definition of "grant":
>
> > 1. To give or confer (something), with or without compensation… 2. To formerly transfer (real property) by deed or other writing… 3. To permit or agree to… 4. To approve, warrant or order (a request, motion, etc.)
>
> These definitions suggest that the grantor has some power to decide whether it will grant something or not. In the context of subsection 17(2)(h), it appears that "grant" means to "give" or "confer" discretionary benefits of a financial nature, in situations where the grantor is not required to give or confer these benefits, or to consent or agree to provide them, but has discretion to do so.

[para 58] I reject the WCB's characterization of compensation benefits paid to a worker under the WCA as "grants" of a discretionary nature. Section 56 of the WCA, which addresses compensation for disability states, in part:

> *56(1) The Board* <u>*shall*</u> *pay periodic compensation*
> *(a) on a monthly basis in the case of permanent disability,*
> *(b) on a bi-weekly basis in the case of temporary disability, or*
> *(c) on a basis other than under clause (a) or (b), if the Board considers it appropriate to do so.* [my emphasis]

The presence of the word "shall" in section 56 of the WCA indicates that the WCB has no discretion regarding the payment of benefits in the case of disability. Rather, once disability is established, benefits must be paid in accordance with the WCA. The only discretion is created by clause (c), which allows the WCB to pay benefits on a basis other than that described in the first two clauses. TTD benefits, which were the subject of the Complainant's appeal, are compensation payments based on temporary disability and are therefore paid under the authority of section 56(1(b) of the WCA.

[para 59] I also note that the personal information of the Complainant that was disclosed when his claim file was provided to Canada Post does not relate to "*details of the discretionary benefit*", even assuming the compensation payment could be characterized as such. As noted above, the information disclosed refers to his medical condition, diagnosis, treatment, and evaluation, in addition to other information about him including his employment and educational history. None of this personal information refers to benefits paid by the WCB to him, whether discretionary or otherwise.

[para 60] I find that the WCB has not established that it would not have been an unreasonable invasion of the Complainant's personal privacy to disclose the Complainant's claim file under section 17. I therefore find that it has not established that section 40(1)(b) applies to its disclosure of the Complainant's claim file to his employer.

Does an enactment of Alberta or Canada authorize or require the disclosure? Was the disclosure made for the purpose of complying with an enactment of Alberta or Canada or an agreement made under such an enactment?

[para 61] The WCB drew my attention to section 35 of the WCA as authorizing its disclosure of the Complainant's personal information in his claim file to his employer. I note that 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.*

The above provision requires the WCB to provide a report of progress being made by the worker if the employer has first requested this information in writing. In the circumstances of this case, there is no evidence that Canada Post requested a progress report. Instead, it requested the Complainant's claim file and received it. There is no evidence before me that the WCB prepared a progress report under section 35 or that such a record was contained in the Complainant's claim file and provided to Canada Post.

[para 62] The WCB also drew my attention to section 44 of the WCA as an authority for disclosure. This provision 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 dependent, 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 63] Section 44 is clear authority for the WCB to provide entitlement decisions to a worker or the worker's dependent, and the worker's employer. It is also authorization for providing a summary of reasons, including medical reasons, to the worker and the employer. I find that the case manager's letters of March 12, 2001, May 3, 2001, August 17, 2001, and May 2, 2002 were disclosed to Canada Post under the authority of this

provision, as these letters all serve to communicate decisions the case manager had made regarding the Complainant's entitlement. In addition, I find that the case manager did not disclose any more of the Complainant's personal information than was necessary in order to meet her statutory obligation under section 44 of the WCA.

[para 64] However, the reasons for a determination regarding entitlement and all the information contained in the Complainant's claim file are not the same thing. The Complainant's claim file contained such determinations, but also contained medical reports and employment history information and evaluations. While I find that section 44 is authority for the Complainant's case manager to provide determinations to both the Complainant and the Complainant's employer, I find that section 44 does not authorize providing the Complainant's entire claim file to Canada Post or sending a copy of a CSRC decision to Canada Post.

[para 65] The WCB also argues section 147(2) of the WCA grants it discretion to disclose personal information. It therefore reasons that disclosure of the Complainant's claim file to Canada Post meets the requirements of section 40(1)(b) because it did so at its discretion. It argues:

> Nothing in section 147(2) limits the disclosure of information to a worker or employer. In fact, section 147(2), unlike section 147(3), does not expressly deal with disclosure to workers or employers but rather to, amongst others, person[s] directly concerned or to agencies or departments of the Government of Canada. It must therefore necessarily follow that the disclosure contemplated by section 147(2) is not limited to workers or employers under the WCA. If it was so limited, section 147(2) would have referenced worker and employers as does section 147(3). Section 147(3) grants workers and employers a right to receive information and there is no discretion on the WCB, whereas section 147(2) grants the WCB discretion to disclose, [and] contemplates disclosure to persons directly concerned, which is not limited to workers and employers and to other government agencies and hence serves a different purpose and has different considerations.

[para 66] Section 147(2) of the WCA states:

> *147(2) No member or officer or employee of the Board shall divulge information respecting a worker or the business or 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 67] In Order 2006-026, the Adjudicator rejected the WCB's argument that section 147(2) of the WCA expressly authorizes disclosing personal information. She said:

> Finally, section 147(2) provides:
>
> > *147(2) No member or officer or employee of the Board shall divulge information respecting a worker or the business of an employer that is obtained by that person in that person's capacity as a member, officer or employee unless it is divulged under the authority of the Board to the persons directly concerned or to agencies or departments*

> *of the Government of Canada, the Government of Alberta or another province or territory ... .*
>
> 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. It would also conflict with the Public Body's stated "Access and Privacy" policy that "The WCB collects, uses and discloses only information necessary to administer and interpret the *Workers' Compensation Act* ("the Act") and only when authorized by the Act, the *Freedom of Information and Protection of Privacy Act* ("FOIP") and the *Health Information Act*. In my view "under the authority of the Board" means 'under the authority given to the Board by the WCA' – in other words, in accordance with the specific provisions of the WCA and the policies of the WCB that authorize the sharing of specified information in specified circumstances. The purpose of section 147(2) is to make it a contravention of the Act to share information *other than that the Board is authorized to share under the WCA.* The "Access and Privacy" policy confirms this limitation. [emphasis in original]

[para 68] I agree with the reasoning of the Adjudicator in order F2006-026 and agree with her interpretation that "under the authority of the Board" means "under the authority given to the Board by the WCA". Section 147(2) does not create a stand alone authority to disclose information; rather, it prohibits unauthorized disclosure. Therefore, if disclosure of the Complainant's claim file is not to contravene section 147(2) of the WCA, it must be authorized by another provision of the WCA. In my view, the phrase "disclosed under the authority of the Board" applies to the phrase "to agencies or departments of the Government of Canada" as it does to the phrase "to the persons directly concerned". Otherwise, the WCB would be restricted to disclosing only information it is authorized to disclose to directly concerned persons, but could disclose information it has no authority to disclose to agencies or departments of the Government of Canada, without any coherent legislative purpose for the distinction.

[para 69] The WCB alternatively points to section 147(3) of the WCA as authority for its disclosure of the Complainant's claim file to Canada Post. It argues:

> Section 147(3) of the WC Act permits an employer to access information for the purpose of a review or appeal.

[para 70] Section 147(3) of the WCA specifically addresses the types of information that may be disclosed to workers and employers, when a worker or an employer is pursuing an appeal. Section 147(3) states:

> *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*

[para 71] 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.

[para 72] 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 73] As noted above, the case manager's notes document that Canada Post requested the entire claim file and the reason for the request was the Complainant's appeal. The case manager's notes indicate that the entire claim file was automatically provided.

> File Note – Insured Requests File
> …
> Requestor Company: CANADA POST complete
> File/Updated File: COMPLETE Reason for Request: APPEAL
> Date of Appeal Hearing if Confirmed: March 27, 2002
> …
> DOA Employer Request File

In my view, section 147(3) is authority for providing information in the Board's files relevant to a matter under appeal or review and is intended to enable a worker or employer to pursue a review or appeal. However, section 147(3) is not authority for providing an entire claim file to a worker or employer at the request of a worker or employer unless a decision is made that all the information in the claim file is relevant to the issue under appeal or review.

[para 74] The WCB has not detailed or reproduced the records it disclosed to Canada Post from the Complainant's claim file, and the Complainant has only provided only the records Canada Post submitted at the labour arbitration hearing.

[para 75] The WCB argues that all the information in the claim file must necessarily be relevant to the issue that was under review; however, it has not provided any evidence to support a finding that such a decision was made. On the contrary, the case manager's notes indicate that on the request of Canada Post for the file, as opposed to information relevant to the matter under review contained in the file, the entire file was automatically provided. There is nothing in the evidence before me to suggest that the case manager reviewed the issues under appeal, or limited the information to be provided to Canada Post to information relevant to those issues.

[para 76] While I accept that some of the personal information in the Complainant's claim file may have been relevant to the matter that was to be reviewed by the CSRC, and therefore disclosed to Canada Post under the authority of section 147(3), the WCB has not established that all of the Complainant's personal information was disclosed under this provision. The WCB has not demonstrated by reference to the actual contents of the file that all the personal information it disclosed was relevant to the matter that was under review. I therefore cannot make a finding that the disclosure of all personal information in the Complainant's claim file was made under section 147(3) of the WCA. I therefore find that the WCB has not discharged its burden of demonstrating its compliance with Part 2 of the FOIP Act.

[para 77] From its response to my question E, I understand that the WCB argues that section 46(5) was, in the alternative, authority for disclosure of the Complainant's claim file, or possibly, that section 46(5) and section 147(3) in combination authorize the WCB to provide a worker's claim file to the worker's employer when there is an appeal.

[para 78] I note that section 46(5) of the WCA does not speak to disclosing information to parties, but requires the CSRC to accept representations from parties. Therefore, the WCB's position that this provision, whether on its own, or in conjunction with section 147(3), authorizes its disclosure of the entire claim file to Canada Post, is without merit.

[para 79] I find that the WCB has not established that it disclosed the Complainant's claim file to Canada Post under the authority of any of the provisions of the WCA it points to as authorizing or requiring the disclosure. It follows, then, that I find that it has not been established that the disclosure was authorized or required by an enactment of Alberta for the purposes of sections 40(1)(e) and (f) of the FOIP Act

Section 40(4) of the FOIP Act

[para 80] If I am wrong in my conclusion that the WCB has failed to establish that it disclosed the Complainant's entire claim file to Canada Post under the authority of section 147(3) of the WCA, and the disclosure therefore does fall under section 40(1)(e) and (f) of the FOIP Act, then I will consider whether the WCB complied with section 40(4) when it disclosed the Complainant's claim file.

[para 81] As noted above, section 147(3) provides authority for disclosing information to a worker or an employer that is relevant to a matter under appeal. Assuming that the WCB disclosed the information in the Complainant's claim file to Canada Post under the authority of this provision, I find that the WCB has not established that it limited disclosure to only that information necessary to enable it to carry out its purpose of complying with this provision in a reasonable manner. I make this finding on the basis that section 147(3) requires the WCB to disclose only the information that is relevant to a matter under review or appeal, and the WCB has not established that it limited its disclosure in this way.

[para 82] Consequently, even if sections 40(1)(e) and (f) of the FOIP Act do apply to the WCB's disclosure of the claim file, I would find that it has not been demonstrated that the disclosure was made in compliance with section 40(4) of the FOIP Act, and that it has therefore not been demonstrated that the disclosure was made in compliance with Part 2.

Did the Public Body disclose the Complainant's personal information in his claim file to Canada Post for the purpose for which the information was collected or compiled or for a use consistent with that purpose under section 40(1)(c) of the FOIP Act?

[para 83] In its rebuttal submissions, WCB raised the possibility that section 40(1)(c) of the FOIP Act authorized its disclosure of the Complainant's personal information to his employer.

[para 84] I have already found that the WCB collected the Complainant's personal information in order to determine his entitlement to compensation. If, as the WCB argues, the WCB provided the Complainant's claim file to Canada Post so that it could determine whether it should appeal any decisions made, such as decisions regarding cost relief, then I find that its disclosure is not consistent with its purpose for collecting the Complainant's personal information, which was to determine the Complainant's entitlement to compensation. In any event, as noted above, the WCB's evidence regarding its policies establishes that federal employers, such as Canada Post, are not eligible for cost relief.

[para 85] If the WCB's alternative theory is to be accepted, that is, if the Complainant's claim file was provided to Canada Post so that it could prepare for an appeal before the CSRC, then this purpose for disclosing information is also inconsistent with the WCB's purpose for collecting the Complainant's personal information. The WCB collected the Complainant's personal information under sections 36 and 38 of the WCA. Both these provisions indicate that the WCB's purpose in collecting information that is then placed on a worker's claim file is to determine the worker's entitlement to compensation.

[para 86] Even if I accepted the argument that providing such information to Canada Post, as would enable it to prepare an appeal, would assist the CSRC to make a determination as to compensation, and is therefore consistent with the purpose of

determining compensation entitlement, I find that information provided for such a purpose must necessarily be relevant to enable Canada Post to participate in the process in which the determination is made. The WCB has not, as explained above, demonstrated to me that the entire claim file was relevant.

[para 87] For these reasons, I find that the WCB has not established that section 40(c) applies to the disclosure of the Complainant's personal information in his claim file.

Did the Public Body disclose the Complainant's personal information in his claim file for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit for the purposes of section 40(1)(l) of the FOIP Act?

[para 88] In its rebuttal submissions, the WCB raised the possibility that section 40(1)(l) of the FOIP Act authorized its disclosure of the personal information in the Complainant's claim file to Canada Post.

[para 89] The WCB did not explain why it considered this disclosure to be contemplated by section 40(1)(l). While I do not discount the possibility that there may be situations in which the WCB must disclose personal information in order to determine a worker's entitlement to compensation, as discussed above, I find for the reasons above, that the WCB has not established that it disclosed the Complainant's entire claim file to Canada Post for the purpose of determining or verifying the Complainant's eligibility for benefits.

The Disclosure of the CSRC decision

[para 90] The WCB made the following argument relating to the disclosure of the CSRC decision to Canada Post:

> In this case, the CSRC determined that the employer offered modified work, albeit the worker did not accept it, and was hence not entitled to TTD as claimed. If the decision by the CSRC was that the worker was entitled to TTD benefits, Canada Post would have incurred wage replacement costs on the claim; therefore Canada Post must be made aware of the outcome. As an analogy, suppose you were sued for damages and went to trial. If the decision found in your favor, and you did not have to pay the claim, would you not be entitled to the reason for the decision even though it means you just don't have to pay? As a result of the decision, Canada Post is in a similar position and does not have to maintain reserves for a potential contingent liability. The WCB submits that it is not reasonable in the circumstances to not disclose the decision to Canada Post and that the disclosure was discretionary under section 147(2) of the WCA. There is no direct evidence that the WCB is able to offer by way of affidavit or otherwise.

[para 91] I have already rejected the argument that section 147(2) grants the WCB discretion to disclose information that it is not otherwise authorized by the WCA to disclose.

[para 92] Having reviewed the version of the WCA in force at the time the CSRC provided its decision to Canada Post, and Workers' Compensation Regulation A.R. 427/81 I note that there were no provisions that expressly authorized or required the CSRC to give copies of its decisions to parties to a review or appeal or to give reasons to the parties.

[para 93] However, I agree with the WCB that it would be an absurd result if the parties to an appeal were not advised of the outcome of a review or appeal when their interest in participating in the review or appeal has already been recognized. In my view, the authority to inform interested parties of decisions made by the CSRC is implicit in section 13 of the WCA, (similar in purpose to the current section 13.2(1)) which empowers an interested party dissatisfied by a decision of the CSRC to appeal to the Appeals Commission. This provision states:

> *13(1) An interested party who is dissatisfied with*
>
> *(a) a decision of the claims services review committee or assessment review committee referred to in section 12(1) or*
> *(b) a determination of the Board under section 21(3)*
>
> *may, in accordance with the regulations and the Appeals Commission's rules, appeal the decision or determination to the Appeals Commission.*

[para 94] Moreover, interested parties are provided with one year to appeal. Section 13(9) of the previous WCA states:

> *13(9) An appeal from a decision of the claims services review committee or the assessment review committee shall not be accepted unless a written notice of appeal is received by the Appeals Commission within one year from the date that the claims services review committee or assessment review committee made its decision.*

There would be no point in creating a right to appeal in the event of dissatisfaction with a decision, or creating a time limit for doing so, if parties are not to be advised what was decided and why it was decided so that they can determine whether they are dissatisfied with the decision within the time limit. I therefore find that section 13 of the WCA implicitly requires disclosure of CSRC decisions to interested parties.

[para 95] I find that the CSRC Memorandum of Decision was sent to the Complainant and Canada Post as they were both interested parties to the CSRC member's review. I find that this was done to ensure that the parties were informed of the decision and the reasons for it so that they could determine whether they were dissatisfied with it or not, and to appeal it if necessary within the appeal period. For the reasons above, I find that this disclosure was implicitly required by section 13 of the WCA that was in force at the time of the disclosure. I therefore find that this disclosure was made in accordance with section 40(1)(f) of the FOIP Act.

[para 96] The next question to consider is whether the CSRC disclosed only the personal information necessary to comply with section 13 of the WCA in a reasonable way for the purposes of section 40(4). In my view, it did. The CSRC member disclosed the Complainant's personal information only to the extent necessary to communicate the decision and to explain why he confirmed the decision of the WCB. Consequently, I find that this disclosure meets the requirements of section 40(4) of the FOIP Act.

Conclusion

[para 97] As noted above, I find that the case manager's decisions were copied to Canada Post under the authority of section 44 of the WCA. As a result, section 40(1)(f) applies to that disclosure. I also find that these disclosures complied with section 40(4) of the FOIP Act. Consequently, these disclosures were made in accordance with Part 2 of the FOIP Act.

[para 98] In relation to the disclosure by the WCB of the Complainant's claim file to Canada Post, I find that it has not been established that this was disclosure was made in compliance with Part 2 of the FOIP Act.

[para 99] In relation to the CSRC Memorandum of Decision, I find that this disclosure was made in compliance with sections 40(1)(f) and 40(4) of the FOIP Act. Consequently, this disclosure was made in accordance with Part 2 of the FOIP Act.

[para 100] Given that I have found that the WCB has not established that it complied with Part 2 of the FOIP Act, I intend to order it comply with the provisions of Part 2. However, as noted above, the legislation in force at the time the Complainant's personal information was disclosed is different than the legislation currently in force. This order should not necessarily be construed as applying in the same way to the present legislation.

Issue D: Did the Public Body fulfill its duty under section 35(a) of the Act to make every reasonable effort to ensure the personal information it used to make decisions that directly affected the Complainant was accurate and complete?

[para 101] Section 35(a) of the FOIP Act imposes a duty on public bodies to ensure that the personal information on which they base decisions is accurate and complete. It states:

> *35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must*
>
> *(a) make every reasonable effort to ensure that the information is accurate and complete…*

[para 102] The Complainant argues the following in relation to this issue:

> On March 20, 2001 the case manager sent me to see a WCB appointed specialist… This doctor was not given a job description from the WCB and was misinformed as to my length of employment and job duties. The case manager informed the doctor that the employer would make these statements and therefore was misinformed on all issues contributing to the diagnosis. The doctor diagnosed only a nerve impingement and thereafter was never informed of the MRI results or the injuries shown therein. Still, this doctor's opinion has been used continually since his diagnosis…
>
> …
>
> The WCB case manager… did not accept or reveal the additional findings of the tests and the information supplied by my doctor. The case was not updated to reflect this new information. This information was withheld from the case file and therefore not considered when assessing employer responsibility or work capabilities. The WCB case manager was responsible for establishing medical condition and ability to perform modified work. I was then terminated from employment with Canada Post on the stated grounds of being Away Without Leave (AWOL).
>
> The case manager from the beginning of the case eliminated over 80% of my employment with Canada Post. She accepted only 2 years, not the actual 12 years of my employment. The WCB doctors and any others obtaining information from the WCB case manager will be told of the 2 year employment. As well, the case manager submitted into the case file documents stating I had worked the day after the injury, all the while knowing this was not correct. Therefore my injury at work was accepted on an aggravational basis only and all of my condition stated by the WCB to be a pre-existing condition. There was no evidence of a pre-existing condition of lower back injury before my employment with Canada Post in 1989. In the end the injury was accepted as a permanent aggravation of a pre-existing condition but I was never given a decision on this.
>
> The case manager never accepted my work duties at the accident employer. This was indicated by a decision that I was fit to return to work pre-accident duties: and that I was working for another employer. This is after all doctors have accepted otherwise and there is a permanent injury that requires light sedentary work only. A job description is never done or asked for by the case manager. The WCB never at any time produced this significant document…
>
> …
>
> During the time all of the above was happening the WCB case manager was making decisions based on the incorrect information being put into the case file by her. This had a great affect on the administration of the case, decisions, employment at Canada Post, subsequent termination of this employment and arbitrations with the WCB and Canada Post.

[para 103] In response, the WCB concedes that some of the personal information on the Complainant's claim file is inaccurate:

> The WCB acknowledges that [the Complainant's] date of birth, date of accident and term of employment with Canada Post is inaccurately recorded in some documents contained on the claim file.
>
> The WCB will deal with this matter and will issue a correction if appropriate…

In relation to statements from medical advisors and doctors containing the personal information of the Complainant, the WCB argues that the statements are accurate and

should not be corrected. However, the WCB did not explain why it was of the view that the statements were accurate and should not be corrected.

[para 104] To comply with section 35(a), a public body must ensure that the personal information with which it makes decisions is complete and accurate. When deciding whether a public body has complied with section 35(a), I must consider the personal information available to a decision maker, rather than the decision itself. My role is not to evaluate the decision making process of a public body, but to consider only whether the information it uses to make decisions is accurate and complete.

[para 105] With the exception of his length of employment with Canada Post, his age, and the date of accident, the Complainant primarily objects to the decisions made by the WCB in relation to his claim and to the opinions of medical advisors.

[para 106] I find that the reports of medical advisors accurately reflect the opinions of the medical advisors who formed them. In addition, it appears that the opinions are complete. While the Complainant disagrees with these opinions, it was open to him to challenge the weight given to them by the WCB by following the appeals process established by the WCA.

[para 107] The WCB states that it confirmed with a Customer Service Supervisor that the inaccurate date of accident had no bearing or impact on decisions because it did not affect payment of the Complainant's benefits.

[para 108] I note that the records created by the WCB and submitted by the Complainant for the inquiry describe his employment with Canada Post as beginning in 1989 in some cases, and in others, as beginning in 1998. I also note that the date of accident is referred to in some records as January 27, 2001, and in other as January 28, 2001. Finally, I note that in some records, the Complainant's birth date is given as August 20, 1954, but in a memo dated May 6, 2002, the case manager indicates that the Complainant was 47 at the date of accident.

[para 109] I also note that these discrepancies appear in records containing decisions affecting the Complainant. However, section 35, does not refer to personal information appearing in decisions, but to information used to make decisions. I find that the date of accident and the age of Complainant, while inaccurate, do not appear to have been used to make decisions.

[para 110] In relation to the Complainant's length of employment with Canada Post, this information appears in the Economic Loss Payment Proposal dated May 6, 2002, a record which was used to determine the Complainant's entitlement to an economic loss payment, and the length of employment in this record is inconsistent with other records on the claim file. Further, given the case manager's reference to "experience" and her statement that she based her decision on the "above information," a statement which encompasses the Complainant's work experience, it appears that the case manager

considered the length of time the Complainant had worked with Canada Post when making the determination as to whether he was entitled to an economic loss payment.

[para 111] I will therefore order the WCB to determine the Complainant's term of employment with Canada Post and ensure that this information is accurately recorded in the documents contained on the claim file. I make no comment regarding the Complainant's age or date of accident, given that this information was not used to make a decision. However, it would be reasonable for the WCB to correct this information as it proposes to do.

V. ORDER

[para 112] I require the head of the Public Body to ensure that it discloses the Complainant's personal information only in compliance with Part 2 of the FOIP Act. Compliance with this portion of the order may be achieved by taking steps to ensure that there is authority under Part 2 of the FOIP Act to disclose the Complainant's personal information prior to doing so, and by ensuring that no more personal information than is necessary for carrying out the Public Body's authorized purposes in a reasonable way is disclosed.

[para 113] I order the head of the Public Body to determine the Complainant's term of employment with Canada Post and to ensure that the Complainant's length of employment is accurately recorded in its records.

[para 114] I further order the head of the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

____

Teresa Cunningham
Adjudicator