

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-034

May 30, 2011

ALBERTA HEALTH SERVICES

Case File Number F4715

Office URL: www.oipc.ab.ca

Summary: The Complainant was the recipient of Workers' Compensation Board ("WCB") benefits as the result of a workplace injury and had also applied to Great-West Life Assurance Company ("GWL"), her employer's group disability insurer, for disability benefits. The Complainant complained that her employer, Alberta Health Services ("the Public Body"), disclosed her personal information to GWL contrary to her express wishes and the *Freedom of Information and Protection of Privacy Act* ("the Act").

The Public Body argued that the Complainant consented to the disclosure of her personal information when she signed a consent form as part of her application for disability benefits to be paid by GWL. In the alternative, the Public Body argued that it was permitted to disclose the Complainant's personal information pursuant to section 40(1)(l) of the Act (for the purpose of determining the Complainant's eligibility for a program) and that it had disclosed only the amount of information necessary to meet its purpose pursuant to section 40(4) of the Act.

The Adjudicator found that the Complainant had not consented to the Public Body disclosing her personal information found in WCB reports to GWL. The Adjudicator also found that, although the Public Body was authorized to disclose some of the Complainant's personal information pursuant to section 40(1)(l) of the Act, it disclosed more information to GWL than was necessary or reasonable to meet its purpose of determining the Complainant's eligibility for disability benefits.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 40(1)(1), 40(4), and 72.

Authorities Cited: AB: Order F2007-019 and P2010-022.

I. BACKGROUND

[para 1] According to Alberta Health Services, on November 19, 2008, the Peace Country Health Authority was disestablished and the duties of that health authority were transferred to Alberta Health Services. Therefore, for the remainder of this order, when I refer to the actions of the “Public Body” prior to November 19, 2008, I will be referring to Peace Country Health Authority and when I refer to the actions of the “Public Body” after November 19, 2008, I will be referring to Alberta Health Services.

[para 2] The Complainant was employed by the Public Body when she was injured at work on February 14, 2007. As the result of her injury she made a Workers’ Compensation Board (“WCB”) Claim, which was accepted. She also made a claim for disability payments to Great West Life (“GWL”), who was the insurer for the Public Body’s employee group benefits policy.

[para 3] The Complainant complains that the Public Body disclosed her personal information to GWL in contravention of the *Freedom of Information and Protection of Privacy Act* (“the Act”). Specifically, the Complainant claims that the Public Body disclosed medical information found in reports created by the WCB relating to her workplace injury and her ability to return to work.

[para 4] The Commissioner authorized a portfolio officer to investigate and attempt to resolve the issues between the parties, but this was not successful, and the Complainant requested an inquiry. Both the Complainant and the Public Body made initial submissions in the inquiry. The Complainant also provided rebuttal submissions.

[para 5] Following receipt of the Complainant and Public Body’s submissions, I invited GWL to participate in this inquiry as an affected party. It provided submissions which responded to the issues in this inquiry. The Complainant also responded to GWL’s submissions.

[para 6] The Complainant also complained that GWL collected this information in contravention of the *Personal Information Protection Act*. That complaint was the subject of a separate inquiry which resulted in Order P2010-022.

II. ISSUES

[para 7] The Notice of Inquiry dated July 7, 2010 stated that the issue for this inquiry was as follows:

Issue A:

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

[para 8] As well, in her last submission, the Complainant raises a possible privacy breach due to the fact that the Public Body did not update its contact information with this office. I am not certain that there was a breach and in any event, if there was, this is not an issue at this inquiry.

[para 9] In addition, the Complainant takes issue with the Public Body's handling of her situation and alleges that the Public Body acted in contravention of the *Workers' Compensation Act* and that the Public Body's employees breached their Code of Ethics. These issues are not directly relevant to the central issue in this inquiry – the only issue over which I have jurisdiction – and, therefore, I will limit my findings to the issue noted above.

III. DISCUSSION OF ISSUES

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

1. Burden of Proof

[para 10] Although the Act is silent as to who bears the burden of proof in inquiries regarding complaints, in Order F2007-019, the Commissioner established that in matters such as this inquiry, the initial burden (or evidential burden) rests with the Complainant. The Complainant must first adduce some evidence that the Public Body disclosed her personal information. Once the Complainant has met this evidential burden, the Public Body bears the burden to prove that it disclosed the Complainant's personal information in compliance with the Act.

[para 11] In this inquiry, the Complainant states that the Public Body disclosed her medical information, contained in her WCB file, to GWL. Although she suspects that this happened on numerous occasions, the only compelling evidence she submitted were two faxes dated July 18, 2007 and September 10, 2007 sent by the Public Body to GWL which attached two reports created by the WCB dated March 2, 2007 and August 27, 2007, respectively. The attached reports contained information about the Complainant's injury, treatment, recovery and prognosis. The fax cover sheet dated September 10, 2007 also states "I look forward to a case conference call."

[para 12] The Public Body denied that it disclosed any health information to GWL, and stated that it disclosed only payroll information. This is clearly not the case, as evidenced by the faxes provided as part of the Complainant's rebuttal submission.

[para 13] Although I do not have evidence that a case conference call occurred, or, if it did, what was discussed during the call, the Complainant has adduced sufficient evidence that the Public Body disclosed her personal information to GWL when it faxed reports created by the WCB containing her personal information to GWL on July 18, 2007 and September 10, 2007. As the Complainant has met her evidential burden regarding these disclosures, the burden to prove that it complied with the Act rests with the Public Body.

2. *Consent*

[para 14] The Public Body argues that the Complainant consented to its disclosure of her personal information to GWL when she executed a consent form dated June 4, 2007 (“consent form”) as part of her application to GWL for disability benefits.

[para 15] The Public Body points out the following excerpt from the consent form:

You are responsible for providing medical proof that you are entitled to receive disability benefits, and this includes responsibility for providing medical reports. However, to simplify the application process for you and prevent delays Great-West Life will request additional medical information directly from your Physician if required. This also helps to ensure that the questions your Physician is asked are relevant to your claim.

[para 16] From her submissions, I gather that the Complainant did not take issue with her doctor disclosing medical information to GWL directly. In fact at the bottom of the consent form, the Complainant hand wrote the following statement:

All medical information should come through my treating physician with regard [to] this claim.

[para 17] The Public Body did not explain the relevance of the first excerpt to its arguments. However, more relevant to the issues in this inquiry, the Public Body also points to the following excerpt:

Before we can assess your claim, we need a statement from your Employer confirming the date your insurance coverage began, your job duties and earnings and any other information that is needed to assess your claim. We have asked your Employer to supply this information directly to us.

[para 18] Again, from the Complainant’s submissions, I gather that she did not take issue with the Public Body advising GWL that she was receiving WCB benefits for her work related injury, the amount of the benefits and the date the benefits began and ended. So, I believe that the Complainant consented to the Public Body’s disclosing this information to GWL.

[para 19] The Public Body then points to the following excerpt:

I authorize:

Great-West Life to exchange information with my employer, plan sponsor, or plan administrator when relevant for the purpose of discussing rehabilitation and return to work planning.

Great-West Life to exchange my information with my employer's occupational health department when relevant for the purpose of assisting with the assessment of my claim.

[para 20] Finally, the Public Body points to the handwritten note added to the consent form by the Complainant, and argues that any information disclosed to GWL was done in accordance with the consent form (including the handwritten modification).

[para 21] The affected party GWL argues that the reports did not contain the Complainant's "medical information" and were, therefore, not covered by her handwritten modification. I disagree. The reports include information about the Complainant's injury, treatment, recovery, and prognosis. This is her medical information as that term is commonly understood, and therefore, in my view, her handwritten modification to the consent form should be understood as intended to cover such information. Therefore, I find that the WCB reports do contain the Complainant's medical information.

[para 22] On my reading of the consent form (including the Complainant's handwritten modification) I think it is clear that the Complainant wanted medical information only from her treating physician to be disclosed to GWL. I do not see how her wording in this regard could have been clearer. Given where it was situated (at the end of the form), as well as its comprehensive nature (referring to "[a]ll medical information ... with regard to this claim"), I regard this hand-written qualification to her consent as applying to the entire consent form, including the provisions allowing for the exchange of information about her between GWL and the Public Body. I also note that the Complainant faxed a copy of her consent form to the Public Body after she signed it, and so the Public Body was aware of the Complainant's qualification to her consent at the time of the disclosures.

[para 23] Based on the foregoing, I find that the Complainant did not consent to the Public Body's disclosure of the WCB reports dated March 2, 2007 and August 27, 2007.

3. Section 40(1)(l) of the Act:

[para 24] The Public Body argues, in the alternative, that it had authority to release the Complainant's personal information to GWL pursuant to section 40(1)(l) of the Act which states:

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

...

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

... .

[para 25] I will assume for the purposes of this discussion that the Public Body is entitled to rely on section 40(1)(1) even though it was GWL, rather than the Public Body, that was making the determination as to entitlement to benefits. As the Public Body's insurer, arguably GWL was acting in part on the Public Body's behalf in doing this.

[para 26] Even if section 40(1)(1) of the Act applies, the Public Body must comply with section 40(4) of the Act. Section 40(4) of the Act limits the amount of personal information a public body is authorized to disclose. It states:

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

[para 27] Therefore, I will discuss the Public Body's compliance with both sections 40(1)(1) and 40(4) of the Act.

[para 28] The Public Body argues that it disclosed the Complainant's personal information to determine her eligibility to receive long term disability benefits from GWL and that it complied with section 40(4) of the Act in so doing.

[para 29] The Complainant argues that the Public Body disclosed the WCB reports to GWL in an attempt to discredit her claim and eventually save money by not having the Complainant receive disability benefits. There was no evidence provided as to the motives behind the disclosure of the WCB reports to GWL and I find it more likely that the reports were disclosed for the purpose of enabling GWL to determine the Complainant's eligibility for disability benefits than that it was done for some improper motive. Therefore, I find that the Public Body did disclose the information in the WCB reports in accordance with section 40(1)(1) of the Act.

[para 30] According to the Public Body's submissions it denied that it disclosed any of the Complainant's medical information and only disclosed her payroll information. It seems that at the time the submissions were drafted, the individual drafting the submissions was unaware that the Public Body had disclosed two WCB reports to the GWL – far more than payroll information. Its arguments in its submissions seem to be premised on this erroneous fact.

[para 31] If it were the case that the only information disclosed to GWL by the Public Body had been her payroll information, I would agree that the Public Body complied with section 40(4) of the Act. If the Complainant were not an employee of the Public Body, or if she had been receiving WCB benefits, she would not have been eligible for

disability benefits with GWL. Therefore, the Complainant's pay, and the amount and duration of her WCB benefits was information that would in some circumstances be necessary to fulfill the Public Body's and GWL's purpose of determining or verifying the Complainant's eligibility for disability benefits.

[para 32] However, payroll information was not the only information that was disclosed by the Public Body to GWL. As already noted, the WCB reports that were disclosed contained medical information about the Complainant's injury, treatment, recovery, and prognosis. Although not argued by the Public Body specifically, presumably one of the requirements to receiving disability benefits from GWL is that the Complainant be disabled from working. As evidenced by the agreement quoted above, it was the Complainant's responsibility to provide medical information to support her claim that she was not able to work in the same capacity in which she had been working before her injury. According to the Complainant and GWL, the Complainant provided information to this effect from her treating physician to GWL; however, she did not provide GWL with information from WCB.

[para 33] GWL argues that it did not use the Complainant's medical information from the WCB reports in making its determination on whether she was eligible for disability benefits, but used information provided to it by the Complainant's treating physician initially, and also information provided to GWL from the Complainant's union representative, later on in the claims process.

[para 34] Further, GWL states:

Great-West Life complied with [the Complainant's] specific request [only to collect medical information from herself, her treating physician and her union representative] and received and used in assessing her claim only the medical information that was provided to us by [the Complainant] herself, her physician and her union representative.

[para 35] GWL goes on to state:

Great-West Life adjudicated [the Complainant's] disability claim using only the medical information that was provided to Great-West Life by [the Complainant], her physician, and subsequently with her consent, her union representative.

[para 36] GWL then states:

The fact that WCB may have relied on [reports referenced in the fax dated September 10, 2007] in their claims assessment is not relevant to Great-West Life, as we assess entitlement to benefits independently from WCB and any other insurer.

[para 37] In conclusion, GWL states:

In accordance with the terms of the group insurance policy, Great-West Life required information as to the amount and duration of WCB benefits that were payable to [the Complainant] in order to administer the plan, and this information was provided to Great-West Life by [the Public Body].

[para 38] In its submissions in this inquiry, GWL was clear that to assess her claim, it used medical information only from the Complainant, her doctor, and her union representative. It was also clear that the only information from the WCB that GWL required to assess the Complainant's claim was her payroll information, including the amount and duration of her WCB benefits. Finally, GWL confirmed that it does not rely on the conclusions of the WCB or any other insurers and that it assesses claims completely independently of these other providers.

[para 39] In the companion order to this one, Order P2010-022, I conclude, based on a letter sent by the Organization to the Complainant, dated September 20, 2007, (provided to me by the Complainant), that at least to some degree, GWL relied on the information in the WCB reports, including, directly or otherwise, what would commonly be understood as "medical information", in order to make its decision to deny benefits. As noted in the companion order, possibly GWL's argument that it did not use the medical information in the WCB reports can be attributed to its narrow view of what constitutes "medical information".

[para 40] I do not need to rely on that finding in this case, however. I point to GWL's submissions in the present case that "[t]he fact that WCB may have relied on [reports referenced in the fax dated September 10, 2007] in their claims assessment is not relevant to Great-West Life, as we assess entitlement to benefits independently from WCB and any other insurer". Based on this submission, I find that the WCB reports sent to GWL by the Public Body in the faxes dated July 18, 2007 and September 10, 2007, contained more information than GWL itself regarded as necessary to determine the Complainant's eligibility or suitability for disability benefits.

[para 41] In my view, the "necessity" test under section 40(4) of the Act is an objective one, so that my conclusion holds even though the Public Body may have believed the medical information from the WCB in the faxes would be relevant and hence arguably necessary for making the determination regarding the Complainant's benefits.

[para 42] For the reasons above, I find that, contrary to section 40(4) of the Act, the Public Body did not disclose the Complainant's personal information only to the extent necessary to enable GWL to carry out the purpose of determining the Complainant's eligibility for disability benefits in a reasonable manner.

IV. ORDER

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

[para 44] I order the Public Body to cease disclosing the Complainant's personal information to Great-West Life Assurance Company in contravention of the Act.

[para 45] I impose the following term on the Public Body:

The Public Body is to ensure that it does not disclose personal information of the Complainant that it is not authorized to disclose by ensuring that its employees are made aware of the Public Body's obligations under the Act.

[para 46] I further order the Public Body to notify me and the Complainant, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Keri H. Ridley
Adjudicator