

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2011-006

June 2, 2011

WORKERS' COMPENSATION BOARD

Case File Number F5169

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that the Workers' Compensation Board ("WCB") used and disclosed his personal information to his treating physicians, date of accident employers, and various past, present, and potential employers contrary to the *Freedom of Information and Protection of Privacy Act* ("the Act" or "the FOIP Act").

The WCB admitted to disclosing the Complainant's personal information to his treating physicians and two date of accident employers but denied disclosing information to other employers as alleged by the Complainant. The Adjudicator found that the Complainant did not provide adequate evidence that the WCB disclosed his personal information to other employers, other than his date of accident employers.

The Adjudicator found that the WCB used the Complainant's personal information in accordance with the Act.

The Adjudicator also found that the WCB disclosed the Complainant's personal information to his date of accident employers in accordance with the *Workers' Compensation Act* and the FOIP Act. However, the Adjudicator found that the WCB disclosed the Complainant's personal information to his treating physicians in contravention of the FOIP Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 39, 40, 41, and 72; *Workers' Compensation Act* R.S.A. 2000 c. W-15 ss. 13.2, 46, 120, and 147.

Authorities Cited: AB: Orders F2006-018, F2006-026, F2007-019, and F2009-041.

I. BACKGROUND

[para 1] The Complainant had three separate claims with the Workers' Compensation Board ("WCB"). He complains that the WCB disclosed his personal information, found on his WCB files, in contravention of the *Freedom of Information and Protection of Privacy Act* ("the Act" or "the FOIP Act").

[para 2] Specifically, the Complainant claims that:

1. A WCB medical consultant and a WCB case worker disclosed a Medical Panel Report, dated October 3, 2006 ("Medical Panel Report") to three of the Complainant's treating physicians.
2. The WCB provided his "date of accident" employers with a complete copy of the Complainant's file relating to his claim arising from the injury he suffered while working for these employers.
3. The WCB disclosed the Complainant's personal information to past, present and potential employers.

[para 3] On receiving his complaints, the Commissioner authorized a portfolio officer to investigate and attempt to resolve the issues between the parties, but this was unsuccessful and an inquiry was requested.

[para 4] I received initial submissions from both the Complainant and the WCB and a rebuttal submission from the Complainant. As well, I asked for and received additional information and submissions from the WCB regarding if and when an appeal or review of the WCB's decision was made and the relevance of the information that was disclosed to the Applicant's date of accident employers. The Complainant responded to this additional information from the WCB.

II. INFORMATION AT ISSUE

[para 5] The information at issue is the Complainant's personal information that was allegedly disclosed by the WCB to the Complainant's treating physicians and employers.

III. ISSUES

[para 6] The Notice of Inquiry lists the issues in this inquiry as follows:

Issue A:

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

Issue B:

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

IV. DISCUSSION OF ISSUES

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

[para 7] Although it is not clearly argued by the Complainant in his submissions, the Complainant seems to suggest that the Medical Panel Report, containing his personal information, was used in contravention of the Act.

[para 8] The WCB submits that the Medical Panel Report was collected by the WCB, "...to clarify the Complainant's diagnosis, treatment, fitness to work and permanent clinical impairment issues." The WCB went on to explain that a medical panel is a group of impartial, independent decision makers that assist the WCB in resolving medical issues that arise between applicants and the WCB.

[para 9] Section 39 of the Act allows a public body to use an individual's personal information in prescribed circumstances. The portions of section 39 of the Act relevant to this inquiry state:

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

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

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

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

...

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

[para 10] The WCB argues that the Medical Panel Report was, "...used to determine [the Complainant's] eligibility to benefits under the [*Workers' Compensation Act*]."

[para 11] I find that the Medical Panel Report was collected by the WCB to assist in its determination regarding the Complainant's eligibility and was used for the same purpose and, therefore, the WCB used the Complainant's personal information in compliance with section 39(1)(a) of the Act.

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

[para 12] The more contentious issue in this inquiry is the WCB's disclosure of the Complainant's personal information.

[para 13] The Complainant alleges that the WCB improperly disclosed his personal information (found in both his WCB files and the Medical Panel Report) as follows:

1. A WCB medical consultant and a WCB case worker disclosed a Medical Panel Report, dated October 3, 2006 ("Medical Panel Report") to three of the Complainant's treating physicians.
2. The WCB provided his "date of accident" employers with a complete copy of the Complainant's file relating to his claim arising from the injury he suffered while working for these employers.
3. The WCB disclosed the Complainant's personal information to past, present and potential employers.

[para 14] The WCB confirms that:

1. A WCB medical consultant disclosed the Medical Panel Report to one of the Complainant's treating physicians.
2. A WCB case worker disclosed the Medical Panel Report to another two of the Complainant's treating physicians.
3. Severed copies of the Complainant's respective WCB files were provided to two of the Complainant's "date of accident" employers.

[para 15] However, the WCB denies that it provided the Complainant's personal information to any of his past, present and potential employers beyond what it admitted above.

[para 16] This office has established that in inquiries relating to a complaint about disclosure of personal information, the initial, or evidential, burden lies with the

complainant. If he or she has met that burden, the public body then has the burden to prove that it disclosed the complainant's personal information in accordance with the Act (see Order F2007-019).

[para 17] The Complainant did not provide evidence that the WCB provided his personal information to past, present and potential employers. Therefore, with regard to the Complainant's third allegation noted above, I find that the Complainant did not meet his evidential burden of proof and I will deal only with the WCB's disclosure of the Complainant's personal information (the Medical Panel Report) to his three doctors and the WCB's disclosure of the Complainant's personal information (his WCB files) to his "date of accident" employers.

WCB's disclosure of Medical Panel Report to the Complainant's treating physicians:

[para 18] The WCB argues that the Medical Panel Report was disclosed to two of the Complainant's treating physicians by a WCB case worker because the findings of the Medical Panel did not support the treatment that the physicians were providing to the Complainant. The WCB submits:

...it was important that these doctors be provided a copy of the [Medical Panel Report] and be made aware of the information contained therein as it could have a direct impact on decisions made by them concerning the Complainant's treatment in relation [to one of his WCB claims].

[para 19] The WCB further argues that the Medical Panel Report was provided to another one of the Complainant's treating physicians by a WCB medical consultant:

... to ensure that [the treating physician] was aware of the WCB's level of accepted responsibility with respect to the Complainant's injury, and to enable him to make any further treatment and rehabilitation decision based on this current information.

[para 20] The WCB submits that it had authority to disclose this information to the treating physicians pursuant to section 40(1)(c) and (f) of the Act. These sections state:

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

...

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

...

(f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,

...

[para 21] Dealing first with section 40(1)(c) of the Act, the WCB argues:

The clear purpose for which the Medical Panel Report was disclosed was consistent with the purpose for which it was collected – to examine, inquire into, hear and determine the Complainant’s entitlement to workers’ compensation benefits including the provision of medical aid.

[para 22] Section 40(1)(c) of the Act allows a public body to disclose information either for the same purpose for which it was collected or, “for a use consistent with that purpose”. Given the purpose of the collection was to determine the Complainant’s eligibility for WCB benefits, it cannot be said (nor was it argued by the WCB) that the disclosure of the Medical Panel Report was for the same purpose for which it had been collected. I base this conclusion on the fact that the WCB had already decided that the treatment suggested by the Complainant’s physicians was either not supported by the evidence that the Medical Panel had before it or was not for an injury which was related to a workplace accident. The Medical Panel’s decision had already taken into account what the Complainant’s treating physicians had recommended. Thus, the disclosure to the treating physicians cannot have been for the purpose of determining entitlement to WCB benefits.

[para 23] In fact, the WCB does not argue that the information was disclosed for the same purpose but rather argues that the information was disclosed for a use consistent with the purpose for which it was disclosed.

[para 24] Section 41 of the Act defines “consistent with the purpose for which the information was collected” as follows:

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

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

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

[para 25] Therefore, in order for the purpose of the disclosure to be consistent with the purpose for which it was collected, the disclosure must have a direct connection to the purpose of the collection and it must be necessary for performing the statutory duties or operating a legally authorized program of the WCB.

[para 26] In Order F2006-018, the Adjudicator stated:

...when deciding whether the purpose of a use or disclosure of personal information is the same as or consistent with the purpose of collection, I believe that one should examine the specific, primary or dominant purpose. Otherwise, a public body would have too wide of a latitude to use and disclose personal information simply by characterizing

the purposes broadly enough (e.g., by saying that all information is collected, used and disclosed because it relates directly to and is necessary for an operating program or activity).

[para 27] I agree with this reasoning.

[para 28] As noted above, the WCB argued that it disclosed the Medical Panel Report to two of the treating physicians to make them aware that the Medical Panel's findings did not support a particular diagnosis, so as to possibly influence what treatment the physicians would decide to provide. Similarly, it provided the Report to the third physician to enable him to make further treatment decisions based on the WCB's level of accepted responsibility.

[para 29] I must determine if these are purposes consistent with the purpose for collecting the information, which was to determine eligibility for benefits. As set out above, to be consistent with the purpose for collection, a use must be directly connected to the purpose for collection, as well as necessary for the performance of the WCB's statutory duties or for the operation of a legally authorized WCB program.

[para 30] Had the physicians been providing workers' compensation benefits in the form of medical aid, and had they therefore been providing treatment or making treatment decisions in order to implement decisions that had been made by the WCB (in reliance on the Medical Panel Report), I would entertain an argument that the purpose of disclosing the Medical Panel Report was consistent with the purpose for collecting it, since such a disclosure would be necessary for performing the statutory duties, or operating a legally authorized program, of the WCB. A disclosure of information that was for the purpose of implementing a program-related decision of the WCB would be consistent with the purpose of collecting the information in order to make the decision.

[para 31] The same might arguably be said of information that was disclosed in order to influence a treatment decision, if the treatment that was provided by the treating physicians could have some effect on benefits that the WCB would be obliged to provide.

[para 32] However, neither appears to be the case.

[para 33] Rather, based on the Complainant's and WCB's submissions, I cannot find that the Complainant's treating physicians were WCB doctors or consultants or that they were providing treatment to the Complainant at the direction of the WCB. Neither, according to the evidence before me, were these physicians providing workers' compensation benefits in the form of medical treatment. Nor does any of the evidence before me suggest that whatever treatment these physicians chose to provide could have any impact on whether WCB would be required to pay any further benefits. As stated above, the WCB had already made a decision as to what medical aid should be provided, and a decision by the physicians to provide medical treatment that was not supported by the Medical Panel Report or accepted by the WCB would not have the effect of changing the WCB's conclusion.

[para 34] It is my further understanding that the Complainant's treating physicians made their decisions regarding his treatment based on their examination of the Complainant and not on the WCB's level of accepted responsibility. Indeed, I note that in one of the treating physician's reports which was provided to me by the Complainant, the physician makes no connection between the Complainant's workplace injury and his diagnosis but simply states that the Complainant should not return to work until he has recovered following this treatment. There is no suggestion that the Complainant should receive WCB benefits during this recovery period.

[para 35] Thus, I do not accept that the disclosures to the physicians were for the purpose of performing the statutory duties of, or operating a legally-authorized program of, the WCB. On this account, I cannot find that the disclosures were consistent with the purpose for which the WCB collected the Medical Panel Report.

[para 36] The WCB also argues that the disclosure of the Medical Panel Report to the Complainant's treating physicians was authorized by an enactment of Alberta, specifically section 147(2) of the *Workers' Compensation Act* ("WCA") which states:

147(2) No member or officer or employee of the Board shall divulge information respecting a worker or the business of an employer that is obtained by that person in that person's capacity as a member, officer or employee unless it is divulged under the authority of the Board to the persons directly concerned or to agencies or departments of the Government of Canada, the Government of Alberta or another province or territory

[para 37] The WCB argues:

Because [the treating physicians] were providing care to the Complainant, they are considered to be interested parties under section 147(2) of the WCA. It is therefore submitted that the WCB had the authority to disclose the October 3, 2006 [Medical Panel Report] to each of them.

[para 38] Our office has considered section 147 of the WCA previously. In Order F2006-026, the Director of Adjudication rejected the idea that this provision of the WCA provided authority to disclose personal information rather than restricting its disclosure. This interpretation was cited with approval in Order F2009-041 in which the Adjudicator states:

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.

(Order F2009-041 at para 68)

[para 39] I agree with the reasoning in both prior orders of this office that have considered section 147(2) of the WCA. This section of the WCA does not authorize disclosure unless authorized by another provision of the WCA, and therefore section 40(1)(f) of the Act does not apply.

[para 40] Furthermore, even if section 147(2) did apply, I do not see why “treating physicians”, as persons providing care to the Complainant, should be considered to be “interested parties” – or, more precisely, “persons directly concerned” – within the terms of section 147(2) of the WCA. While undoubtedly physicians are usually concerned about their patients’ well-being, the idea of interest or concern in the context of the provision is, in my view, in the nature of a legal interest or at a minimum a directly personal one such as one has in one’s own physical well-being. The WCB’s own Policy Manual provides that:

[w]hen the information is about a worker, “persons directly concerned” are normally considered to be the worker, the worker’s representative or dependant (in the case of worker death or incapacity) or the representative or agent of any of them.

[para 41] The WCB points to no other sections of the WCA which would give it authority to disclose this information to the Complainant’s treating physicians. Therefore, I find that the WCB disclosed the Complainant’s personal information to his treating physicians contrary to the Act.

WCB’s disclosure of WCB files to the Complainant’s date of accident employers:

[para 42] The WCB admits that on May 28, 2008 one of the Complainant’s date of accident employers requested an entire copy of the Complainant’s case file related to the injury the Complainant suffered while working for that date of accident employer. A severed copy was provided to the date of accident employer on June 4, 2008. As well, an updated copy of the Complainant’s claim file was requested and provided to the date of accident employer on August 22, 2008.

[para 43] The WCB also admits that on February 20, 2008 and March 27, 2009, it disclosed, to another date of accident employer, a severed copy of the Complainant’s case file related to an injury he suffered while working for that date of accident employer. I will collectively refer to these employers as the Complainant’s “date of accident employers”.

[para 44] The WCB argues that pursuant to sections 46(1) and 13.2 of the WCA, the date of accident employers have a “direct interest” in the Complainant’s claim and can request a review or appeal of a decision made by “the review body”. Further, the WCB submits that because the date of accident employers are interested parties, section 147(3) of the WCA applies. Section 147(3) of the WCA 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 45] Finally, the WCB submits that because section 147(3) of the WCA applies, it gives the WCB the authority to disclose the Complainant’s personal information to his date of accident employers. Therefore, it argues that in disclosing a severed version of the Complainant’s WCB files to his date of accident employers, the WCB was compliant with section 40(1)(f) of the Act.

[para 46] The WCB also submits that the disclosure of the Complainant’s personal information in his case files was done in accordance with its “Business Procedure 20.1 Access to Claim File Information – Review and Appeals”. This is not an enactment of Alberta or Canada and, therefore, is not relevant to its argument regarding section 40(1)(f) of the Act.

[para 47] That being said, I agree that section 147(3) of the WCA authorizes the release of some information in the Complainant’s claim file to his date of accident employers. There are two qualifiers in this section. The first, a prerequisite, is that the “matter”, in this case the decision to cover or deny coverage to the Complainant, must be under review or appeal pursuant to section 46 or 120 of the WCA. Secondly, if the first criterion is met, the date of accident employers are still entitled to review only information in the file that is relevant to the issue being appealed.

[para 48] As I mentioned above, because the Complainant has met his evidential burden, the burden to prove that the WCB complied with the Act in disclosing the Complainant’s personal information rests with the WCB.

[para 49] Initially, the WCB did not submit that at the time of the disclosures, these matters were under review or appeal. As well, initially, it did not provide me with a copy of the records that were released, or detail what it disclosed, or argue that these records were all relevant to the review or appeal. This was a similar situation to that in Order F2009-041 in which the Adjudicator states:

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.

(Order F2009-041 at para 76)

[para 50] Due to the lack of evidence or argument on these points, on April 20, 2011, I asked the WCB the following questions:

1. In the WCB's submissions, it admits to disclosing two of the Complainant's claims files to the respective date of accident employers. The WCB argues that it was authorized to do so pursuant to section 147(3) of the *Workers' Compensation Act*. I note that section 147(3) of the WCA pertains to matters that are under review or appeal. Please advise if there was an appeal or review under way when the claims files were disclosed to the date of accident employers, the date the appeal or review was requested and the party who requested it.
2. I note that the entirety of one claim file was released to the date of accident employer and other date of accident employer was given a severed copy of the claim file relating to the injury the Complainant suffered while under its employment. Section 147(3) of the WCA states that only information on the claim file relevant to the appeal or review be released to the employer. Please provide the WCB's position on the relevance of the material provided to the date of accident employers and evidence to support this position.

[para 51] The WCB confirmed that at the time of the disclosures to the Complainant's date of accident employers, the Complainant had requested an appeal of the WCB's decisions.

[para 52] Further, the WCB confirmed that it provided only severed copies of the Complainant's WCB files to his date of accident employers. It also stated that the appeals related to the Complainant's view that there were medical conflicts, and to his entitlement to benefits.

[para 53] The WCB provided me with copies of a summary of the records that were disclosed to the Complainant's date of accident employers. The records provided to the date of accident employers consist of correspondence from the Complainant, medical reports and invoices, memos from the special investigation unit, and documents relating to the Complainant's readiness to work. It appears to have consisted of almost the entirety of the Complainant's WCB file. Although I was not given the opportunity to review the actual records, given the scope of the Complainant's appeal and the summary provided to me, I find that what was disclosed was relevant to the appeals.

V. ORDER

[para 54] I make this Order under section 72 of the Act.

[para 55] I find that the WCB used the Complainant's personal information in accordance with section 39 of the Act.

[para 56] I find that the WCB disclosed the Complainant's personal information to his treating physicians in contravention of the Act and I order the head of the WCB to ensure that it discloses the Complainant's personal information only in compliance with Part 2 of the Act.

[para 57] I confirm that the WCB disclosed the Complainant's personal information to his date of accident employers in compliance with Part 2 of the Act.

[para 58] I further order the head of the WCB to notify me and the Complainant in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Keri H. Ridley
Adjudicator