

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-37

October 2, 2014

WORKERS' COMPENSATION BOARD

Case File Number F6406

Office URL: www.oipc.ab.ca

Summary: An individual made a complaint to this Office after she had been surreptitiously videotaped by an investigator with the Workers' Compensation Board (WCB, or the Public Body). The Complainant had been accompanying her mother in a store when she was videotaped. The purpose of the videotaping was to capture images of the mother (as a WCB claimant) rather than the Complainant.

The Complainant states that the Public Body collected her personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

The Adjudicator found that the Public Body had authority to collect the Complainant's personal information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 33, 34, 72, *Workers' Compensation Act*, R.S.A. 2000, c. W-15, ss. 151, 152.

Authorities Cited: AB: F2006-018, P2008-008.

I. BACKGROUND

[para 1] An individual made a complaint to this Office after she had been surreptitiously videotaped by an investigator with the Workers' Compensation Board (the Public Body). The Complainant had been accompanying her mother in a store when she was videotaped.

[para 2] The Complainant's mother was a WCB claimant; the Public Body had initiated surveillance of the Complainant's mother for reasons related to the mother's claim. The purpose of the videotaping was to capture images of the mother rather than the Complainant. The Complainant also notes that the video footage included images of her children; however, the complaint is limited to the collection of the Complainant's personal information.

[para 3] The Complainant made a complaint to this office that the Public Body collected her personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (FOIP Act) when it captured her image on video.

[para 4] The Commissioner authorized an investigation in attempt to settle the matter. This was not successful; the Complainant requested an inquiry and the matter was set down for a written inquiry.

II. INFORMATION AT ISSUE

[para 5] The information at issue is the Complainant's personal information collected by the Public Body – specifically the Complainant's image captured on video in the course of the Public Body's surveillance of her mother.

III. ISSUES

[para 6] The Notice of Inquiry sent April 3, 2014 lists the issues as follows:

- 1. Did the Public Body collect the personal information of the Complainant in compliance with, or in contravention of, section 33 of the FOIP Act?**
- 2. Did the Public Body collect the personal information of the Complainant directly, or indirectly? If the Public Body collected the personal information indirectly, did it do so in compliance with, or in contravention of, section 34 of the FOIP Act?**

IV. DISCUSSION OF ISSUES

- 1. Did the Public Body collect the personal information of the Complainant in compliance with, or in contravention of, section 33 of the FOIP Act?**

Is the information at issue personal information of the Complainant?

[para 7] The FOIP Act defines personal information as follows:

1 In this Act,

...

- n) "personal information" means recorded information about an identifiable individual, including*

- i) *the individual's name, home or business address or home or business telephone number,*
- ii) *the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
- iii) *the individual's age, sex, marital status or family status,*
- iv) *an identifying number, symbol or other particular assigned to the individual,*
- v) *the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
- vi) *information about the individual's health and health care history, including information about a physical or mental disability,*
- vii) *information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
- viii) *anyone else's opinions about the individual, and*
- ix) *the individual's personal views or opinions, except if they are about someone else;*

[para 8] The above is not an exhaustive list. The information at issue is the image of the Complainant, as well as other information captured in the video footage (including family status and place of residence). This is personal information of the Complainant under the FOIP Act.

[para 9] A public body may collect personal information only as authorized under section 33 of the Act:

- 33 No personal information may be collected by or for a public body unless*
- (a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,*
 - (b) that information is collected for the purposes of law enforcement, or*
 - (c) that information relates directly to and is necessary for an operating program or activity of the public body.*

Collection of the Complainant's personal information incidental to the surveillance of her mother

[para 10] The Public Body states that its authority to collect the Complainant's personal information is related to its authority to collect the personal information of her mother (the Claimant). Its submission regarding the collection of the Complainant's personal information in the surveillance video frames the issue in terms of the Complainant's expectations of privacy. The Public Body argues that the video footage was taken in a toy store, which is a public place. I note that the video footage (provided to me by the Complainant) also captures images of the Complainant outside her place of residence.

[para 11] The Complainant's expectation of privacy is not the issue in this inquiry. The issue is whether the Public Body had authority to collect the Complainant's personal information. That

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

[para 12] That said, I agree that the Public Body's authority to collect the Complainant's personal information is related to its authority to collect the Claimant's personal information. The Public Body's initial submission indicated multiple purposes for conducting the surveillance. By letter dated August 1, 2014, I asked the Public Body to clarify its purpose for collecting the Claimant's personal information via surveillance. I said:

The Public Body's submission (at page 10) states that "video surveillance that was conducted was authorized by another Act, the WC Act, and the purpose of the collection was to confirm if fraudulent behavior had occurred, in order to determine eligibility for WCB wage replacement benefits and medical services."

While a finding of fraudulent behavior will likely affect a claimant's eligibility for benefits, conducting an investigation into possible fraudulent behavior and determining an individual's eligibility for benefits (or the correct level of benefits) are two different purposes. For example, an investigation into possible fraud might be conducted if it is suspected that a claimant has misrepresented his or her symptoms or injuries to the Public Body and/or medical professionals. In contrast, a determination of benefit levels may include a consideration of the claimant's range of motion, ability to sit, stand or walk for certain periods of time, etc.

The Public Body indicates (at page 5 of its submission) that the purpose of the surveillance of the Complainant's mother (the claimant) was to resolve conflicting medical opinions regarding her ability level. This seems to relate to the determination of her *benefit level*, rather than an investigation into possible fraudulent behavior (although conflicting medical opinions could possibly indicate that a claimant has misrepresented injuries to one or more doctors).

Can the Public Body please clarify the purpose of the surveillance on the claimant? Was the purpose to determine the claimant's capabilities (and therefore the level of benefits for which she was eligible), or was it based on a suspicion of fraudulent behavior?

[para 13] The Public Body clarified that it believed that discrepancies regarding the Claimant's capabilities indicated that the Claimant may have been deceitful about her capabilities. It said:

The Special Investigations Unit (SIU) Manager, who approved the surveillance investigation on [the Claimant], determined that the cause for the referral was advice from a Medical Manager to the Claim Owner. It was suggested to them that the worker [the Claimant] was possibly being deceitful in past examination[s], as discrepancies were noted during these exams. It appeared that she might have been feigning a limp as it was not consistently present. There was also no objective findings found to support the self-described restrictions/limitations she complained of experiencing. (Additional submission, page 3).

Section 33(b) – Collection for law enforcement purposes

[para 14] Section 33(b) authorizes a public body to collect personal information for the purposes of law enforcement. If the Public Body’s surveillance of the Claimant was conducted for the purposes of law enforcement, this provision would authorize the collection of the Claimant’s personal information. Law enforcement is defined in section 1(h) of the Act as follows:

(h) “law enforcement” means

(i) policing, including criminal intelligence operations,

(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to the result of the investigation are referred, or

(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the result of the proceedings are referred.

[para 15] The Public Body states that its Special Investigations Unit (SIU) was created to “conduct investigations in relation to allegations of system abuse and lay charges when appropriate.” It states that “[s]ome investigators are granted ‘Peace Officer’ status under section 7 of the *Peace Officer Act*”... which “enables investigators to lay information on behalf of the Crown in matters relating to offences under the Criminal Code and the Workers’ Compensation Act...” (Initial submission, page 6).

[para 16] The Public Body also points to section 152 of the WCA, which is an offence provision for contravening that Act. It states in part:

152(1) A person who contravenes this Act or a regulation or order made under it is guilty of an offence.

(2) Where a person is guilty of an offence referred to in subsection (1), the person is liable

(a) to a fine of not more than \$25 000 and, where the offence is a continuing offence, a further fine of not more than \$10 000 for each day during which the offence continues, and

(b) in the case of an individual, to imprisonment for a period not exceeding 6 months in addition to or instead of the fine.

[para 17] Section 151.1(1) is also relevant:

151.1(1) No person shall, in connection with a claim for compensation,

(a) knowingly provide false or misleading information to the Board,

*(b) fail to report to the Board, without lawful excuse, the person’s return to work,
or*

(c) *fail to inform the Board of a material change in the person's circumstances that may affect the person's entitlement to compensation or other benefits under this Act or the amount of that compensation or those benefits.*

[para 18] The Public Body is arguing that medical personnel believed there was sufficient reason to suspect that the Claimant was fraudulently presenting symptoms (or restrictions) that she did not, in fact, have. If that were true, the behaviour would fall within the scope of section 151.1(1) of the WCA; contravening that provision could lead to a fine under section 152 of the WCA. I find that the Public Body's investigation was a law enforcement investigation within the terms of section 1(h) of the FOIP Act.

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

[para 20] Based on the notes of the investigator taking the surveillance video (provided to me by the Complainant), it seems the investigator was attempting to capture images of the Claimant in a variety of situations, performing a variety of tasks. It would likely be difficult for the Public Body to covertly record the Claimant in public places, in a variety of situations, without also recording images of other individuals (if the Public Body were interested only of images of the Claimant walking, it may have been a simple matter to catch images of the Claimant alone). Having reviewed the surveillance tapes, I note that the Complainant's personal information was collected (recorded on the surveillance tapes) only when she was close enough to the Claimant to be caught in the camera's field of vision. For all of these reasons, I find that the purpose for which the Complainant's personal information was collected by the Public Body in the surveillance tape was a law enforcement investigation.

[para 21] It is not clear to me whether, or to what extent, surveillance tapes can be edited before they are disclosed (if they are disclosed). The Public Body may consider whether, when individuals other than the subject of an investigation are recorded on a surveillance tape, it must remove (or blur) the images of those other individuals before the surveillance tape can be used or disclosed. However, the use and/or disclosure of the surveillance tape are not an issue in this inquiry.

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

[para 22] Collection from a source other than the individual the personal information is about is authorized in the circumstances set out in section 34(1).

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

concluded that video surveillance is a direct collection (see Orders F2006-018, at para. 22; P2008-008, at para. 90).

[para 24] As I have found that the Public Body collected the Complainant's personal information directly from her, I do not need to consider whether the Public Body had authority to collect the personal information indirectly under section 34(1).

V. ORDER

[para 25] I make this Order under section 72 of the Act.

[para 26] I find that the Public Body was authorized to collect the Complainant's personal information under Part 2 of the Act. I also find that the Public Body collected the information directly from the Complainant.

Amanda Swanek
Adjudicator