ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2010-022

May 30, 2011

THE GREAT-WEST LIFE ASSURANCE COMPANY

Case File Number P1042

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 ("the Organization"), her employer's group disability insurer, for disability benefits. The Complainant complained that the Organization collected and used her personal information that had been disclosed to the Organization by her employer, Alberta Health Services ("AHS"), contrary to the *Personal Information Protection Act* ("the Act" or PIPA).

The Organization argued that the Complainant consented to its collection and use of her personal information and that it did not collect or use her medical information.

The Adjudicator found that the Complainant did consent to the Organization's collection and use of some of her personal information but this consent did not apply to her medical information. She consented to the collection of her "medical information" only from herself, her treating physician, and her union representative. The Adjudicator found that the Organization did collect and use the Complainant's "medical information" (which was her personal information) without consent and contrary to the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, s. 40(4); *Personal Information Protection Act*, S.A. 2003, c. P-6.5 ss. 1(k), 11, 14, 15, 16, 17, 18, and 52.

Authorities Cited: AB: Order P2006-008 and F2010-034.

I. BACKGROUND

[para 1] The Complainant was an employee of Alberta Health Services ("AHS"). She was injured while working as a nursing attendant on February 14, 2007 and made a Workers' Compensation Board ("WCB") claim as a result. The WCB accepted the Complainant's claim and provided "Temporary Total Disability Benefits". The WCB also provided a treatment plan for the Complainant involving physiotherapy.

[para 2] On June 4, 2007, the Complainant made a disability claim to The Great-West Life Assurance Company ("the Organization"), the insurance company who carried her employer's group insurance policy. In her application for benefits, the Complainant added the following hand-written notation: "[a]ll medical information should come through my treating physician with regards [to] this claim."

[para 3] Her claim was accepted by the Organization but, pursuant to the "Benefit Provisions" of the insurance contract with the Organization, the Complainant's benefits were reduced by the amount she was receiving in benefits from the WCB.

[para 4] On August 8, 2007, the Complainant was discharged from physiotherapy and on August 9, 2007 the WCB considered the Complainant fit to return to work. The Complainant disagreed with this assessment, as it did not take into account an injury she had allegedly suffered at physiotherapy, and, as a result, she did not return to work on that date. The WCB then determined that the Complainant was fit to return to regular duties with no restrictions beginning August 30, 2007. The Complainant also disagreed with this finding.

[para 5] On September 20, 2007, the Organization wrote to the Complainant and stated:

> Based on reports from WCB, we understand you were approved for modified return to work effective August 9, 2007. A full return to work was indicated for August 30, 2007…
>
> …Since you were to have returned to work on August 30, 2007, and this falls within the Long Term disability qualifying period, your Long Term disability claim is declined.

[para 6] The Complainant wrote to the Office of the Information and Privacy Commissioner ("this office") and complained that her personal information had been collected by the Organization contrary to the *Personal Information Protection Act* ("the Act" or "PIPA"). The Complainant also complained that her personal information was improperly disclosed to the Organization by her employer. The latter complaint is the subject of Order F2010-034.

[para 7] The Commissioner authorized a portfolio officer to investigate this matter and attempt to resolve it, but this was unsuccessful, and the Complainant requested an inquiry. Both the Complainant and the Organization provided initial and rebuttal submissions.

II. ISSUES

[para 8] The Notice of Inquiry dated July 7, 2010 lists the issues in this inquiry (which I have reworded slightly) as follows:

> **Issue A:**
>
> **Did the Organization collect and use "personal information" of the Complainant as defined in PIPA section 1(k)?**
>
> **Issue B:**
>
> **Did the Organization obtain the Complainant's consent in accordance with section 8 of the Act before using the information?**
>
> **Issue C:**
>
> **Did the Organization collect and use the "personal information" in contravention or, or in compliance with, section 7(1) of PIPA?**
>
> **Issue D:**
>
> **If the Organization had the authority to collect and use the personal information under sections 14 and 17 but not under sections 15 and 18, did it collect and use the information contrary to, or in accordance with sections 11 and 16 of PIPA (use for purposes that are reasonable)?**
>
> **Issue E:**
>
> **If the Organization had the authority to use the personal information under sections 14 and 17 but not under sections 15 and 18, did it use the information contrary to, or in accordance with sections 11(2) and 16(2) of PIPA (use to the extent reasonable for meeting the purposes)?**

[para 9] In addition to these issues, the Complainant argues that the Organization improperly denied her claim. This is not an issue over which I have jurisdiction; therefore, I will restrict my findings to the issues noted above.

III. DISCUSSION OF ISSUES

A: Did the Organization collect and use "personal information" of the Complainant as defined in PIPA section 1(k)?

[para 10] Personal information is defined in section 1(k) of the Act as follows:

> *1(k) "personal information" means information about an identifiable individual*

[para 11] The Complainant contends, and the Organization concedes, that the Organization collected personal information about the Complainant from AHS consisting of, among other things, two reports that had been sent by the WCB to AHS.

[para 12] The report of March 2, 2007 gives a brief description of the events that caused the Complainant's injury, as well as her diagnosis. It goes on to state the details of WCB benefits the Complainant is to receive and a "Case Plan" to have the Complainant return to work. The second report, dated, August 27, 2007, states when the Complainant's WCB benefits are to end and also contains the background and injury details pertaining to the Complainant, along with a description of a subsequent injury suffered by her at her physiotherapy, and brief descriptions of her physiotherapist's opinion of the severity of the injury, and the opinions of a Specialist whom the WCB consulted regarding the Complainant's ability to return to work.

[para 13] With respect to the use of the information, I have before me a letter sent by the Organization to the Complainant, dated September 20, 2007, provided to me by the Organization, which states;

> Based on reports from WCB, we understand you were approved for modified return to work effective August 9, 2007. A full return to work was indicated for August 30, 2007.
>
> As per your Group Plan provision, [the Organization] considers the WCB rehabilitation plan to be an approved rehabilitation plan. Since you were to have returned to work on August 30, 2007, and this falls within the Long Term disability qualifying period, your Long Term disability claim is declined.

[para 14] The statements just quoted suggest that the Organization reviewed the WCB reports and adopted the WCB's assessment that the Complainant was able to return to work on August 30, 2007, and that it denied disability benefits for the Complainant on this basis. It is not clear from this letter whether the Organization actually considered the detailed information in the reports (the information about the injury and diagnosis) which led the WCB to determine when the Complainant was to return to work, or whether it simply relied on the conclusion reached by the WCB that was based on this information. Either way, it seems that the Organization relied on the information in the WCB reports to deny benefits not because the WCB was already paying her benefits, but, rather, it used the information to reach the conclusion that the Complainant was not entitled to benefits because she was fit to return to work.

[para 15] Nonetheless, the Organization argues that to determine if she was eligible for benefits it used only the Complainant's medical information provided to the Organization by the Complainant, by her treating physician, and, later, by her union representative – but not any "medical information" in the report. The Organization says:

> ...[The Organization] adjudicated [the Complainant's] long-term disability claim on the basis of the medical information that she provided to us, or that was received with her consent from her physician and union representative.

[para 16] The statements in the letter of September 20, 2007 are difficult to reconcile with the Organization's argument that it used only medical information from the Complainant, her family doctor, and later medical information sent to it by the Complainant's union representative, to make its findings about the Complainant's eligibility for benefits. As well, while the Organization's letter was dated September 20, 2007, this information was not forwarded by the Complainant's union representative until February 14, 2008, at which time it was sent back until the Complainant expressly authorized the Organization to receive medical information from the Complainant's union representative.

[para 17] A possible explanation is that the Organization did not regard the information described at paragraph 12 as "medical information", and therefore, although it relied on this information to make or help it to make its determination about the Complainant's eligibility for benefits, it argued that it did not rely on the "medical information" in the reports. Possibly as well, in making its determination it relied not only on the information in the reports, but also on information it may have received from the Complainant's doctor (who according to the Organization did note on August 16, 2007, that the Complainant was fit to return to modified duties on August 20, 2007) and also, ultimately, on medical information it later received from the Complainant, her doctor, and her union representative. Possibly, though this is not clear from the evidence before me, separate decisions were made from different time periods.

[para 18] Nonetheless, the letter of September 20, 2007 constitutes evidence that at least to some degree, the Organization 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. Thus I conclude that in relying on this information to make its eligibility determination, the organization "used" it within the terms of PIPA.

[para 19] As the Complainant has established (and the Organization has confirmed) that the Organization collected the personal information, and as I have found that the Organization used this information, either directly or indirectly, to make a determination as to eligibility, the Organization bears the onus to prove that it complied with the Act when it collected and used the Complainant's personal information (see Order P2006-008).

B: Did the Organization obtain the Complainant's consent in accordance with section 8 of the Act before collecting and using the information?

[para 20] The Organization argues that the Complainant consented to its collection and use of her personal information. It points to the application the Complainant signed and submitted to the Organization when she made her claim for disability. The application form had a section titled "Authorizations and Declarations" which sets out the following provisions:

> I authorize:
>
> · [The Organization], any healthcare or rehabilitation provider, my plan administrator, other insurance or reinsurance companies, administrators of government benefits or other benefit programs, other organizations or service providers working with [the Organization] to exchange my information, when relevant and necessary for the purpose of assessing my claim, administering the group benefits plan, or performing independent assessments;
>
> · [The Organization] to exchange information with my employer, plan sponsor, or plan administrator when relevant for the purpose of discussing rehabilitation and return-to-work planning;
>
> · [The Organization] to release information about my claim to an auditor authorized by my employer, plan sponsor or their agent and [the Organization] at any time for the purpose of auditing the assessment of the claims.
>
> · [The Organization] to exchange my information with my employer's occupational health department when relevant for the purpose of assisting with the assessment of my claim.
>
> Except for audit purposes, this authorization shall remain valid for the duration of my claim for benefits or until otherwise revoked by me.
>
> I confirm that a photocopy or electronic copy of this authorization shall be as valid as the original.
>
> I declare that the statements provided in this Employee's Statement and any statements provided in any personal or telephone interview concerning this claim for disability benefits will be true and complete. I agree that all such statements form the basis for any benefit approved as a result of a claim.
>
> *All medical information should come through my treating physician with regard [to] this claim.*

[para 21] The Complainant added the underlining, and handwrote the italicized portion above. According to the Complainant, she added this note to make it clear to the Organization that she did not want any of the information on her WCB file to be sent to the Organization; however, I note the notation refers to "medical information" only.

[para 22] The Organization argues that it took this note to mean that it was not to collect "medical information" from any sources other than the Complainant (with consent) or her treating physician. The Organization notes that later, the Complainant expanded this restriction to allow her union representative to provide the Organization with her medical information.

[para 23] It is not clear from her notation that the Complainant was objecting specifically to collection or use by the Organization of her medical information *on her WCB file*. However, I do not think that anything turns on this as the Organization's interpretation would necessarily preclude the collection of medical information received from WCB or from the Complainant's employer, AHS.

[para 24] As already noted above, in its submissions the Organization provided copies of two faxes from WCB to AHS which attached two WCB reports, which AHS had sent to the Organization. These reports contain opinions regarding the Complainant's diagnosis, treatment, and prognosis.

[para 25] The Complainant argues that these reports contain her medical information. The Organization argues that they do not. The Organization seems to interpret medical information as restricted to medical reports. I believe that the information in these reports, in particular the opinions regarding the Complainant's diagnosis, treatment, and prognosis, are her medical information as that term is commonly used; hence, that is how it should be understood in the context of the Complainant's handwritten note on the consent form. In my view, the Complainant's consent, as qualified by the handwritten notation, did not cover, or permit the collection and use of the type of information in the WCB reports.

[para 26] Further, if, for the sake of argument, I were to accept the Organization's submission that:

> As per [the Complainant's] authorization, [the Organization] could exchange information with her plan administrator when relevant and necessary for the purposes of assessing her claim, administering the group benefits plan, and discussing rehabilitation and return to work.

this consent is still restricted by the term, "relevant and necessary".

[para 27] In its initial submissions, the Organization states:

> Under the terms of [the Complainant's] employer's group insurance policy with [the Organization], [the Organization] is required to reduce any benefit payable

> under the group insurance policy by the amount paid from workers compensation benefits. [The Organization] collected and used information received from [the Complainant's] employer about the amount of workers compensation benefits that [the Complainant] was receiving and whether WCB payments were ongoing. This collection and use was reasonable and necessary in order to administer the terms of the group insurance policy and [the Organization] had obtained [the Complainant's] express consent for this collection and use for this purpose.

[para 28] I agree that given the terms of the insurance policy it might be reasonable and necessary for the Organization to collect personal information about the Complainant's WCB benefits – specifically the commencement date, the amount, and the duration, of the WCB benefits – particularly if it determined that the Complainant was entitled to benefits and needed to ensure that it was not duplicating WCB benefits. However, the two reports mentioned disclose much more of the Complainant's personal information then the amount and duration of her WCB benefits.

[para 29] As noted, the Organization argues that it did not collect and use any medical information from the WCB to make its determination regarding her entitlement to benefits. Possibly, the Organization means that the information in the WCB reports was not medical information. Alternatively, it may be saying that it did not use the information that was medical information in the WCB letters to make its determination regarding the Complainant's entitlement to benefits.

[para 30] If the organization is making the former argument, as I stated above, I disagree that the WCB reports did not contain the Complainant's medical information. Given the wording of the Complainant's handwritten note, I find that she did not consent to the collection and use of this information.

[para 31] However, if it is the latter argument on which the Organization is relying – that it did not use the medical information in the WCB reports to make its determination –then it cannot be said that the medical information in the WCB reports was "necessary" for making its decision within the terms of the "Authorizations and Declarations" agreement the Complainant signed. (In any event, this argument would address only the use of the information and not its collection.)

[para 32] Therefore, even based solely on the arguments of the Organization, I cannot find that that Complainant consented to the collection, and use, of her personal information, beyond such information as to the amount and duration of her WCB benefits as would be necessary for determining her entitlement to benefits.

C: Did the Organization collect and use the "personal information" in contravention or, or in compliance with, section 7(1) of PIPA? In particular,

a. Did the Organization have the authority to collect and use the Complainant's personal information without consent, as permitted by sections 11, 14, 16 and 17 of PIPA?[1]

[para 33] As I have decided that the Complainant did not consent to the Organization's collection and use of what I have termed her medical information in the WCB reports, I must determine whether it had authority to do so without consent under one of the authorizing provisions of the Act.

[para 34] Because the Organization argued that it had the Complainant's consent to collect the WCB reports, and, that to determine if she was eligible for benefits it used only the Complainant's medical information provided to the Organization by the Complainant, by her treating physician, and, later, by her union representative – but not any "medical information" in the reports – the Organization did not submit any argument on the applicability of section 11, 14, 16, and 17 of the Act, beyond stating that these sections do not apply.

[para 35] The potentially relevant portions of section 14 of the Act state:

> *14 An organization may collect personal information about an individual without the consent of that individual but only if one or more of the following are applicable:*
>
> > *(a) a reasonable person would consider that the collection of the information is clearly in the interests of the individual and consent of the individual cannot be obtained in a timely way or the individual would not reasonably be expected to withhold consent;*
> >
> > *…*
> >
> > *(c) the collection of the information is from a public body and that public body is authorized or required by an enactment of Alberta or Canada to disclose the information to the organization; … .*

[1] The Notice of Inquiry also included the following issue:

b. Did the Organization have the authority to collect and use the information without consent, because the information was the Complainant's "personal employee information" as that term is defined in PIPA section 1(j), and the terms of sections 15 and 18 were met?

However, as there was no suggestion by the Organization, that sections 15 and 18 of the Act are applicable, I will not consider them.

[para 36] The potentially relevant portions of section 17 of the Act state:

> *17 An organization may use personal information about an individual without the consent of the individual but only if one or more of the following are applicable:*
>
> > *(a) a reasonable person would consider that the use of the information is clearly in the interests of the individual and consent of the individual cannot be obtained in a timely way or the individual would not reasonably be expected to withhold consent;*
> >
> > *…*
> >
> > *(c) the information was collected by the organization from a public body and that public body is authorized or required by an enactment of Alberta or Canada to disclose the information to the organization; … .*

[para 37] On my review of the evidence before me I cannot find that any of the exceptions in sections 14 or 17 of the Act apply.

[para 38] First, it is not clear to me that use of the information would be in the Complainant's best interest. Second, for this reason, it could not be said that she would, "…not reasonably be expected to withhold consent."

[para 39] As well, although the information was collected by the Organization from AHS, a public body, I do not believe that AHS was, "…authorized or required by an enactment of Alberta or Canada to disclose the information…". I have held in the companion order to this one (Order F2010-034) that the disclosure of the "medical information" in the WCB reports to GWL by Alberta Health Services (the Complainant's employer) was not authorized under the *Freedom of Information and Protection of Privacy Act*, as it was not limited according to the requirements of section 40(4) of that act. No other legislation was suggested by the Organization. Therefore, I cannot find that sections 14(c) or 17(c) of the Act apply.

[para 40] On this basis, I find that the Organization did not have the authority under one of the authorizing provisions of the Act to collect or use the Complainant's personal information it obtained from her employer.

D: If the Organization had the authority to collect and use the personal information under sections 14 and 17 but not under sections 15 and 18, did it collect and use the information contrary to, or in accordance with sections 11 and 16 of PIPA (use for purposes that are reasonable)?

E: If the Organization had the authority to use the personal information under sections 14 and 17 but not under sections 15 and 18, did it use the information contrary to, or in accordance with sections 11(2) and 16(2) of PIPA (use to the extent reasonable for meeting the purposes)?

[para 41] As I have found that the Organization had no authority under the Act to collect and use the Complainant's personal information found in the WCB reports, either by virtue of her consent, or in the absence of her consent, it is not necessary for me to decide if the collection and use were for a reasonable purpose or reasonable for the purpose for which the information was collected or used.

IV. ORDER

[para 42] I make this Order under section 52 of the Act.

[para 43] I order the Organization to cease collecting and using the Complainant's personal information in contravention of the Act and order the Organization to destroy the WCB reports dated March 2, 2007 and August 27, 2007 that it collected from Alberta Health Services.

[para 44] I further order the Organization 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.

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Keri H. Ridley
Adjudicator