



INVESTIGATION REPORT 179-2019

Saskatchewan Workers' Compensation Board

April 23, 2020

Summary:

The Complainant raised concerns that the Saskatchewan Workers' Compensation Board (WCB) collected their personal health information (PHI) without their consent. The Commissioner found that collection provisions in Part IV of *The Health Information Protection Act* and *The Freedom of Information and Protection of Privacy Act* do not apply to this matter, and therefore, could not find an inappropriate collection of PHI occurred. The Commissioner recommended that WCB take no further action. However, the Commissioner pointed out that if this case would have arisen on or after November 15, 2019, this finding might have been different because certain amendments to FOIP came into force.

I BACKGROUND

[1] In correspondence dated May 27, 2019, the Complainant wrote to the Saskatchewan Workers' Compensation Board (WCB) with concerns alleging that the WCB breached their privacy when it obtained their past medical information without their consent.

[2] On June 5, 2019, the WCB responded to the Complainant with the following:

As for the collection by the WCB of medical information the consent of an injured worker is not required to collect information that is or may be relevant to determining a worker's entitlements to benefits. The WCB is exempt from the requirement in The Health Information Protection Act to obtain an individual's consent to collect personal health information. [sic]

[3] In correspondence dated June 11, 2019, the Complainant asked my office to investigate the matter.

[4] On June 12, 2019, my office notified both WCB and the Complainant of my intent to undertake an investigation.

[5] In undertaking my investigation, I note that my jurisdiction only concerns whether WCB had authority to collect the Complainant's personal health information; I do not have jurisdiction to consider decisions made by WCB or how WCB's decisions may have affected the Complainant.

II DISCUSSION OF THE ISSUES

1. Does *The Health Information Protection Act (HIPA)* apply to this matter?

[6] HIPA is engaged when three elements are present: 1) there is personal health information; 2) there is a trustee; and 3) the personal health information is in the custody or control of the trustee.

[7] The Complainant alleged that WCB undertook, "wrongful access of my private medical history without my prior approval or knowledge" when it accessed, "an X-ray originating from an injury to my right knee that happened almost six (6) years prior to..." In response to my office, WCB stated, "[t]he Case Manager obtained x-ray information pertaining to a prior right knee injury". WCB added, "WCB cannot deny coverage for a work injury when there is a pre-existing condition but can terminate benefits when the work injury has been resolved..." Although I cannot be certain that it is the exact X-ray or medical information the Complainant believes it was, it does appear to support the Complainant's concern that WCB collected medical information on them that was related to a previous injury.

[8] Pursuant to subsection 2(m)(i) of HIPA, an X-ray would qualify as information with respect to the physical or mental health of an individual because of what it reveals about the individual, and pursuant to subsection 2(m)(iv)(A) of HIPA because it is something collected in the course of providing a health service. These subsections provide:

2 In this Act:

...
(m) “personal health information” means, with respect to an individual, whether living or deceased:

...
(i) information with respect to the physical or mental health of the individual;

...
(iv) information that is collected:
(A) in the course of providing health services to the individual; or

[9] WCB is a government institution pursuant to subsection 2(h) of HIPA, and qualifies as a trustee pursuant to subsection 2(t)(i) of HIPA, which states that government institutions are trustees. WCB is also a government institution pursuant to subsection 2(1)(d)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[10] Any personal health information collected by WCB would be in its custody or control; thus, HIPA applies in these circumstances. However, subsections 4(4)(h) and 4(6) of HIPA provide the following:

4(4) Subject to subsections (5) and (6), Parts II, IV and V of this Act to not apply to personal health information obtained for the purpose of:

...
(h) *The Workers’ Compensation Act, 2013*;

...
(6) *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.

[11] Pursuant to subsections 4(4)(h) and 4(6) of HIPA, Parts II, IV and V of HIPA do not apply to personal health information for the purposes of *The Workers’ Compensation Act, 2013* (WCA). Part IV of HIPA covers the rules regarding the collection of personal health information from which WCB is exempt. I find that the collection provisions in Part IV of HIPA do not apply to this matter. The next question I must ask then is to what extent FOIP applies due to the application of subsection 4(6) of HIPA.

2. Does FOIP apply in this matter?

[12] Subsection 4(6) of HIPA provides that FOIP applies to an enactment listed in subsection 4(4) of HIPA. Subsection 4(6) of HIPA provides:

4(6) The Freedom of Information and Protection of Privacy Act and The Local Authority Freedom of Information and Protection of Privacy Act apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.

[13] WCA is listed in subsection 4(4) of HIPA; therefore, I need to determine if FOIP is engaged in this matter. FOIP applies to government institutions and governs its collection, use and/or disclosure of personal information. WCB qualifies as a government institution pursuant to subsection 2(1)(d)(ii) of FOIP, which provides:

2(1) In this Act:

...

(d) **“government institution”** means, subject to subsection (2):

...

(ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:

(A) by the Lieutenant Governor in Council;

(B) by a member of the Executive Council;

(C) in the case of:

(I) a board, commission or other body, by a Crown corporation; or

(II) a Crown corporation, by another Crown corporation;

[14] With respect to personal health information, subsection 24(1.1) of FOIP provides:

24(1.1) “Personal information” does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

[15] As FOIP does not apply to personal health information, I find that FOIP does not apply to this matter.

[16] I should point out that if this case would have arisen on or after November 15, 2019, this finding might have been different because certain amendments to FOIP came into force.

3. Did WCB have authority to collect the Complainant's information?

[17] As I stated at paragraph [5], my jurisdiction does not extend to decisions made by WCB. Based on the complaint, it appears the Complainant questions how WCB knew about a previous injury. This is based on WCB's apparent knowledge of a past X-ray, which they did not provide consent to WCB to obtain, and because they believed their physician did not provide such information to WCB.

[18] In response to the complaint, WCB advised the Complainant that, "the consent of an injured worker is not required to collect information that is or may be relevant to determining a worker's entitlement for benefits... The determination of what is relevant rests with the WCB and the individual adjudicator". WCB added that, "[t]here are various sections of the WCA, notably sections 21, 22 and 25 that authorize the WCB to gather evidence needed to determine all matters or questions arising under the WCA, pursuant to section 20". [sic]

[19] Upon review of the WCA, I note that section 20 sets out WCB's jurisdiction, while section 21 sets out its authority to collect evidence. I note that both these sections would provide WCB with broad authority to collect personal health information on a worker or recipient of benefits, including that of the Complainant, for any of its program purposes.

[20] As I noted at paragraph [7], WCB stated its case manager had information from an X-ray related to a prior knee injury sustained by the Complainant. As I have stated in this Report, neither HIPA nor FOIP apply to the collection of the Complainant's personal health information; WCB is able to rely on its broad authority to collect personal health information pursuant to the WCA. I, therefore, cannot find that an inappropriate collection of personal health information occurred.

IV FINDINGS

[21] I find that the collection provisions in Part IV of HIPA and FOIP do not apply to this matter.

[22] I cannot find that an inappropriate collection of personal health information occurred.

V RECOMMENDATION

[23] I recommend that WCB take no further action.

Dated at Regina, in the Province of Saskatchewan, this 23rd day of April, 2020.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner