

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

INVESTIGATION REPORT 046/2014

Saskatchewan Workers' Compensation Board

Summary: The Commissioner received a complaint that Saskatchewan Workers' Compensation Board (WCB) had collected too much personal health information of an individual who had a claim regarding a back injury. The Commissioner considered which portions of *The Freedom of Information and Protection of Privacy Act* (FOIP) and *The Health Information Protection Act* (HIPA) applied in these circumstances. He found that the collection provisions of FOIP and HIPA did not apply. However, he found that WCB did not adhere to certain provisions of *The Workers' Compensation Act, 2013*. He recommended that WCB develop policies and procedures that address the over collection of personal health information.

I BACKGROUND

[1] In December 2013, the Complainant contacted Saskatchewan Workers' Compensation Board (WCB) to raise concerns about what he believed to be an over collection of his personal health information during the course of a WCB claim.

[2] The WCB responded in a letter dated January 20, 2014 indicating that it had authority to collect personal health information from *The Workers' Compensation Act, 2013* (WCA). Further, WCB indicated that it was the discretion of the WCB decision maker in each case to determine what personal health information was required. No specifics regarding the personal health information collected for the Complainant was referenced. It also indicated that the rules of collection found in *The Health Information Protection Act* (HIPA) did not apply to WCB as follows:

In addition to this I can advise you that the WCB is not subject to the collection provisions regarding personal health information that are found in *The Health Information Protection Act*.

[3] The Complainant made a complaint to my office on April 22, 2014. He alleged the WCB collected his entire medical file from his physician, including details of past surgeries and procedures unrelated to his injuries.

[4] On May 8, 2014, notification of my office's intention to undertake an investigation was provided to both WCB and the Complainant. In response, WCB provided a letter to my office, dated May 26, 2014, asserting that this office does not have authority to investigate this matter as follows:

As you are aware the collection of personal health information by the WCB is exempt from the provisions of *The Health Information Protection Act* (HIPA) as expressed in paragraph 4(4)(h) of that Act. Since the collection of personal health information is covered by HIPA and not *The Freedom of Information and Protection of Privacy Act* it is clear that your office does not have the jurisdiction to investigate and report on the collection of personal health information by the WCB.

This notification has been provided pursuant to section 7(2)(b) of *The Freedom of Information and Protection of Privacy Act*.

[5] My office provided WCB with a copy of this draft Report on December 11, 2014. I then met with WCB's Corporate Solicitor on January 13, 2015 to discuss my analysis and potential solutions. WCB provided a response to the draft Report on February 25, 2015.

II DISCUSSION OF THE ISSUES

1. What personal health information about the Complainant was collected by WCB?

[6] The Complainant provided my office with a copy of his file which he had requested from WCB. His claim was for a back injury. There was a covering letter on the package from WCB to the Complainant dated November 13, 2013 which stated: "Enclosed are photocopies of your June 13, 2005 back injury claim. The enclosed photocopies are an

update of your file from April 8, 2012 to October 21, 2013.” A total of 218 pages were received by the Complainant, 105 of those pages were correspondence from the Complainant to WCB or documents prepared by WCB.

[7] In reviewing the medical information, I found there was information about previous ailments and injuries. Four pages related to the Complainant’s lungs, six pages related to his knee, one page was a pathology report following a biopsy of his antrum and duodenum, 15 pages were his physician’s cumulative progress notes and blood work results, 42 pages related to a heart condition, and finally 45 pages related to his back. WCB has not indicated that all of this personal health information was required for the Complainant’s back injury claim.

2. Do the collection provisions of HIPA apply in this case?

[8] HIPA can apply when three elements are present. The first element is personal health information, the second element is a trustee, and the third element is whether the trustee has the personal health information in its custody or control.

[9] The Complainant is concerned that WCB over collected information about his physical health and health services provided to him. This would qualify as personal health information pursuant to subsection 2(m) of HIPA.

[10] WCB qualifies as a trustee pursuant to subsection 2(t)(i) of HIPA which states that government institutions are trustees. WCB is a government institution pursuant to 2(1)(d)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and Part I of the Appendix of the *FOIP Regulations*. The personal health information in question was under WCB’s custody or control.

[11] Subsections 4(4)(h) and 4(6) of HIPA provides:

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

[12] It should be noted that subsection 4(4)(h) was amended in 2013 by the WCA. This is a clear statement by the Legislature that it intended Parts II, IV and V of HIPA not to apply to personal health information obtained for the purposes of the WCA.

[13] Part IV of HIPA covers the rules regarding collection of personal health information from which WCB is excluded. Subsection 23(1) of HIPA provides:

23(1) A trustee shall collect, use or disclose only the personal health information that is reasonably necessary for the purpose for which it is being collected, used or disclosed.

[14] Subsection 24(1) of HIPA provides:

24(1) A trustee shall ensure that the primary purpose for collecting personal health information is for the purposes of a program, activity or service of the trustee that can reasonably be expected to benefit the subject individual.

[15] These subsections set out reasonable principals that the Legislature has said applies to all trustees under HIPA. Subsection 23(1) establishes the principal need-to-know. Subsection 24(1) establishes that the primary purpose for collecting personal health information should be for the program being administered.

[16] As stated, these subsections do not apply to WCB but they do outline principals that I would hope every trustee and government institution would honor just because it is fair and reasonable.

3. Does FOIP apply to WCB?

[17] 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*.

[18] The legislation is clear that personal health information is not personal information under FOIP.

[19] Section 23 of FOIP provides:

23(1) Where a provision of:

(a) any other Act; or

(b) a regulation made pursuant to any other Act;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Subsection (1) does not apply to:

...

(k) sections 172 to 174 of *The Workers’ Compensation Act, 2013*;

...

and the provisions mentioned in clauses (a) to (m) shall prevail.

[20] It should be noted that subsection 23(3) was amended in 2013 when the WCA was passed by the Legislature. This recent amendment makes it clear that the Legislature intended sections 172 to 174 to prevail over FOIP but intended FOIP to prevail over all other sections of the WCA.

[21] In summary, it is clear that:

(a) Parts II, IV and V of HIPA do not apply to WCA and WCB, but the rest of HIPA does apply;

(b) FOIP does not apply to personal health information and does not apply to sections 172 to 174 of WCA but applies to the rest of WCA and WCB.

4. What sections of HIPA do apply?

[22] I have concluded Parts II, IV and V of HIPA do not apply to WCA and WCB but Parts I, III, VI, VII and VIII do apply to WCA and WCB. There are a number of sections that are relevant to the current case.

[23] Section 19 of HIPA in Part III provides:

19 In collecting personal health information, a trustee must take reasonable steps to ensure that the information is accurate and complete.

[24] WCB is a trustee and the Legislature has clearly indicated that a trustee must take steps to ensure personal health information is accurate and complete. In this case no question was raised as to accuracy. Further the information if anything was “over-complete”.

[25] Subsection 20(2) of HIPA in Part III provides:

20(2) Where personal health information disclosed by one trustee becomes a part of the records of the trustee to whom the information is disclosed, the trustee to whom the information is disclosed is subject to the same duties with respect to that information as the trustee that discloses the information.

[26] The receiving trustee is under the same duties as the sending trustee. In this case, the WCB is under the same duties as the physician. The physician was and is subject to Part IV of HIPA. That Part deals with collection and use of personal health information. In particular subsection 23(1) and 24(1) (quoted above) bind WCB to the duties of the sending trustee.

5. Are there relevant provisions in WCA?

[27] Subsection 19(1)(a) of WCA provides:

19(1) The board shall:

(a) treat workers and their dependants in a fair and reasonable manner;

[28] WCB is statutorily required to treat a worker in a fair and reasonable manner. I pose the question, is it fair and reasonable to over collect personal health information that is not relevant to the injury for which compensation is claimed? For example, to collect information on the Complainant's lungs, knee and heart condition when considering compensation for a back injury.

[29] Subsection 19(2) of the WCA provides:

19(2) The board shall make its policy directives available to the public and cause its policy directives to be made public in any manner that the board considers necessary to bring it to the attention of the public.

[30] My office asked WCB and checked online and saw no policy directive regarding over collection. I believe it is reasonable to expect organizations to have a policy regarding collection and over collection of personal health information.

[31] Subsection 23(1) of the WCA provides:

23(1) The board shall make its decisions on the real merits and justice of each case and it is not bound to follow any legal precedent.

[32] In my mind making a decision on its merits would mean making a decision on relevant information and not making a decision on information that is not directly related to the injury for which compensation is claimed. Over collection runs the risk of an organization considering material that isn't related to the case. Should WCB consider lung, knee and heart condition when looking at compensation for a back injury?

[33] Section 49 of the WCA provides:

49 The board shall not reject the claim of a worker or a worker's dependant for compensation or reduce the amount of compensation payable by reason of a pre-existing condition of the worker if the injury materially aggravates or accelerates the pre-existing condition to produce a loss of earnings or death.

[34] It is clear WCB shall not reject a claim because of a pre-existing condition. Over collection of personal health information increases the risk of WCB considering earlier medical information that could be considered a pre-existing condition. For example, considering lung, knee and heart condition.

[35] Section 55(a) of the WCA provides:

55 Any health care professional who attends to or is consulted with respect to an injury to a worker shall:

(a) furnish the board with any reports with respect to the examination or treatment of the worker that are relevant to the injury for which compensation is claimed;

[36] Section 57(a) of the WCA provides:

57 Every health care professional or hospital official who attends to, is consulted with respect to or has care of an injured worker:

(a) shall furnish the board with any reports that:

(i) deal with the examination or treatment of the worker that are relevant to the injury for which compensation is claimed; and

(ii) are required by the board; and

[37] The WCA imposes a duty on every health care professional who has care of an injured worker shall furnish WCB with any reports with respect to the examination or treatment of the worker that are relevant to the injury for which compensation is claimed. There is no obligation to provide personal health information for injuries not related to the claim for compensation. Further there is no obligation to provide all medical information on a person's file.

[38] Section 56 of the WCA provides:

56 Reports required pursuant to clause 55(a) must be furnished at the times and in the form that the board may require.

[39] Reports for clause 55(a) are to be in a form as required by WCB. It is clear health care professionals have to provide relevant information in a form required by WCB.

[40] However, WCB has indicated that “As each workers situation is unique there is not a standard form that is used to collect information from trustees. A case worker will send a letter to the trustee(s) identifying the injured worker and the nature of their injury or condition, and request records from the trustee to assist in adjudicating the claim.” WCB has provided us with template letters for the use of its employees when collecting personal health information from various types of trustees.

[41] If the health care professional provides non-relevant information such as other ailments and previous injuries on that form that is over collecting and contrary to sections 55 and 57.

[42] Within provisions of WCA, we have a situation that can result in over collection just because of the design of the form or can result in a request that a health professional provide the entire file.

[43] Best practices would suggest that organizations only collect the information they require or are entitled to. Over collection is viewed as an inappropriate practice.

[44] I find that a situation has been created where WCB can over collect information for workers with the appearance of legislative protection. I find that is inappropriate and is something I will ask the Legislative Assembly to correct.

[45] I believe Saskatchewan can find ways of dealing with this difficult situation short of legislative amendments. SGI has provisions that exempt Part VIII of *The Automobile*

Insurance Act and they have by policy and practice found ways of dealing with over collection. I am hopeful WCB could find similar ways of dealing with the issue.

[46] In response to the draft report and our meeting on January 13, 2015, WCB indicated that it would be willing to take the following actions:

- “WCB will develop a policy/procedure that enables a worker to request removal of information from their claim record. If a worker complains to the WCB that we have collected too much information, the WCB will remove the non-relevant information subject to the worker providing written consent/acknowledgement of its removal. This would only come into play in those circumstances where a worker has received a copy of their file.”
- “Place a link on the home page of the WCB website to WCB policies and procedures.”
- “WCB will engage the [Saskatchewan Medical Association (SMA)] and College of Physicians and Surgeons (CPSS) in discussions regarding what types and how much information their members provide to the WCB.”

IV FINDINGS

[47] Part IV of HIPA does not apply to personal health information collected by WCB for the purposes of the WCA.

[48] I find that the WCB has over collected information of the Complainant contrary to the provisions of the WCA.

V RECOMMENDATIONS

[49] WCB provide my office with a copy of the aforementioned policy and procedure regarding the removal of personal health information that has been over collected as soon as it is available.

[50] WCB apply the aforementioned policy and procedure to the Complainant’s file as soon as it is available.

- [51] WCB place a link to the aforementioned policy and procedure regarding the removal of personal health information that has been over collected, and other privacy related policies and procedures, on the homepage of its website.
- [52] WCB change the wording on its template letters that request personal health information from health care professionals. Letters should instruct them to provide WCB only with personal health information that relate directly to the injury in question.
- [53] WCB and my office, jointly or separately, meet with members of the SMA and CPSS to educate physicians on the type of personal health information that should be provided to WCB when requested.
- [54] WCB, Ministry of Health and Ministry of Justice consider amendments to subsection 4(4)(h) of HIPA to have all or part of Part IV apply to WCB regarding the collection of personal health information.

Dated at Regina, in the Province of Saskatchewan, this 26th day of February, 2015.

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