



INVESTIGATION REPORT 266-2017

Saskatchewan Workers' Compensation Board

February 5, 2018

Summary: The Complainant was dissatisfied with the Saskatchewan Workers' Compensation Board (WCB) when it disclosed personal information to an Employee during a harassment investigation. The Commissioner found that it was not necessary to disclose all of the personal information to the Employee for the purpose of the investigation. He recommended that WCB review its policies and offer an apology to the Complainant.

I BACKGROUND

[1] On September 11, 2017, the Complainant wrote a letter to the Saskatchewan Workers' Compensation Board (WCB) alleging that one of its employees (the Employee) harassed the Complainant during the Employee's work hours. The letter asked WCB to address the issue with the Employee. The Complainant and the Employee have a social relationship. WCB investigated this matter and concluded that it was an e-mail sent from the Employee's personal e-mail account while the Employee was not at work. As such, WCB concluded it was a personal matter that did not involve WCB. It notified the Complainant of its findings in an undated letter.

[2] On October 25, 2017, the Complainant wrote to WCB concerned that the Employee had received a copy of the Complainant's letter and the WCB's response letter. The Complainant indicated that copies of the letters were received as part of a package of Court documents related to the child custody case of a mutual acquaintance of the Complainant and the Employee. In response, on October 26, 2017, WCB wrote to the Complainant to

indicate that, in its view, it was not a privacy breach because it could not have dealt with the allegations without disclosing the information.

[3] The Complainant was dissatisfied with WCB's response and, on October 30, 2017, made a complaint to my office. On October 31, 2017, my office provided notification to both WCB and the Complainant of my intention to undertake an investigation.

[4] I am not investigating the Complainant's allegations of harassment. However, the goal of my investigation was to consider whether WCB disclosed too much personal information when it investigated the allegations of harassment by one of its employees.

II DISCUSSION OF THE ISSUES

1. Does FOIP apply in these circumstances?

[5] *The Freedom of Information and Protection of Privacy Act* (FOIP) applies to privacy matters when three elements are present. The first element is a government institution, the second element is personal information and the third element is if the personal information is in the possession or control of the government institution.

[6] WCB qualifies as a government institution for the purpose of FOIP pursuant to subsection 2(1)(d)(ii).

[7] Three documents were provided to the Employee by WCB. They included:

- 1) The Complainant's letter to WCB dated September 11, 2017;
- 2) An e-mail chain between the Complainant and the Employee that was attached to the Complainant's letter; and
- 3) WCB's letter to the Complainant in response (undated).

[8] The Complaint is concerned that the Employee received copies of the September 11, 2017 letter to WCB and WCB's undated response.

[9] Personal information is defined by subsection 24(1) of FOIP. Some relevant clauses include:

24(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;

...

(e) the home or business address, home or business telephone number or fingerprints of the individual;

(f) the personal opinions or views of the individual except where they are about another individual;

...

(h) the views or opinions of another individual with respect to the individual;

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

[10] The list of examples provided at subsection 24(1) are not meant to be exhaustive. There can be other types of information that would qualify as personal information that are not listed. Part of that consideration involves assessing if the information has both of the following: 1. Is there an identifiable individual? 2. Is the information personal in nature?

[11] Personal in nature means that the information reveals something personal about the individual. Information that relates to an individual in a professional, official or business capacity could only qualify if the information revealed something personal about the individual for example, information that fits the definition of employment history.

[12] The Complainant's letter included the following data elements:

- the Complainant's home address which qualifies as personal information of the Complainant pursuant to subsection 24(1)(e) of FOIP;
- the Complainant's opinion of how WCB supports its employees which qualifies as personal information of the Complainant pursuant to subsection 24(1)(f) of FOIP;
- the family status of the Complainant which qualifies as personal information of the Complainant pursuant to subsection 24(1)(a) of FOIP;
- the Complainant's opinion of the Employee's conduct and an e-mail the Employee wrote which qualifies as personal information of the Employee pursuant to subsection 24(1)(e) of FOIP;
- factual information about the e-mail;
- information about the Complainant's WCB status and a request which qualifies as personal information of the Complainant because it is personal in nature.

[13] The letter also contained a request by the Complainant that WCB address the matter that the e-mail, allegedly sent during business hours, was inappropriate. WCB did investigate the complaint.

[14] Employment history is the type of information normally found in a personnel file such as performance reviews, evaluations, disciplinary actions taken, reasons for leaving a job or leave transactions. It does not include work product. Employment history is considered personal information pursuant to subsection 24(1)(b) of FOIP. The complaint and the actions WCB took is the kind of material that would likely be found in a personnel file. As such, the Complainant's request is the personal information of the Employee pursuant to subsection 24(1)(b) of FOIP.

[15] I note that the e-mail chain that was attached to the Complainant's letter (e-mails between the Complainant and the Employee) also contains personal information of both the Complainant and the Employee. However, the Complainant was not concerned with the disclosure of this information to the Employee.

[16] WCB's response back to the Complainant included the following information:

- the Complainant's home address which qualifies as personal information of the Complainant pursuant to subsection 24(1)(e) of FOIP;

- a restatement of the Complainant's request which, as described above, qualifies as the Employee's personal information pursuant to subsection 24(1)(b) of FOIP;
- facts about the e-mail chain between the Employee and the Complainant;
- facts about the Employee's work schedule;
- facts about the Employee's work duties at WCB;
- the conclusion reached by WCB.

[17] I note that the information about the Employee's duties as an employee of WCB do not qualify as the Employee's personal information pursuant to subsection 24(2)(a) of FOIP which provides:

24(2) "Personal information" does not include information that discloses:

(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a government institution or a member of the staff of a member of the Executive Council;

[18] Further, the hours that the employee worked does not qualify as personal information. The Supreme Court, in *Dagg v. Canada (Minister of Finance)* [1997] 2 SCR 403, decided that sign-in logs containing the name, dates and times individuals went to their work places constituted information about the position and is not personal information.

[19] Finally, WCB acknowledged that it had possession and control of the personal information. FOIP applies in these circumstances.

2. What authority did WCB have to collect the personal information in the Complainant's letter?

[20] The Complainant's letter of September 11, 2017 to WCB asked WCB to investigate claims of harassment that allegedly involved the Employee during work hours.

[21] Section 25 of FOIP provides:

25 No government institution shall collect personal information unless the information is collected for a purpose that relates to an existing or proposed program or activity of the government institution.

[22] Subsection 3-8(d) of *The Saskatchewan Employment Act* requires that an employer take reasonable measures to ensure its workers are not exposed to harassment with respect to any matter or circumstance arising out of the workers' employment. I am not aware of any specific legislation that requires WCB to ensure its clients are not harassed by its employees. Nevertheless, any employer would want to ensure that there is no professional misconduct by its employees. WCB indicated it collected the information for the purpose of investigating a complaint against one of its staff members. Further, the Complainant specifically requested that the WCB look into these allegations.

[23] I note also that WCB collected personal information about its employee indirectly. In other words, it collected the Employee's personal information from a third party. Given the reason that WCB collected the information, the manner of collection was authorized by subsection 26(1)(f)(i) of FOIP which provides:

26(1) A government institution shall, where reasonably practicable, collect personal information directly from the individual to whom it relates, except where:

...

(f) the information is collected for the purpose of:

(i) management;

of the Government of Saskatchewan or one or more government institutions;

[24] As discussed later in this report, management in this context refers to aspects of the management of human resources of a public body that relate to the duties and responsibilities of employees.

[25] I find that managing its employees is an existing activity of WCB and that section 25 of FOIP authorized it to collect the personal information in question.

3. What authority did WCB have to disclose the personal information in the Complainant's letter and WCB's response?

[26] In its submission, WCB indicated that the disclosure of the Complainant's personal information to the Employee was authorized by subsection 29(2)(a) and 29(2)(1)(iii) of FOIP. Relevant sections of section 29 of FOIP provide:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:

(a) for the purpose for which the information was obtained or compiled by the government institution or for a use that is consistent with that purpose;

...

(l) for the purpose of:

(i) management;

(ii) audit; or

(iii) administration of personnel;

...

[27] As noted earlier in this report, I have determined that some of the information is the personal information of the Complainant, some is the personal information of the Employee and some is not personal information at all. Part IV of FOIP is not engaged when WCB provided the Employee's personal information or factual information to the Employee. It is only engaged in relation to the disclosure of the Complainant's personal information to the Employee. This includes:

- the Complainant's home address;
- the Complainant's opinion of how WCB supports its employees;
- the family status of the Complainant; and
- information about the Complainant's WCB status and a request.

[28] I will consider the WCB's authority to disclose this personal information.

- [29] First, I will consider whether WCB was authorized to disclose this personal information pursuant to subsection 29(2)(a) of FOIP. As noted, the WCB collected the personal information for the purpose of investigating a complaint against one of its staff members. It stated that disclosing this information to that staff member was necessary in order to determine if there was professional misconduct by the Employee. However, WCB did not indicate why it was necessary to disclose these specific data elements to the Complainant in order to investigate the complaint.
- [30] For many years, my office has said there is an implicit duty to protect personal information. On January 1st, 2018, an amendment to FOIP came into force which made the duty to protect explicit. Part of the duty to protect is to ensure collections, uses and disclosures adhere to the data minimization and need-to-know principles. The data minimization principle means that a government institution should collect, use or disclose the least amount of identifying information necessary for the purpose. The need-to-know principle is the principle that a government institution and its staff should only collect, use or disclose personal information needed for the purpose it was collected or other authorized purposes. Personal information should only be available to those employees in an organization that have a legitimate need-to-know that information for the purpose of delivering their mandated services.
- [31] I am not satisfied that the disclosure of the personal information in question to the Employee was required for the purpose of investigating the complaint pursuant to subsection 29(2)(a) of FOIP. The data minimization and need-to-know principles were not followed.
- [32] WCB also submitted that the disclosure was authorized by subsection 29(2)(1)(iii) because it was disclosed for the purpose of the administration of personnel. I note that Alberta's *Freedom of Information and Protection of Privacy Act* uses the terms "administration of personnel" and "management of personnel".

[33] Service Alberta's resource *FOIP Guidelines and Practices* defines these terms as follows:

Management of personnel refers to aspects of the management of human resources of a public body that relate to the duties and responsibilities of employees... This includes staffing requirements, job classification or compensation, recruitment and selection, salary, benefits, hours and conditions of work, leave management, performance review, training and development, occupational health and safety, and separation and layoff.

Administration of personnel comprises all aspects of a public body's internal management, other than personnel management, necessary to support the delivery of programs and services. Administration includes business planning, financial, materiel, contracts, property, information, and risk management.

[34] This province's FOIP does not use the term "management of personnel" in Part IV. However, it does use the term "management". The investigation undertaken by WCB in these circumstances relates more to the purposes of management pursuant to subsection 29(2)(1)(i) of FOIP than it does to the purposes of administration of personnel pursuant to subsection 29(2)(1)(iii) of FOIP.

[35] Nonetheless, WCB has not persuaded me that the specific data elements were required to be disclosed to the Employee pursuant to subsections 29(2)(1)(i) or (iii) of FOIP.

[36] I am not persuaded that WCB had authority under FOIP to disclose the personal information in question to the Employee. It should have severed the personal information before providing the rest of the letters to the Employee.

[37] WCB has indicated that it has retrieved the personal information in question from the Employee.

[38] I note that subsection 36(1)(f) of *The Occupational Health and Safety Regulations, 1996* provides the following:

36(1) An employer, in consultation with the committee, shall develop a policy in writing to prevent harassment that includes:

...

(f) a statement that the employer will not disclose the name of a complainant or an alleged harasser or the circumstances related to the complaint to any person except where disclosure is:

(i) necessary for the purposes of investigating the complaint or taking corrective action with respect to the complaint; or

(ii) required by law;

[39] WCB's internal *Respectful Workplace Policy* provides:

This policy is designed to respect the rights of all parties in the resolution and complaint process. It is designed to ensure that individuals feel free to come forward in efforts to find resolution, and to make complaints of harassment without fear of revenge, including inappropriate disclosure of information provided in the complaint process.

This policy is designed to provide similar protection to respondents and witnesses who become involved in the resolution of a complaint. While confidentiality is the general rule applicable to the complaint process, this policy respects respondents' legitimate need to know the case alleged against them. As well, there may be circumstances, including legal proceedings, in which the WCB may be compelled to disclose information about complaints.

[40] I note that these regulations and WCB's policy apply to complaints of harassment made by workers. Nevertheless, I recommend that WCB expand its policy to include complaints of harassment by all individuals. I also recommend it revise its policy to be specific about what personal information will be disclosed during such an investigation.

[41] WCB also indicated that it did not communicate any conditions to the Employee when it disclosed the Complainant's personal information to the Employee. Although Part IV of FOIP has no application to individuals, the Employee also acted inappropriately when it used highly sensitive personal information related to a harassment complaint in a custody matter to which neither the Employee or the Complainant was a party.

III FINDINGS

[42] I find that WCB was authorized by subsection 25 of FOIP to collect the personal information of the Complainant.

[43] I find that WCB did not have the authority to disclose the personal information of the Complainant to the Employee.

[44] I find the Employee should not have provided the personal information in question to anyone else.

IV RECOMMENDATIONS

[45] I recommend that WCB offer the Complainant an apology.

[46] I recommend that WCB expand its policy to include complaints of harassment by employees from individuals outside WCB.

[47] I recommend WCB revise its policy to be specific about what personal information will be disclosed during a harassment investigation

Dated at Regina, in the Province of Saskatchewan, this 5th day of February, 2018.

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