SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT F-2009–001

Saskatchewan Workers' Compensation Board

Summary: The Complainant was an injured worker who sought compensation from the Saskatchewan Workers' Compensation Board (WCB) under *The Workers' Compensation Act, 1979.* The Complainant identified four concerns with actions of WCB in regard to his personal information and the way it was collected, used and disclosed. The Commissioner, under the authority of *The Freedom of Information and Protection of Privacy Act* (FOIP), found that one of the complaints dealing with the disclosure of personal information of the Complainant to a third party without the Complainant's consent and without legal authority to do so was well-founded. The Commissioner offered a number of recommendations to WCB in respect to that complaint. The other three complaints were not well-founded. The Commissioner expanded the investigation however to address whether WCB had met its duty under FOIP to ensure the personal information it collected was accurate and complete. He found that WCB had not met this duty. The Commissioner offered a number of recommendations in respect of this failure to discharge its obligations related to accuracy of the personal information it collected about the Complainant and whether that personal information was complete.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, (S.S. 1990-91, c. F-22.01) ss. 2(2), 3, 4(a), 4(b), 23, 26, 26(3), 27 28, 29, 29(2)(a), 31, 33, 50(2), 59 and 59(e); *The Freedom of Information and Protection of Privacy Regulations*, (c. F-22.01 Reg. 1) s.18; *The Health Information Protection Act,* (S.S. 1999, c. H-0.021) ss. 4(4) and 4(6); *The Workers' Compensation Act*, 1979, (S.S. 1979, c. W-17.1) ss. 171, 171(1), 171.1 and 171.2; *The Interpretation Act*, (S.S. 1995, c. I-11.2) s. 10.

Authorities Cited: Saskatchewan Information and Privacy Commissioner (OIPC) Reports H-2008-001, LA-2007-001, 2004-003; OIPC Investigation Report F-2007-001; Alberta OIPC Orders H2006-002, 2001-005, 2001-036 and 99-034; Alberta OIPC Adjudication Order #3 (Review Numbers 2170 and 2234); Ontario IPC Orders PO-1879, P0-2092-F and Order P-344; British Columbia OIPC Ruling File No. 14884; British Columbia OIPC Order 04-41; *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance* (Sask C.A.), [1993] S.J. No. 601; *Napoli v. Workers' Compensation Board*, [1981] 121 D.L.R. (3d) 301; *Kane v. Board of Governors of University of British Columbia* [1980], 110 D.L.R. (3d) 311, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124.

Other Sources Cited: *OIPC Submission to the Workers' Compensation Board Review Committee* (October, 2006); OIPC, *Annual Report 2008-2009*; Saskatchewan Workers' Compensation Board, *Policy Manual*, Section 10.0, Doc 10.3 (WCB, 2008); Saskatchewan Justice, *An Overarching Personal Information Privacy Framework For Executive Government*, (Government of Saskatchewan, 2003); Department of the Executive Council, *Privacy Framework for Executive Government*, Powerpoint presentation (Government of Saskatchewan, December 2003); *Concise Oxford English Dictionary*, 10th Ed. (USA: Oxford University Press, 2002).

I. BACKGROUND

[1] Commencing in approximately 1999, the Complainant sought compensation as an 'injured worker' from the Saskatchewan Workers' Compensation Board (WCB). There were a number of injuries or types of loss and a number of compensation claims. The bulk of the material reviewed for purposes of this investigation is dated in 2001 or later years. The voluminous material provided by WCB that I reviewed reflected a claim advanced after a 2001 accident and involved the creation of two different WCB claims files[1]. The material I reviewed dealt with various fitness-to-work assessments, training for alternate employment, a wide variety of issues related to compensation, an appeal to the WCB Appeals Committee and a further appeal to the WCB Board. In approximately 2004, the Complainant was classified by WCB as a 'C4' according to its *Safety and Security Policy* which meant that he could only communicate by mail or email

[1] Claim files are also referred to as claim records within quotations in this Report.

but could not physically attend at WCB premises. At a subsequent time, the Complainant was classified as a 'C5' according to its revised *Safety and Security Policy*.

[2] On February 26, 2007, the Complainant provided my office with a written complaint against WCB. His letter identified four specific complaints:

1) WCB had released information to E.T. (an independent claims advisor) without a signed consent from the Complainant.

2) He also alleged that WCB disclosed to E.T. that the Complainant has threatened to harm someone at WCB.

3) WCB sent information to the Sergeant-at-Arms with the Legislative Assembly Service (LAS) without consent or legal authority.

4) The Complainant's girlfriend's unlisted phone number was released by WCB to a third party in Colorado. The Complainant indicated that his girlfriend's unlisted phone number had only been provided to WCB for contact purposes.

II. PRELIMINARY OBJECTIONS

[3] At the outset, we advised WCB of the nature of the complaint under *The Freedom of Information and Protection of Privacy Act* (FOIP)[2] and since there had been considerable discussion between the Complainant and WCB concerning his privacy, I invited WCB to raise any preliminary matters or objections as to why an investigation should not ensue.

[4] WCB raised three preliminary objections. Since I have not previously addressed these objections in a published report, I will outline the objections and our response in detail.

[2] *The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01.

Frivolous or Vexatious Complaint

[5] WCB asserted that the application/complaint of the Complainant was frivolous or vexatious, or not made in good faith. After reviewing the WCB submission, I determined on April 2, 2007 that it would not be appropriate to dismiss the complaint on that basis and decided to proceed with our investigation.

[6] The relevant portions of the letter from WCB dated March 14, 2007 are as follows:

> Your correspondence dated February 28, 2007 was received by the Workers' Compensation Board (the "WCB") on March 7, 2007. The WCB is of the view that your office should not undertake an investigation of these matters as the Application for Review is frivolous or vexatious, or has not been made in good faith.
>
> …
>
> The Complainant had retained the services of [E.T.] to represent him in matters relating to his claim for workers' compensation. The complainant had given no indication to the WCB that this relationship had ended.
>
> With respect to the second issue, it was in fact the Sergeant at Arms who advised the WCB of the threat.
>
> Finally, the issue of the alleged disclosure of the unlisted phone number was raised by the Complainant at his Appeal hearing in May 2005. The Board Members, at that time, asked the Complainant to provide further particulars, including the name(s) of the WCB staff who allegedly released his telephone number. No such information was forthcoming and the matter was considered closed.
>
> For the foregoing reasons, the WCB believes that your office should exercise its discretion under subsection 50(2) of *The Freedom of Information and Protection of Privacy Act* and refuse to conduct a review.[3]

[3] Letter from Saskatchewan Workers' Compensation Board's (hereinafter WCB) Privacy Officer to Office of the Saskatchewan Information and Privacy Commissioner (hereinafter OIPC) dated March 14, 2007.

[7] Our detailed response to WCB was as follows:

> Thank you for your March 14th response to our letter regarding the above file which was received in our office March 19. I should clarify that since we are proceeding to investigate an alleged breach of privacy complaint pursuant to Section 33 of FOIP, Section 50(2) does not apply. Nonetheless, we need to determine whether to exercise our discretion to undertaken an investigation in view of your preliminary submission.
>
> With respect to the first issue, you indicated that "*…the complainant had given no indication that the relationship had ended*". We have reviewed the WCB website, and take note of the form named "*Authorization Letter of Representation WREP* [06/16/2005]". This form appears to have a clear limitation period of 1 year. On the surface, this supports the Complainant's position, which likely then requires our further investigation.
>
> It would appear that the second issue in his complaint, the alleged disclosure to the Sergeant at Arms, could be a simple misunderstanding. However, given the fairly superficial information we have received to date, it is impossible for us to determine that this is specifically the case. The statement made by the Sergeant at Arms involves a potentially serious charge that could result in criminal penalties, and it is certainly not a frivolous matter. In addition, we have seen no evidence indicating how the Complainant's response, when seeing this information in his file, would be considered *vexatious* or *not made in good faith*.
>
> Similar logic can be applied to the third element of his complaint. We have read your statement that the Complainant had raised this issue during his WCB Appeal, along with your assertion that it was dismissed at that time. However, it is difficult for us to support the notion that the WCB Appeals Board has the appropriate jurisdiction to address an alleged breach of privacy complaint.
>
> Upon consideration of the above, I have determined that it is not appropriate to dismiss the complaint. In the result, we invite your formal response to the allegations from the Complainant.[4]

OIPC as a Third Party

[8] WCB required express consent from the Complainant before disclosing its file contents to our office for purposes of our investigation. I explained that this office is not a third party and does not require consent from the Complainant to undertake an investigation under our legislation, although in this case we did have his consent.

[4] Letter from OIPC to WCB Privacy Officer dated April 2, 2007.

[9] On February 7, 2008, I received an email from the WCB Privacy Officer as follows:

> As part of the WCB's access to information process when a third party seeks access to a worker's claim record the WCB seeks assurance from the third party that the worker has consented to such access.
>
> Has [the Complainant] provided your office with his consent to access his claim record?[5]

[10] My response of February 15, 2008 was as follows:

> Thank you for your email.
>
> The complainant has indeed provided us with his consent for our office to investigate his claim record.
>
> In any event, our view is that we are not a "third party" but a legislative officer charged with oversight of FOIP and [*The Health Information Protection Act* (HIPA)] and are entitled to view any records necessary for purposes of our work without any consent requirement. This is consistent with the operation and interpretation of similar legislation in other Canadian jurisdictions. This may require from time to time an investigation with respect to the personal information or personal health information of many individuals if that is required in order that we may "carry out investigations with respect to the personal information in the possession or under the control of government institutions to ensure compliance with this Part". This broad investigative mandate is not qualified by a consent requirement from any individuals whose personal information or personal health information may be examined in the course of that investigation.
>
> As arranged between our respective offices, I will attend at your offices on Wednesday, Feb. 27 at 1 p.m. to examine the entire file for [the Complainant]. This would be not just a "claims file" but any records that relate to [the Complainant] including records related to communication with members of the Board of WCB.
>
> I trust that you will find the foregoing in order.[6]

[5] E-mail from WCB Privacy Officer to OIPC dated February 7, 2008.
[6] E-mail from OIPC to WCB Privacy Officer dated February 15, 2008.

OIPC Investigation Coinciding with Civil Action

[11] WCB raised a concern that the Complainant had also commenced a civil action and that WCB might be prejudiced by our investigation. We provided WCB with authority for our investigation to proceed independent of any civil action underway.

[12] This was raised in the following email from WCB:

> Sent: February 20, 2008 9:33 a.m.
> Subject: [the Complainant] – File Review WCB Offices Feb. 27
>
> There is one other issue that I need to bring to your attention regarding [the Complainant].
>
> He commenced a civil action against a WCB employee in June 2007, and my client is seeking some assurance that your investigation of the alleged breach of privacy by the WCB will not impact or prejudice the defence of this civil, action by [the Complainant].
>
> Has your office had similar experience in the past? If so, what has been your position on the matter of the overlap between an OIPC review and a civil action? If not, have you considered this issue and your office's approach to it?
>
> What is your legal view on access to WCB claim records, where those records may relate to/have an impact on the outcome of a civil proceeding?[7]

[13] I responded to that email as follows:

> Thank you for your email and your query.
>
> I have no knowledge of the civil action you refer to other than your comments. I have not seen the pleadings and am not familiar with either the issues raised by the pleadings or the relief sought by the Plaintiff.
>
> I offer however the following observations:
>
> Is civil litigation involving WCB and the Complainant a bar to our office proceeding with a [sic] alleged breach of privacy investigation?
> In fact, there has not to my knowledge ever been a formal decision by our office with respect to the specific question you raise. My approach however is to consider the modern principal of statutory interpretation (discussed in the FOIP FOLIO), the practice of this office and other offices across Canada, relevant

[7] E-mail from WCB Privacy Officer to OIPC dated February 20, 2008.

jurisprudence including orders and decisions of oversight agencies in other jurisdictions.

I'd suggest that it is now well established across Canada that a parallel civil action does not bar a formal review of a decision to deny access to records. (Alberta OIPC Order 99-034 [35], Investigation Report 2001-IR-004 [10]. I can see no reason why the same approach should not be taken with a privacy investigation. You will appreciate that unlike a court proceeding our only role is to determine whether there has or has not bee [sic] compliance with the FOIP Act and in particular, Part IV. We are not concerned with any claim for injunctive relief or damages. Any information we learn during an investigation would be confidential and we are prohibited by FOIP from disclosing such information. The exception of course would be such information as we include in our formal report to support our findings and recommendations. Otherwise we cannot be compelled in any other judicial proceedings to disclose what we learned during our investigation.

As our investigation proceeds, there are several options. We may find the complaint is not well founded and conclude our investigation. There may be an informal resolution of the complaint that would lead us to close our file. In those circumstances I do not know what prejudice would attach to WCB.

Alternatively, we may ultimately issue a report that would be published on our website. In that case, it would be up to the parties to the action to then argue whether any findings that I might make are either determinative or probative regarding the issues in the litigation.

I'd further suggest that before any Saskatchewan resident loses an avenue of statutory redress there would need to be an explicit statutory provision to that effect. In any event, the remedies under the FOIP Act are very different than any remedies that a court would entertain or have jurisdiction to award to the Plaintiff.

You might find of interest Order F07-18 [31] and [111] to [128] from David Loukidelis, British Columbia Information and Privacy Commissioner. This involved a question of whether the Commissioner should suspend a privacy investigation until an arbitration proceeding was concluded. The Commissioner declined to suspend his investigation.

Given all of the foregoing, I see no reason why our office should not proceed with our Part IV investigation under the FOIP Act. ….[8]

[8] E-mail from OIPC to WCB Privacy Officer dated February 25, 2008.

[14] The WCB Privacy Officer sent a further email dated February 25, 2008 as follows:

> Thanks for your prompt response.
>
> Firstly, I would like to be clear that the WCB is not disputing that your office can investigate an alleged breach of privacy.
>
> The point I was more concerned with would be the OIPC directing that information be disclosed to a person, which is then used by that person in a civil lawsuit. This is obviously unavoidable and the lawsuit unforeseeable if the information is released prior to any civil action being commenced.
>
> However, after a lawsuit has begun, it seems inappropriate for the OIPC to be used to compel a body to disclose information that is then used against them in court.
>
> This would also include the publication, by the OIPC, of a report that contained information that would or may be prejudicial to the outcome of a civil action.[9]

[15] I responded on February 26, 2008 as follows:

> Further to your email of Feb. 25, this is not a review of a decision to deny access. It is an investigation with respect to the privacy requirements of Part IV of FOIP. We will not be 'directing than [sic] information be disclosed to a person.' In any event, even when we make recommendations it is ultimately up to the government institution to decide within 30 days whether it will comply with some or all or none of our recommendations.
>
> We will be determining if WCB complied with Part IV of FOIP and the Privacy Framework, its own policies and procedures and making recommendations, informally initially to WCB and if no resolution is possible at that point and if we find the complaint is well founded, we will proceed to issue a report of our findings and recommendations.
>
> I trust that this clarifies our process.[10]

[9] E-mail from WCB Privacy Officer to OIPC dated February 25, 2008.
[10] E-mail from OIPC to WCB Privacy Officer dated February 26, 2008.

[16] In fact, in my Review Report H-2008-001 (Saskatoon Health Region)[11], I did consider an assertion by a trustee under *The Health Information Protection Act* (HIPA)[12] that one of the reasons for denying an individual access to his personal health information was that he had commenced legal action against the trustee organization. I made the finding in that case that "whether or not the Applicant has commenced or may commence legal action against the Region to be of no consequence to the obligations of a trustee under Part V of HIPA."[13] I take the same view when such an objection is raised when the issue is Part IV of FOIP.

III. MATERIAL REVIEWED IN THE INVESTIGATION

[17] WCB has made available to me what I understand to be all of the records in the possession or control of WCB with respect to the Complainant. Some of the records are in hard copy form but most are in digital form. The record I examined is extensive and is comprised of more than 700 pages organized in one of the four following areas:

1) Security file
2) A collection of WCB Board emails assembled by the WCB Privacy Officer
3) Claim File #A
4) Claim File #B

[18] Numerous names of WCB employees or officers appear in many of the documents discussed in this Report. Since no useful purpose is served by including those names, I have substituted "WCB employee" for the various names in the case of quotations from WCB documents.

[11] Saskatchewan OIPC Report H-2008-001 available online at http://www.oipc.sk.ca/reviews.htm at [25] to [29].
[12] *The Health Information Protection Act*, S.S. 1999, c. H-0.021
[13] *Supra* note 11 at [29].

IV. ISSUES

1. **Which statute applies to the information in question?**

2. **Did WCB release personal information of the Complainant to E.T. (an independent claims advisor) without the consent of the Complainant or authority?**

3. **Did WCB disclose to E.T. that the Complainant threatened to harm someone at WCB?**

4. **Did WCB disclose personal information to the Sergeant-at-Arms with the Legislative Assembly Service without consent or authority?**

5. **Did WCB disclose personal information of the Complainant to a third party in Colorado without consent or authority?**

6. **Did WCB discharge its obligation to ensure that the personal information of the Complainant in its possession was accurate and complete?**

V. DISCUSSION OF THE ISSUES

1. Which statute applies to the information in question?

[19] A fundamental preliminary question is which legislation applies to WCB.

[20] I have considered this question before. I refer to this office's submission to the Workers' Compensation Act Review Committee[14] dated October 24, 2006 and my Investigation Report F-2007-001.[15] Both of those documents are available at www.oipc.sk.ca. I will not reproduce all of that analysis but I will summarize my position.

[21] The applicable statutes for purposes of this investigation are FOIP and *The Workers' Compensation Act, 1979* (WCA)[16]. There is some "personal health information" within the meaning of HIPA in the material reviewed, but most of the information in question would not qualify as personal health information. To the extent that there is personal

[14] Saskatchewan OIPC, *OIPC Submission to the Workers' Compensation Board Review Committee* (October, 2006); available at http://www.oipc.sk.ca/resources.htm.
[15] Saskatchewan OIPC, Investigation Report F-2007-001 available online at http://www.oipc.sk.ca/reviews.htm, pp.11 to 23.
[16] *The Workers' Compensation Act*, 1979, S.S. 1979, c. W-17.1.

health information of the Complainant in the custody of WCB, Parts III, VI, VII, and VIII of HIPA apply to that information. Otherwise FOIP will apply to those areas of HIPA addressed by Part II, IV and V of HIPA. I incorporate in this Report by reference the discussion of applicable statutory provisions in my Investigation Report F-2007-001.[17] In cases where the treatment of personal health information has been carved out of FOIP by virtue of section 4(4) of HIPA, then FOIP applies as a result of section 4(6) of HIPA.

[22] As I have held in earlier Reports, WCB is a "government institution" for purposes of FOIP[18]. Part IV of FOIP not only defines "personal information" but sets out the detailed rules for the collection, use and disclosure of that personal information. Part IV also makes provision for an individual's right of access to personal information in the possession or control of a government institution and the right to request correction of that personal information.

[23] The Information and Privacy Commissioner (Commissioner) is charged with responsibility for overseeing the compliance by government institutions with the requirements of FOIP. The privacy powers of the Commissioner are described in section 33 as follows:

> **Privacy powers of commissioner**
> 33 The commissioner may:
> (a) offer comment on the implications for privacy protection of proposed legislative schemes or government programs;
> (b) after hearing the head, recommend that a government institution:
> (i) cease or modify a specified practice of collecting, using or disclosing information that contravenes this Act; and
> (ii) destroy collections of personal information that is collected in contravention of this Act;
> (c) in appropriate circumstances, authorize the collection of personal information in a manner other than directly from the individual to whom it relates;
> (d) from time to time, carry out investigations with respect to personal information in the possession or under the control of government institutions to ensure compliance with this Part.

[17] *Supra* note 15 at [22] to [28].
[18] *Supra* note 15 at [9].

Paramountcy Analysis

[24] Section 23 of FOIP provides as follows:

> 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:**
> (a) The Adoption Act, 1998;
> (b) section 27 of The Archives Act, 2004 ;
> (c) section 74 of The Child and Family Services Act;
> (d) section 7 of The Criminal Injuries Compensation Act;
> (e) section 12 of The Enforcement of Maintenance Orders Act;
> (e.1) The Health Information Protection Act;
> (f) section 38 of The Mental Health Services Act;
> (f.1) section 91.1 of The Police Act, 1990 ;
> (g) section 13 of The Proceedings against the Crown Act;
> (h) sections 15 and 84 of The Securities Act, 1988;
> (h.1) section 61 of The Trust and Loan Corporations Act, 1997;
> (i) section 283 of The Traffic Safety Act;
> (j) subsection 10(6) of The Vital Statistics Act;
> (j.1) section 12 of The Vital Statistics Administration Transfer Act;
> (k) **sections 171 to 171.2 of The Workers' Compensation Act, 1979**;
> (l) any prescribed Act or prescribed provisions of an Act; or
> (m) any prescribed regulation or prescribed provisions of a regulation;
> and the provisions mentioned in clauses (a) to (m) shall prevail. [emphasis added]

[25] As discussed in our Investigation Report F-2007-001, FOIP is paramount to the WCA save and except for sections 171 to 171.2 of the WCA.

[26] Section 171 of the WCA provides as follows:

> **Offence to divulge information obtained under Act**
> 171(1) Subject to sections 171.1 and 171.2, no officer of the board and no person authorized to make an inspection or inquiry under this Act shall divulge or allow to be divulged, except in the performance of his duties or under the authority of the board, any information obtained by him or that has come to his knowledge in connection with that inspection or inquiry.

> (2) Every person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.

[27] This provision is a general prohibition against disclosure of information, including information about the injured worker, outside of disclosure for purposes of the performance of duties by the WCB employee or under the authority of the WCB Board.

[28] Sections 171 needs to be considered in this Report because the nature of the complaint in issue relates to an alleged disclosure of information about the Complainant to third parties.

[29] Section 171.1 provides as follows:

> **Worker's access to information**
> 171.1(1) Where:
>
> > (a) a worker or any person whom he has authorized in writing to be his representative; or
> >
> > (b) in the case of a deceased worker, any of his dependants;
>
> has requested reconsideration of or applied for a review of a decision made pursuant to this Act, the board shall, at the written request of the worker, his representative or his dependant, as the case may be, allow the worker, his representative or his dependant, as the case may be, access to information respecting that worker for the purposes of this Act, but the person receiving the information shall use that information only for the purposes of that reconsideration or review.
>
> (2) Where the board is of the opinion that any medical report which the worker or his representative has requested contains information of a sensitive nature which, if provided directly to the worker or his representative, would cause injury to the worker or any other person, the board shall provide the information to the worker's treating physician instead of providing it to the worker or his representative.
>
> (3) Where a physician receives information pursuant to subsection (2), he shall explain to the worker or his representative, as the case may be, the contents of the medical report to assist the worker or his representative in his request for reconsideration of or application for a review of the decision of the board.

[30] Section 171.1 of WCA permits the WCB Board to respond positively to a request from an injured worker for access to certain information in the possession of the WCB Board in advance of a review or an appeal under the WCA.

[31] Section 171.1 needs to be considered in this Report because this analysis deals with the accuracy of the information in the records of WCB, whether that information is complete, and the right of access provided by FOIP is a major means of identifying errors in the personal information held by government institutions. An important related right in FOIP is to seek the correction of errors in that personal information held by government institutions.

[32] Section 171.2 of the WCA provides as follows:

> **Employer's access to information**
> 171.2(1) Where an employer has requested reconsideration of or applied for a review of a decision made pursuant to this Act with respect to a worker's claim for compensation, notwithstanding that the employer is not a party to the reconsideration or review, the board may on written request, in accordance with this section, grant the employer, or a representative of the employer on presentation of the employer's written authorization, access to the information that the board used to make its decision with respect to:
>
> (a) the facts of the situation in which the injury occurred; or
>
> (b) the percentage of the cost of compensation which has been assigned by the board to the injury cost record of that employer with respect to the injury the worker suffered out of and in the course of his employment with that employer;
>
> that is obtained on or after the date this section comes into force for the purposes of this Act, but the person receiving the information shall use that information only for the purposes of that reconsideration or review.
>
> (2) Where a request is made pursuant to subsection (1), the board shall notify the worker or any person whom he has authorized in writing to be his representative of the request and the information that it will grant access to and inform the worker or his representative that he may make any objection to the release of the information within the time specified in the notice.
>
> (3) On the expiration of the time mentioned in subsection (2), the board shall, after consideration of any objections, determine what information it will grant the employer or his representative access to and so notify the worker or his representative in writing sent by registered mail.

> (4) The worker may, within 21 days of the date that the notice pursuant to subsection (3) is mailed, request the board to reconsider its decision made pursuant to subsection (3).
>
> (5) The board shall not grant the employer or his representative access to any information until the expiration of the time allowed for a request pursuant to subsection (4) or the determination of the request, whichever is later.
>
> (6) The board shall inform the worker or his representative of all information it has granted an employer or his representative access to pursuant to this section.
>
> (7) An employer may request the board to reconsider its decision with respect to the information the board has granted access to within 21 days of the date of that decision.

[33] Section 171.2 of WCA has no application since I am not dealing with disclosure to the Complainant's employer.

[34] Before proceeding with the paramountcy analysis, I should note that the position of WCB is that

> …it was the intention of the legislature, when *The Freedom of Information and Protection of Privacy Act*, (FOIP) was enacted to provide an exemption to the WCB from certain elements of FOIP. This was necessary to ensure the orderly and efficient operation of the WCB system, to enable the WCB to provide timely service to those in need, the injured workers. This was also the legislature's intention in providing the WCB with exemptions to certain portions of *The Health Information Protection Act* (HIPA), which was accomplished after a lengthy review and consultation process with the drafters of the legislation.[19]

[35] I have two observations to make about such an assertion. As I have noted before[20], my office follows *The Interpretation Act*[21] and the 'modern principle'[22] of statutory interpretation in our oversight role. Since the legislature has not incorporated a purpose or object clause in FOIP, I have been largely guided by the Saskatchewan Court of Appeal and its direction that "[FOIP's] basic purpose reflects a general philosophy of full

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[19] Letter from WCB Privacy Officer to OIPC dated October 16, 2009.

[20] *Supra* note 15 at [21].

[21] *The Interpretation Act*, S.S. 1995, c. I-11.2, section 10; *"Every enactment shall be interpreted as being remedial and shall be given the fair, large and liberal construction and interpretation that best ensure the attainment of its objects."*

[22] Described by the Information and Privacy Commissioner (hereinafter IPC) of Alberta as "*The modern principle says I must read the words in an enactment "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."* Alberta OIPC Order H2006-002 at [28]. See also Ontario IPC Order PO-1879; British Columbia OIPC Ruling File No. 14884; Alberta Adjudication Order #3 (Review Numbers 2170 and 2234).

disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."[23]

[36] The second observation is that if the intention ascribed to the legislature by WCB is accurate, one would have expected that provision would have been made in the exclusion provisions in section 2(2) or section 3 of FOIP. The legislature apparently chose not to do so.

[37] Although WCB references HIPA in its argument, this conflates the genuine exclusion or exemption in section 4(4) of HIPA with the paramountcy provisions of section 23(3) of FOIP. I accept that HIPA does exclude or exempt personal health information in the custody or control of WCB from three portions of HIPA, namely Parts II, IV and V. It was open to the Legislative Assembly to have similarly excluded personal information in the custody or control of WCB from all or part of FOIP but it apparently chose not to do so.

[38] In conclusion to this point raised by WCB, I find that paramountcy is something quite different than an exclusion or exemption and further that there is no "exemption to the WCB from certain elements of FOIP"[24] as asserted by WCB.

[39] My view of paramountcy, as reflected in section 23 of FOIP, is that it ensures that the fundamental rights enshrined in the access and privacy legislation are given proper deference when interpreting legislative intent as to its application in conjunction with other statutes. A primacy clause is a strong expression of legislative intent and a tool for ensuring public policy objectives are met. In the event of a contest between two statutes, the legislature is presumed to not intend conflict between the statutes. Therefore, if an interpretation allows concurrent application, that interpretation should be adopted.

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[23] *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance* (Sask C.A.), [1993] S.J. No. 601 at [11]; Saskatchewan OIPC Reports 2004-003 at [8]; LA-2007-001 at [87].

[24] *Supra* note 18.

[40] There are three tests used to determine whether the two laws can coexist or are inconsistent or are in conflict.[25] These tests were developed in the context of defining federal powers and when federal government powers are paramount, but I find the same analysis appropriate in determining whether there is conflict or inconsistency between FOIP and WCA.

a. Does compliance with one law involve the breach of the other?

b. Is one law supplemental to the other by adding something to the regulation of workers' compensation claims? If the one law is "supplemental" then it will be valid concurrently with the other law.

c. Does one law duplicate the other such that there is not an actual conflict or contradiction? Mere duplication without actual conflict or contradiction is normally not sufficient to invalidate a law. It would just mean that the WCB would be held to the higher standard of the competing statutes.

a. Does compliance with one law involve the breach of the other?

i. Section 171(1) of WCA

[41] Section 171(1) appears to be neutral in terms of FOIP. It does not speak in terms of access. It does utilize the word "divulge". *The Concise Oxford English Dictionary* defines "divulge" as "make known."[26] I take the section as intended to ensure the confidentiality of claims information and to ensure that the kinds of sensitive financial (personal information) and personal health information common to WCB claims files is closely held by WCB. It is clearly focused on the individual officer or employee working for WCB. It is intended presumably to ensure that an individual or officer able to use the personal information of claimants does not independently make known that personal information contrary to the authority of the WCB Board and when such disclosure is not in the performance of that person's duties. It does not purport to limit the disclosure

[25] Ontario IPC Orders P0-2092-F and P-344; British Columbia OIPC Order 04-41; Alberta OIPC Orders 2001-005, 2001-036 and 99-034.

[26] *Concise Oxford English Dictionary, 10th Ed.* (USA: Oxford University Press, 2002) p. 419.

provisions in section 29 of FOIP which are focused on disclosure by the WCB Board. Disclosure may be made "in the performance of [a person's] duties or under the authority of the board"[27].

[42] Section 171(1) of WCA does not negate nor does it purport to negate the obligations of WCB, as a Saskatchewan government institution, to comply with FOIP in respect to the disclosure provisions in Part IV of FOIP. This would include the right of access guaranteed by section 31 of FOIP.

[43] If the WCB provides an individual with access to his or her file in response to a formal access request under section 31 of FOIP, does that breach section 171(1) of WCA? I find that it does not.

[44] If the WCB requires compliance with section 171(1) of WCA, does that breach Part IV of FOIP? It does not since section 171(1) affirms the duty to not disclose personal information outside the 'need to know' purview of managing the case file. This is further delineated in the appeal process identified in section 171.1 and 171.2. Section 171 appears to be focused exclusively on what is colloquially known as "the case file"; in other words the records and information that relate solely to the particular claim of the injured worker. Section 171 does not purport to deal with correspondence with the WCB Board or Chairman or records relating for example not to the claim itself but assessment of risk of any danger posed by a particular claimant to WCB staff or others.

ii. Section 171.1 of WCA

[45] I take section 171.1 as a provision that codifies the standards of procedural fairness and natural justice as well as the common law fiduciary duties of WCB. In this respect I am relying on the reasoning in the British Columbia Court of Appeal decision in Re: Napoli v. Workers' Compensation Board.[28] That decision is consistent with the Supreme Court

[27] *Supra* note 16, section 171(1).
[28] *Napoli v. Workers' Compensation Board*, 121 D.L.R. (3d) 301.

of Canada decision in Kane v. Board of Governors of University of British Columbia.[29] Section 171.1 serves to ensure that an injured worker who has requested reconsideration of or applied for a review of a decision may request access, independent of FOIP, to his or her own claims file information. But for this provision, the injured worker would be prejudiced by not having the means to learn what information WCB would be relying upon for purposes of an appeal or review.

[46] I note that section 4 of FOIP expressly states that FOIP "complements and does not replace existing procedures for access to government information or records"[30] and "does not in any way limit access"[31] to records that are normally available. FOIP operates to ensure that access is provided where it would not otherwise be available to an individual.

[47] Since section 171 addresses disclosure of the personal information of workers, I can see no basis to conclude that would also be an exhaustive description of the right of an injured worker to access his/her personal information in the possession or control of WCB. The **right of access**[32] by the data subject to his or her own personal information is clearly distinguished in privacy law from the act of **disclosure**[33] which involves sharing personal information not with the data subject but with a third party. The right of access can only be denied for specific and limited reasons. It is not considered a discretionary exercise by the government institution. The 'need-to-know' rule[34] and the 'data minimization rule'[35] do not apply to the exercise of the right of access. Disclosure on the other hand is discretionary for the most part.[36] The exercise of disclosure is always subject to the need-to-know rule and the data minimization rule. This assessment appears

[29] *Kane v. Board of Governors of University of British Columbia* (1980), 110 D.L.R. (3d) 311, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124

[30] *Supra* note 2; section 4(a).

[31] *Ibid*; section 4(b).

[32] Saskatchewan OIPC, *Annual Report 2008-2009* available at http://www.oipc.sk.ca/annual_reports.htm p. 68; "Access is the right of an individual (or his or her lawfully authorized representative) to view or obtain copies of records in the possession or control of a government institution, local authority or trustee including his/or her personal information/personal health information."

[33] *Ibid.*, p. 69, "Disclosure is sharing of personal information with a separate entity, not a division or branch of the public body or trustee in possession or control of that record/information".

[34] Saskatchewan Justice, *An Overarching Personal Information Privacy Framework For Executive Government*, (Government of Saskatchewan, 2003); available at http://www.gov.sk.ca/news-archive/2003/9/11-648-attachment.pdf; p. 16.

[35] *Ibid*.

[36] There will be certain circumstances where a statute, regulation or court process will require disclosure on a mandatory basis. Such circumstances are not engaged on the facts of this particular investigation.

to be confirmed by the wording in sections 171.1 and 171.2 that are qualified by information that can only be used for purposes of reconsideration or review. A reconsideration or review would presumably only focus on information related to the claim before WCB.

[48] If WCB responds positively to the worker's request for access to his claims file, this is no violation of FOIP. If someone makes a personal information access request to WCB, it is not a violation of section 171.1 for WCB to respond by making access available to the individual. The FOIP access request by an individual is different since it is broader and would capture any information about the individual and would not be limited to the claims file. The exemptions available to WCB in responding to the access request are different than the obligations of WCB when a request is made under section 171.1.

[49] I therefore find that there is not such a conflict between Part IV of FOIP and sections 171(1) and 171.1 of WCA that to comply with one would violate the other.

b. Is one law supplemental to the other by adding something to the regulation of workers' compensation claims? If the one law is "supplemental" then it will be valid concurrently with the other law.

[50] As noted earlier, my view is that the two laws (WCA and FOIP) can operate together and are complementary. In one sense, they are supplemental to the other. An injured worker should not have to go to the trouble of making a formal FOIP access request in order to get access to his or her claims file in order to prepare for a review or appeal on their claims file. On the other hand, there is nothing in section 171.1 of WCA that precludes any individual from making an access request that seeks any and all of that individual's personal information regardless of whether that information is found in the claims file or elsewhere within the possession of WCB.

[51] Section 171(1) is protection for the privacy of WCB claimants and is complementary to Part IV of FOIP. It does not purport to deny claimants the fundamental right of all Saskatchewan residents to make application to WCB under FOIP for any and all information WCB may have about those applicants.

[52] I therefore find that the two laws can be supplemental to the other.

c. Does one law duplicate the other such that there is not an actual conflict or contradiction? Mere duplication without actual conflict or contradiction is normally not sufficient to invalidate a law. It would just mean that the WCB would be held to the higher standard of the competing statutes.

[53] I would not consider one law to 'duplicate' the other but for the reasons discussed earlier I find that the two statutes are not in actual conflict. In the result, I find that the provisions of FOIP are not in conflict with sections 171 or 171.1 such that it is necessary to declare section 171 and or 171.1 paramount to the provisions of FOIP, particularly the provisions in Part IV of FOIP. Sections 171 and 171.1 can be viewed as complementary to Part IV of FOIP. I am therefore required to apply the applicable provisions of FOIP to deal with the issues raised by the Complainant.

[54] I now turn to the four specific complaints raised by the Complainant:

2. Did WCB release personal information of the Complainant to E.T. (an independent claims advisor) without the consent of the Complainant or authority?

[55] The relevant section is the surrogacy provision in section 59(e) of FOIP. That provides as follows:

> 59 Any right or power conferred on an individual by this Act may be exercised:
>
> …
>
> (e) by any person with **written authorization from the individual** to act on the individual's behalf. [emphasis added]

[56] The provision of consent by an individual to WCB for the disclosure of personal information to a third party would qualify as the exercise of a "right or power" within the meaning of section 59(e)

[57] In addition, consent of an individual for purposes of FOIP must conform to the *The Freedom of Information and Protection of Privacy Regulations*[37]:

> 18 Where the Act requires the consent of an individual to be given, **the consent is to be in writing** unless, in the opinion of the head, **it is not reasonably practicable to obtain the written consent** of the individual. [emphasis added]

[58] The Complainant readily admits that he did provide written authorization for WCB to deal with E.T. with respect to one of his claim files namely, Claim File #A. In the files of WCB, I found what I understand to be a standard form, then available on the WCB website[38] entitled *Authorization – Letter of Representation* [WREP 06/16/2005]. This bears the signature of the Complainant and was witnessed by another person and dated January 24, 2005. This document includes the following statement: "This letter of representation will terminate one year from date of signature unless I terminate the authorization earlier." The document expressly authorizes E.T. "to represent me in my dealings with the Saskatchewan Workers' Compensation Board **regarding claim(s): [Claim File #A]**". [emphasis added]

[59] WCB, in direct response to a complaint from the Complainant, replied that "…[the Complainant's] correspondence with this office, both files were treated as a single entity and the authorization on [Claim File #A] together with your comment in your July 31, 2006 memo that E.T. was assisting you provided us with the full authority to speak to E.T."[39]

[60] WCB also submitted that "It was on August 1, 2006 that [E.T.] telephoned this office and spoke with both [names of two WCB employees]. It was clear that [E.T.] was acting on your behalf as the issue being discussed was the job shadowing that he was very helpful in assisting to organize."[40]

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[37] *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg. 1, section 18.

[38] http://www.wcbsask.com/WCBPortal/appmanager/WCBPortal/WCB2?_nfpb=true&_pageLabel=page_forms_publications_worker_forms.

[39] Letter from WCB employee to the Complainant dated January 23 2008.

[40] *Ibid.*

[61] In fact, the May 1, 2006 letter to a WCB employee from the Complainant is as follows:

> "May 1/06
>
> ATTENTION [WCB employee]
>
> CLAIM #[Claim File #B] and [Claim File #A]
>
> I am requesting under SEC. 171 of the workers compensation act a [sic] update of my files since the last update be forwarded to me useing [sic] the above claim numbers.
>
> [the Complainant]
>
> cc/ Fair Practice Office"[41]

[62] The May 4, 2006 correspondence from the Complainant is as follows:

> "May 4/06
>
> ATTENTION [WCB employee]
>
> CLAIM # [Claim File #A]+ [Claim File #B]
>
> Regarding your letter dated Apr. 27/06 I am willing to do voc. testing again. As far as the GED all i need is to write the eassay [sic] to complete the GED how ever [sic] where I live there is no place to write it, so arrangements would have to be made to go somewhere to write the test.
>
> As to travel and relocation at this time there would be no need as this course is a online course and can be done right from my home. After compliting [sic] the course relocation will then be necessary as there is no employment available in this area nor in the ner procsimaly. [sic] Lets [sic] get this done it hase [sic] been 4 years.
>
> [the Complainant]
>
> cc/ Fair Practice Office
> cc/ Minister of Labour
> cc/ North Sask. Business Assn. [name of individual]
> cc/ Sask. Chamber of Commerce"[42]

[41] Letter from Complainant to WCB dated May 1, 2006.
[42] Letter from Complainant to WCB dated May 4, 2006.

[63] The third item relied on by WCB is an email from the Complainant as follows:

> "To: [WCB employees]
> cc: [WCB employees]
>
> Subject: wage loss
> Claim# [Claim File #A]
>
> I am sending this regarding my wage loss benefits. July 20/06 [WCB employee] sent me a letter regarding job shadowing, and asking me to help her find a company to do this job. So as of July 20/06, I should have been put back on full benefits. This has not seemed to have happened. As I am, with the help of [E.T.], looking for someone to job shadow, I should be back on full wage loss. Please email me telling me why this has not happened. I request a quick response to this matter
>
> [the Complainant]"[43]

[64] WCB has specifically referred me to a number of other emails, but I have not found them helpful on the specific question of whether the Complainant has provided written consent under section 59(e) of FOIP to WCB that E.T. had the Complainant's express authority to assist the Complainant in his dealings with WCB for all purposes of FOIP beyond the explicit terms of the single, time-limited authorization described above.

[65] WCB asserted that "The twelve month condition mentioned in this form is not required under *The Workers' Compensation Act, 1979* (the "WCAct") nor is it part of WCB policy on worker's representatives access to claim file information. The authorization form is used to obtain the worker's consent and signature, and the twelve month condition was inserted 'for administrative convenience." It urged that: "Granting claim record access to a worker's representative is entirely at the WCB's discretion and the insertion of the twelve month condition was also at the discretion, of the WCB. It is also within the WCB's discretion to extend this right of access."[44] It further indicated as follows:

> In [the Complainant's] case it is important to note that it was [E.T]. who approached the WCB seeking information to assist [the Complainant] with his claim.

[43] E-mail from Complainant to WCB dated July 31, 2006.
[44] Letter from WCB Privacy Officer to OIPC dated August 28, 2007.

> At the time the twelve month condition lapsed [E.T.] was not deterred from calling the WCB and seeking information, and in fact was calling, in good faith, as [the Complainant's] representative.
>
> [WCB employee] recognized [E.T.]'s voice and made a conscious, good faith decision to discuss the issues that [E.T.] was raising in an effort to assist [the Complainant].
>
> [WCB employee] believed, in good faith, that [E.T.] represented [the Complainant], and upon my own review of the file I believe this to be the case.[45]

[66] For WCB to disclose the personal information of the Complainant to any third party including E.T. it must comply with Part IV of FOIP. WCB could legitimately disclose the personal information of the Complainant to E.T. if it had the consent of the Complainant or if such disclosure was permitted by statute. Consent is required by the FOIP Regulation to be in writing unless that is not reasonably practicable. No argument has been raised by WCB that written consent would not be reasonably practicable in this case.

[67] I am not persuaded by the suggestion from WCB that WCB's own Authorization form can be ignored by WCB with impunity. I do not understand the WCB assertion that the twelve month limitation was "for administrative convenience." It appears that WCB is arguing that whether to honour its own Authorization form in full, in part or not at all is entirely at the discretion of WCB. When WCB publishes a form to the world via its website, Saskatchewan residents are entitled to assume that WCB is volunteering to be bound by the terms of that form. I accept that this is not a requirement under the WCA; there are all kinds of procedural matters that would not be expected to be incorporated into the statute, but that would be expected to be developed by WCB to carry on its important business. In any event, forms that deal with authority to access the personal health information and personal information of claimants frankly deserve more attention than WCB's submissions would contemplate. If WCB intended to rely on the general powers for collection, use and disclosure of personal information in Part IV of FOIP, there would be no need for a printed form to be utilized. I find it unreasonable to expect that any WCB claimant would understand that signing such an Authorization form would be an empty exercise that could be ignored or disregarded by WCB. Also, I note that

[45] *Ibid.*

when the Complainant wished the RCMP to be able to access his WCB claims file or part of his file an *Authorization – Letter of Representation* signed by the Complainant was required in June 2007. In a March 14, 2005 Memo to file from a WCB employee, she states that she needed to find a signed release from the Complainant before she could speak with E.T. and it was only after she located the authorization that she agreed to answer his questions related to WCB Claim File #A.

[68] The Complainant was entitled to take the Authorization form at face value and proceed on the assumption that E.T.'s authority would extend from January 24, 2005 until January 24, 2006 and that this authority was restricted to the single file identified in the Authorization namely, Claim File #A. I have seen no evidence of a diarization system that would remind WCB staff when an Authorization needed to be renewed and no evidence of any request to the Complainant to renew the Authorization. I have seen no evidence of any attempt by WCB to have the Complainant renew the Authorization beyond January 25, 2006. I have seen no evidence of a request of the Complainant that he sign a second Authorization in respect of Claim File #B.

[69] I note that in 2008, WCB started to use a different *Authorization – Letter of Representation* [WREP 10/07/2008]. This provides that:

> This letter of representation will <u>remain in full force and effect until such time as I notify the Workers' Compensation Board in writing that I no longer wish the individual named above to act as my representative</u>. [emphasis added]

[70] Nonetheless, the Authorization in use during the material times is what I must deal with in this investigation.

[71] WCB has asserted that there were subsequent representations from E.T. that he was acting on behalf of the Complainant. The Complainant cannot however be bound by representations made by E.T. independent of him and for which the Complainant has made no valid representation of authority to WCB. The point after all is not the intentions or motives of E.T. but the wishes of the Complainant.

[72] Consent becomes much more important when we consider that although FOIP applies to all kinds of personal information, some prejudicial and some likely less so, WCB tends to deal with a good deal of personal information that is particularly sensitive and prejudicial and that warrants a higher level of protection.

[73] WCB has also asserted that it was dealing with E.T. in respect of another claim file involving the Complainant but at its strongest, the claim of WCB is really that it could draw inferences from the course of dealing with the Complainant and E.T. on the other file that it had the Complainant's implied consent to share personal information and personal health information of the Complainant with E.T. This assertion ignores the FOIP requirement that consent be written.

[74] WCB has also asserted that despite the fact there were two different claim files for the Complainant, he had by his conduct treated them as merged or as a single file. I certainly did find occasions when the Complainant wrote WCB and made reference to both file numbers. I note however that WCB maintained the two different files, made no attempt to consolidate them into a single file and not all correspondence and documentation included both files.

[75] WCB has also asserted that it had authority to disclose the personal information of the Complainant to E.T. by reason of section 28 and 29(2)(a) of FOIP.

[76] Section 28 provides that:

> **Use of personal information**
> 28 No government institution shall use personal information under its control without the consent, given in the prescribed manner, of the individual to whom the information relates, except:
>
> (a) for the purpose for which the information was obtained or compiled, or for a use that is consistent with that purpose; or
>
> (b) for a purpose for which the information may be disclosed to the government institution pursuant to subsection 29(2).

[77] Section 29(2)(a) provides that:

> 29(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;

[78] In any event, section 28 relates to "use" of personal information under its control without consent yet the sharing of information by WCB with E.T. would have been a "disclosure". In my 2008-2009 Annual Report,[46] I defined the terms as follows:

> "Disclosure is sharing of personal information with a separate entity, not a division or branch of the public body or trustee in possession or control of that record/information."[47]
>
> "Use indicates the internal utilization of personal information by a public body and includes sharing of the personal information in such a way that it remains under the control of that public body."[48]

[79] WCB has argued that "The WCB can disclose information in the claim record to anyone as needed in order to assist the worker or employer in their dealings with the WCB. A worker's representative is not treated as a third party as for the purposes of the claim they stand in the shoes of the worker."[49] I frankly do not understand this argument since it would mean that, on the facts of this case, WCB and not the injured worker is determining who is the 'worker's representative'. Surely that must be exclusively the choice of the injured worker, and in accordance with the FOIP Regulation or section 59, that choice would be expressed in written authority from the injured worker. It would be surprising if the Legislative Assembly would have contemplated that WCB would decide which person outside of WCB should represent that injured worker and then proceed to disclose whatever personal information of the injured worker it might choose to that worker's representative in spite of no written authority from the injured worker.

[46] *Supra* note 31.
[47] *Ibid*, p. 69.
[48] *Supra* note 31, p. 71.
[49] *Supra* note 18.

[80] I find that the Complainant did not provide and WCB did not collect the personal information of the Complainant for the purpose for sharing it with a third party who did not have written authority or consent of the Complainant to receive such information. To uphold this argument by WCB would effectively condone routine abrogation of the privacy of WCB applicants and would render valueless the provision in section 18 of the FOIP Regulation for written consent of the WCB claimant in this case and many others.

[81] If it had been the intention of WCB to rely on section 28 or section 29(2)(a) why would WCB have created the Authorization form and apparently routinely require the execution of that form before disclosing personal information of an injured worker to someone who would serve as an advocate or representative of the injured worker?

[82] Further, I refer to the discussion concerning *An Overarching Personal Information Privacy Framework For Executive Government* (Overarching Privacy Framework)[50] in my Investigation Report F-2007-001. Despite my misgivings about the Overarching Privacy Framework, I note that it has not been rescinded and therefore Saskatchewan residents are entitled to assume that WCB should be attempting to attain a "corporate culture within government that reflects greater concern over how we collect, use, disclose and protect personal information. This puts a much greater emphasis on a citizen's right to have their personal information protected."[51]

[83] In conclusion, the Complainant was required to execute an Authorization that entitled WCB to deal with E.T. in respect of one of his two claims for a one year period ending January 24, 2006. The evidence is that no renewal of that Authorization was sought on Claim File #A and that there never was an executed Authorization for E.T. in respect of the second Claim File #B. All things considered, to the extent that WCB asserts that it had authority to disclose the personal information of the Complainant to E.T. that burden has not been discharged in this case.

[50] *Supra* note 33.

[51] *Privacy Framework for Executive Government* Powerpoint presentation by Senior Policy Advisor, Cabinet Planning Unit, Department of the Executive Council, December 2003.

3. Did WCB disclose to E.T. that the Complainant threatened to harm someone at WCB?

[84] Obviously a threat to injure anyone is of great concern. If this is accurate, it requires immediate action to minimize the risk to personal safety of individuals. On the other hand, if this is inaccurate, there would be great prejudice to the Complainant. Such an allegation if left unrefuted would likely poison any subsequent dealings an injured worker would have with WCB.

[85] I found no evidence in support of this allegation of a disclosure to the named individual of such a threat. The specific allegation therefore is not well-founded. There is however a good deal of opinion expressed in the record by WCB employees about threats of various kinds alleged to have been made by the Complainant. Although E.T. may not have received such a disclosure from WCB staff, it is evident that many individuals within WCB were reading material that spoke of the Complainant in terms of a physical threat posed to WCB staff or the Complainant. It is likely in the context of work being done by E.T. between January 24, 2005 and January 24, 2006 in respect of Claim File #A that E.T. may have learned of various claims that appear in various WCB documents that refer to the Complainant's conduct at different times as being angry and verbally aggressive. I will discuss this material in the section of this Report which addresses whether WCB took reasonable steps to ensure the information about the Complainant was accurate and complete.

4. Did WCB disclose the Complainant's personal information to the Sergeant-at-Arms with the Legislative Assembly Service without consent or authority?

[86] The materials I reviewed satisfy me that the disclosure was from the Legislative Assembly Security Detail, a body not subject to FOIP, and received by WCB. I found no evidence that WCB sent any personal information of the Complainant to the Sergeant-at-Arms. What happened was an unsolicited disclosure by the LAS and a collection by WCB.

[87] Section 26 of FOIP requires that a government institution shall, where reasonably practicable, collect personal information directly from the subject individual unless one of eight enumerated circumstances applies. Section 26(3) of FOIP provides that subsections (1) and (2) do not apply where compliance with them might result in "the collection of inaccurate information or defeat the purpose or prejudice the use for which the information is collected."[52] Collection of the information in question from the Sergeant-at-Arms of the LAS would be consistent with section 26(3) of FOIP.

5. Did WCB disclose personal information of the Complainant to a third party in Colorado without consent or authority?

[88] In the course of our investigation, I have been unable to find any evidence to support the fourth complaint involving an alleged inappropriate disclosure of personal information to an entity based with a Colorado address. In fact, the assertion that an entity received personal information was based on conjecture without supporting evidence. More importantly, the personal information in question is not that of the Complainant but his girlfriend. I am not persuaded that this is an appropriate case to undertake an 'own-motion' investigation.

6. Did WCB discharge its obligation to ensure that the personal information of the Complainant in its possession was accurate and complete?

[89] In the course of my review of the voluminous materials related to the Complainant, I did find evidence that raised the application of the duty on WCB to ensure accuracy in the personal information it uses for an administrative purpose and that such information be complete[53]. My statutory mandate includes own-motion investigations and the ability to offer commentary on apparent non-compliance by a government institution. In any event, the complaints raised by the Complainant deal with his personal information in the possession of WCB. I have determined that it is appropriate to offer commentary on this concern about inaccurate information about the Complainant. I indicated to WCB by a letter July 15, 2009 that I would be commenting on this evidence. I have received commentary from WCB with respect to this issue of accuracy and completeness.

[52] *Supra* note 2; section 26(3).
[53] *Ibid*, section 27.

[90] Section 27 of FOIP provides as follows:

> 27 A government institution shall ensure that personal information being used by the government institution for an administrative purpose is as accurate and complete as is reasonably possible.

[91] The relevant discussion of the duty to ensure accuracy in the Overarching Privacy Framework is as follows:

> "7. Accuracy
>
> Personal information shall be as accurate, complete and up-to-date as is reasonably necessary for the purposes for which it is to be used.
> Commentary
>
> The extent to which personal information is accurate, complete, and up-to-date will depend upon the use of the information, taking into account the interests of the individual. Information shall be sufficiently accurate, complete, and up-to-date to minimize the possibility that inappropriate information may be used to make a decision about the individual.
>
> When updating personal information, always consider the reason or purpose it was collected. It is not necessary to routinely update personal information, unless such a process is necessary to fulfill the purposes for which the information was collected.
>
> Personal information that is used on an ongoing basis, including information that is disclosed to third parties, should generally be accurate and up-to-date, unless limits to the requirement for accuracy are clearly set out.[54]

[92] I also considered the important 'data minimization' rule and the 'need-to-know' rule that underlie Part IV of FOIP. Data minimization means that an organization should always collect, use and disclose the least amount of personal information necessary for the purpose. The need-to-know rule is that 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.

[54] *Supra* note 33, p.17.

[93] I find that WCB has appropriately developed a *Safety and Security Policy*. It includes a number of checks and balances to ensure that decisions made under the policy would be evidence based and properly substantiated. Unfortunately, on the basis of the documents I reviewed, that policy was not followed and at the very least, the factual basis upon which WCB classified the Complainant as a C4 and later as a C5 risk is demonstrably incomplete.

[94] There is a clear need for additional training of WCB staff specifically to ensure that the information of injured workers collected, used, disclosed for purposes of the *Safety and Security Policy* is accurate and complete.

[95] In my review of the materials related to the Complainant, I found the following:

- Documents that discuss the Complainant's conduct that appear in sharp variance to the official risk classification assigned the Complainant

- Evidence that WCB did not follow its own internal *Safety and Security Policy* in respect to the Complainant

- Inappropriate intermingling of information related to threat assessment with his claims file with result that all kinds of information including some of what appears to be little more than gossip and innuendo is exposed to many different individuals who would process his compensation claim.

- An email in a claims file for the Complainant that contains a set of very general but highly prejudicial statements about the Complainant that was volunteered by a member of the public never apparently examined for accuracy but nonetheless left for review by virtually anyone processing his claim. I acknowledge that WCB would have no control over what unsolicited information is sent to it by third parties. My concern however is that WCB retained this email on its claims file. There it would have been accessible to anyone working on the file

- Apparent indiscriminate collection of information from third parties related to perceptions of the motives and intentions of the Complainant.

- Threats by the Complainant to bring in a lawyer and to "straighten everything out" or to involve MLAs appear to be treated by WCB staff as a threat that engages or at least supports the *Safety and Security Policy*.

[96] I choose not to detail the particulars of these concerns in this public Report; however, I have provided detailed information to WCB in a letter dated July 15, 2009 and urged it to pay immediate attention to its section 27 requirements in respect to this Complainant as well as its general operation.

[97] The security classification assigned to the Complainant appears in many places in the voluminous record under consideration. Given that I have reviewed all of its records, I find that there are contradictions in the security classification that are not accounted for in the files. In earlier files, the Complainant is identified as a C4 classification in 2004, but later as a C5 in 2007. In each case, this would be the highest threat classification. The significance of this is that it suggests that the information upon which the security classification is based is inaccurate and unreliable. There was a prescribed system of reporting under the *Safety and Security Policy* in place at all material times. That policy, if followed, should ensure that gossip and uncorroborated information would not be the basis for a C4 or C5 classification. That system of reporting is not reflected in the Complainant's file material. The records of any assessment process followed in this case are surprisingly thin. I did note the comment by an SE Team Leader in an email of June 26, 2007 that "I get the impression some of [the Complainants] misconduct wasn't recorded on file (at least not in great detail). Folks like [3 names of WCB employees] might be able to provide additional information about why they felt a C5 designation was required."[55] On the basis of my review of WCB materials, I'd suggest this is a remarkable understatement. In the WCB files I reviewed, I found detail about a large number of interactions between the Complainant and the WCB staff that were civil, productive, and uneventful.

[55] E-mail of WCB employee dated June 27, 2006

[98] Inaccuracies about the Complainant's classification directly impact his claim. It is clear from the record that I reviewed that the Complainant would be disadvantaged to the extent that his communication is limited to writing. In fact, in one memorandum, a WCB team leader observed that "We discussed the [Complainant's] general frustration with delays in getting training arranged. I acknowledge that our inability to speak with him directly, because of the previous conduct, did make things clumsy."[56]

[99] Given the high prejudice that attaches to anyone who is classified as a security risk by the government institution that it is dealing with, it is incumbent on that government institution to have clear policies and procedures and to scrupulously follow them. It is important that the personal information that is the foundation for any risk assessment also be the focus of such policies and procedures. The duty that information be accurate and complete needs to be a higher one in the context of a security classification.

[100] I should add that I found the *Security and Safety Policy* of WCB is not accessible to injured workers or to the public. It is not available on the WCB website and WCB provided the policy to me with the advice that the document was for "internal use only" and would "not be disclosed to any parties outside of [the OIPC]."[57] As it stands, the secrecy surrounding the *Security and Safety Policy* appears to offend the #9 principle of openness in the Overarching Privacy Framework.[58] I encourage WCB to ensure that this document is published so that the tests, thresholds, and processes employed by WCB to deny injured workers the opportunity to meet with WCB staff and attend at WCB premises are transparent and predictable.

[101] One important function of the individual's right to access to his or her own personal information in FOIP is that it facilitates the identification of errors in that recorded personal information. This function is impaired in Saskatchewan by WCB's refusal to allow claimants access to his or her personal information unless he or she has first filed an appeal or unless "the issue in dispute must be clearly identified and must concern a

[56] Memorandum of WCB Employee dated August 1, 2006.
[57] E-mail from WCB Privacy Officer to OIPC dated July 6, 2009.
[58] *Supra* note 33, p.18.

decision made on the claim or a pending appeal"[59] and even then access is limited to what may be in the "claims file". I have discussed this problem most recently in my Annual Report for 2008-2009[60].

[102] WCB's Privacy Officer has submitted that it is not the function of the Commissioner's office to second-guess the security protocols and policies developed by WCB and its experts to keep its staff safe. I accept that general proposition. At issue in this investigation however is whether WCB has the appropriate policies and procedures to ensure its section 27 responsibilities are satisfied and whether section 27 has been satisfied insofar as this particular Complainant is concerned. I find that WCB failed to take adequate steps to ensure that the personal information of the Complainant in its possession was accurate and complete.

VI. FINDINGS

[103] I find that the actions of WCB were not authorized by either section 28 or 29(2)(a) of FOIP as the Complainant did not provide and WCB did not collect the personal information of the Complainant for the purpose of sharing it with a third party who did not have written authority of the Complainant to receive such information.

[104] I find the complaint that WCB disclosed the Complainant's personal information to E.T. without the consent of the Complainant and without statutory authority is well-founded.

[105] I find that the specific complaint raised by the Complainant that WCB disclosed to E.T. that the Complainant had threatened to harm someone at WCB was not well-founded.

[106] I find that the specific complaint raised by the Complainant that WCB disclosed his personal information to the Sergeant-At-Arms with the LAS without consent or authority was not well-founded.

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[59] WCB, *Policy Manual*, available at http://www.wcbsask.com/WCBPortal/ShowProperty/WCBRepository/pdfs/PolicyManual, at section 10, p.9.

[60] *Supra* note 31, p.14.

[107] I find that the specific complaint that WCB disclosed the Complainant's girlfriend's personal information to a third party in Colorado without her consent or authority is not well-founded.

[108] I find that WCB failed to satisfy its obligations under section 27 of FOIP to ensure accuracy of the personal information of the Complainant in its possession and that the information was complete.

VII RECOMMENDATIONS

[109] That WCB follow our *Privacy Breach Guidelines* published on our website, www.oipc.sk.ca in respect to the personal information in Claim File #A that was disclosed to E.T. outside of the period from July 24, 2005 to July 24, 2006 and personal information of the Complainant in respect to Claim File #B.

[110] That WCB forthwith purge by shredding unsolicited and uncorroborated opinion information about the Complainant received from third parties without the consent of the Complainant from its records.

[111] That WCB segregate all information concerning risk to safety assessments other than the classification code from its general files and retain this information under the control of the Privacy Officer and ensure that only those employees of WCB who have a demonstrable need-to-know can view this segregated information.

[112] That WCB develop a policy to screen unsolicited personal opinion and information about claimants that is gratuitously disclosed to WCB and has not or cannot be corroborated.

[113] That WCB bolster training for its employees on what would be adequate documentation of its dealings with injured workers, particularly when a risk assessment is undertaken under its safety and security policy.

[114] That WCB publish its *Safety and Security Policy* on its website so this is available to all WCB claimants and the public.

Dated at Regina, in the Province of Saskatchewan, this 28th day of October, 2009.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan