SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT F-2010–001

Saskatchewan Government Insurance

Summary: The Office of the Information and Privacy Commissioner (OIPC) received three formal 'breach of privacy' complaints that relate to the collection, use and disclosure by Saskatchewan Government Insurance (SGI) of personal health information of claimants under *The Automobile Accident Insurance Act* (AAIA). The complaints alleged excessive collection of personal health information and improper use and disclosure of that personal health information. Our office commenced formal investigations in respect to each of the three complaints. SGI took the position that there is a gap in Saskatchewan's legislative scheme for privacy protection. SGI asserted that the OIPC had no authority to investigate these matters since neither *The Health Information Protection Act* (HIPA) Parts II, IV and V, nor *The Freedom of Information and Protection of Privacy Act* (FOIP) applied to these complaints. The Commissioner considered representations from SGI and concluded that there is no evidence that the Legislative Assembly would have intended to create such a gap in legislated privacy protection and that, in fact, there is no such gap as alleged by SGI. The OIPC has explored with SGI informal means to resolve the impasse but no such resolution appears possible. The Commissioner recommends that the Legislative Assembly amend the appropriate legislation to clarify the rules that will apply to the personal information collected, used and disclosed by SGI in its activities under the AAIA and the role of the OIPC in overseeing SGI's statutory responsibilities under FOIP and HIPA. He also recommended that SGI publish on its website clear information about its collection, use and disclosure practices. He further recommended that SGI revise its procedure for collection of personal health information to ensure that it is not over-collecting such information.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 23, 24, 25, 28, and 29; *The Freedom of Information and Protection of Privacy Act Regulations*, c. F-22.01 Reg. 1, s. 12; *The Health Information Protection Act*, S.S. 1999, c. H-0.021, ss. 4, 16, and 23; *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1; *The Automobile Accident Insurance Act*, S.S. 1978, c. A-35, ss. 35, 72, 165, and 183; *The Personal Injury Benefits Regulations,* c. A-35 Reg. 3, s. 74; *The Interpretation Act, 1995,* S.S. 1995, c.I-11.2, s. 10; *Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5,* Schedule 1*; Access to Information Act,* R.S., 1985, c. A-1; *Privacy Act,* R.S., 1985, c. P-21; *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982. c.11, ss. 7 and 8; *Personal Information Protection Act*, R.S.A. 2003, c. P-6.5 and *Personal Information Protection Act*, S.B.C. 2003, c. 63.

Authorities Cited: Saskatchewan Office of the Information and Privacy Commissioner Report H-2004-001; *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, (2002) SCC 53 at [25]; *R.* v. *Dyment*, [1988] 2 S.C.R. 417; *R.* v. *Mills*, [1999] 3 S.C.R. 668; *Dagg* v.*Canada (Minister of Finance)*, [1997] 2 S.C.R. 402; *R.* v. *Plant,* [1993] 3 S.C.R. 281; *R.* v. *Duarte*, [1990] 1 S.C.R.; and *General Motors Acceptance Corp. of Canada* v. *Saskatchewan Government Insurance*, [1993] S.J. No. 601 (Sask. C.A.).

Other Sources Cited: Saskatchewan Office of the Information and Privacy Commissioner *2004-2005 Annual Report*; Saskatchewan FOIP FOLIO February 2007; Saskatchewan Office of the Information and Privacy Commissioner, *Report on the Overarching Personal Information Privacy Framework;* SGI's Corporate Privacy Policy; E. A. Driedger, *Construction of Statutes*, 2nd ed. (1983); *An Overarching Personal Information Privacy Framework for Executive Government*, Province of Saskatchewan, September 2, 2003; Canadian Standards Association, *Model Code for the Protection of Personal Information* (Q830); and Government of Saskatchewan Privacy Assessment, Deloitte & Touche, February 12, 2003.

I. BACKGROUND

[1] Our office has reached an impasse with Saskatchewan Government Insurance (SGI) on privacy investigations in response to complaints from individuals who are claimants under *The Automobile Accident Insurance Act* (AAIA).[1] SGI has adopted an interpretation of the three statutes involved, AAIA, *The Health Information Protection Act* (HIPA)[2] and *The Freedom of Information and Protection of Privacy Act* (FOIP)[3] that does not allow our office to make any further progress on these investigations. Although our office operates on a collaborative basis with government institutions and other public bodies we oversee, when my office has exhausted efforts to resolve a matter informally, my only option is to issue a Report.

[2] We have consolidated three different files in this Investigation Report.

OIPC File No. 029/2005

[3] The Complainant contacted our office on May 1, 2005 requesting an investigation of an alleged breach of her informational privacy by SGI. The Complainant alleged that SGI had disclosed her personal health information without her consent to third parties. In fact, she alleged that SGI's disclosures had been made in spite of explicit instructions from her that certain personal information was not to be disclosed. My office wrote to SGI on May 27, 2005 advising of the complaint and that we would undertake an investigation. The Complainant had been injured in a motor vehicle accident on April 5, 2000. She made a claim to SGI for compensation for her injuries. She expressed concern that too much of her personal health information was collected by SGI. This included information about her daughter and the birth father. SGI had requested a Tertiary Assessment Report from [a rehabilitation centre]. In this case, the Complainant was presented by SGI with a written consent form entitled *Authorization for Release of Health Information* (the Authorization). The Authorization included the following:

[1] *The Automobile Accident Insurance Act,* S.S. 1978, c. A-35 [hereinafter AAIA].
[2] *The Health Information Protection Act,* S.S. 1999, c. H-0.021 [hereinafter HIPA].
[3] *The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01 [hereinafter FOIP].

> I hereby authorize the [the rehabilitation centre] to disclose the following information:
>
> 1. Tertiary Assessment Report
> 2. Admission Report
> 3. Progress Report
> 4. Discharge Report
>
> I consent to the use of this information by the authorized recipient, other than myself for the purpose of:
>
> personal information
>
> I acknowledge that this information is confidential. The [a health district][4], its affiliates and employees, are relieved of any responsibility of liability resulting from reproduction or further use of the information.

[4] The Complainant's signature appears on the consent form and it is dated March 17, 2003.

[5] The Complainant had also signed a separate *Authorization for Release of Medical Information* dated January 16, 2002. That Authorization included the following:

> I, [name of Complainant], DO HEREBY AUTHORIZE any physician or other health care provider and any hospital, clinic, or laboratory, to release any and all medical information, notes, memoranda, reports, records, charts, correspondence, x-rays and any other documentation or electronically stored information to Saskatchewan Government Insurance.
>
> The release of this information is to afford Saskatchewan Government Insurance the opportunity to fully and thoroughly review my past and present medical history and for this purpose I waive any physician/patient privilege which may otherwise be available to me.
>
> This authorization for the release of medical information shall be in effect for a period of one (1) year from the date of execution. A photocopy of this document shall be treated as an original.

[6] Another document signed by the Complainant is dated October 16, 2000. This document provides:

> I, [name of Complainant], DO HEREBY AUTHORIZE [name of physician crossed out and initialed by the Complainant], [name of physiotherapy clinic] and [name of

[4] The form apparently has not been revised since regional health authorities were created in Saskatchewan. All former health districts have been subsumed in the twelve regional health authorities in the province.

> massage clinic] to release any and all medical information, notes, memoranda, reports, charts, correspondence, x-rays and any other documentation or electronically stored information to Saskatchewan Government Insurance. [A handwritten marginal note appears beside this paragraph: "information pertaining to my BACK INJURY" and this is accompanied by the Complainant's initials.]
>
> The release of information is to afford Saskatchewan Government Insurance the opportunity to fully and thoroughly review my medical information and for this purpose [the words: "I waive any physician/patient privilege which may otherwise be available to me" have been crossed out and initialed by the Complainant].
>
> This authorization for the release of medical information shall be in effect for a period of 1 year from the date of execution. A photocopy of this document shall be treated as an original.
>
> [A handwritten note appears on the bottom of this form below the Complainant's signature as follows:]
>
> > Dr. [name of physician] is no longer at clinic, however I will be seeing Dr. [name of different physician]. I will only allow him to release medical information pertaining to my car accident (back injury) NOT my complete medical file. I will discuss this matter with Dr. [name of physician] and indicate to him I am to review all medical information prior to it being sent to SGI. [Signature of Complainant]

[7] The former Chief Privacy Officer and Ethics Advisor wrote to our office on November 28, 2008 in relation to this file and one other. He summarized the position of SGI as follows:

> Given the combination of subsection 4(3) of HIPA and 24(1.1) of FOIPP, I do not believe that your office has the jurisdiction to commence an investigation pursuant to subsection 33(d) of FOIPP. Even if I am wrong on the application of subsection 4(3) of HIPA, FOIPP cannot apply to personal health information, as the Legislature made a clear statement to remove it from FOIPP. As such, to the extent that your investigation seeks to review SGI's collection, use and disclosure of personal health information, I would argue that there is no authority for your office to do so, as it violates the provisions of both HIPA and FOIPP.

OIPC File No. 082/2007

[8] On July 10, 2007, my office received a written complaint, dated June 24, 2007, from the Complainant with respect to the actions of a Personal Injury Representative employed by SGI who allegedly attempted to obtain information contrary to the authorization executed

by the Complainant. The Complainant had been injured in a motor vehicle accident and had submitted a claim for compensation to SGI. The Complainant provided a number of documents including:

- *April 16, 2007 letter from SGI to the Complainant*. This letter detailed the kinds of information required by SGI in order to process the Complainant's claim. The letter referred to an "Authorization and Release" which had been included with the SGI letter for completion by the Complainant. The SGI Personal Injury Representative stated:

  > You will find enclosed our Authorization and Release, for your completion. Section 165 of the [AAIA] reads as follows:
  >
  > > "165(1) A claimant shall provide any information, and any authorization to obtain that information, that is requested by the insurer for the purposes of this Part."
  >
  > Failure to provide SGI with or any changes made to the Authorization and Release will be constituted as non-compliance as per Section 183(b) of the [AAIA].
  >
  > We look forward to your complete cooperation in this regard. If you have any questions or concerns, please feel free to contact me at the above noted number.

- *May 2, 2007 letter from SGI to a medical clinic in another province.* This letter stated the following:

  > Please be advised that we are in the process of reviewing a claim of [name of Complainant] with respect to injuries claimed in a motor vehicle accident. A review of the Saskatchewan Department of Health Medical Care Insurance Branch print-out indicates that you attended upon before and/or after the motor vehicle accident. In order to complete my review of [name of Complainant]'s claim, I require a copy of your entire medical file.
  >
  > Please provide me with a copy of your medical file. A copy of [the Complainant]'s authorization and release in this regard is enclosed. We, of course, will remit payment of your account associated with you providing this information to us. Thank you.

- *May 6, 2007 letter from Complainant to Manager of HO Claims, Injury at SGI.* This apparently is a response to a letter from the SGI Claims Manager received earlier by the Complainant. It included the following:

  > I would like a list of third parties you will be contacting prior to contacting them and why you are contacting them.

> "Should SGI in any way try to obtain information that is not related to my mva accident of April 5, 2000, release this information to a third party without consulting with me I will pursue legal action against the party that participated in this action without my authorization and pursue legal action against the employer of the employee (employers are responsible for the actions of their employees)." Also, I will pursue a complaint with the Privacy Commission [sic].
>
> …
>
> As far as my complete cooperation in any regard with SGI, I have always cooperated and will continue to do so.

- *May 1, 2007 letter from SGI Manager HO Claims, Injury to the Complainant.* The relevant portions of that letter are:

> You mention, in your letter, that you have concerns with respect to privacy issues.
>
> As you are aware, SGI's only interest is to adjudicate the injuries arising out of your [date] motor vehicle accident. Obviously this requires us to have a complete understanding of your medical condition and requires us to receive information from third parties.
>
> SGI is clearly aware of its obligations pursuant to relevant legislation and its own corporate policies and fully intend to comply with those obligations.

- *June 2, 2007 letter from Complainant to SGI Manager HO Claims, Injury.* This letter reads in part:

> Thank you for taking my call on Thursday, May 31, 2007. It was obvious I was upset and appalled by a message that I received on my answering machine.
>
> The message was from the Registered Nurse at the [name of medical clinic] in [community outside of Saskatchewan]. The message and my response was as follows:
>
> > "[Name of Complainant], this is [name] from the [name of medical clinic]. I received a call from [name of SGI Personal Injury Representative] at SGI, she was really upset. She said she did not get your entire medical file, could you call me about this. … [The Personal Injury Representative] demanded that my entire file be sent to her and that I had signed a release saying just that. She was rude and made a comment that if she did not get the entire file that I would not get any benefits"

> I am enclosing a copy of the letter sent to the medical clinic from [Personal Injury Representative] and please note that entire [sic] is in bold. As discussed with you, [Personal Injury Representative] does not require my entire file, only medical information that is relevant to my motor vehicle accident.
>
> In signing the release form, I advised all parties that [Personal Claim Representative] would be requesting information regarding a motor vehicle accident and that only relevant information was to be released. [Personal Claims Representative] was made aware of what information she was entitled to in numerous letters. [Personal Claims Representative] violated the Privacy Act by trying to get more information that [sic] was required and by mentioning the term benefits [Personal Claims Representative] violated my Human Rights.

- *June 8, 2007 letter from SGI Claims Manager*. This was a response to the Complainant's letter dated June 2, 2007. The letter includes the following relevant statements:

> In my discussion with you on Thursday, May 31, I indicated that we require relevant medical information to adjudicate your claim. As discussed with you, we do not require information that is totally unrelated to the motor vehicle accident. As you can appreciate, however, SGI must review medical information to determine whether or not it is relevant. Thus, it is not unusual for SGI to request an entire medical file, as was done here. You would have noted our letter of April 16, 2007, which quoted Sec. 165 of The Act. We have no interest in medical information that is not relevant to the motor vehicle accident. However, we will require your medical practitioners to certify we have all relevant medical information arising out of the motor vehicle accident. Failing such certification, which I assure you is an unusual step on our behalf, it will be impossible to properly assess your condition arising from the motor vehicle accident.

- *October 17, 2007 letter from Personal Injury Representative to the Complainant.* This letter states the following:

> Please be advised that SGI has requested a copy of your Patient History Statement from the [the health ministry in another province] to assist in processing your claim. This letter is being sent to you so we comply within Saskatchewan Health policy that you be made aware of this request. If you would like a copy of this report, please contact me at the above number.

[9] The former Chief Privacy Officer and Ethics Advisor wrote to our office on January 9, 2008 objecting to our jurisdiction to commence an investigation using language similar to [7] above.

OIPC File No. 002/2008

[10] On November 26, 2007 the Complainant wrote to my office regarding "SGI's use and possession of medical information that they are not entitled to possess." This was actually first brought to our attention the previous year when the Complainant questioned why his physiotherapist had provided the entire treatment file for the Complainant to SGI instead of sending only copies of those records relevant to the compensation claim in question. The physiotherapist communicated to SGI that she had erred in sending the entire file as the file included irrelevant personal health information, and she requested the immediate return of that irrelevant file material. SGI refused to accede to that request. In fact, SGI apparently disclosed the entire file to the Automobile Injury Appeal Commission (the Commission), another government institution, when the Complainant appealed to that body. This complaint relates to that refusal of SGI to return to the physiotherapist all of the file except for material relevant to the claim in question.

[11] The former Chief Privacy Officer and Ethics Advisor wrote to our office on November 28, 2008 in relation to this file and one other. His summary of the position of SGI has been described in [7] above.

SGI INJURY MANUAL

[12] SGI has provided us with excerpts from the Injury Manual utilized by SGI Personal Injury Representatives in their claims adjusting work pursuant to the AAIA. These excerpts outline and quote the statutory authority for medical practitioners to disclose information to SGI in respect to their patients who are advancing a claim for compensation pursuant to the AAIA. This makes reference to the Application for Benefits form that also includes a release that states: "I authorize SGI to undertake whatever investigations are necessary with respect to my claim for compensation, including examination of any medical and employment information that SGI deems as

relevant." SGI advises that this is the relevant form referenced in section 74 of *The Personal Injury Benefits Regulations*.[5]

SGI PRIVACY POLICY

[13] Prior to 2006, SGI had no written privacy policy. There was a written Code of Ethics and Conduct (the Code) that was in effect since June 1, 2002. The Code was "designed to protect all employees, as well as the Corporation. The general and specific guidelines of this Code, along with applicable codes of professional conduct, will assist employees in resolving ethical, legal and moral situations during work." The Code includes reference to FOIP and HIPA but in the context of protecting corporate information. This is in a section entitled "Managing Corporate Information." It mentions personal information but only in the context of "information that is confidential or proprietary to the Corporation, or non-public". It goes on to state that this "must not be divulged to anyone other than those authorized to receive the information." It also states that "Employees shall respect the privacy of the Corporation's stakeholders at all times. Requests for confidential information should be referred to your Supervisor or Manager." The following paragraphs are included in the Code:

> Employees must safeguard against improper access of information contained in the Corporation's records, whether in written, electronic or any other form. Employees may disclose information only to persons having a lawful right to such information.
>
> Employees must not use information acquired as an employee of the Corporation to benefit themselves, relatives, friends or business associates, or use information in any way that could be detrimental to the Corporation or its employees.

[14] Such a policy would fall short of privacy best practices as they existed in 2002. Treating personal information simply as a component of "confidential or proprietary" information of SGI is problematic for reasons particularized in our Annual Report for 2005-2006 at page 18.[6] It does not address collection of personal information at all. Nor does it

[5] *The Personal Injury Benefits Regulations*, c. A-35 Reg. 3. Section 74 reads as follows: "A claimant shall: (a) apply on a form provided by or acceptable to the insurer; and (b) sign his or her application."
[6] Saskatchewan Office of the Information and Privacy Commissioner [hereinafter SK OIPC] *2004-2005 Annual Report* at p. 18, available at: www.oipc.sk.ca/annual_reports.htm.

address the data minimization principle or need-to-know in practical and accessible language.

[15] SGI has a Corporate Privacy Policy that was introduced May 11, 2006 and then revised November, 2009. The Corporate Privacy Policy includes the following elements, among others:

> Purpose
>
> The Saskatchewan Auto Fund, SGI, SGI CANADA, SGI CANADA Insurance Services Ltd., Coachman and ICPEI (the "Corporation") are committed to the protection of personal information entrusted to them. This includes personal information residing with the Corporation and that is provided to third parties in the course of business. To do this, and to earn customer trust, the Corporation, through its employees, shall abide by 10 privacy principles, which are the foundation of this policy.
>
> …
>
> **2. Identifying purposes**
>
> **The purposes for which personal information is collected shall be identified by the Corporation before or at the time the information is collected.**
>
> The Corporation shall collect and use personal information for the purposes of:
>
> - verifying customer identity and communicating with customers
> - confirming application information, and to understand and assess needs for insurance
> - establishing and maintaining a relationship with customers, brokers and, in Saskatchewan, motor licence issuers
> - underwriting risks on a prudent basis
> - investigating claims and paying customers the compensation to which they are entitled
> - detecting, investigating and preventing fraud
> - offering and providing products and services to meet customer needs
> - compiling statistics for research or product and program development that may require using de-identified data
> - complying with the requests of law enforcement agencies
> - meeting legal and regulatory requirements
> - litigating matters that arise out of its business

- conducting business audits
- for Saskatchewan residents, meeting licensing, registration, photo identification and safety mandates as required by governing legislation for the Saskatchewan Auto Fund

The sharing of personal information to provide a service
To perform the duties listed above, departments within the Corporation often require the advice or assistance of outside parties or other departments within the Corporation (i.e. legal, independent adjusters, reinsurers, medical consultants, data processing, etc.). The Corporation may disclose personal information to these sources to assist the Corporation in providing the service for which the information was obtained. If the information is being provided to an outside party or another department within the Corporation for a different purpose than the original reason for which the information was collected, the Corporation may only disclose that information:

- if the individual whose personal information it is consents to the disclosure

  or

- disclosure is permitted pursuant to *The Freedom of Information and Protection of Privacy Act* and the regulations

3. Consent

The knowledge and consent of the individual is required for the collection, use or disclosure of personal information, except in certain circumstances where consent is not required.

General
The Corporation, in providing services should, whenever possible, obtain the personal information needed to provide the service from the individual(s) to whom it concerns and with their consent.

Obtaining consent
Consent to the collection, use and disclosure of personal information can be provided expressly or implicitly.

Express consent can be given orally or in writing. It is given by agreement or action on the part of the customer, to acquire or accept a product or service. For example, express oral consent can be given over the phone, or express written consent can be given by signing an application form or an agreement, which may relate to personal information. Express consent by an action can be given by clicking an accept button on a computer screen. If oral express consent is given, the Corporation will document the conversation within the appropriate policy or claim file.

Implied consent can be inferred from the relationship between the parties or from the nature of the dealings between the parties. For example, if personal information is provided to an insurance broker or agent for the purpose of obtaining insurance, it is

reasonable to infer that there is implied consent to the disclosure of that information to the insurer to meet the customer's needs.

Who can give consent
Consent may be given by the individual or by an authorized representative, such as a person having power of attorney or a legal guardian. The Corporation may require verification of this authorization.

When consent is not required
Consent is not required in limited circumstances, such as:

- complying with subpoenas and other court or government orders
- providing personal information to lawyers representing the Corporation in legal actions
- disclosing, under a public requirement, personal information to appropriate authorities in matters of significant public interest
- where the individual is a minor, seriously ill or mentally incapacitated, and seeking consent is impossible or inappropriate
- where the personal information is publicly available
- **where the law states it is not required**

Withdrawing consent
An individual may withhold or withdraw consent for the Corporation to collect, use or disclose personal information, provided there are no legal or contractual reasons to prevent the individual from doing so. Depending on the circumstances of the withdrawal of the consent, the Corporation's ability to continue to provide the products and services requested may be impacted.

4. Limiting collection

The collection of personal information shall be limited to that which is reasonably necessary for the purposes identified by the Corporation, and such information shall be collected by fair and lawful means.

The Corporation collects information needed to conduct business with its customers. It will be collected openly, fairly and lawfully. [7]

[emphasis added]

[7] SGI's Corporate Privacy Policy, available at: http://www.sgi.sk.ca/corporate_privacy_policy.pdf.

II. ISSUES

1. Which law, if any, applies to the personal information of claimants that is collected, used and disclosed by SGI?

2. Was the approach taken by SGI to consent from the complainants appropriate?

3. Was there an over collection by SGI of personal information of claimants?

4. Was the use and disclosure of personal information by SGI appropriate?

5. Is there a better approach to addressing privacy protection for SGI claimants?

III. DISCUSSION OF THE ISSUES

1. Which law, if any, applies to the personal information of claimants that is collected, used and disclosed by SGI?

[16] I considered the relevant law applicable to SGI's work in addressing claims for compensation under AAIA in my Investigation Report H-2004-001.[8] In that case, the complainant objected to the scope of personal health information solicited and collected by SGI that ante-dated the date of the accident. In that Report, I concluded that the relevant law would be FOIP. I further found that in the particular circumstances of the injury and the claim, it was not unreasonable for SGI to solicit and collect the additional personal information. I found however that SGI was bound by section 16 of HIPA and that it had not met its obligations to develop appropriate policies and procedures to avoid excessive collection of personal health information. I recommended that SGI confirm to the Complainant and our office that all medical information not directly relevant to making an entitlement decision regarding injuries claimed by the Complainant be removed from its records.

[8] SK OIPC Report H-2004-001, available at: www.oipc.sk.ca/reviews.htm.

[17] On each of these three privacy complaint files, SGI has taken the position that our office has no jurisdiction to investigate complaints that there has been an improper collection, use or disclosure of any claimant's personal information by SGI. According to SGI, this office would be limited to examining whether SGI has the appropriate policies and procedures required by section 16 of HIPA but would have no ability to determine whether the actions of SGI in the context of any particular complaint by a claimant corresponded to those policies and procedures. The argument of SGI necessitates a review of the relevant legislation.

[18] SGI is clearly a government institution[9] and is therefore subject to FOIP. Part IV of FOIP sets out a complete code which first defines what is and is not personal information and which then prescribes the rules governing the collection, use and disclosure of personal information. FOIP is the major access and privacy law in Saskatchewan and has been since its proclamation in 1992. This is similar to access and privacy laws in every other province and territory in Canada and also the federal *Access to Information Act*[10] and the federal *Privacy Act*.[11] The two-fold purpose of FOIP is to make public records accessible and to protect the information privacy of individuals. In Saskatchewan, there is a similar law for local authorities that was proclaimed in 1993 – *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).[12] LA FOIP is not engaged on the facts of this case.

[19] SGI is also a trustee for purposes of HIPA.[13] I have noted before that this dual designation is problematic[14] and, in this office's experience, has made compliance efforts with respect to both provincial statutes considerably more complicated. This particular investigation highlights that complication.

[9] See SK OIPC Investigation Report H-2004-001 at [16] to [20].
[10] *Access to Information Act*, R.S., 1985, c. A-1.
[11] *Privacy Act*, R.S., 1985, c. P-21.
[12] *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.
[13] See section 2(t) of HIPA.
[14] See SK OIPC Investigation Report H-2004-001 at [30].

[20] HIPA defines what "personal health information"[15] is and then prescribes the rules for the collection, use and disclosure of personal health information by trustees. The history and purpose of HIPA is markedly different than FOIP. HIPA was conceived in the late 1990's parallel with similar laws in Manitoba and Alberta to enable an electronic health record for every individual in each of those three prairie provinces. HIPA, which was not proclaimed until September 1, 2003, is designed to facilitate the sharing of patient personal health information among trustees who have a need-to-know that information for the purpose of providing diagnosis, treatment and care.

[21] The Information and Privacy Commissioner is a form of ombudsman with oversight responsibility of Saskatchewan's government institutions, local authorities and trustees under FOIP, LA FOIP and HIPA.

[22] The AAIA is the primary enabling legislation for SGI. Part VIII of AAIA sets out a comprehensive code for the work done by SGI in receiving and processing compensation claims arising from motor vehicle accidents.

[23] The relevant portions of FOIP are 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*;

[15] See section 2(m) of HIPA.

(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.

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;

(c) Repealed. 1999, c.H-0.021, s.66.

(d) any identifying number, symbol or other particular assigned to the individual, other than the individual's health services number as defined in *The Health Information Protection Act*;

(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;

(g) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

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

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;

(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

(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.

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

(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;

(b) the salary or benefits of a legislative secretary or a member of the Executive Council;

(c) the personal opinions or views of an individual employed by a government institution given in the course of employment, other than personal opinions or views with respect to another individual;

(d) financial or other details of a contract for personal services;

(e) details of a licence, permit or other similar discretionary benefit granted to an individual by a government institution;

(f) details of a discretionary benefit of a financial nature granted to an individual by a government institution;

(g) expenses incurred by an individual travelling at the expense of a government institution.

(3) Notwithstanding clauses (2)(e) and (f), **"personal information"** includes information that:

(a) is supplied by an individual to support an application for a discretionary benefit; and

(b) is personal information within the meaning of subsection (1).

[emphasis added]

[24] The relevant portions of HIPA are as follows:

> 4(1) Subject to subsections (3) to (6), where there is a conflict or inconsistency between this Act and any other Act or regulation with respect to personal health information, this Act prevails.
>
> (2) 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) Except where otherwise provided, *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* do not apply to personal health information in the custody or control of a trustee.
>
> (4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:
>
> (a) *The Adoption Act* or *The Adoption Act, 1998*;
>
> (b) Part VIII of *The Automobile Accident Insurance Act*;
>
> (c) Repealed. 2006, c.C-1.1, s.26.
>
> (d) *The Child and Family Services Act*;
>
> (e) *The Mental Health Services Act*;
>
> (f) *The Public Disclosure Act*;
>
> (g) *The Public Health Act, 1994*;
>
> (g.1) *The Vital Statistics Act, 1995* or any former *Vital Statistics Act*;
>
> (g.2) *The Vital Statistics Administration Transfer Act*;
>
> (h) *The Workers' Compensation Act, 1979*;
>
> (h.1) *The Youth Drug Detoxification and Stabilization Act*; or
>
> (i) any prescribed Act or regulation or any prescribed provision of an Act or regulation.
>
> (5) Sections 8 and 11 apply to the enactments mentioned in subsection (4).
>
> (**6) *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.**
>
> [emphasis added]

[25] The relevant portions of the AAIA are as follows:

> **35** Accident benefits provided by this Part are subject to the following statutory conditions:
>
> …
>
> **5**(1) **A claimant shall provide any information, and any authorization necessary to obtain that information, that is requested by the insurer for the purposes of this Part**.
>
> (2) As soon as is practicable after receiving a request from a claimant, the insurer shall release to the claimant, at the claimant's request, all of the insurer's information concerning the claimant and the claimant's claim that the claimant:
>
> (a) is entitled by law to receive; and
>
> (b) may reasonably require for the purposes of this Part.
>
> …
>
> **72 Every physician and every surgeon**, chiropractor, physiotherapist, psychologist, massage therapist or dentist **treating or attending or consulted upon any case of injury to a person involved in a motor vehicle accident shall furnish a report in respect of the injury forthwith and from time to time to the insurer in such form as the insurer may prescribe.**
>
> …
>
> **165**(1) **A claimant shall provide any information, and any authorization necessary to obtain that information, that is requested by the insurer for the purposes of this Part.**
>
> (2) The insurer shall, as soon as is practicable, release to a claimant, at the claimant's request, all of the insurer's information concerning the claimant and his or her claim that the claimant:
>
> (a) is entitled by law to receive; and
>
> (b) may reasonably require for the purposes of this Part.
>
> …
>
> **168** Within six days after receiving a written request from the insurer, a practitioner who or hospital that is consulted by an insured or who or that treats an insured after the accident shall provide the insurer with a written report respecting:
>
> (a) the consultation or the treatment; and
>
> (b) any finding or recommendation relating to the consultation or treatment.
>
> …

> **183 The insurer may refuse to pay a benefit** to a beneficiary or may reduce the amount of a benefit or suspend or **terminate the benefit if the beneficiary**:
>
> (a) knowingly provides false or inaccurate information to the insurer;
>
> (b) **refuses or neglects to produce information required by the insurer for the purposes of this Part** or to provide an authorization reasonably required by the insurer to obtain the information;
>
> (c) without valid reason, refuses to return to his or her former employment, leaves an employment that he or she could continue to hold, or refuses a new employment;
>
> (d) without valid reason, neglects or refuses to undergo an examination by a practitioner, or interferes with an examination by a practitioner, requested or required by the insurer;
>
> (e) without valid reason, refuses, does not follow or is not available for treatment recommended by a practitioner and the insurer;
>
> (f) without valid reason, prevents or delays recovery by his or her activities;
>
> (g) without valid reason, does not follow or participate in a rehabilitation program; or
>
> (h) prevents or obstructs the insurer from exercising any of its rights of recovery or subrogation pursuant to this Part.
>
> [emphasis added]

[26] I note that section 4(4)(b) of HIPA makes Parts II, IV and V of HIPA inapplicable to personal health information obtained for the purposes of Part VIII of the AAIA. I further note that sections 35 and 72 of the AAIA that are engaged in this analysis are found in Parts II and VI of AAIA respectively and not in Part VIII. It is not clear that personal health information of claimants that was obtained for the purpose of sections 35 and 72 should be interpreted as personal health information obtained for the purposes of Part VIII and thus excluded from HIPA. I do not however need to resolve that question given my findings and recommendations in this Report.

[27] There was a clear intention by the Legislative Assembly that two different laws (FOIP and HIPA) would not apply to the same personal information at the same time. There was an obvious need to clarify which laws applied to what information and at which times. This clear intention is manifest in section 4(4) of HIPA.

[28] There also was a clear intention by the Assembly to ensure that if HIPA did not apply by reason of section 4(4) of HIPA that FOIP would apply. This would avoid a gap in terms of privacy protection. This intention was manifest in section 4(6) of HIPA. It would have been a simple matter for the Legislative Assembly to include in FOIP or HIPA, or regulations under either statute, a provision to the effect that the personal information collected, used or disclosed by SGI in the course of its work under the AAIA would be made exempt from the application of FOIP and HIPA. Such a provision is arguably what is contemplated by section 4(6) of HIPA. No such exemption provision has been enacted as of this date.

[29] To this point, I understand that our analysis is no different than that of SGI.

[30] SGI however then considers section 24(1.1) of FOIP and contends that this section constitutes the 'exemption' authorized by section 4(6) of HIPA. Section 24 of FOIP defines personal information for the purposes of FOIP. Section 24(1.1) provides as follows:

> "Personal Information" does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

[31] My view is that the purpose of section 24(1.1) of FOIP is to ensure that two different laws do not apply to the same information at the same time. The practical effect of section 24(1.1) is that if personal health information is in the custody or control of a trustee and therefore subject to HIPA, it cannot simultaneously be personal information subject to FOIP. The purpose of the Legislative Assembly in enacting section 24(1.1) was presumably to avoid duplication in legislative coverage, not to create a void where no privacy law applied to the information collected, used and disclosed by SGI in the course of its work under the AAIA. To deny the important rights of Saskatchewan residents prescribed by FOIP and HIPA would warrant clear and unambiguous language that evidenced that the Assembly had turned its mind to such a result. The obvious and appropriate place to do so would have been the paramountcy provision in section 23 of

FOIP or the paramountcy provision in *The Freedom of Information and Protection of Privacy Regulations*,[16] section 12.

[32] FOIP and HIPA are quasi-constitutional laws according to the Supreme Court of Canada.[17] They define fundamental rights of Saskatchewan residents and this includes the privacy interest that has been judicially determined to be protected by sections 7 and 8 of the *Charter of Rights and Freedoms*.[18]

[33] As I have noted before, my office follows section 10 of *The Interpretation Act*[19] and the 'modern principle' of statutory interpretation in our oversight role.[20] 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 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."[21] Obviously, this was said in respect to a formal request for access under Parts II and III which is not the case in these three subject files.

[34] In this regard, I also note that *An Overarching Personal Information Privacy Framework for Executive Government*[22] (Privacy Framework) has not been rescinded so it therefore

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[16] *The Freedom of Information and Protection of Privacy Act Regulations*, c. F-22.01 Reg. 1 [hereinafter FOIP Regs].

[17] See *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, (2002) SCC 53 at [25]; *R.* v. *Dyment*, [1988] 2 S.C.R. 417; *R.* v. *Mills*, [1999] 3 S.C.R. 668; *Dagg* v.*Canada (Minister of Finance)*, [1997] 2 S.C.R. 402; *R.* v. *Plant*, [1993] 3 S.C.R. 281; and *R.* v. *Duarte*, [1990] 1 S.C.R.

[18] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982. c.11.

[19] *The Interpretation Act, 1995*, 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."

[20] This requires that the words of the legislation be read "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": E. A. Driedger, *Construction of Statutes*, 2nd ed. (1983) at 87. See also Saskatchewan FOIP FOLIO February 2007, p. 2, available at: http://www.oipc.sk.ca/newsletters.htm.

[21] *General Motors Acceptance Corp. of Canada* v. *Saskatchewan Government Insurance*, [1993] S.J. No. 601 (Sask. C.A.) at [11].

[22] *An Overarching Personal Information Privacy Framework for Executive Government*, Province of Saskatchewan, September 2, 2003, available at: http://www.gov.sk.ca/news-archive/2003/9/11-648-attachment.pdf.

appears to continue in full force and effect for the current Government. In the roll-out of the Privacy Framework, provincial government employees were advised as follows:

> Vision: To build a culture of privacy
>
> The Vision talked about in the Framework is "To build a culture of privacy". This vision focuses on how we can create 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.**
>
> [emphasis added]

[35] At page 6 of the Privacy Framework it is stated that:

> This Privacy Framework is designed to place Saskatchewan at the strongest possible privacy protection policy position, while balancing the Government's need to meet its public policy obligations.

[36] For all of those reasons, I find that the applicable law is FOIP and more particularly Part IV of FOIP and its protection of privacy provisions.

2. Was the approach taken by SGI to consent from the complainants appropriate?

[37] In the cases in question, there are complaints about the consent form utilized by SGI, about the ability of the insured to modify the consent and about the obligations of SGI to honor such consent forms. In one case, the claimant was presented with a consent form that was on its face in effect for only a one year period but that did not limit or stop SGI collecting personal information after one year elapsed. I should note that this office has also received a number of phone calls from Saskatchewan residents raising concerns about the SGI approach to consent from claimants but which have not resulted in formal investigations by our office.

[38] These cases highlight a curiosity in SGI practices and a problematic area that arises from attempting to marry modern privacy principles to a public motor vehicle insurance agency. This also underscores one of the confusing aspects of the Privacy Framework.

The specific issue is whether express consent of the individual is required by law and if not, should it be required as a matter of policy.

[39] Modern privacy laws are usually consent based. An express consent of the data subject usually cures or permits what would otherwise be a privacy breach when certain personal information is collected, used or disclosed. The best example would be the private sector privacy law that applies in Saskatchewan to organizations that collect, use or disclose personal information in the course of commercial activity, *Personal Information Protection and Electronic Documents Act* (PIPEDA).[23] That federal law is based on the *Model Code for the Protection of Personal Information* (Model Code), which was based on the Fair Information Practices developed by the Organization for Economic Co-operation and Development in 1980.[24] Indeed, the Model Code has been incorporated into PIPEDA as Schedule 1 to that law. Those Fair Information Practices have been modified from the original list of eight practices and now consist of ten practices or principles. These same Fair Information Practices represent the foundation for all Canadian and most international privacy laws.

[40] After the major Saskatchewan privacy breach involving CGI in early 2003, the Government of Saskatchewan commissioned Deloitte & Touche to conduct a privacy assessment of 17 provincial government institutions. SGI was one of those government institutions. *Recommendation 3* in that privacy assessment provided as follows:

> 3. SGI should consider adopting the fair information practices in the Federal Personal Information Protection and Electronic Documents Act ("PIPEDA") legislation and to which all private sector insurance companies must comply by January 1, 2004.[25]

[41] That privacy assessment was based on the Model Code. That privacy assessment then led in turn to the development and adoption by the Government of Saskatchewan on

[23] *Personal Information Protection and Electronic Documents Act, S.C. 2000, c.5* [hereinafter PIPEDA]. PIPEDA has, since January 1, 2004, applied to all businesses in Saskatchewan save for those that qualify as federal works and undertakings. This law does not apply to SGI. It is overseen by the office of the Privacy Commissioner of Canada.
[24] Canadian Standards Association, *Model Code for the Protection of Personal Information* (Q830), available at: http://www.csa.ca/cm/ca/en/privacy-code.
[25] Government of Saskatchewan Privacy Assessment, Deloitte & Touche, February 12, 2003 at p. 215, available at: http://www.llbc.leg.bc.ca/public/pubdocs/docs/359935/privacy_report.pdf.

September 1, 2003 of the Privacy Framework. The Privacy Framework promotes the use of consent from the data subject consistent with the Model Code.

[42] It does this by its section entitled *3. Limiting Consent* as follows:

> **3. Limiting Consent**
>
> Obtaining consent from the individual is the expected approach for the collection, use, and disclosure of personal information, but it is not always feasible, appropriate, or the only legal means of authority.
>
> Commentary
>
> The way in which a department or agency obtains consent may vary, depending on the circumstances and the type of information collected. When consent is required, a department or agency should seek informed consent. This is achieved when an individual is informed of the purpose for collection, and how the information will be used or disclosed.
>
> When collecting personal health information, individuals must be informed of anticipated use and disclosure of the information. This results in an informed consent, in circumstances where consent is required by HIPA. HIPA does not always require consent for use or disclosure but collection must still be informed.
>
> Individuals can give consent in many ways. For example:
>
> a) a person may provide a specific written consent for the proposed collection, use or disclosure. This could be part of an application form for services or programs, or a separate document;
>
> b) an electronic application form may inform the individual of the reason for collection and the expected uses and disclosures that will be made of the information. By completing and sending the form, the individual is impliedly consenting to the collection and the specified uses;
>
> c) for personal health information, HIPA allows consent to be deemed to exist, or if expressed, to be oral or written; however, for personal information, the FOI Act only permits oral consent in exceptional cases; or
>
> d) consent may be obtained at the time that individuals use a service.
>
> In general, consent must be obtained from the person to whom the information relates. However, legally authorized representatives (such as a legal guardian for minors, a person having the power of attorney or a personal guardianship order from the court) may be able to give consent on behalf of another.

> It is important for government to strive to obtain informed written consent where such is reasonably practical.

[43] In Canada, we now have 27 years of experience with public sector privacy laws. Those public sector laws however are not and have not been consent based. There is provision for consent[26] but obtaining consent is the exception and not the prevailing practice when it comes to 'use' or 'disclosure'. There is no consent requirement for 'collection' of personal information. The limiting statutory requirement for collection is that "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."[27] The experience in Canada with public sector privacy laws is that the greatest part of use or disclosure by public bodies would be founded on the power to use or disclose without consent if the use or disclosure is "for the purpose for which the information was obtained or compiled, or for a use that is consistent with that purpose".[28] In addition, there are no less than 22 prescribed circumstances under which personal information can be used or disclosed by any government institution without consent of the individual.[29] The reason is that government institutions require a vast amount of personal information from citizens to provide the services that those citizens expect. This includes the operation of schools, hospitals, social services and countless other services. To require express consent every time a public body collected, used or disclosed such personal information would likely be unwieldy, inefficient and cumbersome not to mention expensive. This fundamental difference is neither acknowledged nor reflected in the Privacy Framework. I discussed this difficulty in my *Report on the Overarching Personal Information Privacy Framework.*[30]

[44] Consent is generally conceived as the free and voluntary act of a sovereign individual. Consent needs to be thought of as a process that provides the individual with a measure of

[26] See FOIP sections 28(1) and 29(1) and FOIP Regs section 18.
[27] FOIP section 25.
[28] FOIP section 28(a).
[29] FOIP sections 29(2) and 28(b).
[30] SK OIPC, *Report on the Overarching Personal Information Privacy Framework*, available at: http://www.oipc.sk.ca/resources.htm. This was also considered in SK OIPC Investigation Report F-2007-001 at [29] to [42].

control over their own personal information. Consent normally can be modified and can be revoked.

[45] What we have encountered in investigating these three complaints is that claimants who object to the consent form or who wish to modify the consent form to limit the amount of personal health information collected by SGI, even where that would be appropriate so as to screen out non-relevant personal health information, are advised that these modifications to the consent form are not possible. Furthermore, they are advised that if they fail to provide an executed consent form without modification their claim will be dismissed by SGI.[31] In that sense, the consent form required by SGI cannot be considered a free and voluntary consent.

[46] In the result, consent is clearly not a requirement under FOIP for SGI to collect, use or disclose the personal information of a claimant provided the purpose for such collection, use or disclosure can be brought within sections 25, 28 and 29.

[47] The difficulty with the use of consent forms by SGI is that it contributes to confusion and creates expectations that will not be met by SGI. The current consent process would lead a claimant to believe a measure of control is afforded him or her. In fact, any measure of control is entirely illusory. Section 165 of the AAIA and statutory condition 5 in section 35 of the AAIA require the claimant to provide "any information, and any authorization necessary to obtain that information, that is requested by the insurer…". Section 183 of the AAIA makes it clear that refusing or neglecting to produce information required by the insurer or to provide an authorization reasonably required by the insurer to obtain the information entitles SGI to NOT pay a benefit to the claimant. It cannot fairly be said that in these circumstances the consent that is a pre-condition to resolving a compensation claim is free or voluntary. Rather it is a strict requirement in order to advance their claim. The consent form in use by SGI not only authorizes the release by a health care provider of personal information relevant to the specific claim but also the release of all personal information of the claimant regardless of relevance to the specific claim in issue.

[31] See sections 165(1) and 183 of the AAIA.

[48] Furthermore, by virtue of sections 72 and 168 of the AAIA, every physician, surgeon, chiropractor, physiotherapist, psychologist, massage therapist or dentist must furnish a report in respect of the injury forthwith and in such form as SGI may prescribe.

[49] The other major limitation on a government institution such as SGI is that it must "ensure that personal information being used by the government institution for an administrative purpose is as accurate and complete as is reasonably possible."[32] This must be subject to the data limitation principle discussed above and cannot justify SGI collecting more personal information than is necessary for the specific claim in issue.

[50] In the eighteen years since the proclamation of FOIP there has been a growing emphasis on ensuring that Saskatchewan public bodies operate more transparently. This includes requiring that citizens have ready information about why public bodies are collecting their personal information, how they use that information and to whom it may be disclosed and for what reasons. This is evidenced by the Privacy Framework as follows:

> **9. Openness**
>
> The privacy principles, and the policies and procedures relating to their implementation should be readily available.
>
> Commentary
>
> The information available should include: (a) the name/title and address of the person who is accountable for the organization's policies and procedures and to whom complaints or inquiries can be forwarded; (b) the means of gaining access to personal information held by the department or agency; (c) a description of the type of personal information held by the department or agency; (d) a copy of any brochures or other information that explain the departments or agency policies and procedures; and (e) what personal information is made available to related organizations or third parties.

3. Was there an over collection by SGI of personal information of claimants?

[51] It has been argued by SGI that it is appropriate that the primary provider disclose to SGI the entire health history of the claimant. It acknowledges that its claims adjusters are not

[32] FOIP, section 27.

health professionals but it argues that SGI will often have the entire file reviewed by their own physicians and health professionals to determine what is or is not relevant to the claim. The difficulty with this argument is that not only does it offend the data minimization principle but it exposes to non-health professionals a large volume of personal health information of Saskatchewan residents. It creates opportunities for collateral personal health information to be used for negotiation or strategic purposes in dealing with the claimant. It increases the risk of a breach by improper use or disclosure of personal health information that is not relevant to the claim being investigated.

[52] A further consideration is that SGI acquires a vast amount of personal health information about Saskatchewan residents in the course of its work. Much of this is routinely collected in claims files and not treated any differently than other kinds of personal information collected by the adjuster. I understand that in the event of an appeal to the Commission, the entire SGI file may be made available to the Commission if SGI determines that it is relevant. This further compounds the injury to the privacy of the claimant or customer. The effect is that SGI will have in its custody what may be the entire health history of a Saskatchewan resident. This information may be available to a number of non-health professionals while SGI has an active file. This entire information would then be available to a number of non-health professionals at the Commission including the Commissioners in the course of their work. There is then the issue of duplicates of substantial personal health information that is stored by both SGI and the Commission and the risks in multiple records that could be misused. I have no doubt that most of the employees of SGI and the Commission will be respectful of the privacy of claimants and protective of their privacy. Nonetheless, from a risk assessment perspective, the fact that so many persons will have the opportunity to view the personal health information, much of which will be completely irrelevant to the particular claim in dispute, of any claimant, is worrisome.

[53] In the case of a private insurer that is not a government institution for purposes of FOIP, a consent would be required from the claimant and the description of the purpose in that consent would effectively define and limit the type of personal health information that could properly be disclosed to that insurer.

[54] Given our determination that consent is not required by SGI and that its attempts to collect consent make its process confusing for claimants, is there a better way to protect the privacy of claimants and the confidentiality of their personal information? In the event that SGI accepts our recommendation to eliminate the consent form it currently uses and substitutes a notice to claimants and providers that clearly identifies the purpose for the demand for personal information, it must ensure that its claims staff understand that the personal information to be provided will be limited by the description of the purpose for the demand for personal health information. In other words, if SGI claims staff receive personal information in response to their demand for information that is not relevant, they must immediately return that irrelevant information to the health provider who supplied it, or shred it. Such procedures should be available on the SGI website so they are transparent to all Saskatchewan residents.

[55] I note as well that Saskatchewan physicians, physiotherapists and other health information trustees are bound by section 23 of HIPA, including the data limitation rule and the need-to-know rule. As a result they are enjoined from disclosing to SGI personal health information that exceeds what would be the least amount of identifying information necessary for the purpose of the disclosure. The purpose would be to deal with the compensation claim arising from a specific accident(s) which should be particularized on the notice form. A similar requirement for physicians in Alberta who are disclosing patient personal health information to an insurance company was discussed at length in the Investigation Report H2009-IR-001 and P2009-IR-001 by Leahann McElveen, Portfolio Officer for the Alberta Information and Privacy Commissioner. This Investigation Report is available at .oipc.ab.ca.

[56] In OIPC File No. 086/2006-HIPA/BP a physiotherapist, upon receiving the request from SGI concerning a particular patient, proceeded to send her entire file capturing information with respect to all professional services provided to an individual to SGI. After my office advised the physiotherapist of her obligations as a trustee under section 23 of HIPA, she advised that the file she disclosed to SGI included more personal health information than could be justified under section 23 of HIPA. She requested that SGI return those portions of the file not relevant to the injury in question. SGI refused to do

so. We will continue to remind those primary providers of their obligations to apply their clinical and professional judgment in applying section 23 of HIPA in their role as trustees subject to HIPA. A trustee that disclosed to SGI all of the personal health information it may have in its custody relating to a particular AAIA claimant without exercising judgment as to what was or was not relevant would be at risk of breaching HIPA and their responsibility to comply with section 23.

[57] In the event that there is a conflict between section 72 of the AAIA and section 23 of HIPA, HIPA would be paramount and would prevail by reason of section 4(1) of HIPA.

[58] I note that SGI has not been open and transparent to the public and complainants with respect to two past practices:

1. SGI collected, in at least some claim files, personal information that a health provider may have in its custody or control regardless of whether a third party trustee has made a determination under HIPA that some of the information is unrelated to the claim in question; and
2. SGI would review and retain all of that personal information collected from third party providers.

4. Was the use and disclosure of personal information by SGI appropriate?

[59] Much of this analysis has focused on collection of personal information by SGI from health trustees. The other two major privacy activities are 'use' and 'disclosure'.

[60] The general duties including the data minimization principle and the need-to-know principle codified in section 23 of HIPA apply to use and disclosure. Both general duties are implicit in Part IV of FOIP and explicit in the Privacy Framework.

[61] 'Use' captures what is done by SGI, its employees and contractors with the personal information once it comes into the possession of SGI. The complaints in this case revolve however around collection rather than use.

[62] 'Disclosure' captures the sharing of personal information of claimants by SGI to other organizations such that it no longer controls that personal information. Two different disclosures were engaged on these three files. One disclosure was sharing certain personal information with physicians and others outside of SGI and the second type of disclosure was to the Commission. In both cases there is legislative authority for such disclosures. Neither type of disclosure however is clearly brought to the attention of the Saskatchewan resident who is a claimant prior to the disclosure. In addition, it does not appear that there is a consistent effort by SGI to limit the personal information disclosed to outside medical experts. As noted earlier, the entire SGI claim file is made available to the Commission in the event of an appeal to that government institution if SGI determines that it is relevant.

5. Is there a better approach to addressing privacy protection for SGI claimants?

[63] To better align with the requirements of FOIP, SGI should implement ways to become more transparent to its claimants. The skeletal information now on its website does not adequately address why and how SGI will collect personal information of claimants from their health providers. It does not communicate that:

- SGI is entitled by FOIP to collect that information without the consent of the claimant.
- how long the information will be retained and when and how it will be destroyed.
- if there is an appeal to the Commission, that all of the personal information in the possession of SGI may be forwarded to the Commission.
- health providers in Saskatchewan will be bound by HIPA and therefore limited in what personal health information they can disclose to SGI.
- if a claimant believes that excessive personal information has been disclosed by their health care provider, they can complain to the OIPC.

[64] SGI should provide that information enumerated in the preceding paragraph and do so via its website and any printed information that it makes available to prospective claimants.

[65] SGI should develop a new form that it can provide to health care providers when soliciting personal information of claimants in order to adjust those claims for compensation. The form should identify the claimant, confirm that a claim is being processed under the AAIA by SGI, provide particulars of the accident and the injury related to the claim and request that the health care provider disclose all personal information relevant to that accident and claim. The form should also identify the statutory authority in the AAIA and FOIP that allows collection of this personal information. There should be contact information for an officer of SGI who can explain the statutory authority that SGI is relying on. I assume this would be section 29(2)(t) of FOIP. The form should incorporate by reference section 23(1) of HIPA which would apply in limiting the personal health information disclosed by the provider to only that which is necessary for purposes of SGI adjusting the claim.

[66] SGI should consider a broader communication campaign to remind Saskatchewan health care providers that by reason of its FOIP powers it has certain powers to collect personal information without consent and that there is authority in HIPA to accommodate that collection without consent. SGI is in a different legal position than private insurers or employers.

[67] My further suggestion is that the Legislative Assembly consider the novel approach taken in the private sector legislation of both British Columbia and Alberta with respect to employee information.[33] It was determined by the drafters of that legislation in 2003 that to require consent for the collection, use and disclosure of employee information was impractical and that it could likely not be said to be a free and voluntary consent given the context of the employment relationship. The solution was to substitute a new two-prong test for collection, use and disclosure of employee personal information. This test was that the collection, use and disclosure could only be for the purpose of the employment relationship and that it must be reasonable in the circumstances. After six years of practice in those two jurisdictions, it certainly appears that this non-consent based approach is working satisfactorily and in a way that adequately protects employees.

[33] See *Personal Information Protection Act*, R.S.A. 2003, c. P-6.5 and *Personal Information Protection Act*, S.B.C. 2003, c. 63.

Given the problems encountered with the SGI consent form and process, surely it is time to consider whether SGI could manage its business more efficiently and fairly yet in a way that protects the privacy of its claimants and customers by means of an adapted two-prong test. This new limitation or test would be that any collection, use or disclosure could only be for purposes of those activities contemplated by the Commission and that any such collection, use or disclosure must be reasonable in the circumstances. In the event that such a change occurred, it would be very important that SGI be transparent in ensuring that all claimants/customers would be advised of the fact that personal health information would be collected, used and disclosed without consent but subject to these two conditions or requirements.

[68] In the meantime, and pending any legislative solution, it will be important that SGI ensure greater transparency to its claimants and customers so that they understand their consent is not now required in order for SGI to collect, use or disclose their personal health information, that the consent form cannot be amended in any way and that failure to complete the consent form will lead to a denial of compensation. I note that this recommendation is consistent with the following recommendation in the Deloitte & Touche privacy assessment:

> 6. SGI should incorporate processes, which explicitly tell individuals in advance why their information is being collected and how it is going to be used. They should formally document the purposes for which all personal information is collected. We recommend that SGI work with the HITS program to ensure that the privacy needs of individuals are balanced against the purposes of the program itself.[34]

IV. MITIGATION

[69] SGI and its Chief Privacy Officer and Ethics Advisor have been helpful and diligent in attempting to craft a mitigation strategy to minimize the over collection of personal health information of the complainants in these three cases. SGI has undertaken to review the files to identify personal health information that is not relevant to the claims in question and to return that information to the respective complainants.

[34] Supra note 25.

[70] I recognize that in practice it will sometimes be difficult to determine precisely what personal information is necessary for SGI to collect in order to investigate and adjust a claim for compensation. There will need to be some reasonable latitude and flexibility in making that judgment. Nonetheless, the starting point needs to be that both SGI and trustees, such as primary care providers, recognize that not all of the claimant's personal health information will normally be reasonable to collect, or in the case of trustees, to disclose. I have not seen policies and procedures from SGI that provide appropriate guidance to its staff and to the public in making that kind of judgment. An important step in facilitating appropriate decision making would perhaps be for clearer and more specific identification of the information that SGI requires from the trustee at the early stages of SGI's investigation.

V. FINDINGS

[71] That FOIP applies to the personal information of citizens who make a claim for compensation pursuant to the provisions of the AAIA.

[72] That Part IV of FOIP sets out the rules for the collection, use and disclosure of personal information by SGI.

[73] That the data minimization principle – that SGI should collect, use and disclose the least amount of personal information necessary for the purpose of determining the claims made pursuant to the provisions of AAIA - is consistent with the Privacy Framework and implicitly with Part IV of FOIP.

VI. RECOMMENDATIONS

[74] That SGI ensure that it has policies and procedures that specifically reflect:

- the type of personal information that will be collected by SGI;
- why consent is not required for collection;
- the data minimization principle and how that is integrated into the work of SGI;

- the need-to-know principle and how that is followed in use by SGI and its staff; and
- the steps taken by SGI to limit the collection, use and disclosure of personal information of claimants consistent with the requirements of FOIP, HIPA and the Privacy Framework (save for provisions promoting consent).

[75] That those policies and procedures are published on SGI's website so they are available to all claimants and prospective claimants.

[76] That SGI revise its procedure for collection of personal information to ensure that it is not over-collecting the personal information of claimants. This revision should address how SGI will deal with excessive collection of personal information in any case where this is discovered.

[77] That the Legislative Assembly amend FOIP and/or HIPA to clarify the rules that will apply to the personal information collected, used and disclosed by SGI in its activities under the AAIA and the role of our office in overseeing SGI's statutory responsibilities under FOIP and HIPA.

Dated at Regina, in the Province of Saskatchewan, this 15th day of December, 2010.

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