SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT F-2012-002

Saskatchewan Workers' Compensation Board

Summary: The Complainant brought forward concerns regarding a telephone conversation that took place between a Saskatchewan Workers' Compensation Board (WCB) employee and a Trucking Company regarding the Complainant's active claim. The Commissioner found that the company was a third party. As such, he found that there was an unauthorized disclosure of personal information when the WCB employee confirmed that the Complainant had an active claim. The Commissioner also found that, during this conversation, WCB collected personal information of the Complainant from the third party without proper authority to do so from *The Freedom of Information and Protection of Privacy Act*.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 2(1)(d), 24(1)(b), 24(1)(j), 25, 26, 27, 29(1) 32, 33, 59(e); *The Health Information Protection Act*, S.S. 1999, c. H-0.021; *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, ss. 22, 23, 24, 27, 52, 53; Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 34(1)(k).

Authorities Cited: Saskatchewan OIPC Reports LA-2009-002/H-2009-001, H-2008-002, Investigation Reports F-2007-001, F-2009-001; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 SCR 66.

Other Sources Cited: Saskatchewan OIPC: *Glossary of Common Terms: The Health Information Protection Act (HIPA)*; Rules Of Court Office Consolidation Province Of Saskatchewan: *The Queen's Bench Rules*; Access and Privacy Branch, Service Alberta: *FOIP Guidelines and Practices (2009)*; Information, Privacy and Archives Division, Ministry of Government Services, Ontario: *Freedom of Information (FOI) and Privacy Manual*; *Black's Law Dictionary*, 9th Ed., USA: Thomson West, 2009; Saskatchewan Workers' Compensation Board: *Policy and Procedure Manual*: *Policy 9.6 and Procedure 10.3.*

I BACKGROUND

[1] On March 4, 2008, my office received a written complaint, dated March 1, 2008 from the Complainant detailing privacy concerns he had with the Saskatchewan Workers' Compensation Board **(**WCB). The complaint at issue in this Report involves a WCB employee allegedly confirming the Complainant's personal information with a third party. In his original letter of March 1, 2008, the Complainant wrote as follows:

> The second incident happened on Feb. 11, 2008. A staff member of [Trucking Company #1] phoned WCB and talked to [WCB Case Manager]. . . . This [staff member of Trucking Company #1] represented herself as my employer which was false. [Complainant's trucking company] had a contract with [Trucking Company #1] and I ([the Complainant]) worked for [the Complainant's trucking company] and carried my own WCB coverage and paid my own premiums. This was confirmed by [a WCB Employee] in Employer Accounts at WCB. . . . What I find so disturbing about this is that WCB accepted [Trucking Company #1's] false pretense without any verification and talked with this person. [WCB Case Manager] then diarized the conversation with [Trucking Company #1] and filed it into the claim file I have been appealing with WCB against [Trucking Company #2]. **What is really disturbing is that [Trucking Company #1] gave unsolicited statements that are FALSE and unsubstantiated** and now I have to do a lot of extra documentation to prove that [Trucking Company #1] gave these false statements to WCB.
>
> When I confronted this [WCB Case Manager] about this issue and told her that [Trucking Company #1] was NOT my employer, she proceeded to argue with me that they were. Again I was not an employee so what is going on here that WCB staff does not even know what the definition of employee is? [WCB Case Manager] had no business talking to [Trucking Company #1] until it was confirmed that I was in fact an employee (which I was not). **I believe she gave out information that she had no right to when she told [Trucking Company #1] I had a claim with WCB.** Again I was not an employee of [Trucking Company #1] so they had no reason or

> right to know my affairs with WCB (this includes any claims or issues I have with WCB) and WCB should not have been talking to [Trucking Company #1]. Again, I believe my right to privacy has been violated.
>
> [emphasis added]

[2] After confirming with the Applicant he had first attempted to resolve his complaints with WCB, my office opened a file on November 6, 2008 and notified both WCB and the Complainant of my intention to conduct an investigation into the matter.

[3] On November 27, 2008, my office received a letter from WCB dated November 26, 2008 which stated that it had investigated the incident and no breach had occurred. The letter stated that WCB had provided the Complainant with the conclusion in a letter dated November 4, 2008. WCB included its internal investigation report and privacy of information policy.

[4] The incident at issue was a telephone call between an employee of Trucking Company #1 and a WCB Case Manager that took place on February 11, 2008.

[5] I originally launched this investigation into this matter on the basis that the Complainant alleged that there had been an inappropriate disclosure of personal information. My office's notification letter to WCB of November 6, 2008 stated:

> The complainant alleges that on February 11, 2008 an employee of the WCB inappropriately shared information regarding his WCB claim with an individual claiming to be a representative of his employer [Trucking Company #1]. [The Complainant] asserts that [Trucking Company #1] was not his employer and that by sharing any claim information, including the existence of a claim, his privacy with regards to his WCB claim had been violated.

[6] On May 26, 2011, my office wrote to WCB and asked for further information including documentation from the Complainant's files and a more detailed submission. We received a submission dated May 31, 2011.

[7] However, upon review of WCB's submissions, it became clear that there was also an issue of an apparent unauthorized collection of personal information resulting from the February 11, 2008 telephone conversation.

[8] My office shared a preliminary analysis with WCB on March 23, 2012 and asked for a submission regarding the issue of the inappropriate collection of personal information. WCB provided a letter in response dated April 19, 2012. My office shared a further analysis on May 10, 2012 and received a final response from WCB on June 27, 2012.

II ISSUES

1. What is the role of Trucking Company #1 with respect to the Complainant's claim with the Saskatchewan Workers' Compensation Board?

2. Did the Saskatchewan Workers' Compensation Board inappropriately disclose the personal information of the Complainant to a third party?

3. Has the Saskatchewan Workers' Compensation Board inappropriately collected personal information of the Complainant?

III DISCUSSION OF THE ISSUES

[9] WCB is a government institution pursuant to section 2(1)(d) of *The Freedom of Information and Protection of Privacy Act* (FOIP).[1]

[10] My authority to investigate the identified issues is found in section 33 of FOIP which states:

> **33** The commissioner may:
>
> (a) offer comment on the implications for privacy protection of proposed legislative schemes or government programs;

[1] *The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01, section 2(1)(d).

> (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.[2]

1. What is the role of Trucking Company #1 with respect to the Complainant's claim with the Saskatchewan Workers' Compensation Board?

[11] The Complainant alleged that Trucking Company #1 was not his employer with respect to his WCB claim. It appears from the Complainant's correspondence that either the Complainant's own Trucking Company or Trucking Company #2 is actually the employer. WCB has never clarified this fact. It also appears that the Complainant's Trucking Company had contracted services at least at one time to Trucking Company #1.

[12] WCB has not contradicted or clarified this understanding in its submissions of November 26, 2008, May 31, 2011 and April 19, 2012. Instead, throughout the course of this investigation, WCB has been vague and inconsistent regarding the role of Trucking Company #1.

[13] In its November 4, 2008 letter to the Complainant, WCB stated: "The record of this phone call indicates that [Trucking Company #1] was calling to determine whether or not they should sign a letter on your behalf." It appears that at this point, WCB viewed Trucking Company #1 as a representative of the Complainant. However, the procedure for dealing with a representative of a worker is addressed in section 10.3 of WCB's Procedure Manual as follows:

[2] *Ibid.* at section 33.

> 12. Before providing any information to a worker's representative, staff must ensure a valid Worker's Authorization Letter of Representation (WREP) document is on the claim or at hand, indicating that this person acts on behalf of the worker. Such an authorization remains in effect until rescinded by the worker.[3]

[14] This is further enforced by section 59(e) of FOIP which states:

> **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.[4]

[15] WCB has not provided evidence that there was a WREP on file for Trucking Company #1 to act as a surrogate for the Complainant.

[16] Later in this investigation, WCB in its letter of June 27, 2012, apparently acknowledged Trucking Company #1 as a contractor. It stated:

> A worker has no reasonable expectation that his employer will be denied access to information about a claim the worker submits to the WCB. A contractor would be in the same position relative to his principal.

[17] The claim in the above quotation by WCB is not supported by any argumentation and, in my view, is not valid; this quotation also demonstrates that WCB may have viewed Trucking Company #1 as a contractor, but not necessarily the employer of record.

[18] However, it then appears that WCB's view of the role of Trucking Company #1 changes. Its June 27, 2012 letter later states:

> However, we must advise you that sections 52 and 53 of the WCAct impose a positive duty on an employer to contact the WCB to provide any knowledge it has with respect to workplace injuries of its employees.

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[3]Saskatchewan Workers' Compensation Board (hereinafter WCB), *Procedure Manual*: *10.3, Authority for Disclosure (PRO 04/2008)* at p. 6, available at http://www.wcbsask.com/WCBPortalWeb/ShowProperty?nodePath=/WCBRepository/pdfs/PolicyManual.
[4]*Supra* note 1 at section 59(e).

> **Your opinion that the WCB should consider an employer a representative of the worker is not supported b** [sic] **the WCAct.**
>
> **All employers in an industry are collectively responsible for the costs of injuries to all workers in that industry.** Additionally, **who is an employer and who is an employee for the purposes of the WCAct falls to the exclusive determination of the WCB, and not the worker or any other court, board or tribunal.**
>
> The employer is obliged to report, and otherwise may become liable for, injuries that arise out of or in the course of employment. In the communication in issue, evidence was provided by [Trucking Company #1] that a worker had reported to them a possible injury ("vibration disease"). **The employer had a positive obligation under section 52 of the WCAct to report this to the WCB. Whether or not [the Complainant] was a worker of [Trucking Company #1] would be something that the WCB would have to determine.** Such determinations are commonplace in the trucking industry.
>
> Further, this reporting satisfies any risk of liability that the employer might fear under section 53 for failing to report an injury. Employers also have an interest (both financial and safety rating) in being held responsible for injuries that occur outside of the workplace.
>
> [emphasis added]

[19] It appears that WCB is now arguing that Trucking Company #1 was calling to report an injured worker. WCB has said that pursuant to section 52 of *The Workers' Compensation Act, 1979* (the WCAct), that employer must report its employees' injuries to the WCB. Section 52 of the WCAct reads as follows:

> **52** Each employer shall, **within five days** from the date he becomes aware of an injury which prevents a worker from earning full wages or which necessitates medical aid, notify the board in writing of:
>
> (a) the nature, cause and circumstances of the injury;
>
> (b) the time of the injury;
>
> (c) the name and address of the injured worker;
>
> (d) the place where the injury happened;
>
> (e) the name and address of any physician who attends the worker for his injury;

> (f) any further particulars of the injury or claim for compensation that the board may require.[5]
>
> [emphasis added]

[20] What proof is there that: (a) the Complainant suffered from an injury that would be captured by the above; and that (b) the individual that called in representing Trucking Company #1 was in fact the Complainant's employer? Was a W1, E1 or Care Provider's Form (i.e. PPI)[6] filled out with respect to a claim made to WCB regarding this specific individual, Trucking Company #1 and "vibration disease" at the material time? Instead of providing evidence that it made a formal determination regarding the above, WCB only offered generalizations regarding employer obligations.

[21] WCB also said the following: "Whether or not [the Complainant] was a worker of [Trucking Company #1] would be something that the WCB would have to determine."[7] Section 53 of the WCAct states the following:

> **53** Any employer who contravenes section 52, unless he is excused by the board, is guilty of an offence and liable on summary conviction to a fine of not more than $1,000 and shall, where the board orders, pay to the board any part of the amount of compensation and medical aid that the board awards for that injury.[8]

[22] WCB should know within 5 days from the date the employer comes to know that one of its workers is injured to the extent necessary to warrant making a WCB claim. WCB has offered nothing to demonstrate that this particular telephone conversation with Trucking Company #1's representative had anything to do with a claim involving it as employer.

[23] If WCB had determined that Trucking Company #1 was in fact the employer of record, then pursuant to section 52, the Case Manager would have had the requisite authority to collect details pertaining to the injury in question. I note instead the WCB Case Manager said that she could not give the caller any information regarding the man's claim. If

[5] *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, section 52.
[6] Forms available online at http://www.wcbsask.com/book_forms_pubs/page_forms_publications_physician_forms.html.
[7] Letter from WCB to OIPC dated June 27, 2012.
[8] *Supra* note 5 at section 53.

Trucking Company #1 was the employer, why did the WCB Case Manager refuse to discuss the claim?

[24] WCB has indicated it is within its jurisdiction to decide who is an employer in this case. This determination should have been made before personal information was disclosed or collected. When, and if this determination was made, has not been made known to me.

[25] WCB's assertion that "all employers in an industry are collectively responsible for the costs of injuries to all workers in that industry"[9] is irrelevant. Certainly, FOIP does not support the notion that all employers in an industry have a right to access personal information of any worker in the industry, which appears to be WCB's argument.

[26] Further, in its letter of June 27, 2012, WCB stated:

> After due consideration (which is why information is kept), it is clear that the worker did in fact speak to his employer [I assume WCB is referencing Trucking Company #1] about his claim. It is also clear on the totality of the evidence that the worker spoke about "vibration disease" with his current employer [again, I assume WCB is referencing Trucking Company #1]. . . . Both the current and the **previous employer** had a legitimate interest in this information. These are all relevant facts to the merit and justice of the worker's claim, and the factual issues are not in dispute by the worker.
>
> [emphasis added]

[27] It appears WCB may have also referred to Trucking Company #1 as former employer although its submission was not specific.

[28] As WCB has not clarified the role of Trucking Company #1 by providing any supporting evidence, I must conclude that Trucking Company #1 is a third party.

2. Did the Saskatchewan Workers' Compensation Board inappropriately disclose the personal information of the Complainant to a third party?

[9] *Supra* note 7.

a) How was information about the Complainant disclosed to Trucking Company #1?

[29] On November 27, 2008, WCB provided me with a copy of its investigation report. It concluded that:

> No breach of privacy occurred. No personal information was provided to [Trucking Company #1]. The Case Manager made it clear that she could not provide claim file/personal information to the caller from [Trucking Company #1].
>
> The evidence indicates that it was [the Complainant] who contacted [Trucking Company #1] and requested that they sign a letter regarding the nature of his injury. [Trucking Company #1] then called the WCB to seek guidance.

[30] By letter dated May 26, 2011, my office contacted WCB to ask for evidence to support its claims that no breach occurred. On June 2, 2011, my office received from WCB a copy of the memorandum describing the February 11, 2008 phone call on the Complainant's file. It was dated February 11, 2008 and is written by WCB Case Manager. The call in question took place at 2:02 in the afternoon as indicated on the memorandum. It provides as follows:

> [TRUCKING COMPANY #1] CALLED
> [NAME OF EMPLOYEE OF TRUCKING COMPANY #1]…
> CLMT WANTS THE COMPANY TO SIGN A LTR STATING THAT TIME MISSED FROM WORK IS DUE TO HIS **"VIBRATION DISEASE"**
> TOLD HER THAT IS UP TO THEM AS TO WHAT THEY WOULD LIKE TO DO WITH THAT
> [NAME OF EMPLOYEE OF TRUCKING COMPANY #1] SAID – EMP – THAT ANY TIME HE TOOK OFF WAS ALWAYS TO DO HIS FARMING AND NO OTHER REASON KNOWN TO THEM
> TOLD HER I COULD NOT GIVE HER ANY INFO **REGARDING THIS MAN'S CLAIM**
> SHE UNDERSTOOD
>
> [emphasis added]

[31] I conclude that the Case Manager did confirm to Trucking Company #1 that the Complainant had a claim with WCB.

b) Does the existence of an individual's claim with WCB qualify as personal information?

[32] The existence of an individual's claim with WCB would qualify as personal information. Section 24(1) of FOIP defines personal information as follows:

> **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.[10]

[33] The existence of claim does not fit neatly in one of the subsections in section 24(1). However, the use of the term "and includes" means that this is a non-exhaustive list. This is supported by the Supreme Court of Canada decision *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police),* which states:

> Furthermore, I note that the examples given in this section are not exhaustive and do not reduce the general scope of the introductory phrase. Parliament has clearly expressed its intention that the introductory phrase keep its wide and general meaning by providing only non-exhaustive examples. It uses the expression "including" or "*notamment*" in the French version. I had the opportunity in *Lavigne, supra,* to express the following comments regarding the meaning of that expression in the context of the application of the *Privacy Act*, at para. 53:
>
> > Parliament made it plain that s. 22(1)(*b*) retains its broad and general meaning by providing a non-exhaustive list of examples. It uses the word "*notamment*", in the French version, to make it plain that the examples given are listed only for clarification, and do not operate to restrict the general scope of the introductory phrase. The English version of the provision is also plain. Parliament introduces the list of examples with the expression "without restricting the generality of the foregoing"… [11]

[34] As such, the existence of an individual's WCB claim file would qualify as personal information. Further, the existence of a claim constitutes information of a personal nature.

[35] The existence of a claim also indicates that there has been an injury or illness that may prevent an individual from working. This could also lead to a violation *of The Health Information Protection Act*;[12] however I will only deal with this complaint under FOIP.[13]

[10] *Supra* note 1 at section 24(1).
[11] *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2003 SCC 8, [2003] 1 SCR 66 at [29].
[12] *The Health Information Protection Act* (hereinafter HIPA), S.S. 1999, c. H-0.021.

c) Was this action a disclosure?

[36] I have defined "disclosure" in my Investigation Report F-2007-001 as "the 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."[14]

[37] The memorandum dated February 11, 2008 on the Complainant's file stated:

> TOLD HER I COULD NOT GIVE HER ANY INFO REGARDING THIS MAN'S CLAIM

[38] The memorandum indicates that the WCB Case Manager confirmed the Complainant's claim. In its letter of April 19, 2012, WCB wrote the following:

> It is clear to me that the call from [Trucking Company #1] was directly related to a request made by [the Complainant] to [Trucking Company #1] asking that they sign a letter regarding the nature of an injury he may have suffered.
>
> If you are suggesting that the mere act of talking to an employee of [Trucking Company #1] constituted a breach of privacy in that it revealed the existence of a claim for [the Complainant], I view this as a strained interpretation of the term "breach".

[39] However, WCB also stated in its April 19, 2012 letter:

> I would agree that the existence or non existence of a claim with the WCB would be the personal information of the individual.

[40] My office's resource, *Glossary of Common Terms: The Health Information Protection Act (HIPA)*, states:

> **PRIVACY BREACH** happens when there is an unauthorized collection, use or disclosure of phi, REGARDLESS OF WHETHER THE PHI ENDS UP IN A THIRD PARTY'S POSSESSION.[15]

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[13]HIPA does not apply to all personal health information in the custody or control of WCB. See Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Investigation Report F-2007-001 at [25] to [28], available at www.oipc.sk.ca/reviews.htm.
[14]SK OIPC Investigation Report F-2007-001 at [179], available at www.oipc.sk.ca/reviews.htm.
[15]SK OIPC *Glossary of Common Terms: The Health Information Protection Act (HIPA)*, available at www.oipc.sk.ca/resources.htm.

[41] It is not simply the fact the WCB Case Manager had a conversation with Trucking Company #1 that constituted a privacy breach, it was the disclosure of personal information by confirming the Complainant had a claim with WCB.

[42] WCB points out in its first submission that there is evidence that demonstrates that the employee of Trucking Company #1 may have already had knowledge of the Complainant's claim file. However, it does not matter that the employee of Trucking Company #1 had prior knowledge of the claim. The incident still constitutes a disclosure by WCB.

d) Did WCB have authority to disclose the personal information under FOIP?

[43] Section 29 of FOIP states:

> **29**(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.
>
> (2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:
>
> (a) for the purpose for which the information was obtained or compiled by the government institution or for a use that is consistent with that purpose;
>
> (b) for the purpose of complying with:
>
> (i) a subpoena or warrant issued or order made by a court, person or body that has the authority to compel the production of information; or
>
> (ii) rules of court that relate to the production of information;
>
> (c) to the Attorney General for Saskatchewan or to his or her agent or legal counsel for use in providing legal services;
>
> (d) to legal counsel for a government institution for use in providing legal services to the government institution;
>
> (e) for the purpose of enforcing any legal right that the Government of Saskatchewan or a government institution has against any individual;

(f) for the purpose of locating an individual in order to:

(i) collect a debt owing to Her Majesty in right of Saskatchewan or to a government institution by that individual; or

(ii) make a payment owing to that individual by Her Majesty in right of Saskatchewan or by a government institution;

(g) to a prescribed law enforcement agency or a prescribed investigative body:

(i) on the request of the law enforcement agency or investigative body;

(ii) for the purpose of enforcing a law of Canada or a province or territory or carrying out a lawful investigation; and

(iii) if any prescribed requirements are met;

(h) pursuant to an agreement or arrangement between the Government of Saskatchewan or a government institution and:

(i) the Government of Canada or its agencies, Crown corporations or other institutions;

(ii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

(iii) the government of a foreign jurisdiction or its institutions;

(iv) an international organization of states or its institutions; or

(v) a local authority as defined in the regulations;

for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(h.1) for any purpose related to the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the Criminal Code, to:

(i) the Government of Canada or its agencies, Crown corporations or other institutions;

(ii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

(iii) the government of a foreign jurisdiction or its institutions;

(iv) an international organization of states or its institutions; or

(v) a local authority as defined in the regulations;

(i) for the purpose of complying with:

(i) an Act or a regulation;

(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or

(iii) a treaty, agreement or arrangement made pursuant to an Act or an Act of the Parliament of Canada;

(j) where disclosure is by a law enforcement agency:

(i) to a law enforcement agency in Canada; or

(ii) to a law enforcement agency in a foreign country;
pursuant to an arrangement, a written agreement or treaty or to legislative authority;

(k) to any person or body for research or statistical purposes if the head:

(i) is satisfied that the purpose for which the information is to be disclosed is not contrary to the public interest and cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates; and

(ii) obtains from the person or body a written agreement not to make a subsequent disclosure of the information in a form that could reasonably be expected to identify the individual to whom it relates;

(l) for the purpose of:

(i) management;

(ii) audit; or

(iii) administration of personnel;

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

(m) where necessary to protect the mental or physical health or safety of any individual;

> (n) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;
>
> (o) for any purpose where, in the opinion of the head:
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or
>
> (ii) disclosure would clearly benefit the individual to whom the information relates;
>
> (p) where the information is publicly available;
>
> (q) to the office of the Provincial Auditor, or to any other prescribed person or body, for audit purposes;
>
> (r) to the Ombudsman;
>
> (s) to the commissioner;
>
> (t) for any purpose in accordance with any Act or regulation that authorizes disclosure; or
>
> (u) as prescribed in the regulations.
>
> (3) A government institution that is a telephone utility may disclose names, addresses and telephone numbers in accordance with customary practices.
>
> (4) Subject to any other Act or regulation, the Provincial Archivist may release personal information that is in the possession or under the control of The Saskatchewan Archives Board where, in the opinion of the Provincial Archivist, the release would not constitute an unreasonable invasion of privacy.[16]

[44] If WCB did confirm the existence of the Complainant's claim file, or disclosed any of the Complainant's other personal information to Trucking Company #1, WCB would have to provide justification for doing so as outlined in section 29 of FOIP.

[45] WCB stated in its letter of April 19, 2012:

> However, in these circumstances it was the information given by [the Complainant] to [Trucking Company #1] that precipitated the call. The Case Manager's option could have been to not speak to the caller and merely record the information

[16] *Supra* note 1 at section 29.

> provided. This seems to me to be impractical. The Case Manager in this circumstance was aware of the need to not disclose personal information to a third party, without authority, as she clearly stated she could not speak with the caller about [the Complainant's] claim. For all practical intents and purposes she did the right thing.

[46] It is unclear how WCB arrived at the conclusion that Trucking Company #1 knew about this claim prior to the call. Trucking Company #1 may have been fishing for information. The Complainant stated "I believe she gave out information that she had no right to when she told [Trucking Company #1] I had a claim with WCB."[17]

[47] Regardless, FOIP does not contemplate what third parties know or may know at the time that a government institution discloses information. It does not matter if Trucking Company #1 knew that the Complainant had a claim with WCB. The action of the unauthorized disclosure of personal information by WCB is key in terms of the legislation.

[48] Again, in its letter of June 27, 2012, WCB stated:

> After due consideration (which is why information is kept), it is clear that the worker did in fact speak to his employer [I assume WCB is referencing Trucking Company #1] about his claim. It is also clear on the totality of the evidence that the worker spoke about "vibration disease" with his current employer [again, I assume WCB is referencing Trucking Company #1]… Both the current and the previous employer had a legitimate interest in this information. These are all relevant facts to the merit and justice of the worker's claim, and the factual issues are not in dispute by the worker.

[49] The WCB has provided nothing to support the claim that the above noted statements "are not in dispute by the" Complainant. Nevertheless, WCB did not verify at the time of the disclosure and collection if this was the case. It may have been that Trucking Company #1 had an interest in the Complainant's information; however, it still remains that WCB did not appear to make the necessary determination with respect to employer status and its authority to disclose at the material time.

[17] From original complaint letter received from the Complainant on March 4, 2008.

[50] As WCB has not provided any specific authority for disclosure under FOIP, I conclude that WCB breached the Complainant's privacy by making an unauthorized disclosure of his personal information to the third party, Trucking Company #1.

[51] In my office's analysis of May 10, 2012, we made the following recommendations with regard to the disclosure of personal information:

> WCB should provide an apology to the Complainant for confirming to [Trucking Company #1] that the Complainant had a claim file with WCB. It should also provide an apology for collecting personal information without authority at the time of collection.
>
> WCB should instruct its employees to use the phrase "I can neither confirm nor deny that this individual has a claim file with WCB" if a third party calls to inquire or offer information about an individual.

[52] WCB did not accept the first recommendation, however it stated in its letter of June 27, 2012 that:

> We must state that in the many years since this alleged breach, the WCB has continued to be more vigilant on the phrasing and tone used in responding to employer inquiries regarding claims. We welcome your suggestion regarding the phrasing that would be appropriate to ensure that a third party is not made aware of whether or not a worker has a claim for compensation, and we will be making this recommendation for training purposes.

[53] I applaud this action; however it is the only recommendation WCB has agreed to follow.

3. Has the Saskatchewan Workers' Compensation Board inappropriately collected personal information of the Complainant?

[54] This issue was raised by my office later in this investigation.

a) What personal information was allegedly collected?

[55] The Complainant's original letter to my office stated:

> What I find so disturbing about this is that WCB accepted [Trucking Company #1]'s false pretense without any verification and talked with this person. [WCB Case Manager] then diarized the conversation with [Trucking Company #1] and filed it into the claim file I have been appealing with WCB against [Trucking Company #2]. What is really disturbing is that [Trucking Company #1] gave unsolicited statements that are FALSE and unsubstantiated and now I have to do a lot of extra documentation to prove that [Trucking Company #1] gave these false statements to WCB.[18]

[56] It appears that WCB collected the following statement from Trucking Company #1 during the telephone call on February 11, 2008:

> [NAME OF EMPLOYEE OF TRUCKING COMPANY #1] SAID – EMP – THAT ANY TIME HE TOOK OFF WAS ALWAYS TO DO WITH FARMING AND NO OTHER REASON KNOWN TO THEM[19]

[57] Sections 24(1)(b) and 24(1)(j) of FOIP state:

> **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:
>
> …
>
> (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
>
> …
>
> (j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness[20]

[58] I have considered "employment history" in my Report LA-2009-002/H-2009-001 as follows:

> [170] I must next determine if records related to performance investigations constitute employment history for purposes of 23(1)(b) of LA FOIP.
>
> [171] Ontario Reconsideration Order R-980015 addresses what does and does not constitute an employee's personal information as follows:

[18] *Supra* note 17.
[19] From WCB submission received June 2, 2011 – Memorandum describing the February 11, 2008 phone call.
[20] *Supra* note 1 at sections 24(1)(b) and 24(1)(j).

> A wide range of employment or work-related information is captured by the definition of personal information, including records relating to such things as job competitions (Orders 11, 20, 43, 97, 99, 159, 170, P-222, P-230, P-282, M-7, M-99 and M-135), **information generated in the course of investigations of improper conduct or disciplinary proceedings**(Orders 165, 170, P-256, P-326, P-447, P-448, M-120, M-121 and M-122), and specific details of individual employment arrangements with an institution (Orders 61, 170, 183,P-244, P-380, P-432, M-18, M-23, M-26, M-35, M-102, M-129 and M-141).
>
> …
>
> It is apparent from various provisions of the Act that certain employment and other work-related information is indeed, intended to fall with the scope of personal information definition. **For example, paragraph (b) of the definition in section 2(1) specifically provides that an individual's employment and education history is considered to be personal information.** This is also reflected in the presumption against disclosure of such information set out at section 21(3)(d). **Similarly, certain evaluative information in a personnel context is considered to be the personal information of the individual to whom it relates and is protected from disclosure** by the presumption at section 21(3) of the Act.
>
> …
>
> The statutory notion of **employment history** appears to relate to what might be referred to as "**personnel matters**" and should not, in my view, be construed to include every action of an individual employee which might cumulatively be said to constitute that employee's "history".

[172] I also considered British Columbia's Commissioner in Order 01-15 in which employment history is described as follows:

> [41] Section 22(3)(d), in relevant part, protects information related to the "employment history" of a third party. **In my view, someone's "employment history" includes information about her or his work record and reasons for leaving a job** (see, for example, Order 00-53). **It also includes information about disciplinary action taken against an employee**(see, for example, Order No. 62-1995, [1995] B.C.I.P.C.D. No. 35; and Order 00-13, [2000] B.C.I.P.C.D. No. 16). I see nothing in the withheld portions of records 5 and 7 that could even remotely be construed as information "that relates to employment ... history" of any third party.
>
> [42] The only withheld item in record 5 which is connected to anyone's employment in any way is the first severed line, a comment on a Ministry **employee's efforts in dealing with the applicant. It does not relate to the employee's work history**. **It merely records action taken by that employee - information as to what was done and by whom**. Section 22(3)(d) does not apply to it. The withheld information in the middle of record 7 describes a

> Ministry employee's telephone call with the applicant and another employee's comment on a work-related decision by the first employee. This information does not relate to a third party's employment history. I find that it also does not fall under s. 22(3)(d).

[173] The Assistant Commissioner's comments in Ontario Order PO-1772 are also helpful as follows:

> The Ministry and the appellant both submit that the records contain the appellants personal information. I concur.
>
> …
>
> In support of its position, the Ministry relies on the findings of former Assistant Commissioner Irwin Glasberg in Order P-721, where he found that:
> Previous orders have held that **information about an employee does not constitute that individual's personal information where the information relates to the individual's employment responsibilities or position. Where, however, the information involves an evaluation of the employee's performance or an investigation of his or her conduct, these references are considered to be the individual's personal information**.
> **All of the records that remain at issue in this appeal were prepared by Correctional Officers during the course of discharging their professional responsibilities as employees of the Ministry. Previous orders have determined that references to a government employee contained in records created in the normal course of discharging employment responsibilities is not about the individual employee, and does not qualify as the employee's personal information** under section 2(1) of the Act (see Orders 139, 194, P-157, P-257, P-326, P-377, P-477, P-470, P-1538 and M-82 and Reconsideration Order R-980015). However, as the **Ministry points out in its representations, where the information is associated with the employee's performance or conduct, other orders have determined that this information is about the individual employee, and qualifies as the employee's personal information** (see Orders 165, 170, P-256, P-326, P-447, P-448, M-120, M-121 and M-122).[21]

[emphasis in original]

[59] The statement collected by WCB would constitute personal information as it is employment history pursuant to section 24(1)(b) of FOIP. Further, it appears to reveal that the Complainant has a farm, which is an asset. As such, the statement would also qualify as personal information under section 24(1)(j) of FOIP.

[21] SK OIPC Report LA-2009-002/H-2009-001 at [170] to [173], available at www.oipc.sk.ca/reviews.htm.

b) What are WCB's responsibilities regarding the collection of personal information under FOIP?

[60] Alberta's *FOIP Guidelines and Practices (2009)* defines collection as follows:

> *Collection* occurs when a public body gathers, acquires, receives or obtains personal information. It includes the gathering of information through forms, interviews, questionnaires, surveys, polling, and video surveillance. There is no restriction on how the information is collected. The means of collection may be writing, audio or videotaping, electronic data entry or other means.
> …
>
> **Unsolicited Information**
>
> If a public body does not have specific authority to collect unsolicited personal information and the information is not necessary for an operating program or activity of that public body, it is not an authorized collection (see *IPC Order 98-002*). **The public body should adopt a policy of either returning the unsolicited information or destroying it in accordance with a transitory records schedule.**[22]
>
> [emphasis added]

[61] Ontario's *Freedom of Information (FOI) and Privacy Manual* states:

> Authority to Collect
>
> s.38(2) FIPPA / s.28(2) MFIPPA
>
> This section sets out the conditions under which personal information may be collected. Personal information is collected when the institution actively acquires the information or invites an individual or others to send personal information to the institution. **An individual may submit personal information on his/her own initiative without the information being requested by the institution. Receipt of this information is not considered a collection unless the institution keeps or uses the information**.[23]
>
> [emphasis added]

[22] Access and Privacy, Service Alberta, *FOIP Guidelines and Practices (2009)* at pp. 236 and 239, available at http://www.servicealberta.ca/foip/resources/guidelines-and-practices.cfm.

[23] Information, Privacy and Archives Division, Ministry of Government Services, Ontario, *Freedom of Information (FOI) and Privacy Manual* at chapter 5, available at http://www.accessandprivacy.gov.on.ca/english/manual/index.html.

[62] In this case, WCB indirectly collected this information as it was collected from a source other than the subject individual.

[63] However, in its letter of June 27, 2012, WCB disputed the fact that it was an unsolicited collection of personal information. It stated:

> The information provided was not by "chance". It was provided intentionally by an employer, as required of them by the WCAct.

[64] Again, it does not appear that Trucking Company #1 was calling to report anything. The WCB's investigation report stated:

> The evidence indicates that it was [the Complainant] who contacted [Trucking Company #1] and requested that they sign a letter regarding the nature of his injury. **[Trucking Company #1] then called WCB to seek guidance**.[24]
>
> [emphasis added]

[65] Pursuant to section 25 of FOIP, WCB should not collect personal information unless it has the requisite authority to do so under section 26 as follows:

> **25** No government institution shall collect personal information unless the information is collected for a purpose that relates to an existing or proposed program or activity of the government institution.[25]
>
> **26**(1) A government institution shall, where reasonably practicable, collect personal information directly from the individual to whom it relates, except where:
>
> (a) the individual authorizes collection by other methods;
>
> (b) the information is information that may be disclosed to the government institution pursuant to subsection 29(2);
>
> (c) the information:
>
> (i) is collected in the course of, or pertains to, law enforcement activities, including the detection, investigation, prevention or prosecution of an offence and the enforcement of:

[24]From WCB submission received November 27, 2008.
[25]*Supra* note 1 at section 25.

(A) an Act or a regulation; or

(B) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or

(ii) pertains to:

(A) the history, release or supervision of persons in custody, on parole or on probation; or

(B) the security of correctional institutions;

(d) the information is collected for the purpose of commencing or conducting a proceeding or possible proceeding before a court or tribunal;

(e) the information is collected, and is necessary, for the purpose of:

(i) determining the eligibility of an individual to:

(A) participate in a program of; or

(B) receive a product or service from;

the Government of Saskatchewan or a government institution, in the course of processing an application made by or on behalf of the individual to whom the information relates; or

(ii) verifying the eligibility of an individual who is participating in a program of or receiving a product or service from the Government of Saskatchewan or a government institution;

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

(i) management;

(ii) audit; or

(iii) administration of personnel;

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

(g) the commissioner has, pursuant to clause 33(c), authorized collection of the information in a manner other than directly from the individual to whom it relates; or

(h) another manner of collection is authorized pursuant to another Act or a regulation.

> (2) A government institution that collects personal information that is required by subsection (1) to be collected directly from an individual shall inform the individual of the purpose for which the information is collected unless the information is exempted by the regulations from the application of this subsection.
>
> (3) 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.[26]

[66] With respect to WCB's authority to collect the personal information described above, in its letter of April 19, 2012, WCB stated:

> The WCB collects information under authority of sections 23, 24 and 27 of *The Workers' Compensation Act, 1979* (the "WCAct"). The information that is collected is for the purpose of administering the many duties and responsibilities under the WCAct.
>
> All information received by the WCB is placed on the claim record. The WCB then determines the weight that is to be placed on each piece of evidence, and the appropriate course of action to be taken . . . .
>
> It is obvious that the collection of the above information is for the purposes of determining entitlement under the WCAct, which should satisfy your concern regarding section 25 of *The Freedom of Information and Protection of Privacy Act* ("FOIP"). It is equally clear that the method of collection satisfies the requirement of section 26 of FOIP, I would refer you to paragraph 26(1)(e) of FOIP.
>
> I would also refer to recommendations made in OIPC Investigation Report F-2009-001 and the WCB's response to these recommendations. The Recommendations found at paragraphs 110 and 112 of that report were that WCB remove information from the claim file when it is received without the consent of the worker. The WCB's response to those recommendations was that no evidence on a worker's claim file will be destroyed or removed, but such information will be given the appropriate weight and a determination as to an appropriate course of action will be taken based upon the information provided. This remains the WCB's position.

[67] Section 26(1)(h) of FOIP allows a manner of collection described in another Act, such as the WCAct. Sections 23, 24 and 27 of the WCAct are as follows:

> **23** The board shall have the same powers as the Court of Queen's Bench for compelling the attendance of witnesses and examining them under oath, and compelling the production of books, papers, documents and things.

[26] *Supra* note 1 at section 26.

> **24** The board may cause depositions of witnesses residing within or outside the province to be taken before any person appointed by the board, in a manner similar to that prescribed in The Queen's Bench Rules for the taking of those depositions.
>
> …
>
> **27**(1) The board may act upon the report of any of its officers and any inquiry that the board considers necessary may be made by any member or officer of the board or any other person that the board may appoint to make the inquiry on behalf of the board and the board may act upon his report as to the result of the inquiry.
>
> (2) A person appointed pursuant to subsection (1) has, for the purposes of the inquiry, all the powers conferred upon the board under section 23.[27]

[68] WCB appears to be arguing that the WCB employee who took the phone call and collected the personal information of the Complainant would qualify as an officer pursuant to section 27(1) of the WCAct and that she would have the powers described in section 23 of the WCAct.

[69] *Black's Law Dictionary* (Ninth Edition) defines "compel" as follows: "1. To cause or bring about by force, threats or overwhelming pressure."[28]

[70] In the case at hand, the personal information collected by WCB was not sought or compelled but rather volunteered by chance to WCB. As such, WCB cannot rely on sections 23 and 27 of the WCAct to authorize the collection in these circumstances.

[71] Section 24 of the WCAct allows the "depositions of witnesses residing within or outside the province to be taken before any person appointed by the board, in a manner similar to that prescribed in The Queen's Bench Rules for the taking of those depositions." The collection of the personal information in question did not take place during a deposition.

[72] Some of *The Queen's Bench Rules* pertaining to depositions are as follows:

> **237**(1) The examination (unless otherwise ordered or agreed) shall be taken by an official court reporter or special court reporter, if available, otherwise by a person approved by the parties and duly sworn by the examiner and shall be taken down by

[27] *Supra* note 5 at sections 23, 24 and 27.
[28] *Black's Law Dictionary*, 9th Ed., USA: Thomson West, 2009, at p. 321.

> question and answer either in shorthand or dictated by such reporter or person into a recording device. The deposition so taken shall be transcribed or be caused to be transcribed by such reporter or approved person, unless the parties otherwise agree. Such transcription shall be certified by the said reporter or approved person as the case may be to be a correct transcription of the questions and answers so taken or dictated.
>
> …
>
> **289** The court may in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the court may direct. R. 289.
>
> …
>
> **292** The examination shall take place in the presence of the parties, their counsel, solicitors or agents, or such of them as may think fit to attend, and the witnesses shall be subject to cross-examination and re-examination. R. 292.
>
> …
>
> **294** The depositions shall be taken and certified to in a manner provided for in Rule 237. R. 294.
>
> …
>
> **298** When the examination of any witness before any examiner shall have been concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the local registrar and shall be filed by him. R. 298.
>
> …
>
> **300** Depositions taken under the provisions of Rule 289 and duly certified under the hand of the person authorized to take the examination, may, unless otherwise ordered by the court, be given in evidence at the hearing or trial of the cause or matter saving all just exceptions without proof of the signature of the person taking the examination. R. 300.[29]

[73] An unsolicited phone call to WCB would not qualify as a deposition pursuant to section 24 of the WCAct. As such, WCB cannot rely on this section for the collection of the personal information in question.

[29]Rules of Court Office Consolidation Province of Saskatchewan, *The Queen's Bench Rules*, sections, 237, 289, 292, 294, 298 and 300, available at http://www.qp.gov.sk.ca/documents/English/Rules/qbrules.pdf.

[74] WCB wrote in its letter of June 27, 2012 that:

> The WCB has clear authority under section 22 to obtain such information which bears directly on the question of whether the worker has suffered, or continues to experience losses, as a result of a workplace injury. It is information necessary to assess the merits and justice of the case, and that it is the WCB that is the arbitrator as to whether the information is relevant to a claim of workplace injury, and whether it is correct or false; not the worker.

[75] WCB had not previously raised section 22 of the WCAct. It states:

> **22**(1) The board shall have exclusive jurisdiction to examine, hear and determine all matters and questions arising under this Act and any other matter in respect of which a power, authority or discretion is conferred upon the board and, without limiting the generality of the foregoing, the board shall have exclusive jurisdiction to determine:
>
> (a) whether any condition or death in respect of which compensation is claimed was caused by an injury;
>
> (b) whether any injury has arisen out of or in the course of an employment;
>
> (c) the existence and degree of functional impairment to a worker by reason of an injury;
>
> (d) the permanence of a functional impairment resulting from an injury;
>
> (e) the degree of diminution of earning capacity caused by an injury;
>
> (f) the average earnings;
>
> (g) the existence of the relationship of any member of the family of a worker and the degree of dependency;
>
> (h) whether any industry or any part, branch or department of any industry is within the scope of this Act and the class to which it is assigned;
>
> (i) whether any worker is within the scope of this Act.
>
> (2) The decision and finding of the board under this Act upon all questions of fact and law are final and conclusive and no proceedings by or before the board shall be restrained by injunction, prohibition or other proceeding or removable by *certiorari* or otherwise in any court.

> (3) Notwithstanding subsection (2), the board may reconsider any matter that it has dealt with or may rescind, alter or amend any decision or order it has made.[30]

[76] Further, in its letter of June 27, 2012, WCB stated:

> The [workers' compensation] scheme is one that must be capable of resolving claims for injuries that did not occur as alleged, or are not the result of a workplace injury. Accordingly, workplace compensation schemes, as with most no-fault schemes, assign to the institution the power of finder-of-fact. **Sections 22 and 23 of the WCAct are for the purpose of collecting a non-exhaustive range of information relating to workplace injuries**. If necessary, and almost never used, the WCB has a power to compel the production of evidence. As an adjudicative and quasi-judicial body, the WCB under section 25 shall make a determination based on all the evidence, that is, "upon the real merits and justice of the case."
>
> [emphasis added]

[77] WCB has not explained how sections 22 and 23 provide a "non-exhaustive" power to collect personal information, nor is it obvious such as the presence of language in the WCAct that would so indicate.

[78] Further, the WCB has drawn attention to the fact that it may compel the production of evidence. As indicated above, WCB has not compelled the personal information in this case as it received it passively as indicated by the definition of compel from *Black's Law Dictionary*. WCB has indicated it does not accept this interpretation as it stated the following in its letter of June 27, 2012:

> The dictionary analysis of statutory interpretation is not adequate to understand the purpose and intent of the WCAct, and consequently the legislative purpose and extent for the collection of information.

[79] What cannot be overlooked is that WCB is still bound by FOIP. I note sections 22, 23, 24 and 27 are not paramount to Part IV of FOIP.

[30] *Supra* note 5 at section 22.

[80] WCB also cited section 26(1)(e) of FOIP as authority for collection. I considered this section briefly in my Investigation Report H-2004-001; however, it is not of assistance in this case.

[81] Section 34(1)(k) of Alberta's FOIP Act is very similar as follows:

> **34**(1) A public body must collect personal information directly from the individual the information is about unless
>
> …
>
> (k) the information is necessary
>
> (i) to determine the eligibility of an individual to participate in a program of or receive a benefit, product or service from the Government of Alberta or a public body and is collected in the course of processing an application made by or on behalf of the individual the information is about, or
>
> (ii) to verify the eligibility of an individual who is participating in a program of or receiving a benefit, product or service from the Government of Alberta or a public body and is collected for that purpose[31]

[82] Alberta's *FOIP Guidelines and Practices (2009)* makes some interesting comments on these sections. Regarding section 34(1)(k)(i) it states:

> ***Information is necessary to determine eligibility to participate in a program or receive a benefit, product or service***
>
> Many programs operated by public bodies have eligibility criteria that must be met in order for an individual to participate in them or receive a benefit or service. **This may require the public body to approach several different sources of information besides the individual to determine whether the criteria or qualifications are met.** Examples include verification of income for the Alberta Seniors Benefit, low-income housing or other income-tested programs; verification of assets for programs requiring asset testing; and verification of educational prerequisites for a post-secondary program.
>
> **This collection of information can take place only in the course of processing an application from the individual, or from his or her representative.** It is a good business practice to inform the individual about whom information is being collected that information from a variety of sources will be collected to document a particular application. Public bodies should not take the further step of asking an individual to

[31] Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, section 34(1)(k).

> authorize indirect collection unless they are prepared to modify their procedures for determining eligibility if an individual refuses to authorize the indirect collection. Authorization from the individual is not necessary if the requirements of **section 34(1)(g)** are fulfilled.[32]
>
> [emphasis added]

[83] Regarding section 34(1)(k)(ii), it states:

> ***Information is necessary to verify eligibility to participate in a program or receive a benefit, product or service***
>
> **This provision is intended to allow for cases where an individual has already qualified for a program, benefit, product, or service and the public body needs to check that the individual is still eligible**. **In this case, personal information may be collected from a variety of sources other than the individual the information is about, and the individual does not need to be informed that verification is taking place.**
>
> For example, a public body may perform random checks on the income and assets of individuals on social assistance or in low-income housing to verify that an individual remains eligible for the program. Such a check may involve an interview with the individual but may also involve collection of personal information about an individual from other sources. Another example would be verification of a student's continued enrolment in a program so that the student may continue to receive student financial assistance or a grant.
>
> As with the previous provision, it is a good business practice to inform the individual about whom the information may be collected that verification of continuing eligibility may occur without notice. This is especially the case if the individual could incur any penalty for receiving a benefit for which he or she has become ineligible.[33]
>
> [emphasis added]

[84] It appears that the Complainant was in the midst of an appeal process when he learned about this statement collected by WCB. However, it is not clear when in the appeal process the telephone conversation took place. In addition, my office has not been provided details of the nature of the appeal. Therefore, it is unclear whether section 26(1)(e)(i) or 26(1)(e)(ii) of FOIP would apply. This was not addressed in WCB's submission of June 27, 2012.

[32] *Supra* note 22 at p. 245.
[33] *Supra* note 22 at pp. 245-246.

[85] However, this section requires that a government institution have legal authority to collect personal information. When a government institution makes an active collection of personal information, I would expect that it know what authority under FOIP on which it would rely. In this case, however, the personal information was collected from a third party by WCB. I have stated in Report H-2008-002 that if a trustee came in to the possession of personal health information sent by a third party in which it did not plan on using, I would expect that it return the information to the sender.[34] Another alternative would be destroying the personal health information. I would expect the same of government institutions collecting personal information in the same way.

[86] WCB however, did not destroy the Complainant's personal information. Therefore, it must justify the collection. Justification of the collection was not documented at the time of collection demonstrating that WCB had not considered whether it had authority to do so at that point.

[87] The need for an active collection when personal information is not collected directly from the subject individual is evident in the section itself as it states that a government institution may collect personal information about an individual indirectly if "the information is collected, and is necessary, for the purpose of verifying the eligibility of an individual who is participating in a program of or receiving a product or service from the Government of Saskatchewan or a government institution."[35] There is no evidence that at the time of collection the information was needed for this purpose. This is reinforced by the passage from the Alberta *FOIP Guidelines and Practices 2009*. All of the examples given demonstrate action initiated by the government institution.

[88] Further, WCB's *Policy 9.6* states: "7. Board Services staff may require the collection of additional information at any time during the process."[36]

[89] This also demonstrates that collection must be initiated by WCB in the case of an appeal.

[34]SK OIPC Report H-2008-002 at [52], available at www.oipc.sk.ca/reviews.htm.
[35]*Supra* note 1 at section 26(1)(e)(ii).
[36]*Supra* note 3 at *9.6, Appeals – Board Appeal Tribunal (POL 30/2010)* at p. 21.

[90] Further, I have briefly addressed the subject of indiscriminate and inaccurate collection of personal information in Investigation Report F-2009-001.[37] In it, I commented on the "data minimization" principle which means that an organization should always collect, use and disclose the least amount of personal information necessary for the purpose. Again there is no evidence presented by WCB to show that this statement was required at the time of collection.

[91] Again in its letter of June 27, 2012, WCB raised the argument that all employers share responsibility for all claims. It stated:

> [OIPC analysis] also misunderstands the fundamental relationship between all employers and all workers under the legislative scheme. All employers share liability and responsibility, and all are equally immune under the WCAct for individual workplace injuries.

[92] It is unclear how this argument relates to the collection of personal information in this particular case; however, FOIP nor the WCAct support that all employers have free reign over the personal information of all workers.

[93] Further, the WCB appears to misinterpret these arguments. In its letter of June 27, 2012, it stated:

> Your analysis that the information is not relevant to the purposes of the WCB is incorrect for the reasons already provided. The determination of relevance is left exclusively, by the legislature, to the WCB and not the OIPC. The analysis that only information provided by the worker can be considered creates an absurdity…

[94] Our analysis concluded that the WCB has not demonstrated it had authority to collect the personal information of the Complainant in the manner that it did under FOIP. It does not conclude that the personal information was not relevant or that it must solely be collected from the worker.

[95] Finally, WCB must ensure that all personal information that is collected is accurate and complete as noted below.

[37] SK OIPC Investigation Report F-2009-001at [89] to [102], available at www.oipc.sk.ca/reviews.htm.

> **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.[38]

[96] As noted earlier, the Complainant alleges that the information is inaccurate.

[97] WCB's letter of April 19, 2012 stated:

> Finally, as was mentioned above the section 27 "accuracy" requirements in FOIP were met when [the Complainant] advised the WCB on February 28, 2008, that the statement from [Trucking Company #1] was, in his view, incorrect, and this information as was noted above was placed on the claim file.

[98] Also, the Complainant challenged the information collected by [Trucking Company #1] to the WCB. WCB noted the Complainant's challenge in his claim file thereby meeting its obligation under section 32 of FOIP which states:

> **32(1) An individual who is given access to a record that contains personal information with respect to himself or herself is entitled:**
>
> (a) to request correction of the personal information contained in the record if the person believes that there is an error or omission in it; or
>
> **(b) to require that a notation be made that a correction was requested but not made.**
>
> **(2) Within 30 days after a request pursuant to clause (1)(a) is received, the head shall advise the individual in writing that**:
>
> (a) the correction has been made; or
>
> **(b) a notation pursuant to clause (1)(b) has been made.**
>
> (3) Section 12 applies, with any necessary modification, to the extension of the period set out in subsection (2).[39]
>
> [emphasis added]

[38] *Supra* note 1 at section 27.
[39] *Supra* note 1 at section 32.

[99] However, section 32 of FOIP would not have been engaged if the Complainant had not seen a copy of the information. It is not clear if the Complainant requested a copy of his file or if WCB provided it for another purpose. Regardless, at the point of collection, there does not seem to have been a process to ensure that the information collected was accurate pursuant to section 27 of FOIP. Review of *WCB Procedure 10.2 Information from Inquiries (PRO 05/2008)* sent to us by WCB with its April 19, 2012 letter confirms that there are no steps directing WCB employees to verify the accuracy of information collected.

[100] On the subject of accuracy, WCB simply stated in its letter of June 27, 2012 that:

> The worker has full right to advise the WCB of contrary evidence, and to appeal any decision, which will be considered without bias, as is the evidence provided by an employer.

[101] WCB has apparently not recognized its duty to ensure the accuracy of personal information.

IV FINDINGS

[102] Saskatchewan Workers' Compensation Board disclosed personal information of the Complainant to Trucking Company #1 when it confirmed the Complainant had a claim with Saskatchewan Workers' Compensation Board in contravention of *The Freedom of Information and Protection of Privacy Act*.

[103] Saskatchewan Workers' Compensation Board has not demonstrated that it had legal authority to collect personal information of the Complainant from Trucking Company #1 at the time of collection as required by section 26(1)(e) of *The Freedom of Information and Protection of Privacy Act*.

[104] Saskatchewan Workers' Compensation Board does not have a procedure to verify the accuracy of personal information in which it collects.

VI RECOMMENDATIONS

[105] Saskatchewan Workers' Compensation Board should provide an apology to the Complainant for confirming to Trucking Company #1 that the Complainant had a claim file with Saskatchewan Workers' Compensation Board. It should also provide an apology for collecting personal information without authority at the time of collection.

[106] Saskatchewan Workers' Compensation Board should instruct its employees to use the phrase "I can neither confirm nor deny that this individual has a claim file with WCB" if a third party calls to inquire or offer information about an individual.

[107] Saskatchewan Workers' Compensation Board should ensure that its employees are instructed on the rules governing the collection of personal information and the appropriate treatment of unsolicited personal information from third parties.

[108] Saskatchewan Workers' Compensation Board should add steps to its *Procedure 10.2* Information from Inquiries (PRO 05/2008) that require employees to verify the accuracy of personal information it collects.

Dated at Regina, in the Province of Saskatchewan, this 29th day of August, 2012.

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