

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT F-2012-003

Saskatchewan Workers' Compensation Board

Summary:

The Commissioner received a complaint that the Saskatchewan Workers' Compensation Board (WCB) disclosed the personal information of four employees to third parties without consent. The Commissioner found that in this case sections 171 to 171.2 of *The Workers' Compensation Act, 1979* were not paramount to the privacy protections in Part IV of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner also found that the information constituted personal information under section 24(1) of FOIP. He determined that the complaint dealing with the disclosure of four employees' personal information to a third party without the four employees' consent and without other legal authority to do so was well-founded. The Commissioner offered a number of recommendations to WCB in respect to the findings.

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)(k)(i), 24(2)(a) and 29; *The Freedom of Information and Protection of Privacy Act Regulations*, c. F-22.01 Reg. 1, s. 18; *The Workers' Compensation Act, 1979*, (S.S. 1979, c. W-17.1) ss. 23, 27, 171(1), 171.1(1).

Authorities Cited:

Saskatchewan OIPC Report F-2012-002 and Investigation Reports F-2007-001, F-2009-001.

**Other Sources
Cited:**

Saskatchewan OIPC: *Helpful Tips: Privacy Breach Guidelines*.

I BACKGROUND

- [1] On or about November 27, 2007 an individual with an open claim file involving the Saskatchewan Workers' Compensation Board (WCB) received a document from WCB which had formed part of the individual's WCB claim file. The individual had requested copies of documents from his WCB file and one of the documents he received was an audit report involving his former employer.
- [2] When the individual received the audit report it revealed the employment and financial information of four other employees of the individual's former employer. As well, the audit report included income information and tender rates for all contracts performed by the former employer.
- [3] On January 18, 2008 the individual provided the WCB with a written complaint outlining his concerns.
- [4] On January 31, 2008 the WCB responded to the individual asserting the following:

It is essential that information obtained by the WCB for decisions on a claim must be documented and must be provided to a worker in the manner specified in Section 171.1(1) of *The Workers Compensation Act, 1979*. This was done in your case, although we regret the delay in doing so.

Section 171(1) states:

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

As a result of our review of your request, it has been determined [WCB employee] was authorized to provide you the document in question "in the performance of his duties under the authority of the board" and that no action beyond the investigation is necessary at this time. The Members of the Board consider this matter to be concluded.

- [5] On February 5, 2008 the individual requested our office investigate the matter.

II ISSUES

1. **What is the applicable law in this case?**
2. **Does the information in question constitute “personal information” under section 24(1) of *The Freedom of Information and Protection of Privacy Act*?**
3. **Did the Saskatchewan Workers’ Compensation Board disclose personal information to a third party without consent or other authority?**

III DISCUSSION OF THE ISSUES

1. **What is the applicable law in this case?**

[6] As is apparent from the background section of this Report, WCB takes the position that the applicable law is *The Workers’ Compensation Act, 1979* (the WCAAct)¹ and not *The Freedom of Information and Protection of Privacy Act* (FOIP).²

[7] On June 24, 2008 we advised WCB of the nature of the complaint under FOIP and that my office would be commencing an investigation into the matter. We also advised WCB that although the letter dated January 31, 2008 to the individual addressed section 171.1(1) of the WCAAct that we required WCB to also address the sections of FOIP that apply to WCB.

[8] On August 7, 2008 WCB responded by way of letter stating:

In response to your correspondence of June 24, 2008, wherein you requested clarification of the Workers’ Compensation Board’s (“WCB”) authority for releasing the “audit” report to [the individual], I can firstly advise that the WCB’s authority for collecting such information is derived from sections 27 and 171 of *The Workers’ Compensation Act, 1979* (“WCAAct”). Once such information has been collected

¹*The Workers’ Compensation Act, 1979*, S.S. 1979, c. W-171.1.

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

section 171.1 of the WCA Act obliges the WCB to disclose claim record information to a worker.

It is under authority of sections 171 and 171.1 of the WCA Act that the WCB discloses information to workers. Such disclosure is not made under authority of *The Freedom of Information and Protection of Privacy Act*.

[9] My office responded to WCB by way of letter dated May 7, 2009. We stated the following:

As to the substance of your August 7, 2008 letter, you indicate that your authority for the disclosures in question (namely disclosure of 1997 audit sheets) falls under sections 27 and 171 of *The Workers' Compensation Act, 1979* (WCA). As we understand it, these records were initially not included in the Applicant's claim file, but were later found to be relevant to his file. You further state that such disclosure is not made under *The Freedom of Information and Protection of Privacy Act* (FOIP).

The relevant sections of the WCA are as follows:

Inquiry by board

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.

Evidence

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.

Worker's access to information

171.1(1) Where:

(a) a worker or any person whom he has authorized in writing to be his representative; or

(b) in the case of a deceased worker, any of his dependants;

has requested reconsideration of or applied for a review of a decision made pursuant to this Act, the board shall, at the written request of the worker, his representative or his dependant, as the case may be, allow the worker, his representative or his dependant, as the case may be, access to information

respecting that worker for the purposes of this Act, but the person receiving the information shall use that information only for the purposes of that reconsideration or review.

(2) Where the board is of the opinion that any medical report which the worker or his representative has requested contains information of a sensitive nature which, if provided directly to the worker or his representative, would cause injury to the worker or any other person, the board shall provide the information to the worker's treating physician instead of providing it to the worker or his representative.

(3) Where a physician receives information pursuant to subsection (2), he shall explain to the worker or his representative, as the case may be, the contents of the medical report to assist the worker or his representative in his request for reconsideration of or application for a review of the decision of the board.

While section 23 may authorize WCB to *collect* a wide array of personal information in the course of an investigation, we find nothing in the above that authorizes the *disclosure* to [the individual] of personal information pertaining to third parties. As such, we are not yet clear of what your statutory authority for disclosure might be.

We also note that while sections 171 to 171.2 of WCA are paramount to FOIP in cases where *access* is restricted to the extent that a conflict arises with FOIP, this paramouncy does not arise in cases of *privacy* concerns. As such, FOIP is applicable to this case. Please see paragraph 46 in SK OIPC Report H-2008-001 for further commentary on this point (available at www.oipc.sk.ca under "Reports"). Please provide alternative statutory authorization for your disclosure to [the individual] of the personal information of third parties involved in this case.

[10] WCB responded to our letter of May 7, 2009 stating:

Evidence gathered by the WCB and used in the adjudication of the claim must, under the principles of fundamental justice and procedural fairness, be disclosed to the worker. There would be a limited number of circumstances where such disclosure would not occur. This is why section 171.1 of the WCA exists.

The issue of the information accessed by the worker is directly related to the information used in the decision making process. This means that the issue is not one of privacy but rather of relevancy: Was the information used in the decision process and was it relevant to the decision?

[11] Despite this paramouncy argument, WCB did not provide any evidence supporting how the employment, income and other financial information of four other employees was "relevant in the decision process" involving the individual's own WCB claim.

[12] As is apparent from the background section of this Report, WCB takes the position that the applicable law is the WCAct and not FOIP.

[13] This issue of the applicable law has been explored in considerable detail in three earlier OIPC Reports³ and further WCB has not presented any new arguments for my consideration. Therefore, I incorporate by reference my commentary in those earlier Reports and expressly adopt the same for purposes of this Report.

[14] Therefore, FOIP is the applicable law engaged on the facts in this case.

2. Does the information in question constitute “personal information” under section 24 of *The Freedom of Information and Protection of Privacy Act*?

[15] Our customary analysis when dealing with a complaint under Part IV of FOIP is to first determine whether there is “personal information” involved and then to consider which of the three primary privacy activities is engaged, i.e. collection, use or disclosure.

[16] The definition of personal information is in section 24(1) of FOIP and provides 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.

³Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Investigation Reports F-2007-001 at [16] to [176] and F-2009-001 at [19] to [53] and Review Report F-2012-002 at [17] to [24], available at www.oipc.sk.ca/reviews.htm.

(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).⁴

[emphasis in original]

[17] The audit report is a two page, 11 x 17 size spreadsheet. It is titled “Calculation Sheet”. Four employees are listed by full name. Under the “Payroll” heading, the following details are given for each employee for each of two pay periods in November/December 1997 (for one employee four pay periods are listed):

- Total number of hours;
- Rate of pay per hour;
- Total pay amount;
- Total vacation pay; and
- Total gross and net pay.

[18] This type of information could constitute personal information pursuant to sections 24(1)(b) and 24(1)(k)(i) of FOIP because it appears to be “information relating to a financial transaction in which the individual has been involved” and “the name of the individual where it appears with other personal information that relates to the individual”. It would not be exempt from the definition of personal information pursuant to section

⁴*Supra* note 2 at section 24.

24(2)(a) of FOIP as the employer is not a government institution as defined in section 2(1)(d) of FOIP.⁵

[19] As there is personal information involved Part IV of FOIP is relevant and engaged in this matter.

3. Did the Saskatchewan Workers' Compensation Board disclose personal information to a third party without consent or other authority?

[20] Now that we have established that the information in question constitutes personal information under FOIP, the practices of WCB are subject to the privacy provisions of FOIP set out in Part IV. Specifically, WCB is required to comply with the privacy protection provisions that govern the collection, use, and disclosure of personal information.

[21] On the facts in this case, “collection” and “use” of the personal information do not appear to be at issue. What appears to be at issue is the “disclosure” of the personal information.

[22] I defined the term “disclosure” in my Investigation Report F-2007-001 as follows:

[179] Disclosure is not defined by FOIP. We have however defined disclosure as follows:

*Disclosure is 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.*⁶

⁵Section 2(1)(d) states: “**government institution**” means, subject to subsection (2): (i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or (ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part: (A) by the Lieutenant Governor in Council; (B) by a member of the Executive Council; or (C) in the case of: (I) a board, commission or other body, by a Crown corporation; or (II) a Crown corporation, by another Crown corporation;

⁶SK OIPC Investigation Report F-2007-001 at [179], available at www.oipc.sk.ca/reviews.htm.

[23] Disclosure occurred in this case on or about November 27, 2007 when WCB provided a copy of the audit report containing the personal information of the four employees to the individual who made the complaint to our office.

[24] For WCB to disclose the personal information of the four employees to any third party it must comply with section 29 of FOIP. WCB could legitimately disclose the personal information of the four employees to a third party if it had the consent of the four employees or if such disclosure was permitted without consent under section 29(2), (3) or (4) of FOIP.

[25] Section 29 of FOIP states that:

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.⁷

[26] Where consent is required under section 29(1) of FOIP it must conform to section 18 of *The Freedom of Information and Protection of Privacy Regulations* which requires that the consent must be in writing unless that is not reasonably practicable:

18 Where the Act requires the consent of an individual to be given, **the consent is to be in writing** unless, in the opinion of the head, **it is not reasonably practicable to obtain the written consent** of the individual.⁸

[emphasis added]

⁷Supra note 2 at section 29.

⁸*The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg 1, section 18.

- [27] No argument has been raised by WCB that written consent would not be reasonably practicable in this case.
- [28] It appears that WCB did not have consent from the four employees to disclose their personal information. Therefore, I must consider whether WCB had authority to disclose without consent under 29(2), (3) or (4) of FOIP.
- [29] Subsections 29(3) and (4) clearly do not apply in this case. Therefore, WCB would have to have demonstrated its authority under one of the provisions of subsection 29(2).
- [30] WCB did not put forth any arguments supporting its disclosure of the personal information under subsection 29(2) of FOIP.
- [31] Therefore, I find that WCB did not have authority to disclose the personal information of the four employees to third parties without the consent of those four individuals.

IV FINDINGS

- [32] I find that *The Freedom of Information and Protection of Privacy Act* is the applicable law in this case.
- [33] I find that Part IV of *The Freedom of Information and Protection of Privacy Act* sets out the rules for the disclosure of personal information by the Saskatchewan Workers' Compensation Board.
- [34] I find that the complaint that the Saskatchewan Workers' Compensation Board disclosed the personal information of the four employees to a third party without the consent of the four employees or without other statutory authority is well-founded.

V RECOMMENDATIONS

- [35] I recommend that the Saskatchewan Workers' Compensation Board follows our *Helpful Tips: Privacy Breach Guidelines*⁹ in respect to the personal information of the four employees of the private business which was disclosed to third parties without the four employees' consent.
- [36] I recommend that the Saskatchewan Workers' Compensation Board provide adequate training to its employees to ensure a better understanding of the privacy obligations required by Part IV of *The Freedom of Information and Protection of Privacy Act*.
- [37] I recommend that the Minister responsible for the Saskatchewan Workers' Compensation Board take steps to resolve the issue of the applicability of *The Freedom of Information and Protection of Privacy Act* to the Saskatchewan Workers' Compensation Board records.

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

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

⁹SK OIPC, *Helpful Tips: Privacy Breach Guidelines*, available at www.oipc.sk.ca/resources.htm.