SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

INVESTIGATION REPORT F-2014-001

Saskatchewan Workers' Compensation Board

Summary: The Office of the Information and Privacy Commissioner received a formal complaint alleging that Saskatchewan Workers' Compensation Board (WCB) disclosed too much of the Complainant's personal information in its "Decision of the Appeals Department" letter to her employer. The letter contained personal information regarding medical symptoms and diagnoses unrelated to her WCB claim such as pneumonia and alcohol dependence syndrome. The Commissioner found that *The Freedom of Information and Protection of Privacy Act* (FOIP) and not *The Health Information Protection Act* applied in this case. He found that WCB did not rely on any section of FOIP when making the disclosure which also violated the 'data minimization' and 'need-to-know' principles. He also found that WCB did not follow its own procedures in this case. WCB refused to acknowledge the unauthorized disclosure and refused to take steps to prevent further similar disclosures.

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), 24(1)(k)(i), 24(1.1), 29, 29(1), 29(2), 29(2)(i)(i); *The Health Information Protection Act*, S.S. 1999, c.H-0.021, ss. 2(m), 2(t), 4(4)(h), 4(5), 4(6), 27, 28; *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, ss. 49, 104, 171.

Authorities Cited: Saskatchewan OIPC Review Reports F-2013-002, F-2013-001, F-2012-002; Investigation Reports F-2012-005, F-2012-004, F-2012-002, F-2010-001, F-2009-001, F-2007-001.

Other Sources Cited: Saskatchewan Workers' Compensation Board: *Procedure Manual*: *Access to Information – 10.3 Authority for Disclosure (PRO 04/2008)*.

I BACKGROUND

[1] On or about May 11, 2012, the Complainant wrote to Saskatchewan Workers' Compensation Board (WCB) to complain about an alleged breach of privacy. She claimed that on or about November 23, 2011, WCB sent her appeal decision to her former employer. She also complained that there was too much personal health information in the appeal decision. Her letter stated:

> There should be no question that the Appeals Department decision in my case contains specific health information of a very sensitive nature. My question to you is why such information was readily released to the employer?

[2] WCB replied in a letter dated May 22, 2012. It included a copy of an internal privacy breach investigation report prepared by WCB to her.

[3] On June 15, 2012, my office received a letter from the Complainant indicating she was dissatisfied with WCB's response.

[4] On July 31, 2012, my office notified both WCB and the Complainant of our intention to undertake a privacy breach investigation pursuant to section 33 of *The Freedom of Information and Protection of Privacy Act* (FOIP).[1] We asked WCB to provide us with a copy of its internal privacy breach report. We also asked WCB to specifically explain how WCB followed the data minimization principle.

[5] My office received a submission from WCB on September 4, 2012 dated August 30, 2012. We provided our preliminary analysis of the matters at hand to the WCB on August 22, 2013 which included my recommendations. On October 22, 2013, my office received a response stating the following:

> At this point in time, the Workers' Compensation Board has no further comment or input regarding this matter and will not be undertaking the suggested course of action found [in the preliminary analysis].

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

[6] As WCB is unwilling to work to improve its practices, I decided to issue this Investigation Report.

II ISSUES

1. Which law applies in this matter?

2. What personal information was disclosed to the Complainant's employer?

3. Was Saskatchewan Workers' Compensation Board authorized to disclose the personal information in question in this case?

III DISCUSSION OF THE ISSUES

[7] In several past Reports, I have concluded that WCB is a "government institution"[2] pursuant to section 2(1)(d) of FOIP. I have also found it qualifies as a "trustee"[3] pursuant to section 2(t) of *The Health Information Protection Act* (HIPA).[4]

1. Which law applies in this matter?

[8] The information contained in the document "Decision of the Appeals Department", which is the document in question, appears to contain personal health information pursuant to section 2(m) of HIPA. Therefore, HIPA would normally be the statute engaged. However, sections 4(4)(h), 4(5) and 4(6) of HIPA are as follows:

> 4(4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:
>
> ...

[2]Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Reports F-2013-002 at [12], F-2012-002 at [19]; Investigation Reports F-2012-002 at [9], F-2009-001 at [22], all available at www.oipc.sk.ca/reviews.htm.
[3]SK OIPC Review Report F-2013-001 at [16]; Investigation Reports F-2012-004 at [24], F-2007-001 at [9], all available at www.oipc.sk.ca/reviews.htm.
[4]*The Health Information Protection Act*, S.S. 1999, c. H-0.021.

> (h) *The Workers' Compensation Act, 1979*;
>
> ...
>
> (5) Sections 8 and 11 apply to the enactments mentioned in subsection (4).
>
> (6) *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.

[9] Two central issues of this investigation are disclosure of personal health information and the data minimization principle. Sections 27 and 28 of HIPA deal with the disclosure of personal health information and the data minimization principle. They are found in Part IV of HIPA; therefore it does not apply.

[10] I must then rely on FOIP in this matter because HIPA does not apply. WCB has not objected to the application of FOIP in this investigation.

2. What personal information was disclosed to the Complainant's employer?

[11] A document entitled "Decision of the Appeals Department" and dated November 23, 2011 was sent to both the Applicant and her former employer. Among other personal information, the decision contains personal health information of the Complainant. The Complainant noted that the "decision in my case contains specific health information of a very sensitive nature."

[12] The definition of "personal information" is found in section 24(1) of FOIP:

> 24(1) Subject to subsections (1.1) and (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:
>
> (a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;

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

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

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

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

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

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

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

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

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

(k) the name of the individual where:

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

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

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

[emphasis added]

[13] The information contained in the "Decision of the Appeals Department" qualifies as the Complainant's personal information pursuant to section 24(1)(k)(i) as it contains her

name and information of a personal nature such as information about diagnoses, tests and treatment related to her health.

[14] Section 24(1.1) of FOIP does not apply because, as explained earlier, HIPA is not engaged in this matter. This is supported by comments I made in my Investigation Report F-2010-001 which states:

> [31] My view is that the purpose of section 24(1.1) of FOIP is to ensure that two different laws do not apply to the same information at the same time. The practical effect of section 24(1.1) is that if personal health information is in the custody or control of a trustee and therefore subject to HIPA, it cannot simultaneously be personal information subject to FOIP. The purpose of the Legislative Assembly in enacting section 24(1.1) was presumably to avoid duplication in legislative coverage, not to create a void where no privacy law applied to the information collected, used and disclosed by SGI in the course of its work under the AAIA. To deny the important rights of Saskatchewan residents prescribed by FOIP and HIPA would warrant clear and unambiguous language that evidenced that the Assembly had turned its mind to such a result. The obvious and appropriate place to do so would have been the paramountcy provision in section 23 of FOIP or the paramountcy provision in *The Freedom of Information and Protection of Privacy Regulations*, section 12.

[15] Therefore, the information about the Complainant's health qualifies as personal information pursuant to section 24(1)(k)(i) of FOIP in this matter.

3. Was Saskatchewan Workers' Compensation Board authorized to disclose the personal information in question in this case?

[16] Section 29 of FOIP provides as follows:

> 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.

[17] WCB did not have the Complainant's consent to share her personal information with her employer pursuant to section 29(1) of FOIP. Therefore, I must determine if this disclosure is permitted under section 29(2) of FOIP.

[18] WCB did not indicate that there was a specific section in FOIP that it relied on when disclosing the Complainant's personal information. In support of its actions, WCB wrote the following in its letter to my office dated August 30, 2012:

> The Appeal Decision was provided to the employer in accordance with WCB policy. I am enclosing for your reference the applicable policies. As you are aware, employers fund the workers compensation system and in doing so have a vested interest in decisions made concerning their workers. **Section 104 of *The Workers' Compensation Act, 1979*, (the "WCAct") specifically provides employers with a right to request review of compensation being paid.** It would be very difficult for employers to pursue this right if they were not made aware of the facts upon which a decision is being made and the reasons for that decision. In fact if such information were not provided employers could rightfully assert that the rules of fundamental justice had been breached.
>
> [emphasis added]

[19] It also provided the following in its Breach of Privacy Report dated May 22, 2012:

> The Workers' Compensation Board (the "WCB") has a duty under *The Workers' Compensation Act, 1979* (the "WCAct") to provide information to employers. This obligation arises as it is the employers who fund the compensation system and who require information in order to manage their employee's claims for compensation. This duty has been expressed by the Board in its Authority for Disclosure procedure (PRO 04/2008) at Points 1, 4 and 5:
>
> 1. Of necessity, information is disclosed in the course of:
>
> a. making inquiries concerning injuries, treatment and disability, or concerning employers' business activities; or
>
> **b. explaining decisions made by the WCB, including explanations required by Section 49 of *The Workers' Compensation Act, 1979* (the "Act").**
>
> 4. Normally, workers, employers and primary health care providers should receive a written explanation of the reasoning leading to a decision. Others affected only need to be informed of the extent or duration of WCB payment.

> 5. Normally, the employer at time of injury is entitled to know the reasons for a claim decision, and is therefore sent a copy of the written explanation. Where there are multiple claims with separate employers, the employers will receive separate explanations.

In addition to the above, the Board has provided specific guidance on the content of appeal decisions in the Appeals - Claims policy (POL 31/2010) and procedure (PRO 13/2010). Point 8 Of POL 31/2010 states:

> 8. Following each level of appeal, the decision will be communicated in writing to all interested parties. The written decision will comply with POL 06/2008 - Privacy of information, and will outline:
>
> a. The decision in dispute;
> b. The appeal decision now being made; and,
> c. The full reasons for the appeal decision, including the applicable authority as set out in the Act or WCB policy.

Point 11 of PRO 31/2010 states:

> 11. Following a thorough review, the Appeals Officer will provide a written appeal decision to the worker and employer. The appeal decision will provide detailed reasons, including the information used and the applicable authority as set out in the Act and/or WCB policy. The worker or employer who submitted the appeal will be invited to discuss the decision with the Appeals Officer to facilitate understanding.

WCB employees are prohibited under section 171 of the WCAct from disclosing information except in the performance of their duties or under authority of the board. Based upon the above I find that the disclosure of the Decision to [the Complainant]'s employer was done in accordance with section 171. The Decision was disclosed in the performance of the Appeals Officer's duties, and under the authority of the Board as expressed in the above noted policies and procedures.

[emphasis added]

[20] Section 49 of *The Workers' Compensation Act, 1979* (the WCAct)[5] states:

> 49 Where the board is unable to determine an issue in favour of the person claiming compensation, it shall **provide that person with written reasons** for its decision.
>
> [emphasis added]

[5] *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1.

[21] Section 171 of the WCAct states:

> 171(1) Subject to sections 171.1 and 171.2, no officer of the board and no person authorized to make an inspection or inquiry under this Act shall divulge or allow to be divulged, except in the performance of his duties or under the authority of the board, any information obtained by him or that has come to his knowledge in connection with that inspection or inquiry.
>
> (2) Every person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine of not more than $1,000.

[22] In my Investigation Report F-2007-001, I considered a similar incident involving WCB. The analysis of the unauthorized disclosure in that case is found in paragraphs [177] to [212].

[23] The circumstances in that Investigation Report are similar to the case at hand. In each case, WCB sent letters which included sensitive personal information related to the health of the complainants to both the complainants and their respective employers.

[24] Of particular note are the following comments from my Investigation Report F-2007-001:

> [193] WCB asserted in respect of Document 5) above as follows:
>
> > *As was discussed previously since the employer has a vested interest in the outcome of a claim, or an appeal of a claim it would not be improper to provide the information contained in the October 18, 2006 letter to the employer. It is this type of correspondence that the employer may rely on in deciding whether or not to take part in the appeal.*
>
> [194] That letter includes specific information about treatments and medical studies undergone, medical test results, matters in respect of which there was no medical evidence, diagnostic information and a denial of responsibility. In the event that the Complainant chose not to appeal, there would be no reason or basis for disclosing this to the Employer. That presumably would not have been known at the time this letter was posted. I find that to the extent some of this information could, under the WCA, be shared with the Employer, such a **determination is only appropriate if and when an appeal is initiated by the claimant or employer.**
>
> [195] WCB's Solicitor indicated that in his view the Employer should be entitled to see all information relevant to the following needs:
>
> • To determine the ability to return to work;

- Confirming acceptance of a claim and the rate of pay;
- Notice when a worker appeals; and
- Issues of cost relief.

[196] I have not found a clear description of *"cost relief"* in the material produced by WCB. I am advised by WCB's Solicitor that the WCB definition of *"cost relief"* is "*removing or transferring claim costs from an employer's account/experience rating."*

[197] On the basis of the material I have reviewed, my understanding is that generally claim costs from a compensable accident are normally charged against the accident Employer's account/experience account. There are, however, **exceptional circumstances** when WCB may relieve the Employer of all or part of the claim costs. The appropriate distribution of the relieved costs will be determined by the WCB. Some factors that may trigger cost relief include negligence on the part of another employer or previous injuries.

[198] **The WCB Solicitor confirmed that Saskatchewan employers have no standing to challenge, dispute or debate medical assessments and therefore wouldn't need particularly granular personal health information about any claimant.** A WCB brochure *"Information for Workers"* states that *"*[t]*he Act gives the WCB responsibility to determine if an injury arises out of or in the course of employment."*

[199] **I find that the correspondence in question, when copied to the Employer, had the effect of disclosing personal health information of the Complainant to which, in our understanding, the Employer was not entitled.**

[200] I acknowledge that it may well be that the Employer may be **interested** in all of the personal health information of the Complainant shared with it on this WCB claim file. The Employer is not however **entitled** to all of the personal health information and WCB exceeded its authority in making these disclosures.

[201] There is no specific policy to assist Case Managers in meeting the need-to-know and limiting rules on any given case file. There is no specific training on how to sever personal health information that an employer is not entitled to view.

[202] In my view the much better practice would have been for the Case Manager to not copy correspondence intended for the Complainant to the Employer but to prepare a much shorter note revealing only the information required by the Employer. WCB has offered no persuasive evidence that a separate letter could not be prepared other than noting some additional work would be required. I find that the convenience of the WCB Case Managers ought not to take precedence over the claimant's legitimate privacy interests.

[203] I recognize that Case Managers and members of the case management teams in WCB have expertise in evaluating claims and applying the provisions of the WCA. I am persuaded by the WCB's Solicitor that the nature of the work of these case managers makes it very difficult to prescribe with great precision when certain kinds of information can or cannot be collected, used or disclosed. Accepting the need for Case Managers to have scope to exercise their judgment and discretion in managing claim files, WCB could and should develop a set of reasonable criteria for Case Managers to consider in deciding what to release to employers. This might take the form of a set of key questions for WCB Case Managers to ask themselves in their investigation and case management work.

[204] Those reasonable criteria should reflect the limiting rule and the need-to-know rule described earlier in this report.

[205] I think it is important that WCB rather than our office develops these criteria so that they will reflect the requirements of appropriate case management and that they can ensure that they will not unduly impair the important statutorily mandated work of WCB.

[206] Although the complaint in question specifically related to disclosure of personal health information to a third party, i.e. the Employer, we have also considered whether WCB had taken appropriate steps to restrict access by other WCB staff who would not have had a legitimate need-to-know the personal information of the Complainant.

[207] A well established best practice in modern privacy regimes is to limit the use of any individual's personal information or personal health information by employees in a government institution to those employees who have a legitimate need-to-know. This is explicit in HIPA.

[208] I note that the following commentary appears in the Privacy Framework:

> 5. *To help ensure compliance with this* [Use and Disclosure] *principle, it is a good idea to take steps to limit the access of employees to personal information to only those who can be reasonably expected to require the information to perform their job duties.*

[209] Commentary in the *Alberta Freedom of Information and Protection of Privacy Guidelines and Practices Manual* includes the following:

> *A public body can use information only to the extent necessary to carry out its purpose in a reasonable manner.*
>
> *…*
>
> *For example, employees in a particular program area who have access to personal information in an electronic database should be provided with access to only those data elements they require to do their job, not to the whole database.*

> [210] This is referred to as the need-to-know rule.
>
> [emphasis added]

[25] In this case, the decision in question includes the diagnosis with respect to the claim as well as previous and then current diagnoses. It also discusses symptoms and treatment related to all of these diagnoses.

[26] It appears that the decision was based on the diagnosis of "major depressive disorder" and "anxiety disorder". However, the decision speaks of diagnoses and suspected diagnoses of H1N1 flu, lingular pneumonia, acute stress reaction, reactive depression, colds and alcoholic dependence syndrome. Further, the decision also outlines symptoms of the diagnoses such as being "teary eyed" when visiting the doctor.

[27] It is unclear why the employer has a need-to-know these unrelated medical conditions and symptoms. As noted in my Investigation Report F-2007-001, employers have no standing to dispute medical diagnoses, so it is also unclear why the employer would need access to this granular personal information.

[28] As noted earlier, section 29(2)(i)(i) of FOIP states:

> 29(2) Subject to any other Act or regulation, personal information in the possession or under the control of a government institution may be disclosed:
>
> ...
>
> (i) for the purpose of complying with:
>
> (i) an Act or a regulation;

[29] It appears that WCB is relying on this provision as it points to the WCAct for authorization for disclosure.

[30] Section 104 of the WCAct states:

> 104(1) Any weekly or other periodical payment to a worker or a dependent spouse of a worker payable out of the fund may be reviewed on the motion of the board or at

the request of the worker, dependent spouse or employer and, on that review, the board may terminate or diminish the payment or may increase the payment to a sum not beyond the maximum compensation prescribed in this Act.

(2) The board may, after due investigation, withhold or suspend the payment of compensation to a worker or other person receiving compensation for any period that the board considers advisable where the worker or other person is confined in:

(a) a correctional facility within the meaning of *The Correctional Services Act, 2012*;

(b) a penitentiary within the meaning of the *Corrections and Conditional Release Act* (Canada);

(c) a prison or reformatory within the meaning of the *Prisons and Reformatories Act* (Canada); or

(d) a place of open custody, a place of secure custody or a place of temporary detention as defined in *The Youth Justice Administration Act*.

(3) Where compensation to a worker or other person is withheld or suspended pursuant to subsection (2), the board may pay compensation to dependants of the worker or other person or to any other persons that the board considers advisable.

(4) The board may terminate or reduce payment to a worker of any compensation based on the worker's loss of earnings:

(a) where the worker's loss of earnings is not related to the effects of the injury; or

(b) without limiting the generality of clause (a), if:

(i) without good reason, the worker is not available or declines to accept a bona fide offer of employment in an occupation in which the worker, in the opinion of the board in consultation with the worker, is capable of engaging;

(ii) without good reason, the worker fails to co-operate in, or is not available for, a medical or vocational rehabilitation program that has as its objective returning the worker to suitable productive employment;

(iii) in consultation with the worker, the board has designed and provided to the worker, at the expense of the board, a vocational rehabilitation program, and the worker has been allowed a reasonable time to obtain employment after completing the program;

(iv) the worker voluntarily:

> (A) accepts employment in an occupation that has a lower rate of pay than an occupation in which the worker, in the opinion of the board in consultation with the worker, is capable of engaging; or
>
> (B) withdraws from the labour force for reasons other than the effects of the injury; or
>
> (v) the worker fails to comply with section 51.1.
>
> (5) Subsection (4) applies, with any necessary modification, to a dependent spouse after the expiration of entitlement to compensation pursuant to subsection 83(1) or (2).

[31] In its letter of August 30, 2012, WCB offered section 104 of the WCAct as justification for the disclosure of the personal information. It argued that an employer would need the information if they wish to provide "employers with a right to request review of compensation being paid". However, in this case, the Complainant lost her appeal and no compensation is being paid. Therefore, WCB cannot rely on this provision. It is also curious why an employer would request a review of a decision in its favour and there is no evidence that a request was made.

[32] It also pointed to section 49 of the WCAct. However, this section does not mention the employer. Therefore, WCB cannot rely on this section either.

[33] Further, even if WCB is authorized to disclose personal information to the employer, it did not follow the need-to-know or data minimization principles. I have provided the following definitions of these principles in my Investigation Report F-2012-005 as follows:

> [65] For both the personal information and personal health information involved in the injury claim and RTW planning it appears that there are issues related to the 'need-to-know' and 'data minimization' principles.
>
> [66] These two principles underlie section 28 of FOIP and sections 23 and 26 of HIPA. The need-to-know principle means that SGI should collect, use and disclose only on a need-to-know basis. As well, data minimization means that SGI should collect, use or disclose the least amount of identifying information necessary for the purpose.

[34] As I commented in my Investigation Report F-2007-001, WCB could have sent a separate letter to the employer notifying of the decision of the appeal department without the unnecessary personal information. In fact, some of the recommendations I made are as follows:

> [247] That WCB develop training tools and materials designed specifically for Case Managers and members of the case management teams that reflect other recommendations in this report.
>
> [248] That WCB ensure that Case Managers and the members of claim management teams are discouraged from routinely forwarding copies of correspondence intended for the claimant to the claimant's Employer.
>
> [249] **That WCB develop either a set of clear criteria for Case Managers to consider in deciding what to release to Employers or a set of key questions for those Case Managers to ask themselves in processing claims files.**
>
> [250] That WCB ensure all staff have a clear understanding of the need to restrict disclosure to the least amount of information necessary for the purpose and to share information with anyone other than the claimant on a strict need-to-know basis only.
>
> [emphasis added]

[35] WCB did follow these recommendations from my Investigation Report F-2007-001, at least in part, as evidenced by procedure *Access to Information – Authority for Disclosure* (PRO 04/2008), dated May 21, 2008, which states the following:

> 4. Normally, workers, employers and primary health care providers should receive a written explanation of the reasoning leading to a decision. Others affected only need to be informed of the extent or duration of WCB payment.
>
> **5. Normally, the employer at time of injury is entitled to know the reasons for a claim decision, and is therefore sent a copy of the written explanation. Where there are multiple claims with separate employers, the employers will receive separate explanations.**
>
> 6. Staff are only to include personal information in the written explanation to the worker **if it is evidence that is directly relevant to the issue and decision, and where it is absolutely necessary. In these cases, an employer at time of injury will receive a separate letter outlining the decision and reasoning.**[6]
>
> [emphasis added]

[6]Saskatchewan Workers' Compensation Board, *Procedure Manual*: *Access to Information – 10.3 Authority for Disclosure (PRO 04/2008)* at pp. 4 to 5.

[36] However, in this case, this procedure was not followed. WCB has not addressed why this procedure was not followed or how it plans to ensure it is going forward.

[37] I find WCB was not authorized to disclose the personal information of the Complainant found in the "Decisions of the Appeals Department" to the employer. Further, its own procedure was not followed. As such, there has been a breach of the Complainant's privacy in this case.

IV FINDINGS

[38] *The Freedom of Information and Protection of Privacy Act* applies in this matter.

[39] The information regarding the Complainant's health found within the "Decision of the Appeals Department" qualifies as personal information pursuant to section 24(1)(k)(i) of *The Freedom of Information and Protection of Privacy Act*.

[40] Saskatchewan Workers' Compensation Board did not have authorization pursuant to *The Freedom of Information and Protection of Privacy Act* to disclose the personal information in question to the Complainant's employer.

[41] Saskatchewan Workers' Compensation Board did not follow the data minimization or need-to-know principles.

V RECOMMENDATIONS

[42] I recommend that:

[43] Saskatchewan Workers' Compensation Board provide the Complainant with a formal apology for the improper disclosure of personal information to the former employer.

[44] Saskatchewan Workers' Compensation Board employ its best efforts to immediately require the Complainant's former employer to return any copies of the "Decision to the

Appeals Department" to Saskatchewan Workers' Compensation Board in order that Saskatchewan Workers' Compensation Board can properly destroy them.

[45] Saskatchewan Workers' Compensation Board investigate why its procedure *Access to Information – Authority for Disclosure* (PRO 04/2008) was not adhered to in this case and create a strategy to avoid future similar disclosures.

Dated at Regina, in the Province of Saskatchewan, this 30th day of January 2014.

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