

**SASKATCHEWAN**

**OFFICE OF THE**  
**INFORMATION AND PRIVACY COMMISSIONER**

**REPORT F-2012-005**

**Saskatchewan Workers' Compensation Board**

**Summary:**

Three different Saskatchewan Workers' Compensation Board (WCB) claimants submitted access to information requests to the WCB pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) in 2008, 2009 and 2010.

In each case, the Privacy Officer/Corporate Solicitor responded to the access requests by advising that the information sought is not subject to the access provisions of FOIP.

The consistent position taken by the Commissioner and the Office of the Saskatchewan Information and Privacy Commissioner (Saskatchewan OIPC) since 2003 has been that section 23 of FOIP is a paramountcy provision and not an exclusion from FOIP. The Commissioner has taken the view that section 23 is not applicable since although there may appear to be a conflict between sections 171.1 and 171.2 of *The Workers' Compensation Act, 1979* (the WCA) and Parts II and III of FOIP, it is possible to read the provisions together so they are complementary and not adverse. Since one can comply with the WCA provisions without violating the FOIP provision for access to information, there is no genuine conflict and FOIP prevails.

The view of the Commissioner has been outlined in detail in his Report F-2012-002 and Investigation Reports F-2009-001 and F-2007-001.

The Commissioner recommended that WCB process each of the three access requests in accordance with FOIP.

The Commissioner also recommended that WCB and the Minister responsible for the WCA resolve this matter by adopting the

recommendations in the 2006 Committee of Review and ensure that FOIP explicitly guarantees injured workers the same rights to access information that exist for all other Saskatchewan residents when they deal with other government institutions and local authorities.

**Statutes Cited:** *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 15(1), 23(3)(k); *The Workers' Compensation Act, 1979*, ss. 171 to 171.2

**Authorities Cited:** Saskatchewan OIPC Report F-2012-002; Saskatchewan OIPC Investigation Reports F-2009-001, F-2007-001.

**Other Sources Cited:**

Saskatchewan OIPC: *Submission to the Workers' Compensation Board Review Committee*; Saskatchewan Workers' Compensation Act *Committee of Review 2006 Report*.

## I BACKGROUND

[1] This Report addresses decisions made by the Saskatchewan Workers' Compensation Board (WCB) in respect of three different access to information requests from three different and unrelated applicants (Applicant A, Applicant B and Applicant C). In this section of the Report I will deal with the three requests separately but sequentially.

[2] Applicant A submitted to WCB a request on the prescribed Access to Information Request Form A (the prescribed form) that was received by WCB on September 8, 2008.

[3] This request was for the following records:

All information [name of WCB employee] has gather [sic] from his informants or people he interviewed, his personal notes on my file, pictures, video tape, all [the WCB employee] hidden file

[4] On September 30, 2008, WCB's Privacy Officer/Corporate Solicitor acknowledged receipt of the access request and advised Applicant A as follows:

I can firstly advise that access to the information you are seeking is governed by section 171.1 of *The Workers' Compensation Act, 1979* and not *The Freedom of Information and Protection of Privacy Act*.

Section 171.1 does not require that the Board should release all the information it has about a worker. There are several reasons why such disclosure may be denied including:

- a) The effect that providing access might have on any criminal proceedings;
- b) The general importance of being able to assure informants that they can speak in confidence; and
- c) The precedent that might be set by allowing such access.

Your request under section 171.1 is denied for the above reasons.

Should FOIP apply to your request it is denied under the provisions section 15(1) of that Act which reads:

15(1) A head may refuse to give access to a record, the release of which could

- (a) prejudice, interfere with or adversely effect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;
- (b) be injurious to the enforcement of:
  - (i) an Act or a regulation
- (c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;
- (d) be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated proceedings;
- (e) reveal investigative techniques or procedures currently in use or likely to be used;
- (f) disclose the identity of a confidential source of information or disclose information furnished by that source with respect to a lawful investigation or a law enforcement matter.<sup>1</sup>

[5] On February 5, 2009 this office received a request for review from Applicant A and provided notice of that review request to WCB on March 31, 2009.

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<sup>1</sup>*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 at section 15(1).

[6] On April 8, 2009 the Privacy Officer /Corporate Solicitor for WCB wrote to our office to clarify its initial response to Applicant A noted above. This included the following representations:

Release of information collected by the WCB under the authority of *The Workers' Compensation Act, 1979*, ("the WCAct") to employers, workers and third parties is governed by sections 171, 171.1 and 171.2 of the WCAct.

A worker has a right under section 171.1 of the WCAct to access information that is used in determining their entitlement to compensation under the WCAct. This section is narrow in its application in that it pertains to the information collected **and** used in making entitlement determinations under the WCAct.

Section 171 of the WCAct is broader in its application in that it applies to the information gathered via inquiries and inspections under the authority of the WCAct. Information that is not used in making claims decisions would only be accessible under section 171, and such access is at the discretion of the WCB.

The information being sought by [Applicant A] is not subject to the access provisions of *The Freedom of Information and Protection of Privacy Act* ("FOIP").

To be clear, the WCB does not find that FOIP applies to requests for information that has been gathered under the powers of the WCAct. The point in raising the section 15 exemption was to emphasize that even if the WCB had determined that FOIP applied to [Applicant A's] request, the WCB would have denied such access.

[7] Applicant B submitted to WCB a request, which we assume was on the prescribed form, which was received by WCB on October 27, 2009.

[8] Although we were not provided a copy of the original prescribed form, the response from WCB dated December 8, 2009 described the request as follows:

- all documents that have my name listed on them, including listing my name as reference or in passing
- copies of all "sent" and "received" emails that reference to my name and directly include my name
- copies of all phone records that refer to me or name me
- copies of all handwritten notes that contain my name or refer to me
- copies of all phone calls that name me or refer to me
- copies of all video that show me, appear to show me, or wherein I am referred to
- copies of all else that otherwise names me or refers to me

[9] In that same response from WCB's Privacy Officer/Corporate Solicitor, it states:

The Workers' Compensation Board is not a body that is subject to LA FOIP [*The Local Authority Freedom of Information and Protection of Privacy Act*].

Access to your claim record is through *The Workers' Compensation Act, 1979*, not through *The Freedom of Information and Protection of Privacy Act*. All of the information, with the exception of information relating to your lawsuit involving the WCB, is contained within your claim record. If you have not already accessed your claim record, please do so through your Case Manager.

Any documentation relating to the Board's defense of the lawsuit that you had commenced is subject to Solicitor/Client privilege and access to that information is denied.

[10] On December 10, 2009 our office received a request for review from Applicant B and provided notice of that review request to WCB on January 15, 2010.

[11] Applicant C submitted to WCB a request on the prescribed form which was received by WCB on April 26, 2010.

[12] The request was for the following:

all notes and documentation, hand-written, typed or in digital format that are in the possession of Saskatchewan Workers' Compensation Board including, but not limited to:

- Handwritten and typed notes by any employee or Claim Specialists, pertaining to me, or my previous claims.
- Copies of emails originating or received by employees of the Saskatchewan WCB regarding my previous claims, the status of the claims, which in any way relate to myself [name of Applicant C].
- Information, notes or documents, whether hand-written or in digital format, of any conversations, reports or medical opinions provided to your office in relation to my previous claims, pertaining to me, or my previous claims.
- A copy of any electronic records retained within any computer databases or electronic filing systems. If same have (sic)are no longer maintained, I would request copies from digital/computer backups which are maintained.
- A copy of all information, papers and documents within any files maintained by yourself, pertaining to me, or my previous claims.

[13] In addition, Applicant C sought a fee waiver and provided information as to why this would be appropriate.

[14] The WCB Privacy Officer/Corporate Solicitor responded to Applicant C as follows:

A search of records has revealed that the only records that may be responsive to your request would be two claims that you had with The Workers' Compensation Board ("WCB"). I can advise that access to claims is governed by *The Workers' Compensation Act, 1979*, and not *The Freedom of Information and Protection of Privacy Act* ("FOIP"). I draw your attention in particular to section 23(3)(k) of FOIP. Access to the claim record is under the authority of sections 171 and/or 171.1 of *The Workers' Compensation Act, 1979*. As such your request under FOIP is denied.

[15] Neither WCB nor its Privacy Officer/Corporate Solicitor has at any time addressed the fee waiver request from Applicant C.

[16] On June 4, 2010 this office received a formal request for review from Applicant C of the decision of WCB. We provided notice of the review to WCB by letter dated August 9, 2010.

[17] Since the issue raised by each of these three files is the same and given that this issue has been the subject of considerable comment by this office in the past 8 years, I determined that these three files could be most efficiently dealt with by consolidating all three cases into this single report.

## **II RECORDS AT ISSUE**

[18] WCB has not provided the record in respect to any of the three requests for review relying on its conclusion that FOIP has no application.

## **III ISSUES**

### **1. What is the applicable law?**

## IV DISCUSSION OF THE ISSUES

### 1. What is the applicable law?

[19] This represents the nub of the problem experienced by each of these three Applicants and many others who contact our office to discuss how they might gain access to their personal information or personal health information in the possession or under the control of WCB.

[20] I have discussed my view of the applicable law in my Report F-2012-002 and Investigation Reports F-2009-001 and F-2007-001. I repeat and incorporate herein by reference the analysis from Report F-2012-002.<sup>2</sup> There is no conflict involving sections 171 to 171.2 of *The Workers' Compensation Act, 1979* that would trigger the paramouncy provision in section 23(3)(k) of FOIP. Therefore, FOIP applies.

[21] In addition, I made recommendations to the 2006 Workers' Compensation Act Committee of Review.<sup>3</sup> The Committee then issued a Report titled, *Committee of Review 2006 Report*. The Report recommended a number of changes including:

***Recommendation*** [#27]:

***Amend the Act to specify the Board is subject to *The Freedom of Information and Protection of Privacy Act*.***

The Board collects, compiles and uses extensive personal health information. There is a regime in *The Health Information Protection Act* that addresses the protection of this information while preserving access and sharing of the information by “trustees” for the diagnosis, treatment and care, which the Board involves itself in through the Early Intervention Program and other case management endeavours.

The general rules and processes in many parts of *The Health Information Protection Act* apply to the Board, but it is exempt from Parts II (Rights of the Individual), IV (Limits on Collection, Use and Disclosure of Personal Health Information by Trustees) and V (Access of Individuals to Personal Health Information).

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<sup>2</sup>Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Report F-2012-002 at [17] to [24], available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>3</sup>SK OIPC *Submission to the Workers' Compensation Board Review Committee* (October 24, 2006), available at [www.oipc.sk.ca/resources.htm](http://www.oipc.sk.ca/resources.htm).

The Committee has concluded there is no overriding purpose or reason that the Board should be exempt from these parts.

**Recommendation** [#28]:

**Repeal the exemption *The Workers' Compensation Act, 1979* has from Parts II, IV and V of *The Health Information Protection Act*.**

Once these recommendations are enacted, the Board will have to review and adopt new processes and procedures for the collection, use and disclosure of personal information that will respond to the submissions the Committee received.<sup>4</sup>

[22] Subsequent to the Committee's Report, the Saskatchewan Government produced a list of the Committee's recommendations and the action taken for each. Neither recommendation #27 nor #28 nor the Committee analysis is mentioned in the Government response. Although I had an opportunity to meet with the Minister formerly responsible for WCB to discuss our recommendations and the recommendations from the Committee of Review I am not aware of any concrete action to implement those recommendations.

[23] I also made the same kind of recommendations to the Workers' Compensation Act Committee of Review in 2011<sup>5</sup> but the Committee's relevant recommendations were vague and appear to have completely ignored the outstanding recommendations from the Committee of Review 2006.

## V FINDINGS

[24] I find that the provisions relied on by the Saskatchewan Workers' Compensation Board namely sections 171 and 171.2 are not paramount to *The Freedom of Information and Protection of Privacy Act* and that by reason of section 23 of *The Freedom of Information and Protection of Privacy Act*, *The Freedom of Information and Protection of Privacy Act* is paramount to *The Workers' Compensation Act, 1979*.

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<sup>4</sup>*Saskatchewan Workers' Compensation Act Committee of Review 2006 Report* at p. 228, available at <https://www.wcsask.com/WCBPortalWeb/ShowProperty?nodePath=/WCBRepository/formsPublications/publications/annualPubs/2006CommitteeOfReviewPart2/pdfContent>.

<sup>5</sup>SK OIPC *Submission to the Workers' Compensation Act Committee of Review: April 29, 2011*, available at [www.oipc.sk.ca/resources.htm](http://www.oipc.sk.ca/resources.htm).



## VI RECOMMENDATIONS

- [25] I recommend that the Saskatchewan Workers' Compensation Board forthwith proceed to process each of the three requests for access in accordance with the provisions of *The Freedom of Information and Protection of Privacy Act*.
- [26] I recommend that the Saskatchewan Workers' Compensation Board act on the recommendations from the 2006 Committee of Review, namely recommendations #27 and #28.
- [27] I recommend that the Minister responsible for the Saskatchewan Workers' Compensation Board initiate legislative amendment to clarify that the Saskatchewan Workers' Compensation Board is subject to *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act* as are all other government institutions in Saskatchewan.

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

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