

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

**REVIEW REPORT F-2013-002**

**Saskatchewan Workers' Compensation Board**

**Summary:**

Two Applicants, one an employee of the Saskatchewan Workers' Compensation Board (WCB), made requests to WCB for information related to their individual workers' compensation claims. WCB indicated, in its responses to the Applicants, that records were being withheld pursuant to various exemptions found in Part III of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicants requested a review of these decisions and the Commissioner asked WCB for submissions in support of its reliance on the exemptions. In response, WCB indicated that FOIP did not apply to the records pursuant to section 23(3)(k) of FOIP.

The Commissioner's position, taken since 2003, is that section 23 of FOIP is a paramountcy provision and not an exclusion from FOIP. The Commissioner has taken the view that section 23 of FOIP is not applicable since although there may appear to be a conflict between sections 171 to 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 Commissioner also found that section 23(3)(k) of FOIP would not apply to responsive records found in the employee file held by WCB. He found that WCB did not comply with section 7 of FOIP and did not meet the duty to assist by not identifying its position on section 23(3)(k) of FOIP to the Applicants. As WCB did not provide representation on the exemptions identified in the section 7 responses to the Applicants, he found that WCB did not meet the burden of proof in demonstrating their

applicability. Finally, the Commissioner found WCB had not demonstrated it undertook an adequate search for records.

**Statutes Cited:** *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 5, 7, 7(2)(d), 15(1)(c), 15(1)(e), 15(1)(f), 17(1)(a), 17(1)(b), 23, 23(3)(k), 31(2), 61; *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. 171, 171.1, 171.2.

**Authorities Cited:** Saskatchewan OIPC Review Reports F-2013-001, F-2012-005, F-2012-002, F-2007-002, F-2007-001; Investigation Reports F-2012-004, F-2012-003, F-2012-002, F-2009-001, F-2007-001.

**Other Sources Cited:**

Saskatchewan OIPC, *Submission to the Workers' Compensation Act Committee of Review, April 29, 2011*; Workers' Compensation Act Committee of Review, *Saskatchewan Workers' Compensation Act Committee of Review 2006 Report*; Government of Saskatchewan, Bill 58 – *The Workers' Compensation Act, 2012*; Legislative Assembly of Saskatchewan, Standing Committee on Human Services, *Hansard Verbatim Report No. 19 – April 30, 2013*.

## I BACKGROUND

[1] This Review Report addresses two decisions made by the Saskatchewan Workers' Compensation Board (WCB) to deny access to information with respect to two different and unrelated Applicants (Applicant A and Applicant B).

[2] Applicant A, an employee of WCB, made a request to WCB on or about January 18, 2012 for a number of records regarding her workers' compensation claim. WCB replied on March 19, 2012. WCB provided Applicant A with a number of records responsive to her request. However, WCB also denied access to a number of records pursuant to sections 15(1)(c), 15(1)(e), 15(1)(f), 17(1)(b) and 31(2) of *The Freedom of Information and Protection of Privacy Act* (FOIP)<sup>1</sup>. WCB also indicated that a number of the requested records did not exist.

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

- [3] My office received a Request for Review from Applicant A on March 28, 2012. My office provided notification to both Applicant A and WCB of our intention to undertake the review on or about July 23, 2012. My office asked WCB to provide a submission regarding the above noted exemptions and for details of its search for records that it claimed did not exist.
- [4] In response, dated August 29, 2012, WCB advised my office that it was relying on section 23(3)(k) of FOIP in that pursuant to sections 171 and 171.1 of *The Workers' Compensation Act, 1979* (the WCA),<sup>2</sup> FOIP did not apply to the records. This change in WCB's view on how FOIP applies to the responsive record was communicated to us five months after its section 7 response to the Applicant. To my knowledge, this had not been communicated by WCB to Applicant A.
- [5] On or about May 15, 2012, Applicant B made a request to WCB for the following:
- Aside from general file copies already provided to me, I hereby request any and all other records pertaining to myself and the above referenced WCB claim. These records are to include, but not limited to: fax and e-mail transmissions, file memorandums, meeting minutes, summary notes/reports/memorandums, or any other number of written material to or from the Members of the Board, Board Services, WCB Operations, WCB Health Care Services, WCB Medical Services, the Minister Responsible for WCB, and any and all Medical Review Boards or Panels both internal and external.
- [6] WCB responded on June 11, 2012 indicating that a number of responsive records had already been provided to Applicant B. It also indicated that WCB was relying on sections 17(1)(a) and 17(1)(b) of FOIP to deny access to the remaining records.
- [7] On June 25, 2012, my office received a Request for Review from Applicant B. On or about July 23, 2012, my office provided notice to both Applicant B and WCB of our intention to undertake a review. We asked WCB to provide a submission to support its reliance on sections 17(1)(a) and 17(1)(b) of FOIP.

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<sup>2</sup>*The Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1.*

- [8] Again, my office received a letter dated August 28, 2012 indicating that WCB was relying on section 23(3)(k) of FOIP and that FOIP did not apply to the records. To my knowledge, this had not been communicated to Applicant B by WCB.
- [9] In letters dated January 25, 2013, my office provided a summary of WCB's position to Applicant A and B and invited them to make their own submissions. No submissions were received.
- [10] Since the issue raised by each of these two files is the same, and given that this issue has been the subject of considerable comment by this office in the past eight years, I determined that these two files could be most efficiently dealt with by consolidating the two cases into this single Review Report.

## **II RECORDS AT ISSUE**

- [11] WCB has not provided the record in respect to the two Requests for Review relying on its conclusion that FOIP has no application.

## **III ISSUES**

- 1. What is the applicable law?**
- 2. Did the Saskatchewan Workers' Compensation Board comply with section 7 of *The Freedom of Information and Protection of Privacy Act* and meet the implied duty to assist?**
- 3. Has the Saskatchewan Workers' Compensation Board met the burden of proof to demonstrate that sections 15(1)(c), 15(1)(e), 15(1)(f), 17(1)(a), 17(1)(b) and 31(2) of *The Freedom of Information and Protection of Privacy Act* apply to the records?**
- 4. Did the Saskatchewan Workers' Compensation Board perform an adequate search for records?**

## IV DISCUSSION OF THE ISSUES

[12] As noted in many of my previous Reports, WCB is a “government institution” for the purposes of FOIP.<sup>3</sup>

### 1. What is the applicable law?

[13] I most recently dealt with the issue of the paramountcy of FOIP to sections 171 to 171.2 of the WCA in my Review Report F-2012-005 as follows:

[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. There is no conflict involving sections 171 to 171.2 of *The Workers’ Compensation Act, 1979* that would trigger the paramountcy 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

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<sup>3</sup>Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Report F-2013-001 at [16], F-2012-002 at [19]; Investigation Reports F-2012-004 at [24], F-2012-003 at [14], F-2012-002 at [9], F-2009-001 at [22], F-2007-001 at [9], all available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

Individual), IV (Limits on Collection, Use and Disclosure of Personal Health Information by Trustees) and V (Access of Individuals to Personal Health Information).

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.

[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 but the Committee's relevant recommendations were vague and appear to have completely ignored the outstanding recommendations from the Committee of Review 2006.<sup>4</sup>

[14] In its submissions of August 28, 2012 and August 29, 2012, WCB argued the following:

Pursuant to sub-sections 22(1) and 22(2) of the WCAct, the WCB has "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 additionally subsection 22(2) gives the WCB full authority to determine the evidentiary and factual basis of all materials before it. Under the WCAct, the access requests of the Applicant are governed by sections 171 and 171.1.

Section 23(3)(k) of *The Freedom of Information and Protection of Privacy Act* (FOIP) specifically sets out the jurisdiction of the Privacy Commissioner with respect to the WCAct. That section states that the statutory authority of the Privacy Commissioner imparted under section 23(1) over legislation that "restricts or

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<sup>4</sup>SK OIPC Review Report F-2012-005 at [19] to [23], available at: [www.oipc.sk.ca/Reports/F-2012-005.pdf](http://www.oipc.sk.ca/Reports/F-2012-005.pdf).

prohibits access” does not apply to the WCAct. The WCAct pursuant to sections 171 and 171.1 does not restrict access to all “information respecting that worker for the purposes of this Act” and such restrictions are determined solely and exclusively by the WCB pursuant to section 22 and 171.1 of that Act.

In Reports H-2008-001, F-2007-001, and F-2009-001 the Privacy Commissioner argues that the interpretation and application of section 23(3)(k) is governed by the provisions of section 23(1). Section 23(1) states that any existing legislation that “conflicts with this Act” and denies access authorized under FOIP are now to be governed under FOIP. The Privacy Commissioner takes the view there are no conflicts under 23(1) with the WCAct, and therefore FOIP can be applied. Section 23(1) is a paramountcy clause. Such an argument, if applied to the matter of access, would entail the Privacy Commissioner using the very clause that is stated unequivocally not to apply to the WCB to make the argument that it does. It would also negate any meaning to section 23(3)(k). The question of conflict between FOIP and the WCAct, pursuant to 23(3)(k) does not arise because 23(1) of FOIP does not apply to the WCB.

The argument as presented in the aforementioned Reports ignores:

1. The statutory basis of the Privacy Commissioner’s authority to act in the face of exemptions where there are other legislative provisions mandating and determining the rights of access to records;
2. The basic rules of statutory interpretation; and
3. The statutory preferences of legislature in establishing the ‘balance’ of various competing interests in relation to a quasi-judicial administrative body.

...

It is further noteworthy that while all other access exemption provisions under Part III indicate a Head either “shall” or “may” provide access to records, no such option arises or is provided for the exemptions under section 23(3) as they are outside the jurisdiction of the Privacy Commissioner and accordingly are not the subject matter of section 61.

The legislature has established exemptions in Part III of FOIP that are intended to be applied. The basic test of exempt status that has evolved is whether the record constitutes information that complies with the form or nature specified under the exemption. All records that have been denied to the Applicant constitute records created in relation to the entitlement and administration of the Applicant’s claim for benefits falling under the WCAct and are subject to section 171.1 of the WCAct.

...

[15] The arguments provided by WCB in these reviews are not persuasive and do not change my view that section 23(3)(k) of FOIP does not restrict the right of a applicant to view any records about that applicant, held by WCB.

[16] Further, WCB acts as both the employer and the insurer of Applicant A. While WCB holds a claim file for Applicant A that would be contemplated by section 23(3)(k) of FOIP, it would also hold an employee file that appears to fall outside of this provision. In a letter dated May 6, 2013, we asked WCB the following:

Please inform us if any of the responsive records are found in the Applicant's employee file with WCB or elsewhere in the organization (in its possession or under its control) that would not, in your view, be addresses [sic] by section 23(3)(k) of FOIP. **Further, are there any records within the claim file that would normally be shared with an employer and are stored solely in the employees claim file or elsewhere within WCB?**

Please perform a new search and provide us with any responsive records under WCB's possession or control identified outside of the claims file. If none are found, please provide us with details of your search efforts.

[emphasis added]

[17] In response, WCB provided the following in a letter dated May 13, 2013:

As you will note in the Applicant's original request she was quite specific in describing the records she was seeking. In addition, I contacted the Applicant to seek clarification regarding a few of the items in her request. As a result WCB staff who, in my opinion, may have had records responsive to her request either as employer or insurer were contacted. They were provided with the specific request as submitted by the Applicant and were asked to provide any records that may be responsive.

The Applicant was then provided records from the WCB as employer or insurer, or was advised as to which records would not be provided together with an explanation. Where appropriate a reference to the applicable FOIP exemption was also provided. I would once again refer you to the WCB's correspondence to the Applicant of March 19, 2012.

Based upon the request and clarification provided by the Applicant an adequate search was conducted and no further search will be carried out.

[18] My understanding of WCB's comments is that it agrees that there are some records responsive to Applicant A's request, namely those in her employee file, that would not be contemplated by 23(3)(k) of FOIP in conjunction with section 171 and 171.1 of the WCA. I note that WCB did not clarify this view until late in this review when pressed by my office.



[19] As such, my conclusion is that section 23(3)(k) of FOIP should not restrict the access of Applicant A or Applicant B to the personal information held by WCB. I find FOIP applies to all of those records.

**2. Did the Saskatchewan Workers' Compensation Board comply with section 7 of *The Freedom of Information and Protection of Privacy Act* and meet the implied duty to assist?**

[20] Section 7 of FOIP provides as follows:

7(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:

**(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or**

(b) transfer the application to another government institution in accordance with section 11.

**(2) The head shall give written notice to the applicant within 30 days after the application is made:**

**(a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;**

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

**(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;**

(e) stating that access is refused for the reason that the record does not exist; or

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4).

(3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.

(4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.

(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.<sup>5</sup>

[emphasis added]

[21] Section 7(2)(d) of FOIP requires that a public body, denying access to a record, respond to an access request by identifying specifically what provision of FOIP it is relying on to do so. In WCB's section 7 response of March 19, 2012 to Applicant A, it cited sections 15(1)(c), 15(1)(e), 15(1)(f), 17(1)(b) and 31(2) of FOIP. In its section 7 response of June 11, 2012 to Applicant B, it cited sections 17(1)(a) and 17(1)(b) of FOIP as the basis for refusing access.

[22] At no place, in either section 7 response, did WCB raise the potential applicability of section 23(3)(k) of FOIP. WCB did not raise the paramountcy issue of 23(3)(k) of FOIP until both applicants had made Requests for Review to my office causing us to ask for submissions on the applicability of the above noted exemptions.

[23] While WCB has argued that the sections cited in its section 7 response apply to some responsive records in Applicant A's employee file, it neglected to inform Applicant A of its view that FOIP does not apply to her claim file, pursuant to section 23(3)(k) of FOIP.

[24] In terms of Applicant B's request, WCB appears to have abandoned its reliance on sections 17(1)(a) and 17(1)(b) of FOIP, as it did not address these exemptions in its submission to my office.

[25] As such, WCB did not meet its duties imposed by section 7(2)(d) of FOIP when responding to these two access requests.

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<sup>5</sup>*Supra* note 1 at section 7.

[26] However, the inadequate section 7 response also impacts the implied duty to assist. I commented on this in my Review Reports F-2012-002<sup>6</sup> and F-2013-001<sup>7</sup> involving the WCB. I also made the following comments on the duty to assist in my Review Report F-2007-001:

[59] Previous Reports have determined that government institutions have a duty to assist applicants based on the power and knowledge imbalance between applicants and public bodies. **The duty to assist consists largely of a proactive, transparent, communicative and timely response taken by the public body vis á vis individuals who make access requests.** It involves respecting the spirit, as well as the letter, of the law. As found in our Report F-2004-003, paragraph [15], “*to realize and respect the ‘right’ guaranteed to Saskatchewan residents by the Act, there is an implicit requirement for government institutions to assist applicants and to respond openly, accurately and completely to an access request.*”<sup>8</sup>

[emphasis added]

[27] WCB’s section 7 responses were neither communicative, nor transparent. I am unaware of any attempt on the part of WCB to communicate its position with respect to section 23(3)(k) of FOIP with the applicants in light of the developments in these reviews.

[28] Due to WCB’s lack of transparency with respect to the reasons for withholding responsive records, it did not meet the duty to assist in these cases.

**3. Has the Saskatchewan Workers’ Compensation Board met the burden of proof to demonstrate that sections 15(1)(c), 15(1)(e), 15(1)(f), 17(1)(a), 17(1)(b) and 31(2) of *The Freedom of Information and Protection of Privacy Act* apply to the records?**

[29] As is customary of my office, in our notification letters of July 23, 2012 we asked WCB to provide a submission to support its reliance on sections 15(1)(c), 15(1)(e), 15(1)(f), 17(1)(b) and 31(2) of FOIP to withhold responsive records from Applicant A and sections 17(1)(a) and 17(1)(b) of FOIP to withhold responsive records from Applicant B.

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<sup>6</sup>SK OIPC Review Report F-2012-002 at [50], available at: [www.oipc.sk.ca/Reports/F-2012-002.pdf](http://www.oipc.sk.ca/Reports/F-2012-002.pdf).

<sup>7</sup>SK OIPC Review Report F-2013-001 at [25] to [39], available at: [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>8</sup>SK OIPC Review Report F-2007-001 at [59], available at: [www.oipc.sk.ca/Reports/F-2007-001.pdf](http://www.oipc.sk.ca/Reports/F-2007-001.pdf).

[30] WCB provided no such submissions. We also note that all of the above noted provisions are discretionary. With respect to discretionary exemptions, I made the following statement in my Review Report F-2007-002: “With respect, simply claiming that a discretionary exemption applies without supporting explanation as to how or why it applies is insufficient to meet the burden of proof imposed by the Act.”<sup>9</sup> Further, even if WCB had demonstrated that the exemptions applied, it could use its discretion to release the responsive records to the Applicants. In any case, it did not meet the burden of proof to demonstrate that these exemptions apply.

**4. Did the Saskatchewan Workers’ Compensation Board perform an adequate search for records?**

[31] In its section 7 response to Applicant A of March 19, 2012, WCB informed the Applicant that some records responsive to the access request did not exist. In my office’s notification letter of July 23, 2012, we asked WCB to provide details of its search efforts.

[32] Section 5 of FOIP provides as follows:

**5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.**<sup>10</sup>

[emphasis added]

[33] In my Review Report F-2012-002 involving WCB, I made the following comments concerning an adequate search:

[26] Our office discussed the search for responsive records in some detail in our Report F-2008-001. I adopted the following approach described in Ontario Order PO-2257 of the Ontario Information and Privacy Commissioner’s (IPC) Office.

...the Act does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate

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<sup>9</sup>SK OIPC Review Report F-2007-002 at [15], available at: [www.oipc.sk.ca/Reports/F-2007-002.pdf](http://www.oipc.sk.ca/Reports/F-2007-002.pdf).

<sup>10</sup>*Supra* note 1 at section 5.

responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).

[27] A similar approach had been taken by the British Columbia IPC in his Order 01-47 as follows:

...Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In any inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also include how the searches were done and how much time its staff spent searching for the records.

[28] In addition, we address search efforts in the following excerpts from our office's resource, *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests*:

The public body/trustee has a duty to search for, identify and consider all responsive records. We highly recommend that public bodies/trustees thoroughly document their search efforts. To ensure a complete and adequate search, the public body/trustee should utilize a search strategy which considers the following:

- Were records in any form or format considered (i.e. electronic, paper, other)?
- Is the original access request very broad and could include information developed over a wide open time period? If so, how did you define the search?
- How did you search for records in the public body's possession?
  - Did you search yourself?
  - Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?
  - Did you send out an email to other units, etc?
- Could records also exist that are responsive to this access request that are not in your possession, but in your control?
  - Did agents, consultants or other contracted services have any role in the project the access request is referencing?
  - If yes, are these records included in the package provided to the OIPC?

[29] Based on all of the above, it appears that WCB failed to undertake an adequate search for responsive records. Our attempts to elicit the kind of information necessary to establish whether an adequate search was undertaken have been protracted and persistent. In fact it has taken almost three years of pursuit to elicit an acknowledgement that there were additional records that may have been responsive but these apparently no longer exist. When we asked WCB for further details and

evidence to satisfy this question, WCB stated that they would not be providing any further evidence.<sup>11</sup>

[34] When asked, WCB failed to provide details of its search efforts. In our letter of May 6, 2013, we again asked WCB to perform a new search and provide us with details of that search. In its response of May 13, 2013, WCB stated: “Based upon the request and clarification provided by the Applicant an adequate search was conducted and no further search will be carried out.”

[35] WCB has not demonstrated that it has performed an adequate search for records responsive to Applicant A’s request.

## **V FINDINGS**

[36] The provisions relied on by the Saskatchewan Workers’ Compensation Board namely sections 171 and 171.1 *The Workers’ Compensation Act, 1979* 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*.

[37] Section 23(3)(k) of *The Freedom of Information and Protection of Privacy Act* does not apply to responsive records held in Applicant A’s employee file.

[38] The Saskatchewan Workers’ Compensation Board did not comply with section 7(2)(d) of *The Freedom of Information and Protection of Privacy Act* when it provided responses to the access requests of Applicant A and Applicant B.

[39] The Saskatchewan Workers’ Compensation Board did not meet the duty to assist when it responded to Applicant A and Applicant B.

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<sup>11</sup>*Supra* note 6 at [26] to [29].

[40] The Saskatchewan Workers' Compensation Board did not meet the burden of proof to demonstrate that sections 15(1)(c), 15(1)(e), 15(1)(f), 17(1)(a), 17(1)(b) and 31(2) of *The Freedom of Information and Protection of Privacy Act* apply to the responsive records.

## **VI RECOMMENDATIONS**

[41] The Saskatchewan Workers' Compensation Board should release all records responsive to Applicant A's request to Applicant A.

[42] The Saskatchewan Workers' Compensation Board should release all records responsive to Applicant B's request to Applicant B.

[43] I recommend that the Saskatchewan Workers' Compensation Board act on the recommendations from the *Saskatchewan Workers' Compensation Act Committee of Review 2006 Report*, namely recommendations #27 and #28.<sup>12</sup>

[44] I recommend that the Minister responsible for the Saskatchewan Workers' Compensation Board initiate legislative amendment to clarify that the Saskatchewan Workers' Compensation Board is fully subject to *The Freedom of Information and Protection of Privacy Act* to the same extent as other government institutions in this province.

Dated at Regina, in the Province of Saskatchewan, this 29th day of October, 2013.

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

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<sup>12</sup>Workers' Compensation Act Committee of Review, *Saskatchewan Workers' Compensation Act Committee of Review 2006 Report*, at p. 228, available at: [www.wcbsask.com/WCBPortalPage/page\\_forms\\_publications\\_pubs.html?navigationAction=page\\_forms\\_publications\\_pubs](http://www.wcbsask.com/WCBPortalPage/page_forms_publications_pubs.html?navigationAction=page_forms_publications_pubs).

## POSTSCRIPT

On April 30, 2013, the Human Services Committee (the Committee) of the Legislative Assembly of Saskatchewan (the Legislative Assembly) addressed Bill 58 – *The Workers’ Compensation Act, 2012*.<sup>1</sup>

During that Committee meeting, questions were raised by members about past recommendations from the *Saskatchewan Workers’ Compensation Act Committee of Review 2006 Report*<sup>2</sup> and from our office<sup>3</sup> for clarifying that the Saskatchewan Workers’ Compensation Board (WCB) is subject to *The Freedom of Information and Protection of Privacy Act* (FOIP)<sup>4</sup> and *The Health Information Protection Act* (HIPA),<sup>5</sup> like almost all other government institutions in Saskatchewan. During the Committee meeting, questions of members were answered by the Privacy Officer for WCB and by the Minister responsible for WCB.

Our Review Reports F-2013-001 and F-2013-002 highlight some of the ongoing difficulties created by the approach taken by WCB. They also provide evidence that some of the assurances proffered, by and on behalf of WCB to the Committee, need qualification.

The Privacy Officer, in his comments to the Committee, discussed ‘access’ but it is clear that he was actually referring only to what WCB describes as “the claim file.” There was no accounting for or recognition of the existence of other kinds of personal information or personal health information, that may or may not be in the claim file. This is illustrated by the experience of applicants under FOIP who were employees of WCB, but also claimants under *The Workers’ Compensation Act* (the WCA).<sup>6</sup> Now, the advantage of FOIP is that it applies to all records in the custody or under the control of a government institution. This broad sweep is not affected by

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<sup>1</sup>Government of Saskatchewan, Bill 58 – *The Workers’ Compensation Act, 2012*, available at: [www.qp.gov.sk.ca/documents/english/FirstRead/2012/Bill-58.pdf](http://www.qp.gov.sk.ca/documents/english/FirstRead/2012/Bill-58.pdf).

<sup>2</sup>Workers’ Compensation Act Committee of Review, *Saskatchewan Workers’ Compensation Act Committee of Review 2006 Report*, available at: [www.wcbask.com/WCBPortalPage/page\\_forms\\_publications\\_pubs.html?navigationAction=page\\_forms\\_publications\\_pubs](http://www.wcbask.com/WCBPortalPage/page_forms_publications_pubs.html?navigationAction=page_forms_publications_pubs).

<sup>3</sup>SK OIPC, *Submission to the Workers’ Compensation Act Committee of Review, April 29, 2011*, available at: [www.oipc.sk.ca/Resources/WCB%20Committee%20of%20Review%20Submission%202011%20final.pdf](http://www.oipc.sk.ca/Resources/WCB%20Committee%20of%20Review%20Submission%202011%20final.pdf).

<sup>4</sup>*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

<sup>5</sup>*The Health Information Protection Act*, S.S. 1999, c.H-0.021.

<sup>6</sup>*The Workers’ Compensation Act, 1979*, S.S. 1979, c. W-17.1.



the way any government organization organizes its records and what particular hard copy or electronic file such information may be stored in.

In my Review Report F-2013-002, I dealt with two claimants under the WCA and one of them was an employee of WCB. For both, there was a question about the adequacy of the WCB search for responsive records. In the case of the employee/claimant, Applicant A, WCB provided a section 7 response under FOIP that cited five provisions in FOIP that might justify denial of access. Five months later when our office commenced a formal review under FOIP, WCB raised, for the first time, section 23(3)(k) of FOIP and argued that FOIP had been displaced by section 171 and 171.1 of the WCA. WCB, therefore, refused to provide a submission to meet the burden of proof in section 61 of FOIP for the five provisions in FOIP originally cited as its authority to deny access. If an employee of WCB makes a workers' compensation claim, what possible reason would there be for WCB to deny her access to other records about her that were not in the claims file but clearly were within the possession of WCB at all material times?

In my Review Report F-2013-001, WCB did an inadequate search for responsive records of an employee who did not have a claim under the WCA. Clearly, sections 171 and 171.1 did not apply in that case. Yet, it appears that there may have been responsive records that were not acknowledged by WCB's section 7 response to the Applicant.

It is important that the Legislative Assembly be aware that the WCB is not consistently objecting to our office's jurisdiction under FOIP to do a review of access denial, but chooses to raise the jurisdiction argument, at least in one case, only after we commenced a review and asked WCB to provide a submission to meet its statutory burden of proof. Further, it is not consistently handling FOIP requests in accordance with best practice even when FOIP clearly applies.

In the result, it is clear that injured workers are being denied access to records about them, unless those records have been placed in a claims file. That means that when other records exist, that are clearly in the possession or under the control of WCB, WCB may not even disclose the existence of such records and may take refuge behind section 171 and 171.1 of the WCA.

A somewhat confusing matter is the suggestion by the Minister that "all injured workers are able to raise privacy concerns with the fair practices office, the WCB's internal ombudsman, as well

as the Ombudsman for the province.”<sup>7</sup> He described these as “a number of avenues that a worker could use to address [privacy concerns].”<sup>8</sup> So far as I know, the only independent office of the Legislative Assembly mandated to address information privacy concerns is the Office of the Saskatchewan Information and Privacy Commissioner. This is the case in almost all other Canadian provinces. It is unclear why an aggrieved claimant, whether or not a WCB employee, will be denied access to the rights they should have under FOIP and HIPA, including the right to have this independent office of the Legislative Assembly review the decisions of WCB. Neither the fair practices office, nor the “internal ombudsman” are independent of the very body that is the subject of the complaint. Our experience is that in matters of information privacy, the Ombudsman Saskatchewan office quite properly defers and refers those access or privacy complainants to our office.

The current state of affairs is unfair to WCB claimants who are denied their right to be able to see all of the personal information WCB has about them, subject only to applicable exemptions in Part III of FOIP.

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<sup>7</sup>Legislative Assembly of Saskatchewan, Standing Committee on Human Services, *Hansard Verbatim Report No. 19* – April 30, 2013, at p. 420 available at: <http://docs.legassembly.sk.ca/legdocs/Legislative%20Committees/HUS/Debates/130430Debates-HUS.pdf>.

<sup>8</sup>*Ibid.*