

**NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 08-071

File: 07-269-4

June 26, 2008

BACKGROUND

On October 29th , 2007, the Complainant requested that I "assess the actions" taken by the Workers Compensation Board in:

- a) forwarding his personal information without his request to do so;
- b) copying the same information to third parties he did not want his information to be seen by;
- c) providing information about him to third parties that the WCB must have known was incorrect.

By letter to the public body dated November 6th, 2007, I asked them to respond to the allegations that they had used the Complainant's records contrary to the provisions of the *Access to Information and Protection of Privacy Act*. Their response was provided on November 21st and on the same day, further materials were received from the Complainant containing further allegations. These, too, were forwarded to the WCB who provided further response on January 20th. The Complainant was given the opportunity to make any final submissions he might have, which he did on June 11th, 2008.

The fact situation surrounding the complaint are somewhat complicated and a little difficult to piece together. However, from my reading of the materials provided by both the Complainant and the WCB, I understand the relevant facts are as follows.

In February, 2007, the Complainant filed a 'Worker's Report of Accident/ Application for Benefits' with the W.C.B. in which he appears to claim that he was suffering from Post

Traumatic Stress Disorder (PTSD) in relation to an incident which had occurred approximately 8 years earlier at a remote work site while the Complainant was employed with "Employer A". For some reason, in completing the form the Complainant entered information about his current employer under the section entitled "Employer Information" rather than about Employer A, with whom he was employed at the time of the incident.

Along with the Report, the Complainant provided a written chronology of events over the course of approximately a year which he says caused his PTSD. The events outlined relate only to his employment with Employer A. He also attached a handwritten chart outlining various employers and organizations, although it is not clear from the attachment how he intended the chart to be used. It appears to be his employment history after 1998 and in several instances he has indicated that he was harassed either by an individual within the employer's organizations or by the people in the community he was working in.

The WCB opened a file and began an investigation into the allegations. During the investigation the employers listed in the employment history document were contacted. The Complainant subsequently contacted the WCB to request that his claim be put on hold. This was done and the Complainant was advised of that fact by letter. The WCB at some point reactivated the claim, although it does not appear that the Complainant asked for it to be pursued again. Compensation was denied and the Complainant was informed of that decision by means of a letter dated July 24, 2007.

The Complainant provided further background in his second letter. He says that shortly after he filed his claim with the W.C.B., a dispute arose between him and his then current employer, a department of the Government of the Northwest Territories.

This dispute was completely unrelated to his W.C.B. claim, but was a significant dispute as a result of which there was a disciplinary process undertaken (which eventually resolved the issue). As it happened, when the W.C.B. contacted the current employer

and provided them with information about the substance of the Complainant's claim for PTSD, it was concurrent with the dispute that he was having with his current employer and, in his opinion the employer used the information in the WCB claim in the context of his current problems and, as a result of the information received from the WCB, his employer demanded that he provide them with a note from his doctor outlining a prognosis for his "mental condition". The employer went so far as to write a letter to the Complainant's doctor requesting a review of his job description to determine if he was fit to continue his job if he suffered from PTSD.

It is to be noted, at this point, that the Complainant is not complaining about his employer's use of the information it received from the WCB. His complaint relates specifically and only to the fact that the WCB provided the employer with details of his WCB claim.

The Complainant was also concerned that his WCB claim was apparently re-activated without his request. He had asked that his claim be suspended and it was. The Complainant says he never asked that it be re-activated and the fact that it was exacerbated his problems with his new employer. He questions whether the WCB has the right to do that and whether they have the right to continue to investigate and to continue to talk to people about his situation after he's asked that a claim be suspended.

In his second letter, the Complainant also raises a new issue. In his dealings with the WCB, he apparently ran into some difficulties and was banned from a section of the WCB offices. As a result of this, he asked to see a copy of his WCB file. In the file he noted a comment apparently made by a Director at the Government of the Northwest Territories saying that he had made a formal complaint against the Complainant as a result of certain alleged behaviours demonstrated by the Complainant. He inquired with the Department of Human Resources and determined that no such complaint had ever been made. He says that when he tried to follow up with the President of the WCB to correct this mistake, his claim file information was sent out and copied to the Deputy

Minister of Human Resources.

THE RELEVANT SECTIONS OF THE ACT

The privacy sections of the Act are found in Divisions B and C which deal, respectively, with allowable "uses" and allowable "disclosures" of personal information. The term "use" implies that the information remains in the possession only of the public body. The term "disclosure" refers to giving the information to someone outside of the public body who gathered the information in the first instance.

43. A public body may use personal information only
 - (a) for the purpose for which the information was collected or compiled, or for a use consistent with that purpose;
 - (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use; or
 - (c) for a purpose for which the information may be disclosed to that public body under Division C of this Part.

Division C provides as follows:

47. A public body may disclose personal information only
 - (a) in accordance with Part 1; or
 - (b) in accordance with this Division.

48. A public body may disclose personal information
 - (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose;
 - (b) where the individual the information relates to has identified the information and consented, in the prescribed manner, to

its disclosure;....

- (g) for the purpose of hiring, managing or administering personnel of the Government of the Northwest Territories or a public body;....
- (k) to an officer or employee of the public body or to a member of the Executive Council, where the information is necessary for the performance of the duties of the officer or employee or the member of the Executive Council;....
- (q) when necessary to protect the mental or physical health or safety of any individual;...
- (s) for any purpose when, 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 ...
- (u) for any purpose in accordance with any Act that authorizes or requires the disclosure; or

ISSUES

Cutting through the volumes of materials provided, there are three issues raised by the Complainant. These are

- a) did the Workers' Compensation Board improperly disclose his personal information when it provided his current employer with information in respect of his claim against a former employer?
- b) once he asked the Workers' Compensation Board to suspend the investigation of his claim, did the WCB have the jurisdiction to continue the investigation and thereby "use" or "disclose" his personal information for the purpose of their investigation?

- c) did the WCB improperly disclose the Complainant's personal information when they copied information about his troubles with the WCB to the Human Relations office of his current employer, the Government of the Northwest Territories?

THE PARTIES POSITIONS

The WCB's Position

In my letter to the WCB asking them to respond to the Complainant's concerns, I posed a series of questions.

In particular, I asked them

- a) whether there were written policies or protocols with respect to the investigative process or with respect to communication with claimants

In response, the public body indicated that they did have policies with respect to the adjudicative process and provided me with two of them, one dealing with "Entitlement" and one dealing with "Psychiatric and Psychological Disability". They further indicated that the communication protocol between the WCB and a claimant is informal and is usually conducted through a Case Manager assigned to the claimant. They indicate that typically, a Case Manager would send a claimant a letter setting out what he or she can expect from the WCB in terms of service and communication and what a claimant's corresponding obligations are. They provided me with a copy of a letter which was written to the Complainant in this case, but it appears to be a letter advising the claimant of the decision to deny his claim, not a letter indicating what he can expect from the process.

- b) when the WCB would go outside the four walls of the claim to consult third parties not the subject of the claim

The WCB responded that they will "contact those parties necessary to adjudicate a claim" and that this may include medical professionals who have treated the worker, third parties who may have witnessed an incident and the employer involved. The purpose of the investigation is to gather information, not to share the personal information of the claimant. They take the position that the form the worker fills out to make a claim provides them with the necessary consent to do this. That consent, at the bottom of the second and last page of the form, is included in the same paragraph in which the worker "elects to claim compensation" for injuries. It reads as follows:

I declare that all the information I have given on this form is true and correct and I elect to claim compensation for the above mentioned injuries or disease. This will authorize the Board and boards of review to obtain or view, from any source whatsoever, including records of physicians, qualified practitioners or hospitals, a copy of records pertaining to examination, treatment history and employment of the undersigned.

Underneath the signature line is the following statement:

Any personal information, as defined by the *Access to Information and Protection of Privacy Act* (ATIP) (sic), request (sic) herein is for the purpose of administering the *Workers' Compensation Act* and is authorized by the Act. For more information, please contact the WCB ATIP (sic) Coordinator at the appropriate number below

- c) if there was a protocol with respect to copying correspondence to third parties?

The public body takes the position that both a claimant and an employer are parties to a claim for compensation and that an employer is entitled to all non-medical correspondence and, in some cases, to medical information. They point to another of their policies entitled "Access to Information in Claim Files". This policy refers to section 77.1(1), 17(8) and (9); and 19.1(3) of the Worker's Compensation Act.

Section 17(8) and (9) deal with limitation periods and have nothing to do with access to information.

Section 19.1(3) provides that the WCB may provide an employer with information with respect to the worker's progress as reflected in medical reports upon written request.

Section 77.1 is relevant. It provides as follows:

77.1. (1) Any information respecting a worker, a dependant or an employer obtained by a person under this Act is confidential and may only be disclosed under the authority of the Board

- (a) to the persons directly concerned;
- (b) to agencies or departments of the Government of the Northwest Territories, the Government of Canada or the government of a province or territory; or
- (c) in accordance with the *Access to Information and Protection of Privacy Act*.

Based on this, the public body indicates that copying correspondence to a third party would only take place in accordance with the WCA or on the written authorization of the worker.

- d) what precautions are taken to ensure that personal information is not disclosed to third parties without specific authorization, either from the individual or by reason of legislation?

The WCB indicated in its response to me that information on a claim file is considered confidential and only disclosed as outlined above.

- e) whether WCB investigators have training in ATIPP?

The public body replied that its Case Managers are not ATIPP trained but that there is an ATIPP Co-Ordinator through whom access requests and privacy complaints are filtered and who is in a position to provide support and training in this regard. Case Managers are, however, apparently trained to apply the "Access to Information" policy.

- f) whether there are any consents for the use and disclosure of information obtained from a claimant when they make an application for WCB benefits? Was there such a consent signed in this case?

Again, the public body points to their Access to Information Policy and the WCA (although no sections are specified). They state that, other than as permitted therein, there are no circumstances under which a claimant's personal information would be disclosed without consent. They do have a form authorizing the release of information and if there was a need to disclose information for some reason they say they would have the claimant sign this and explain it to them prior to obtaining the signature. They indicated, however, that such a consent was not required in this case as the employers contacted by the WCB were identified by the claimant and are "therefore not considered third parties".

- g) if so, are those consents explained to a claimant and are they given the opportunity to refuse consent and still proceed with their claims?

The WCB indicated that consents are explained to a claimant and the claimant can refuse consent. They go on to say that the impact, if any, of refusal on the claims process would also be explained but point out that such impact would likely be minimal as it is not generally the case that the WCB needs to release a claimant's personal information in order to adjudicate a claim. They gather rather than disclose information about claimants.

- h) whether there is there a limitation within the consents as to what information gathered in the context of a WCB claim can be used for?

The public body says there is no limitation contained in the consents but that the organization complies with section 43 of the ATIPP Act which says that personal information can only be used for the purpose it is collected or a consistent purpose.

- i) whether there is a process for a worker to withdraw a complaint or ask that an investigation stop and, if so, is it possible that further investigation might still proceed, using the complainant's personal information?

The WCB says that a worker may choose to no longer pursue a claim and in order to withdraw their claim need only to advise the WCB of their wishes. They go on, however, to say that the WCB may be obligated to follow up on information provided by the claimant that reveals a safety concern but in these circumstances, the claimant's personal information would not be relevant and would not be shared.

- j) whether there was any other information about the process or this claim in particular that might assist?

The public body says that their file in this case indicates a conversation between the Complainant and a WCB employee describing a misunderstanding about which employers the Complainant was alleging had harassed him. They say that in hindsight, the claimant may not have intended to identify the employers that he did in his claim. Nonetheless, they say, they relied on the claimant's written submission which "clearly identifies" four employers.

The WCB chose not to comment on the Complainant's concern that information about his dispute with WCB personnel was improperly shared with his employer. It is their

position that this is a separate matter which involves allegations that the Complainant had harassed an employee of the WCB, which matter had been turned over to the police. They chose, therefore, not to comment.

The Applicant's Position

The Applicant has a very different perspective from the public body's. It is his position that it was never his intention to make a claim with respect to any employer but the one he was working for in 1999 and that he received no guidance from the WCB as to the process or who might be contacted with respect to his claim. Nor did he feel that it was appropriate for the WCB to send a copy of the letter (July 24th) denying his claim to the Department of Human Resources. He also feels that it was improper to copy correspondence relating to allegations against him that he may have harassed an employee of the WCB to his employer.

DISCUSSION:

1. Did the Workers' Compensation Board improperly disclose the Complainant's personal information when it provided his current employer with information in respect of his claim against a former employer?

Having reviewed all of the documentation provided to me, I am satisfied that the WCB is aware of its duty of confidentiality and its obligations not to use or disclose personal information except in accordance with legislation. That having been said, I am not entirely satisfied that these concepts are fully understood or that the processes in place are sufficient to meet those obligations.

I begin with the 'consent' on the form which worker completes when making a claim under the Act. Firstly, it is not a stand alone consent. It is buried in the middle of a paragraph which starts with a declaration that the information in the document is true and ends with an acknowledgment that it is a criminal offence to file a false claim. One

skimming the document before signing would be justified in assuming that if the first and last sentence of the paragraph deal with the need for truthfulness, the middle sentence is likely to relate to the same issue. Furthermore, unless the claimant signs underneath this paragraph, he cannot make his claim. This means that there is no option to make a claim for compensation without also giving the WCB *carte blanche* to collect information "from any source whatsoever" which is about as widely as such a consent can possibly be worded. Nor are there any flags which suggest to the person signing the document that the paragraph contains a consent in which the person is giving up certain rights.

Secondly, this "consent" is an authorization to collect information, not to use or disclose information. It does not specifically acknowledge that in order to collect information, certain personal information about the claimant will have to be disclosed. This latter may be implied, but is not specifically stated and may not be immediately obvious to someone not familiar with an investigative process. There is clearly a difference between consenting to the collection of information and consenting to the disclosure of information in order to collect that information.

I am also concerned that, at least in this particular case, although the letter of the law may have been complied with, the Case Manager may not have abided with spirit of the law. It does not appear to me, at least from the material I have been provided with, that any effort was made to follow up with the claimant and to clarify the nature of his claim. Where a claim is clear and unambiguous for compensation for a physical injury and there is only one employer involved, it may be sufficient to rely only on the application form. But the application in this case, on its face, was problematic and unclear. Certain assumptions were made which may have been erroneous. Had an effort been made to make contact with the claimant to verify his meaning in the face of the uncertainty, it may be that he could have avoided being embarrassed as he was when other employers were contacted. There is no indication that anyone ever explained to the Complainant in this case what the process was for investigating his claim and it is fairly clear that he was never specifically advised that the WCB would be contacting a

number of his former employers or that those people would be told that he claimed to be suffering from PTSD. Although it is critical to ensure that the medical privacy of individuals is maintained as much as possible, extra cautions should be taken where, as here, the issue is a mental illness or infirmity because this is the kind of information that can lead to discrimination.

I am somewhat surprised that there does not appear to have been any attempt to sit down with the claimant before a full scale investigation was launched in light of the kind of claim that was being made. There were all kinds of indications from the application form alone that the claim would most likely not succeed. For example, the employer with whom the claimant was employed at the time of the alleged incident was under federal jurisdiction so that no compensation could be granted. Furthermore, the claim was made nearly 8 years after the fact and the WCA provides a one year limitation on most claims except in certain narrow circumstances. It seems to me that it would have been prudent in this case to explore these issues with the claimant before contacting any of the former employers. Had the Complainant in this case had all the relevant information before the investigation was launched, he would at least have had the opportunity at that point of withdrawing his claim before any of this personal information was disclosed to anyone else in the investigative process.

2. Once he asked the Workers' Compensation Board to suspend the investigation of his claim, did the Complainant's original consent to collect (and disclose) information in the investigative process expire?

It is very clear that the Complainant in this case asked the WCB to discontinue the investigation of his claim fairly early on in the process. What is not clear is why the investigation appears to have been resumed. The Complainant says that he didn't ask that the investigation be resurrected. There is some indication that there was some verbal communication between the Complainant and his Claims Manager after he requested that the investigation be discontinued. It is possible that there was a misunderstanding between them. There is certainly nothing in the materials that I was

provided with which suggests that there was any written or verbal request from the Complainant to resume the investigation.

For the purpose of this discussion, I will assume that there was no such direction from the Complainant.

The WCB has argued that it has the jurisdiction to continue an investigation even after a worker withdraws a complaint where there are safety concerns, albeit without any specific focus on the individual who made the complaint in the first instance. They have not, however, suggested to me that this is one of those cases. Nor is there anything in the materials to suggest that there might have been such concerns. There is, therefore, no apparent reason the claim might have been investigated further after the Complainant asked that it be suspended.

It seems to me that the spirit and intention of the *Access to Information and Protection of Privacy Act* suggests that if an individual requests that a process for which he/she has given consent to the collection or disclosure of personal information be stopped, by implication the consent attached to the original request is also revoked. Thereafter, the WCB would have no right whatsoever to use or disclose the personal information of the claimant.

In this case, however, it is unclear what, if any contact was made with third parties after the Complainant chose to withdraw his claim. It appears that all of the "collection" of information on this file occurred before he made that request.

3. Did the WCB improperly disclose the Complainant's personal information when they copied information about his troubles with the WCB to the Human Relations office of his current employer, the Government of the Northwest Territories?

The WCB chose not to comment on this issue, even to acknowledge whether they did or did not copy the Complainant's employer on correspondence concerning his

difficulties with the WCB. For the purpose of this discussion, I will assume that the copy was sent.

In my opinion, this should not have happened. The Complainant's difficulties in dealing with the WCB had nothing to do with the substance of his compensation claim. It was an issue between himself and the WCB about behaviour. There was no good reason for correspondence in relation to that issue to be shared with anyone other than the Complainant and, perhaps, law enforcement agencies if the behaviour was such as to merit a criminal investigation. Any consents that might have been given for the purpose of the claim would have no application whatsoever to any other issues which might arise. Nor has the public body suggested any other legislative authorization for the disclosure. In my opinion, section 77.1(b) of the WCA, which authorizes the WCB to disclose "information respecting a worker ...obtained by a person under this Act. ... under the authority of the Boardto agencies or departments of the Government of the Northwest Territories, the Government of Canada or the government of a province or territory" was not meant to apply to information obtained outside of the investigative process of the WCA. In this case, the information which appears to have been shared with the Complainant's employer, a department of the Government of the Northwest Territories, was not obtained "under" the WCA, but as extraneous to the Act.

SUMMARY AND RECOMMENDATIONS

Based on the information I have received, it is my opinion that, although the WCB is aware of its responsibilities under the Act, the application of its own policies and its attention to detail was, at least in this case, seriously lacking.

The consent which claimants sign when making a claim for WCB benefits is not adequate for the purpose of ensuring that individuals are fully aware that their personal information will be disclosed for the purpose of collecting relevant information for the investigation of the claim. The consent should be a "stand alone" consent, preferably witnessed so as to confirm that it is of significant importance and to draw the claimant's

attention to it. Care should be taken to inform the claimant how and how much of his or her personal information will be disclosed in the process of an investigation and to whom the information will be disclosed. The consent should be re-drafted so as to clarify the scope of the consent and make it more focused on information required to complete an investigation rather than the open ended manner in which it is currently worded.

I therefore recommend that the WCB review the 'consent' on the Application for Benefits form, to make it clearer, more focused and more visible and to include a specific acknowledgment that the applicant is aware that his/her information will be used for the purpose of conducting an investigation into the claim and, for that purpose, some personal information will have to be disclosed to employers, medical personnel and other relevant third parties.

I further recommend that all Claims Managers be given basic training with respect to the privacy provisions of the *Access to Information and Protection of Privacy Act* so as to ensure that they fully understand their obligations to maintain the confidentiality of the personal information of claimants and others. These individuals appear to be privy to a significant amount of sensitive personal information and it is important that they fully understand their obligations in handling this information.

I further recommend that policies be created and adopted to require Case Managers to consult directly with the claimant before conducting an investigation to clarify any issues which appear to need clarification, such as the identity of the employer with whom the complainant was working at the time of the incident leading to the claim. Had that been done in this case, the matter could have been dealt with without involving any employer but for the original employer.

Finally, I am concerned about the fact that it appears that the personal information of the Complainant in connection with matters that had nothing whatsoever to do with his claim for WCB benefits were shared with his current employer. That should, most

emphatically, not have happened. Unfortunately, information, once disclosed, cannot be taken back. To the extent, however, that it is in the power of the WCB to do so, I **recommend** that the WCB make all effort possible to recover the information about the Complainant's dispute with the WCB from the Complainant's employer, and should attempt to mitigate, as far as possible, any fallout as a result of the inappropriate sharing of information. A letter should be written to the employer indicating that the information in question was improperly shared and should be returned and any record of it be expunged from the Complainant's record and should request that the employer provide a response indicating what steps have been taken by it. The Complainant should, of course, receive a copy of any such correspondence.

Elaine Keenan Bengts
Information and Privacy Commissioner