

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-78

December 20, 2018

WORKERS' COMPENSATION BOARD

Case File Number 000577

Office URL: www.oipc.ab.ca

Summary: An individual had an ongoing claim with the Workers' Compensation Board (the Public Body) under the *Workers' Compensation Act* (the "WCA") relating to a workplace injury. The Applicant made a correction request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Public Body to correct a document by obtaining "accurate and complete changed conclusions". The Public Body refused to correct the information in the manner requested by the Applicant.

The Applicant requested a review of the Public Body's response and subsequently an inquiry. In addition to the Public Body's response to the correction request, the inquiry considers whether the Public Body used the information to make a decision about the Applicant and if so, whether it made every reasonable effort to ensure the accuracy and completeness of the information (section 35(a)).

The Adjudicator determined that the Public Body met its duty to make every reasonable effort to ensure the personal information was accurate and complete, as required by section 35(a) of the Act. The Adjudicator also found that the Public Body responded properly to the Applicant's request for correction of his personal information (as contained in the doctor's report) under section 36 of the Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 35, 36, 72.

Authorities Cited: AB: Orders H2004-004, H2005-006, F2006-018, F2011-017, F2013-04, F2017-39.

I. BACKGROUND

[para 1] An individual had an ongoing claim with the Workers' Compensation Board (the Public Body) under the *Workers' Compensation Act* (the WCA) relating to a workplace injury.

[para 2] In response to a request by the WCB, a doctor produced a report entitled Independent Examination File Review with respect to the Applicant's file. The Public Body's submissions have referred to this as an IME and for consistency that is how I will refer to it in this Order.

[para 3] The Applicant disagreed with some of the information in the IME. Further to correspondence from the WCB about these concerns, the doctor issued an Addendum two weeks after the IME was written, acknowledging a factual error. In this Addendum, the doctor stated that the factual error would change the conclusions in the IME. The doctor then provided further steps that, in his opinion, should be taken to assess the Applicant.

[para 4] The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), asking that the Public Body correct the IME by obtaining the "accurate and complete changed conclusions" referred to by the doctor, but the Public Body denied this request.

[para 5] In its submissions, the Public Body provided copies of the IME and Addendum. These copies show annotations made in October 2014, in response to previous correction requests by the Applicant.

[para 6] On March 20, 2015, the Applicant submitted a Request for Review of the Public Body's response to his correction request. An investigation was conducted but did not resolve the issues between the parties. Subsequently, the Commissioner agreed to conduct an inquiry into the matter.

II. ISSUES

[para 7] The Notice of Inquiry sent March 13, 2018 lists the issues as follows:

1. Did the Public Body use or intend to use the Applicant's personal information (as contained in the doctor's report) to make a decision directly affecting him? If yes, did the Public Body make every reasonable effort to ensure the personal information was accurate and complete, as required by section 35(a) of the Act?
2. Did the Public Body respond properly to the Applicant's request for correction of his personal information (as contained in the doctor's report) under section 36 of the Act (right to request correction of personal information)?

III. DISCUSSION OF ISSUES

1. Did the Public Body use or intend to use the Applicant's personal information (as contained in the doctor's report) to make a decision directly affecting him? If yes, did the Public Body make every reasonable effort to ensure the personal information was accurate and complete, as required by section 35(a) of the Act?

[para 8] Section 35(a) of the Act states:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete...

[para 9] In order for section 35(a) of the Act to apply, the Applicant's personal information must have been used to make a decision that directly affected him.

Is the information at issue the Applicant's personal information?

[para 10] The Public Body argues that the information in the Addendum, dated September 28, 2012, is not the Applicant's personal information. Therefore, sections 35 and 36 do not apply.

[para 11] The Addendum states that the doctor performed a chart review of the Applicant's chart. The doctor notes that a typographical error on the chart was brought to his attention; the error relates to the weight of a piece of machinery. The doctor notes that this error would definitely change the conclusions in his report. He then recommends next steps for assessing the Applicant.

[para 12] Were the Applicant's name removed from the Addendum, the remaining information might be unidentifiable. Perhaps this is why the Public Body argues that the information in the Addendum is not the Applicant's personal information.

[para 13] However, to suggest that an Addendum to a chart review relating to a particular patient/claimant is not that patient/claimant's personal information and the Public Body has no duty to ensure accuracy of the information in a patient/claimant's file is erroneous. The weight of an item of machinery is not, absent context, information about the Applicant. However, in the context of the Applicant's claim, the weight of the machinery is clearly relevant to the Applicant's claim, as the doctor stated the weight would directly affect his assessment. Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are personal information about an individual.

[para 14] Clearly the information in the Applicant's claim file relating to medical chart reviews is the Applicant's personal information.

Did the Public Body use or intend to use the Applicant's personal information (as contained in the doctor's report) to make a decision directly affecting him?

[para 15] The IME was created by a doctor at the request of the Public Body, in order to help make a determination about the Applicant's claim.

[para 16] The Public Body argues that the doctor performing the IME did not make any decisions about the Applicant as a claimant, and therefore section 35(a) does not apply to his opinion. It cites paragraph 71 of Order F2011-017 in support of its position, which states:

The conclusions set out in the doctor's IME report of October 29, 2008 also did not amount to a decision of the Public Body under section 35(a). The conclusions were not a decision at all, but rather an opinion. The doctor's views may have been used, in part, to make a decision by Great West Life, but the doctor himself made no decision affecting the Applicant.

[para 17] In the case cited above, an individual was employed by a public body; that public body offered its employees benefits administered by Great West Life. The adjudicator's point in the paragraph above, is that the decision made about long-term disability benefits was made by Great West Life as the benefit provider; it was not a decision of the public body (or the doctor).

[para 18] This case is clearly distinguishable. Here, it is the Public Body that makes decisions about the benefits provided to the Applicant as a claimant. Section 35(a) requires the Public Body to make every reasonable effort to ensure the information upon which it makes its decisions is accurate and complete. The Public Body's arguments seem to suggest that it has no duty to ensure that information contained in expert opinions is accurate and complete because the expert giving the opinion is not making the decision. The Public Body's point that the doctor was not making a decision about the Applicant means only that the doctor does not have a duty under section 35(a) to ensure that the information was accurate and complete. The Public Body was making a decision about the Applicant so it has this duty under section 35(a).

[para 19] It is not clear whether the Public Body will use *this* IME and Addendum in making determinations about the Applicant's claim. In my view, this is not the standard for section 35(a). The Applicant's claim file contains information that will be used to make determinations about his claim. The duty in section 35(a) to ensure that information in the claim file is accurate and complete applies to all the information on the file. It cannot apply piecemeal to only information that has already been used or that the Public Body believes will be used in the future to make determinations about the claimant.

[para 20] It is questionable to what extent a professional or expert opinion, such as the doctor's opinion in the IME and Addendum, can be characterized as inaccurate or

incomplete. As noted by former Commissioner Work in Order H2004-006, “a professional opinion or observation does not go to the truth of its contents, but rather to the impressions, perceptions, views and understandings of the author” (at para. 64). Although this comment was made in reference to the *Health Information Act*, I find it equally true of opinions under the FOIP Act. It is also consistent with Order F2011-17, in which the adjudicator found that a physician’s opinion on a matter was “accurate in the sense that it was indeed the doctor’s opinion” (at para. 91).

[para 21] Nevertheless, the doctor’s opinion was based in part upon erroneous factual information provided to him by the Public Body. This factual information was compiled by the Public Body and provided to the doctor for the IME. The purpose of the IME was to help the Public Body make a decision about the Applicant’s claim. Therefore, the Public Body had a duty to ensure that factual information was accurate. Once the Public Body noticed that the IME was partly based on erroneous facts, the Public Body had a duty to under section 35(a) with respect to that information.

Did the Public Body make every reasonable effort to ensure the personal information was accurate and complete, as required by section 35(a) of the Act?

[para 22] The Applicant provided me with a copy of a letter from a clinical consultant with the Public Body to the doctor who performed the IME. In this letter, the clinical consultant states that the Applicant’s worker representative identified the typographical error, and asked the doctor if this error would change the doctor’s opinion. The Public Body then obtained the Addendum which ‘corrected’ the doctor’s conclusions. This Addendum is on the Applicant’s file, with the initial IME.

[para 23] “Every reasonable effort” has been interpreted by this Office to mean:

Every reasonable effort is an effort which a fair and rational person would expect to be done or would find acceptable; the use of “every” indicates that a public body’s efforts are to be thorough and comprehensive and that it should explore all avenues in verifying the accuracy and completeness of the personal information. (See Orders F2006-018 at para 111 and F2017-39)

[para 24] The Applicant’s initial submission seems to indicate that he believes the Public Body did not provide the IME doctor with accurate and complete information about the Applicant, in order for the IME doctor to complete an assessment. It seems clear from the typographical error that was later identified, that the Public Body did not provide entirely accurate information to the doctor at the outset.

[para 25] The Applicant’s worker representative noticed the error in his file; the Public Body then took steps to clarify the factual information with the doctor, and requested an Addendum to his opinion. These are reasonable steps taken by the Public Body to ensure that the factual information was accurate. The fact that a typographical error was made does not necessarily mean that reasonable efforts weren’t made to ensure accuracy. Identifying an error and taking steps to ensure that information and/or opinions based on that error are amended as required, fulfills the duty in section 35(a) in this case.

[para 26] The Applicant states that the Public Body should have undertaken a new IME rather than asking for an addendum from the IME doctor once the factual error was noted. He also argues that the Public Body should have waited until it had further medical information from his treating physicians before requesting a new IME.

[para 27] How the Public Body processes and adjudicates claims is outside my jurisdiction. The Public Body took reasonable steps to ensure that the doctor's opinion on the Applicant's file was amended once it identified the typographical error. Removing the initial IME rather than obtaining an addendum is a decision for the Public Body to make; it is not required by section 35(a).

[para 28] The Public Body also states that it cannot remove the IME and Addendum from the Applicant's file. It states (initial submission, at page 8):

Since so much correspondence has been directed at the content of [Dr. N's] IME and various versions of the consultation requests, it is impossible to remove any of the documents from the claim file.

[para 29] The Public Body is essentially stating that the IME and Addendum must remain on the Applicant's file to maintain its "completeness." I accept this argument. To do otherwise might destroy the historical record.

[para 30] Information on a file that is inaccurate or ought not to be relied on for any other reason, yet cannot be removed, must be flagged as such on the record. If this is not done it is reasonably foreseeable that such erroneous or unreliable information could be used to make a decision about a claimant in the future. Correcting, flagging or annotating the erroneous or unreliable information would generally satisfy the requirement in section 35(a). As stated, it is my view that the actions taken by the Public Body to inform the doctor of the factual error and obtain the Addendum to the IME fulfills its duty under section 35(a).

2. Did the Public Body respond properly to the Applicant's request for correction of his personal information (as contained in the doctor's report) under section 36 of the Act (right to request correction of personal information)?

[para 31] Section 36 of the Act states:

36(1) An individual who believes there is an error or omission in the individual's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) Despite subsection (1), the head of a public body must not correct an opinion, including a professional or expert opinion.

(3) If no correction is made in response to a request under subsection (1), or if because of subsection (2) no correction may be made, the head of the public body must annotate or

link the personal information with that part of the requested correction that is relevant and material to the record in question.

(4) On correcting, annotating or linking personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year before the correction was requested that a correction, annotation or linkage has been made.

(5) Despite subsection (4), the head of a public body may dispense with notifying any other public body or third party that a correction, annotation or linkage has been made if

(a) in the opinion of the head of the public body, the correction, annotation or linkage is not material, and

(b) the individual who requested the correction is advised and agrees in writing that notification is not necessary.

(6) On being notified under subsection (4) of a correction, annotation or linkage of personal information, a public body must make the correction, annotation or linkage on any record of that information in its custody or under its control.

(7) Within 30 days after the request under subsection (1) is received, the head of the public body must give written notice to the individual that

(a) the correction has been made, or

(b) an annotation or linkage has been made pursuant to subsection (3).

(8) Section 14 applies to the period set out in subsection (7).

[para 32] The initial burden of proof lies with the Applicant to show that section 36 of the Act is engaged. Two requirements must be met in order for section 36 of the Act to apply:

1. There must be personal information about an applicant; and
2. There must be an error or omission in the applicant's personal information.

[para 33] If these two pre-requisites are met, the burden then shifts to the public body to show why it did not correct the information and instead chose to annotate or link the personal information to the requested correction (see Order F2013-04 at para 14).

[para 34] The Public Body has argued that the Addendum does not contain the Applicant's personal information and I have already rejected this argument.

[para 35] The Public Body states that the factual information (the weight of the piece of machinery) has been already been corrected in his file. It also argues that the Applicant's request is not a correction request within the terms of section 36. This is because the Public Body characterized Applicant's request as a request to 'correct' a

medical opinion that had been sought by the Public Body in relation to the Applicant's claim. In its March 12, 2015 response to the Applicant, the Public Body told him:

The FOIP Act is not intended to be used by individuals to thwart processes established by public bodies to fulfill their legislative mandate or to be used as a means for attempting to revisit decisions, opinions or actions taken by a public body, with which an individual does not agree.

[para 36] The Applicant's correction request notes the error identified in the Addendum and the statement from the doctor that the error would "definitely change" his opinion. The Applicant then asks the Public Body to request the doctor's "accurate and complete changed conclusions." He is concerned that if the doctor's initial IME remains on his claim file, then the Public Body will be adjudicating his claim based on inaccurate and misleading information.

[para 37] Section 36(2) of the Act states that a public body cannot correct an opinion, including a professional or expert opinion. "Opinion" means a belief or assessment based on grounds short of proof, a view held as probable; "professional" means relating to or belonging to a profession (Order H2004-004). "Observation" means a comment based on something one has seen, heard, or noticed, and the action or process of closely observing or monitoring (Order H2004-004). Although these precedents relate to Orders under the *Health Information Act*, I find them to be applicable under the FOIP Act. They are also consistent with Orders F2013-04 and F2017-37, which found that information having a subjective or evaluative component may be an opinion and not subject to correction under section 36 of the FOIP Act.

[para 38] The majority of the IME contains the doctor's evaluation of the Applicant's file, and his opinion about the Applicant's injury. This falls within the scope of a professional or expert opinion.

[para 39] Because the error in the Applicant's file was factual, and that factual error found its way into the IME, there is a duty to correct that factual error. In this case, the Public Body has corrected the factual error.

[para 40] It seems that the Applicant is not asking for the doctor's opinion to be 'corrected'. Rather, he is asking that the initial IME be removed altogether, and be replaced with a new assessment by the same doctor.

[para 41] As discussed in the section of this Order addressing section 35(a), the Public Body has explained that it cannot remove the IME or Addendum from the Applicant's file, because of the amount of correspondence on the file referring to or relating to these records. I have accepted this explanation.

[para 42] The factual error in the doctor's IME was corrected via the Addendum. While his opinion in the initial IME remains on the Applicant's file, the opinion has effectively been amended by the Addendum. The Public Body is not required to remove an opinion that was based on erroneous factual information, if the factual error can be

identified another way, as it was in this case. The Public Body also annotated both the initial IME and the Addendum on October 17, 2014, in response to previous correction requests from the Applicant. The Public Body provided me with a copy of the annotated records.

[para 43] I find that the Public Body has fulfilled its duty under section 36 of the FOIP Act.

IV. ORDER

[para 44] I make this Order under section 72 of the Act.

[para 45] I find that the Public Body fulfilled its duty under sections 35(a) and 36 of the FOIP Act.

Amanda Swanek
Adjudicator