

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-79

December 20, 2018

WORKERS' COMPENSATION BOARD

Case File Number 000738

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. For the purpose of requesting an Independent Examination File Review from a physiatrist, the Public Body created a Consultation Request – a 10-page summary of the contents of the Complainant's file. It provided this document to the doctor.

The Complainant complains that this Consultation Request contained inaccurate and irrelevant information that should not have been provided to the doctor, and that it was inappropriate to provide a summary where this could have the effect that the requested File Review report would not be based on a complete file review.

The Complainant also says the Public Body's responses failed to meet its duty to assist him.

The Adjudicator determined that the Public Body had authority to disclose the Complainant's personal information to the doctor, and that the Public Body did not fail to ensure the accuracy and completeness of information as required by section 35(a).

The Adjudicator did not make a finding as to whether section 10(1) applies to complaints or requests made under Part 2 of the Act, but noted if it does apply, the Public Body's responses to the Complainant were open, accurate and complete.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 35, 39, 40, 72, *Workers' Compensation Act* R.S.A. 2000, c. W-15, s. 13.3.

Authorities Cited: AB: Orders 2001-004, F2006-018, F2008-029, F2011-017, F2013-55, F2017-39, F2018-59, F2018-78.

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] For the purpose of requesting an Independent Examination File Review from a physiatrist, the Public Body created a Consultation Request – a 10-page summary of the contents of the Complainant's file. It provided this document to the doctor.

[para 3] The Complainant complains that this information contained what he refers to as 'nonmedical' information that is inaccurate and irrelevant, and should not have been provided to the doctor, and that it was inappropriate to provide a summary where this could have the effect that the requested File Review report would not be based on a complete file review.

[para 4] The Complainant also says the Public Body failed to meet its duty to assist him when it referred him to the Ombudsman, as well as by reference to the manner in which it responded to his correction requests (the request to correct the doctor's report is addressed in companion File #000577 (Order F2018-78)).

[para 5] This Office received a complaint from the Complainant on April 13, 2015, to review the Public Body's actions and decisions. A request for inquiry was received on July 7, 2016.

II. ISSUES

[para 6] The Notice of Inquiry sent March 13, 2018 lists the issues as follows:

1. Did the Public Body use and/or disclose the Complainant's personal information? If yes, did it have authority to do so under sections 39(1) and 39(4) and/ or sections 40(1) and 40(4) of the FOIP Act?

Whether there was a disclosure requires a consideration of the relationship between the WCB and Independent Examiners.

2. Did the Public Body use or intend to use the Complainant's personal information 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)?

3. Did the Public Body meet its duty to the Complainant as provided by section 10(1) of the Act (duty to assist applicants)?

This issue raises, among other questions, whether section 10 (which is found in Part 1 of the Act) applies to complaints under Part 2 of the Act, and to the duty to ensure accuracy, and to requests for correction, also contained in Part 2.

III. DISCUSSION OF ISSUES

- 1. Did the Public Body use and/or disclose the Complainant's personal information? If yes, did it have authority to do so under sections 39(1) and 39(4) and/ or sections 40(1) and 40(4) of the FOIP Act?**

[para 7] The Public Body has stated in its submission that the Appeals Commission directed the Public Body to obtain additional medical reporting from the Complainant's treating practitioners and submit all medical reporting of the Complainant to an appropriate specialist asking specified questions. The Appeals Commission directed that the medical specialist should undertake any additional investigation required. The Public Body was to then make a new decision regarding the Complainant's claim (submission at para. 6).

[para 8] The Public Body states that it obtained additional medical reporting from several physicians. The Public Body further states (at paras. 10-11):

Medical reporting was received on the claim file from [Dr. A] on April 16, 2012, and June 27, 2012 (reporting dated 1990, 1991, 1992, 1993 and 2007), [Dr. R] confirmed on May 31, 2012, that he did not have records, and [Dr. K's] reporting was received June 21, 2012.

On July 19, 2012, a file note was placed on [the Complainant's] claim file indicating that the Complainant's Representative and the Claim Owner agreed that WCB had attempted to collect all of the outstanding medical reporting.

[para 9] The Public Body states that WCB Business Procedure 40.3 outlines the process for making a referral for an Independent Medical Examination (IME). This procedure includes providing the examiner with a Consultation Request prepared by a WCB Clinical Consultant. It states that the Consultation Request was prepared, and provided to Dr. N, a specialist in psychiatry in July 2012. Dr. N provided his report to the WCB in September 2012.

Did the Public Body use or disclose the Complainant's personal information when it provided the Consultation Request to Dr. N?

[para 10] This question depends on the relationship between the Public Body and Dr. N. The Public Body states that Dr. N is a physician in a private practice and has a contract with the Public Body to conduct IMEs. It cites Order F2013-55 in which it was found that providing personal information to Public Body medical consultants is a use of that information, rather than a disclosure. In that Order, it was argued that medical consultants are “contracted employees of the WCB and have the same legislated authority, and are subject to the same responsibilities, as any staff member of the WCB, in regards to the handling of personal information” (at para. 15).

[para 11] In that Order, I accepted the Public Body's argument that medical consultants were performing duties of the Public Body. In making this determination, I noted that memos of the medical consultants were on WCB letterhead.

[para 12] In this case, the fact that Dr. N was providing an *Independent Medical Examination* indicates that he was not performing the duties of the Public Body but was providing services to the Public Body, as an independent expert. Further, his IME and Addendum are not written on WCB letterhead. I find that the Public Body disclosed (rather than used) the Complainant's personal information when it provided the Consultation Request to Dr. N.

Did the Public Body have authority to disclose the Complainant's personal information to Dr. N?

[para 13] The Public Body cites sections 40(1)(c), (e), (f), (h) and (l) as authority to disclose the Complainant's personal information to Dr. N. These provisions, along with section 40(4), state:

40(1) A public body may disclose personal information only

...

(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

...

(e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada,

...

(f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,

...

(h) to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member,

...

(l) for the purpose of determining or verifying an individual's suitability or eligibility for a program or benefit,

...

(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 14] As noted above, the Public Body has stated in its submission that the Appeals Commission directed the Public Body to obtain additional medical reporting from the Complainant's treating practitioners and submit all medical reporting of the Complainant to an appropriate specialist asking specified questions. The Appeals Commission directed that the medical specialist should undertake any additional investigation required. The Public Body was to then make a new decision regarding the Complainant's claim (submission at para. 6).

[para 15] The Public Body states that Dr. N was asked to perform a documentary IME, in accordance with the Appeals Commission's direction, and to assist the Public Body in coming to a determination regarding the Complainant's claim. As noted by the Public Body, section 13.3(1) of the *Workers' Compensation Act* (WCA) requires the Public Body to implement decisions of the Appeals Commission.

[para 16] It further states (at pages 7 and 8-9):

The Consultation Request accompanies the Medical Information Package that is given to the physician for review. The Medical Information Package consists of all claim file records that may be pertinent to the examination.

...

Determinations regarding medical aid cannot be made without sufficient information. In this case, providing the relevant claim and health information to [Dr. N], the examiner, was necessary in order for him to provide his opinion to the WCB as required by the direction given by the Appeals Commission.

[para 17] The Public Body argued that the information on the claim file was collected and compiled in order to make a determination about the Complainant's claim. I accept the Public Body's argument that it disclosed information to Dr. N in order to obtain an opinion regarding the Complainant's injury, as directed by the Appeals Commission. There is no indication from the Consultation Request or the submissions to this inquiry that the disclosure was made for any other purpose than obtaining the opinion.

[para 18] The medical opinion was obtained in order to make a new determination regarding the Complainant's claim. This is the same purpose for which the information was collected. Therefore, the disclosure was authorized under section 40(1)(c) of the Act.

Did the Public Body disclose the Complainant's personal information only to the extent necessary as required by section 40(4)?

[para 19] Section 40(4) limits a public body's disclosure to what is necessary to meet the purpose of the disclosure. The meaning of "necessary" in this provision has been interpreted in past Orders of this Office; it does not mean 'indispensable'.

[para 20] In Order F2008-029 the adjudicator determined that a disclosure was necessary insofar as it permitted the public body “a means by which they may achieve their objectives... that would be unavailable without [the disclosure]” (at para. 51).

[para 21] The Public Body has argued (at page 10) that “providing the psychosocial information on the claim file provides context and insight on the relationship between [the Complainant’s] ongoing pain symptoms and the original work injury.” It states that some of the interactions between the Complainant and Public Body have been “fraught with emotion” and may have had an adverse effect on the Complainant’s ability to cope with his injury. Therefore, it determined it was appropriate to include “claim related” information in the Consultation Request.

[para 22] The Public Body then went on to address some of the specific examples of information the Complainant argued ought not to have been included in the Consultation Request. It states that information about prior related claims is relevant because it provides information about the duration of the Complainant’s injury.

[para 23] The Public Body said that it included information about the Complainant’s employer and working conditions as they “provide context and insight on the relationship between [the Complainant’s] ongoing pain symptoms and the original work injury” (at page 11).

[para 24] The Complainant stated that a letter, related to a denial by the Public Body of a claim made by the Complainant relating to his injury, was referred to in the Consultation Request. He argues that it should not have been relevant because the letter was no longer in the possession of the Public Body. The Public Body noted that there is sufficient documentation about the letter (and contents) to verify that it did exist even if it has not been retained.

[para 25] The Complainant also objected to the inclusion of information in the Consultation Request about his claim, including the processing of his claim, decisions made on his claim at various points, and work history. The Public Body states that this information is relevant because it provides insight into the Complainant’s pain symptoms and state of mind.

[para 26] The Complainant objected to the inclusion of a memo that he says is inaccurate. The Public Body states that this memo was annotated in 2014 as a result of a correction request made by the Complainant. The Consultation Request occurred in 2012, before the correction request; the Public Body states that, in any event, it does not consider the information in the memo to be inaccurate. The accuracy of the memo is not an issue in this inquiry.

[para 27] The Complainant has objected that a number of procedures of the Public Body were not followed in his case. I do not have the requisite expertise to evaluate

whether the Public Body followed its own procedures properly; nor do I have jurisdiction to review such matters.

[para 28] The Complainant also provided a copy of an email between Public Body employees regarding another IME to occur in 2015. The email states that the file summary created for the IME doctor should “simply reference all the medical reporting on this claim as well as [the Complainant’s] other claims” (email attached as page 6 of initial submission). Having reviewed this correspondence I do not give it any weight as evidence supporting the Complainant’s argument that the Public Body included more information in the 2012 Consultation Request than it was authorized to do. That one Public Body employee directed another Public Body employee to limit the personal information in a later consultation request is not an admission or evidence that too much information was included in a previous consultation request.

[para 29] In Order F2018-59, I found that a public body did not disclose more personal information than necessary in its submission to an administrative tribunal, even though the tribunal appeared not to have relied on the particular information being complained about. In that case, the public body argued that it when it compiled its submission, it did not know for certain what information the tribunal would rely on for its decision. It argued that the information disclosed in its submission all had a logical connection to the matters considered by the tribunal. I accepted this argument; that the information was not ultimately used by the tribunal was not relevant to the determination under section 40(4).

[para 30] Previous Orders have also stated that deference must be given to those in the Public Body making determinations about a claimant’s eligibility for compensation (see Orders 2001-004, F2013-55). This deference extends to determining what information to disclose to an examining physician in order to obtain an opinion.

[para 31] In this case, I accept the Public Body’s explanation for disclosures of the Complainant’s information to Dr. N. Nothing in the submission or the Consultation Request indicates that the Clinical Consultant disclosed information for purposes other than as necessary to help Dr. N form an opinion as to the Complainant’s injury and abilities. All of the information related to the Complainant’s claim, even if not all of the information was medical information. I accept that the information in the Consultation Request all had a logical connection to the request for a medical opinion.

[para 32] I find that the Public Body did not disclose more personal information than necessary for its stated purpose.

2. Did the Public Body use or intend to use the Complainant’s personal information 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 33] 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 34] In order for section 35(a) of the Act to apply, the Complainant's personal information must have been used to make a decision that directly affected him. In this case, the Complainant's personal information is being used to make decisions about his claim.

[para 35] "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 36] The Public Body argues that the doctor performing the IME did not make any decisions about the Complainant 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 37] 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.

[para 38] This case is different. Here, it is the Public Body that makes decisions about the benefits provided to the Complainant 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 provided to an expert to obtain an opinion is accurate and complete because the expert giving the opinion is not making the decision. The fact that the doctor was not making a decision about the Complainant 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 has this duty under section 35(a) when it makes decisions about the Complainant's claim.

[para 39] That said, section 35(a) does not mean that a public body cannot obtain a limited opinion based on a subset of information in a file. The adjudicator in Order F2011-017 also discussed a situation in which the applicant felt that a consulting doctor was not given sufficient information from the public body to form an accurate opinion. The adjudicator observed that “none of the foregoing renders the doctor’s opinion regarding the Applicant’s ability to travel inaccurate or incomplete. His opinion was based on a limited set of information, but the Public Body was aware of what the opinion was and was not based on” (at para 91).

[para 40] I agree with this observation; section 35(a) of the FOIP Act is not meant to prohibit a public body from obtaining a limited opinion based on limited information.

[para 41] The Complainant’s argument in this case is that the Public Body did not provide *complete* information to Dr. N. He argues that the Consultation Request is not complete and that his complete medical file was not provided to Dr. N. He also argues that a Consultation Request ought to be a summary of medical information on the file but that the intent of the Consultation Request sent to Dr. N was “to provide a summary of what the Registered Nurse feels is relevant and to misrepresent the facts and avoid providing the actual documents or to prevent the examiner of reviewing the actual facts in the file” (submission at page 2).

[para 42] The Public Body states (submission, at pages 16-17):

...it is important to note the Consultation Report is a summary of relevant medical and claim information on the claim file. The Clinical Consultant decides what information is recorded in the Consultation Request document based on their professional opinion and expertise. The report is not an all-inclusive index and is not intended to be a complete summary of the file. The examiner is provided with a Medical Information Package and is instructed and expected to refer to the actual documents for further details. The Consultation Request is prepared in order to provide the physician with a brief overview of the file and reference points to documents they may want to view within the Medical Information Package which is provided to the examiner at the time of examination.

[para 43] The Public Body further states that contrary to the Complainant’s argument, Dr. N had access to the Complainant’s complete file. It states that Dr. N conducted his review at the Public Body premises and was provided with a copy of the Complainant’s paper file as well as the more current electronic claim file.

[para 44] The Complainant seems to object to the process outlined by the Public Body (excerpted above) on the grounds that there is no assurance that the examining physician will review the entire medical file. It is the examining physician’s decision what information is necessary to form an opinion. This is not a matter that I have jurisdiction to review.

[para 45] Given the foregoing, I find that the Public Body did not fail in its duty to make every reasonable effort to ensure the Complainant’s personal information was accurate and complete.

3. Did the Public Body meet its duty to the Complainant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 46] This provision states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 47] The Notice of Inquiry states:

This issue raises, among other questions, whether section 10 (which is found in Part I of the Act) applies to complaints under Part 2 of the Act, and to the duty to ensure accuracy, and to requests for correction, also contained in Part 2.

[para 48] The Public Body states that it “is of the opinion that there is a general duty to assist applicants and complainants in all matters related to the *FOIP Act*” (submission at page 21).

[para 49] Section 10(1) relates to a public body’s response to an applicant making an access request under section 6 of the Act. It is not clear to me that this provision applies to correction requests or complaints under Part 2 of the Act, which refer to “individuals” and not “applicants”. Nevertheless, for the reasons provided below, even if this duty in section 10(1) does apply, the Public Body did not fail to fulfil the duty.

[para 50] The Public Body states that it “processed the various correction requests submitted by [the Complainant], under the FOIP Act, within the legislated time frames... In many of the requests for correction to his personal information, [the Complainant] included concerns related to administrative process and the adjudication of his claim that would not be appropriate for the FOIP Office to address” (submission, at page 21). In these cases, the Public Body referred the Complainant to the Ombudsman or this Office as appropriate.

[para 51] The Complainant states that the Public Body failed in its duty to assist when it referred him to the Ombudsman’s Office in response to his requests and inquiries to the Public Body. He argues that his requests for correction (including addressing omissions on his file) are issues under the FOIP Act. He disagrees that his requests relate to the adjudication of his claim.

[para 52] I have reviewed the correspondence provided to me by the Public Body addressing the Complainant’s various correction requests. If section 10(1) applies in this case, there is no indication that the Public Body has not made every reasonable effort to respond to the Complainant openly, accurately and completely. The Complainant’s submissions to this inquiry show that he is, at times, not clear about what falls within the scope of a correction request under the FOIP Act and what amounts to a request to change a decision on his claim (i.e. an administrative or adjudicative matter). It was not inappropriate for the Public Body to direct the Complainant to the Ombudsman in cases

where the corrections being requested were not the type of corrections that fall under section 36 of the FOIP Act. This direction by the Public Body was not made in lieu of responding to the correction requests within the scope of the FOIP Act, nor was it made in lieu of notifying the Complainant that he could request a review from this Office.

IV. ORDER

[para 53] I make this Order under section 72 of the Act.

[para 54] I find that the Public Body had authority to disclose the Complainant's personal information under the FOIP Act.

[para 55] I find that the Public Body did not fail in its duty to make every reasonable effort to ensure the Complainant's personal information was accurate and complete.

[para 56] I find that the Public Body did not fail to fulfil its duties under sections 10(1) and 35(a) the FOIP Act.

Amanda Swanek
Adjudicator