OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F10-17

WORKSAFEBC

Jay Fedorak, Adjudicator

May 27, 2010

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Summary: A complainant requested a review of her income calculation that WorkSafeBC used to determine her benefit level for her accident claim. As part of the review process, WorkSafeBC disclosed her file to her employer, including three psychological reports. The complainant submitted that this contravened s. 33.1 of FIPPA because the reports did not relate to review of the income calculation matter. Disclosure was in compliance with s. 3(2) of FIPPA, which states that FIPPA does not limit information available by law to a party to a proceeding. The claim review process is a proceeding for s. 3(2) purposes, the employer was a party to that proceeding and s. 96.2(6) of the WCA required disclosure of records relating to the matter under review, which matter consists of the entire claim file.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 3(2); *Workers Compensation Act*, s. 96.2(6).

Authorities Considered: B.C.: Investigation Report P96-006; Office of the Ombudsperson *Public Report No.7* July 1987; Workers' Compensation System Study.

Cases Considered: *Napoli and Workers' Compensation Board*, (1981) 126 D.L.R. (3d) 179 (B.C.C.A), *Candeloro v. British Columbia (WCB)*, [1988] B.C.J. No. 1574 (B.C.S.C.); *Brand v. British Columbia (WCB),* (1993) 32 Admin. L.R. (2d) 89 (B.C.S.C.).

1.0 INTRODUCTION

[1] The complainant, a former tour guide, applied for compensation for personal injuries sustained in a work-related motor vehicle accident involving a tour bus on which she was working. WorkSafeBC accepted the claim and calculated a benefit for her. The complainant accepted WorkSafeBC's decision,

disagreeing only with the wage rate that WorkSafeBC set for the claim. She filed a request for review with WorkSafeBC's Review Division on the narrow issue of whether tips and commissions should be included in the calculation of her income.

[2] WorkSafeBC invited the employer to participate in the review, but it declined. However, the complainant was not satisfied with the results of the review and made a second request for review by the Review Division, again on the issue of the calculation of her income. This time the employer decided to participate. As part of the Review Division process, WorkSafeBC provided the employer with the complainant's full claim file, including three psychological reports containing what the complainant considered to be highly sensitive personal information. The complainant made a formal complaint to the Office of the Information and Privacy Commissioner ("OIPC") under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") that WorkSafeBC had improperly disclosed the psychological reports to her employer. She felt that the reports were unrelated to the issue raised by her review, which was whether tips and commissions should be included with salary in the calculation of her benefits.

[3] Mediation failed to resolve the matter, and it was referred to a written hearing under FIPPA. The OIPC sent the Notice of Written Hearing to the complainant and WorkSafeBC. The OIPC also invited three intervenors to participate in the hearing: the Workers' Compensation Appeal Tribunal ("WCAT"), the Employers' Advisers Office ("Employers' Advisers") and the Workers' Advisers Office ("Workers' Advisers"), the latter two of which are part of the Ministry of Labour. The Workers' Advisers and Employers' Advisers assist the parties involved in WorkSafeBC's adjudication processes. WCAT hears appeals of WorkSafeBC review decisions, in accordance with which it receives disclosure of records from WorkSafeBC. The collection, use or disclosure of personal information by WCAT is not at issue in this hearing.

2.0 ISSUE

[4] Originally, the only issue in this hearing was whether s. 33.1(1)(c) of FIPPA authorized WorkSafeBC to disclose the complainant's psychological reports to her employer as part of the WorkSafeBC review process. However, during the course of the hearing a preliminary or threshold issue arose as to whether the disclosure of the information was authorized by s. 3(2) of FIPPA.

3.0 DISCUSSION

[5] **3.1 Preliminary Issue**—In its initial submissions, WorkSafeBC argued that the OIPC has no jurisdiction over this matter and effectively maintained that the OIPC is bound by Commissioner Flaherty's conclusions in his 1996 report entitled "An investigation into the practices of the Workers Compensation Board of British Columbia" with respect to disclosing personal information about injured

workers to employers" ("Report").[1] That Report considered the effect of s. 3(2) of FIPPA on *Workers Compensation Act* ("WCA") adjudication and appeal processes as they existed at that time.

Section 3(2) provides:

> 3(2) This Act does not limit the information available by law to a party to a proceeding.

[6] In s. 5(4) of his Report, Commissioner Flaherty found in part that:

> Once an appeal has been filed with one of the WCB's appellate bodies, section 3(2) of the Act applies, and the WCB has the authority to design its own policy on disclosure, which the courts oversee. Thus, if the WCB (including Medical Review panels and the Appeal Division) and the Review Board decide they must disclose an entire file at that point, I have no jurisdiction to review this decision. If the appellate bodies choose to disclose more information than the worker believes is necessary, that decision or policy could be challenged through a judicial review. Before an appeal is filed, however, I am of the considered opinion that the FOIPPA Act fully applies to the WCB's disclosure policies.

[7] Relying on this aspect of the Report, WorkSafeBC noted that, in the present case, the employer had filed a Notice of Intention to Participate in the complainant's review before WorkSafeBC provided disclosure.[2] WorkSafeBC said that, in order to find that there was an unauthorized disclosure of the complainant's personal information to the employer, the OIPC would have to conclude that either the employer was not a party to a proceeding for s. 3(2) purposes or the OIPC has jurisdiction to determine what information is available at law to a party to a proceeding under the WCA. WorkSafeBC maintained that either conclusion would run contrary to the Report's findings because, in its view, Commissioner Flaherty found that "once a finding was made that an employer was a party to a proceeding within the meaning of Section 3(2) ..., the commissioner's jurisdiction ended and the jurisdiction of the Board and the courts commenced".[3]

[8] In a similar vein, WCAT submitted that FIPPA was never intended to "intrude" into quasi-judicial or judicial proceedings:

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[1] Investigation Report P96-006: http://www.oipcbc.bc.ca/investigations/reports/WCB.html.
[2] Initial Submissions, paras. 13 – 14.
[3] Initial Submissions, para. 16. See also, para. 20: "after the employer becomes a party to the appellate process under the WCA … the rules of natural justice apply and the Courts supervise the Board's disclosure practices".

> The effect of these provisions is to oust the jurisdiction of the Information and Privacy Commissioner on the issue of the scope of disclosure within the appellate process in the workers' compensation system.[4]

[9] The complainant submitted that WorkSafeBC directed her to complain to the OIPC and did not mention that her only avenue of redress was a judicial review to the Supreme Court, thereby contradicting its position that the OIPC has no jurisdiction in this matter. Moreover, the complainant points out that WorkSafeBC freely engaged with the OIPC during the initial investigation and mediation of the complaint without raising these jurisdictional objections, only to object on those grounds after the matter proceeded to a formal hearing.[5]

Analysis

[10] By characterizing the issue in jurisdictional terms, I think that WorkSafeBC and WCAT have blurred the lines between two distinct questions, namely:

(1) whether the OIPC has jurisdiction to determine whether s. 3(2) of FIPPA applies to the matter at issue; and

(2) whether s. 3(2) of FIPPA authorizes the disclosure.

The first question involves determining whether it is lawful for the OIPC to consider whether a particular provision of FIPPA applies to the information at issue and, in particular, to determine whether that information was available "by law" to a party to a proceeding.

[11] It is important to consider the wording of s. 3(2) of FIPPA in the context of both the entire section and FIPPA as a whole. The purpose of s. 3 is to define the scope of the legislation. It sets out that FIPPA applies to all records in the custody or under the control of a public body, with certain exceptions. Section 3(2) does not stipulate that records disclosed "to a party to a proceeding" are excluded from the scope of FIPPA or otherwise are exempt from all or part of the rules concerning the collection, use, retention, disclosure or disposal of personal information contained in Part 3 of FIPPA. Rather, the language of s. 3(2) provides reassurance that FIPPA does not restrict the availability of information to a party to a proceeding, where that information is available by law. In other words, FIPPA permits disclosures to parties to a proceeding where authorized by statute or common law.

[12] As part of his investigation, Commissioner Flaherty commented to the effect that he did not have authority to review WCB (now WorkSafeBC) disclosures of personal information in individual cases, once he had confirmed that disclosure had taken place according to an established practice within a

[4] WCAT initial submissions, para. 19.
[5] Complainant's reply submission, p. 2.

standard process that he verified was lawful. He concluded that the standard workers' compensation review process qualified as a quasi-judicial proceeding and that disclosure of personal information to parties to that proceeding was available "by law". I do not take him to have said that the OIPC does not have the jurisdiction to determine whether disclosures to parties to proceedings are in accordance with statute law or common law in the first place.

[13] In the Report, the Commissioner examined the disclosures and found that s. 3(2) of FIPPA applied because the disclosures were authorized by common law natural justice principles. In other words, once he had determined that s. 3(2) of FIPPA applied, any review of the disclosure under Part 3 of FIPPA was moot. This flows from his conclusion, in s. 5.3 of the Report, that "the practice of disclosing a worker's entire file to an employer prior to the launching of an appeal exceeds the requirements of natural justice and is a breach" of FIPPA. His recommendation in this respect was for the WCB to amend its disclosure policies to reflect that a "proceeding" with respect to s. 3(2) of FIPPA does not begin until either a worker or an employer has formally initiated a review or appeal. Implicit in this recommendation is his acceptance that disclosure after formal initiation of a review or appeal is authorized by law.

[14] Moreover, Commissioner Flaherty's findings were with respect to particular circumstances of the disclosures he was investigating in accordance with the state of the law at the time. His conclusion did not have the effect of granting an exemption from FIPPA, in perpetuity, for all disclosures by WorkSafeBC to any parties to a review or appeal proceeding. In any event, I do not consider myself bound by prior OIPC orders or reports and no party provided me with any authority that would persuade me that I am. To the extent that Commissioner Flaherty's Report can be construed as finding that the OIPC has no jurisdiction to determine if the disclosure at issue is authorized by law - and I do not agree it is properly so construed - I respectfully disagree. Determining whether the information at issue is available by law is a necessary component of the s. 3(2) analysis.

[15] I therefore find that the real question is not whether the OIPC has jurisdiction to determine whether the disputed information was available by law. In my view the OIPC clearly does. The real question is whether s. 3(2) applies in the circumstances of this case. This requires me to consider whether the personal information at issue is "available by law" (*i.e.*, whether its disclosure is authorized by statute or common law) to "a party to a proceeding". If I find that s. 3(2) applies, the disclosure will be lawful and the issue of the application of s. 33.1(1)(c) of FIPPA will be moot.

[16] **3.2 Is disclosure authorized by law?—**The evidence satisfies me that the disclosure at issue in this case was made pursuant to a formal review of a claim decision under the WCA. At the time of disclosure, the employer had filed a Notice of Intention to Participate in the review proceeding. As a participant to

the review, the employer was a party to that proceeding.[6] I agree with Commissioner Flaherty that, for s. 3(2) purposes, "proceeding" means activities governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgment or decision. Applying that definition, I find that a review under the WCA constitutes such a quasi-judicial proceeding. I note parenthetically that neither the complainant nor the Workers' Advisers dispute this.

[17] The remaining question is whether the disclosure of the complainant's personal information in the review is authorized by law. The WCA governs the claims review and appeal processes. Section 96.2(6) of the WCA deals specifically with records disclosure to parties to a review proceeding and it provides as follows:

> 96.2(6) As soon as practicable after a request for a review is filed, the Board must provide the parties to the review with a copy of its records respecting the matter under review.

[18] Policy Item #99.32 – Provision of copies of File Documents in the WCB *Rehabilitation Services and Claims Manual*, made under authority of the WCA, provides:

> A copy of all the documents on the claim file will be sent out automatically on receipt of a request for disclosure from a claimant or an authorized representative.
>
> Where an employer has a right to receive disclosure of a claim file, that disclosure will consist of the same disclosure which would be granted to the claimant.

[19] WorkSafeBC, WCAT and the Employers' Advisers all take the position that, for s. 96.2(6) purposes, the records respecting the matter under review are the entire claim file.[7] These are the records which the initial adjudicator looked at before making his or her decision, and it is this decision which is the subject of the review. Each party to the review proceeding is entitled to the same information as that available to the decision-maker.

[20] The Workers' Advisers argues that s. 96.2(6) of the WCA, proclaimed in force in March 2003, narrowed the disclosure obligations of the Board.[8] It also argues that this provision signalled a legislative "fine tuning" of the balancing of concerns respecting full disclosure and the employer's right to fully know the

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[6] WCAT also pointed out in its initial submissions, para. 52, that "both the Review Division and WCAT can deem an employer for the purposes of a review or an appeal: ss. 96.2(7), (8) and 248".

[7] The Employers' Advisers argues that the "matter" referred to in s. 96.2(6) is either a compensation or rehabilitation matter, an assessment or classification matter, or an occupational health and safety matter, as per section 96.2(1)(a),(b) or (c): reply submission, para. 13.

[8] Initial submissions, paras. 6-8.

case based on natural justice principles with the workers' right to privacy and confidentiality of personal information:

> [7] ... The legislative changes recognized that not every employer is directly affected by a decision and that the appropriate scope of disclosure is determined by the parameters of what is under appeal.
>
> [8] As a result of the amendments to the WCA, we suggest that the legislature imposed a heightened onus on the Board as "custodian" of claims information to provide greater scrutiny in whom disclosure is made to, and the extent of disclosure, in light of the "matter" under appeal.

[21] The Workers' Advisers maintains that, in s. 96.2(6) of WCA, the legislature intended to impose a "relevancy" test. Like the Workers' Advisers, the complainant also takes the position that the "matter under review" under s. 96.2(6) pertains only to the records that are relevant to the part of the claim that has been put in issue in the review. In this case, the review concerned only the calculation of the complainant's income with respect to whether tips and commissions should be included with salary.[9] The complainant believes that the psychological reports she submitted to establish her original claim were not relevant to the review as they contained no information that would be relevant to calculating her income. She described her additional concerns about the disclosure of her personal information this way:

> The Complainant did not want her employer and co-workers to know about her marital and financial problems. The Complainant was therefore very upset when large amounts of personal data from her confidential psychological treatment sessions were just routinely mailed to her employer in a plain mailing envelope (*i.e.*, without any "personal" or "confidential" labels) for permanent keeping. The disclosure documents mailed to her employer also included excessive details of the Complainant's financial, marital and depression health problems. ... WorkSafeBC had made it almost impossible now for the Complainant to face her former employer and colleagues without embarrassment.[10]

[22] The complainant states that, from the start, she was very concerned about the risk to her privacy that this process involved:

> She did not want to sign the form to release personal information to her employer, but only signed it after being informed by WorkSafeBC staff that her case review will not proceed further if she did not sign the disclosure information release form. This policy created a "catch 22" situation. The Complainant was very reluctant to sign because her employer is a very small company with several employees, and unlike review organizations

[9] Complainant's initial submission, para. 4; Workers' Advisers initial submission, para. 14.
[10] Complainant's initial submission, paras. 2-3.

> such as WCAT, her employer cannot always guarantee restricted access to the Complainant's printed personal documents.[11]

[23] WorkSafeBC and WCAT do not attempt to establish that the psychological reports were relevant to the review of the income calculation in this particular case. Rather, they argue that any review under the WCA relating to any part of an original claim determination is effectively a review of the entire determination. They add that any attempt to reduce the scope of disclosure would cause unacceptable delays in cases where it is determined that further records should have been disclosed.[12] In the words of WorkSafeBC:

> The records respecting the matter under review are the claim file. Given the desire of the government to reduce delays in the decision making process, it is not reasonable to assume they would add the complexity of a relevancy test and its inherent delays. The initial decision maker looked at the entire claim file before making his or her decision on which the decision under review or appeal was rendered. It is submitted that only the ultimate decision maker can determine what is relevant to the decision-making process.[13]

[24] WorkSafeBC and WCAT made extensive submissions rejecting any changes to the current procedures that might help to avoid in future what the complainant in this case regarded as an unnecessary and traumatic disclosure. From what they have stated in their submissions, it appears that their paramount consideration is to avoid risk of breaching the rules of natural justice that might occur if they failed to disclose to employers any information from the claim file, regardless of the circumstances of the case.[14] Their other main priority is to avoid anything (such as checking files prior to disclosure to employers) that might cause any delay to the administration of the claim.[15] WorkSafeBC concludes: "The benefit gained by protecting privacy in such cases may not outweigh the harm caused by delay."[16]

[25] In support of its position, WCAT cites a report the Office of the Ombudsperson issued in 1987 that WCAT interprets as criticizing the concept of limiting disclosure to employers.[17] In fact, the report recommended that WorkSafeBC continue to impose some limits on the access of employers to information in claim files. Recommendation 4 from the report reads as follows:

> That the W.C.B. restrict disclosure to an employer of material judged to be both irrelevant and prejudicial to a worker. Before providing disclosure to

[11] Complainant's initial submission, para. 1.
[12] WorkSafeBC initial submission, para. 39.
[13] WorkSafeBC initial submission, para. 33.
[14] WorkSafeBC initial submission, paras. 7; 39 WorkSafeBC reply submission, para. 3; WCAT initial submission, paras 27-8; 51; WCAT reply submission, paras. 6; 14
[15] WorkSafeBC initial submission, paras. 25-30; 39.
[16] WorkSafeBC initial submission, para. 39.
[17] WCAT initial submission, paras. 26; 54.

> an employer, the W.C.B. shall consider representations from the worker on issues of possible irrelevance and prejudice.[18]

[26] I note that, although WorkSafeBC interprets s. 96.2(6) of the WCA as requiring it to disclose the entire claim files to employers, it acknowledges that it does make exceptions to this practice. WorkSafeBC's present practice is to cull some of the records from a claim file prior to disclosure. These records consist of the "Accounts" section of the file (containing accounting type information such as medical and support service bills and payments).[19] It also has an entirely separate procedure for dealing with disclosure of files relating to claims of sexual assault against an employer, in which the rules of disclosure differ, though WorkSafeBC does not indicate exactly how.[20] WorkSafeBC assigns these files to the Sensitive Claims Area.

[27] Finally, WorkSafeBC and WCAT referred to three Court decisions which, they submit, collectively support, on common law natural justice and procedural fairness principles, full disclosure of a WCA claim file to a claimant or an employer participating as a party to a WCB review or appeal proceeding (but not prior to initial adjudication on a claim). Those cases are *Re: Napoli and Workers' Compensation Board*, [1981] 126 D.L.R. (3d) 179 (B.C.C.A), *Candeloro v. British Columbia (WCB)*, [1988] B.C.J. No. 1574 (B.C.S.C.), and *Brand v. British Columbia (WCB),* [1993] 32 Admin. L.R. (2d) 89 (B.C.S.C.).

Analysis

[28] The applicant writes compellingly on how it was personally devastating to her and unnecessary for WorkSafeBC to disclose to her employer intimate and embarrassing details about the state of her mental health and the precarious state of her personal life, given that the issue in dispute was solely the calculation of her income. I accept that the disclosure of this sensitive personal information has had a traumatic effect on her mental health, which the psychological reports indicate was already in a precarious state, from the accident for which she was seeking compensation.

[29] I am sympathetic to the complainant's concerns and her argument that disclosure to her employer of the sensitive personal information in her psychological reports was not necessary for the sole purpose of appropriately calculating her wage rate. Nevertheless, the language of s. 96.2(6) of the WCA is broad enough to allow WorkSafeBC's interpretation of the phrase "matter under review" as encompassing the entire original claim. While the particular issue raised on review was the wage calculation, it was part of the larger claim that led to the original decision and it is that original decision which is the subject

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[18] Office of the Ombudsperson, *Public Report No. 7* July 1987: Workers' Compensation System Study, p. 24.
[19] WorkSafeBC reply submission, para. 16
[20] WorkSafeBC initial submission, Exhibit C, p. 1.

of the review. In a context such as the one under consideration here, the underlying subject matter of any review under the WCA will be the claim. The decision that triggers the review will be in respect of that claim, and the record of proceeding is what the initial adjudicator had before him or her when making the original claim decision. Put somewhat differently, the record of proceeding culminating in a claim decision is not, in any subsequent review proceeding, defined or narrowed by the issues as framed by the parties or the relevance of the claim file records to those issues. Moreover, s. 96.2(6) does not link disclosure to the relevance of an issue or issues raised as a ground(s) of review.

[30] For these reasons, I grant that s. 96.2(6) of the WCA constitutes explicit statutory language requiring disclosure, as elaborated by WorkSafeBC policy.[21] Therefore, I conclude that s. 96.2(6) of the WCA, as elaborated by WorkSafeBC policy, authorized the disclosure of the entire claim file to the employer once the employer decided to participate in the review. Accordingly, as the disclosure in issue involved information that is available by law to the employer as a party to the claim review, it met the requirements of s. 3(2) of FIPPA.

[31] As an aside, and as noted above, WorkSafeBC appears to recognize that some claims involving extraordinarily sensitive personal information (*i.e*., cases of alleged sexual assault) warrant a different approach from other files, with respect to disclosure of claimants' personal information. I echo the Office of the Ombudsperson in encouraging WorkSafeBC to take a similar approach to other sensitive personal information, in cases where it is clear that the information is not relevant to the review or appeal and disclosure would likely be prejudicial to the worker.

Findings

[32] In summary, I find that:

(1) a formal review of a claim under the WCA is a "proceeding" for s. 3(2) FIPPA purposes;

(2) the complainant's employer was a party to the review proceeding; and

(3) WorkSafeBC's decision to disclose the complainant's psychological reports to her employer was authorized by s. 96.2(6) of the WCA.

As such, the disclosure met the requirements of s. 3(2) of FIPPA, as providing information available by law to a party to a proceeding. The issue as to whether disclosure was in compliance with s. 33.1(1)(c) of FIPPA, therefore, is moot.

[21] Initial submissions, para. 25.

4.0 CONCLUSION

[33] For reasons given above, no order regarding s. 3(2) is necessary.

May 27, 2010

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

OIPC File No. F07-32730