



Office of the
Saskatchewan Information
and Privacy Commissioner

Submission to

**The Workers' Compensation Act
Committee of Review 2015**

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy Commissioner
November 2015

Introduction

I am pleased to make the following submission to the 2015 Workers' Compensation Act Committee of Review and am pleased to present to the Committee on November 9, 2015.

Currently, the Saskatchewan Workers' Compensation Board (WCB) is a "government institution" pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) and a "trustee" pursuant to *The Health Information Protection Act* (HIPA). However, these laws do not apply to the claim files of workers.

I believe that the current legislative provisions can be improved so that workers in Saskatchewan can enjoy the same access and privacy rights as they do from other government institutions.

I propose that FOIP apply in full to the WCB for the following reasons:

- so workers can enjoy the full protection of FOIP;
- workers would have the opportunity to ask for a review on access and privacy decisions made by the WCB;
- WCB in the majority of other provinces are fully subject to legislation similar to FOIP; and
- the 2006 Committee of Review has shared this view.

However, I am of the view that WCB should not be treated as a trustee pursuant to HIPA. This would mean that HIPA should have no application to WCB. WCB is not in the business of providing health services, such as diagnosis, treatment or care. Its role is to make decisions on compensation to workers who are injured or unable to work. FOIP would provide sufficient protection of the personal information and personal health information of workers.

In this submission, I urge the Committee of Review to recommend that WCB be fully subject to FOIP and not be subject to HIPA.

Role of the OIPC

The Office of the Information and Privacy Commissioner (OIPC) oversees three Saskatchewan statutes: FOIP, *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) and HIPA. These laws protect the access to information rights and privacy rights of individuals in Saskatchewan.

FOIP and HIPA both apply in part to WCB.

FOIP is considered a quasi-constitutional law and has dual purposes and sets out the rights of citizens and workers. It provides citizens with the right to access information from government institutions, such as WCB. It also outlines the rules which government institutions must follow to ensure the protection of personal information of all individuals. These rules include the collection, use, disclosure and safeguarding of personal information.

HIPA has similar purposes. It outlines how health trustees must protect and grant access to the personal health information of individuals. WCB is currently a trustee under HIPA.

The OIPC has an oversight role. Citizens who are dissatisfied with the access or privacy actions or decisions of a government institution or trustee can bring their concerns to my office. My office's mandate is to ensure government institutions and trustees comply with the legislation.

In addition, part of my mandate is to offer comment on the implications for privacy protection of proposed legislative schemes.

I recommend that WCB be subject to FOIP

WCB is a government institution pursuant to subsection 2(1)(d)(ii) of FOIP.

FOIP applies to general information about WCB and personal information that are not related to workers' claims. For example, an individual could request general information about the operations of WCB. Further, an employee of WCB could expect that his/her personal information is protected to the same extent as other government institutions. In these circumstances, WCB must follow the procedures and rules provided in FOIP. My office can also review decisions made in these circumstances and investigate breach of privacy related issues.

However, FOIP does not apply to information about workers' claims. Subsection 23(3)(k) of FOIP indicates sections 172 to 174 of *The Workers' Compensation Act, 2013* (WCA) prevail. (See Appendix A) As a result, FOIP does not apply to information about workers' claims.

Does FOIP Apply in Other Provinces?

In all other provinces and territories (except Quebec and New Brunswick) legislation similar to FOIP applies to WCB in the same manner as it would to any other public body. (See Appendix B.)

However, many of the provinces have special exemptions for personal notes, communications or draft decisions created by or for a person who is acting in a judicial or quasi-judicial capacity.

In New Brunswick, Alberta, Manitoba, Ontario and Prince Edward Island, the Workers' Compensation Board and the Appeal Body are separate entities. FOIP applies to both the Board and the Appeal Body (except in New Brunswick where FOIP only applies to the Board).

Workers in Saskatchewan do not enjoy the same access and privacy rights and protections as workers in most other provinces and territories.

FOIP Provides more Access and Privacy Protections than Sections 174 to 176 of WCA

Subsection 23(3)(k) of FOIP indicates that the access provisions in FOIP do not apply to information about workers' claims. Instead, sections 172 to 174 of the WCA apply. This means FOIP is replaced only by three sections of WCA with respect to the information about the claims of workers. WCB has advised it has policies and procedures in place that deal with the basic privacy principles of "need to know" and "data minimization". However, workers would benefit from the legislative protections contained in FOIP.

Section 172 of WCA provides that no person should divulge information about inspections or inquiries unless authorized by the WCA, the Board or by a Court. FOIP provides more complete rules about the disclosure of information.

Section 174 provides additional rules that allow the WCB to disclose personal information to a worker's employer. This subsection is addressed by FOIP in two ways:

- FOIP allows a government institution to disclose personal information with consent of the individual. This is a much simpler process than what is described in subsections 174(4) to (9) of WCA. This gives a worker control over the disclosure of his or her personal information.
- FOIP allows disclosure of personal information without consent when it is consistent with a purpose for which it is collected. WCB collects personal information for the purpose of adjudicating claims. If it must disclose personal information to facilitate processing of a claim or an appeal, it may do so. This can also be handled in an application form, signed by the worker, that sets out the purpose for which personal information will be collected.

Subsection 173(2) outlines the process a worker must follow to gain access to his/her personal information.

- Subsection 173(3) of WCA states that any information obtained by subsection 173(2) can only be used for the purpose of dealing with a claim. It is unduly restrictive to dictate how an individual can and cannot use their own personal information.
- Subsections 173(4) and (5) provide two reasons why WCB can withhold personal information. However, FOIP provides more detailed direction in this respect. For example, subsection 173(4)(a) of the WCA provides that the WCB can deny access to information if it is "of a sensitive nature" and would cause harm to any person. Sensitive nature is not defined in WCA. FOIP provides clear detail exemptions to allow denial to information.

At the moment, it is unclear if section 32 of FOIP would apply to the WCB. This section allows an individual to request a correction of his/her personal information in the event of an error or omission. The right to correction is an important privacy principle. It also ties in with FOIP's section 27 requirement that a government institution collect accurate personal information. WCA does not address these two issues.

Sections 172 to 174 of WCA make no provisions for personal information of others (third parties). On a worker's file there can be third party information that is really personal information of someone other than the worker (called the third party). The third party has no protection of his or her personal information. FOIP provides protection to third parties and a process by which third parties can have input into the release of their information.

FOIP is 23 years old and I have recommended that it be updated. The government is currently reviewing proposed amendments to FOIP. I am hopeful those amendments will increase the rights of citizens in the province. Thus FOIP in the future may prove to have more protections than it does now. It would be disappointing if workers did not get the benefit of those rights and protections.

In conclusion, FOIP, now and particularly after it is updated, provides a comprehensive scheme and set of rules for the access to information and for the protection of privacy.

FOIP provides for a review of decisions made by a public body

Sections 172 to 174 do not provide the worker with an opportunity to have my office review decisions made by WCB with respect to access to information.

Part VIII of FOIP describes a comprehensive review process for access to information decisions. Typical reviews include:

- the denial of records, including personal information;
- the lack of response to an access request;
- decision made on a request for a correction of personal information; and
- the amount of fees.

Once my office has reviewed an access to information matter, a worker who is disappointed in the result can then appeal to the Court of Queen's Bench. Currently, a worker must go straight to Court, commence an action, and obtain a subpoena if the WCB withholds records about a claim. This is costly for a worker who may already be on a reduced income.

A review by my office is timely (on average 35 days), at no cost to the Applicant, no lawyer is required and experts in the area review the Applicant's concern.

Contacting my office

Workers are often frustrated when they consult my office about access to information or privacy concerns. My office first must assess the worker's complaint to determine whether or not the office has jurisdiction over the particular issue. If not, my office then must explain to the worker the complexities of the legislation. From my office's observations, workers become more discouraged with the process. They become suspicious and skeptical towards the intentions of the WCB and my office.

Recommendations of Past WCA Committees of Review

Past WCA Committees of Review have either agreed that FOIP should apply to WCB or that the access and privacy rights of workers should be improved.

2006

The 2006 Committee of Review made a recommendation with respect to FOIP.

The final report of the 2006 Committee provided:

“The Committee recognizes the unique mandate and decision-making role of the Board in the administration of justice, but does not consider the Board’s mandate and role to be so unique or special that the law and remedies that apply to other administrative agencies and public bodies should not apply to the Board.”

The 2006 Committee made the following recommendation:

- “Amend the Act to specify the Board is subject to *The Freedom of Information and Protection of Privacy Act*.”

2011

The 2011 WCA Committee of Review stated in its final report that it heard opposing opinions about FOIP and HIPA and their application to WCB. The final report acknowledged that it reviewed some options but “was not able to conduct a thorough legal analysis.” It suggested “that future Committees examine this issue further.”

The Committee did make the following recommendation:

- “All workers and employers have timely access to files without the need to file an appeal. A good rationale such as privacy legislation must be provided for any access that is denied.”

I recommend WCB should not be a Trustee under HIPA

Does HIPA Apply in Other Provinces?

Eight provinces and territories have laws similar to HIPA. HIPA equivalent laws apply to WCB in only three of these provinces (Manitoba, Prince Edward Island and Newfoundland). New Brunswick’s health information law applies in full to the Board, but not to the Workers’ Compensation Appeals Tribunal (See Appendix B).

WCB does not provide a health service

WCB differs from the majority of other trustees in that it is not in the business of providing health services to individuals. Its role is to provide insurance to workers who are unable to work. WCB collects personal health information for the purposes of adjudicating claims.

One of the main purposes of HIPA is to facilitate a secure flow of personal health information among trustees and others so that individuals can receive the health care that is required.

WCB collects personal health information for the purposes of making a financial decision. Part IV of HIPA is most applicable to these activities; however, it does not apply to WCB.

Recommendations

I ask for the support of the Committee of Review in recommending the following in its final report:

1. That FOIP apply fully to WCB and the following legislative amendments occur:
 - Repeal sections 172 to 174 of the WCA.
 - Repeal subsection 23(3)(k) of FOIP.

2. That WCB not be a trustee under HIPA and the following legislative amendments occur:
 - Repeal subsection 4(4)(h) of HIPA.
 - Amend subsection 2(h) of HIPA to exclude WCB as a trustee.
 - Amend subsection 24(1.1) of FOIP to ensure that personal health information under the possession or control of WCB is treated as personal information under FOIP.

Appendix A – The Relevant Parts of the Current Legislation

FOIP

23(1) Where a provision of:

- (a) any other Act; or
- (b) a regulation made pursuant to any other Act;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Subsection (1) does not apply to:

- ...
- (k) sections 172 to 174 of *The Workers' Compensation Act, 2013*;

...

and the provisions mentioned in clauses (a) to (m) shall prevail.

24(1.1) "Personal information" does not include information that constitutes personal health information as defined in *The Health Information Protection Act*.

HIPA

4(4) Subject to subsections (5) and (6), Parts II, IV and V of this Act do not apply to personal health information obtained for the purposes of:

- ...
- (h) *The Workers' Compensation Act, 2013*;

...

(5) Sections 8 and 11 apply to the enactments mentioned in subsection (4).

(6) *The Freedom of Information and Protection of Privacy Act* and *The Local Authority Freedom of Information and Protection of Privacy Act* apply to an enactment mentioned in subsection (4) unless the enactment or any provision of the enactment is exempted from the application of those Acts by those Acts or by regulations made pursuant to those Acts.

WCA

Offence to divulge information obtained pursuant to Act

172 Subject to sections 173 and 174, no member and no person authorized to make an inspection or inquiry pursuant to this Act shall divulge or allow to be divulged any information obtained by him or her or that came to his or her knowledge in carrying out his or her duties or in exercising his or her powers pursuant to this Act unless:

- (a) required or permitted to do so pursuant to this Act;
- (b) authorized to do so by the board; or
- (c) ordered to do so by a court.

Worker's access to information

173(1) In this section and in section 174, “**worker's representative**” means a person whom a worker has authorized in writing to be his or her representative.

(2) Subject to subsection (4), the board shall allow access to information respecting a worker collected or otherwise gathered pursuant to this Act by the board if a written request for that information is made by:

- (a) the worker;
- (b) any worker's representative; or
- (c) in the case of a deceased worker, any of the worker's dependants.

(3) A person receiving information pursuant to subsection (2) shall use that information only for the purposes of a reconsideration or review of a decision of the board.

(4) The board shall provide any medical report that the worker, worker's representative or worker's dependant has requested pursuant to subsection (2) to the worker's or worker's dependant's physician instead of providing it to the worker, worker's representative or worker's dependant if the board is of the opinion that the medical report:

- (a) contains information of a sensitive nature; and
- (b) if provided directly to the worker, worker's representative or worker's dependant, would cause harm to the worker or any other person.

(5) If a physician receives information pursuant to subsection (4), the physician shall explain to the worker, worker's representative or worker's dependant, as the case may be, the contents of the medical report to assist the worker, worker's representative or worker's dependant in the request for reconsideration of or application for a review of the decision of the board.

Employer's access to information

174(1) In this section, “**employer's representative**” means a person authorized in writing by an employer to represent that employer.

(2) If an employer has requested a reconsideration of or applied for a review of a decision made pursuant to this Act with respect to a worker's claim for compensation, notwithstanding that the employer is not a party to the reconsideration or review, the board may on written request, in accordance with this section, grant the employer or the employer's representative access to the information that the board used to make its decision with respect to:

- (a) the facts of the situation in which the injury occurred; or
- (b) the percentage of the cost of compensation that has been assigned by the board to the injury cost record of that employer with respect to the injury of the worker arising out of and in the course of the worker's employment with the employer.

(3) The person receiving the information pursuant to subsection (2) shall use that information only for the purposes of the reconsideration or review.

(4) If a request is made pursuant to subsection (2), the board shall:

- (a) notify the worker or the worker's representative of the request and of the information that it will grant access to; and
- (b) inform the worker or the worker's representative that he or she may make an objection to the release of the information within the period specified in the notice.

(5) On the expiration of the period mentioned in clause (4)(b), the board shall, after consideration of any objections:

- (a) decide what information it will grant the employer or the employer's representative access to; and
 - (b) notify the worker or the worker's representative in writing of its decision.
- (6) The notice required pursuant to clause (5)(b) must be served by registered mail or any other means prescribed in the regulations, and, if mailed, the notice is deemed to have been received five business days after it is mailed.
- (7) Within 15 business days after the date on which the notice pursuant to subsection (6) is received, the worker may request the board to reconsider its decision made pursuant to subsection (5).
- (8) The board shall not grant the employer or the employer's representative access to any information until the expiration of the period allowed for a request pursuant to subsection (7) or the determination of the request, whichever is later.
- (9) The board shall inform the worker or the worker's representative of all information it has granted an employer or employer's representative access to pursuant to this section.
- (10) An employer may request the board to reconsider its decision with respect to the information the board has granted access to within 15 business days after the date of that decision.

Appendix B – Access and privacy legislation in other provinces

Province	Does its FOIP equivalent apply to its WCB?	Does its HIPA equivalent apply to its WCB?
British Columbia	In full* There is a provision in BC's <i>Workers' Compensation Act</i> that states that certain material supplied to the Board is deemed to be supplied in confidence for the purpose of section 21(1)(b) of <i>Freedom of Information and Protection of Privacy Act</i> .	N/A
Alberta	In full	No
Manitoba	In full* The <i>Workers Compensation Act</i> expressly provides that it prevails where there is an inconsistency or conflict with FIPPA.	In full
Ontario	In full	In part The Workplace Safety and Insurance Board and the Workplace Safety and Insurance Appeals Tribunal are not health information custodians under our health privacy legislation, the <i>Personal Health Information Protection Act, 2004 (PHIPA)</i> . However, these agencies would be subject to restrictions on use and disclosure in <i>PHIPA</i> where they receive personal health information directly from a health information custodian.
Québec	In Part Some sections of <i>Loi sur l'accès aux documents des organismes publics</i> are excluded from Québec's WCB. It also includes special rules about disclosing personal information to employers.	N/A
New Brunswick	In Part Does not apply to the Workers' Compensation Appeals Tribunal.	In Part Does not apply to the Workers' Compensation Appeals Tribunal.
Nova Scotia	In full	No Personal Health Information Act does not consider the Board to be a custodian organization, but does authorize them to collect health information in order to "assess an injured worker's entitlement to benefits."
Prince Edward Island	In full*	In full (not yet in effect)
Newfoundland and Labrador	In full	In full
Yukon	In full	No (not yet in effect)
North West Territories & Nunavut	In full	N/A

* FOIP does not apply to a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity.