

Manitoba Ombudsman

REPORT UNDER

THE PERSONAL HEALTH INFORMATION ACT

CASE 2015-0142

THE APPEAL COMMISSION

PRIVACY COMPLAINT: UNAUTHORIZED DISCLOSURE

PROVISIONS CONSIDERED: 20(1), 20(2), 22(2)(o)

REPORT ISSUED ON AUGUST 8, 2016

SUMMARY: The complainant alleged an unauthorized disclosure of personal health information by the Appeal Commission (the commission) of the Workers Compensation Board. A disclosure of personal health information took place when his former employer was provided with a copy of a decision (with reasons) issued by the commission in connection with the complainant's appeal of a decision of the WCB Review Office. The ombudsman found that the disclosure was authorized under clause 22(2)(o) of PHIA (authorized or required by an enactment of Manitoba or Canada). However, the ombudsman found that the disclosure was not limited as required under subsections 22(2) and 22(3) of PHIA.

COMPLAINT

On May 27, 2015 the complainant provided our office with a completed *Questionnaire for a Privacy Complaint* under the Personal Health Information Act (PHIA or the Act) alleging an unauthorized disclosure of personal health information by the Appeal Commission. The Appeal Commission (the commission or the trustee) was established by legislative amendment to the Workers Compensation Act (the WC Act) in July 1990. The commission operates separately and independently from the Workers Compensation Board (WCB) and is responsible for hearing appeals of decisions of the WCB Review Office or the WCB Assessment Committee.

The complainant alleged that the commission had disclosed his personal health information without authorization under PHIA by providing his former employer with a copy of a decision (with reasons) issued by the commission in connection with the complainant's appeal to the commission of a decision of the WCB Review Office.

As a government agency the members of which are appointed by the Lieutenant Governor in Council, the commission is a personal health information trustee as defined under PHIA. Under subsection 39(2) of PHIA, an individual who believes that his or her personal health information has been disclosed contrary to the requirements of PHIA has a right to make a complaint to the ombudsman.

BACKGROUND TO THE COMPLAINT

It was the complainant's understanding that his former employer had ceased to have an ongoing interest in his Workers Compensation Board (WCB) claim or his appeal to the commission. The complainant based this belief on a report he received from our office in relation to a previous complaint investigation involving the complainant and the WCB (Case 2013-0016). In that case, the complainant appealed a decision of the WCB to discontinue a portion of his wage loss benefits for prescribed medication to the WCB Review Office (the review office). It was then the practice of the WCB to provide a notice of appeal (which in this case included details about the prescribed medication which was the subject of the appeal) to the employer of record on the claim file (in this case the complainant's former employer). The provision of the notice of appeal containing the complainant's personal health information to his former employer precipitated his earlier complaint of unauthorized disclosure under PHIA.

In this previous matter, the WCB acknowledged that it should not have disclosed the complainant's personal health information to his former employer as the former employer was no longer a party with an interest in the outcome of any appeal. The WCB explained that, in this case, so much time had passed that the outcome of any review office appeal would have no bearing on the former employer's WCB assessment rates and there were no other employer interests that would be effected. During our investigation of the previous complaint, the WCB advised our office that it would be changing its processes and would no longer be sending appeal notices to former employers with no true interest in a claim and in the outcome of any appeal.

The complainant believed that the two instances whereby his personal health information was provided to his former employer were essentially similar. In his view, the same considerations should now apply with regard to identifying parties with an interest in the matter of his appeal before the commission.

POSITION OF THE COMPLAINANT

In making his complaint, the complainant raised two issues as being of major importance to him. First, he objected to a current employee of his former employer having access to detailed personal health information relating to him. He questioned why it was necessary to provide his former employer with a copy of the commission decision (with reasons) in the matter of his appeal. Although his former employer had been his employer at the time of his workplace injury, he had not worked there for approximately 16 years.

The second concern raised by the complainant was based on the belief that the written decision and reasons in the matter of his appeal before the commission contained too much personal health information. The complainant did not understand why it was necessary that the written decision (with reasons) contain so much detailed personal health information when the matter under appeal seemed to relate to a simple issue of transportation expenses.

POSITION OF THE APPEAL COMMISSION

On receiving the complaint our office contacted the commission and requested representations speaking to the statutory authorization under PHIA whereby the commission provided the complainant's former employer with a copy of its decision (with reasons) in the matter of his commission appeal. Our office specifically asked the commission to address the status of the complainant's former employer in the appeal. Our office also asked the commission for representations concerning its policies, procedures and/or guidelines for the writing of its decisions, specifically with regard to the amount of personal health information included in written decisions with reasons.

The commission responded explaining that the Workers Compensation Act and Regulation 279/91, *Appeal Commission Rules of Procedure* (the AC Rules) compelled the commission to consider the complainant's former employer to be a person who has a direct interest in the matter of the complainant's appeal before the commission. The commission explained that subsection 60.8(4) of the WC Act provides as follows:

Representations and new evidence

60.8(4) *In hearing a matter under subsection (1), the appeal commission shall give all parties **who have a direct interest in the matter** an opportunity to make representations, and may allow the presentation of new or additional evidence.*

[Emphasis added.]

The WC Act does not define “a person who has a direct interest” under the Act. However, the commission noted that section 1 of the AC Rules defines a person who has a direct interest as follows:

"person who has a direct interest" includes, with respect to an accident or other matter before the appeal commission, the following:

- (a) the worker whose claim for compensation is before the appeal commission,*
- (b) the employer of the worker at the time of the accident,*

...

Thus, the commission maintained, that because the complainant’s former employer was his employer at the time of his workplace injury, his former employer was a person with a direct interest in the matter before the Appeal Commission.

The commission also explained that section 2 and subsection 12(3) of the AC Rules required the commission to provide written notification and a copy of its decision (with reasons) to the complainant’s former employer (as a person with a direct interest in the matter). The relevant provisions read:

Duties of registrar

2 The duties of the registrar include the following:

- (a) to schedule hearings by panels and, in respect of each matter set for hearing, to notify in writing any person who has a direct interest in the matter;*

...

- (d) in respect of a decision of the appeal commission, to give notice to the corporate secretary and any person who has a direct interest in the matter, in accordance with this regulation.*

Registrar to provide copy of reasons

12(3) On receiving notice of a decision under subsection (1), the registrar shall immediately, in writing, give notice of the decision to the corporate secretary and any person who has a direct interest in the matter.

The commission noted that subsection 22(2) of PHIA sets out the circumstances under which a trustee may disclose personal health information without the consent of the individual the information is about. Clause 22(2)(o) reads:

Disclosure without individual's consent

22(2) A trustee may disclose personal health information without the consent of the individual the information is about if the disclosure is

- (o) authorized or required by an enactment of Manitoba or Canada.*

The commission submitted that the WC Act and the AC Rules require it to consider the complainant's former employer to be a person who has a direct interest in the matter of the complainant's appeal; therefore, it was authorized by clause 22(2)(o) of PHIA in its disclosure of personal health information to the complainant's former employer.

The commission acknowledged that this was not consistent with the practices of the WCB with regard to providing notification and decisions (with reasons) to former employers. However, the commission explained that subsection 60.7 of the WC Act confers of the commission the authority to determine its own practices and procedures as long as they are not in conflict with any policies, by-laws or resolutions of the board of directors. The relevant provision reads:

Practice and procedure

60.7 *Subject to any policies, by-laws or resolutions of the Board of Directors, the appeal commission may determine the practice and procedure for the conduct of matters before it.*

With regard to the amount of personal health information included in its decision (with reasons) in the matter of the complainant's appeal, the Appeal Commission explained that it respects every individual's right to privacy and confidentiality of their personal information and considers this when writing decisions. However, the commission further explained that it must balance this with its obligation to write reasons that provide a full and fair analysis of the arguments and evidence before it.

The commission explained that copies of its decisions (with reasons) provided to persons who have a direct interest in the matter contain identifying information in the document header (the worker's name, WCB claim number, employer's names and the employer's firm number). Decisions posted publicly online do not contain this identifying information. Whether posted online or not, the commission explained that the body text of the decisions (with reasons) do not contain any identifying information which might identify an individual in other ways (e.g. city/town names, names of health-care providers and/or health-care facilities, etc.).

ISSUES AND ANALYSIS

The main issue in investigating this complaint is whether or not the Appeal Commission has complied with the requirements of PHIA in the disclosure of the complainant's personal health information to his former employer. The following PHIA provisions relevant in this matter:

General duty of trustees re use and disclosure

20(1) *A trustee shall not use or disclose personal health information except as authorized under this Division.*

Limit on amount of information used or disclosed

20(2) *Every use and disclosure by a trustee of personal health information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.*

Limit on disclosure

22(3) *A trustee may disclose information under subsection (2), (2.1) or (2.2) only to the extent the recipient needs to know the information.*

Was the Appeal Commission authorized to disclose the complainant's personal health information as required by subsection 20(1) of PHIA?

Subsection 60.8(5) of the WC Act supports the commission's position to the extent that, in certain circumstances, it requires the commission to provide a person with a direct interest in an appeal matter with written notice of its reasons for an appeal decision. The provision reads:

Decision on appeal

60.8(5) *On hearing an appeal, the appeal commission may confirm, vary or reverse the decision appealed from **and shall, on the written request of a person with a direct interest in the matter, provide a written summary of its reasons.***

[Emphasis added.]

Our office agrees that subsection 60.8(5) of the WC Act, together with subsection 12(3) of the AC Rules authorize disclosure of personal health information for the purpose of communicating a decision of the commission to a person with a direct interest in a matter before the commission. Thus, disclosure of commission decisions is authorized under clause 22(2)(o) of PHIA, where disclosure is authorized or required by an enactment of Manitoba or Canada.

Was the disclosure of the complainant's personal health information limited as required under subsections 20(2) and 20(3) of PHIA?

Even when authorized, any disclosure under PHIA must still adhere to the requirements of subsections 20(2) and 22(3) of PHIA. These together provide that any disclosure of personal health information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed and that any disclosure is only authorized to the extent the recipient needs to know the information.

In representations to our office, the commission has submitted that under the AC Rules it has no discretion other than to consider the complainant's former employer to be a person with a direct

interest in the matter of his appeal. The commission further stated that, as such, subsection 12(3) of the AC Rules requires the commission to provide written notification of its decision to the complainant's former employer, and that this includes providing a copy of the commission decision (with reasons) in the complainant's appeal. As the commission has represented that the purpose for disclosure is set out in its enabling legislation, it would follow that, according to this line of reasoning, the disclosure was the minimum necessary to accomplish the legislated purpose for which the personal health information was disclosed and the disclosure of the personal health information contained in the complainant's appeal decision is compliant with clause 20(2)(o) of PHIA.

However, our office noted that subsection 60.8(5) of the WC Act stipulates that providing a written summary of the reasons for a commission decision is mandatory only on the **written request** of a person with a direct interest in the matter. Furthermore, while the heading of subsection 12(3) of the AC Rules is styled 'Registrar to provide copy of reasons' the actual wording of the provision requires that the registrar "*give notice of the decision to the corporate secretary and any person who has a direct interest in the matter.*" Our office considered this distinction to be important as, while the reasons for a decision may be provided at the same time that notice of a decision is given, these two concepts are not interchangeable.

We also note that section 14 of the Interpretation Act provides that headings are for convenience of reference only and do not form part of an act or regulation. The provision reads:

Reference aids

14 *Tables of contents, headings, notes, historical references, overviews, examples and other readers' aids are included in an Act or regulation for convenience of reference only and do not form part of it.*

Thus, it is the actual wording of subsection 12(3) of the AC Rules that is determinative and the provision mandates only that "notice of the decision" shall be given. It is the view of our office that this gives the commission the discretion not to provide reasons if, as set out in subsection 60.8(5) of the WC Act, a person with a direct interest in the matter has not made a written request. It is also our view, therefore, that subsection 12(3) of the AC Rules does not prevent the commission from limiting the disclosure of personal health information and, particularly, did not preclude the commission from limiting its disclosure of the complainant's personal health information to his former employer.

As it is the ombudsman's view that subsection 12(3) of the AC Rules permits the commission to provide the former employer with notice of a decision of the commission without also giving detailed reasons we have concluded that, in providing the complainant's former employer with a copy of the decision **with reasons** in the matter of the complainant's appeal, the commission did not limit the disclosure made under 22(2)(o) of PHIA to the minimum amount of information

necessary to accomplish the purpose for which the information was disclosed and did not limit the disclosure to only that which the recipient needed to know in the circumstances of the complainant's appeal. Our office finds, therefore, that the commission was not in compliance with subsections 20(2) and 22(3) of PHIA.

Our office also considered the commission's representations with regard to the amount of personal health information included in the decision (with reasons) which is the subject of this complaint.

There is no question that giving reasons for a decision is an essential aspect of the rules of natural justice. A person whose rights, privileges or interests are (or may be) affected by a decision is entitled to an explanation of the reasons for the decision which demonstrates that the decision was based on a consideration of relevant evidence. This is the culminating step in a process that requires giving such persons advance notice of any hearing, the opportunity to prepare for a hearing, the opportunity to submit relevant evidence and to have this evidence considered in the proceeding. The act of giving reasons for a decision demonstrates that these steps have been followed as they relate to a person whose rights, interests and privileges may be affected by a decision.

Our office acknowledges that it is challenging to determine the amount of information necessary to establish reasons for decisions. We note that the complainant raised a similar issue in a previous complaint to our office made in 2006 involving an earlier decision of the Appeal Commission (Case 2006-0512). As a result of this previous complaint, the commission committed to limiting the amount of personal health information in a decision (with reasons) to that which is necessary to communicate the reasons for a decision and to not include information which may identify an appellant such as the name of health-care providers or geographic location. The commission further undertook to train panel members in these obligations under PHIA.

Our office reviewed the decision (with reasons) which is the subject of this complaint. We have concluded that, while the decision (with reasons) does contain a description of the personal health issues of the complainant, the amount of information does not exceed that which could reasonably be considered necessary to establish reasons for the decision reached.

The commission also represented that under subsection 60.7 of the WC Act, the commission may determine its own practices and procedures, including publishing and posting decisions online. The commission considers it to be in the best interests of workers and employers to have decisions publicly available as this affords workers and employers an opportunity to review prior decisions when preparing for hearings and reviews before the commission. The commission explains that decisions posted online do not include identifying information in the headers.

Our office accepts the commission's representations and has concluded that the commission has taken reasonable steps to anonymize posted decisions. Nonetheless, our office asked the commission to consider limiting the discoverability of its online decisions (with reasons) in search engines. The commission advised our office that it is currently in the process of a major redevelopment of the Appeal Commission website and will discuss limiting the discoverability of its online decisions with its service provider with a view to ensuring there are reasonable limits on discoverability.

ADDITIONAL MATTERS

It was evident to us that the commission is wholly dedicated to promoting and upholding the fundamental principles of procedural fairness as articulated in the AC Rules. However, since the AC Rules were written in 1992 there have been changes to the WC Act and evolution of the means by which the board administers the workers compensation program. Significantly for this complaint, PHIA was proclaimed in 1997. It is our understanding that no revisions have been made to the AC Rules since 1992.

It was the view of our office that the real heart of the present complaint arises not from the requirements of subsection 12(3) of the AC Rules but rather from the fact that the AC Rules define "a person with direct interest in the matter" to include "the employer of the worker at the time of the accident" without exception and regardless of what has transpired in the interim. So, even in those exceptional situations (such as this one) where the employer at the time of the accident no longer appears to have rights, interests or privileges which may be affected by a decision, the definition in the AC Rules provides the commission with no statutory discretion to make this determination. In fact, even if a former employer is vehemently opposed to participating in an appeal, the AC Rules oblige the commission to continue to involve the former employer.

The commission has explained to our office that in order to make any changes to the definition of a party with a direct interest in matters before the commission, revisions to the AC Rules are required. The Appeal Commission has further explained that the WC Act authorizes the WCB board of directors to make regulations. Any amendments to the AC Rules must, therefore, be made in accordance with the provisions of the WC Act.

In the course of our investigation of this complaint, the commission explained to our office that it is prepared to recommend to the WCB board of directors that revisions to the AC Rules be considered and that this include a revision to the definition of a "person who has a direct interest" in matters before the Appeal Commission. The commission further noted that the WC Act requires a comprehensive review of the WC Act every ten years. It is the commission's understanding that a review of the WC Act may be initiated this year and the commission has

advised our office that it will ask that revisions to the AC Rules be considered as part of this review.

In the interim, in order to comply with the WC Act and the AC Rules, the Appeal Commission has explained it will continue to provide notice of appeals to all employers, regardless of how much time has passed since the date of the workplace injury. However, effective immediately the commission will amend the process by which an employer is notified of decisions by the Appeal Commission. Unless the employer has initiated the appeal, the commission has advised our office that it will no longer routinely provide the employer with a copy of written reasons with the decision. Employers will be advised that a decision has been made by the Appeal Commission and is on the worker's WCB file. Employers will now be directed to contact the commission if they want to obtain a copy of the written reasons. Our office notes that this amended process is compliant with subsections 22(2) and 22(3) of PHIA. The ombudsman thanks the Appeal Commission for its willingness to cooperate with our office in ensuring that its processes not only continue to observe the rules of natural justice but are compliant with PHIA as well.

CONCLUSIONS

Our office found that the disclosure of commission decisions is authorized under clause 22(2)(o) of PHIA (disclosure is authorized or required by an enactment of Manitoba or Canada).

Our office found that the commission was not in compliance with subsections 20(2) and 22(3) of PHIA in that it did not limit the disclosure of personal health information to the minimum amount of information necessary to accomplish the purpose for which the information was disclosed and did not limit the disclosure to only that which the recipient needed to know in the circumstances of the complainant's appeal.

The complaint of unauthorized disclosure is partly supported.

Manitoba Ombudsman
August 8, 2016