

Manitoba Ombudsman

REPORT UNDER

THE PERSONAL HEALTH INFORMATION ACT

CASE 2019-0266

THE WORKERS COMPENSATION BOARD OF MANITOBA

PRIVACY COMPLAINT: DISCLOSURE

PROVISIONS CONSIDERED: 19.1(1), 19.1(2), 20(1), 22(1)(b)

REPORT ISSUED ON JULY 30, 2019

SUMMARY: The complainant submitted a request to Compensation Services at the Workers Compensation Board (WCB) to review new information about her claim. The WCB referred the request to the WCB Review Office for reconsideration. Following the referral of her request for review, the complainant alleged that her personal health information was disclosed by the WCB to her employer without authorization under the Personal Health Information Act. Our office determined that the disclosure of the complainant's health information was authorized under clause 22(1)(b) of PHIA and that the WCB complied with the requirements for consent under provisions 19.1(1) and 19.1(2) of the act. The complaint was not supported. In the course of our investigation, the WCB also identified a further opportunity for examination of the employer file access process. The trustee noted that it will be reviewing its policies *Reconsiderations* and *Disclosure of File Information - Employer Access* from a privacy perspective to ensure that the decision to disclose personal health information of employees to employers is timely and fully considered.

BACKGROUND

On April 24, 2019, our office received a privacy complaint from the complainant under the Personal Health Information Act (PHIA or the act). The complainant asked us to investigate the alleged unauthorized disclosure of her personal health information by the Workers Compensation Board of Manitoba (WCB). The WCB is a trustee, as defined under PHIA, and is therefore subject to the application of the act in its collection, use and disclosure of personal health information.

The complainant explained that her representative submitted a letter of appeal on her behalf to her WCB adjudicator at Compensation Services on December 18, 2018, with respect to an

August 2018 decision issued about the claim. The complainant noted that she understood that her employer would not be involved in this first level of appeal, to the primary WCB decision maker, and therefore would not be contacted to determine interest in receiving a copy of the complainant's WCB claim file containing her personal health information. The complainant referred to the WCB policy 20.10.4 *Reconsiderations*, which states:

Parties seeking reconsideration must first contact the primary decision maker before proceeding with a formal request for reconsideration. This promotes resolution of the issue prior to pursuing a formal reconsideration

The complainant stated that while she did not request a formal "second level" reconsideration, she received information by letter dated December 27, 2018, from the WCB confirming receipt of "your request for reconsideration of the adjudicator's decision of August 2018" and that the matter was assigned for review to the WCB Review Office. The letter also contained an attached information sheet on the role of the Review Office. The complainant advised our office that she had not known that her appeal submission was being elevated to the Review Office.

The complainant also provided our office with a copy of a letter dated January 2, 2019, whereby the Review Office advised further that the request for reconsideration had been registered. Included in the letter was information on the process for employer access to a worker's claim file. The letter described the information contained in the claim file to be disclosed to the employer and noted in bold print, "The WCB will release this information to the employer unless we receive an objection on or before January 16, 2019."

On January 11, 2019, however, the Review Office notified the complainant in writing that her appeal submission had been returned to the attention of Compensation Services on that date, as there was additional information that had not been considered by the primary decision maker.

The complainant stated that she later became aware that her employer had received a copy of her WCB file on or about January 9, 2019, despite the matter not proceeding for reconsideration at the Review Office. The complainant alleges that the disclosure of her claim file, containing her personal health information, to her employer was not authorized as the matter was not before the Review Office even though she had signed an authorization for release of this information earlier that month.

Under section 39(2) of PHIA an individual who believes that his or her personal health information has been collected, used or disclosed by a trustee in violation of PHIA may make a complaint to the ombudsman.

THE POSITION OF THE TRUSTEE

Our office notified the WCB of the complaint on May 1, 2019. In a letter of response dated May 21, 2019, the WCB advised of the events surrounding the disclosure of the complainant's personal health information to her employer. The WCB noted that on January 9, 2019, they obtained a signed file access authorization release (consent) form from the complainant dated January 6, 2019, authorizing release of her claim file information to her employer. Copies of the

complainant's medical information from her claim file were then sent to her employer by the WCB later on January 9, 2019. These records from the claim file were sent with a cover letter by regular mail and included medical information received on or after July 2018, which the WCB determined to be relevant to the appeal to the Review Office.

DISCUSSION OF THE ISSUES AND FINDINGS

Was the WCB authorized under PHIA to disclose personal health information about the complainant?

As noted above, the WCB told us that the claim file documents were disclosed to the employer following receipt, on January 9, 2019, of the complainant's consent for release form dated January 6, 2019. A copy of this consent form was provided to our office. We note that both the December 27, 2018, and January 2, 2019, letters to the complainant confirmed that the matter was under reconsideration by the Review Office, explained the process for employer access to her claim file and the right to object to release of portions of the claim file which the complainant believes may be irrelevant to the reconsideration. The letter also explained that a worker may choose not to object and may consent more quickly than the end date noted in the letter, to the disclosure of the claim file information to the employer:

If you do not have an objection to the release of this information, you can authorize its immediate release by completing the enclosed authorization form.

Based on the complainant's consent for immediate release of claim file information to her employer, the WCB advised that it sent her medical information to the employer, who had indicated an interest in receiving a copy of the relevant claim file information for purposes of participating in the appeal.

PHIA describes the duties of trustees of personal health information, such as the WCB, with regard to disclosure. We note the following provisions were identified by the WCB as authorization for the disclosure 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.

Individual's consent to disclosure

22(1) Except as permitted by subsection (2), a trustee may disclose personal health information only if

(b) the individual the information is about has consented to the disclosure.

The WCB also indicated that the disclosure of the complainant's personal health information contained in the claim file was authorized under clause 22(2)(o) of PHIA which 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 WCB cited subsection 101(1.2) of the Workers Compensation Act as further authorization for the disclosure of claim file information to an employer, as follows:

Employer's access to information

101(1.2) Notwithstanding subsection (1) and section 20.1 (medical reports), an employer or the agent of the employer who is a party to a reconsideration of a decision by the board or an appeal to the appeal commission may examine and copy such documents in the board's possession as the board considers relevant to an issue in the reconsideration or appeal and the information shall not be used for any purpose other than a reconsideration or appeal under this Act, except with the approval of the board.

Our office first considered the trustee's reliance on clause 22(1)(b) of PHIA to authorize disclosure and the facts provided by the complainant and the trustee. We note that at the time of the disclosure of her claim file on the specific date of January 9, 2019, the request for reconsideration was still before the Review Office, her employer had expressed an interest in receiving claim file information and a consent form authorizing the release of claim file information had been signed by the complainant, the worker.

In the complaint to our office, the complainant stated that she had not made a request for reconsideration to the WCB Review Office and that the appeal submission was intentionally sent to her adjudicator at Compensation Services. In reviewing the information sent to the adjudicator on December 19, 2018, the fax cover sheet described the package as "appeal submission," while later in the letter to the adjudicator there is a request for a review and opinion by the WCB medical advisor. We note that a WCB *Request for Review* form, which directly refers a request for appeal to the Review Office, was not enclosed.

In information provided to us from the WCB, we were informed that the adjudicator referred the appeal submission to the Review Office without contacting the complainant first to discuss her submission and to confirm whether or not she was seeking a second level review by the Review Office. As noted in the background section of this report, WCB policy 20.10.4 states that parties seeking reconsideration must first contact the primary decision maker before a reconsideration proceeds.

While the complainant's submission clearly followed the process for appeals required by the WCB, the absence of a verbal response and invitation to discussion from the primary decision maker appears to be contrary to this policy and was a missed opportunity by the WCB to have clarified the complainant's intentions and the requirements for each level of appeal. This may have prevented an unwanted referral to the Review Office and the subsequent disclosure of personal health information to the employer.

At the same time, the WCB letters of December 27, 2018, and January 2, 2019, to the complainant clearly indicate that the matter had been assigned to the Review Office and information on the review process, including employer access to claim file information, was enclosed for her reference. Following receipt of this information, the complainant signed the file authorization form on January 6, 2019, which indicated that she was aware that the matter was before the Review Office and consented to the disclosure of the relevant portions of her claim file, personal health information, to her employer.

PHIA describes the required elements of consent when disclosure is authorized by the individual the information is about under subsection 19.1. In providing the complainant with details of the employer access process and explaining the right of objection to, or the option of consenting to, the release of claim file information, we find that the WCB complied with the requirements for consent under clauses 19.1(1) and 19.1(2) of PHIA, as follows:

Elements of consent

19.1(1) When this Act requires an individual's consent for the use or disclosure of personal health information, the consent must

- (a) relate to the purpose for which the information is used or disclosed;*
- (b) be knowledgeable;*
- (c) be voluntary; and*
- (d) not be obtained through misrepresentation.*

Knowledgeable consent

19.1(2) Consent is knowledgeable if the individual who gives it has been provided with the information that a reasonable person in the same circumstances would need in order to make a decision about the use or disclosure of the information.

Although the complainant may have believed the suspension of the Review Office process invalidated her consent, the disclosure of her claim file information occurred prior to the decision of the Review Office to refer the appeal back to Compensation Services. Once a disclosure of personal health information has occurred, changes to the status of an appeal or an individual's consent to the disclosure do not alter the fact that the act of disclosure has already taken place for a purpose that was authorized at the time.

In considering all of these factors, while we observe that the process undertaken by Compensation Services following receipt of the appeal submission did not appear to be in keeping with the intent of WCB policy 20.10.4 *Reconsiderations*, we find that the disclosure of the complainant's personal health information was authorized as a result of her written consent in compliance with provisions 19.1(1), 19.1(2), 20(1) and 22(1)(b) of PHIA. Therefore, the complaint is not supported.

As the WCB had authority under PHIA to make the disclosure based on the complainant's consent, we did not consider the applicability of any other authorizing provisions.

Were the measures taken by the WCB to ensure the security of the complainant's personal health information following the disclosure appropriate in the circumstances?

PHIA sets out the duties of trustees to protect personal health information under subsection 18(1) of the act, as follows:

Duty to adopt security safeguards

18(1) In accordance with any requirements of the regulations, a trustee shall protect personal health information by adopting reasonable administrative, technical and physical safeguards that ensure the confidentiality, security, accuracy and integrity of the information.

While we find that the WCB had authorization to disclose the claim file information to the employer on January 9, 2019, once it was determined that the Review Office would not be conducting a reconsideration there was no administrative purpose for the complainant's employer to have access to her claim file.

Our investigation then considered the corrective actions taken by the trustee with respect to the security of the personal health information. Upon realization that the claim file remained with the employer, the WCB took steps in February 2019 to retrieve, secure and destroy the copy of the complainant's personal health information that had been disclosed to the employer. The WCB also took further steps to investigate any actions taken by the employer with respect to the complainant's claim file information; it was able to confirm that the personal health information was not accessed in any manner and that the envelope with the claim file copy remained unopened for the duration it was in the employer's custody.

We do note, however, that the realization that the employer still had the claim file was brought to light by the complainant's representative on February 13, 2019, and not by the WCB. As a result, the personal health information remained in the care of the employer for more than 40 days, following the decision not to proceed by the Review Office, before it was retrieved and secured.

In email correspondence between the complainant's representative and the WCB following the realization that the file was still with the employer, the WCB Review Office acknowledged the error, explained the efforts taken to retrieve and secure the file and offered an apology to the complainant for the inconvenience the disclosure of the file information may have caused. Further correspondence to the complainant on February 22, 2019, confirmed that the file copy sent to the employer was destroyed.

In our discussions with the WCB in the course of our investigation, we raised questions about the Compensation Services, file access and Review Office processes. We noted the potential for premature disclosure of personal health information (claim file information) if the file access process occurs prior to a thorough consideration and analysis of the appeal submission and claim file by both Compensation Services and the Review Office. We also asked about the policy direction given to WCB staff on immediately acting to retrieve and secure sensitive personal health information from an employer when a reconsideration is no longer occurring.

In its response to our office of May 21, 2019, the WCB advised of the actions taken to better protect the personal health information of claimants and to ensure that the need for disclosure of this information to employers has been fully considered. The WCB stated that it reviewed the employer file access process with Adjudication Services and the supervisor discussed the issue with the adjudicators who review claim submissions. The WCB explained:

The adjudicators were reminded that documents attached to submissions should be reviewed and if there is new information that was not considered in the primary decision-making process, another decision at that level should be made taking new information into account. Only if there appears to be no new information should the submission be sent to the Review Office.

The WCB also advised us that it conducted a similar process with the WCB Review Office:

(The WCB) also discussed the matter with the Director of the Review Office. Once he was made aware of this incident, he met with the Review Officers and spoke to the importance of more thoroughly screening appeal submissions to determine if it is truly a Review Office matter before sending notices to the employer and worker, thus starting the file disclosure process. In the event that a file is released to the employer and the appeal is subsequently sent back to the adjudicator for review, the Review Officer will send a note to the File Access Unit tasking them with retrieving the file from the employer as soon as possible.

The WCB access and privacy officer also stated that policy 20.10 *Reconsiderations* and policy 21.50.40 *Disclosure of File Information - Employer Access* will be reviewed during the third business quarter of this year, October to December 2019. We were advised that the review will be conducted through a privacy lens, with the objective of ensuring that the policies comply with privacy and access to information legislation.

CONCLUSION

Our office found that the Workers Compensation Board of Manitoba (WCB) was authorized under clause 22(1)(b) of PHIA to disclose the complainant's personal health information, as she had provided written consent for the disclosure. We also found that the WCB complied with the requirements for consent under subsections 19.1(1) and 19.1(2) of the act. Based on our findings, the complaint is not supported.

Although not required by PHIA, we note that the WCB took steps to have the complainant's personal health information returned by the employer when it was not required for the purpose of the employer's participation in a review. In addition, we find that the decision of the WCB to conduct policy reviews on reconsiderations and employer access to claim file information later this year, from a larger privacy perspective, is also a valuable proactive measure.

The circumstances of this case, however, have highlighted the importance of critically considering the timing of the disclosure of personal health information to employers in the course of second level reviews or appeals and ensuring the immediate retrieval and security of

such information when such reconsiderations are not proceeding. The employer in this case is a public body under the Freedom of Information and Protection of Privacy Act as well as being a trustee subject to PHIA. The employer did not use or disclose the complainant's personal health information while it remained in their custody. Private employers, who are not subject to the privacy requirements of PHIA or FIPPA, may not have the same level of understanding of the importance of protecting employee personal and personal health information that has been disclosed to them in the course of a WCB appeal, should that appeal or reconsideration not proceed.

It is not clear to our office, based on this case, how often this situation arises. We encourage the WCB to monitor the frequency of employer access to employee claim file information when a review is no longer occurring and to study the timing of the employer file access process in its policy reviews this year, so that the process includes sufficient time for a thorough determination as to whether there are sufficient grounds for proceeding with a reconsideration or appeal before an employer receives sensitive employee personal health information.

July 30, 2019
Manitoba Ombudsman