



Commissioner and Applicant to clarify the nature of the review. The Commissioner commenced a privacy breach review in October 2020.

- [3] The Commissioner has jurisdiction over the Department of Education: ATIPP, s 2, definition of “public body”.

### **Issues**

- [4] The issues in this review are:
- a. Is a WSCC claim “personal information”?
  - b. Was there an unauthorized use of the Complainant’s personal information, contrary to s 43 of the Act?

### **Facts**

- [5] The Complainant is a teacher. In October 2019, the Complainant reported a work-related injury resulting from a fall. They filed an injury claim with the Workers’ Safety and Compensation Commission (WSCC). The claim was accepted by the WSCC. The Complainant was off work for a period and then returned to work.
- [6] In December 2019, the Complainant’s principal gave them a notice of a “fact-finding meeting”, a form of investigation by the employer into potential workplace misconduct.
- [7] At the fact-finding meeting, the lead was taken by the superintendent of the Complainant’s school district. A number of topics were discussed at the meeting, including an allegation of an inaccurate report by the teacher to the WSCC. According to the Complainant, the specific allegation was that the Complainant had inaccurately reported the date of injury or the date of a conversation with the principal about the injury.
- [8] The allegation originated with the school principal. The principal communicated the allegation with the Employee Relations Division of the Department of Human Resources. The ER Division prepared the questions for the fact-finding meeting. The lead at the fact-finding was taken by the superintendent, who relied on the questions prepared by the ER Division.

The superintendent had no independent knowledge of the facts behind the allegation. The principal appears not to have attended the meeting.

- [9] The Complainant alleges that the principal and/or the superintendent breached her privacy rights, because the only way they could have known what the teacher reported to the WSCC was to look at the WSCC material in the teacher's personnel file, which they were not entitled to do.

## Law

- [10] "Personal information" means any information about an identifiable individual, including information about their health or health care history: ATIPPA, s 2.
- [11] Personal information may be used only for the purposes specified in ATIPPA section 43:

*43. A public body may use personal information only*

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

*(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use; or*

*(c) for a purpose for which the information may be disclosed to that public body under Division C of this Part.*

- [12] We should note, in s 43, that the word "or" is used between paragraphs (a), (b) and (c). In order for use to be authorized, it is sufficient that any one of the three conditions is met.

- [13] The phrase "a use consistent with that purpose" in s 43(a) is explained in s 48.1, which was added to ATIPPA in 2017:

*48.1. A use of personal information is consistent under section 43 or 48 with the purpose for which the information was collected or compiled where the use*

*(a) has a reasonable and direct connection to that purpose; and*

*(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.*

- [14]** We should note, in s 48.1, that the word “and” is used between paragraphs (a) and (b). In order for a use to be consistent, both conditions must be met.

## **Analysis**

*Is a WSCC claim “personal information”?*

- [15]** A worker who has suffered a workplace injury and wishes to receive compensation “shall report the event to the worker’s employer and to the Commission as soon as is practicable”: *Workers’ Compensation Act*, S.Nu. 2007, c 15, s 17. There is a similar obligation on an employer who has “reason to believe” that one of its workers has suffered work-related injury, disease or death: WCA, s 18. Whether the report comes from the worker or the employer, a claim for compensation is considered to be made when the WSCC receives a report: WCA, s 19.
- [16]** The WSCC typically asks an injured worker to fill out a form called “Worker’s Report of Injury”. Completing this form is not an absolute requirement, but the form does indicate the kind of information the WSCC needs to adjudicate a claim. It is available on the WSCC website and I have reviewed it for purposes of this report. I do not know if the Complainant in this case completed a Worker’s Report of Injury, but one way or another they would have had to provide this kind of information to the WSCC.

- [17] The Worker’s Report of Injury asks for detailed personal information (including name, address, date of birth, gender, telephone, e-mail, and social insurance number), employer information, details of the “incident”, and names of witnesses. On the third page it asks questions about past injuries, return to work, nature of employment, wages, and marital status (for tax purposes).
- [18] The form concludes with a “Worker’s Consent” which reads “I claim compensation for my work-related injury or disease and declare the information provided in support of my claim is true and accurate to the best of my knowledge and belief. I acknowledge it may be a criminal offence to make a false claim.” It is an offence to “knowingly or negligently” provide false information to the WSCC: WCA, s 148.
- [19] The Worker’s Report of Injury, when completed, is obviously “personal information” within the meaning of the ATIPPA. It must be handled carefully, and in accordance with the confidentiality provisions of the WCA and the privacy provisions of the ATIPPA.

#### *The employer and workers’ compensation*

- [20] The employer plays a key role in the workers’ compensation system.
- [21] The core principles of workers’ compensation were established in Canada over a century ago: workers receive no-fault compensation for workplace injury and disease, in exchange for giving up the right to sue; and employers will pay into the compensation fund, in exchange for being protected from tort-based lawsuits. The *Workers’ Compensation Act* of Nunavut reflects these principles: WCA, s 1.1.
- [22] Either a worker or an employer can report an injury. When the worker reports, they must also report to the employer: WCA, s 17. This is reflected in the Government of Nunavut’s Human Resources Manual, sections 1307 (Injury-on-Duty Leave) and 1608 (Workers’ Compensation). The employer is therefore involved from the start of the claim.

- [23]** The rights and responsibilities of the employer under the WCA are too numerous to list in full, but they include:
- a. An employer may request from the Commission a report “on the progress being made by the worker”: s 25(5).
  - b. An employer may request a medical examination of a worker: s 26(1).
  - c. The WSCC must send to the employer notice of its decision on a worker’s claim for compensation: s 31(3).
  - d. The fund is financed by a levy on employers: WCA, Part 3.
  - e. An employer dissatisfied with a WSCC decision on a compensation claim may seek review (s 113) or appeal (s 128).

**[24]** The Workers’ Compensation Act also has its own provisions on access and confidentiality: ss 161-164. If there is a conflict between the disclosure provisions of the WCA and the ATIPPA, the WCA prevails: WCA, s 162.

**[25]** Section 164(1)(a) gives the employer additional rights of disclosure:

*164. (1) In addition to providing a copy of the progress report under subsection 25(5), the Commission shall, on request, disclose to an employer the following information in the Commission's possession:*

*(a) information related to the cause of a claim for compensation by one of the employer's workers, the disposition of the claim, the recovery of the worker and any vocational rehabilitation of the worker; ...*

**[26]** Taken together, we see that the statutory scheme gives the employer a significant role in a workers’ compensation claim.

**[27]** The WSCC is authorized to disclose a substantial amount of information to an injured worker’s employer. The purposes of that disclosure are to make the employer aware of the claim, to inform the employer of the progress

of the claim, to assist the employer in managing the claim (including the injured worker's return to work), and to provide the employer with the information it needs if it wants to contest a claim. The employer's right to information is strongest for purposes of review or appeal: WCA, s 164(1)(b).

- [28]** Nevertheless there are limits on what an employer can see, or how the information can be used: WCA ss 25(5), 164(1)(a), 164(2). An injured worker's WSCC claim file is not an open book.

*Personnel files and WSCC claims*

- [29]** The Government of Nunavut has a written policy on Employee Records/Personnel Records: Human Resources Manual, section 1103. The policy is dated April 10, 2006, and revised November 23, 2006. It was the policy in force at all relevant times, and still in force today.
- [30]** The policy applies "to all employees of the GN": paragraph 2. That includes teachers.
- [31]** The policy specifies, among other things, who can look in a personnel file. A supervisor may view "disciplinary or performance-related documents" on the personnel file of any employee who reports to the supervisor: paragraph 5. (In my view, the word "supervisor" includes the principal of the school and the superintendent of the school district in which a teacher is working.) A supervisor "is not entitled to view confidential information such as rating forms or insurance beneficiaries". There are other circumstances in which a personnel file may be viewed, but none apply in this case.
- [32]** According to the Department of Education, a supervisor who wishes to see a personnel file must request the file from human resources staff; the HR staff removes the file from a locked cabinet for viewing; and then when the supervisor is finished, the HR staff replaces the file in the locked cabinet. No record is kept of who viewed the file.

- [33] The Department of Education says that some WSCC claim information would be kept in the employee's school-based personnel file. The department does not specify which parts of the WSCC claim are in the file, but "most often", says the department, this would be a copy of the Functional Abilities Form which the department requires to accommodate any needs the employee has. In my view, that is an appropriate placement of that kind of information.
- [34] The Department of Education also says that medical information from a WSCC claim is "often" not a part of the information in a personnel file; it is typically managed by the Department of Human Resources. That is because the Return-to-Work Coordinators deal directly with the WSCC and insurance. Again, in my view, that is an appropriate placement of that kind of information.
- [35] What is left unstated, either in the Personnel Records policy or in the department's submissions, is the location and status of the Worker's Report of Injury. In my view, that basic, originating document for a compensation claim does not belong in the worker's local personnel file. But no matter where it is, it is not a "disciplinary or performance-related document" that a supervisor is permitted to see. It is more in the nature of the confidential information that, according to GN policy, the supervisor is explicitly not permitted to see.

*Where did the supervisors get information about the claim?*

- [36] One basic factual question in this case is where the principal or the superintendent got the information on which they based an allegation of inaccurate reporting to the WSCC.
- [37] The Complainant's position is simple: the principal or superintendent must have looked at the WSCC material in the personnel file, because there was no other way for them to know what the Complainant reported to the WSCC.



- [38] In its submissions, the Department says that the superintendent never looked in the personnel file. In the circumstances of the case, they say, it was desirable for the superintendent to take the lead at the fact-finding meeting, but during the meeting the superintendent relied on material prepared for them by the ER Division. I am prepared to accept, as a fact, that the superintendent did not look in the Complainant's personnel file.
- [39] That leaves the principal, who was the source of the allegation.
- [40] The file material is silent as to whether the principal did or did not look at WSCC material in the Complainant's personnel file. The Complainant assumes that the principal must have done so; that assumption is the basis of the complaint.
- [41] In my view, there may be ways for a principal to know basic details of a claim without looking inside a personnel file. A principal is likely to be aware, without looking at any WSCC claim information, of at least some of the facts around a workplace injury: for example, when the teacher reported the injury to the employer, when the teacher sought medical attention or left work as a result of the injury, the teacher's assigned duties, where the teacher was supposed to be at a given time, and so on. It is also conceivable that the Department of Human Resources, or whoever is overseeing the Department of Education's WSCC claims, might check with a principal about the details of a WSCC claim.
- [42] Nevertheless, in this case the principal was alleging an inaccuracy on a very specific detail of the claim, namely the date of injury or the date of a conversation with the principal about the injury. To do so, the principal must have had some way of knowing what the Complainant reported to the WSCC. There is no evidence before me that the allegation came from anyone else, or from the WSCC.
- [43] If the principal did not know what the Complainant reported to the WSCC, then the allegation of an inaccurate WSCC report was groundless. That would no longer be a privacy matter under the ATIPPA, but I expect it

would cause the department some concern from a human resources perspective.

- [44] If the principal did know what the Complainant reported to the WSCC, then they must have had access, directly or indirectly, to the Worker's Report of Injury. It is on that basis that the rest of this report proceeds.

*Was there an unauthorized use of personal information?*

- [45] The Complainant argues that the filing of a WSCC claim has only one purpose: to claim compensation for a workplace injury. Since the WSCC claim was used by the Department of Education for a different purpose, i.e. for workplace discipline, there was therefore an unauthorized use of personal information: ATIPPA, s 43(a).
- [46] This argument is not correct. That is too narrow a reading of s. 43.
- [47] Section 43 has three separate circumstances in which use of personal information is authorized, in addition to the original purpose. Paragraph (a) authorizes the use of personal information "for a use consistent with" the original purpose. Paragraph 43(b), which deals with consent, does not apply in this case. Paragraph 43(c) authorizes the use of personal information for the purpose for which it was lawfully disclosed to the public body under Division C of Part 2 of the ATIPPA.
- [48] A technical legal point: Paragraph 48(a) is the only part of Division C that is relevant to this case. Since the language in that paragraph ("for a use consistent with that purpose") is the same as paragraph 43(a), the following analysis applies to both paragraphs 43(a) and 43(c).
- [49] We can now address the central question in this case: Did the department use the WSCC claim information for a purpose consistent with the original purpose of the information? If yes, there is no breach of privacy. If no, there is a breach of privacy.
- [50] As I have outlined above, the *Workers' Compensation Act* gives the employer a substantial, but not unlimited, right to be involved in a

worker's claim for compensation. The employer has the right to be notified of a claim for compensation resulting from a work-related injury: WCA, s 17. That would include details like the time and circumstances of the injury. It follows from the scheme of the Act that an employer may contest a claim if the employer believes the workplace injury did not occur, or occurred in circumstances different from those reported by the worker.

- [51] In my view, it also follows that an employer may investigate a potentially false WSCC report and, in an appropriate case, use a false report as the basis for workplace discipline. As required by s 48.1 of the ATIPPA, those secondary purposes (investigation and possible discipline) are consistent with the original purpose (deciding a claim for compensation). They have "a reasonable and direct connection" to the original purpose, and are necessary for the purpose of managing the employer's workforce.
- [52] I therefore do not accept the Complainant's position that raising the truthfulness of the WSCC report at the fact-finding meeting was automatically a breach of privacy.
- [53] Having said that, I do have substantial reservations about the way the employer handled the WSCC information, to the point where I am not satisfied that the s 48.1 threshold was actually met on the facts of the case.
- [54] An allegation of a false WSCC claim is not something to trifle with. A false claim is an offence under the *Workers' Compensation Act*. A false claim can have an impact on a worker's future WSCC claims. It can, in an appropriate case, form the basis for workplace discipline. Even an allegation, if known around the workplace, can have pernicious effects.
- [55] When an employer believes there may be an inaccuracy in a WSCC injury report, I would expect they would raise it with the WSCC. The WSCC may make any inquiry it considers necessary to determine a claim for compensation: WCA, s 30.

- [56] There is no evidence before me that the employer raised the allegation with the WSCC. Neither is there any indication of the source of the principal's allegation, or the outcome of the principal's allegation, or whether the department believes there is or ever was any substance to the principal's allegation. The allegation seems to have been dropped after the fact-finding meeting. If there was any follow-up on it, the Complainant is not aware of it.
- [57] Because of the way that the employer in this case approached the WSCC issue, I am not prepared to find that, as a matter of fact, the threshold in s 48.1 of the ATIPPA has been met. The use of the information was not consistent with the original purpose. There was a breach of the Complainant's privacy.

### **Conclusion**

- [58] The WSCC Worker's Report of Injury form, when completed, is "personal information" for purposes of ATIPPA.
- [59] An employer may use WSCC claim information to investigate a claim for compensation and, in an appropriate case, as the basis for workplace discipline.
- [60] In the specific circumstances of this case, the use of the Complainant's WSCC claim information does not meet the threshold in s 48.1 of the ATIPPA. A use consistent with the original purpose has not been established. There was a breach of the Complainant's privacy.

### **Recommendations**

- [61] The Commissioner may review the practices of a public body with respect to the collection, use and disclosure of personal information: ATIPPA, s 49.1(2). In addition, a privacy breach review may include recommendations with respect to the collection, use or disclosure of the individual's personal information: ATIPPA, s 49.5(a). These

recommendations may go beyond the facts of the specific case under review.

- [62] **I recommend** that the Department of Education not place WSCC claim information in the school-based personnel file, except to the limited extent necessary for management of the school, e.g. the Functional Abilities Form that informs school management of workplace accommodations required as a result of a work-related injury.
- [63] **I recommend** that any WSCC claim information that is kept in the school-based personnel file be segregated in some manner, perhaps by placing it in its own envelope, so that the WSCC claim information cannot be seen when the file is being reviewed for other purposes.
- [64] **I recommend** that the Department of Education bring this Final Report to the attention of the Department of Human Resources, and that the Department of Human Resources consider revising the GN Personnel Records policy (Section 1103 of the Human Resources Manual) to make explicit
- a. where WSCC claim information is to be held;
  - b. who may have access to WSCC claim information and under what circumstances;
  - c. that WSCC claim information in a personnel file is not “disciplinary or performance-related”; and
  - d. that WSCC claim information in a personnel file is to be handled in the same way as other confidential information.

Graham Steele

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