** Amended at paragraph [108]*

OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. PP-11-001

Re: Workers Compensation Board and Workers Compensation Appeal Tribunal

Prince Edward Island Information and Privacy Commissioner

Maria C. MacDonald

July 8, 2011

Summary:

Did the Workers Compensation Board (the Board) and/or the Workers Compensation Appeal Tribunal (the Tribunal) improperly disclose personal information to a Company that was the employer of the Complainant at the time of a work injury (Accident Employer)? There are three complaints of improper disclosure to the Accident Employer: (1) improper oral disclosure of medical information; (2) improperly disclosing personal information by providing a copy of a reconsideration decision letter and enclosures to the Accident Employer; and (3) improperly disclosing personal information by providing a copy of the Complainant's whole file to the Accident Employer during an appeal. The Commissioner's findings are that: (1) there is insufficient evidence of improper oral disclosure; (2) the Board violated the *Freedom of Information and Protection of Privacy Act* (*FOIPP Act*) when it disclosed the reconsideration

decision letter and enclosures to the Accident Employer; (3a) the Board violated the *FOIPP Act* when it filed with the Tribunal the contents of the Complainant's whole claim file, including records that the Board did not intend to rely on, and, (3b) the Tribunal violated the *FOIPP Act* when it disclosed the Complainant's whole Board file to the Accident Employer who had advised the Tribunal that it was not participating in the appeal.

Statutes and Regulations Cited: *Freedom of Information and Protection of Privacy Act,* S.P.E.I. 2001, c.37, R.S.P.E.I. 1988, c. F-15.01, ss. 3, 37, 38, 50, and 66; *Freedom of Information and Protection of Privacy Act General Regulations* (EC564/02), s. 6; *Workers Compensation Act*, R.S.P.E.I. 1988, c. W-7.1, ss. 56, 83; *Workers Compensation Act Appeal Regulations* (EC357/95), ss. 3, 4.

Authorities Cited: *Re Workers Compensation Board*, P.E.I. Order No. PP-06-002, 2006 CanLII 39091 (PEI IPC); *Re Workers' Compensation Board*, Order F2005-027 (AB OIPC.); *Calgary Police Service*, Order F2006-016 (AB OIPC); *Re Department of Health*, Order No. PP-06-003, 2006 CanLII 39092 (PEI IPC); *Workers' Comp. Bd. (PEI)* v. *MacDonald,* 2007 PESCAD 4 (CanLII); *Re Workers Compensation Board*, Order No. PP-04-004, 2004 CanLII 54474 (PEI IPC); *Simons* v. *Prince Edward Island (Workers Compensation Board)*, [1999] 2 P.E.I.R. 316, 1999 CanLII 4721 (PE S.C.T.D.), *Re Workers' Compensation Board Appeals Commission* 98-IR-012, Investigative Report #1501 (AB OIPC); *Dunkle* v. *Saskatchewan (Advanced Education, Employment and Labour, Occupational Health and Safety Division)*, 2011 SKQB 59 (CanLII).

Authorities Distinguished: *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (S.C.C.), [1999] 2 S.C.R. 817 (S.C.C.)

I. BACKGROUND

[1] The complaint is that the Workers Compensation Board (the Board) improperly disclosed personal information to the Complainant's Accident Employer on three different occasions. This is the second order of this office concerning the Board disclosing the Complainant's personal information and records to the Accident Employer.

Previous Complaint

[2] This office reviewed a previous complaint by the Complainant against the Board of a similar nature. *Re Workers Compensation Board*, P.E.I. Order No. PP-06-002, 2006 CanLII 39091 (PE IPC), contains Acting Commissioner Rose's ruling. She summarizes the complaint on page 1 of the order, as follows;

> Six months following the injury, the Case Manager of the Public Body notified the Complainant that he was ready for an ease back program. The Complainant was also advised by the Case Manager that his job was now unavailable due to a slow down in his employer's business. Because the job was unavailable, the Public Body would not be able to arrange an ease back program for him after all. The Complainant responded to the Public Body, in writing, as follows:
>
> > The writer must view your letter of June 18, 2001 as an indirect notice of layoff releasing him from the employment of [*employer*]. As a result of this transition, there will be no further sharing of information regarding the writer or this case with [*employer*]. Information released by either the Board or yourself from the date of notification without my consent would constitute a severe breach of the Privacy Act. I do not believe this to be an unreasonable demand based upon the present circumstances.

> Three years later, the Complainant wrote to the Internal Reconsideration Officer of the Public Body to request that his case be re-opened based upon new medical information. When the Internal Reconsideration Officer responded to the Complainant's request, the correspondence was copied to the Complainant's former employer. It is this action which has led to the complaint to this Office.

[3] The first level of appeal for an injured worker is a "reconsideration" (*Workers Compensation Act*, R.S.P.E.I. 1988, c. W-7.1, s. 56). The Board made a reconsideration decision and sent a copy of the decision letter and enclosures to the Accident Employer. Acting Commissioner Rose found that the letter and enclosures copied to the Accident Employer contained personal information and that sending these records to the Accident Employer was not reasonably required. The Acting Commissioner states at page 18:

> I find that the Public Body has violated section 37(2) of the *FOIPP Act*, in that it has not disclosed only the information which is reasonably required by section 37(1)(b) of the *FOIPP Act*. The Public Body's action of sending a copy of the letter at issue to the Complainant's former employer goes beyond the Public Body's stated intention of "notifying" parties with a direct interest. The letter provides personal information of the Complainant which is not necessary to fulfill the Public Body's obligation to notify the employer. The Complainant's home address, for example, exceeds the requirements of notification, as does the discussion regarding medical aid benefits from three years previously.

[4] The Acting Commissioner did not order the Board to cease disclosing the information, saying:

> I have found that the head of the Workers' Compensation Board has violated Part II of the *FOIPP Act*. However, as is often the case when a public body has violated the privacy provisions of the *FOIPP Act*, I cannot order the head of the Workers' Compensation Board to stop disclosing the Complainant's personal information, as the disclosure at issue is already complete.

[5] The Acting Commissioner goes on to recommend that the Board amend its reconsideration procedure to be sensitive to privacy and to limit the disclosure of

personal information to that which is necessary and complies with the *FOIPP Act*.

Present Complaint

[6] The present complaint is that personal information was improperly disclosed to the Complainant's Accident Employer. The Complainant questions the information handling practices of the Board and states in his initial submissions:

> The Board and their representatives continue to be too liberal with the sharing of my personal information. I would like my confidential information to be handled with a more appropriate level of privacy and request an end to the violation of my right to privacy.

[7] The Complainant says that the Board disclosed personal information to the same Accident Employer on three separate occasions, as follows:

(1) the Board discussed the Complainant's medical information with the Accident Employer;
(2) the Board sent a copy of a reconsideration decision letter and enclosures containing personal information to the Accident Employer; and
(3) the Appeal Record and Factum, both containing personal information, were provided to the Accident Employer.

Summary of Complaint 1:

The Board discussed the Complainant's medical information with the Accident Employer

[8] Phone conversations between the Board and the Accident Employer were recorded in an event log kept by the Board. A couple of entries summarize conversations with the Accident Employer about an upcoming meeting regarding a functional capacity evaluation of the Complainant. The Complainant believes that during the phone conversations, an employee of the Board discussed the Complainant's medical condition.

The foundation for this belief is that an employee of the Accident Employer asked the Complainant about a "pre-existing condition" at a social function. The Complainant believes that this person does not normally use this expression; it was remarkable enough for the Complainant to note it in his own records. When the Complainant received a copy of the event log prepared by the Board, the Complainant made a connection between the phone calls and the remark made at the social function. The remark was made by the employee several days after the telephone calls, and the Complainant believes that the employee learned the expression from the Board. The Complainant believes that the employee and the Board were discussing the Complainant's medical condition.

Summary of Complaint 2:

The Board sent a copy of the reconsideration decision letter and enclosures containing personal information to the Accident Employer

[9] This complaint is strikingly similar to the facts of the above-noted 2006 order; however, the topics of the reconsideration decisions are different. The reconsideration decision letter in the 2006 order was about not yet having an original decision to reconsider; the subject of the reconsideration decision letter to this review is about deeming the Complainant capable of working a certain amount of hours per week and consequently reducing benefits. About ten days before requesting reconsideration, the Complainant wrote to the Board and repeated his concerns about the Board disclosing personal information to the Accident Employer. Two months later, the Board sent the reconsideration decision letter and enclosures to the Complainant and sent a copy to the Accident Employer.

Summary of Complaint 3:

The Appeal Record and Factum were disclosed to the Accident Employer

[10] The Complainant appealed the reconsideration decision about his deemed hours and reduced benefits. For every appeal, the Board prepares an appeal record and factum. An appeal record is a copy of the records that the Workers Compensation Appeal Tribunal (the Tribunal) needs to review for the appeal and typically includes all records that the Board relied upon. A factum is a document that usually sets out the facts, the issues, the pertinent rules, including laws, policies and case precedents, and a discussion of the author's position on how the facts apply to the rules. I do not have copies of all of these records, but I have a copy of the cover page to both the Appeal Record and the Factum, together with an index to the Appeal Record that lists 151 documents described by date, recipient and author. The Accident Employer received a copy of all the records in the Appeal Record and a copy of the Factum.

[11] On the initiation of the complaint to our office, the Board conducted its own internal review. It became apparent that the Tribunal was also a party to the review, because when the Board filed the Appeal Record and Factum on the Tribunal, the Tribunal served or delivered all of the documents to the Accident Employer. The Tribunal was invited to make submissions and participated in this review.

Undisputed Facts:

[12] The following facts are not disputed:

(a) The information in the records contain "personal information" as defined in clause 1(i) of the *FOIPP Act*;
(b) The Board has the authority to collect personal information for the purposes of administering a workers compensation claim;

(c) The Board disclosed the reconsideration decision letter and enclosures to the Accident Employer;

(d) The Accident Employer did not make a written request for a copy of the reconsideration letter and enclosures;

(e) The Accident Employer's assessment rates would not be affected by the decision of the Board or the decision of the Tribunal;

(f) The Appeal Record and Factum were filed by the Board with the Tribunal;

(g) The Tribunal served or delivered the Appeal Record and Factum on the Accident Employer; and

(h) The Appeal Record contains a complete copy of the Board's file about the Complainant's claim.

II. ISSUES

[13] The issues are:

1. Does this office have jurisdiction over the actions of the Board and the Tribunal?
2. Did the Board violate the *FOIPP Act* by discussing the Complainant's medical information with the Accident Employer?
3. Did the Board violate the *FOIPP Act* by providing a copy of the reconsideration decision letter and enclosures to the Accident Employer?
4. Did the Board violate the *FOIPP Act* by filing the contents of the Complainant's whole claim file to the Tribunal in the appeal procedure?
5. Did the Tribunal violate the *FOIPP Act* by providing the Complainant's Appeal Record and Factum to the Accident Employer?

III. ANALYSIS OF THE ISSUES

Issue 1: Does this office have jurisdiction over the actions of the Board and the Tribunal?

[14] One of the first issues to address in every review is the authority of this office to review the matter. The Board does not dispute the jurisdiction of this office to review the first complaint about the Board discussing medical information. The Board contests my authority to review both the second complaint about copying the reconsideration decision letter and enclosures to the Accident Employer, and the third complaint about what records the Board may file with the Tribunal. Initially, before the Tribunal was joined as a party to the review, the Board contested my jurisdiction over the Tribunal.

Jurisdiction regarding disclosure of the reconsideration decision letter and enclosures to the Accident Employer:

[15] The Board submits that I do not have jurisdiction to decide to whom the Board may copy the reconsideration decision letter and enclosures. The Board submits that:

> It should be up to the appellate tribunal (i.e. either WCAT or to the Court) to determine whether an employer or former employer has real, as opposed to presumptive, standing to pursue an appeal. The Privacy Commissioner should not attempt to decide which employers or former employers have standing or do not have standing to appeal because, doing so, would trench on the jurisdiction of those appellate tribunals. Moreover, the Privacy Commissioner must take great care to ensure that employers and former employers are not deprived of their appeal rights under the *WCA*, because of any order by this office in this case which, when implemented by the Board, will have the effect of denying them access to such Board decisions in the future.

[16] This office had jurisdiction to review and make findings on the complaint in 2006, and this office has jurisdiction again. In law, a person with 'standing' has sufficient connection to the matter to be permitted to participate. I am not determining who has

standing to appeal a decision of the Board. As a designated public body, the Board is required to comply with the *FOIPP Act*, and my focus remains on whether the Board had the authority to disclose the personal information of the Complainant.

Jurisdiction regarding filing the Appeal Record and Factum by the Board with the Tribunal:

[17] The Board submits that:

> It is also not the function of the Privacy Commissioner to second-guess what material the Board and its legal counsel should provide to WCAT on any appeal. Doing so would be beyond both the Privacy Commissioner's mandate and expertise.

[18] The mandate of the Information and Privacy Commissioner includes reviewing the decisions and practices of provincial government offices and public bodies as they relate to protection of privacy. Clause 50(2)(e) of the *FOIPP Act* includes the power to investigate complaints that personal information has been disclosed by a public body in violation of Part II of the *FOIPP Act* regarding protection of privacy. If a violation is found, the Information and Privacy Commissioner may order a public body to stop disclosing personal information in violation of Part II of the *FOIPP Act* [s. 66(3)(e) of the *FOIPP Act*].

[19] It is within my mandate to review the disclosure of personal information by the Board which, as a public body, must comply with the *FOIPP Act*.

Jurisdiction regarding the Tribunal serving the Appeal Record and Factum on the Accident Employer:

[20] The Board initially questioned the jurisdiction of this office to review the issue of the appeal materials being served on the Accident Employer. As noted above, the Board was

the public body that filed the personal information contained in the Appeal Record and Factum on the Tribunal, and the Tribunal was the public body that served or delivered the documents to the Accident Employer. The Board initially argued:

> It could not be clearer that the legal responsibility for serving materials on the parties to an appeal to WCAT lies with WCAT alone. WCAT is not a party to [the Complainant]'s complaint. Consequently, the Privacy Commissioner has no jurisdiction over this allegation, and it ought to be dismissed summarily.

[21] The Board directed me to a decision of the Alberta Information and Privacy Commissioner in *Workers' Compensation Board*, Order No. F2005-027. In that case, a complainant alleged that the Alberta Workers' Compensation Board violated privacy laws by disclosing personal information to the Employer:

> [para 9] The WCB states that it did not disclose the Complainant's entire claim file to the Employer. The WCB surmises that the Appeals Commission may have disclosed, to the Employer, the claim file as part of the Appeal Documents Package.
>
> . . .
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> [para 11] In addition, I note that the Appeals Commission is a public body which is separate and distinct from the WCB and was not identified as a party in this inquiry. As such, I will not address, in this inquiry, whether the Appeals Commission disclosed those records to the Employer in contravention of Part 2 of the FOIP Act.

[22] This Alberta decision has similar facts to the case before me. The difference between this case and the Alberta case is that in this case the Tribunal became a party to the review. The Board and the Tribunal are listed under Part II of Schedule 1 to the *FOIPP Act General Regulations* as separate and distinct public bodies. The *FOIPP Act* does not limit reviews to only one public body so, although the Tribunal was not initially a subject of the complaint, the scope of the review was broadened and the Tribunal was invited to participate in the review by carrying out their own investigation and to make submissions. The two public bodies are very closely connected and the Complainant's failure to distinguish between them is understandable. In response to the submission of the Board to summarily dismiss the matter, the Complainant made the following remarks,

which have been paraphrased:

(a) the Notice of Appeal was sent to the Tribunal at the same address as the Board;
(b) the Notice of Appeal was sent in care of the Board;
(c) the operating costs and the wages for the Tribunal and the Board are drawn from the same fund; and
(d) the Tribunal is bound by and implements the Board's policies.

[23] As two public bodies are involved, the third complaint is two-fold. The disclosure of the Appeal Record and Factum to the Accident Employer happened in two stages: (1) the Board provided the Appeal Record and Factum containing the personal information to the Tribunal; and (2) the Tribunal then served the Appeal Record and Factum containing the personal information on the Accident Employer.

[24] Although the Complainant did not initially identify the Tribunal in the complaint, I find that the Tribunal is a party to the review and that I have jurisdiction over this matter to review the actions of both the Board and the Tribunal.

[25] I find that I have jurisdiction to review all matters in this review.

Issue 2: Did the Board violate the FOIPP Act by discussing the Complainant's medical information with the Accident Employer?

[26] In late 2006, the Board arranged a functional capacity evaluation of the Complainant. This is a medically-supervised test of a worker's abilities and physical tolerance to a variety of work activities (e.g. weights, frequency and/or duration). The Board phoned the Accident Employer to invite it to a meeting to discuss the results of the Complainant's evaluation. The Accident Employer did not attend this meeting and the meeting is not the subject of this complaint, but the phone conversations between the Board and the Accident Employer regarding the meeting gave rise to one of the

complaints. The phone conversations are summarized in an event log created by the Board, a copy of which was provided to the Complainant. The Complainant believes that during the phone conversations, an employee of the Board discussed the Complainant's medical condition. The Complainant believes the proof that his medical condition was discussed is that an employee of the Accident Employer used the expression "pre-existing condition" shortly after these phone calls. Nothing in the event log indicates that the Board shared any medical information with the Accident Employer. The Complainant believes that inappropriate disclosure was not recorded in the event log because the employee of the Board knew better than to create a record of an offence. The Board submits that the employee of the Board confirmed that there was no discussion of the content of the Complainant's medical records during the telephone conversations.

[27] Citing from *Calgary Police Service*, Order F2006-016 (AB OIPC), the Board states:

> The Complainant's assertion that these were discussion of his medical conditions during these conversations is based on pure speculation, and should not be entertained. A person who makes a privacy complaint based on the alleged unlawful disclosure of his personal information to a third party must, at the very least, "provide some evidence that the thing of what he complains happened – at a minimum, some credible basis for the complainants idea or belief that it happened."

[28] Previous orders of this office say that when considering the burden of proof in complaints of a breach of privacy, I must look at logical factors such as which party raised the issue and which party is best able to provide evidence. It is up to a complainant to prove that a disclosure of personal information occurred, and to a public body to show that the disclosure is a proper one under the *FOIPP Act* [*Re Department of Health*, Order No. PP-06-003, 2006 CanLII 39092 (PE IPC)]. The standard of proof is on a balance of probabilities.

[29] There is evidence of phone conversations between the Accident Employer and the Board, and there is evidence of the subsequent use of the expression "pre-existing condition" by an employee of the Accident Employer; however, I have no evidence that the employee

learned this expression from the Board during a discussion about the Complainant's medical condition. The Complainant was unwilling to request a supporting statement from the employee (whom he describes as a friend for 25 years), because he did not believe that this person would confirm his complaint. The use of the expression alone does not establish that the Complainant's personal information was disclosed. "Pre-existing condition" is not a complicated medical expression or unfamiliar expression. Many would understand the expression upon hearing it just once and would be able to properly incorporate it into their vocabulary. The expression has a broader usage than just the Complainant's file or the workers compensation system. The employee could have learned the expression in dealing with the workers compensation system with other employees, or in relation to his own circumstances, or those of a family member or colleague; it is possible that this expression may have been used in the records that were the subject of Order PP-06-002.

[30] Although the Board did not provide a statement from its employee, it is initially the Complainant's burden of proof. The Complainant has not met the burden of proof that a disclosure of medical information occurred. I do not have evidence that an employee of the Board discussed the Complainant's medical condition with an employee of the Accident Employer. I therefore do not find any violation of Part II of the *FOIPP Act* by the Board as it relates to discussing the Complainant's medical information with the Accident Employer.

Issue 3: Did the Board violate the FOIPP Act by providing a copy of the reconsideration decision letter and enclosures to the Accident Employer?

[31] The Board does not deny that it provided a copy of the reconsideration decision letter and enclosures to the Accident Employer, but says that it has the authority under two clauses of section 37 of the *FOIPP Act*. Section 37 is found in Part II of the *FOIPP Act* dealing with protection of privacy. It lists about 30 circumstances when a public body may disclose personal information. The Board relies on clause 37(1)(b), which permits

disclosure of personal information if the disclosure is for a purpose consistent with its collection. The Board also relies on clause 37(1)(e), which permits disclosure of personal information if it is in accordance with another law.

Clause 37(1)(b): Consistent purpose for which the information was collected

[32] The *FOIPP Act* permits disclosure of personal information if it is consistent with the purpose for which the information was collected. Clause 37(1)(b) states:

> 37. (1) A public body may disclose personal information only
> (b) for the purpose for which the information was collected or compiled or for a use consistent with that purpose;
> . . .
> 37. (2) Only information that is reasonably required may be disclosed under subsection (1).

[33] The Board claims that the purpose of disclosing the personal information was for the administration of the claim and, specifically, for ensuring that the Accident Employer could appeal if necessary. The Board argued this clause in 2006 and the Commissioner partially accepted its position in Order PP-06-002. Acting Commissioner Rose found that disclosure of the letter to the former employer was for a consistent purpose, namely, to ensure that the employer was aware of what was occurring with respect to the worker's claim. The disclosure allowed the employer an opportunity to appeal the decision if necessary. Commissioner Rose also discussed section 38 of the *FOIPP Act*, which sets out the standards in determining if disclosure of personal information is consistent with the purpose for which the information was collected or compiled. Section 38 states:

> 38. For the purposes of clauses 36(1)(a) and 37(1)(b), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure
> (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.

[34] In 2006, Acting Commissioner Rose found that the Board had disclosed too much personal information by providing the whole reconsideration decision letter. I am again asked to review whether the Board has authority under clause 37(1)(b) to provide a copy of the whole reconsideration decision letter and enclosures to the Accident Employer. This involves another analysis of whether providing this letter is reasonably or directly connected to the purpose of ensuring that a person with a direct interest is informed and can pursue an appeal, and whether disclosure is necessary to operate the workers compensation program.

[35] The Board must be mindful of who may request a reconsideration or appeal of a decision of the Board. A person with a direct interest in a decision by the Board has a right to request that it be reconsidered or appealed. It follows then, that a person with a direct interest has to be aware that a decision has been made in order to make this right of reconsideration or appeal effective. The *Workers Compensation Act, supra,* contemplated that "persons with a direct interest" be notified of the decision. Subsection 56(1) states:

> 56. (1) The Board shall not reconsider a decision under this Act or the prior Act made after this section comes into force, except on the written request of a person with a direct interest in the decision made not later than 90 days from the date of notification of the decision. [emphasis added]

[36] There is an important fact in this review that is different from the facts of Order PP-06-002. In the 2006 review, the Board claimed its decision may have affected the Accident Employer by compelling the Accident Employer to return the worker to the workplace or by changing the Accident Employer's assessment rate. At page 14 of Order No. PP-06-002, Acting Commissioner Rose observed that returning the worker to the workplace was no longer an issue. The remaining factor of the Board decision that may have affected the Accident Employer at that time was the possibility of a change in the Accident Employer's assessment rate. In the case at hand, the Board now advises that the assessment rate for the Accident Employer will not be affected by either the outcome of

the reconsideration decision or by the outcome of an appeal to the Tribunal.

[37] Disclosure of personal information is tempered by subsection 37(2) of the *FOIPP Act*, which says that only information that is reasonably required may be disclosed and the disclosure must have a reasonable and direct connection to that purpose. Further, pursuant to section 38 of the *FOIPP Act*, the disclosure must be necessary. I am not persuaded that the entire letter and enclosures were reasonably required, or that the disclosure was necessary.

[38] A notice could serve the same purpose of informing an accident employer that a decision was being made. The notice could advise an accident employer that if it wished to have a summary of the reconsideration decision it could make a written request. Subsection 56(5) of the *Workers Compensation Act, supra*, states:

> 56. (5) Following reconsideration, the Board may confirm, vary or reverse its decision and shall, on the written request of a person with a direct interest in the matter, provide a written summary of its reasons.

[39] The notice could advise an accident employer if the decision could affect the employer's assessment rate or obligation to re-employ the worker. There may be circumstances when the Board finds a direct interest outside of an accident employer's assessment rate or the obligation to re-employ the worker. The notice to an accident employer could include a request for an explanation from the accident employer of what its direct interest is, and then the Board could assess the direct interest.

[40] The Board made lengthy submissions about its practice of sending copies of reconsideration decisions to accident employers. The Board says:

> The Accident Employer had a "direct interest" in the IRO Decision as a party to the claim process. Nothing further was required in order for it to have a right to appeal to WCAT.[1]

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[1]IRO – acronym for 'Internal Reconsideration Officer' – an employee of the Board.

[41] The Board cites several Ontario decisions about the accident employer being a "party to the claim" or a "party of record". Ontario's workers compensation laws requires reconsideration decisions be given to the "parties of record", but this is not the law of PEI. The workers compensation laws of PEI do not automatically give an accident employer a right to receive the reconsideration decision; PEI law says a person **with a direct interest in the matter** may request a **summary** of a reconsideration decision [*Workers Compensation Act, supra*, ss. 56(5)]. The PEI *Workers Compensation Act, supra*, does not direct the Board to disclose personal information on its own initiative. The Board submissions do not contain any assessment of whether the Accident Employer has any interest, let alone a "direct interest".

[42] The Complainant argues that the Accident Employer did not have a direct interest. The Complainant says:

> This company did not inquire about my condition or maintain communication, failed to co-operate in the safe return to work, did not request a copy of my WCB File in writing nor verbally, did not make an alternative position available, did not respond to any WCB letters concerning the undersigned and did not attend any of the proceedings to which it was invited: ie: FCE post conference, and the Appeal Tribunal. In fact the company did not respond to any of the correspondence that it was force fed by the Board. This lack of action by the former employer was a direct violation of Section 86(1), 86(8) and 86.1 WCA.
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> . . .
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> The employer has displayed "no interest" in this case by its own lack of action even with the unsolicited documentation provided by the Board. [2]

[43] I agree with the Complainant. The expression "person with a direct interest" must mean something more than a mere curiosity. Justice McQuaid comments in *Workers' Comp. Bd. (PEI)* v. *MacDonald,* 2007 PESCAD 4 (CanLII) that typically the employer is a

[2]The Complainant refers to subsections 86(1), 86(8) and section 86.1 of the *Workers Compensation Act, supra*, dealing with the employers obligation to re-employ the worker, obligation to cooperate in the early and safe return to work of a worker injured in his or her employment and penalties for non-compliance.

disinterested person because one of the underpinnings of the workers compensation system is that the right to compensation is not based on fault. In that case, the Board was seeking standing and argued that if it did not participate in the hearing, the appeal of the worker would go unopposed. Justice McQuaid says at paragraph [33]:

> [33] Initially, when a claim is made by a worker for compensation the only "parties" are the Board and the worker. Employers are more often than not disinterested persons because fault is not in issue, the employer will have no liability and no financial responsibility other than the likelihood there may be an increase in the levy imposed by the Board if a significant number of claims in the employers' class are allowed. Therefore, in the event a worker appeals the decision of the Board to WCAT, there is a legitimate reason why the Board is permitted to appear as a person with a direct interest in the matter. Otherwise, there would be no party opposite the worker with a knowledge of the merits of the claim to present the Board's position on the claim to the WCAT panel.
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> [34] This is not to say that an employer never becomes involved in a claim. [emphasis added]

[44] The Board has a blanket presumption that the Accident Employer has a direct interest. The expression "person with a direct interest in the matter" is not defined under the *Workers Compensation Act, supra*, or it's regulations. The Board relies on the Board policies that define "persons with a direct interest", as follows:

"Persons with a direct interest" means:

- for employer assessment decisions – an employer, the Workers Compensation Board or representatives of any of these persons;
- for worker claim decisions – a worker, dependants of a deceased worker, the worker's employer, the Workers Compensation Board or representatives of any of these persons.

[45] With respect, the policy definition of "persons with a direct interest" is not well-founded. I am not persuaded that an accident employer has a direct interest in every case. By making a blanket presumption, the policy preempts an analysis of a direct interest.

[46] Providing the whole reconsideration decision letter and enclosures is not reasonably required to fulfill the purpose of ensuring that a person with the potential of having a direct interest is informed of a decision. Disclosure of the reconsideration decision letter was not directly connected to the administration of the Complainant's claim. I find that the disclosure was not necessary. As the disclosure is not reasonably connected to the purpose, or necessary, the disclosure is not permitted under clause 37(1)(b) of the *FOIPP Act*.

Clause 37(1)(e): Disclosure in accordance with another law

[47] The *FOIPP Act* permits disclosure of personal information if the disclosure is in accordance with another enactment (a law or regulation) that authorizes disclosure. Clause 37(1)(e) states as follows:

> 37. (1) A public body may disclose personal information only
> (e) for any purpose in accordance with an enactment of Prince Edward Island or Canada that authorizes or requires the disclosure;
> . . .
> 37. (2) Only information that is reasonably required may be disclosed under subsection (1).

[48] Acting Commissioner Rose remarks about the interpretation of this clause at page 10 of Order PP-06-002, as follows:

> For the Public Body to be successful in its argument, it would need to show that the *Workers Compensation Act, supra* authorizes or requires the disclosure.

[49] The Board relies on subsection 56(5) of the *Workers Compensation Act, supra,* which says:

> 56. (5) Following reconsideration, the Board may confirm, vary or reverse its decision 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]

[50] The Legislature did not intend for reconsideration to be a public procedure; the Legislature intended that:

(1) there be a written request;
(2) the written request be from a person with a direct interest in the matter; and
(3) the Board provide a written summary of its reasons.

[51] Here, the Board has met none of these three requirements of the *Workers Compensation Act, supra;* the Board has not shown that it was authorized or required to disclose personal information. As such, the Board is not permitted to disclose the reconsideration decision letter and enclosures to the Accident Employer under clause 37(1)(e) of the *FOIPP Act*.

Written Request

[52] The Accident Employer did not make a written request for a summary of the reasons for the reconsideration decision. The Board advises that:

> The Board recognizes that s. 56(5) of the *WCA* contemplates that a written request for summary reasons for an internal recommendation decision will be made. It is not, however, the Board's practice to require such a request by either the worker or the employer.

[53] The Board takes the position that it pro-actively discloses the reconsideration decision to an accident employer because an accident employer might have standing to appeal. The Board says that providing the decision without a request is fulfilling its duty to act fairly to an accident employer. The Board relies on a Supreme Court of Canada case, *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (S.C.C.), as support for its submission that it should send the reconsideration decision to an accident employer. However, I distinguish the *Baker* case from this situation, because the

Supreme Court of Canada decision does not deal with the issue of to whom to disclose reasons for a decision; it deals with a situation where no reasons for an immigration decision were given at all.

[54] At the time of disclosure, the Board had a written procedure directing that it send copies of a reconsideration decision about a worker's claim to the worker's employer without a request (Policy No. POL 06-01). This is not the disclosure procedure set out in the *Workers Compensation Act, supra*. The law did not authorize or require disclosure of the entire reconsideration decision letter, so it was not a permitted disclosure under clause 37(1)(e) of the *FOIPP Act*.

Direct Interest

[55] I have already found that the law did not authorize or require disclosure of the reconsideration decision letter and enclosures to the Accident Employer as there was no written request and, as such, is not permitted under the *FOIPP Act*. If the Accident Employer had made a written request for a summary of the reasons for the Board decision, I would still have found that the Board had not met the second requirement of subsection 56(5) of the *Workers Compensation Act*, *supra*. The Board ought to have made an assessment of the Accident Employer's "direct interest in the matter." As raised in the discussion of clause 37(1)(b), an accident employer may have a direct interest in a reconsideration decision, but no direct interest has been identified here.

Written Summary of Board Reasons

[56] I have already found that the law does not authorize or require disclosure of the reconsideration decision letter and enclosures and, as such, is not permitted under the *FOIPP Act*. If the Accident Employer had made a written request and identified a direct interest, I still would have found that the Board had not met the third part of subsection 56(5) of the *Workers Compensation Act, supra,* which directs the Board to give an

accident employer a written summary of the Board reasons. The Board gave a copy of the whole decision letter and enclosures to the Accident Employer which contained personal information of the Complainant. The Board submits that although the reconsideration decision letter contains an overview of the Complainant's claim, including medical information, it is in an abbreviated form. I have reviewed the decision letter and confirm that the decision letter includes medical information and financial information. Even in an abbreviated form, it is still a disclosure of personal information. Subsection 56(5) of the *Workers Compensation Act, supra,* does not authorize or require the entire reconsideration decision letter be disclosed. If the Legislature had intended the entire letter be provided, it would not have used the word "summary". Acting Commissioner Rose already found that sending the entire reconsideration letter discloses too much personal information.

[57] The *Workers Compensation Act, supra,* allows the disclosure of personal information if a person makes a written request and the person has a direct interest. If these two factors are present, the Board can tailor a summary of the reconsideration decision to the identified direct interest of the person.

[58] It is possible that a summary of a decision would not be enough information to present an appeal effectively. The *Workers Compensation Act, supra*, addresses this possibility at section 83. Section 83 permits an employer to request access to the relevant parts of a worker's file if there is some *bona fide*s or legitimate issue with respect to compensation of a worker. This section of the law limits the use of the information to pursue the issue in the dispute and sets out a penalty of not less than $1,000.00 if the law is broken.

[59] The Board did not have authority to disclose the Complainant's personal information under its own legislation, and it did not meet the requirements of clause 37(1)(e) of the *FOIPP Act* to disclose the reconsideration decision letter and enclosures.

[60] I find that the Board has violated Part II of the *FOIPP Act* about the protection of

personal information by disclosing personal information in the reconsideration decision letter and enclosures to the Accident Employer.

Issue 4: Did the Board violate the FOIPP Act by filing the contents of the Complainant's whole claim file to the Tribunal in the appeal procedure?

[61] The third complaint about the provision of the appeal records to the Accident Employer is two-fold. I will first consider the actions of Board when it disclosed personal information to the Tribunal in the Appeal Record and Factum.

Authority to Collect Information

[62] The Board made submissions about its authority to collect personal information; however, the authority to collect information is not an issue of the review. The issue of this review is whether the Board was in compliance with the *FOIPP Act* when it disclosed personal information to the Tribunal for the appeal.

Authority to Disclose Information

[63] Section 37 of the *FOIPP Act* lists about 30 circumstances when the law allows a public body to disclose personal information. The Board discusses two clauses of section 37: clause 37(1)(e) permits the disclosure of personal information if another law authorizes the disclosure; and clause 37(1)(t) permits the disclosure of personal information if it is to be used in a proceeding before a court or quasi-judicial body.

Clause 37(1)(e): Disclosure in accordance with another law

[64] Clause 37(1)(e) of the *FOIPP Act* permits the disclosure of personal information if another enactment or law authorizes the disclosure. Clause 37(1)(e) states:

> 37. (1) A public body may disclose personal information only
>
> (e) for any purpose in accordance with an enactment of Prince Edward Island or Canada that authorizes or requires the disclosure;
>
> . . .
>
> 37. (2) Only information that is reasonably required may be disclosed under subsection (1).

[65] The Board relies on the *Workers Compensation Act Appeal Regulations, supra*, and, specifically, section 4. Section 4 requires the Board to file with the Tribunal the materials upon which it intends to rely. It states as follows:

> 4. Within 30 days after receiving the materials, submissions, arguments or reasons of the appellant, the Workers Compensation Board and all other parties who have a direct interest in the matter and who choose to be involved in the appeal, shall file with the Workers Compensation Appeal Tribunal five copies of the materials, submissions, arguments or reasons upon which they intend to rely. [emphasis added]

[66] The Book of Authorities that the Board filed with the Tribunal lists 151 documents in its index. I do not have all of the documents listed in the index of the Appeal Record or the Factum filed by the Board. The Factum presumably sets out pinpoint references to evidence or records on which the Board intended to rely. Of the 151 documents, I counted 25 that the Complainant provided to the Tribunal with some financial information blacked out. Expecting that the Board would rely on the balance of the information found in these 25 documents is reasonable. As the Board intended to rely on this information, the *Workers Compensation Act, supra*, authorizes or permits disclosure of the information and it is a permitted disclosure under the *FOIPP Act*. Additionally or alternatively, disclosure of personal information already disclosed to the Tribunal by the Complainant would not be an unreasonable invasion of the personal privacy of the Complainant on the facts of this case. Except for the financial information that the Complainant had blacked out, I do not find that the Board violated the *FOIPP Act* by disclosing the information in these 25 records to the Tribunal.

[67] Although I cannot assess many records indexed and identified by date, author and

recipient, I compared the index of the Appeal Record to the reconsideration decision letter of the Board and the decision of the Tribunal. I identified 11 additional records that the Tribunal mentioned in the written decisions and that the Complainant did not provide to the Tribunal. I find that the Board relied on the 11 records specifically mentioned in the written decisions. I do not find that the Board violated the *FOIPP Act* by disclosing these 11 records to the Tribunal.

[68] As for the balance of the records, the Board is obliged to file materials with the Tribunal upon which the Board intends to rely. The Board says that the Complainant's grounds for appeal as listed in his Notice of Appeal were not clear and, therefore, the Board had the authority to provide the Complainant's whole file to the Tribunal. The Board says:

> The Board, and its legal counsel, are entitled to a great deal of latitude in determining what should be filed with WCAT. In the circumstances, giving a very substantial amount of leeway in that regard would be reasonable. Issues that cannot always be fully anticipated beforehand are often raised during WCAT hearings. This is particularly true where, as here, the Notice of Appeal is expressed in extremely ambiguous terms, and the worker has filed a lot of materials to which the Board has to respond. WCAT also tends to give workers, who are usually unrepresented, considerable freedom in presenting their cases, and in raising new issues. Consequently, the Board has to be fully prepared for what will, and might, come up at the hearing.

[69] I do not accept the Board's position that it has the authority to disclose the contents of the Complainant's whole file, including personal information, just in case the Board might need it. Section 4 of the *Workers Compensation Act Appeal Regulations, supra*, is clear that the Board has the authority to file materials **upon which the Board intends to rely**.

[70] It is possible that the Board and Tribunal relied on some of the remaining 115 records listed in the index of the Appeal Record, but were not mentioned in the two written decisions. In its reply submissions the Board argued:

> [The Complainant]'s complaint was that the Board deemed him capable of

> working a certain amount at a particular wage rate. In order to properly present its case to WCAT, the Board had to have all the information pertinent to that issue at its disposal at the appeal hearing. All that information also had to be made available to WCAT in order for it to make a proper decision. [The Complainant] submitted extensive materials which included medical information.
>
> The primary documentation relied upon by WCAT in its decision was the functional capacity evaluation conducted on the worker . . . , and the vocational counsellor's report. . . . Both documents refer to, and rely extensively on, other information about the worker. That information included an extensive client history form which was attached to the functional capacity evaluation, and information about [the Complainant]'s work history and education level etc. The Board and WCAT needed this underlying information in order to properly address [the Complainant]'s medical history and current medical status, and the validity of the functional capacity evaluation and vocational counsellor's report.

[71] It is reasonable that the Board would rely on some medical and financial information to assess capacity to work and benefits, but there are glaring examples of documents that are not relevant to the appeal. For example, the Board gave the Tribunal copies of correspondence between the Board and this office about the previous substantiated privacy complaint. I cannot conceive of any legitimate purpose the Board would rely on these records in its submissions to the Tribunal about a decision on the Complainant's capacity to work and benefits.

[72] Many of the records include the Complainant's Personal Health Number. This concern was specifically raised by the Complainant. The Board has its own case numbering system and neither the Board nor the Tribunal identified any use for the Personal Health Number. Another observation of the Complainant is that the Board disclosed medical records dated almost two years before the injury. The Board advises that it routinely collects medical records pre-dating the work injury to decide if the worker had a relevant pre-existing injury that would affect the workers benefits. The authority of the Board to collect personal medical information from before the work injury was considered and accepted by this office in *Re Workers Compensation Board*, Order No. PP-04-004, 2004 CanLII 54474 (PE IPC). While it may have been an acceptable collection of personal

information, the Board has made no submissions about its authority to disclose the information to the Tribunal.

[73] I question whether it would be reasonable to expect that the Board would rely on some of the other records. For example, the Board disclosed a letter from the Complainant's provincial Member of the Legislative Assembly. I cannot conceive of any legitimate purpose the Board would need to rely on this record in its submissions to the Tribunal about the Complainant's capacity to work and benefits.

[74] It is not necessary for me to review all of the records to see that the Board disclosed documents that are not relevant to the appeal. The Board disclosed too much personal information to the Tribunal in its Appeal Record and Factum. The *FOIPP Act* does not limit the information otherwise available by law to a party to a legal proceeding [subsection 3(c) of the *FOIPP Act*]. Restricting the Appeal Record to relevant information ought not be a hardship to the Board. As an example, in *Workers Compensation Board,* F-2005-027, *supra,* the Alberta Commissioner remarks that the Alberta WCB only disclosed information that was relevant to the review:

> [para 36] I find that the WCB properly exercised its discretion in disclosing the Complainant's personal information to the Employer. In coming to this conclusion I took into account that the WCB did not arbitrarily disclose the Complainant's personal information. After a review of the records at issue, I am satisfied that the WCB only disclosed information that was relevant to the review and information rights of employers under the WCA.

[75] I find that section 4 of the *Workers Compensation Act Appeal Regulations, supra,* does not authorize or require the Board to disclose personal information to the Tribunal just in case the Board might need it. The *Appeal Regulations* only give the Board the authority to disclose records on which it intends to rely. For some records, the Board has not met the minimum requirements to legally permit disclosure under the *Workers Compensation Act*, *supra,* and, as such, the disclosure is not permitted under clause 37(1)(e) of the *FOIPP Act*. Without reviewing all of the records or the Factum, I do not quantify the

scope of the violation to the Complainant's personal privacy by the Board's disclosure to the Tribunal.

Clause 37(1)(t): Disclosure for use in a proceeding before a quasi-judicial body

[76] The *FOIPP Act* permits disclosure of personal information if the disclosure is for use in a proceeding before a court or quasi-judicial body. Clause 37(1)(t) states:

> 37. (1) A public body may disclose personal information only
> (t) for use in a proceeding before a court or quasi-judicial body to which the Government of Prince Edward Island or a public body is a party;
>
> . . .
>
> 37. (2) Only information that is reasonably required may be disclosed under subsection (1). [emphasis added]

[77] The Board says:

> The Board was a party to [the Complainant]'s WCAT appeal, and WCAT was a quasi-judicial tribunal. That subsection, therefore, applied.

[78] Again, I have evidence that some of the records disclosed to the Tribunal were used in the appeal, but not all of the records disclosed to the Tribunal were used in the appeal or were even expected to be used in the appeal. Clauses from subsection 37(1) of the *FOIPP Act* are not *carte blanche* for disclosing records. The authority to disclose personal information under subsection 37(1) is balanced by a reasonableness component in subsection 37(2). Subsection 37(2) tempers the authority to disclose personal information to only information that is reasonably required.

[79] I find that clause 37(1)(t) of the *FOIPP Act* does not give the Board authority to disclose all of the contents of the Complainant's file. The Board disclosed more information than was reasonably required. If the Board did not intend to rely on all of the information or records it disclosed, then it was not "information that is reasonably required" and, as such, the *FOIPP Act* does not permit the disclosure.

[80] I find that the Board violated Part II of the *FOIPP Act* by disclosing personal information to the Tribunal about the Complainant that it did not intend to rely on in the appeal.

Issue 5: Did the Tribunal violate the FOIPP Act by providing the Complainant's Appeal Record and Factum to the Accident Employer?

[81] I turn now to the actions of the Tribunal. The Tribunal says that it had the legislative authority to disclose the Appeal Record and Factum to the Accident Employer because:

(1) the Tribunal had the Complainant's consent [clause 37(1)(c) of the *FOIPP Act*];
(2) the disclosure was consistent with the purpose for which the information was collected [clause 37(1)(b)of the *FOIPP Act*]; and
(3) the Tribunal was obliged to distribute the records under section 4 of the *Workers Compensation Act Appeal Regulations, supra*, and, as such, was permitted disclosure under clause 37(1)(d) of the *FOIPP Act*.

Clause 37(1)(c): Complainant's consent

[82] The *FOIPP Act* permits disclosure of personal information if the person consents to the disclosure. Clause 37(1)(c) states:

> 37. (1) A public body may disclose personal information only
> (c) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure;

[83] Section 6 of the *FOIPP Act General Regulations* requires that written consent to the disclosure of personal information needs to set out, in writing, to whom the public body may disclose the personal information and how the information may be used. Section 6 states:

> 6. The consent of an individual to a public body's using or disclosing any of the individual's personal information under clauses 36(1)(b) or 37(1)(c) of the Act shall
>
> (a) be in writing; and
>
> (b) specify to whom the personal information may be disclosed and how the personal information may be used.

[84] The Tribunal submits that it did not disclose personal information to the Complainant's Accident Employer without the Complainant's consent. The Tribunal says:

> It is WCAT's submission, we did have the worker's permission. An injured worker is required to complete a Form 6 - Worker's Report of Accident, which includes a Declaration of release of information to the employer. While a separate entity, the appeal process is part and parcel of the original process, policies and procedures. . . . [emphasis added]

[85] I have reviewed the two-page form entitled "Workers Report of Injury" signed by the Complainant. There is no declaration of release of information, nor is there any declaration of release of information to the Complainant's employer. This form has since been revised but, at the time the Complainant signed the claim, the form read as follows:

> IT IS VERY IMPORTANT THAT YOU IMMEDIATELY NOTIFY YOUR EMPLOYER AND ATTENDING PHYSICIAN(S) THAT YOU ARE FILING FOR WORKERS' COMPENSATION.
>
> I AGREE TO NOTIFY THE WORKERS COMPENSATION BOARD OF PEI IMMEDIATELY OF ANY CHANGE IN CIRCUMSTANCES AFFECTING THIS CLAIM, INCLUDING ANY RETURN TO WORK OR ANY INCOME EARNED FROM EMPLOYMENT.
>
> I DECLARE ALL THE INFORMATION GIVEN IS TRUE AND CORRECT AND I CLAIM COMPENSATION FOR THE INJURIES SUSTAINED. I UNDERSTAND THAT THIS WILL AUTHORIZE THE BOARD TO OBTAIN OR REVIEW FROM ANY SOURCE WHATSOEVER, INCLUDING RECORDS OF PHYSICIANS, QUALIFIED PRACTITIONERS OR HOSPITALS, A COPY OF RECORDS PERTAINING TO EXAMINATIONS, TREATMENT, HISTORY AND EMPLOYMENT OF THE UNDERSIGNED.

[86] I find that the declaration on the original claim form permits collection of personal information, but it does not extend any authorization for the Tribunal to disclose the collected information to the Accident Employer in these circumstances.

No Objection by the Complainant

[87] The Tribunal says that its correspondence includes a carbon copy (cc) line that shows who is receiving copies of the correspondence. The Tribunal says that it is in this manner that it notified the Complainant to whom they were sending the correspondence, including the Accident Employer. The Complainant never objected to the Tribunal corresponding with the Accident Employer, so the Tribunal assumed that the Complainant consented to the disclosure of the Appeal Record to the Accident Employer.

[88] As previously pointed out, consent to the disclosure of personal information needs to be in writing and must say to whom the public body may disclose the personal information and how the information may be used. I find that the absence of an objection by the Complainant does not authorize the Tribunal to disclose the collected information to the Accident Employer in these circumstances.

Clause 37(1)(b): Consistent purpose

[89] This clause was discussed above in considering the actions of the Board when it disclosed the reconsideration decision letter and enclosures to the Accident Employer. The *FOIPP Act* permits the disclosure of personal information if the disclosure is consistent with the purpose for which the information was collected. As previously noted, all of the clauses of subsection 37(1) of the *FOIPP Act* are tempered by a reasonableness component that is found in subsection 37(2). Clause 37(1)(b), in particular, is also tempered by section 38. Section 38 requires that the disclosure of personal information has to have a reasonable and direct connection to the purpose for which the information was collected and the disclosure must be necessary for performing

the statutory duties of the public body.

[90] The Tribunal submissions are thin. The Tribunal states:

> It is WCAT's opinion that disclosure of those documents to all parties is a necessary and integral component of ensuring the appellant is afforded a fair, unbiased hearing.

[91] The Accident Employer advised the Tribunal that it would not be taking any position before the Tribunal. The Accident Employer orally advised the Tribunal before receiving the personal information of the Complainant that it would not be participating in the appeal, but that it wished to be kept appraised. I see no reasonable or direct connection between giving personal information to somebody that is not participating in an appeal, and affording a fair, unbiased hearing. Whether or not the Tribunal disclosed the Complainant's personal information to the Accident Employer would have made no difference to the conduct or outcome of the hearing. Therefore, the disclosure of personal information was not necessary to afford a fair, unbiased hearing. I find that it was not reasonable, connected, or necessary to disclose the personal information of the Complainant to the Accident Employer and, as such, the disclosure is not permitted under the *FOIPP Act*.

Clause 37(1)(d): Disclosure in compliance with another law

[92] The *FOIPP Act* permits disclosure of personal information if the disclosure is for the purpose of complying with another law. Clause 37(1)(d) states:

> 37. (1) A public body may disclose personal information only
> (d) for the purpose of complying with an enactment of Prince Edward Island or Canada or with a treaty, arrangement or agreement made under an enactment of Prince Edward Island or Canada;
>
> . . .
>
> 37. (2) Only information that is reasonably required may be disclosed under subsection (1).

[93] The Tribunal refers to the *Workers Compensation Act Appeal Regulations, supra,* that governs the appeal procedure, including deadlines to commence an appeal, timing to file submissions to the Tribunal and the distribution of the materials filed. These regulations direct the Tribunal to distribute the records filed. Section 3 of the *Workers Compensation Act Appeal Regulations* states:

> 3. The Workers Compensation Appeal Tribunal will distribute filings as appropriate and as received to the Workers Compensation Board, the appellant and all other parties who have a direct interest in the matter. [emphasis added]

[94] In every appeal of a workers compensation matter, the filings will likely include personal information. The Legislature did not intend that the filings are open to the public. The Legislature intended that the Tribunal distributes the filings:

> (1) as appropriate;
> (2) as received; and
> (3) to the Board, the Appellant and all other parties who have a direct interest in the matter.

As Appropriate:

[95] There is no definition of "as appropriate" in the *Workers Compensation Act, supra,* or its regulations, and I am not aware of any other legal definition of the expression in any policy or guideline of the Board or the Tribunal. I take the plain definition of "appropriate" to be "as suitable, fit or proper". The expression "as appropriate" incorporates a judgment of a particular situation.

[96] The Tribunal must accept documents filed on appeal. It is an understatement to say that it would be unpractical and potentially unfair for the Tribunal to pre-assess the content of the records filed with it before the Tribunal accepts the documents. Therefore, the expression "distribute filings as appropriate" gives the Tribunal only a limited discretion

to decide when, how, and to whom it distributes the documents. As the focus of this complaint is the distribution of the Appeal Record and Factum to the Accident Employer, I will only consider whether it was appropriate for the Tribunal to distribute the Appeal Record and Factum to the Accident Employer.

As Received

[97] Pursuant to section 3 of the *Workers Compensation Act Appeal Regulations, supra,* the filings are to be distributed "as received". Although both the Board and the Complainant believe that the Tribunal had a responsibility to remove personal information from the Appeal Record and Factum, the *Workers Compensation Act Appeal Regulations, supra,* says that the Tribunal has to distribute the filings "as received". The Tribunal does not have any legal discretion to remove records or information from the Appeal Record or Factum. The Board cited Ontario case law to argue that the Tribunal is responsible for removing the personal information; however, these cases offer no assistance to this analysis, as the workers compensation laws of Ontario are quite different from the workers compensation laws of PEI. The Ontario law requires its board to file a worker's whole file with the appeal tribunal and then the Ontario appeal tribunal removes records or information before distribution to the parties.

Parties with a Direct Interest

[98] There are several points raised by the Complainant about the Tribunal's distribution of the filings to the Accident Employer, including the fact that the Complainant consistently expressed concern about protecting his privacy, that the Accident Employer had not employed the Complainant for over eight years and that the outcome of the appeal would not affect the Accident Employer in any identified way. Most of these facts were drawn from communications to and from the Board and were buried among the 151 records filed with the Tribunal. The Tribunal advises that they do not review appeal records and the factum for content until the matter is set down for a hearing and assigned to the

Tribunal members. I accept these facts and do not fault the Tribunal for not reviewing the content of the materials filed by the Board.

[99] The Board defines "persons with a direct interest" by policy to include the accident employer, and the Board policy applies to every file without any consideration of the circumstances. The Tribunal is obliged to comply with the policies of the Board, including the interpretation of "persons with a direct interest". Subsection 56(17) of the *Workers Compensation Act, supra*, states:

> 56. (17) The Appeal Tribunal shall be bound by and shall fully implement the policies of the Board and the Appeal Tribunal, its chairperson and members are prohibited from enacting or attempting to enact or implement policies with respect to anything within the scope of this Part.[3]

[100] Justice Webber observed the potential difficulty with the Tribunal being bound by the policies of the Board in *Simons* v. *Prince Edward Island (Workers Compensation Board)*, [1999] 2 P.E.I.R. 316, 1999 CanLII 4721 (PE S.C.T.D.). This case was about the Board sending medical records of several employees to a physician for a second opinion. Justice Webber states:

> [189] With respect to an appeal to the Board, serious concerns are raised by the provisions of s-s. (17) and (26) of s. 56. Subsection (17) states that the Appeal Tribunal "shall be bound by" all the policies of the Board and the Appeal Tribunal is "prohibited from" trying to enact its own policies. This means that if what is objected to — e.g. sending confidential medical information to third parties without the consent of the worker involved — is described as a "policy" of the Board then the Appeal Tribunal would appear to have no authority to deal with the matter. [4] [emphasis added]

[101] This trial and its subsequent appeal occurred before the *FOIPP Act* was in force. The PEI Court of Appeal overturned the trial decision in 2000 in *Workers' Comp. Board (PEI)* v. *Simons*, 2000 PESCAD 15 (CanLII); however, the Court of Appeal did not

[3] "This part" means the part of the *Workers Compensation Act*, *supra*, that deals with reconsideration and appeals.

[4] Justice Webber's serious concerns with subsection 56(26) of the *Workers Compensation Act, supra,* were addressed by the Legislature. It repealed subsection 56(26) in 2001.

address the serious concerns about subsection 56(17) that were raised by Justice Webber.

[102] If the Board has a policy that requires a violation of another law, the Tribunal could be in the difficult position of deciding which law to break. If the Tribunal was required to consider the expression "persons with a direct interest in the matter", it would be faced with such a dilemma. The Tribunal is a public body and it must comply with the *FOIPP Act*. As a designated public body, the Tribunal cannot breach the provisions of the *FOIPP Act* to comply with the *Workers Compensation Act, supra*; however, that is not the case before me. The language in section 3 of the *Workers Compensation Act Appeal Regulations, supra*, refers to "parties with a direct interest" and not "persons with a direct interest". The rules of statutory interpretation presume that the Legislature meant something different when it uses different words. Different words are used in the *Workers Compensation Act, supra*: persons and parties. I do not need to invoke the prevailing provisions of the *FOIPP Act*.

[103] I interpret those who are "parties with a direct interest" to be a subset of those who are "persons with a direct interest". I am not deciding who has standing in a workers compensation matter; I leave it to the Tribunal to make this assessment. A party is someone who has, at the very least, expressed some interest in participating in the hearing. This was not so here. I find that the Accident Employer was not a party.

[104] Alternatively, the Tribunal has the power to assess the "direct interest" of a party, despite the Board policy definition of "persons with a direct interest." The term "as appropriate" in the regulations incorporates a capacity for the Tribunal to use its judgment. Also, subsection 56(19) of the *Workers Compensation Act*, *supra,* gives the Tribunal authority to determine its own practices and procedures, subject to the policies of the Board:

> 56. (19) Subject to any policies, bylaws or resolutions of the Board, the Appeal Tribunal may determine, only, the practice and procedure for the conduct of matters before it.

[105] The Tribunal has not shown that the Accident Employer had a direct interest to this

matter and, therefore, the Tribunal was not complying with the *Workers Compensation Act, supra*. The disclosure of the Appeal Record and Factum by the Tribunal to the Accident Employer was not a permitted disclosure under the *FOIPP Act*, as the Tribunal was not complying with an enactment of Prince Edward Island.

IV. OTHER ISSUES

Order PP-06-002

[106] In Order PP-06-002, *supra*, Acting Commissioner Rose found that the Board had violated Part II of the *FOIPP Act* when it sent the entire copy of the reconsideration decision letter to the Accident Employer. The Board had improperly disclosed personal information of the Complainant. The Board had not proceeded with a reconsideration because the Board had not yet made an original decision, so there was nothing to reconsider. In her decision, the Acting Commissioner recommended as follows:

> Based on my findings as set out above, I recommend that the Workers' Compensation Board amend its reconsideration procedure such that the disclosure of personal information is limited to that which is necessary. I recommend that the Workers' Compensation Board develop a reconsideration procedure pursuant to section 56(4) of the *Workers Compensation Act, supra* which is privacy sensitive and complies with the *Freedom of Information and Protection of Privacy Act*. In order to ensure a greater sensitivity to the Complainant's personal privacy, one suggested option would be to provide general notification of reconsideration applications, rather than copying the full letters sent to the worker.

[107] The Board amended some of their procedures, but not the procedures regarding to whom the Board copies whole reconsideration decisions. As these were recommendations, the Board was not obliged to comply. The Board did not violate Order PP-06-002.

[108] This is the second complaint regarding the same complainant, the same public body, a similar reconsideration procedure and the same accident employer. If the Board continues to make breaches of a similar nature, it risks these actions being interpreted as

willful disclosure, which is an offence under the *FOIPP Act* [s.75] and bears liability on summary conviction to a fine of up to $10,000.00. [amended]

The Board's Role in Sending the Appeal Records to the Accident Employer

[109] The Board claimed several times that it was "completely removed" from the action of serving the appeal records on the Accident Employer, stating that the Board "simply files its materials with Tribunal and the Tribunal serves them as it deems appropriate." The Complainant did not identify the Accident Employer in his Notice of Appeal, which brings me to the question of how the Tribunal identified the Accident Employer when, at that stage, it had not yet reviewed the content of the records.

[110] The Tribunal's submissions provided a sequence of events in the appeal. When the Board forwarded the Complainant's Notice of Appeal to the Tribunal, the Board provided contact information for the Accident Employer. The Board also included the Accident Employer's name, address and contact person on the front page of each of the Board's two Appeal Books and its Factum. The Board identified the company as the "Employer" and not "Former Employer" or "Accident Employer". The Board did not list the Complainant's two subsequent employers since the work injury on the front covers of the Board appeal documents. I have already found that the Tribunal had a critical role in assessing parties with a direct interest, but I do not agree that the Board was a passive bystander or that the Board was "completely removed" from the action of serving the appeal record on the Accident Employer.

Since this Request to Review was Initiated

[111] Two months after this request for review was initiated, the Board wrote to the Tribunal with recommended amendments to the Tribunal's practice of providing copies of the appeal records and the factum to accident employers. The Board proposed a new procedure under which the Tribunal send a notice of an appeal to an accident employer

and extend an invitation for the accident employer to file a notice of appearance. The notice of appearance would be modeled after procedures in other workers compensation systems and in the Supreme Court of PEI. A person who does not file a notice of appearance is not entitled to receive any further information on the progress of the appeal, or to receive any documents or file material, or to make submissions at the hearing. I understand that the Tribunal is considering this proposal. A key requirement not addressed in this proposal is that the Tribunal will still have to assess whether the accident employer is a party with a direct interest in the matter.

Definition of "Persons with a Direct Interest"

[112] One expression used in the *Workers Compensation Act, supra,* is "a person with a direct interest" in a matter or decision.[5] The Board developed policies that define "persons with a direct interest". The expression has a different definition depending on who is asking for a reconsideration. The Board gives a decision about a worker to an employer (without request), but it does not give a decision about an employer to a worker (even on a written request). Within the last six months, the Board amended its definition and now defines "persons with a direct interest" to include the "worker's employer who has a direct financial impact as a result of the decision".

[113] The Board points out that it is not within my mandate to review the fairness of the Board's administrative and decision-making process and cites from a 1999 report of the Alberta Information and Privacy Commissioner, namely, Investigative Report #1501, *Re Workers Compensation Board Appeals Commission* (also cited as Investigation Report 98-IR-012).

[114] I restrict my observations to those that relate to access to information and protection of privacy. Even with the amended definition, an access to information and protection of privacy problem remains. Sticking to a rigid definition risks the potential of personal

[5]3*Workers Compensation Act, supra*, ss. 56(1), (1.1), (5), (6), (24), 56.1. (1), (2), (3)

information being disclosed to those who have no direct interest, and potentially limits the right of access to information of a person who does have a direct interest.

[115] The Board or the Tribunal must assess each case based on the circumstances. As Chief Justice Laing of the Saskatchewan Queens Bench recently remarked in *Dunkle* v. *Saskatchewan (Advanced Education, Employment and Labour, Occupational Health and Safety Division)*, 2011 SKQB 59 (CanLII), at para 35:

> ". . . one can imagine situations where workers or employers who are not in the business or enterprise affected by a decision might wish to argue for status to appeal; for example, an employee of Burger King seeking to appeal a decision in favour of McDonald's. It is to be noted that s. 50 of the Act gives the right of appeal to a person who is directly affected by a decision of the director. The word "person" is broader than defined terms in the Act such as "worker" or "employer". [emphasis added]

Communication with the Complainant

[116] The Complainant submits that he raised his privacy concerns several times. The Board did not acknowledge the Complainant's privacy concerns. Board Policy POL-07-09 was in effect when the subject of these complaints occurred. Policy POL-07-09 directs the Board to "not permit procedures that fail, to provide appropriate confidentiality and privacy and to provide clients a clear understanding of what may be expected and what may not be expected from the service offered by Board." Clearly, this policy was not being followed by the Board in the case here. The Board had not replied to the Complainant's privacy concerns.

V. FINDINGS

[117] My findings are as follows:

1. I have jurisdiction to review the matters herein.

2. The Complainant has not met the burden of proof that oral disclosure of medical information occurred during telephone conversations between the Board and the Accident Employer.

3. The Board violated Part II of the *FOIPP Act* by providing a copy of the reconsideration decision letter and enclosures to the Accident Employer.

4. The Board did not violate Part II of the *FOIPP Act* when it disclosed to the Tribunal in the appeal records it intended to rely on in the appeal.

5. The Board violated Part II of the *FOIPP Act* when it disclosed to the Tribunal appeal records that it did not intend to rely on in the appeal.

6. The Tribunal violated Part II of the *FOIPP Act* when it provided the Appeal Record and Factum to the Accident Employer.

VI. ORDER

[118] With respect to the disclosure of the reconsideration decision and enclosures, in the 2006 Order *Re Workers Compensation Board*, P.E.I. Order No. PP-06-002, 2006 CanLII 39091 (PEI IPC), the Commissioner found that the Board violated Part II of the *FOIPP Act* by sending more information than is necessary to notify the employer. The Commissioner did not order the Board to stop disclosing, as the disclosure was already complete (page 20). As subsequently learned, the Board has continued to disclose personal information in a similar manner. Clause 66(3)(e) of the *FOIPP Act* provides that I may require a public body to stop disclosing personal information in violation of Part II of the FOIPP Act. Although there is no indication that disclosure of the Complainant's personal information is ongoing, and in consideration of the Complainant's history with the Board and the Accident Employer,

I ORDER the Board and the Tribunal to stop disclosing personal information in violation of Part II of the *FOIPP Act* in all circumstances such as those described in this order.

VII. RECOMMENDATIONS

[119] I do not have the power to make policies and procedures for the Board or for the Tribunal. Pursuant to clause 50(1)(h) of the *FOIPP Act*, I have the power to give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under the Act. Based on the above findings and order, I make the following recommendations:

1. I RECOMMEND that the head of the Board review its policies and procedures to ensure that they are privacy sensitive and limit the disclosure of personal information to only that which is necessary and complies with the *FOIPP Act*.

2. I RECOMMEND that the head of the Tribunal review its policies and procedures to ensure that they are privacy sensitive and limit the disclosure of personal information to only that which is necessary and complies with the *FOIPP Act.*

3. I RECOMMEND that the head of the Board provide education to its supervisors and to those employees who disclose personal information of workers about their obligations to protect privacy under the *FOIPP Act* .

4. I RECOMMEND that the head of the Tribunal provide education to its supervisors and those employees who disclose personal information of workers about their obligations to protect privacy under the *FOIPP Act*.

5. With respect to reconsideration decisions, I RECOMMEND that the Board only notify the persons the Board has identified as persons with the potential to have a

direct interest in the matter about decisions made about a worker or an employer. This notice ought to include:

- a notice that it has made a decision;
- what expected affect the decision will have on the recipient of the notice, if any;
- information about the persons right to request a summary of the decision, subject to an assessment of their direct interest and subject to the limits of disclosure under Part II of the *FOIPP Act*; and
- information about that persons right to access relevant parts of the workers compensation file, subject to an assessment of the *bona fides* issue in dispute.

6. Although time has passed since the Board sent a copy of the reconsideration letter and enclosures to the Accident Employer, I RECOMMEND that the Board make efforts to recover all copies of the records that contain personal information about the Complainant from the Accident Employer.

7. Although time has passed since the Tribunal sent copies of the Appeal Record and Factum to the Accident Employer, I RECOMMEND that the Tribunal make efforts to recover all copies of the records that contain the personal information of the Complainant from the Accident Employer.

8. The Board may never recover the trust of the Complainant. With respect to the Complainant, I RECOMMEND that the head of the Board endeavour to obtain written consent from the Complainant to disclose any further personal information about the Complainant. Pursuant to section 6 of the General Regulations to the *FOIPP Act*, the written consent should specify to whom it will disclose the personal information and how the personal information will be used.

[120] I thank the Complainant for bringing his concerns forward again and exercising his privacy rights under the *FOIPP Act*. These reviews allow us the opportunity to better understand and improve our means of protecting the privacy of all individuals whose personal information a public body collects.

[121] In accordance with subsection 68(1.1) of the *FOIPP Act*, the heads of the Board and the Tribunal, respectively, shall not take any steps to comply with this order until the end of the time period for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*.

Maria C. MacDonald
Information and Privacy Commissioner