NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 16-097
February 26, 2016

Review File: 15-163-5

THE COMPLAINT

This Review came about as a result of a request from an individual (to be referred to in this report as "A.B." for ease of reference) who was upset that the Workers' Safety and Compensation Commission (WSCC) had shared his personal health information with their legal counsel for the purpose of defending a complaint filed by A.B. with the Human Rights Commission. According to A.B., he had filed a complaint against the WSCC with the Human Rights Commission of Nunavut several years ago. At some point in 2015, he discovered that the WSCC had released "hundreds of pages of my confidential medical record to the lawfirm (*sic*) representing them in this complaint". This disclosure was done without his consent or knowledge. He says that some of the information included in the package disclosed to the lawyers "is unparalleled in its sensitivity", including

> highly personal and confidential psychiatric evaluations, physical evaluations, counselling updates, information on mental functioning, sexual affect, health issues of my family, records from when I was involuntarily committed to a psychiatric facility and much more.

A.B. indicated that his expectation, when making a claim under the *Workers' Compensation Act*, was that his medical health information would remain absolutely confidential. In his opinion, legal counsel should have been required to go through the "Access to Information" process under the *Access to Information and Protection of Privacy Act* before any of his medical records were disclosed, which would have given him the chance, as an affected third party, to object to the disclosure. When he did find

out about the disclosure, he says the WSCC refused to provide any details on who made the release or specifically what material was involved. The Human Rights complaint, he says, was supposed to "deal with a discrete slice of time and a limited number of events that spanned a few months" but the WSCC did not limit the disclosure to records from this time period but released records spanning several years. In another piece of correspondence, however, A.B. acknowledges that his claim with the WSCC covered a period of more than four years. He points out that while Section 48(l) of the *Access to Information and Protection of Privacy Act* states that personal information may be disclosed for provision of legal services, he did not believe that that section gave the WSCC "carte blanche" authorization to share his personal health information, even for the purpose of defending themselves against his Human Rights complaint.

In subsequent submissions to this office, the Complainant provided some additional information:

- he had agreed with the WSCC's counsel that portions of his WSCC file relevant to his human rights complaint could be admitted to the process and that a restricted set of records had been agreed upon;

- he had discovered that the WSCC had disclosed the entire content of his medical file to counsel;

- this medical information was, in turn, placed in a cloud-based document sharing platform

He pointed out section 48 of the *Mental Health Act* which reads as follows:

> (2) Subject to subsections (3) and (5), no person shall disclose, transmit or examine a patient's health record.

(3) A patient's health record may be examined by the medical practitioner and the person in charge of the hospital, and the person in charge of the hospital may transmit the patient's health record to or permit the examination of the patient's health record by

(a) any person with the consent of the patient where the patient is mentally competent;

(b) any person with the consent of the substitute consent giver, where the patient is not mentally competent;

(c) any person employed in or on the staff of the hospital for the purpose of assessing or treating or assisting in assessing or treating the patient;

(d) a medical practitioner, nurse or psychologist for the purpose of assessing or treating or assisting in assessing or treating the patient outside the hospital;

(e) the person in charge of another hospital to which the patient is transferred, admitted or referred; or

(f) a person for the purpose of research, academic pursuits or the compilation of statistical data.

Subsection (1) of this section defines "patient's health record" as “the patient's health record compiled in a hospital or in the office of a medical practitioner or a psychologist in respect of the mental disorder of the patient and includes any medical or psychological reports on the mental disorder of the patient that are sent to the hospital by a medical practitioner or a psychologist”.

The Complainant also referred me to the case of Nova Scotia (WCB) v. Martin in the following context:

> In *Nova Scotia (WCB) v. Martin*, the Supreme Court of Canada found that a tribunal with the legal authority to decide questions of law within its jurisdiction must also consider alleged Charter violations associated with matters before it. Failure to examine the allegations of a Charter violation, (sic) would likely pose a Charter violation (section 15).

> While the Supreme Court decision in this case dealt with a WCB Appeals Tribunal, an entity with adjudicative responsibility that is enabled to decide questions of law within its purview would have the same responsibility to examine allegations of Charter violations, unless legislation specifically excludes this function from the entity in question. I see no such exclusion within the ATIPP legislation.

The Complainant referred me, as well, to a number of other Supreme Court of Canada cases which discussed privacy in the context of criminal law matters.

THE WSCC's RESPONSE

The WSCC provided a bit of a historical background with respect to their dealings with the Complainant, depicting an aggressive approach by the Complainant dating back almost to the beginning of his initial claim. It appears that he regularly accused the WSCC and those dealing with his claim of discrimination on a number of fronts and threatened legal and other action numerous times. He filed one complaint with the Human Rights Commission in 2011, another in 2013 and a third in 2015. The WSCC retained a firm of lawyers to work with the WSCC's General Counsel and to provide legal advice on various matters including the legal threats made by A.B. They gave the firm information to provide a factual basis for legal advice requested, which information "necessarily included portions of [A.B.'s] claim file".

The WSCC provided a copy of their Policy 07.01 respecting claim file information access. This policy provides that the WSCC may provide claimant information to external counsel for the purpose of third party actions. It also notes that the WSCC may disclose information in accordance with the *Access to Information and Protection of Privacy Act* (ATIPP Act).

The WSCC acknowledges that, over a period of time, their outside counsel was provided with "most of [A.B.'s] claims file, including medical reports". They argue, however, that this disclosure was permitted by the ATIPP Act. Specifically, they point to section 48(l) which provides as follows:

> 48. A public body may disclose personal information ...
>
> (l) for use in the provision of legal services to the Government of Nunavut or a public body;...

The WSCC, in its submissions, spent a significant amount of time on the issue of solicitor/client privilege and whether or not the records in question were protected from disclosure to my office for the purpose of this review. I disagree with much of the argument made in this regard, but I do not need to see the records in this case in order to address the issues in that the WSCC has acknowledged the disclosure of A.B.'s sensitive medical information. I do not, therefore, propose to address that issue at this juncture. Nor do I propose to address whether or not the WSCC is a "custodian" under the terms of the Northwest Territories' *Health Information Act* as this matter arises in Nunavut and that Act does not apply in Nunavut.

DISCUSSION

This case raises a number of interesting issues. When an employee seeks compensation through the WSCC, they must provide that organization with sensitive personal health information. If they want (or need) the financial support that WSCC offers, there is no choice. Because of the nature of the information collected, and the lack of choice on the part of clients using the system, the onus on the WSCC to maintain confidentiality is strict. As noted by the Complainant in this case, health information can be some of the most sensitive information there is about an individual. In this situation, the Complainant had no option but to provide the WSCC with some extremely sensitive personal health information for the purpose of assessing his claim.

The information was provided to WSCC with A.B.'s consent. From his perspective, however, the only purpose for providing that information was to support his claim for compensation. He says he never provided his consent for the WSCC to use his personal health information for any other reason and never considered the possibility that it might be used for other purposes.

While I understand the Complainant's perspective and his frustration, I am satisfied that he did, in fact, provide his implicit consent to WSCC to use his personal health information in the context of his Human Rights complaints when he filed those complaints. The Complainant himself, in his submissions to me, recognized that the WSCC had the right to defend itself against his allegations of discrimination and that they would need to refer to his medical situation to do so. There is nothing in the *Access to Information and Protection of Privacy Act* which requires consent to the disclosure of personal information to be written consent. That, of course, is the best practice, but it is not a requirement. Here, A.B. clearly did not give the WSCC his written consent to the disclosure of his information to counsel for the WSCC. That said, A.B. has filed not one, but three complaints about the WSCC and its employees with the Human Rights Commission of Nunavut. From what I can glean from the submissions of both parties, those complaints all stem from the WSCC's assessment of his disability and their refusal to recognize his ailments as work related, leading to his allegations that the refusal is based on discriminatory policies and procedures. In those circumstances, the reasonable person would assume that the WSCC would need to give its counsel a fairly comprehensive history of the situation in order to evaluate their position and provide good legal advice and/or representation. By filing his complaints, the Complainant, as a reasonable person, would have or should have known that the information in his WSCC file, including his personal health information, would need to be shared with outside legal counsel. By filing the complaint, he therefore provided his implicit consent to the disclosure of his personal health information to counsel for the WSCC for the purpose of allowing them to obtain legal advice and representation.

Even if I am wrong in this, as pointed out by the WSCC, section 48(l) of the *Access to Information and Protection of Privacy Act* clearly authorizes a public body to disclose

personal information for use in the provision of legal services to the public body. This section clearly authorizes the disclosure of personal information (including health information) for the purposes of obtaining legal advice and legal services.

As noted by the Complainant, this does not give the WSCC *carte blanche* to disclose any and all personal information which it collects for the purpose of dealing with a compensation claim to its counsel for the purpose of obtaining legal advice and/or services. The disclosure of information must be limited to that which is absolutely required for the purpose of the legal consultation. The question becomes whether it was absolutely necessary for counsel to have access to all of A.B.'s medical records or whether that information should have been limited to the records around the "discrete slice of time and a limited number of events that spanned a few months" which the Complainant says his complaint encompassed. That is not an assessment which I am qualified to make. The WSCC disclosed as much information as they considered necessary to give their counsel the full picture needed for them to provide sound legal advice. Even if I knew the exact nature of the complaints made by A.B. and were to have full knowledge of the facts and the content of his file, my assessment of what might be absolutely necessary for counsel to give good advice might differ from another's similar assessment. As a former litigator, however, I know that it is important to have all of the relevant information to form a legal opinion or provide legal advice. Based on what I do know from both the Complainant's submissions and the WSCC's submissions, it appears to me that, while A.B's complaints might have been limited to a "discrete slice of time" or a "limited number of events", the nature of A.B.'s complaints and his history with the WSCC suggests that counsel would have required more than the narrow records for the "discrete slice of time" or the "limited number of events". A more historical perspective would have been necessary in order for counsel to provide good advice and/or mount their defence.

A.B. has also referred me to the *Mental Health Act* and, in particular, section 48(2). This Act provides that "no person shall disclose, transmit or examine a patient's health record". For the purposes of this section, "a patient's health record" is defined as "the

patient's health record compiled in a hospital or in the office of a medical practitioner or a psychologist in respect of the mental disorder of the patient and includes any medical or psychological reports on the mental disorder of the patient that are sent to the hospital by a medical practitioner or a psychologist" - in other words, psychiatric records. There are some exceptions to this prohibition. The exceptions allow these records to be examined by a medical practitioner and for the records to be transmitted to any person with the consent of the patient where the patient is mentally competent.

There is no disagreement that some of the records involved here were very sensitive psychiatric records for A.B. Nor is there any suggestion that A.B. was not mentally competent when he consented first to the disclosure to the WSCC in support of this claim for compensation or subsequently when he filed his complaints to the Human Rights Commission. As noted above, the act of filing of these complaints constituted A.B.'s implicit consent to the disclosure of his sensitive psychiatric and counselling records to counsel for the WSCC and/or to the Human Rights Commission. Furthermore, section 4 of the *Access to Information and Protection of Privacy Act* provides that

> If a provision of this Act is inconsistent with or in conflict with a provision of any other enactment, the provision of this Act prevails unless the other enactment is an Act, or is made under an Act, that expressly provides that the Act, a provision of the Act or a regulation or order made under the Act prevails despite this Act.

I do not believe that the *Mental Health Act* conflicts with the *ATIPP Act* but, in the event that the stated provisions do conflict, the provisions of the *ATIPP Act* would prevail.

With respect to the Complainant's reference to the case of *Nova Scotia (WCB) v. Martin*, and the Supreme Court of Canada's finding that a tribunal with the legal authority to decide questions of law within its jurisdiction must also consider alleged Charter violations associated with matters before it, I note that my mandate does not give me authority to decide questions of law. While my mandate requires me to

interpret the *Access to Information and Protection of Privacy Act*, the Legislative Assembly has not seen fit to give my office the power to make orders or make definitive findings of fact. My findings are, therefore, not dispositive and I can do more than make recommendations. It is the head of the public body who must make the decisions based on those recommendations and who has ability to make "decisions" on questions of law. I am, however, satisfied that my conclusions are in keeping with the Charter of Rights and Freedoms to the extent that it applies to this situation, and are generally in accordance with the accepted law with respect to the protection of privacy in Canada.

Finally, with respect to the law firm's use of a cloud platform to store and share the relevant records, I would share the Complainant's concerns. That said, the information that has been provided by the Complainant indicates that the website used by the law firm was a secure site which allowed access to only those to whom the law firm gave the required passwords and encryption codes. While I have concerns about the use of a public cloud for the exchange of records, I would be extremely surprised if the law firm in this case, a large and well respected firm, would be using technology that was not fully vetted in terms of its security and confidentiality. Lawyers are required to maintain solicitor/client confidentiality and, as such, would be required to ensure that all forms of communication are appropriately secure. Furthermore, as agents for the WSCC, the law firm would be accountable to the WSCC for ensuring that, when dealing with information provided to them, that information remains secure and confidential. The fact is that in today's day and age, we cannot avoid the use of technology such as cloud services and that such technology carries with it the risk of breach. There is, however, nothing in this case to suggest that the use of the cloud product in this case constituted a further disclosure of A.B.'s personal health information.

CONCLUSIONS AND RECOMMENDATIONS

While I am satisfied that the WSCC had the legislative authority to disclose the Complainant's personal health information to their legal counsel for the purposes of

obtaining legal advice and representation, I completely understand the Complainant's concerns about the sharing of his very personal health information without being informed about the disclosure. While the WSCC may have the legislative authority to disclose such information, it must be done in a measured way and, unless there is some significant reason not to do so, the client should be informed that the disclosure will happen or has happened. I do have some suggestions and recommendations for the WSCC, and indeed, for all public bodies to implement best practices in similar situations:

1. Immediately upon receipt of notice that a client of the WSCC has filed a claim or an action of any kind against the WSCC, that client (or his or her counsel) should be contacted and given notice that it may be necessary for the WSCC to disclose the client's personal information (medical and otherwise) to outside counsel for the purpose of responding to the claim or action. That communication should also include contact information for the ATIPP Co-ordinator within the WSCC who can answer any questions about the possible disclosure.

2. If/when the WSCC determines that it does need to retain outside counsel and/or to disclose an individual's personal information or personal health information pursuant to section 48(l), this should, whenever possible, be communicated to the individual, along with the specific purpose of the disclosure.

3. When it is necessary to disclose personal health information or other personal information to outside legal counsel, only such information as is absolutely required for the provision of the legal advice or legal representation should be disclosed. Each page of information to be disclosed should be reviewed individually to consider whether or not the information included is necessary and relevant to the legal advice/representation being sought. A record should not be disclosed unless relevant and necessary to provide sufficient background information for counsel to consider all legal questions.

4. When disclosing sensitive personal information to outside counsel pursuant to section 48(l), the WSCC retains responsibility for ensuring that the information is not further used or disclosed except in accordance with the ATIPP Act. It is therefore incumbent on the public body (in this case the WSCC) to ensure that the technology employed by the law firm retained is secure and not subject to vulnerabilities that might result in an inadvertent disclosure either as a result of human error or intentional hacking. The WSCC should, therefore, require that any technology to be used by the law firm for storage and/or sharing of the records in question is fully secure and not vulnerable to hackers or other third parties.

Elaine Keenan Bengts
Information and Privacy Commissioner