

# **The Industrial Accident Victims Group of Ontario's Submission on WSIB Confidentiality Policies**

## **Introduction**

The Industrial Accident Victims Group of Ontario (IAVGO) is a community legal clinic which specializes in workers' compensation. IAVGO has been representing injured workers and their survivors for over twenty-five years. We are pleased to have this opportunity to comment on the WSIB's draft confidentiality policies.

## **The Breadth of the Policy Review**

The draft policies deal almost exclusively with the confidential personal information contained in workers' files. The Board has failed to update its policy (OPM Document 11-01-09) on access to employer information. For the policy review to be comprehensive there should be a parallel review. This is clearly an area in which legal disputes about release of employer information have arisen, and on which the Information and Privacy Commission and the Court have spoken.<sup>1</sup>

It is IAVGO's submission that clearer provisions are needed regarding the disclosure of confidential employer information, but the WSIB has failed to address this in this policy consultation. It is our view that the WSIB should update the policy on disclosure of employer information and contend with several issues not currently covered in OPM Document 11-01-09. Among the issues that should be covered in such an update are:

- Listing of what disclosure requires consent and does not require consent;
- Disclosure of employer information for research into workplace injuries and disease;
- Disclosure of employer information for prevention of workplace injuries and disease;
- Disclosure of experience rating information; and,
- Integrating the new WSIB Privacy Office into the policies.

## **Commentary on the Draft Policies**

### **The Primacy of Privacy**

As currently written the draft policies do not place sufficient emphasis on the privacy rights of workers as statutorily provided for by the *Freedom of Information and Protection of Privacy Act* (FIPPA) and the *Workplace Safety and Insurance Act* (WSIA). This is most apparent in draft policy Documents 11-03-02 and 11-03-04. While specific concerns about these policies are detailed later in this submission, at the outset it is important to review the FIPPA provisions which must guide all Board policies.

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<sup>1</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, [1998] 41 O.R. (3d) 464 (C.A.).

21 (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, ...

(e) for a research purpose if,

- (i) the disclosure is consistent with the conditions or reasonable expectations of disclosure under which the personal information was provided, collected or obtained,
- (ii) the research purpose for which the disclosure is to be made cannot be reasonably accomplished unless the information is provided in individually identifiable form, and
- (iii) the person who is to receive the record has agreed to comply with the conditions relating to security and confidentiality prescribed by the regulations ...

41 An institution shall not use personal information in its custody or under its control except, ...

(b) for the purpose for which it was obtained or compiled or for a consistent purpose ...

42 An institution shall not disclose personal information in its custody or under its control except, ...

(c) for the purpose for which it was obtained or compiled or for a consistent purpose...

43 Where personal information has been collected directly from the individual to whom the information relates, the purpose of a use or disclosure of that information is a consistent purpose under clauses 41 (b) and 42 (c) only if the individual might reasonably expected such a use or disclosure.

In addition to the FIPPA, the WSIA sets out specific circumstances in which disclosure of workers' confidential information can occur (see ss. 22(5)-(8), 47(7), 58 and 59). When both the FIPPA and WSIA are read together, it is clear that workers' personal information must be kept confidential and only disclosed in the narrow circumstances prescribed by law.

One of the main purposes of FIPPA is to protect the privacy of an individual's personal information held by government institutions such as the WSIB. The draft policies rely on the FIPPA exceptions in ss. 21, 41 and 42 to use and disclose personal information without a worker's consent. However, it is IAVGO's submission that the draft policies are based on an expansive interpretation of these FIPPA exceptions, which the legislation cannot sustain.

In light of the substantial concerns raised here and by other stakeholders such as the Ontario Federation of Labour and the Office of the Worker Adviser, we recommend that the WSIB requests a review of the draft policies by Ontario's Information and Privacy Commissioner pursuant to s. 59(a) of FIPPA before any policies are adopted by the Board of Directors. The Commissioner's input would ensure that the WSIB's interpretation and application of FIPPA is consistent with the law as viewed by the government agency which oversees privacy for government bodies. This would also provide some measure of assurance that the WSIB will not be faced with a litany of privacy complaints arising from its policies.

#### Confidentiality - General (11-03-02)

The policy, at page 2, indicates that the Board, in deciding whether to disclose personal information, is to weigh two factors (1) the privacy interests of the affected individual;

and (2) whether the disclosure is necessary to achieve a legitimate WSIB purpose. However, FIPPA starts from the principle that without consent, personal information must not be disclosed unless it meets specific exemptions. We submit this "weighing" principle is inappropriate. It should be removed from the draft policy and replaced with the clear language of the FIPPA exceptions, and appropriate interpretations of those sections.

IAVGO has serious concerns about the draft policy as it relates to disclosure of confidential worker information without consent for the purposes of (a) conducting research into workplace injuries/diseases and (b) preventing the occurrence of workplace accidents. As presently worded the policy language allows for greater disclosure than provided for under the relevant statutory provisions of FIPPA.

First, s. 21 of FIPPA puts the authority for any disclosure for research purposes exclusively with the "head" who is, as specified in Regulation 460, the Chair of WSIB. This draft policy inappropriately allows for any WSIB staff to decide this issue. It is IAVGO's position that disclosure of workers' personal information for research purposes is not a proper subject for the Operational Policy Manual. These requests should be decided by the Chair or delegated senior management, and thus should not be within the purview of operational staff.

Second, the policy fails to cite the mandatory prerequisites for disclosure for research purposes under s. 21(e) of FIPPA:

1. The disclosure is consistent with the conditions or reasonable expectations of disclosure under which the information was obtained; and
2. The research for which the disclosure is made cannot be reasonably accomplished unless it provides identifying personal information; and
3. The person who is to receive the record has agreed to comply with the prescribed security and confidentiality conditions.

If the WSIB decides to issue a final policy about the disclosure of claim file information to researchers or health and safety agencies, then there must be a clear statement of s.21(e) of FIPPA, and an explanation of how this provision is to be applied by the WSIB.

Although the draft policy lists research and prevention as either the purpose for which workers' information was collected, or a purpose consistent with that original purpose, it is IAVGO's position that this is not the case. Workers do not provide their personal information to the WSIB with the reasonable expectation that their confidential information will be used for research or prevention.

While we recognize the laudable goals of research and prevention, there is no justification for not getting the consent of workers where personal confidential information is being sought by research or health and safety organizations. The Board can collect and disclose statistical information about injuries and diseases as long as it does not identify workers individually. However, if any personal information which can

identify the worker is to be disclosed, consent must be granted by the worker before disclosure can occur. The only exception to this is specified in s. 21(e) of FIPPA which requires the researcher to show that in order to achieve their research goal, they must have workers' identifying information and that they will comply with security and confidentiality safeguards.

The requirement to only disclose what is necessary to meet a WSIB purpose must be emphasized more in the policy. One area where this should be done is in the section of the draft policy about "partial disclosure" at page 7. This should be given more prominence, and should include case examples.

Currently, in IAVGO's experience, no effort is made to partially disclose documents. In particular, there are often medical reports which include discussions of unrelated medical conditions, yet the entire medical reports are disclosed. The Board needs to emphasize that documents, particularly those relating to health information, must be reviewed closely to exclude irrelevant personal information. Examples of how to partially disclose medical reports would be an important addition to this policy.

The general policy should contain a clear direction to WSIB staff that whenever there is a release of a worker's confidential information, whether the release is verbal or written, this must be clearly documented. Further, this documentation must form part of the worker's claim file.

Finally, in this general policy, as well as in the other draft policies, there are references to a new "Privacy Office". However, there is no description of this Office and its mandate in the letter to stakeholders or in the policies themselves. This information should be provided to stakeholders.

#### Confidentiality - Disclosure of Claim File Information (Issue in Dispute) (11-03-03)

There are no guidelines in this policy about employer access in a claim where a worker has not been granted access in accordance with the "harmful information" exception discussed at pages 2 to 4 of the draft policy. It is IAVGO's position that any information withheld from the worker should not be released to the employer. Without a parallel withholding, a worker may be forced to deal with this information for the first time in an appeal process. This is a perverse result. The employer access section of this draft policy should outline this exception to access.

With respect to employer access to prior or subsequent claims at page 5 of this draft policy, there should be a clear definition of relevancy in this context. It is unclear what the WSIB's intention is in this section, but without further details and case examples it invites errors to be made in this regard.

## Confidentiality - Disclosure of Claim File Information (No Issue in Dispute) (11-03-04)

This draft policy is the only one in the package which is "new". It recognizes the reality that employers request workers' personal information where there is "no issue in dispute". However, it allows for far too much disclosure to employers without a worker's consent, particularly in relation to health information. It is IAVGO's submission that without substantial revisions to this policy as outlined below, this policy will allow employers to get through the back door what they cannot get through the front door.

An employer's ability to access a workers' personal information is already clearly spelled out in the WSIA and FIPPA, and Board policy cannot broaden employer's rights. Yet this is what this policy does. The policy is far too concerned with an employer's ability to "manage" claims, rather than the privacy rights of workers, especially when it comes to workers' health information.

The WSIA gives employers limited access to worker's health information under s. 22(5) to assist them with the early and safe return to work provisions in the Act. Similarly, an employer's need to be able to participate in the compensation process is provided for by the WSIA through an employer's right to copies of claims decisions (s. 131 (4)) and to claim files when there is an issue in dispute (ss. 58 and 59).

The WSIA specifies when and how employers are granted access to workers' personal information in WSIB's possession and FIPPA regulates any additional disclosures made by the WSIB. This draft policy relies on an exceptionally broad interpretation of what constitutes "the purpose for which [the personal information] was obtained or for a consistent purpose" under s. 42(e) of FIPPA.

IAVGO strongly disagrees with the policy statement at page 3, that a consistent purpose for the collection of workers' confidential information is to allow employers to "monitor" the compensation process. Similarly, it is not a consistent purpose to allow employers to track the effect of claims on their accident costs. This is what many employers desire, but these are not purposes consistent with the purpose for which workers' personal information is obtained under the WSIA. Furthermore, for any information collected from the worker, s. 43 of FIPPA clearly states that for a purpose to be consistent within the meaning of that Act, the worker must have reasonably expected such a use or disclosure.

It is IAVGO's submission that this draft policy must be entirely re-written so that it is consistent with the clear statutory restrictions under FIPPA and WSIA. As a result, we are not providing an itemized response to Table 1 (Disclosure Permitted) and Table 2 (Disclosure Not Permitted). It suffices to say that, in our view, most of Table 1, is not legally supported by the FIPPA and WSIA.

The draft policy should have addressed the question of "who" can request access to claim file information. It is IAVGO's submission that restrictions should be placed on which employer staff members can access a worker's WSIB claim information. If the WSIB has

been able to create a restrictive list of "who" can access employer information (see OPM Doc. 11-01-09, page 3), then the same can and must be done for employers requesting workers' personal information when there is no issue in dispute.

Confidentiality - Disclosure of Claim File Information to Health Care Providers, LMR Service Providers, and Research Organizations (11-03-06)

At page 1 of this draft policy, the Board again describes the decision-maker's task as the weighing of two factors: the privacy interests of the affected individual and whether the disclosure is necessary to achieve a legitimate WSIB purpose. IAVGO submits this section should be written to properly reflect the correct FIPPA principles; that without consent, personal information must not be disclosed unless it meets the prescribed exemptions.

IAVGO has already articulated its view on the disclosure of workers' personal information to research organizations, but we wish to simply reiterate it in the context of this more specific draft policy. The draft policy provisions allow for far too much disclosure, which we believe is in breach of FIPPA. Furthermore, the responsibility for research requests should not be at the operating level, hence our submission that the research part of this draft policy be removed entirely.

While the draft policy requires that LMR service providers enter contractual terms which require them to keep information confidential, there is no parallel requirement on "secondary service providers". The policy should contain similar protections for these service providers.

**Conclusion**

While we are pleased that the WSIB has taken steps to update its confidentiality policies, IAVGO is very concerned that the policies are not consistent with the overriding privacy principles of the FIPPA and WSIA. The two main areas where this is apparent to us is the disclosure of worker information to employers where there is no issue in dispute and to research and health and safety agencies. We hope that the WSIB will take our concerns seriously, and seek the assistance of the Information and Privacy Commissioner in ensuring that these policies are consistent with privacy law in Ontario.

All of which is respectfully submitted,

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