

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Personal Health Information Privacy and Access Act

Privacy Complaint Matter: 2014-2075-H-585

Date: July 3, 2015

Case about the disclosure of injured workers' personal health information without consent to an external business for the purpose of conducting a survey

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to the *Personal Health Information Privacy and Access Act*, S.N.B. c.P-7.05 ("the Act") and stems a complaint made by an individual who received compensation benefits from WorkSafeNB as a result of a workplace accident. The complaint concerns WorkSafeNB having disclosed the complainant injured worker's personal health information to a third party private company (Corporate Research Associates, "CRA") without the injured worker's prior knowledge or consent.
2. The complainant was one of 3,062 injured workers whose information was shared by WorkSafeNB with CRA for the purposes of conducting a survey on the effectiveness of WorkSafeNB's communications with injured workers.
3. The complainant became aware of this because CRA conducted the survey by telephone, asking injured workers questions about their experiences with WorkSafeNB and their views on the effectiveness of WorkSafeNB's communications. When contacted by CRA, the complainant refused to take the survey and asked how CRA had obtained the complainant's contact information, CRA indicated that it had been provided by WorkSafeNB.
4. The complainant had not given consent for this information to be shared with CRA and was not aware that such a survey would take place. The complainant spoke with WorkSafeNB's Director of Communications, who informed the complainant that CRA only received name and contact information but no details about the complainant's personal injury situation or compensation claim. The complainant was informed that it was common practice to give this kind of information out to the survey company hired by WorkSafeNB. The Director of Communications also informed the complainant of the right to contact our Office to know about rights or options regarding these concerns.
5. Before contacting our Office and filing a complaint, the complainant visited the WorkSafeNB's website and found "How your personal information is gathered, used and disclosed in managing a workers' compensation claim: What you need to know." The complainant did not find the information on this page helpful to answer these concerns and as a result, contacted our Office to ask whether the sharing of information in this manner by WorkSafeNB was a breach of privacy.

6. The complainant's concerns were therefore filed as a privacy complaint under the *Personal Health Information Privacy and Access Act*; we notified WorkSafeNB of such on October 9, 2014 and began our investigation.

INVESTIGATION

7. WorkSafeNB is specifically designated as a *custodian* under the *Personal Health Information Privacy and Access Act*, and as per the definition found in section 1 of personal health information, the information disclosed to CRA includes the complainant's name, contact information, date of accident, status of workers' compensation claim, the end date of compensation benefits, as well as the fact that the complainant was an injured worker entitled to benefits from WorkSafeNB.
8. We had to determine whether the sharing of the complainant's personal health information by WorkSafeNB with CRA without prior knowledge or consent was in accordance with the law.
9. As will be explained in greater detail below, we found that the sharing of the complainant's information (along with that of 3061 other injured workers for a total of 3062) in this case was not in accordance with the *Personal Health Information Privacy and Access Act*.
10. As a result, recommendations for corrective measures will issue to ensure that WorkSafeNB meets its legal obligations with respect to injured workers' personal information in conducting similar surveys in the future.

WorkSafeNB's legal relationship with CRA

11. WorkSafeNB routinely undertakes surveys with both injured workers and employers as directed by its Board of Directors with the goal of measuring its service delivery performance. In this case, WorkSafeNB engaged CRA to conduct a survey on its behalf to assess injured workers' perceptions about returning to work with the purpose of assisting WorkSafeNB in its overall service and communication to injured workers. CRA is a Nova Scotia based corporation that specializes in market research with offices in New Brunswick (located in Moncton and Fredericton).

12. While WorkSafeNB previously had contracted directly with CRA in the past for the delivery of client satisfaction surveys, WorkSafeNB did not enter into a contractual agreement with CRA for the purposes of this particular survey.
13. Initially, WorkSafeNB indicated to us that it believed it had an “implicit agreement” with CRA, based on the fact that WorkSafeNB was a party to a 2014 Memorandum of Understanding with other Atlantic Provinces’ workers compensation boards that called for: “cost-share and work together in joint communications and marketing initiatives relating to the promotion of occupational health and safety...”
14. In June 2014, the four Atlantic organizations, including WorkSafeNB, agreed to use CRA’s services to prepare and conduct a marketing survey regarding service delivery with each of the four organizations, and to rely on the current existing contract between CRA and the Workers’ Compensation Board of Nova Scotia but WorkSafeNB worked with and shared injured workers’ information directly to CRA.
15. Since that time, WorkSafeNB has informed us of more information. The survey was instead directed by its communications department. Furthermore, the established practice to have a contract in place before disclosing information to an external third party company did not occur in this case.
16. After receiving notice of this Complaint, WorkSafeNB reviewed its recent surveys to verify whether contracts were in place with the external companies hired to conduct these surveys; we were informed that the only recent survey conducted on its behalf that did not have a corresponding contract was the survey that is at the heart of this Complaint.
17. WorkSafeNB acknowledged that it did not, in this case, meet its standards of having a written agreement in place and it recognized the seriousness of the situation.

Information shared by WorkSafeNB with CRA

18. WorkSafeNB sent a list to CRA containing information relating to 3062 injured workers and WorkSafeNB provided us with a full copy of all of the information it shared with CRA.

19. The chart of the 3062 injured workers' information indicates that the following information was shared with CRA:
- Accident date
 - Claim status (Active or finalized)
 - Benefit end date
 - Given names and last name
 - Address
 - Telephone number
 - Employer name
 - Employer language
 - "Operation"—identifies types of activities or operations carried on by a particular employer, which are classified at WorkSafeNB in accordance with risk levels for the purposes of determining employer assessments.
 - Employer address, contact name with the employer, and telephone number.
20. The methodology for selecting the injured workers for the survey was from those with time loss claims arising from injuries that occurred within the last 5 years and who received benefits from WorkSafeNB within the previous six months. This sample was selected to measure recent attitudes, beliefs and opinions regarding timely return to work.
21. WorkSafeNB relied on CRA's instructions as to what information about injured workers was required; as a result, it believed that all of the information disclosed to CRA was necessary for the purposes of carrying out the survey.
22. WorkSafeNB sent this information to CRA's offices in Halifax, Nova Scotia in spreadsheet format on a jump drive/USB key by courier on July 25, 2014. The jump drive containing all of this information was not password protected or encrypted.
23. According to WorkSafeNB, the President of CRA has confirmed that the information was wiped from the jump drive after it was uploaded on to its internal systems, and that it had retained the wiped jump drive at its offices.

How CRA handle the injured workers' information and conduct the survey

24. CRA uploaded the spreadsheet to its internal servers, deleted the columns of information no longer required (everything except name, language and telephone

number) for the purposes of conducting the survey, and assigned a unique identifying number to each individual whose information was provided by WorkSafeNB. The unique identifying number was assigned by CRA to ensure that the information collected from the injured workers during the survey could not be matched back to the person by WorkSafeNB.

25. We understand that CRA maintains this information separately from the survey information and only reports de-identified information back to WorkSafeNB, with the intent of ensuring that responses provided by injured workers are anonymized.
26. The CRA employees who contacted the injured workers by telephone to conduct the survey could only see the person's name, telephone number, and the unique identifier assigned to that person. When CRA employees contacted injured workers by telephone, they :
 - did not ask for injured workers' consent to participate in survey;
 - indicated that CRA was only provided with the injured workers' name and telephone number, and that no information about personal injury situation or claim had been shared;
 - information collected is confidential and will only be reported at the group level; and
 - only provided an injured worker with contact information for a WorkSafeNB representative if he or she raised concerns during the survey.
27. Furthermore, CRA has maintained the raw data on its internal databases in accordance with its own data retention policy, and the CRA will only direct its internal data services division to delete the information once the retention period has ended.

WorkSafeNB's beliefs that it had the legal authority to share injured workers' information with CRA

28. During our investigation, WorkSafeNB indicated that it did not seek the injured workers' consent to share their information with CRA or to participate in the survey, including the complainant on the basis that through consultations with CRA and other market survey experts, asking injured workers for consent to participate in the survey "would create a self-selection bias in survey results and, for the survey results to be the most reflective they had to be random."

29. WorkSafeNB directed us to its following as authority for sharing of such information:

- Policy 41-007: Privacy and Information Sharing Security (effective February 20, 2013)
- Directive 41-007.01: Privacy and Information Security Principles (effective July 18, 2008); and
- *Workplace Health, Safety and Compensation Commission Act*—sections 5 and 7.

30. WorkSafeNB specifically referred to section 7 of the *Workplace Health, Safety and Compensation Commission Act* which outlines the responsibilities of the Commission:

7 In addition to the responsibilities prescribed in sections 4 and 5, the Commission shall:

(d) undertake research on matters related to workers' health, safety and compensation,

(...)

(f) propose legislation, policies and practices to promote workers' health, safety and compensation,

(g) recommend changes in this Act, the Workers' Compensation Act, the Firefighters' Compensation Act, the Occupational Health and Safety Act, and the regulations, in order to promote better service by the Commission, and

(h) publish from time to time such reports, studies and recommendations as the Commission considers advisable.

31. WorkSafeNB believes it has the legislative authority and mandate to carry out surveys to measure its performance for the purpose of reporting those results to its Board of Directors, stakeholders, and the Standing Committee on Crown Corporations.

32. Furthermore, when an injured worker completes and signs the Form 67 (Report of Accident or Occupational Disease), he or she is providing consent for WorkSafeNB to gather, use, release or disclose relevant claim information (including medical and financial information) in accordance with the legislation. WorkSafeNB is of the view that a signed Form 67 includes the authorization to disclose any information from the "claim" to third parties for the purpose of satisfying its legislative obligations of "undertaking research on matters related to workers' health, safety and compensation" and "publishing reports, studies and recommendations as the Commission deems advisable."

33. WorkSafeNB then applies paragraph 38(1)(d) of the *Personal Health Information Privacy and Access Act* as authority to disclose an injured worker's personal health information for the purpose of evaluating a program of WorkSafeNB that relates to the provision of health care.

LAW AND ANALYSIS

What is included in the definition of personal health information

34. Personal health information is defined broadly under section 1 of the *Act*, meaning identifying information about an individual if the information:
- (a) relates to the individual's physical or mental health, family history or health care history, including genetic information about the individual,
(...)
 - (c) relates to the provision of health care to the individual,
 - (d) relates to information about payments or eligibility for health care in respect of the individual, or eligibility for coverage for health care in respect of the individual...
35. As we can see, the definition includes more than an individual's test results, diagnoses, medical reports, and the like. It also includes information about an individual's eligibility for health care coverage and health care payments with respect to the individual. Personal health information thus includes an individual's eligibility for coverage under the public health care system in New Brunswick (Medicare), and also an individual's eligibility for benefits from WorkSafeNB, which serves as an alternative health care and financial benefits scheme for workers who have suffered a workplace injury or accident.
36. This means personal health information includes the fact that a person has been accepted by WorkSafeNB as having a valid claim for benefits as a result of a workplace accident or injury, and being eligible for benefits from WorkSafeNB.
37. It follows that related information, including the person's name and contact information, the date on which the workplace accident occurred, and the date on which the person's benefits ended is all *personal health information* under the *Act*.

WorkSafeNB as a custodian under the Act: can only share as legally authorized

38. WorkSafeNB is specifically designated as a custodian of personal health information in the definition found in section 1 of the *Act*. As such, WorkSafeNB is bound by law to

ensure that it is meeting its obligations in handling personal health information it holds of injured workers.

39. This means that WorkSafeNB must follow the rules in the *Act* that direct how it can collect, use, and disclose personal health information it holds in its records about injured workers.
40. The rules that set out when WorkSafeNB can disclose personal health information are found in Part 5, Division C (“Restrictions on disclosure of information”): only disclose personal health information as authorized under this Division and limit every disclosure to the minimum amount of information necessary to accomplish the purpose for which it is disclosed.
41. As a starting point, subsection 37(1) gives broad authority to share where the individual has consented:
- 37(1) Subject to subsection (2), the custodian may disclose an individual’s personal health information if
- (...)
- (b) the individual or his or her substitute decision-maker consents to the disclosure.
42. Without the person’s consent, however, WorkSafeNB, such as any other custodian, is limited to the circumstances as set out in sections 37 to 47 of the *Act* when considering disclosure of personal health information.

Consent: Knowledgeable, Implied and Express

43. The *Act* sets out clear guidelines to assist in understanding what consent means and when it is permissible to rely on a person’s consent.
44. Founding principle of consent is found in subsection 17(2), which requires that consent be knowledgeable, meaning that the person knows:
- (a) the purpose of the collection, use or disclosure, as the case may be,
- (b) that the individual may give or withhold consent, and
- (c) that the information can only be collected, used or disclosed without his or her consent in accordance with the provisions of the *Act*.

45. Knowledgeable consent with regards to disclosure of personal health information means that a person understands what of his or her health care information will be shared, with whom, and for what purpose; it also means that the person has the opportunity to give or refuse to give consent to the intended disclosure.
46. Consent can also be implied or express (understood and obtained written) and there are rules for when a custodian can rely on implied consent and when the custodian must obtain express written consent before proceeding.

Did WorkSafeNB have implied consent in this case?

47. Implied consent is described in subsection 17(3):
- 17(3) Unless it is not reasonable in the circumstances to make the assumption, a custodian is entitled to assume that an individual knows the purpose of the collection, use or disclosure of the individual's personal health information by a custodian if the custodian posts or makes readily available a notice describing the purpose where it is likely to come to the individual's attention or provides the individual with such a notice.
48. This means that unless the custodian is able to recall that the person was informed of the intended disclosure, either directly or by inference from what was discussed, such that it is reasonable to assume such a situation, then, it is said implied consent exist and can be relied upon. Where it is not reasonable to assume such facts, however, implied consent does not exist and it is not proper to proceed without speaking with the person and obtaining actual consent.
49. In this case, WorkSafeNB's Form 67 does not indicate that WorkSafeNB may share information about an injured worker with an external company for survey purposes; furthermore, we find that it is reasonable to expect that an injured worker would have knowledge that this could occur by virtue of signing Form 67 at the time of the workplace accident or injury.
50. When we reviewed WorkSafeNB's Policy No. 41-007, Directive No. 41-007.01, and the page on WorkSafeNB's website entitled "How your personal information is gathered, used and disclosed in managing a workers' compensation claim: What you need to know," we did not find any wording that would inform the public or an injured worker that WorkSafeNB might disclose an injured worker's information to an external company for the purposes of conducting surveys.

51. For these reasons, we do not agree that WorkSafeNB had the injured workers' implied consent to share their information with the external survey company in this case.

Did WorkSafeNB have express consent in this case?

52. The elements of express consent are found in subsection 19(2) as follows:
- (a) the custodian requests the individual to provide the personal health information,
 - (b) the individual knows the purpose of the collection, use or disclosure of the information, as the case may be, and
 - (c) the individual grants the custodian permission, the contents of which may be prescribed by regulation, in writing, to collect, use or disclose the information.
53. In some cases, the law requires express consent of the individual to collect, use or share personal health information, especially where a custodian discloses information to a person outside New Brunswick, and for the purpose of research (19(1)(d) and(e) of the *Act*).
54. In this case, the facts are clear that no express consent of injured workers was obtained prior to disclosure to CRA for survey purposes.
55. We find that WorkSafeNB did not have the complainant's express consent to share the complainant's personal health information with CRA for the purpose of conducting a survey on WorkSafeNB's behalf.

Disclosure permitted without consent in certain cases

56. Having found that WorkSafeNB did not have the complainant's consent, either implied or express, in this case, we looked to the provisions of the *Act* that set out when personal health information can be shared without the person's consent.
57. As per subsection 35(1), custodians are only authorized to disclose personal health information set out in Part 4: Collection, Use and Disclosure of Personal Health Information, Division C: Restrictions on disclosure of information. We considered section 38:

38(1) A custodian may disclose personal health information relating to an individual without the consent of the individual if the disclosure is

(...)

(d) for the purpose of delivering, evaluating, or monitoring a program of the custodian that relates to the provision health care or payment for health care,

(...)

(f) to an information manager in accordance with this Act...

58. While the word program is not defined, we are of the view that a health care program points to assessing the effectiveness of a health care service provided by a custodian, rather than the quality of its communications with patients or clients.
59. In this case, we find that while it may be useful for WorkSafeNB to conduct surveys of this nature, we do not agree that a client satisfaction survey to receive feedback from injured workers on effectiveness of WorkSafeNB's communications during the claims process is akin to conducting an evaluation of a WorkSafeNB program. Also, we do not find that doing so relates to the provision of health care such that it meets the requirements of paragraph 38(1)(d) of the *Act*.
60. Furthermore, CRA is not an *information manager* under the *Act*, i.e., it was not performing any of the kinds of services for WorkSafeNB described in the definition of an information manager under the *Act*; as a result, 38(1)(f) does not apply so as to authorize WorkSafeNB's disclosure of injured workers' personal health information to CRA without their consent.
61. We looked to other authorized disclosures under the *Act* to determine whether any other provisions are applicable so as to authorize WorkSafeNB to share the Complainant's personal health information without consent in these circumstances, including section 42 (*Disclosure required by law*) and section 43 (*Disclosure for research purposes*). We address each in turn below.
62. Section 42 provides as follows:

42 A custodian shall disclose personal health information without the consent of the individual who is the subject of the information if the disclosure is required by another Act of the Legislature...

63. As indicated above, WorkSafeNB is specifically mandated and required under section 7 of the *Workplace Health, Safety and Compensation Commission Act* to “undertake research on matters related to workers’ health, safety and compensation.” While conducting surveys of this nature may well provide WorkSafeNB with valuable feedback, we do not agree that this provision can be read so as to mean that it legally requires the disclosure of an injured worker’s personal health information for the purpose of conducting surveys.
64. As such, WorkSafeNB cannot rely on disclosure being required by another statute (i.e., section 42 of the *Act* in conjunction with section 7 of the *Workplace Health, Safety and Compensation Commission Act*) as authority to disclose the Complainant’s information to CRA without consent for this purpose.
65. Further, the *Act* sets out detailed parameters for personal health information to be disclosed for research purposes (as found in section 43), which allows a custodian to disclose personal health information to a person conducting a research project, but only if the project has been approved under that section. We find that this does not apply in this case, as these provisions are designed for individual researchers who wish to access and use personal health information held by a custodian for a specific research project, which is first subject to approval by a research review body.
66. Based on all of the above, we find that WorkSafeNB was not authorized under the *Act* to disclose the personal health information of the Complainant to CRA for the purposes of conducting this survey without consent (which, as explained above, cannot be said to be implied or express on the basis of the signed Form 67).
67. For all these reasons, we find that WorkSafeNB was only authorized under the law to disclose injured workers’ personal health information to CRA for survey purposes with their express consent.

Disclosure outside of New Brunswick

68. We must note that WorkSafeNB shared the complainant’s personal health information and that of thousands of injured workers with CRA by sending the data to offices in Nova Scotia, which is outside the Province.
69. The *Act* places restrictions on the disclosure of personal health information outside of the Province as per section 47:

47 A custodian may disclose personal health information relating to an individual that is collected in the Province to a person outside the Province but only in circumstances described in section 37, 38 or 44.

70. Section 37 (*Disclosure for health related purposes*) does not apply in these circumstances as the disclosure of the injured workers' personal health information was not done for a health care related purpose.
71. Similarly, section 44 (*Disclosure of registration information*) does not apply in this case as it does not involve the Minister of Health disclosing injured workers' personal health information.
72. Finally, and we have explained above, section 38 (*Disclosure for health care programs or other programs*) also does not apply so as to authorize the disclosure of the injured workers' personal health information in this case, including that of the Complainant.
73. For all of the reasons above, we do not find that WorkSafeNB was legally authorized to disclose the Complainant's personal health information to CRA in this case as WorkSafeNB did not have the Complainant's consent to do so, nor was it authorized to do so under the *Act* without consent.
74. As a result, we find that the disclosure in question to CRA amounted to a breach of the Complainant's personal health information, a breach of the Complainant's privacy. Because WorkSafeNB shared personal health information of the same nature of 3061 other injured workers in this case, we find that this amounts to a breach of their personal health information as well.
75. As a result, a recommendation will issue that WorkSafeNB notify the 3062 affected injured workers, including the Complainant, of the breach of their personal health information.

Other concerns raised in this case

76. In addition to our finding that WorkSafeNB was not authorized under the *Act* to share the Complainant's (as well as the other injured workers') personal health information with CRA in these circumstances, we also found a number of other deficiencies in how

the survey in this case was conducted. Each of these concerns is addressed in turn below.

Requirement for written agreement with third parties not met

77. WorkSafeNB recognized that it did not have a written agreement in place with CRA, referencing subsection 46(2) of the *Right to Information and Protection of Privacy Act*, which requires public bodies who intend to disclose personal information to a service provider that is not an employee of the public body to enter into a written agreement for the protection of personal information against risks including unauthorized access, use, disclosure or destruction. WorkSafeNB indicated that it looked to this provision as it was not aware of a similar provision under the *Act*.

78. We note the following definition under section 1, which we find applies to these kinds of circumstances:

“agent”, in relation to a custodian, means an individual or organization that acts for or on behalf of the custodian in respect of personal health information for the purposes of the custodian and not for the agent’s own purposes, whether or not employed by the custodian or being remunerated.

79. In our view, a custodian engaging a third party company to conduct a survey that involves injured workers’ personal health information as in this case would make the third party service provider an “agent” under the *Act*, given that the third party company (CRA) is acting on behalf of WorkSafeNB in respect to the injured workers’ personal health information for WorkSafeNB’s purposes. The most common example of agents of custodians are the custodian’s employees, but the definition also includes external parties/third party private companies.

80. Where a custodian wishes to engage an agent, the *Act* requires that a written agreement be in place, as per subsection 52(1):

52(1) A custodian that retains the services of agent for the collection, use, disclosure or retention of personal health information shall enter into a written agreement with the agent requiring the agent to comply with the custodian’s legal obligations regarding handling of personal health information.

81. Both the *Personal Health Information Privacy and Access Act* and the *Right to Information and Protection of Privacy Act* require that a written agreement be in place

with external service providers so as to ensure that they are subject to the same requirements and obligations with respect to the personal information that will be disclosed to them. As WorkSafeNB is aware, neither public bodies nor custodians can contract out of their statutory obligations with respect to the handling and safeguarding of personal information and personal health information, and we find that WorkSafeNB failed in its obligations in this respect by not having a written agreement in place prior to disclosing injured workers' personal health information to CRA. A recommendation will issue on this point.

Lack of appropriate security safeguards in disclosing personal health information

82. The Act also requires that custodians ensure that they have reasonable safeguards in place so as to protect the personal health information it handles, based on the level of sensitivity of the personal health information in question:

50(1) In accordance with any requirements prescribed by the regulations, a custodian shall protect personal health information by adopting information practices that include reasonable administrative, technical and physical safeguards that ensure the confidentiality, security, accuracy and integrity of the information.

50(2) The information practices referred to in subsection (1) shall be based on nationally or jurisdictionally recognized information technology security standards and processes, appropriate for the level of sensitivity of the personal health information to be protected.

83. As indicated above, WorkSafeNB transmitted the information it had prepared for the survey (including the Complainant's personal health information) to CRA on a jump drive/USB key that was neither password-protected nor encrypted. The jump drive/USB key was sent to CRA's offices in Halifax, Nova Scotia by courier. WorkSafeNB indicated to us that this was contrary to its established practice of ensuring that personal health information in electronic format is secured (either with a password and/or encryption) and that it was very concerned when it realized this had occurred in this case.
84. Needless to say, had the jump drive/USB key gone missing, been lost in transit, or otherwise been unaccounted for, the Complainant's, as well as the 3061 other injured workers', personal health information would have been readily accessible by any person who might have found the jump drive/USB key.

85. While WorkSafeNB indicated that it has practices in place to protect personal health information that is being sent electronically, in this case, the practice was not followed. This meant that WorkSafeNB placed a significant number of injured workers' personal health information at risk.
86. For these reasons, we find that WorkSafeNB failed to meet its obligations to ensure that the Complainant's personal health information was appropriately safeguarded when it was disclosed to CRA on an unencrypted and non-password-protected jump drive/USB key. A recommendation will issue on this point.

More than minimum information necessary disclosed to accomplish the purpose

87. The *Act* places restrictions on the disclosure of personal health information, which are found in subsections 35(2) and 35(3):

35(2) Every disclosure by a custodian of personal health information shall be limited to the minimum amount of information necessary to accomplish the purpose for which it is disclosed.

35(3) A custodian shall limit the disclosure of personal health information it maintains to those employees and agents of the custodian who need to know the information to carry out the purpose for which the information was collected or received or to carry out a purpose authorized under section 37 [Disclosure for health related purposes].

88. WorkSafeNB's position is that it only shared the least amount of information necessary for the purposes of conducting the survey in question, and that it relied on CRA to give direction as to what information was necessary for it to conduct the survey, given that it has expertise in this area of conducting surveys of this nature.
89. We cannot agree with this approach, given that WorkSafeNB is the custodian of the Complainant's personal health information and the onus is on WorkSafeNB to ensure that it is only disclosing the least amount of information necessary under the circumstances to meet the purpose. Based on the information and explanations provided by WorkSafeNB, it does not appear that WorkSafeNB questioned CRA as to why it needed all of the fields of information provided about the injured workers in this case, and simply relied on CRA's instructions in preparing and providing the Complainant's (and the other injured workers') personal health information.

90. For example, WorkSafeNB told us that it provided the accident date to verify that the claim information provided fell within the intended scope of the survey (injured workers who suffered injuries within the last five years), which could easily be verified by CRA. We questioned whether the disclosure of this information was truly necessary, given that WorkSafeNB could have verified this detail internally before providing the information to CRA, but WorkSafeNB maintained that its position was that it only shared the minimum amount necessary for the purpose of conducting the survey.
91. As another example, WorkSafeNB informed us that it shared the claim status as CRA needed to know this information in order to adapt its scripts with injured workers with active claims in the event that they were reluctant to participate in the survey. As per our comments above, any concerns on this aspect could have been alleviated at the outset by ensuring the informed consent of injured workers prior to undertaking the survey. For this reason alone, we do not find that this information was necessary to be disclosed for this purpose. Further, the survey script could have been adapted to ask questions in a more general manner (i.e, are you or were you satisfied with...), rather than having two separate scripts depending on the current status of an injured workers' claim.
92. Benefit end date and home address information—WorkSafeNB did not provide any specifics as to why this information needed to be shared with CRA for the purposes of conducting the survey.
93. While we understand that the injured workers' name and telephone number could be seen as necessary information to enable CRA to contact the injured workers to conduct the survey, we do not agree that the remainder of the fields of information needed to be disclosed to CRA to conduct the survey. We thus find that WorkSafeNB shared more than the minimum amount of the Complainant's information to CRA for the purposes of conducting the survey and a recommendation will issue on this point.

Concerns with communications with injured workers with respect to the survey

94. The CRA script indicates that they informed injured workers that they contacted them that “we have only been provided your name and phone number only. I know nothing about your personal injury situation or your claim, if any with WorkSafeNB. The purpose of the survey is to assist WorkSafeNB in its overall service and communication to injured workers.” If an injured worker raised any questions with CRA, they would be directed to a contact person with WorkSafeNB.

95. We were concerned to learn of this as this is inaccurate. WorkSafeNB disclosed much more information to CRA about the injured workers than simply name and telephone numbers.
96. While those conducting the survey may not have been able to access or see all of the information provided by WorkSafeNB to CRA, it appears that they would have also known the injured workers' claim status, given that they could vary their communications approach for those with active claims who might be apprehensive about participating. What the people conducting the survey could see is not representative of the totality of the information that WorkSafeNB provided to CRA for the purposes of conducting the survey.
97. Further, when the Complainant in this case contacted WorkSafeNB with concerns about the Complainant's information being shared with the survey company without prior knowledge or consent, WorkSafeNB informed that only name and contact information had been shared with CRA, and not the details of the Complainant's personal injury situation and claim. As we can see from the above, this again is not accurate, as much more information (including accident date, claim status, end date of benefits) was provided to CRA in the spreadsheet.
98. Upon receiving notice of this Complaint, WorkSafeNB advised those responsible within the organization responsible to conduct surveys of the fact that there was a complaint with our Office about this particular survey and to be on alert for any further concerns raised by individuals. In fact, WorkSafeNB informed us that it had received another concern about this survey in November 2014, when it was contacted by the spouse of an injured worker with numerous questions and concerns, including the fact that the injured worker's information was transmitted to a third party company as an injured worker. WorkSafeNB advised this person of the purpose of the survey (to work towards the improvement of WorkSafeNB's processes) and also that the person could speak with WorkSafeNB's privacy officer to obtain more information and of the right to make a formal privacy complaint with our Office.
99. It is of concern that WorkSafeNB did not take any further steps to provide this individual with helpful information, given that at the time the call came in, WorkSafeNB was aware of Complainant's complaint with our Office and that it had identified issues with how this particular survey was conducted.

100. We point out that the *Act* is premised on the notion that personal health information belongs to the person to whom it relates, and that individuals have the right to be informed about how custodians, including WorkSafeNB, have handled their personal health information. The law places specific obligations on custodians to engage those with concerns about the handling of their personal health information as follows:

49(1) A custodian shall

(...)

(b) designate a person

(i) to assist in ensuring compliance with this Act,

(ii) to respond to inquiries about the custodian's information practices, and

(iii) to receive complaints from the public about any alleged contravention of this Act or its regulation by the custodian,

(...)

(d) promote openness, transparency of policies and procedures to the public.

101. In this case, neither the Complainant nor the other individual who contacted WorkSafeNB with concerns about the information shared by WorkSafeNB for a survey was provided the opportunity to speak directly with WorkSafeNB's privacy officer to discuss their concerns. Further, neither of these individuals received explanations as to exactly what information was shared with CRA in these circumstances.

102. We thus find that WorkSafeNB should have taken further measures to be more transparent about the survey undertaken and more helpful in better informing those who contacted it with concerns about the sharing of their information with the external company.

Corrective measures undertaken by WorkSafeNB to date

103. To its credit, WorkSafeNB has already undertaken remedial measures in respect of this privacy breach:

- WorkSafeNB has reminded employees whose responsibilities include overseeing surveys of the requirement of having contracts in place with third parties prior to WorkSafeNB disclosing personal information or personal health information to third parties (WorkSafeNB indicated that this is an existing practice); and

- WorkSafeNB has created a new position of Vice-President Communications and Human Relations to provide among other things, oversight on communications initiatives, including surveys of the kind in this case which lead to this Complaint.
104. While WorkSafeNB recognizes that it did not meet its legal obligations in handling the Complainant's personal information in this case, it has undertaken measures to improve its practices in relation to surveys it commissions with external parties.
105. In our view, these corrective measures are welcome but they not sufficient to ensure that it is meeting all of its obligations with respect to the disclosure of injured workers' personal health information for survey purposes. As a result, recommendations for further corrective measures will follow below.

SUMMARY OF FINDINGS

106. We find that the information about injured workers, including this individual's, by WorkSafeNB to CRA consisted of their personal health information, and as such, could only be lawfully disclosed as authorized under the *Act*. WorkSafeNB did not have the individual's implied consent or express consent to disclose personal health information to CRA, as it is not reasonable in the circumstances to assume that the individual would have known the purpose of the disclosure, given that WorkSafeNB did not post or make available a notice describing the purpose and consent in writing about the survey was not obtained.
107. We also find that, in the absence of consent of the individual, that WorkSafeNB was not authorized under the *Act* to disclose personal health information without consent as it did not meet the requirements set out under Part 4: Collection, use and disclosure of personal health information, Division C: Restrictions on disclosure of information. As a result, the disclosure amounted to a privacy breach.
108. Further, we find that WorkSafeNB failed to ensure that a written agreement was in place with CRA before sharing such private information entrusted to it for safeguarding; in addition, WorkSafeNB failed to take appropriate steps to safeguard this individual's information when it sent the spreadsheet of information on an unencrypted, non-password-protected USB key/jump drive by courier.

109. We find that neither WorkSafeNB nor CRA provided the individual with accurate details about what information had been disclosed by WorkSafeNB to CRA.
110. For all of the above reasons, we find that the individual's complaint has merit and find it necessary to issue the following recommendations to WorkSafeNB.

RECOMMENDATIONS

111. Based on our findings above, we recommend in accordance with the Commissioner's powers and duties established by sections 63 and 68 of the *Personal Health Information Privacy and Access Act* that:
- a) WorkSafeNB respect the rules regarding *consent* established under Part 3 of the *Act* and its obligations regarding the rules and principles for disclosure of personal health information belonging to injured workers that it holds in its records as set out in Division C of Part 4 of the *Act*;
 - b) WorkSafeNB, as required by paragraph 49(1)(c) of the *Act*, proceed to notify all of the 3061 affected individuals, other than the complainant who is fully aware of the privacy breach incident, that WorkSafeNB disclosed their personal health information to an unauthorized person (CRA) without lawful authority, and without appropriate safeguards in place at the time. The notice should inform the injured workers what specific information was shared by WorkSafeNB, when it was shared, contact information for an official with WorkSafeNB, etc.;
 - c) Before conducting any similar surveys in the future, that WorkSafeNB ensure that it has obtained the injured workers' express consent to disclose their personal health information for that purpose; and,
 - d) Before disclosing any personal health information of injured workers to an external company for the purpose of conducting a survey, or any other purpose, that WorkSafeNB ensure a written agreement be put in place, such agreement that must include clauses to the following effect:
 - i. that WorkSafeNB is a custodian under the *Act* and that the external company must comply with all of WorkSafeNB's legal obligations regarding the handling of personal health information under the *Act*, including its obligations to safeguard the information at all times;

- ii. that specified security safeguards must be in place and confirmed before transfer of personal health information;
- iii. that secure methods of transfer be used to transfer the personal health information;
- iv. that a retention schedule be agreed upon regarding the time period the external company will be able to lawfully maintain the information in its own records with a stipulated method of secure destruction of the data upon expiry of the period, with notice of same in writing to WorkSafeNB; and,
- v. that agreed upon procedures be followed in the event of a privacy breach, including notification under section 49 of the *Act*.

Issued at Fredericton, New Brunswick, this _____ day of July 2015.

Anne E. Bertrand, Q.C.
Access to Information and Privacy Commissioner