NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 20-224

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BACKGROUND

In May of 2019 I received an inquiry from a business about how much information the Workers' Safety and Compensation Commission (WSCC) were authorized to collect in relation to their audit processes. In particular, the business was concerned about the amount of personal information that the WSCC had requested about the business's employees.

The business originally asked that I review this issue but later withdrew that request. While the business chose not to proceed with its request, I determined that the question asked was an important one that required clarification and definition and I therefore notified the WSCC that I would be undertaking a review pursuant to section 49.2 of the *Access to Information and Protection of Privacy Act* on my own motion with no further involvement of the business.

The WSCC does periodic audits of selected employers' payroll reports as part of its compliance process "in order to both protect against fraud and misrepresentation, as well as to ensure employer compliance with legislative requirements by submitting accurate payroll information". These audits begin with a request to the business for certain financial information, including payroll records and information about each employee working in the Northwest Territories and Nunavut for each calendar year of the audit as follows:

a. gross earnings;
b. non-assessable earnings;

c. excess earnings;
d. assessable earnings;
e. copies of T4s and T4 summaries
f. a list of total purchases and payments made to each vendor, contractor and supplier relevant to operations in the Northwest Territories and Nunavut;

They also require a list of all directors and officers of the business as registered with corporate registries. The notice that accompanies the request for information indicates that the provision of the information is mandatory and is collected in accordance with the *Workers' Compensation Act*.

ISSUE

The question that I determined should be explored was whether or not the *Workers' Compensation Act* authorizes the second hand collection of employee's personal information from an employer, including T4s which often contain additional information such as a social insurance number, contributions to pension and other plans, the purchase of Canada Savings Bonds and other information that is not required for the purposes of the WSCC Audit.

WSCC'S SUBMISSIONS

One of the questions I asked WSCC was to reference the specific section or sections of the *Workers' Compensation Act* (WCA) which authorizes the WSCC to conduct audits of employers. They referred me to section 6(2)(c) of that Act which provides as follows:

6(2) The Commission shall, when designating a person as a worker...
(c) determine the assessments payable in respect of that person and who shall pay the assessments

They further referred me to section 81(1)(b) which requires employers to “maintain and make available to the Commission” an accurate account of its payroll and “such other information respecting its operations as the Commission may require”. They also point to section 134(1)(a) which provides as follows:

> 134.(1) Subject to section 134.1, for the purpose of ensuring compliance with any provision of this Act, the regulations or an order made under this Act, an inspector and any person assisting the inspector may, at any reasonable time,
>
> (a) inspect and audit any document or other thing used or obtained in connection with employment...

Finally on this point, the WSCC referred me to section 93(1)(c) of the WCA which gives the Commission broad investigative powers, including “the same powers as a court of superior jurisdiction to compel the production and inspection of books, papers, documents, and things” and section 138(1) which gives more specific investigative powers, including the ability to require a person to produce all or part of a document for inspection or copying.

I also asked whether there was any specific provision in the WCA which authorized the WSCC to collect personal information about third parties from an employer. In response, I was referred to section 162 of the WCA which provides as follows:

> 162. The provisions of this Act respecting the provision of information by or to the Commission have effect notwithstanding the *Access to Information and Protection of Privacy Act* and the *Health Information Act.*

They acknowledged that Section 41 of the *Access to Information and Protection of Privacy Act* directs a public body to "collect personal information directly from the individual the information relates to" where reasonably possible but point to one of the exceptions in that section (s. 41(1)(c)) which excludes information "collected for the purposes of law enforcement". They argue that their audits fit the definition of "law enforcement" under ATIPPA which includes investigations that lead or could lead to the imposition of a penalty or sanction. They argue that their audits are required to ensure the integrity of the WSCC programs and that these audits could lead to penalties under the WCA. Section 156 of the WCA outlines a number of situations in which contravention of the Act will result in an offence, punishable with penalties and sanctions. One of those offences is where an employer is found to have provided false information to the Commission.

I asked for an explanation as to why the WSCC needed to collect identifiable personal information about employees in order to conduct an employer audit. They responded by advising that employer T4 Summaries were insufficient for the purpose of conducting a payroll audit for several reasons:

> (1) The assessment scheme outlined in the WCA provides a yearly maximum insurable remuneration cap which, when applied to an individual worker's remuneration, results in the employer not being liable for paying assessments on the portion of the worker's payroll above the cap. Collecting personal information contained on the Official Canada Revenue Agency issued T4 allows for verification of payroll for each employee and reconciliation of the total assessable payroll for all individual workers with the total payroll reported by the employer. As such, verifying official Canada Revenue Agency employment documents and employer-maintained payroll documents against the employer reported payroll is

necessary. In order to properly assess the information, the WSCC says that it requires specific details of each identifiable worker's earnings.

(2) Section 80(2) of the WCA establishes that a principal (hiring company) on a contract is jointly and severally liable to pay the Commission assessments left unpaid by its contractors or subcontractors. As such, when an employer who has hired contractors is being audited, the Commission is required to perform a comprehensive accounting of the payroll reported by the principal employer and all contractors and their subcontractors to determine if any unpaid assessments are owing. Due to both the complexity of these audits, and the vested financial interest employers may have in the outcome, official Canada Revenue Agency documents are required, which include identifiable personal information pertaining to the employer's workers. This is required by Commission auditors to determine if the payroll or contract values related to contractors and subcontractors, many of whom may be sole proprietors or self-employed individuals, have been correctly reported. Additionally, an employer is liable for assessments for workers deemed under the WCA, even if the employers are under no legal obligation to pay them remuneration (S. 72(4)). During an audit, employer operational records are reconciled against payroll records to ensure that each individual worker operating in the Territory who is deemed a worker under the Act is accounted for in the employer's payroll report.

(3) Section 152(a) of the WCA, prohibits an employer from directly or indirectly deducting from its workers any part of any sum that the employer is or might be liable to pay the Commission. When auditing official payroll records for each worker employed it may be required that the Commission contact an employee to verify payroll information, including the deduction

levied by an employer. Because the outcome of such an investigation could impact the financial interests of an employer, it is not reasonable, and moreover may compromise the accuracy of the information obtained, to contact an employer for required additional information. Possessing a worker's name and contact information is required in order to contact the worker directly to verify the accuracy of the payroll information, and to perform any other investigative function as is authorized under the WCA.

(4) Other aspects of the auditing process require a worker's personal information, such as name, address, and jurisdiction of work. T4 slips are issued to a worker based on the jurisdiction in which their work was completed. Because assessments are owing on payroll only for work that was completed in one of the jurisdictions in which the Commission is responsible for administering its Act, it is necessary that T4 level data be collected. Even more, a T4 summary does not capture this level of payroll resolution and for an employer operating in multiple jurisdictions across Canada would include payroll paid for work conducted in jurisdictions other than the Northwest Territories or Nunavut. The T4 Summary alone does not reflect this level of information.

Additionally, as part of the audit process, worker names, as appearing on T4s, are cross referenced against names of claimants registered to the employer's account in order to confirm appropriate payroll reporting and likewise identify instances where compensation fraud may be suspected. Lastly in regards to this section, a worker's address and the jurisdiction in which they conducted work in combination with their employer's operating address allows Commission staff to assess if the employer maintains a 'sufficient connection' to the Commission's jurisdiction to maintain its account.

I also asked the WSCC to justify the need for every data point that is reflected in a T4 (i.e. employee address, specific deductions, income tax deducted, EI insurable earnings, CPP pensionable earnings etc.). The WSCC indicated in its response to this question that deductions from income reflected in the T4 will ensure that an employer is not deducting from its employees any portion or sum that the employer may be liable to pay the Commission. They also argued that the data points included on a T4 provide "an official and externally verified statement of income and deduction for each worker".

I also asked about the process for ensuring that personal information collected for audit purposes is protected and whether there was a retention/destruction schedule. WSCC confirmed, in response, that the information collected for employer audits is organized by employer and, when in paper format, are locked in filing cabinets, with access limited only to the auditor responsible for the file and the Manager of Employer Services. Otherwise, digital copies of records are stored in a secure intranet environment on a server with access limited to the specific Payroll Auditor assigned to each audit. Employer payroll audit records are kept until the review or audit is complete and then for an additional two years to allow for appeal processes. The records are then transferred to the "Records Management" unit where they will be kept for an additional 5 years before being destroyed in accordance with the *Archives Act*. While in the possession of Records Management, the records are kept in clearly marked boxes in a secure room or facility accessible only to those responsible for the care of the records or who have the authority to see the information. Digital records are stored in a secure server environment where access is similarly limited.

DISCUSSION

Firstly, I would like to thank the WSCC for its comprehensive responses to the questions raised by my office in the course of this review. These responses were very helpful in my analysis of the issue.

Does the "notwithstanding" clause in the WCA allow the collection of employee information for audit purposes?

Section 1 of the *Access to Information and Protection of Privacy Act* (ATIPPA) sets out the purpose of the Act, which is to "make public bodies more accountable to the public and to protect personal privacy" by, among other things, preventing the unauthorized collection, use or disclosure of personal information by public bodies. The Supreme Court of Canada has classified access and privacy legislation in Canadian jurisdictions as "quasi-constitutional" because it confers on individuals rights to self-determination. Section 4 makes it clear that ATIPPA is paramount to other Acts:

> 4. If a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, prevails notwithstanding this Act.

Because access and privacy legislation in Canada is quasi-constitutional in nature, any derogation from the rights granted by such legislation must be interpreted narrowly. As the WSCC pointed out there is a "notwithstanding" clause in the WCA. That clause, however, must be interpreted narrowly with this principle in mind. Section 162 of the WCA provides that the provisions of that Act **respecting the provision of information by or to the Commission** have effect notwithstanding the *Access to Information and Protection of Privacy Act* and the *Health Information Act.* I have emphasized these words because they define the scope and application of the notwithstanding clause. The clause does not totally void the application of the ATIPP Act and/or the HIA insofar as the WSCC is concerned. Rather, it limits the application of these acts in terms only of "the provision of information to" the WSCC and "the provision of information by the WSCC". The wording does not, for example,

- oust the limitations of section 40 which restricts the amount and kind of personal information that a public body can collect.
- set aside the obligation created in section 42 of the ATIPP Act, for the WSCC to "protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal" or
- release the WSCC from its obligation under section 44 to make every reasonable effort to ensure that the information is accurate and complete when using an individual's personal information to make a decision that directly affects the individual.

The clause applies only to the provision of information by or to the Commission.

What does this mean? For the purpose of this review, I will focus on the second part of the exception – the **provision** of information **to** the Commission – as the circumstances of this case relate to the obligation of employers to provide personal information to the Commission, not to the Commission's authority to disclose personal information.

The wording used in this provision is unusual because it is different than the wording contained in the ATIPP Act, which refers to the "collection", "use" and "disclosure" of personal information by public bodies. By contrast, section 162 of the WCA refers to the "provision" of personal information to the Commission. It focusses on the provider of the information, not on the collector of the information. This is a significant distinction. It says that, to the extent that ATIPPA would otherwise prohibit or limit a third party (i.e. a business) from providing personal information to the WSCC, the prohibition or limitation is overridden. ATIPPA, of course, only applies to public bodies. It does not apply to private businesses. So if the WSCC were to audit the Government of the Northwest Territories as an employer, the provisions in the ATIPP Act which might otherwise prevent the public body from providing certain information are over-ridden where the

WCA has specific provisions authorizing the collection of the information. However, because ATIPP does not apply to private businesses, section 162 of the WCA does not apply so as to remove legal barriers to the provision of personal information by private sector businesses.

Does PIPEDA prevent the business from disclosing employee's personal information?

Businesses in the Northwest Territories (as well as in the rest of the country) are subject to and bound by the *Personal Information Protection and Electronic Documents Act* (PIPEDA). This is federal legislation which requires those engaged in commercial activities to protect the personal information which they collect during the course of those activities. It also requires organizations that are "federal works or undertakings" to protect the privacy of their employees. There is a strong legal opinion that has been accepted by the Office of the Privacy Commissioner of Canada that all businesses in the Northwest Territories (and our two other Territories) are "federal works or undertakings" because of the constitutional origins of the three territories. While I disagree with that assessment, I will assume for the purposes of this report that businesses operating in the Northwest Territories are "federal works and undertakings" such that PIPEDA requires them to protect the privacy of their employees.

Based on this premise, businesses in the Northwest Territories are prohibited from providing (disclosing) personal information about their employees to the WSCC unless there is some exception to this prohibition contained in PIPEDA. Section 7(3) of PIPEDA provides some guidance in this regard:

> 7(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose

personal information without the knowledge or consent of the individual only if the disclosure is ...

(c.1) made to a government institution or part of a government institution that has made a request for the information, identified its lawful authority to obtain the information and indicated that ...

(ii) the disclosure is requested for the purpose of enforcing any law of Canada, a province or a foreign jurisdiction, carrying out an investigation relating to the enforcement of any such law or gathering intelligence for the purpose of enforcing any such law,

(iii) the disclosure is requested for the purpose of administering any law of Canada or a province, or ...

Looking at this exception, we have to determine whether the request for information by the WSCC falls within the parameters of the exception such as to allow businesses to provide information about their employees to WSCC auditors.

The first requirement is that the organization has the legal authority to collect the information. That requirement is clearly met. WSCC clearly has the legal authority to conduct audits of employers for the purpose of ensuring compliance and for that purpose is authorized to collect employee payroll information. Furthermore, section 93 of the WCA gives the Commission the same powers as a court of superior jurisdiction to "compel the production and inspection of books, papers, documents and things".

The second requirement is that the information is being requested for the purpose of enforcing or administering a law of Canada or a province. Assuming that the word "province" includes a territory (Section 35, *Interpretation Act,* R.S.C., 1985, c. I-21*)* this

requirement is also met. Section 134(1) of the WCA specifically provides that, “for the purpose of ensuring compliance with any provision of this Act...an inspector and any person assisting the inspector may, at any reasonable time, a) inspect and audit any document or other thing used or obtained in connection with employment.” The purpose of these audits relate to the enforcement of the WCA.

The last requirement is that the organization requesting the information is a “government institution”. Unfortunately, PIPDA does not define the term “government institution”. The same terminology is used and defined in Canada’s *Privacy Act*, as follows:

> government institution means
> (a) any department or ministry of state of the Government of Canada, or any body or office, listed in the schedule, and
> (b) any parent Crown corporation, and any wholly-owned subsidiary of such a corporation, within the meaning of section 83 of the *Financial Administration Act*.

However, because of the wording of section 7(3)(c.1) above, which refers to enforcing any law of Canada *or a province* it seems that the term “government institution” may have a wider meaning in PIPEDA than it does in the *Privacy Act*. In my opinion, reference to the law of a province by implication suggests that “government institution” is intended to include a provincial or territorial government institution.

I found some assistance in considering this question in PIPEDA Case Summary #2015-004 in which Canada’s Privacy Commissioner’s Office considered a similar situation as that outlined here. In that case, an individual complained that a Canadian airport had disclosed her personal information in the form of video surveillance images of her to a provincial worker’s compensation organization (the “Agency”) without her knowledge

and consent. As part of an investigation into the merits of a claim for compensation by the individual, the Agency had issued a subpeona to an airport for video surveillance of her at the time of her departure by air. This ordered the disclosure of video surveillance of the individual on the day of her departure. The airport complied with the subpeona.

Several days later, anticipating the complainant's return to the airport at the end of her trip, the Agency arranged for an airport security employee to operate a video surveillance camera to record the complainant as she claimed her luggage. This footage was then turned over to the Agency. The Agency did not issue a second subpoena to obtain the footage but did submit information request forms supplied by the airport prior to the footage being disclosed. The Agency argued that section 7(3)(c.1) allowed for the disclosure of the footage from the individual's return because that section does not require a subpoena or warrant, but instead requires that the disclosure be made to a government institution or part of a government institution that has: (i) made a request for the information; (ii) identified its lawful authority to obtain the information; and (iii) indicated that the disclosure is being sought for certain permissible purposes, such as the administration or enforcement of any federal or provincial law.

The Privacy Commissioner's Office found that section 7(3)(c.1) did not make the airport's disclosure of the footage from the return trip lawful because the there was nothing in the information request forms submitted by the agency that identified the agency's lawful authority to obtain the information without a subpoena. Secondly, the information request forms submitted by the agency referred, erroneously, only to the departure flight of the complainant from the airport, not to her return. The request therefore did not correspond to what was ultimately disclosed to the agency.

The conclusion to be reached from this case is that the term "government institution" does include a provincial or territorial government institution such as the WSCC and that section 7(3)(c.1) of PIPEDA may allow a business to disclose the personal information

about its employees to the WSCC provided the demand for that information clearly and precisely sets out the legal authority for the collection and information requested is clearly and precisely defined.

Does the WSCC otherwise have the authority to compel production of records?

Section 81 of the WCA requires employers to “maintain and make available to the Commission” an accurate account of its payroll and “such other information respecting its operations as the Commission may require”.

Section 93 gives the Commission “the same powers as a court of superior jurisdiction to...compel the production and inspection of books, papers, documents and things”.

Section 138(1) gives an inspector of the WSCC the authority to require a person to produce all or part of a document for inspection or copying for the purposes of an inspection.

Section 139(1) of the WCA provides:

> For the purposes of an inspection under this Act, the Commission or an inspector may give to an employer, the agent of an employer or any person the Commission considers might be an employer, written notice requiring that person to produce to the Commission or inspector all documents in the possession, custody or power of the employer, agent or other person relating to the inspection referred to in the notice.

And section 139(3) requires the recipient of such a notice to comply with the direction:

> The person named in and served with the notice shall produce all documents required in accordance with the notice.

I am satisfied that the WCA gives WSCC inspectors the authority to compel the production of records and, provided that the notice is in accordance with the requirements of PIPEDA as set out above, employers are required to comply.

Is the WSCC limited in the information it can collect.

One of the most basic of privacy principles and good privacy practices is that an organization should limit its collection of personal information to that which is necessary for the stated purpose. I can accept, to a point, the arguments made by the WSCC as to why they need to collect individual T4 information for a business's employees and why the T4 summary may not contain everything needed to complete an audit. That said, there is far more information on a T4 than the WSCC needs for its audit purposes. For example, there is no apparent need for them to know if or how much an individual is contributing to a pension or RRSP plan through his/her employer. Nor does the WSCC need to know what, if any, charitable donations an employee has made through his/her employment agreement. There must be an identifiable need for every data point collected. If the organization cannot point to a specific need for specific information, it should not be collecting it. Section 40 of the *Access to Information and Protection of Privacy Act*, which as noted above is not in any way affected by the WCA's notwithstanding clause, says that no information can be collected by a public body unless

a) the collection of the information is expressly authorized by an enactment;
b) the information is collected for the purposes of law enforcement; or
c) the information relates directly to and is necessary for an existing program or activity of the public body.

The WSCC has not provided me with reference to any provision in their act which authorizes them to collect information that is not pertinent to the investigation or audit being done. Nor have they suggested that there is a law enforcement need to collect the information not pertinent to their audits. Nor can it be said that this “extra” information contained in T4 slips relates directly to or is necessary for the audit program. Unless, therefore, the WSCC can make a legitimate case that every data point on T4s is “necessary” for the audit program, they should only be collecting those data points that are relevant.

CONCLUSIONS

I am satisfied that the WSCC has the authority to demand and receive information relevant and necessary to conduct compliance audits of employers under the *Workers’ Compensation Act* provided that the their notice to produce clearly outlines their legal authority to collect the information and is clear and precise in the information being demanded. In demanding the production of individual T4s, however, they are demanding and collecting more information than is necessary for their audit purposes. Is there another way to collect the necessary information without collecting the other information in a T4 that is in no way relevant to or necessary for their audit purposes. Perhaps there is a way to allow employers to redact information in certain boxes of the T4 before providing them to the WSCC. Or perhaps there is a way to arrange with Revenue Canada to provide only the required information directly from their records, though this may also prove to be difficult because it may require additional consents that would be impractical to obtain.

I recommend:

a) that the WSCC identify specifically the information contained on a T4 that is relevant and **necessary** for their audit purposes;

b) when making demands for third party personal information for the purposes of audit (or any other purpose) that the notice precisely indicate their legal authority for the collection and outline the specific information required.

c) that the WSCC explore other ways of obtaining the information they need for the purposes of their audits without collecting information that is neither relevant nor necessary to investigate/audit employer's compliance.

Elaine Keenan Bengts
Information and Privacy Commissioner