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**Nunavut Information and Privacy Commissioner**  
Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina  
Commissaire à l’information et à la protection de la vie privée du Nunavut

## Commissioner’s Final Report

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<b>Date:</b>	February 8, 2024

### Summary

[1] The Complainant suffered a hip injury at work. They filed a claim with the WSCC. Four years later, with the Complainant still off work, the WSCC asked the Complainant to consent to the release of five years of pre-injury medical records. The Complainant consented, but only for medical records pertaining to the hip. When the WSCC insisted that all medical records be released, the Complainant filed a privacy breach complaint under the ATIPPA. The Commissioner finds that the WSCC’s collection (or attempted collection) of the Complainant’s personal information did not comply with section 40 of the ATIPPA nor the WSCC’s policy on personal information privacy protection. There was therefore a breach of the Complainant’s privacy.

### Nature of Review and Jurisdiction

[2] This is a review of a privacy breach complaint. The request for review was filed under section 49.1(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I conducted my review under section 49.2(1).

**[3]** I have jurisdiction over the Workers’ Safety and Compensation Commission: ATIPPA, section 2, definition of “public body”, paragraph (b); ATIPP Regulations, Schedule A, item 15.

## **Issues**

**[4]** The issues in this review are:

- a. Did the WSCC collect the Complainant’s personal information in accordance with section 40 of the ATIPPA?
- b. Did the WSCC obtain the Complainant’s consent in accordance with the ATIPPA and ATIPP Regulations?

## **Facts**

**[5]** The Complainant injured their right hip while working in Nunavut in late 2019. A report of injury was filed with the WSCC. The Complainant started receiving benefits from the WSCC for medical care and lost wages. More than four years later, the Complainant is still off work and awaiting hip surgery.

**[6]** In this decision, there are two key WSCC employees to whom I will refer: the case manager and the claims manager. The case manager has primary responsibility for handling the claim. The claims manager is the case manager’s superior and sometimes manages the claim if the case manager is away.

**[7]** The key document in the claims file, for purposes of this review, is a “Medical Advisory Report” dated March 28, 2023, from one of the WSCC’s in-house medical advisors. The report addresses four questions asked by the claims manager. The questions were asked following receipt of some MRI results.

**[8]** For purposes of this case, only the first and fourth questions are relevant:

- a. “Please review the MR Arthrogram results and advise if the findings are related to the compensable workplace injury.”
- b. “Given the pre-existing medical issues that may have contributed to a prolonged recovery, is there a case for cost relief from this claim?”

**[9]** The medical advisor notes the presence of a labral tear (i.e. a tear in the labrum, the ring of cartilage that follows the outside rim of the hip joint socket). The medical advisor then answers the questions as follows (with my underlining):

- a. "If the worker has no prior history of right hip issues one must accept the labral tear as being, at least in part, on the basis of the workplace trauma. As noted above, this could be clarified by sending the MRI arthrogram to [specialist] for his comments. I would also recommend obtaining pre-injury medical for a period of 5 years."
- b. "I am unsure of the extent to which a pre-existing condition has contributed to the worker's delayed recovery. I would therefore recommend that we obtain preinjury medical for a period of 5 years."

**[10]** On June 17, the case manager wrote to the Complainant:

I need your pre-injury medical for a period of 5 years. Do you have General/Family physician that I can contact?

**[11]** Two days later, the Complainant wrote an e-mail to the case manager on various aspects of their claim. It included the following line (with my underlining):

I will sign the paperwork for my family physician to release my information regarding anything involving my injured hip.

**[12]** On October 13, the Complainant wrote to the case manager as a follow-up to a telephone conversation they had just had. The e-mail includes the following paragraph:

I called my physicians office and spoke with Office staff, who after 20 minutes of looking found my signed document asking for WSCC to be provided with all health information regarding my injured hip from 2014 to 2019 the year of my injury. It appears that was not done, although I was under the impression it had been. The discussion ended with the staff putting a note on this for the doctor to approve the information she was going to organize for WSCC. Will call again on Monday. I did request they notify me once this was done.

**[13]** On November 30 there is a note to file from the claims manager, written as a summary of a phone call with the Complainant. The note to file includes the following:

advised worker WSCC hopes to receive medical asap to send to medical advisor  
discussed worker wants to only provide critical information, advised worker per  
policy wsccl requires 5 years pre-existing medical and will make decision based  
on available medical

**[14]** On December 1 the claims manager sent a fax to the Complainant's family doctor's office, saying: "Please forward all medical information from September 2014 to present".

**[15]** By December 18, the WSCC had apparently received only three pages of medical records from 2019. The claims manager then sent a lengthy e-mail to the Complainant. It is labeled "Warning" and is described as "written warning to worker – not submitting requested medical".

**[16]** In the e-mail, the claims manager addresses the Complainant's refusal to consent to the release of medical records unrelated to the hip:

The WSCC requires full medical information, more than just the medical information related to the hip injury, for the following reasons:  
Some medical conditions may not be directly related to the compensable injury, however they could potentially delay the recovery duration or lead to complications, for example, diabetes, obesity, or kidney disease. The WSCC will require all relevant medical information to determine any intervening factors. We are also legislatively required to determine if an employer is entitled to claim cost relief due to any intervening/pre-existing condition.  
Your file will be referred for an independent medical examination (IME). The IME provider usually requires:  
all medical notes, consultations and test results for 3 to 5 years prior to the accident, injury or illness, as well as from the date of the accident or development of the medical condition, to the present time.

**[17]** The Complainant was given until January 15, 2024, to submit the following records:

all clinical chart notes from your family physician, consultations and test results 5 years prior to the accident, injury or illness, as well as from the date of the accident or development of the medical condition, to the present time.

**[18]** The e-mail concludes with the following statement:

There will be no additional warnings after this written warning. If the WSCC does not receive the requested medical information by the due date, your compensation may be reduced, suspended, or terminated.

**[19]** In an e-mail to the claims manager on December 19, the Complainant explained why the request and the warning were, in the Complainant's view, unfair. Nevertheless the Complainant did later provide written consent for the release of all medical records since 2014. The Complainant consented because they could not afford to lose benefits.

**[20]** On January 15, the Complainant filed a privacy breach complaint with my office. The following day I wrote to the WSCC to inform it of the complaint, and to ask for certain documents to assist me with my review.

**[21]** On January 16, a benefit payment should have been made to the Complainant, but was not. The following day, the Complainant asked why. The case manager replied that the requested medical records had not been received from the family doctor, so benefits had been suspended: "You better go back to him [the family doctor] send the reports, because without those reports, your benefits are put on hold as stated in the warning letter". The case manager did, however, reinstate the missed payment to the Complainant, with the proviso that there would be no further payments if the medical records were not received.

**[22]** On January 18, the case manager sent a fax to the family doctor's office, saying "Please disregard my previous email and use the attached request in this email. Our request is ONLY pertaining to the worker's Right Hip injury". The WSCC did not thereafter revive its request for all medical records.

**[23]** On January 29, at my request, the WSCC agreed to include a "Note to File" in the Complainant's claims file. The note acknowledges that the WSCC has received the requested medical information pertaining to the right hip, and states that "any past issue about the scope of the WSCC's request, or the scope of the worker's consent, has been resolved to the satisfaction of the WSCC and the worker".

**[24]** Although resolution was achieved, I informed the WSCC and the Complainant that I would write a Review Report so that there is a public record of what happened and perhaps to avoid similar situations arising in future.

## **Law**

**[25]** Workers' compensation is a statutory program for workplace injury insurance. In Nunavut the program is delivered by the Workers' Safety and Compensation Commission (WSCC) under the authority of the *Workers' Compensation Act* (WCA). The WSCC covers both the Northwest Territories and Nunavut.

**[26]** The WSCC is a "public body" under the ATIPPA. When dealing with an injured worker's personal information, it must follow both the ATIPPA and the WCA.

**[27]** If there is a direct conflict between the WCA and the ATIPPA "respecting the provision of information by or to" the WSCC, the WCA prevails: WCA, section 162. Lawyers often refer to this kind of provision as a "paramountcy clause". In the present case, there is no conflict between the two laws, so there is no need to invoke the paramountcy clause.

### *Collection of personal information – ATIPPA*

**[28]** The WSCC, like all public bodies subject to the ATIPPA, is bound by the provisions of section 40. The relevant part reads as follows:

40. No personal information may be collected by or for a public body unless

...

(c) the information relates directly to and is necessary for

(i) an existing program or activity of the public body, ....

**[29]** There is only one Nunavut case in which the phrase "relates directly to and is necessary for" has been considered in a similar context: *Review Report 16-109 (Re)*, 2016 NUIPC 13 (CanLII). The former Commissioner found that a public body had breached section 40 by collecting more medical information about the Complainant than was necessary for administration of the short-term disability

program for GN employees. The former Commissioner also found it was “clearly inappropriate” for the public body to threaten employment discipline if the Complainant did not consent to disclosure of their medical records.

*Collection of personal information – WCA*

**[30]** Section 30 of the WCA grants the WSCC broad authority to collect information:

30. The Commission may require a claimant, an employer or a health care provider to provide any information that it considers necessary for it to determine a claim for compensation.

**[31]** The authority granted by this section is structured by WSCC Policy 7.04, “Personal Information Privacy Protection”. Policy 7.04 represents the WSCC’s commitment to how it will collect, use, and disclose personal information.

**[32]** The policy is 11 pages long, so I will not quote it in full. The most pertinent parts begin with the “policy statement” (with my underlining):

The WSCC will only collect, use, and disclose the least amount of personal information required for the purposes of the operation of programs and services established under the Workers’ Compensation Acts of the Northwest Territories and Nunavut. The WSCC follows the privacy principles as established in this policy to ensure that the privacy of personal information is protected. The WSCC upholds its legislative duties to protect privacy, as required under in the Workers’ Compensation Acts, Health Information Act, Safety Acts, and Access to Information and Protection of Privacy Acts.

**[33]** Policy 7.04 also includes ten “privacy principles” (pages 4 and 5), of which the most pertinent are the second and fourth (with my underlining):

*Principle 2 - Identifying Purposes*

The purposes for which the personal information is being collected must be identified by the organization before or at the time of collection.

*Principle 4 - Limiting Collection*

The collection of personal information must be limited to that which is needed for the purposes identified by the organization. Information must be collected by fair and lawful means.

I note that the ten privacy principles are widely recognized among privacy professionals, and have been cited several times in Review Reports by the former Commissioner: *Department of Health (Re)*, 2020 NUIPC 4 (CanLII); *Department of Health (Re)*, 2020 NUIPC 5 (CanLII); *Nunavut Legal Services Board (Re)*, 2020 NUIPC 2 (CanLII).

**[34]** In the section on “Collection of Personal Information” (pages 6 and 7), Policy 7.04 includes examples of the types of personal information the WSCC collects. The most pertinent are (with my underlining):

- Medical information specific to the work-related injury/disease; and/or
- Medical information specific to other conditions that may impact the work-related injury/disease.

**[35]** Also relevant is Policy 3.12, “Pre-Existing Conditions”. Pre-existing conditions may be relevant to the question of causation (whether the injury is “arising out of and in the course of employment”, which is the basic criterion for a WSCC claim). They are also relevant to the effect of a compensation claim on the employer’s assessment, which is analogous to an auto insurance premium going up after a motor vehicle collision. When an employer’s assessment is reduced due to a pre-existing condition, it is known as “cost relief”.

**[36]** Policy 3.12 includes the following statement under “Gathering Medical Evidence” on page 4 (with my underlining):

In order to confirm the presence of a pre-existing condition, the Claim Owner must request, where available, the previous five or more years of medical documentation related to the pre-existing condition.

## **Analysis**

**[37]** WSCC Policy 7.04 shows, in my view, a sophisticated understanding of the WSCC’s privacy obligations under Nunavut law, including section 40(c) of the ATIPPA. I can do no better than to hold the WSCC to the standard it has set for itself in Policy 7.04.



**[38]** The fundamental issue in this case is whether the WSCC’s request for the Complainant’s medical records was appropriately “limited” and “specific” as contemplated by Policy 7.04. I find they were not.

**[39]** The source of the request for medical records appears to be the medical advisor’s opinion of March 28, 2023. The opinion included a recommendation (quoted in paragraph 9 above) that the WSCC should obtain five years’ pre-injury medical history. The recommendation is stated twice.

**[40]** In my view, there is nothing at all objectionable in the medical advisor’s opinion. Examination after the injury revealed a labral tear. If there was evidence of a labral tear from before the injury, that would be relevant to the question of a pre-existing condition. If, on the other hand, the Complainant had no previous complaints of or treatment for a problem with the right hip, that too would be relevant to the question of a pre-existing injury.

**[41]** The medical advisor’s recommendation to obtain five years’ pre-injury medical history was, in my view, supported by the evidence and in keeping with WSCC policy – if it was restricted to the right hip.

**[42]** Unfortunately, the recommendation was written in an ambiguous way. In both occurrences, it is not qualified by the words “in relation to the right hip”. So did the medical advisor mean to suggest that the pre-injury medical history be only about the right hip, or did they mean it to be about everything?

**[43]** In the context of the whole document, which is only about the right hip, I believe the better interpretation is the former. But I can see how someone could read it the other way, i.e. as a request for the Complainant’s complete medical records.

**[44]** (An important aside: During this review, I asked the medical advisor if they intended their recommendation to be limited to the right hip. On January 23, the medical advisor confirmed that it was. That clarification was not, of course, available to the case manager or the claims manager before January 23.)

**[45]** When the case manager, and later the claims manager, asked the Complainant to arrange for delivery of the medical records, they did not put any restriction on the request. The request was for the Complainant's complete medical history, full stop. The request was not ambiguous. The claims manager's letter to the Complainant on December 18 was crystal-clear that the WSCC wanted the whole history, not just the history related to the right hip.

**[46]** In my view, it will be a rare case in which the WSCC is justified in asking for an injured worker's entire medical history. The word "relevant" in Policy 7.04 must mean something. The words "relates directly to and is necessary for" in section 40(c) of the ATIPPA must also mean something.

**[47]** The WSCC has broad powers under the WCA. It needs them if it is to perform its statutory function. The questions raised by a pre-existing condition are inherently complex. Nothing in this Review Report should be read as a limitation on the powers the WSCC needs to do its job.

**[48]** But there is a privacy boundary beyond which the WSCC cannot go. A worker who comes to the WSCC with an injury should not have to open their whole medical history to the WSCC, unless and until the WSCC establishes relevance to the compensation claim.

**[49]** To take a hypothetical example, a worker who comes to the WSCC with an injured knee should not have to risk exposing a medical history that may include mental health issues, or an STD, or a pregnancy, or a concussion, or anything else that is unrelated to the knee. It simply is not the WSCC's role to know, or to ask.

**[50]** In this case, the WSCC stepped over the boundary. There is a world of difference between "We need to see all relevant medical records" and "We need to see all medical records so we can decide what is relevant". The former is justified under the ATIPPA and the WCA. The latter is not.

**[51]** In this case, the WSCC was justified in asking for five years' pre-injury medical history pertaining to the Complainant's right hip. The WSCC was not justified in asking for the Complainant's entire medical history over that same five years. The request did not comply with the WSCC's Policy 7.04, nor with section

40(c) of the ATIPPA. When the WSCC attempted to collect that information, the Complainant's privacy was breached.

### *Consent*

**[52]** When the Complainant challenged the WSCC's request, the WSCC's response was to advise (the Complainant uses the word "threaten") that compensation could be suspended if the Complainant did not consent – and compensation was, in fact, suspended on January 16, although it was reinstated the next day.

**[53]** I accept that the case manager and claims manager genuinely believed that the request for the complete medical history was justified. But they were mistaken.

**[54]** Threatening to suspend a worker's compensation – to say nothing of actually doing it – is, in the world of the WSCC, a serious step indeed. An injured worker has already lost their employment income. Losing their workers' compensation could leave them with no income at all. Before taking such a step in this case, the WSCC would have been well-advised to make double-sure that it was on solid legal ground.

**[55]** Faced with the immediate loss of income, the Complainant gave their consent to the release of all medical records. The consent was forced by the threatened loss of benefits.

**[56]** Forcing consent, in these circumstances, did not comply with the WSCC's Policy 7.04 (Principle 4: "Information must be collected by fair and lawful means"). The ATIPPA and ATIPP Regulations do not explicitly say that consent to the collection, use, and disclosure of personal information is invalid if it is not informed and voluntary: ATIPPA sections 40, 43(b), 48(b); and Regulations, section 5. It is, however, so obvious that perhaps it did not occur to the drafters to have to say it out loud. It is certainly implicit: see, for example, *Review Report 16-109 (Re)*, 2016 NUIPC 13 (CanLII); and *Department of Health (Re)*, 2022 NUIPC 1 (CanLII) at paragraph 28.

**[57]** The situation was complicated by the fact that the Complainant’s family doctor’s office appears to have been somewhat slow and disorganized in its response to the Complainant’s request for records. That was not the Complainant’s fault. The first time the Complainant put it in the request, for example, the office misplaced it, and the Complainant had to follow up.

**[58]** A worker who wishes to challenge a WSCC request for medical history should, in my view, have an opportunity to have that request reviewed before compensation is suspended: Policy 7.04, principle 10. The privacy interests at stake are too important for the situation to be handled otherwise.

**[59]** The WSCC has an internal and external appeal process. In principle, matters such as the present case are best handled within that process: *Department of Education (Re)*, 2022 NUIPC 20 (CanLII) at paragraph 24.

**[60]** It is not desirable for this office to insert itself into complex adjudications, just because a sliver of the situation may fall under Part 2 of the ATIPPA: *Department of Education (Re)*, 2022 NUIPC 20 (CanLII) at paragraph 23. The WSCC is a high-volume adjudicative body, and it would be to nobody’s benefit for this office to become a “proxy battleground” for WSCC claims.

**[61]** On the other hand, in a case where a privacy boundary has clearly been crossed, I will not hesitate to assert my jurisdiction. This is such a case.

### *Remedy*

**[62]** As noted in paragraphs 22 to 24 above, the privacy breach was resolved during my review. As a result, my only recommendation is for the WSCC to confirm that it has implemented the resolution as agreed (see paragraph 68).

**[63]** In my view, this case does not reveal a problem with WSCC policy. Policy 7.04, in particular, correctly reflects the WSCC’s obligations under Nunavut’s ATIPPA. I therefore make no recommendation for a change to WSCC policy.

**[64]** The problem, rather, was that Policy 7.04 was not correctly applied. The request for all medical records went beyond what Policy 7.04 allows. Adherence

to policy is a matter of training, experience, and judgment. It is not usually amenable to a Review Report recommendation.

**[65]** If there is one point that bears repeating, it is this: It will be a rare case in which the WSCC is justified in asking for an injured worker's entire medical history. The key is relevance to the claim. If the WSCC can impress that point on its claims staff, we may avoid a repetition of the situation that arose in this case.

### **Conclusion**

**[66]** The WSCC's collection (or attempted collection) of the Complainant's personal information was not in accordance with section 40 of the ATIPPA.

**[67]** The way the WSCC obtained the Complainant's consent was not in accordance with the ATIPPA and ATIPP Regulations.

### **Recommendation**

**[68]** **I recommend** that the WSCC confirm that it has placed in the Complainant's claim file the statement that was agreed upon in correspondence dated January 29, 2024, between myself and the WSCC's ATIPP Coordinator (see paragraph 29 above).

Graham Steele

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