

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## ORDER PO-3729-F

Appeal PA14-252-2

Workplace Safety and Insurance Board

May 3, 2017

**Summary:** This order deals with the outstanding issue of whether the WSIB's search for records relating to changes to its drug formularies was reasonable. The adjudicator reviews the board's searches and upholds the board's search for records and dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24.

### OVERVIEW:

[1] This final order disposes of the remaining issue in the appeal of a decision made by the Workplace Safety and Insurance Board (WSIB or the board) in response to a request for access made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for information and records related to WSIB's drug formularies and the names of the board's drug advisory committee (DAC) members.

[2] During mediation, the requester, now the appellant, narrowed the scope of her request and advised that she was only pursuing access to the names of the DAC members, the drug formularies and records that provide directions on the formularies. WSIB provided the appellant with a final decision to the appellant's narrowed request where it claimed the discretionary exemptions at sections 13(1) (advice or recommendations), 18(1) (economic or other interests) and the mandatory exemption at section 21(1).

[3] Also during mediation, the WSIB provided the appellant with a number of Formulary Drug Listing Decisions and other documents and advised that no additional

records exist "that provide directions on updates to the formularies". The appellant contends that additional records should exist.

[4] Following the inquiry into this appeal, I issued Interim Order PO-3693-I where I found that the names of the DAC members were not exempt under section 21(1), and I ordered WSIB to conduct a further search for responsive records.

[5] Order provisions 2 through 5 required the WSIB to conduct a further search for records responsive to the appellant's request for records relating to changes or updates to the drug formularies and to provide the appellant with a decision if any additional records were located as a result of that search. The WSIB was also required to provide me with representations about its further search including an affidavit.

[6] In accordance with the order provisions, the WSIB provided the appellant with a decision letter granting full access to records located as a result of the additional searches. The WSIB also provided this office with an affidavit setting out the details of these searches. This affidavit was shared with the appellant and the appellant was provided with an opportunity to make representations. The appellant chose not to make representations.

[7] In this decision, I uphold the WSIB's search as reasonable and dismiss the appeal.

## **DISCUSSION:**

[8] The sole issue remaining is whether WSIB conducted a reasonable search for records relating to changes or updates to the drug formularies.

[9] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[10] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. To be responsive, a record must be "reasonably related" to the request.<sup>1</sup>

[11] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>2</sup>

[12] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all

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<sup>1</sup> Order PO-2554.

<sup>2</sup> Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.<sup>3</sup>

[13] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.<sup>4</sup>

[14] In Interim Order PO-3693-I, order provision 5, I ordered the following:

I order the WSIB to provide me with its representations on the further search referred to in provision 2 and to provide me with an affidavit outlining the following:

- (a) The names and positions of the individuals who conducted the searches;
- (b) Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and
- (c) The results of the search.

[15] The WSIB provided an affidavit of the Medical Director for Clinical Services at the board in compliance with the order. A copy of this affidavit was shared with the appellant.

[16] The Medical Director affirmed that she instructed the following individuals to conduct the search for records relating to changes or updates to the drug formularies: Professional Practice Leader, Pharmacy; Professional Practice Leader, Nursing; Chief Nursing Office and Director, Professional Practice; Business Readiness, Health Services; Manager, Health Services Program and Provider Effectiveness Branch; Nurse Consultant; Pharmacist; Business Assistant; and Manager, Business Services.

[17] The affiant further describes the searches and the results of those searches as follows:

Clinical Services staff searched in the WSIB's shared drive (S:\drive) for NOC (notice of compliance) lists sent by the WSIB's service provider, TELUS Health Solutions Inc. ("TELUS"). As a result of that search, 285 pages of responsive records were identified.

NOC lists are sent to the WSIB monthly by TELUS. The lists come in the form of a Microsoft Excel Spreadsheet and are received by email. The lists advise the WSIB of the following:

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<sup>3</sup> Order MO-2185.

<sup>4</sup> Order MO-2246.

- (a) New drugs available that the WSIB may wish to include in its drug formularies;
- (b) Drugs that have new strengths or formulations;
- (c) Drugs that are now available in new generic formats.

The WSIB reviews the NOC list and one of the pharmacists indicates to TELUS, via responses to the spreadsheet, whether or not a drug should be added to the formularies. WSIB pharmacists approve the addition of new generic drugs and product extensions. New drugs and formulations or deletions are put forward for review by the Drug Advisory Committee (DAC) and are not approved for addition or deletion via NOC lists. Based on responses within the NOC lists, TELUS updates the formularies. The exchange of the NOC lists is the primary means by which changes are made to the drug formularies.

[18] The affiant described additional ways in which changes are made to the board's formularies and the searches undertaken to locate responsive records. She states:

Sometimes, generic additions may be noted by the WSIB that were not included in the NOC lists. The WSIB may then request the addition via email after confirming interchangeability...Changes made as a result of WSIB adoption of recommendations made by the DAC can also be communicated to TELUS by email. Thirty-six pages of responsive emails of this nature were identified.

Twenty-four pages of records reporting of DAC recommendations were found during the search. They may have been the impetus for some of the emails to TELUS. These were found in email archives and on the Intranet.

Some changes to the formularies are communicated to TELUS by email in the form of PBAS (Provider Billing Approval System) Change Requests. PBAS Change Requests are used for major medication re-classification listings/de-listings, technical or clinical changes. Staff searched email for PBAS Change Requests and identified five pages of records, whether or not the change requests were acted upon (and therefore resulted in a change to the formularies).

[19] The affiant affirms that additional PBAS Change Requests or other emails once existed but due to staff leaving the WSIB, their email accounts were deleted and are no longer available. Finally, the affiant states:

Every quarter, TELUS sends an updated copy of the drug formularies to the WSIB. The formularies are sent via email in a password protected EXCEL document and are posted on the WSIB's intranet. Upon receipt of

the next quarterly update, the version previously posted on the intranet is overwritten. As the quarterly records are transitory records and do not have a corresponding record retention schedule, not all quarterly updates have been retained. Where they still existed in email archives or the S:\drive, they have been captured as part of this subsequent search. In total, 2809 pages of quarterly updates were located.

Changes to the drug formularies are communicated internally to WSIB staff in two ways: by email and at the nursing forums (regular meetings of the nurses employed by the WSIB). Clinical services staff searched for emails communicating changes to the drug formularies and located 78 pages of records. Staff also searched for records presented at the nursing forums and located 48 pages of records on H:\ drives. No records were found in the cabinets.

[20] As stated above, the appellant was provided with a copy of the affidavit and a copy of the records located as a result of the searches set out above. The appellant was also given an opportunity to submit representations, which she declined.

[21] On the basis of my review of the searches conducted by the board, I find the board's search for records relating to changes to the drug formularies to be reasonable in the circumstances. I find that the board properly searched its various record holdings where responsive records would be located and directed the appropriate staff to conduct searches. I further accept that certain records may have existed and are no longer available due to their transitory nature or staff departure. Accordingly, I uphold the WSIB's search and dismiss the appeal.

**ORDER:**

I find the WSIB's search for responsive records to be reasonable and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ May 3, 2017