

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4036

Appeal PA18-370

Workplace Safety and Insurance Board

March 6, 2020

Summary: The Workplace Safety and Insurance Board (the WSIB) received an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA, or the Act)*, for all telephone voice recordings made by the WSIB with respect to the appellant's WSIB claim. In response, the WSIB issued an access decision claiming the application of the employment and labour relations exclusion at section 65(6) of the *Act* over call recordings. The appellant appealed that decision. At mediation, the WSIB explained that the call recordings at issue, if they ever existed, would have been deleted before the appellant made her access request. The parties maintained their dispute over the application of the claimed exclusion over call recordings. In this order, the adjudicator upholds the reasonableness of the WSIB's search, and finds it unnecessary to consider the section 65(6) exclusion. The appeal is dismissed.

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

OVERVIEW:

[1] The Workplace Safety and Insurance Board (the WSIB) received an access request under the *Freedom of Information and Protection of Privacy Act (FIPPA, or the Act)*, for all telephone voice recordings made by the WSIB with respect to the appellant's WSIB claim.

[2] In response, the WSIB issued an access decision stating:

Call Recordings are collected for the limited purpose of quality assurance and performance management; therefore these records fall outside the scope of *FIPPA* pursuant to the exclusion in section 65(6) of the *Act* relating to employment and labour relations.

[3] The requester, now the appellant, appealed the WSIB's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[4] Mediation resulted in the appellant narrowing her request. Upon being given a description of the date and nature of the only record that the WSIB located in response to her request, the appellant advised the mediator that she is not interested in pursuing access to that record. Accordingly, that record is not at issue in this appeal. However, the appellant advised the mediator that she is seeking access to voice recordings involving a specified WSIB employee on certain dates, between January 25, 2016 and February 28, 2018. The WSIB maintained its position that the exclusion at section 65(6) claim applies to call recordings. In addition, the WSIB noted that the applicable retention period for the specified calls requested was ten days, and that if the calls had been recorded at all, they would have been deleted before the WSIB received the appellant's request (on July 3, 2018). The appellant maintained that recordings of these calls exist, and thereby raised the issue of reasonable search. She also maintained her position that section 65(6) does not apply to the call recordings.

[5] Since mediation could not resolve the dispute, the appeal moved to the adjudication stage, where an adjudicator may conduct an inquiry.

[6] As the adjudicator of this appeal, I sought and received written representations from the WSIB and the appellant on the disputed issues, and shared the non-confidential portions of the parties' submissions between them, in accordance with the confidentiality criteria of this office.¹

[7] For the reasons that follow, I uphold the WSIB's search for records, and dismiss the appeal.

DISCUSSION:

Preliminary issue: The employment and labour relations exclusion at section 65(6) of the *Act*

[8] As set out below, I dismiss this appeal without making a determination in relation to the exclusion claimed.

[9] Although the appellant is no longer seeking the record located by the WSIB in response to her request, the parties maintain their dispute over the possible application

¹ *Practice Direction 7 of the IPC's Code of Procedure*

of the employment and labour relations exclusion over call recordings.

[10] The WSIB's position is that because all call recordings are collected and used exclusively for employment-related purposes (quality assurance and training of WSIB employees, where the WSIB is acting as an employer), they are excluded under section 65(6)3 of the *Act*.² The WSIB provided both non-confidential and confidential submissions to demonstrate this stated purpose of collection and use of call recordings.

[11] I decline to make a determination about section 65(6) in circumstances where the record before me has been removed from the scope of the appeal and where the evidence shows, as discussed later in this order, that any other responsive records (if they ever existed) have been permanently deleted. Exclusions at section 65 are record- and fact- specific.³ This office determines the question of whether an exclusion applies to a record by examining the record as a whole. This is also known as the "record-by-record" approach.⁴

[12] Accordingly, this order will not address the parties' arguments about the possible application of the exclusion section 65(6).

Was the WSIB's search reasonable?

[13] The appellant has challenged the reasonableness of the WSIB's search for call recordings made in relation to her WSIB claim. Therefore, the sole issue to be decided is whether the WSIB has conducted a reasonable search for records as required by section 24 of the *Act*.⁵ For the reasons set out below, I am satisfied that the WSIB's search was reasonable in the circumstances.

[14] 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.⁶ To be responsive, a record must be "reasonably related" to the request.⁷

[15] 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.⁸

[16] 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

² The WSIB also made brief submissions about other human resources-related uses of call recordings.

³ See Orders PO-3893-I, PO-364, M-797, P-1575, PO-2531, PO-2632, MO-1218, and PO-3456-I.

⁴ See Order PO-3893-I in particular.

⁵ Orders P-85, P-221 and PO-1954-I.

⁶ Orders P-624 and PO-2559.

⁷ Order PO-2554.

⁸ Orders M-909, PO-2469 and PO-2592.

of the responsive records within its custody or control.⁹

Scope of the request

[17] The WSIB received the appellant's request on July 3, 2018. It located only one responsive record, which the appellant does not want access to. Its further search, conducted during the mediation stage, yielded no further records.

[18] The recordings sought by the appellant between certain individuals are for calls that she says occurred between January 25, 2016 and February 28, 2018.

Search efforts in response to the initial request

[19] The appellant's initial request was for all telephone voice recordings made in relation to her WSIB claim. It included her full name and WSIB claim number, but not a date range.

[20] The WSIB states that, upon receipt of the request, it put out a search request to the WSIB business area responsible for call recordings. Specifically, this involved the WSIB privacy and freedom of information office sending out a "call out" email to a specified individual holding the position of Quality Manager in Customer Experience. The WSIB further explains that this employee is the contact for all requests made under the *Act* for call recordings.

[21] 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.¹⁰ Here, the appellant states that the WSIB did not provide information about the employee's experience level, training, or number of years of employment at the WSIB. She also submits that the WSIB did not provide evidence of what circumstances would trigger a recording, how recordings are saved, or whether the WSIB claim file includes documentation that a recording has been made and is available for review. However, given my findings below, I am not persuaded that the appellant has established a reasonable basis for concluding that the records she seeks exist.

[22] While I acknowledge that the WSIB did not provide the number of years of employment of the employee in question, I find that such detail is not necessary for me to accept that the employee in question was sufficiently experienced and knowledgeable in the subject matter of a request relating to call recordings.

[23] I also note that evidence about the employee's training is not necessarily needed in a reasonable search appeal, and find that to be the case here.

⁹ Order MO-2185.

¹⁰ Order MO-2246.

[24] Examining the totality of the WSIB's evidence, including the basis of its initial access decision (that calls, if recorded, are recorded for quality assurance and training), I accept that the business area of the WSIB in which call recordings in existence could be found would be that of Customer Experience. As Quality Manager of the business area responsible for call recordings (and the WSIB's contact for requests under the *Act* for such records), I accept that the employee who conducted the search was experienced and knowledgeable in the subject matter of the request. In light of this finding, I accept that the specified database which she searched (mentioned in one of the WSIB's confidential exhibits to its shared representations) was a reasonable location to search. In the circumstances, I also accept that the appellant's full name and WSIB claim number were reasonable search terms to use.

[25] For these reasons, I find that the WSIB has provided sufficient evidence that its search efforts were reasonable, and I will uphold its search.

No reasonable grounds to conduct a further search in response to the narrowed request

[26] The appellant narrowed her request to one for calls between specified individuals made on specified dates, between January 2016 and February 2018. The WSIB conducted a further search during the mediation stage of this appeal, but found no responsive records.

[27] The WSIB states that not all calls are recorded, and that if the calls identified in the narrowed request were recorded at all, they would be deleted by now due to the ten- day retention period applicable to them.

[28] In support of this, the WSIB provided an affidavit and supporting exhibits, detailing the various relevant retention periods for recorded calls since 2012. That was the year the WSIB entered into a contract with a third-party vendor, which covered storage of recorded calls. This evidence was shared with the appellant, but she declined to comment on it.

[29] I am persuaded by the WSIB's affidavit and supporting evidence that there is no reasonable basis for believing that the call recordings being sought exist. The affidavit was provided by the WSIB's Director of Customer Engagement. He attests to having a reasonable understanding of the WSIB's processes and procedures regarding call records, having been an employee of the WSIB for seven years. He also attests to contacting the WSIB's Contract Management Leader about further information related to the WSIB's retention periods since the WSIB entered into a contract with the aforementioned vendor in 2012. To verify the timelines summarized in his affidavit, he provided emails as supporting exhibits, showing communications between various WSIB personnel and an employee of the third-party vendor regarding the changing retention periods.

[30] Based on the affidavit and supporting exhibits, I find that the following retention periods for call recordings are relevant to this appeal:

- a ten-day retention period for calls recorded between September 2013 and March 2018; and
- a ninety-day retention period for calls recorded from April 2018 to the present.

[31] Since the appellant seeks certain calls made between January 25, 2016 and February 28, 2018, I find that the applicable retention period for those calls (if recorded) was ten days. As noted above, the appellant's access request was made in July 2018.

[32] Furthermore, I find that the WSIB provided persuasive evidence that explains why the calls (if recorded) cannot be retrieved. One of the supporting exhibits to the affidavit includes an excerpt from a the WSIB's contract with the vendor in question. According to those contractual terms, unless otherwise requested in writing by the WSIB, the vendor would automatically delete all call recordings on a daily basis if those recordings were older than the applicable retention period (in this case, ten days). Furthermore, the deletions would be done in a manner that would make recovery impossible.

[33] As there is no evidence before me to suggest that the WSIB had reason to make a written request to the vendor to retain the calls beyond the ten-day retention period, I accept the WSIB's position that if the calls now being sought by the appellant were ever recorded, those recordings no longer exist.

[34] Accordingly, I will not order the WSIB to conduct a further search in response to the appellant's narrowed request, and I will dismiss the appeal.

ORDER:

I uphold the reasonableness of the WSIB's search, and dismiss the appeal.

Original signed by _____

Marian Sami
Adjudicator

March 6, 2020 _____