

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4213-I

Appeal PA19-00430

Workplace Safety and Insurance Board

November 25, 2021

Summary: The appellant submitted a request under the *Act* to the WSIB for all records relating to his brother and two identified claims. The WSIB located responsive records and granted the appellant full access to them. The appellant appealed the WSIB's decision, claiming additional responsive records ought to exist. During mediation, the appellant referred to a clarification letter he submitted to the WSIB in relation to his request. The WSIB claims this letter is outside the scope of his original request. In this order, the adjudicator finds that a portion of the clarification letter is within the scope of the appellant's original request, but the remainder is not. The adjudicator orders the WSIB to conduct a further search for records responsive to the appellant's request.

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

Orders and Investigation Reports Considered: Order PO-3299-R

OVERVIEW:

[1] On July 13, 2019, the appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Workplace Safety and

Insurance Board (the WSIB) for all records relating to his brother¹ and two identified claims.

[2] The WSIB located responsive records and granted the appellant full access to them. The appellant appealed the WSIB's decision, claiming additional responsive records ought to exist.

[3] During mediation, the WSIB advised the appellant that the only possible outstanding information was scheduling information found in the WSIB's staff Outlook calendars. The WSIB conducted another search for records, but did not locate any additional responsive records. The appellant provided the WSIB with a list of records he believes ought to exist, including: medical information used to render a decision on one of the claims; records from the Fair Practices Commission; and supervisor reviews of decisions made by WSIB staff.

[4] The WSIB advised the appellant that the Fair Practices Commission was a separate and independent body with its own database of records and directed the appellant to submit a separate request to the Commission. The appellant agreed to submit a separate request to the Fair Practices Commission. However, the appellant maintained that additional responsive records should exist.

[5] The WSIB conducted another search for responsive records but could not locate any additional records.

[6] The appellant maintained further responsive records ought to exist. The appellant also referred to a letter dated July 25, 2019 that he sent to the WSIB clarifying his request to include

... all communications and Records and recordings and Electronic communications and sound recordings and meetings scheduled and meeting minutes and performance reviews and documents and communications in any form relating to [the appellant's brother] and his two WSIB claims and their handling related in any way to [the appellant's brother]. Also please provide a list of any and all communications omitted, lost, not documented or are not provided. Please have all claims adjudicators and the head of department sign that this information is complete and accurate and provide a list of all omitted lost withheld and documents not provided with reasons they are not provided.

[7] The WSIB stated the appellant uploaded the document with this clarification to his claim file instead of sending it to the WSIB FOI Office. As such, the WSIB FOI Office

¹ The appellant is acting on behalf of his brother.

did not process this as an access request or as part of the appellant's original access request. The WSIB advised that some of the records identified in this clarification letter are outside the scope of the original request and the appellant should submit a separate request for these items. The appellant did not agree with the WSIB's position that some of the information identified in his clarification letter is outside the scope of his original request. Accordingly, scope was added as an issue to this appeal.

[8] Mediation did not resolve the issues under appeal and the appeal transferred to the adjudication of the appeal process, where an adjudicator may conduct an inquiry into the issues under appeal. I am the adjudicator in this appeal and began my inquiry by seeking representations from the WSIB in response to a Notice of Inquiry which summarized the facts and issues under appeal. The WSIB submitted representations. I then sought and received representations from the appellant.

[9] In the discussion that follows, I find a portion of the appellant's clarification letter is within the scope of his original request, but the remainder of the clarification is not. I find the WSIB failed to establish that it conducted a reasonable search for records responsive to the appellant's request and I order it to conduct another search.

ISSUES:

- A. Should the scope of the request be included as an issue in this appeal?
- B. What is the scope of the request?
- C. Did the WSIB conduct a reasonable search for responsive records?

DISCUSSION:

[10] The appellant appears to take issue with the WSIB's benefits decision in relation to his brother's claims and filed his access request to confirm whether the benefits decision was properly made. In its representations, the WSIB submits the appellant is inappropriately engaging the IPC appeal process to launch a collateral attack on a WSIB benefits decision. Regardless of the outcome of this appeal, the WSIB states the inquiry and this order will have no impact on any WSIB benefits decision related to the appellant. I confirm the WSIB's benefits decision is outside the scope of this appeal and I will not comment on it in this order. The only issues before me relate to the scope of the appellant's request and the WSIB's search for responsive records.

Issue A: Should the scope of the request be included as an issue in this inquiry?

[11] In its representations, the WSIB objected to the issue of the scope of the request being added to the appeal. The WSIB states the appellant only raised the issue of

reasonable search in his appeal form and the scope issue was not discussed during mediation. However, when the mediator issued the Mediator's Report, the appellant claimed that the issue of scope should be added to as an issue. The mediator added the issue of scope to the appeal and issued a Revised Mediator's Report reflecting the update to the WSIB's objections.

[12] The WSIB objects to the addition of the scope issue to the appeal for four reasons:

1. Scope was not part of the appellant's original appeal;
2. Scope was added by the mediator, which the WSIB submits raises concerns about the informality and impartiality of the mediation process;
3. Two years have passed since the appellant filed his appeal and that is "far beyond" the appeal deadline of 30 days after the issuance of the decision letter;
4. The WSIB claims it was "provided no opportunity to address this new issue" and was therefore denied procedural fairness and the right to respond to this new ground of appeal.

[13] The WSIB refers to Reconsideration Order PO-3299-R, in which the adjudicator reconsidered her Order PO-3219 on the basis that she did not put the issue of scope before the parties to the appeal before deciding the institution had interpreted the scope of the request too narrowly to encompass all of the responsive records sought by the appellant.

[14] The WSIB also submits that allowing the "unilateral addition of new appeal grounds after the permissible statutory deadline" could result in appellant adding new appeal grounds "tactically" while prejudicing an institution's ability to know the case against it and respond to allegations in a procedurally fair manner.

[15] I shared the WSIB's submissions with the appellant and invited him to respond. The appellant did not specifically address whether the issue of scope should be a part of this appeal.

[16] Based on my review of the circumstances of the appeal, I find the mediator did not act inappropriately when she added scope as an issue at the end of the mediation stage. In Reconsideration Order PO-3299-R, the adjudicator described two circumstances in which the issue of scope would arise in an appeal. The first is where an institution withhold some portions of the responsive records from disclosure on the basis that they are not responsive to the request. In the second circumstance,

... an appellant takes the position that additional responsive records to the request should exist but that the institution interpreted the scope of the request too narrowly to capture all of the records sought. In this type of

circumstance, the issue of scope of the request/responsiveness is closely related to the issue of reasonable search. If this office determines that the scope of the request was interpreted too narrowly to capture all of the records sought by the requester, the remedy is to order the institution to conduct a new search interpreting the request in a broader fashion. Therefore, in this type of circumstance, the issue is whether the scope of the request was interpreted appropriately to capture all of the records responsive to the scope of the request. It is an issue primarily related to the institution's search.

[17] Based on my review of the circumstances of this appeal, I find the issue of scope is closely related to the WSIB's search and whether its search encompassed the entirety of the appellant's request.

[18] I agree the appellant did not identify scope of the request as an issue in his appeal form, which was filed within 30-days after the WSIB issued its access decision. However, I do not agree with the WSIB that this means that he was precluded from raising scope of the request as an issue during mediation, particularly where the appellant and the WSIB disagree about the scope of his original request in relation to the WSIB's search for responsive records. Further, this issue was only identified and clarified during mediation.

[19] In addition, given the intertwined nature of scope of the request and the institution's search in this case, I find it reasonable for the scope of the request to be added to the appeal when the file moved to adjudication. The clarification letter was discussed during mediation. The WSIB took the position that the contents of the clarification letter was outside of the scope of the original request. The appellant disagreed. I find there was no prejudice to the WSIB to include scope of the request as an issue to the appeal.

[20] The WSIB claims it was not provided with an opportunity to address this new issue and was denied procedural fairness. I do not agree. Both the WSIB and the appellant were provided with an opportunity to respond to the Mediator's Report after it was issued, as is clear by the appellant's raising of scope of the request as an issue and the subsequent issuance of the Revised Mediator's Report. Moreover, the WSIB was provided with an opportunity to address its concern with including scope of the request as an issue in this appeal during the inquiry. The WSIB submitted representations outlining its position. Accordingly, I find the WSIB was not denied procedural fairness and was provided with sufficient opportunity to raise its concerns and objections to adding scope of the request as an issue to this appeal.

[21] In any case, I have reviewed the circumstances of the appeal and I find that the scope of the request was appropriately added as an issue.

Issue B: What is the scope of the request?

[22] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;...
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[23] To be considered responsive to the request, records must *reasonably relate* to the request.² Institutions should interpret requests generously, in order to best serve the purpose and spirit of the *Act*. Generally, if a request is unclear, the institution should interpret it broadly rather than restrictively.³

[24] The appellant's original request reads, "All documents referring to [the appellant's brother], and my naming [the appellant's brother] and referring to and or concerning [two identified claims]." The appellant later submitted a clarification request to the WSIB, which states:

... all communications and Records and recordings and Electronic communications and sound recordings and meetings scheduled and meeting minutes and performance reviews and documents and communications in any form relating to [the appellant's brother] and his two WSIB claims and their handling related in any way to [the appellant's brother]. Also please provide a list of any and all communications omitted, lost, not documented or are not provided. Please have all claims adjudicators and the head of department sign that this information is

² Orders P-880 and PO-2661.

³ Orders P-134 and P-880.

complete and accurate and provide a list of all omitted lost withheld and documents not provided with reasons they are not provided.

[25] The WSIB claims the appellant's original request was clear and required no clarification. The original request was sufficiently detailed and allowed an experienced WSIB employee, upon a reasonable effort, to identify responsive records. The WSIB states it was not required to seek clarification due to the wording of the original request.

[26] However, some time after he submitted his request to the WSIB, the appellant uploaded and filed the clarification letter to his own claim file. The appellant did not send the clarification letter to the WSIB FOI Office. The WSIB states the appellant knows the correct way to file FOI requests, as is evidenced by his filing the original request with the WSIB's FOI Office. The WSIB states that if the appellant had not advised the WSIB of the clarification letter attached to his claim file, the WSIB FOI Office would not have known of it.

[27] Finally, the WSIB states the WSIB FOI Office is not permitted to access the appellant's claim file(s). According to the *Act* and the WSIB's own privacy policies, the WSIB states that its employees are only to access personal information when it is necessary to perform their job duties. In this case, the WSIB claims the WSIB FOI Office had no reason or right to access the appellant's claim file.

[28] The appellant submits he communicated clearly with the WSIB and clarified his request "in a timely manner." The WSIB did not provide him with any communications to show that the clarification was not received, forwarded or discussed. The appellant submits that the WSIB's claim that the FOI Office could not obtain the clarification request is "ludicrous and disingenuous."

[29] The appellant also submits he should be provided with a "statement of fact under oath of the case officers, supervisors and searches that the case reviews, medical decisions and instructions/admonishments were all verbal and no records were created." The appellant affirms the WSIB had the clarification letter and "should therefore provide the documents, affidavits and explanation of where and how and why there are documents missing: from each claim officer, manager and Information office employee that are part of this claim and information request."

[30] Based on my review of the appellant's original request and the clarification, I find that part of the appellant's clarification is within the scope of his original request. As the WSIB acknowledges, the appellant's original request was very broad. The appellant sought access to all records referring to his brother and two specific claims. Reviewing the clarification, I find the following portion is *reasonably related* to the appellant's original request:

... all communications and Records and recordings and Electronic communications and sound recordings and meetings scheduled and meeting minutes and performance reviews and documents and communications in any form relating to [the appellant's brother] and his two WSIB claims and their handling related in any way to [the appellant's brother].

[31] I find this portion of the appellant's clarification provides a more detailed description of the type of information he feels is responsive to his original request. Therefore, I find this portion of the appellant's request is within the scope of his original request.

[32] I acknowledge the appellant did not submit his clarification to the WSIB FOI Office; rather, the appellant appears to have uploaded the clarification letter onto his own claim file, not his brother's. I also acknowledge the WSIB's privacy policies do not permit the FOI Office to access individual's claim files without reason. Therefore, I find it was reasonable for the WSIB FOI Office to not have known about the clarification letter initially.

[33] However, once the appellant identified the clarification letter to the WSIB, I find the contents of the clarification letter were potentially within the scope of the appellant's request. As discussed above, the first part of the clarification is clearly within the scope of the appellant's request, which the WSIB itself confirms by saying the original request covered "all documents" relating to the appellant's brother and the two identified claims. Accordingly, I find the first part of the appellant's clarification letter is within the scope of the appellant's original request.

[34] However, I find the second part of the appellant's clarification is not within the scope of his original request. This part reads as follows:

Also please provide a list of any and all communications omitted, lost, not documented or are not provided. Please have all claims adjudicators and the head of department sign that this information is complete and accurate and provide a list of all omitted lost withheld and documents not provided with reasons they are not provided.

[35] Reviewing this portion of the request, the appellant appears to be asking the WSIB to create two types of documents: (1) a list of any and all communications omitted, lost, not documented or are not provided; and (2) a confirmation from all claims adjudicators and the head of department that the information is complete and accurate. While these documents, once created, could reasonably be expected to relate to the appellant's brother and/or the two identified claims, I find they are not within the scope of the request. I agree the appellant's original request is broad. However, I find it is not reasonable to expect information relating to records omitted, lost, not documented or otherwise not provided would have been within the scope of his original

request, even with a broad and generous interpretation. Based on my review, I find this information is not reasonably related to the appellant's request.

[36] Similarly, I find the information identified in the appellant's representations, i.e. affidavits and explanations regarding why certain documents are missing and statements of facts confirming that no paper records were created, is not within the scope of his original request. While these records may, once created, refer to the appellant's brother and the two identified claims, I find they cannot be considered to be reasonably related to the appellant's brother and the two identified claims. As above, I find it is not reasonable for the appellant to expect the WSIB to interpret his request for records relating to his brother and the two identified claims to include an explanation as to why certain records do not exist. If the appellant wishes to seek access to this type of information, he will be required to file a new access request for this information.

[37] In conclusion, I find the first part of the appellant's clarification is within the scope of his original request but the second part is not. Due to the broad nature of the appellant's original request, I will consider whether the WSIB conducted a reasonable search for all records responsive to his original request below. I dismiss the appellant's appeal relating to the second part of his clarification because it is not within the scope of his request.

Issue C: Did the WSIB conduct a reasonable search for responsive records?

[38] If a requester claims that additional records exist beyond those found by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.⁴ If the IPC is satisfied the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[39] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they must still provide a reasonable basis for concluding that such records exist.⁵

[40] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show it has made a reasonable effort to identify and locate responsive records;⁶ that is, records

⁴ Orders P-85, P-221 and PO-1954-I. See paragraph 19, above, for the relevant portion of section 24.

⁵ Order MO-2246.

⁶ Orders P-624 and PO-2559.

that are *reasonably related* to the request.⁷

[41] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.⁸ The IPC will order a further search if the institution does not provide enough evidence to show it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁹

[42] The WSIB submits it conducted a reasonable search for records responsive to the appellant's request, in accordance with the requirements of section 24 of the *Act*. The WSIB further states it conducted a reasonable search for all records responsive to the appellant's clarification letter because the scope of the original request encompasses the information requested in the clarification. Specifically, the WSIB submits,

- The original search was conducted by experienced management and case management employees of the Operations and Appeals branches, knowledgeable in the subject matter of the request, that is, the two identified claims and the history of the claims.
- The appellant's request identified two specific claims. Both claim files were disclosed to the appellant, in full.
- The appellant identified any documents referring to, or naming, the appellant's brother. The WSIB states the searches included: the specific claim numbers, the appellant's brother's full name, the appellant's brother's last name. The WSIB states it search e-mail and disclosed the responsive emails to the appellant.
- The WSIB submits it acted in good faith during the Intake and Mediation stages of the appeal process. The WSIB states it conducted two additional searches during mediation, but did not locate any additional responsive records. The appellant requested sworn affidavits from the WSIB employees that conducted the searches, but the WSIB refused his request.

[43] The WSIB concludes by submitting it has "gone beyond its obligations to conduct a reasonable search" for responsive records.

[44] The appellant takes the position that the WSIB has conducted a "cursory and improperly limited search."

⁷ Order PO-2554.

⁸ Orders M-909, PO-2469 and PO-2592.

⁹ Order MO-2185.

[45] Based on my review of the WSIB's representations, I find it has not provided sufficient evidence to establish that it conducted a reasonable search for records responsive to the appellant's request, which includes the information identified in the first part of the clarification letter. In the Notice of Inquiry sent to the WSIB, I asked the WSIB to provide the following:

3. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

4. Is it possible that such records existed but no longer exist? If so please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[46] The WSIB's representations, quoted above, provided general details regarding its searches. The WSIB submits the original search was conducted by experienced management and case management employees of the Operations and Appeals branches. However, it did not identify who conducted the additional searches during the Intake and Mediation stages of the appeal process. Further, the WSIB did not identify the locations or databases searched, the types of files searched and the results of the searches. The WSIB merely states it disclosed the two complete file claims and "responsive emails."

[47] The WSIB states its searches "included" the two claim numbers and the appellant's brother's name (full and last name only), but did not identify the databases or files that it searched for responsive records. Furthermore, while the WSIB searched electronic mail, it did not advise whether it searched other types of communications records, such as paper records, if possible. The WSIB did not address whether some of the communications records could have been archived or destroyed in accordance with its retention policies nor did it provide any other details regarding these types of records.

[48] Given these circumstances, I find the WSIB failed to demonstrate that it conducted a reasonable search for responsive records. I will order the WSIB to conduct a further search for records responsive to the appellant's original request and the first part of the clarification letter.

ORDER:

1. I find the first portion of the appellant's clarification letter to be within the scope of his original request, but the second portion is not.

2. I order the WSIB to conduct a further search for records responsive to the appellant's access to information request.
3. I order the WSIB to issue an access decision to the appellant regarding any records located as a result of the search(es) ordered in order provision 2, in accordance with the *Act*, treating the date of this order as the date of the request for administrative purposes.
4. I order the WSIB to provide me with an affidavit sworn by the individual(s) who conducted the searches by **January 7, 2021**, describing its search efforts. At a minimum, the affidavits should include the following information:
 - 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 searches, and the steps taken in conducting the searches;
 - c. The results of the search; and
 - d. Details of whether additional records could have been destroyed, including information about record maintenance policies, practices and retention schedules.

The WSIB's affidavit(s) and any accompanying representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's Practice Direction Number 7, which is available on the IPC's website. The WSIB should indicate whether they consent to the sharing of their representations and affidavits with the appellant.

5. I remain seized of this appeal in order to deal with any outstanding issues arising from order provisions 2 and 4.
6. I reserve the right to require the WSIB to provide me with a copy of the access decision referred to in order provision 3.

Original signed by: _____
Justine Wai
Adjudicator

November 25, 2021