

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER PO-4240-F

Appeal PA19-00430

Workplace Safety and Insurance Board

March 1, 2022

Summary: This final order resolves the outstanding issue of the reasonableness of the WSIB's search for responsive records following Interim Order PO-4213-I. It also addresses the appellant's allegations of bias against the adjudicator. In compliance with the interim order, the WSIB conducted a further search for responsive records relating to the appellant's brother and two identified claims. The WSIB did not locate any additional responsive records in its additional search and provided the adjudicator with an affidavit describing the searches conducted. The adjudicator upholds the WSIB's search as reasonable. The adjudicator also finds there was no reasonable apprehension of bias in her inquiry and decision-making. The appeal is dismissed.

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: Interim Order PO-4213-I.

OVERVIEW:

[1] This final order disposes of the remaining issue resulting from an access request the appellant made to the Workplace Safety and Insurance Board (the WSIB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The issue is the reasonableness of the WSIB's search for records responsive to the appellant's request

for access to information 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 to the Information and Privacy Commissioner of Ontario (the IPC), claiming additional responsive records ought to exist.

[3] During mediation, the appellant clarified his request, by way of letter to the WSIB, to include information relating to his brother and his claims and the information that may have been lost or omitted. The appellant also asked that all claims adjudicators and the heads of department sign a declaration that this information is complete and accurate and provide a list of all omitted, lost, withheld and other documents not provided. The WSIB claimed that the clarified request was outside the scope of the original request. At the end of mediation, the issues under appeal were the reasonableness of the WSIB's search and the scope of the appellant's request.

[4] As mediation did not resolve the issues, the appeal was moved to the adjudication stage of the appeal process and I conducted an inquiry under the *Act*. In Interim Order PO-4213-I, I found that a portion of the appellant's clarification letter was within the scope of his original request, but the remainder of the clarification is not. Specifically, I found that the appellant's request for all communications and records relating to his brother and the two WSIB claims and their handling was within the scope of his original request. However, I found that the appellant's request for any and all lost, omitted or undocumented records and a declaration signed by claims adjudicators and the head of department confirming that the information was complete and accurate was outside of the scope of his appeal. Finally, I found the WSIB failed to establish that it conducted a reasonable search for records responsive to the appellant's request and I ordered it to conduct another search.

[5] The WSIB conducted a further search but did not locate any additional responsive records. The WSIB submitted an affidavit that summarized the searches it conducted in response to the appellant's request. I then invited the appellant to make representations in response to the city's representations. The appellant submitted representations on the WSIB's search and made a number of submissions regarding alleged bias on my part.²

[6] In the discussion that follows, I find the WSIB has now conducted a reasonable search for responsive records. I also find the appellant has not established there is a reasonable apprehension of bias on my part. I dismiss the appeal.

¹ The appellant is acting on behalf of his brother.

² I note the appellant did not raise the allegation of bias in the context of my inquiry or Interim Order PO-4213-I as part of a reconsideration request. Rather, the appellant's allegation of bias relates to the WSIB's compliance with the interim order. Given these circumstances, I will be considering the allegation of bias in this final order.

PRELIMINARY ISSUE: COMPLIANCE WITH INTERIM ORDER PO-4213-I

[7] Interim Order PO-4213-I was issued on November 25, 2021 and I ordered the WSIB to conduct a further search for records responsive to the appellant's access to information request. I also ordered the WSIB to provide me with an affidavit sworn by the individual(s) who conducted the searches by January 7, 2021.

[8] On January 6, 2021, the WSIB submitted a request to vary the compliance date for Interim Order PO-4213-I to allow it an additional week to complete the further search and submit the affidavit. In response, I advised the WSIB that I would *not* grant the WSIB an extension or vary the order. I also advised the WSIB to contact the appellant directly about its delay. The WSIB advised the appellant of same by email dated January 6, 2022.

[9] In response, the appellant contacted the IPC to express his concern with the "arbitrary change" made to the order and requested that I require the WSIB to provide affidavits regarding the WSIB's inability to comply with the deadline set out in the order.

[10] I confirm I did not vary the deadline set out in my interim order. The WSIB did not meet the deadline set out in the order, but completed the search and submitted its affidavit regarding the searches it conducted on January 13, 2022.

[11] Deadlines imposed by the IPC, particularly those set out in an order, must be respected. For the WSIB to request an extension of time one day before the deadline set out in the order does not reflect well on it. However, as the WSIB has now completed the search required by Interim Order PO-4213-I, I will not be addressing the issue of compliance further.

ISSUES:

- A. Is there bias, or a reasonable apprehension of bias, on my part?
- B. Did the WSIB conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: Is there bias, or a reasonable apprehension of bias, on my part?

[12] In correspondence sent after the issuance of Interim Order PO-4213-I, the appellant made an allegation of bias. Specifically, the appellant states,

I am not receiving a fair and impartial adjudication from Justine Wai. She has allowed the WSIB to arbitrarily extend deadlines without requesting an extension. She communicates in an arbitrary and dismissive fashion, shows preference to WSIB and ignores procedural violations on WSIB's part. She ignores proof of deceit, procedural fairness, omission and refusal to perform assigned duties by WSIB etc.

[13] As stated in the preliminary issue above, I did not allow the WSIB to arbitrarily extend its deadline to comply with the order. Rather, the WSIB communicated it needed an additional week to comply with the order and then advised the appellant of its intention to comply a week after the deadline in the order. I did not vary the deadline in the order provision. However, I also did not penalize the WSIB for submitting its affidavit and representations on January 13, 2022.

[14] In response to this allegation of bias, I invited the appellant to make further representations to support his claims. The appellant submitted additional representations. For the following reasons, I dismiss the appellant's allegation.

[15] In his representations, the appellant alleges that I "disregarded IPC rules" by allowing the WSIB to "deliberately and repeatedly fail to refer to and or disclose that there was a change in case managers; and further to fail to contact the primary case manager and then avoid this fact entirely makes this adjudication biased in favour of WSIB." The appellant does not refer to the IPC rules that he claims I disregarded, but provided a number of citations, quotes and authorities that relate to the tort of omission and the standard of review in relation to jurisdictional issues. The appellant also reproduced portions of the codes of conduct in relation to adjudicators found on the Society of Ontario Adjudicators and Regulators' website³ and the Law Society Tribunal of Ontario's website.⁴

[16] In further representations on the issue of bias, the appellant takes the position that I made the decision "to reduce to the issues under Adjudication to scope alone." To confirm, the two issues under appeal at adjudication were the scope of the appellant's request and the reasonableness of the WSIB's search. I did not remove the issue of reasonable search from the scope of the appeal; in fact, Interim Order PO-4213-I required the WSIB to conduct another search and this Final Order addresses whether the WSIB conducted a reasonable search for responsive records. In other words, Interim Order PO-4213-I considered the scope of the appellant's request and the WSIB's search for responsive records. I will not address this claim of the appellant's further as it is factually incorrect.

[17] The appellant also submits that I decided to ignore his questions and submissions about the WSIB missing the deadline on the order. This is also factually

³ See <https://soar.on.ca/sites/default/files/code-of-conduct.pdf>

⁴ See <https://lawsocietytribunal.ca/adjudicator-code-of-conduct/>

incorrect. The appellant submitted correspondence on January 12 and 17, 2022. I responded to the appellant's correspondence via letter on January 18, 2022, inviting him to make representations in response to the WSIB's access decision and affidavit and confirming that the issue that remains outstanding for this final order is reasonable search.

[18] Finally, the appellant submits there was a "characterization of WSIB as being entitled to an extension, and not acknowledging that the law policy rule states request and not acknowledging or seeking representations and considering fairly and impartially the submissions from the [appellant and his brother] shows clear action of bias." The appellant submits I would have violated "Adjudicator ethics" if I had granted a request by the WSIB for an extension to the order without seeking submissions from or informing the appellant. Again, the premise of the appellant's argument is factually incorrect because I did not grant the WSIB an extension to Interim Order PO-4213-I. Therefore, I did not deny the appellant procedural fairness in not permitting him to make representations on the extension request.

[19] In administrative law, there is a presumption, in the absence of evidence to the contrary that an administrative decision-maker will act fairly and impartially. The onus of demonstrating bias is on the person who alleges it, and mere suspicion is not enough.⁵ A complaint of bias should be made to the adjudicator so that the individual may decide whether or not to disqualify him or herself.⁶ In this case, the appellant bears the burden of demonstrating there was bias on my part.

[20] Actual bias need not be proven. The test is whether there exists a *reasonable apprehension of bias*. The Supreme Court of Canada has described the test for finding a reasonable apprehension of bias as follows:

... the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."⁷

[21] Applying this test to the circumstances of this appeal and considering the appellant's submissions, I find that a reasonable person with knowledge of the facts

⁵ Order MO-1519, which quoted Sarah Blake, *Administrative Law in Canada*, 3rd ed. (Butterworth's, 2001) at 106.

⁶ *Mary-Helen Wright Law Corporation v. British Columbia (Human Rights Tribunal)*, 2018 BCSC 912 at para 15; *Envirocon Environmental Services, ULC v. Suen*, 2018 BCSC 1367 at para 87; and *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC).

⁷ *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

would not conclude that I would not, or did not, fairly decide the issues raised in Appeal PA19- 00430. Based on my review, I find the appellant's submissions amount to no more than his disagreement and dissatisfaction with the WSIB's search for responsive records and slight delay in compliance with Interim Order PO-4213-I. While the appellant claims I was biased, he does not provide any evidence to substantiate this claim. In his submissions on bias, the appellant makes a number of allegations that are incorrect and cannot substantiate his claim that there was bias or a reasonable apprehension of bias on my part. In any case, the appellant does not refer to any specific portion of Interim Order PO-4213-I or instances during the inquiry that would lead me to find there was a reasonable apprehension of bias. In any event, disagreement with a procedural ruling, standing alone, is not enough to establish bias or a reasonable apprehension of bias.

[22] Moreover, the appellant's quotes from legislation, previous IPC decisions and other judgments without any reference to the circumstances in the present appeal do not establish a reasonable apprehension of bias. As set out above, the appellant was frustrated that I permitted the WSIB to submit its affidavit one week after the deadline set out in the order. Based on my review of the appellant's concerns about this, I find that he has not established that I was biased or that there was a reasonable apprehension of bias in my decision to accept the WSIB's affidavits when they were submitted. In the absence of any evidence to support the appellant's claim of bias or reasonable apprehension of bias in the inquiry of Appeal PA19-00430, I find the appellant has not met his burden on this issue.

[23] Therefore, I dismiss the appellant's claim of bias or reasonable apprehension of bias.

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

[24] In Interim Order PO-4213-I, I found the WSIB did not conduct a reasonable search for responsive records because it had not provided any details regarding the searches it conducted in response to the appellant's request. Specifically, I found:

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."

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.⁸

[25] Given these circumstances, I found the WSIB failed to demonstrate it conducted a reasonable search for responsive records and ordered it to conduct another search for records responsive to the appellant's original request and the first part of his clarified request. I also ordered the WSIB to issue an access decision to the appellant regarding any records located as a result of the search ordered and to provide me with an affidavit sworn by the individual(s) who conducted the searches, describing the search efforts.

[26] The WSIB claims it conducted a reasonable search and in compliance with Interim Order PO-4213-I, the Director of the Privacy and Freedom of Information Office (the Director) at the WSIB swore an affidavit describing the searches conducted in response to the appellant's request.

[27] The Director states that, on July 13, 2019, the WSIB received the appellant's request for "all documents referring to [his brother], and my naming [the appellant's brother] and referring to or concerning [two identified claims]." The Director states he requested the Program Associate of the WSIB's Privacy and Freedom of Information (FOI) office for a complete copy of the two identified claim files. The Program Associate received the copies of the two claim files.

[28] In addition, the Privacy and FOI Officer emailed a copy of the request to the Managers of Operations whose teams had carriage over the two claims. One of the Managers conducted a search for responsive records by checking her hardcopy notes, hardcopy files, email account, voicemails, shared drive(s) and hard drive(s). The Eligibility Adjudicator for one of the claims also conducted a search by checking her hardcopy notes, hardcopy files, email accounts, voicemails, shared drive(s) and hard drive(s). The Manager advised that her team did not have any responsive records. The second Manager conducted a similar search for responsive records and the Case Manager for the second claim also conducted a search for records. The second Manager located one record and provided a copy of it to the Privacy and FOI Officer.

[29] The Director affirms he disclosed a complete copy of the two claim files and the email located by the second Manager. The Director states that WSIB claim files are managed and housed on its electronic Account and Claims Enterprise System (ACES), which is the WSIB's authorized repository for records relating to the adjudication of a

⁸ Interim Order PO-4213-I, paras 46-47.

claim. The Director states that the majority of records relating to a claim are stored in ACES, although employees may also retain records relating to their work as hardcopy notes or files, emails, voicemails, or documents on a shared drive or hard drive.

[30] The Director affirms the WSIB conducted a second search for records during the mediation stage of the IPC appeal process. Specifically, the Director asked the two Managers of Operations to conduct another search for records responsive to the appellant's request. Each Manager located records relating to the appellant, but confirmed that neither was responsive to the request at issue in this appeal. Therefore, no additional responsive records were located.

[31] The Director states a third search for responsive was conducted in December 2020, per the request of the mediator. The Director states the mediator requested that the search terms include the appellant's last name and full name. The Director asked the two Managers of Operations to conduct a search for the new search terms and both conducted searches of their email records. However, neither Manager could locate records containing the appellant's name.

[32] Finally, the Director states the WSIB conducted a fourth search for records responsive to the appellant's request pursuant to Interim Order PO-4213-I. The Director contacted the two Managers of Operations as well as the Manager of Quality Assurance and Advisory, whose team has carriage of managing WSIB call recordings. The Director asked the three managers to search for the following:

All documents referring to [the appellant's brother] and my naming [the appellant's brother] and referring to and or concerning [two identified claims]. This includes 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 the appellant] and his two WSIB claims and their handling related in any way to [the appellant's brother and the appellant].

[33] The Manager of Quality Assurance and Advisory advised the Director that WSIB call recordings are retained for a 90-day period and therefore there were no responsive WSIB call recordings.

[34] The Managers of Operations advised the Director that they conducted searches for responsive records by reviewing hardcopy notes, hardcopy files, email accounts, voicemails, shared drives and hard drives. Both Managers of Operations confirmed they did not locate any additional records responsive to the appellant's request.

[35] The Director also asked the Case Manager for one of the claims and the Eligibility Adjudicator for the other claim to undertake another search for responsive records to the clarified request, reproduced above at paragraph 27. Both of these individuals

confirmed they conducted searches of hardcopy notes, hardcopy files, email accounts, voicemails, shared drives and hard drives and did not locate any additional responsive records.

[36] I note the Director provided copies of all of his correspondence with the WSIB staff in which he requested the searches to be conducted. This correspondence and the Director's affidavit were shared with the appellant.

[37] The appellant submits that the documents in the possession of the "original case manager in the arm injury" are missing. The appellant also submits there should be documents "from H drives", as well as documents supporting the denial of one of the claims, such as medical opinions and research. The appellant also claims the WSIB destroying phone records after three months "clearly violates evidence law, Information and privacy law and IPC policies." The appellant submits that the Information and Privacy Officers of the WSIB have a duty to instruct staff on how to comprehensively conduct a search. Furthermore, the appellant submits that the Information and Privacy Officers of the WSIB have a duty to ensure that all relevant individuals are contacted.

[38] 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 it has made a reasonable effort and locate responsive records.⁹ 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.¹⁰

[39] For the reasons that follow, I find that the WSIB has now conducted a reasonable search for records responsive to the appellant's request.

[40] I accept the Director is an experienced employee knowledgeable in the request and the WSIB's records holdings. I also accept the Director contacted other experienced employees knowledgeable in the request, the appellant, his brother and the identified claims to conduct the searches required. In addition, I accept the Director contacted the correct WSIB staff who adjudicated or reviewed the relevant claims to search their records.

[41] I find the Director provided the correct search parameters to the appropriate WSIB staff to conduct the search pursuant to Interim Order PO-4213-I. Given the specific additional search I ordered in Interim Order PO-4213-I, I find the scope and breadth of the Director's search to be reasonable.

[42] I also find the Director provided sufficient evidence to demonstrate that the majority of the responsive records would be found on the ACES. In any case, the Director provided evidence to show that other locations, such as hardcopy notes,

⁹ Orders P-624 and PO-2559.

¹⁰ Orders M-909, PO-2469 and PO-2592.

hardcopy files, email accounts, voicemails, shared drives, hard drives and call recordings, were searched for responsive records.

[43] I have reviewed the appellant's representations regarding the information he believes ought to exist. However, I am not satisfied that he provided sufficient evidence to demonstrate there is a reasonable basis for his belief that additional responsive records ought to exist beyond what the WSIB searched and located. For example, it is unclear who the "original case manager in the arm injury" was. However, the WSIB provided evidence to show it consulted the staff involved with both the appellant's claims for responsive records. In addition, the appellant refers to the "H drives", but it appears the WSIB has searched the shared drives and hard drives in its system beyond the ACES, which it states contains the majority of the records relating to the adjudication of claims. In the absence of additional evidence to support his position, I find the appellant did not provide sufficient information to demonstrate there is a reasonable basis for his belief that additional responsive records ought to exist.

[44] With regard to the call recordings, I accept the WSIB retained them for the standard 90-day period and did not destroy them in contravention of its privacy policies.

[45] On balance, I find the WSIB has now provided me with sufficient evidence to show it has made a reasonable effort to identify and locate records responsive to the appellant's request. The WSIB's affidavit contains detailed information regarding the individuals tasked to conduct the searches, the locations searched and the results of the searches. Based on my review, I am satisfied the WSIB has now conducted a reasonable search for records responsive to the appellant's request.

ORDER:

I uphold the WSIB's search as reasonable and I dismiss the appeal.

Original Signed by: _____
Justine Wai
Adjudicator

_____ March 1, 2022