

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-4316

Appeal PA21-00162

Workplace Safety and Insurance Board

October 27, 2022

**Summary:** The Workplace Safety and Insurance Board (the WSIB) received a request under the *Freedom of Information and Protection of Privacy Act* for access to records related to the appellant's WSIB claims. The WSIB issued a decision granting partial access to the responsive records. The appellant appealed the WSIB's decision to the Information and Privacy Commissioner of Ontario, because he believes further records responsive to his request should exist. In this order, the adjudicator finds that the WSIB conducted a reasonable search for responsive records, and dismisses the appeal.

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

### OVERVIEW:

[1] This order determines whether the Workplace Safety and Insurance Board (the WSIB) conducted a reasonable search for records relating to the requester's WSIB claims. The WSIB received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

Claims [two specified claim numbers] [r]equest all records of "Fair Practices" [i]ncluding notes, emails, chat records, logs, telephone logs, letters, instructions, messages voice recordings, billing records, work assignments, supervisory notes and records, case files, requests, lost files and records, deleted files and records concerning complaints made by

[the requester], communications about either [the requester's last name](s) or their complaints and [WSIB] claims cases. Policy changes or clarifications requested or brought about in the course of Fair Practices involvement with the [requester's last name]s or their cases[] and all records not listed. [Particularly communications which were with] [specified employee #1], [specified employee #2], their [managers] [and] [supervisors and their supervisees and reporting case managers.]

[2] The WSIB issued a decision granting partial access to the responsive records withholding certain information under the mandatory personal privacy exemption at section 21(1) of the *Act*. The WSIB also indicated that two hardcopy (paper) records located in the Fair Practices Commission (FPC) office exist and that it intended to disclose them in full. However, the WSIB did not have access to the FPC office due to the provincial lockdown caused by the COVID-19 pandemic.

[3] The requester, now the appellant, appealed the WSIB's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[4] During mediation, the appellant advised that he has not received the two records located in the FPC office, and that he believes recordings and further records responsive to his request should exist.

[5] Subsequently, the WSIB issued a revised decision and disclosed the two outstanding records from the FPC office to the appellant. The WSIB advised that further records responsive to the appellant's request do not exist.

[6] The appellant advised that he continues to believe that further records exist.

[7] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry by inviting representations from the WSIB, initially. I received representations from the WSIB, which I shared with the appellant. I invited and received representations from the appellant, which I shared with the WSIB. I then sought and received reply representations from the WSIB. The WSIB's reply was shared with the appellant, who submitted additional representations. I reviewed them and decided that I did not need a response from the WSIB.

[8] In this order, I find that the WSIB conducted a reasonable search for responsive records, and dismiss the appeal.

## **DISCUSSION:**

[9] The sole issue in this appeal is whether the WSIB conducted a reasonable search for responsive records.

[10] The appellant claims that further records responsive to his request exist. Where a requester claims 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 of the *Act*.<sup>1</sup> If I am satisfied 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.

[11] 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 to identify and locate responsive records.<sup>2</sup> 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 (responsive) to the request.<sup>3</sup>

[12] 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 such records exist.<sup>4</sup>

### **Representations of the WSIB**

[13] The WSIB submits that it conducted a reasonable search for responsive records. In support of its position, the WSIB submitted the affidavit of its Privacy, Access and Risk Manager in the Privacy and Freedom of Information Office (manager). The relevant portions of the manager's evidence are as follows:

- WSIB claim files are managed and housed on the WSIB's electronic Account and Claims Enterprise System (ACES). As such, the majority of records relating to a WSIB claim reside in ACES.
- WSIB employees may also retain records related to their work as hardcopy notes, hardcopy files, email, instant messages, voicemail, or documents on a shared drive(s) or hard drive(s).
- The FPC is the ombudsman for the WSIB, and provides an independent, neutral, and confidential service for people with work-related injuries and illnesses, employers, and service providers with complaints about the service they receive at the WSIB. The FPC's complaint-related work is managed and housed on the FPC's case tracking system (CTS). The FPC also retains complaint-related records as hardcopy files and documents on a shared drive(s).

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<sup>1</sup> Orders P-85, P-221 and PO-1954-I.

<sup>2</sup> Orders P-624 and PO-2559.

<sup>3</sup> Orders M-909, PO-2469 and PO-2592.

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

- The manager asked the two employees named in the request, whose teams each had carriage of a claim file relating to the appellant, to search for records responsive to the appellant's request. These WSIB employees searched for records responsive to the appellant's request by checking their hardcopy notes, hardcopy files, email account, instant messages, voicemails, shared drive(s), and hard drive(s). This search located 31 responsive records.
- The FPC's Commissioner also conducted a search in the FPC's CTS, hardcopy files, and shared drive(s) that found eight responsive records. He provided six of the records by email, and advised that two of the records only existed in hardcopy.
- The Director of the WSIB's Privacy and FOI Office, who was aware of the request in the course of his duties, provided one record responsive to the request.
- 38 records were initially disclosed to the appellant. Subsequently, the two hardcopy records from the FPC were located and disclosed to the appellant.
- A total of 40 responsive records were located by the WSIB's searches. The WSIB disclosed 39 records in full, and one record in part to the appellant.

[14] The WSIB submits that the appellant has already submitted two other requests for the same records, and that the appellant's two WSIB claim files were already disclosed to him in full pursuant to another access request.

[15] The WSIB submits that it responded to the appellant's request literally, and it is not aware of any responsive records that have been destroyed. However, the WSIB submits that its *Records Management Policy* (record policy) states that any record that is considered to be transitory<sup>5</sup> should be disposed of. The WSIB submits, therefore, that it is possible that transitory records (including emails or notes) related to the appellant were disposed of in accordance with this policy, and this is the responsibility of each individual WSIB staff member, and there is no obligation to retain, or track the disposition, of transitory records. The WSIB states that any records that materially impact the appellant's claim file are found in the ACES system on the WSIB claim file.

[16] The WSIB submits that after the IPC issued an order in a related appeal, it conducted another search for records responsive to the appellant's request in this appeal. The WSIB submits that it has completed four searches for responsive records, and given the information already disclosed to the appellant, there are no further responsive records. The WSIB further submits that the appellant has not provided a reasonable basis to establish that further records responsive to his request exists.

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<sup>5</sup> It is transactional and does not evidence a business decision.

## **Representations of the appellant**

[17] The appellant's representations contain many comments and questions about the WSIB's conduct pertaining to the management of his claims. These submissions are not relevant to my determination of whether the WSIB conducted a reasonable search for responsive records, and I will not comment on them.

[18] The appellant also submitted many documents, such as a list of Workplace Safety and Insurance Appeals Tribunal (WSIAT) decisions, a Human Rights Tribunal of Ontario decision, excerpts of administrative law cases, and other documents, with his representations. These documents are also not relevant to my determination of whether the WSIB conducted a reasonable search. Therefore, I will not refer to these documents further.

[19] The appellant submits that the WSIB has not provided enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control. He states that the four searches conducted by the WSIB were identically narrow, incomplete, and omission-filled. He states that the record policy does not explain why so few records exist. He states that a specified manager was never mentioned in the records, and that the emails disclosed reference reviews by supervisors, but no review records were located or disclosed to him. The appellant submitted a memo from the specified supervisor, which I will address below in relation to his claim that additional "review records" exist.

## **WSIB's reply**

[20] The WSIB submits that there is no "duty to document" under the *Act*, therefore many discussions or interactions may occur between WSIB employees that are not directly related to a WSIB claim file, which would not be documented.

## **Analysis and findings**

[21] I am satisfied that the WSIB conducted a reasonable search for records responsive to the appellant's request. My reasons follow.

[22] The WSIB has described the individuals involved in the search, where it searched, and the results of its search. In my view, the WSIB's search was logical and comprehensive, and it has searched all of its record holdings. As noted above, 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>6</sup> I am satisfied that the WSIB has provided sufficient evidence to establish this.

[23] Furthermore, I accept that the WSIB's explanation about the possible destruction

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<sup>6</sup> Orders M-909, PO-2469 and PO-2592.

of transitory records is reasonable and in accordance with its record policy. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the WSIB must provide sufficient evidence to show it has made a reasonable effort to identify and locate responsive records,<sup>7</sup> and I am satisfied that it has.

[24] The appellant argues that further records responsive to his request should exist. He specifically states that there should be “review records” because the emails disclosed to him reference reviews being requested by supervisors. He submitted a memo from a specified manager, which references a review being requested, a portion highlighted by the appellant. However, from my review of the memo, it appears that the highlighted portion states that the appellant requested a copy of his file to review, not a supervisor requesting a review of the file. As noted above, 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 such records exist.<sup>8</sup> I have reviewed the appellant’s submissions, and I find that there is insufficient evidence to establish a reasonable basis to conclude that further records responsive to his request should exist.

[25] For the reasons above, I find that the WSIB conducted a reasonable search for responsive records.

**ORDER:**

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

Original signed by: \_\_\_\_\_

Anna Truong  
Adjudicator

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October 27, 2022

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<sup>7</sup> Orders P-624 and PO-2559.

<sup>8</sup> Order MO-2246.