

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER PO-4386-I

Appeal PA21-00358

Workplace Safety and Insurance Board

May 2, 2023

Summary: This interim order deals with the sole issue of whether the Workplace Safety and Insurance Board (the WSIB) conducted a reasonable search in response to a request for records made under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The adjudicator finds that the WSIB did not provide sufficient evidence that it conducted a reasonable search, and she orders the WSIB to conduct a further search.

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

OVERVIEW:

[1] This order concerns the question of whether the Workplace Safety and Insurance Board (the WSIB) conducted a reasonable search in response to a request for records made under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The request was as follows:

In 2014 your organization sent me for an IME [internal medical examination] by Neurosurgeon [named physician]. I need to know how many IME's he performed in 2013, 2014 and 2015 and what the results were for those assessments. Also any complaints that your organization received about this Doctor. I am also requesting any emails and other documents not already received pertaining to myself and my case.

[3] In response to the request, the WSIB issued a decision which stated that responsive records did not exist, and asked the appellant for a “provider number” so that a search could be conducted because the WSIB could not locate records “with the details above” (in reference to a portion of the request).

[4] Following communications with the requester, the WSIB issued a second decision, after having received a provider number from the appellant. The WSIB advised the appellant that the provider number does not belong to the physician named in the request. The WSIB’s decision also stated that there are no internal medical examination (IME) records for that physician.

[5] The requester, now the appellant, appealed the WSIB’s decision to the Information and Privacy Commissioner of Ontario (IPC).

[6] The IPC appointed a mediator to explore resolution. During mediation, the mediator relayed the appellant’s questions to the WSIB, and the WSIB’s answers to the appellant. Following discussions with the mediator, the WSIB conducted a secondary search for records, and issued a supplemental decision to the appellant, in which it provided the appellant with full access to his WSIB claim file. After receiving the additional disclosure, the parties participated in a teleconference, after which the appellant advised the mediator that he continues to believe that the WSIB has additional records that have not been disclosed to him. As a result, whether the WSIB conducted a reasonable search is at issue in this appeal.

[7] Since no further mediation was possible, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[8] I conducted a written inquiry under the *Act* on the issue of reasonable search. The WSIB provided representations and affidavit evidence, which the appellant had an opportunity to respond to. Upon my review of the appellant’s representations, I invited the WSIB to provide reply representations, but it did not do so (nor did it request an extension to do so).

[9] For the reasons that follow, I do not uphold the WSIB’s search as reasonable, and I order it to conduct a further search.

DISCUSSION:

[10] The appellant is an individual who had a WSIB benefits claim. In his request, he says that the WSIB referred him to a neurosurgeon in 2014 for an IME; the WSIB does not dispute this. Since the appellant claims that additional records exist beyond those found by the WSIB, the issue is whether the WSIB has conducted a reasonable search for records, as required by section 24 of the *Act*.¹ For the following reasons, I find that

¹ Orders P-85, P-221 and PO-1954-I.

the WSIB has not provided sufficient evidence that it conducted a reasonable search, and I order it to conduct a further search.

The relevant portion of the request

[11] Having reviewed the parties' representations, and in light of the WSIB's full disclosure of the appellant's personal WSIB file, in my view, the dispute that remains is about the portions of the request relating specifically to the physician named in the request. That portion of the request says:

In 2014 your organization sent me for an IME by Neurosurgeon [named physician]. I need to know how many IME's he performed in 2013, 2014 and 2015 and what the results were for those assessments. Also any complaints that your organization received about this Doctor.

[12] The discussion below only refers to this portion of the appellant's request.

The WSIB's preliminary point

[13] The WSIB's representations state:

As a preliminary point, the WSIB asserts that the appellant has not reached the threshold to establish that this information is something that the WSIB would track or have reason to track. The appellant has made a bald assertion that the WSIB should have it, without any reasonable basis for such an assertion.

The underlying theme in the appellant's [*FIPPA*] access request and this IPC appeal is dissatisfaction with the handling of WSIB benefit claims administration. The bald, unsubstantiated allegations of "we should have it" are made in that context.

[14] I do not accept these submissions for two reasons.

[15] First, the WSIB appears to be taking the position that a requester's motivation in making a request is relevant to what must be decided in a reasonable search appeal. However, it is not. Since the WSIB has not claimed that the request is frivolous or vexatious within the meaning of the *Act*, I have no reason to consider the appellant's motivation, or alleged dissatisfaction with the WSIB's benefit claims administration, in deciding whether the WSIB sufficiently demonstrated that it conducted a reasonable search.² In a reasonable search appeal, if the IPC is satisfied that the search carried out

² In any event, even in appeals where an institution *has* claimed that the request is frivolous or vexatious due to an allegedly illegitimate purpose of making the request, the IPC often stresses that a requester generally does not need to give a reason for seeking access, and that even if a requester seeks access for a reason that conflicts with the institution's interests, that is not necessarily illegitimate. See, for example, Orders PO-4851-I and MO-3931.

was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order it to conduct another search for records. The IPC will order a further search if the institution does not provide 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.³

[16] Second, I disagree that the appellant has only provided a bald assertion, and not a reasonable basis, that responsive records exist.

[17] The *Act* obliges a requester who believes that an institution has custody or control over a record to make a request directed to that institution, if they seek access under the *Act*.⁴ At the request stage, the requester is not required to establish a reason for believing that the institution tracks such information, if that is what the WSIB is referring to. On appeal, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.⁵

[18] Here, since the request states that the WSIB sent the appellant for an IME by this physician (which the WSIB does not dispute), I find that it was reasonable for the appellant to believe that the WSIB would have records relating to this physician, and to IMEs (at least in general). Regarding complaints, in my view, it is reasonable to expect that, in general, an institution like the WSIB might receive complaints about employers, physicians, or others that may be involved in WSIB claims. While the request seeks "any complaints" made against the physician made to the WSIB, I do not read this to be an assertion that there were any. However, I note that in his representations, the appellant appears to indicate that he complained, saying that he raised serious concerns about this neurosurgeon to the WSIB, and spoke with various WSIB managers and directors. In addition, the appellant says that he confirmed that the neurosurgeon saw at least 450 people, so he believes the WSIB has records such as emails and other documents about him. The WSIB did not reply to this. In the circumstances, I find that the appellant has established a reasonable basis for believing additional responsive records exist.

The WSIB's evidence regarding its search efforts

[19] The WSIB's position is that it conducted "several in-depth searches," and that the appeal should be dismissed.

[20] The WSIB's evidence about whether it even conducted a search in response to the request is difficult to follow, whether in its representations or in the affidavit of its

³ Order MO-2185.

⁴ See section 24(1)(a) of the *Act*, which says: "A person seeking access to a record shall [...] make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act[.]"

⁵ Order MO-2246.

Privacy, Access and Risk Manager in the Privacy and Freedom of Information Office (the FOI manager).

No initial search was conducted in response to the request

[21] Although the *Act* requires an institution to conduct a search *in response* to a request containing enough details to describe the record(s) being sought,⁶ the evidence before me is that the WSIB did not do so.

[22] The WSIB's representations state, in part:

The WSIB first conducted a search for all IME's performed by a specific neurosurgeon for the years 2013, 2014, and 2015. It was explained to [the appellant] that the provider number was required to conduct this search. [The appellant] was able to supply the provider number *after the initial decision was issued*. [Emphasis mine.]

[23] The above is a summary of what occurred after the WSIB issued an access decision to the appellant stating that there were no responsive records, despite the fact that the affidavit evidence claims that the WSIB was not even able to conduct a search, as discussed below.

No reasonable explanation for requiring identifying numbers, or the WSIB physician ID number, from the appellant

[24] The FOI manager's affidavit says that after receiving the appellant's request, she called him about a month later to ask for his WSIB claim number and "any identifying numbers related to" the neurosurgeon named in the request. The appellant provided neither, which the FOI manager says "limited" the ability of the WSIB to search for responsive records.

[25] However, the FOI manager says that a few months later, when she approached the WSIB's Business and Advanced Analytics team within the Corporate Business Information and Analytics division (CBIA), which "supports health services related data," she "asked if the WSIB would be able to search" for any responsive records, and was advised that the WSIB would not be able to without the neurosurgeon's "WSIB physician ID number."

[26] Further to this, the WSIB says that there was "no ability" for it to "reasonably search" for responsive records, and it then wrote to the appellant to advise him that there were no responsive records. I must emphasize here that if the WSIB could not

⁶ See section 24(1)(b) of the *Act*, which says: "A person seeking access to a record shall [...] provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record[.] See also section 24(2) of the *Act*, which says: "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)*. [Emphasis mine.]"

conduct a search, then it should not to have stated in its access decision that there were no responsive records because it was not in a position to do so.

[27] In my view, it is not sufficiently clear why the WSIB needed the appellant to provide the FOI manager with "any identifying numbers" related to the neurosurgeon, when the neurosurgeon was named in the request. While the FOI manager's affidavit says that she required the appellant's WSIB claim number due to the commonality of his name, she does not say something similar about the neurosurgeon named in the request.

[28] Even more so is this: that the CBIA advised the FOI manager that it could not search for records without a "WSIB physician ID number," but there is no explanation as to why a "WSIB physician ID number" could not be located or identified by an experienced WSIB employee, in the WSIB's own record holdings, for example, by using the neurosurgeon's name. The WSIB did not establish why the appellant should be able to provide this "WSIB physician ID number," but the WSIB could not. In the circumstances, I do not accept that it was reasonable to place the onus of producing the correct "WSIB physician ID number" on the appellant, in order to conduct a reasonable search.

[29] In my view, it is also significant here that the WSIB did not respond to the appellant's representations. The appellant's position is that the WSIB used this neurosurgeon, and would have all available records for him including any provider numbers. He describes his efforts (following a teleconference at IPC mediation) to obtain the neurosurgeon's "provider number;" these representations were shared with the WSIB, so I will not set them out all the details here. However, to summarize, his contact with the College of Physician and Surgeons (CPSO), then with the Ministry of Health, and then with Trillium Health Partners in the WSIB Specialty Clinic did not lead him to the neurosurgeon's "WSIB physician ID number," or any other provider number. According to the appellant, a specified employee at Trillium Health Partners told him that she cannot give him the hospital's ID number, but that when the WSIB requests records, they are given the hospital ID number, as physicians do not have one.

[30] The appellant states, in part, that based on the information he could gather,

. . . it would appear that Doctors do not have individual ID Provider numbers as WSIB is claiming that they do, and which they are using to deny me access to records. I cannot provide them with a number that does not exist which they know that does not exist and are withholding records from me.

If there was a provider ID number for this Doctor it would stand to reason that WSIB has created it and provided the Doctor with it and no one else.

[31] While the appellant is concluding that the WSIB is "withholding records" from

him, that is not the question that I must decide in this appeal, which is whether the WSIB provided sufficient evidence that it conducted a reasonable search in the circumstances. There may, in fact, be no responsive records to his request; and if there are, the records may be subject to exemptions or exclusions under the *Act*, which would be grounds for denying him access to them through a freedom of information request⁷ However my task in this appeal is to determine if the WSIB sufficiently demonstrated that it conducted a reasonable search in response to his request. 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

[32] The appellant's representations appear to indicate that the "WSIB's physician ID number" cannot be obtained by contacting the CPSO, the Ministry of Health, or the WSIB Specialty Clinic at Trillium Health Partners. I find that the WSIB's decision not to provide reply representations in response to the appellant's, given what I have discussed above, further dissuades me from accepting that the WSIB has provided sufficient evidence that it conducted a reasonable search in the circumstances.

The second search

[33] The WSIB also explains that it conducted a "second search" for responsive records, after it had issued the appellant the first access decision. The affidavit states that a CBIA employee contacted the FOI manager to advise that the WSIB could search for responsive records "if the [a]ppellant was able to provide the WSIB physician or provider ID number." The WSIB says it contacted the appellant to advise him of this, and the appellant provided the WSIB with a "Physician ID" number in response.

[34] For the reasons discussed above, I do not accept that there is a reasonable explanation before me as to why the WSIB could not identify a "WSIB physician or provider ID number" itself, when it already had the neurosurgeon's name.

[35] Furthermore, the affidavit says that the WSIB used that Physician ID number to search a specified database, which the WSIB uses to pay and log health services related to billing. The analyst who searched the database used "the Physician ID [which the appellant provided] *and the WSIB provider ID associated with the Physician ID*" (emphasis mine). In my view, the evidence does not sufficiently establish how or why the WSIB was now able to identify its own WSIB provider ID at this point. If it was the case that the WSIB could not find a "WSIB physician ID number" without another ID number (as opposed to a name), then the evidence should have established that.

[36] In the circumstances, I am not persuaded that the search results (no records) yielded from using the appellant-provided "Physician ID" number reflect a search that was reasonable in the circumstances.

⁷ I make no findings about the possible application of any exemptions or exclusions in this order.

⁸ Orders M-909, PO-2469 and PO-2592.

Insufficient evidence that there was a search for complaints

[37] Part of the request relating to the neurosurgeon was for “any complaints that [the WSIB] received about this Doctor.” However, I find that the WSIB’s evidence does not sufficiently establish that it searched for responsive records about this. The affidavit states that the FOI manager contacted the WSIB’s CBIA, which “supports health services related data at the WSIB,” and the database that was searched relates to paying and logging health services. Although the WSIB’s representations state that “ALL file types [their capitals]” of records were searched, this is too vague to establish that the WSIB searched for complaints, and if it did, whether those locations were reasonable locations to search. I find that the evidence does not sufficiently establish which experienced employee, if any, conducted a search for any complaints against the neurosurgeon.

Other search locations

[38] The appellant submits that in addition to searching through billing records, the WSIB could search through its own internal Regulatory Services. He says that he contacted them at a certain point about the neurosurgeon, so there should be a record of the results of the WSIB’s investigation, or lack thereof. The appellant also submits that “emails are never truly deleted and an IT Technician can retrieve emails even long after they have been deleted.”

[39] In the absence of a reply from the WSIB, I am unable to determine whether it would have been reasonable for the WSIB to search its internal Regulatory Services.

[40] In addition, although the WSIB says that it searched for all file types I am unable to conclude that it searched its email system, and if so, which email account(s) were searched, and why those accounts would have been reasonable to search, in the circumstances. There is also insufficient evidence before me about the WSIB’s retention schedule for emails that might contain responsive records covering the years in question (2013-2015). While the WSIB did provide some information about its policy regarding the disposal transitory records, that would not appear to be the type of records the appellant is seeking here in regards to the neurosurgeon.

Conclusion

[41] 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 that it has made a reasonable effort to identify and locate responsive records;⁹ that is, records that are “reasonably related” to the request.¹⁰ For the reasons set out above, I find that the WSIB has not provided enough evidence to show that it has made a reasonable effort to identify and locate records that are reasonably related to the

⁹ Orders P-624 and PO-2559.

¹⁰ Order PO-2554.

appellant's request (pertaining to the neurosurgeon). Accordingly, I will order the WSIB to conduct a search.

ORDER:

1. I do not uphold the WSIB's search as reasonable. I order the WSIB to conduct a further search, treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act*. I order the WSIB to provide the IPC and the appellant with an affidavit containing details about this ordered search, within 30 days of the date of this order. At a minimum, the affidavit(s) should include the following:
 - a. The name(s) and position(s) of the individual(s) who conducted the search(es) and their knowledge and understanding of the subject matter and the scope of the request;
 - b. The date(s) the search(es) took place and the steps taken in conducting the search(es), including information about the type of files searched, the nature and location of the search(es), and the steps taken in conducting the search(es);
 - c. Whether it is possible that responsive records existed but no longer exist. If so, the WSIB must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules; and
 - d. If it appears that no further responsive records exist after further searches, a reasonable explanation for why further records do not exist.
2. If the WSIB locates additional records as a result of its further search(es), or if it does not locate such records, I order it to issue an access decision to the appellant, in accordance with the requirements of the *Act*, treating the date of this interim order as the date of the request for the purpose of the procedural requirements of the *Act*.
3. I remain seized of this appeal to deal with issues arising from order provisions 2 and 3.
4. In order to verify compliance with this order, I reserve the right to require the WSIB to provide me with a copy of the access decision referred to in order provision 3, as well as any records disclosed with this access decision.

Original signed by: _____
Marian Sami
Adjudicator

_____ May 2, 2023

