

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-4402-I**

Appeal PA22-00141

Workplace Safety and Insurance Board

June 6, 2023

**Summary:** The appellant alleges that the Workplace Safety and Insurance Board (the WSIB) failed to conduct a reasonable search for responsive records. The WSIB took the position that it conducted a reasonable search for responsive records in compliance with their obligations under the *Act*. In this interim order, the adjudicator finds that the WSIB did not conduct a reasonable search for responsive records and orders the WSIB to conduct a further search in accordance with the findings in this order and to issue a new access decision. He remains seized of the appeal to deal with any issues arising from the order provisions.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 24.

### **OVERVIEW:**

[1] The Workplace Safety and Insurance Board (the WSIB) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to information relating to a specified file. The requester sought access to:

[...] all internal emails and external emails between the WSIB and 3 Parties, handwritten notes, electronic notes, reports, call recording (specifically between the WSIB and AECON, WSIB and Bayshore, WSIB and Toronto Grace Health Centre, WSIB and Uxbridge Cottage Hospital, etc.), all claim file information not normally in file like internal systems information (dates/times file accessed, by who, what actions on the file, etc).

From the beginning of the claim to present.

[2] The WSIB identified responsive records and granted partial access to them, relying on section 21(1) (personal privacy) of the *Act* to deny access to the portion it withheld.

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

[4] At mediation, the appellant advised that access was no longer being sought to the information the WSIB relied on section 21(1) to withhold but took issue with the reasonableness of the WSIB's search for responsive records. The WSIB took the position that it conducted a reasonable search. Accordingly, the reasonableness of the WSIB's search for responsive records within its custody or control is the sole matter at issue in this appeal.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an IPC adjudicator may conduct an inquiry under the *Act*.

[6] I decided to conduct an inquiry and representations were exchanged between the appellant and the WSIB in accordance with Representations were exchanged in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

[7] In this interim order, I find that the WSIB did not conduct a reasonable search for responsive records and I order the WSIB to conduct a further search in accordance with the findings in this order and to issue a new access decision. I remain seized of the appeal to deal with any issues arising from the order provisions.

### **Did the WSIB conduct a reasonable search for records?**

[8] As explained in the Overview, the appellant believes that the WSIB's search failed to locate responsive records.

[9] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24 of the *Act*.<sup>1</sup>

[10] 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.<sup>2</sup>

[11] 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;<sup>3</sup> that is, records that are "reasonably related" to the request.<sup>4</sup>

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

<sup>2</sup> Order MO-2246.

<sup>3</sup> Orders P-624 and PO-2559.

<sup>4</sup> Order PO-2554.

[12] 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.<sup>5</sup> 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.<sup>6</sup>

### **The WSIB's representations**

[13] The WSIB provided an affidavit of its Director of Privacy and Freedom of Information office (the director) in support of its search efforts. Attached to the affidavit were email exchanges between the director and the appellant that the director referenced in his affidavit.

[14] The director explains that all of the WSIB's claim files are housed on the WSIB's electronic Account and Claims Enterprise System, which is the WSIB's authorized repository for records related to the adjudication of a claim. He states that in addition, WSIB employees may also retain records related to their work as hardcopy notes, hardcopy files, email, or documents on a shared drive or hard drive.

[15] The director states that after he received the request, he emailed the appellant seeking to clarify a number of matters. He specifically asked the appellant to provide a date range for the email correspondence requested, a list of WSIB employees and/or business areas that may have been a party to the email correspondence requested and telephone numbers for the call recordings requested. He states that the appellant sent a responding email that records were sought from the date the WSIB claim began up to the date of the request. However, he says that the appellant's email did not identify individuals or business areas that may have been a party to the email correspondence requested and failed to identify phone numbers for the call recordings requested.

[16] The director states that he replied to the appellant by email advising that the WSIB would do its best to identify potential employees who may have responsive records to the email correspondence requested; and that the WSIB would not search for call recordings in the absence of telephone numbers being provided by the appellant.

[17] The director states that in a responding email, the appellant advised that access was being sought to all email correspondence between the WSIB and "all 3<sup>rd</sup> parties" in relation to the claim. I note that in the email the appellant also questioned how the WSIB could attempt to limit the request after the appellant had provided clarification.

[18] The director states that he then sent a request for responsive records to a number of WSIB employees who were involved in and/or had carriage of the WSIB claim. After fielding emails from the recipients, the director notified additional WSIB

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<sup>5</sup> Orders M-909, PO-2469 and PO-2592.

<sup>6</sup> Order MO-2185.

employees whom may have responsive records and clarified that only outgoing and incoming emails between WSIB employee(s) and an external third party were being sought.

[19] After receiving responses from some of the WSIB employees, and also taking steps to obtain the ACES audit history for the claim and reviewing the records produced to him, the director issued an access decision.

### **The appellant's representations**

[20] The appellant asserts that the WSIB failed to conduct a reasonable search for responsive records. The appellant submits that call recordings were not provided and that many of the notified WSIB employees did not conduct decision making activities on the Claim file, did not interact with the file on a daily basis and the records identified represents a small subset of the responsive records that exist.

[21] The appellant then lists a number of WSIB employees who the appellant asserts were not notified by the WSIB but should have been included because they were day-to-day decision makers with respect to the claim and whose correspondence should have been located by the WSIB's search.

[22] The appellant also submits that after reviewing the records located by the WSIB, "responses, follow-ups, etc., related to the email correspondence" should have been identified. In particular, the appellant asserts that although a specified WSIB employee identified 86 documents in their response to the Privacy and Freedom of Information office, only 22 were disclosed.

### **The WSIB's reply representations**

[23] The WSIB submits that WSIB call recordings are indexed solely by telephone number and the WSIB can only perform a search for call recordings by telephone number. The WSIB argues that the appellant was asked for but failed to provide any telephone numbers in order to conduct the search. The WSIB states that in previous access requests, the appellant provided the WSIB with the phone number(s) associated with the call recording(s) the appellant sought.

[24] Similarly, the WSIB states that the appellant was asked to provide the names of employees, at the WSIB, or general areas, of the WSIB, that may have had contact with third parties involved in the WSIB claim but failed to provide any names or areas to the WSIB to facilitate the search for responsive records. In the absence of that information, the appellant was told that the WSIB would do its best to identify potential employees who may have the potentially responsive records, which was done.

[25] The WSIB submits that had the appellant sent the names listed in the appellant's appeal submissions when requested, they would also have been asked to search for responsive records.

[26] With respect to the appellants assertion that more records relating to the

specified individual should have been disclosed, the WSIB submits that all the attachments were located and reviewed but only the records that were responsive to the request were disclosed to the appellant.

### **Analysis and finding**

[27] In all the circumstances, I find that the WSIB did not make a reasonable effort to locate records that are responsive to the appellant's request.

[28] Although the appellant did not provide a list of WSIB employees and/or business areas or directly respond to the WSIB's request for telephone numbers, I do not interpret this as the appellant agreeing to narrow the scope of the search. Instead, I find that it reflects the appellant relying on the WSIB to identify and locate responsive records, including call recordings between the WSIB and AECON, WSIB and Bayshore, WSIB and Toronto Grace Health Centre, WSIB and Uxbridge Cottage Hospital.

[29] I find that it was reasonable in the circumstances for the appellant to do so. This is because to carry out a reasonable search, the institution must task someone with sufficient knowledge of the subject matter to identify places to look. In my view, this includes identifying the responsive phone numbers and WSIB employees who may have responsive records.

[30] I pause to note here that the WSIB did not appear to request responsive call recordings from even the individuals that it did identify as potentially having responsive records. In my view, a reasonable search would have included at a minimum, searching for responsive phone call recordings relating to the individuals the WSIB contacted as well as requesting responsive records from the individuals listed in the appellant's representations in this appeal.

[31] Accordingly, I will order that the WSIB conduct further searches in accordance with the findings in this order and to issue a new access decision.

### **ORDER:**

1. I order the WSIB to conduct further searches for records responsive to the appellant's request, in accordance with the findings in this order, treating the date of this order as the date of the request for the purposes of the procedural requirements of the *Act*.
2. I order the WSIB to provide me with affidavit evidence describing its search efforts, within 30 days of the date of this order. At a minimum, the affidavit(s) should include the following:
  - 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;

- 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);
- 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
- If it appears that no further responsive records exist after further searches, a reasonable explanation for why further records do not exist.

The WSIB's affidavit will be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in Practice Direction Number 7, which is available on the IPC's website. The WSIB should indicate whether it consents to the sharing of its affidavit with the appellant.

3. 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*.
4. I remain seized of this appeal to deal with issues arising from order provisions 1, 2 and 3.
5. 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: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

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June 6, 2023