

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4424-I

Appeal PA22-00141

Workplace Safety and Insurance Board

July 25, 2023

Summary: This second interim order determines whether the Workplace Safety and Insurance Board (the WSIB) conducted a reasonable search for responsive records in response to Interim Order PO-4402-I. In the first interim order, the adjudicator ordered the WSIB to conduct a further search for responsive records. In this order, the adjudicator finds that the WSIB has not conducted a reasonable search for responsive records following Interim Order PO-4402-I, and orders it to conduct a further search.

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

Order Considered: Interim Order PO-4402-I.

OVERVIEW:

[1] This interim order addresses the reasonableness of the Workplace Safety and Insurance Board's (the WSIB) search for records responsive to the appellant's request, as required under section 24 of the *Freedom of Information and Protection of Privacy Act* (the *Act*), after having been ordered to conduct a further search in Interim Order PO-4402-I.

[2] By way of background, the appellant submitted a request to the WSIB under the *Act* for access to information relating to a specified file. The appellant 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.

[3] In Interim Order PO-4402-I, I determined that the WSIB had not met its search obligations under section 24 of the *Act* and ordered it to conduct a further search for responsive records in accordance with my findings in the interim order and to issue a new access decision.

[4] The WSIB conducted a further search, and submitted an affidavit describing its search efforts, which included a copy of a new decision letter. The affidavit and decision letter were shared with the appellant in accordance with the IPC's *Code of Procedure* and *Practice Direction Number 7*. The appellant provided responding submissions.

[5] In this interim order, I find that the WSIB has not conducted a reasonable search for responsive records, and order it to conduct a further search.

DISCUSSION:

[6] The sole issue to be determined is whether the WSIB conducted a reasonable search in response to the appellant's request.

[7] The appellant maintains that further responsive records exist. 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*.¹

[8] 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.²

[9] 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;³ that is,

¹ Orders P-85, P-221 and PO-1954-I.

² Order MO-2246.

³ Orders P-624 and PO-2559.

records that are "reasonably related" to the request.⁴

[10] 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.⁵ 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.⁶

[11] In Interim Order PO-4402-I, I addressed the failure of the WSIB to search for call recordings and records requested by the appellant. At paragraphs 28 to 31, I wrote:

[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.

[12] The sole remaining issue is therefore whether the WSIB has now carried out a reasonable search for responsive records.

⁴ Order PO-2554.

⁵ Orders M-909, PO-2469 and PO-2592.

⁶ Order MO-2185.

The representations

[13] The affidavit provided by the WSIB's Director of the Privacy and Freedom of Information Office (the Director) indicates that the Director conducted a further search for the call recordings but did not also request responsive records from the 14 individuals the appellant had identified as potentially having responsive records. He carried out the search for call recordings by asking 37 WSIB employees (which included the 14 individuals the appellant had identified) who had involvement in, or carriage of the claim file, for records to determine whether they had a call with a third party involved in the claim, so that the Director could locate responsive call recordings. The Director's affidavit also indicates that because WSIB call recordings are retained for only a 90-day period, the only call recordings retained by the WSIB that could be responsive to the request, were call recordings between November 15, 2021 and February 15, 2022 (the date of the request).

[14] The affidavit explains that when the Director was informed that 10 of the 37 employees were no longer working at the WSIB, he asked a Privacy, FOI & Risk Specialist at the WSIB's Privacy and FOI Office to check on the WSIB's electronic Account and Claims Enterprise System for any records of a call with a third party for the claim file for that period.

[15] As set out in the Director's affidavit, no call recordings were located by any of the notified employees still employed at the WSIB or found through the search of the WSIB's electronic Account and Claims Enterprise System. The Director then issued an access decision indicating that no further responsive records were found.

[16] The appellant maintains that the WSIB's search was inadequate because it only undertook a further search for call recordings, and not for other records, that it was not conducted by an employee with sufficient knowledge of the subject matter of the request, and that the search was limited to the period of November 15, 2021 to February 15, 2022.

Analysis and finding

[17] I find that the WSIB has not conducted a reasonable search for responsive records in compliance with my Interim Order PO-4402-I, in accordance with its obligations under the *Act*.

[18] I find that the WSIB made a reasonable effort to locate call recordings that are responsive to the appellant's request. Based on the searches it conducted and who was tasked with conducting them, I find that the WSIB has now complied with its obligations under the *Act* with respect to making reasonable efforts to locate records responsive to the appellant's request for call recordings.

[19] I also find the date range used by the WSIB for call recordings is reasonable because of WSIB's policy to retain call recordings for 90 days.

[20] However, it appears that the WSIB has not conducted a reasonable search for other responsive records from the 14 individuals the appellant identified as potentially having responsive records. Accordingly, I will order that the WSIB conduct further searches for responsive records from the individuals the appellant identified and to issue a new access decision. To the extent that responsive records relating to those 14 individuals have already been obtained and identified as a result of the WSIB's initial search and in its initial access decision, the WSIB should indicate this in its decision letter. The time frame of the search will be for the time period from January 17, 2012 to February 15, 2022.

ORDER:

1. I order the WSIB to conduct further searches for responsive records, other than call recordings, from the 14 individuals the appellant identified as potentially having responsive records, for the time period from January 17, 2012 to February 15, 2022, and to issue a new access decision. To the extent that responsive records from any of these individuals have already been obtained and identified as a result of the WSIB's initial search and in its initial access decision, the WSIB should indicate this in its access decision letter and in the affidavit discussed in order provisions 2 and 3, below.
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 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

_____ July 25, 2023