

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4527

Appeal PA22-00003

Workplace Safety and Insurance Board

July 9, 2024

Summary: The appellant sought access from the WSIB to records relating to his claims. The WSIB granted partial access, withholding information from one of 17 responsive records because it contains another individual's personal information. The appellant challenges the WSIB's claim that the withheld information is exempt and claims that the WSIB narrowed the scope of his request, resulting in a restricted search for responsive records. The adjudicator finds that the WSIB's clarification of the request and its search for responsive records were reasonable and that the withheld information at issue is exempt under the discretionary personal privacy exemption in section 49(b). She dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c.F.31, as amended, sections 2(1) (definition of "personal information"), 21, 24 and 49(b).

OVERVIEW:

[1] The appellant made a request to the Workplace Safety and Insurance Board (WSIB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

Excluding those exact records provided in response to the two (2) previous information request responses: [appellant and a second named individual]
Request: All records, case reviews, memos, staff supervisions, case notes, staff assignments, managers notes, messages, minutes, decisions, reviews of decisions, diary entries, research records, photocopies, files, logs,

research notes, case review notes, marked copies, in-process copies, drafts and any and all emails, communications about [the appellant's] WSIB claims, information requests, and case reviews. And a full and complete disclosure of all respondents and any documents they say they cannot provide, have lost, have destroyed. As well I request copies of the communications about what info falls in the scope of this and all previous requests for info.

[2] The WSIB issued a decision granting partial access to 17 responsive records. The WSIB granted full access to 16 of the records but denied access to a portion of one email pursuant to the mandatory personal privacy exemption in section 21(1) of the *Act*.

[3] The WSIB added an asterisk with two file numbers at the end of the request description in the decision, indicating that the request pertained to those two specific claims.¹

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

[5] A mediator was appointed to explore the possibility of resolution. The WSIB declined to mediate. As a result, the mediator attempted to identify the issues underlying the appellant's appeal, and, therefore, for adjudication. The appellant told the mediator that he was appealing what he described as the WSIB's deceitful and bad faith narrowing of the scope of the request that he says limited its consequent search for responsive records, and the section 21(1) exemption claimed by the WSIB to deny access to the withheld portion of the partially disclosed email.

[6] With no mediation possible, the appeal was transferred to the adjudication stage of the appeal process. I conducted an inquiry, during which I received representations from both the appellant and the WSIB.

Section 21(1) vs section 49(b)

[7] The WSIB's decision and the mediator's report identify section 21(1) as the exemption at issue. Section 21(1) is a mandatory personal privacy exemption that applies to records that contain an identifiable individual's personal information, but not a requester's (in this case, the appellant's) personal information.

[8] It was apparent from my review of the record at issue that it contains personal information belonging to the appellant and to another identifiable individual. I therefore asked the parties to submit representations on whether the record is exempt under section 21(1), or whether the appropriate exemption is, in fact, section 49(b). Section 49(b) is a discretionary personal privacy exemption that applies to records that contain

¹ The notation added to the end of the description of the request states " **for claims [claim number] and [claim number].*"

personal information belonging to both a requester and to another or other individuals.

[9] In this order, I find that the WSIB's clarification of the request and its search for responsive records were reasonable. I find that the record contains personal information belonging to the appellant and to another identifiable individual. I find that the other individual's personal information in the record is exempt under section 49(b), and I uphold the WSIB's decision to deny access to this information. I dismiss the appeal.

RECORDS:

[10] The record is an internal WSIB email. At issue is access to the portion of the email to which the WSIB has denied access.

ISSUES:

- A. What is the scope of the request? Was the WSIB's search for responsive records reasonable?
- B. Does the record at issue contain "personal information" as defined in section 2(1), and if so, whose?
- C. Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 49(b)?

DISCUSSION:

Issue A: What is the scope of the request? Was the WSIB's search for responsive records reasonable?

[11] The appellant says that the WSIB improperly narrowed the scope of his request. He submits that this limited the WSIB's search and restricted his access to responsive records.

[12] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to access requests. It states, in part, that:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

(2) 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).

[13] To be responsive to the request, records must “reasonably relate” to it.² Institutions should interpret requests liberally, to best serve the purpose and spirit of the *Act*. Generally, if there is ambiguity in a request, it should be resolved in the requester’s favour.³

[14] Where a requester claims that additional records exist beyond any located by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 24.⁴ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the WSIB’s decision. Otherwise, I may order it to conduct another search for records.

[15] The *Act* does not require the WSIB to prove with absolute certainty that further records do not exist. However, it must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records,⁵ that is, records that are reasonably related to the request.⁶

[16] A reasonable search is one in which an experienced employee, knowledgeable in the subject matter of the request expends a reasonable effort to identify and locate records which are reasonably related to the request.⁷

Representations

[17] The appellant says that his request was for access to “all remaining records not previously provided to date.” He says that the WSIB’s demand for case file numbers represents a deceitful and bad faith narrowing of his request intended to limit the information it disclosed to him and obstruct his access rights.

[18] The WSIB submits that clarification of the request was not required because it was clear and contained enough detail to allow an experienced employee, upon a reasonable effort, to identify responsive records. The WSIB goes on to say, however, that it did, in fact, ask the appellant “to clarify which claim he required us to conduct the search on” and that the appellant replied on the same day providing two file numbers. The WSIB provided a copy of the appellant’s email with its representations. The WSIB submits that the provision of the two claim numbers resulted in the exclusion of a claim for a 2007 accident that had not been active since 2009. The WSIB submits that it could not conduct

² Orders P-880 and PO-2661.

³ Orders P-134 and P-880.

⁴ Orders P-85, P-221 and PO-1954-I.

⁵ Orders P-264 and PO-2559.

⁶ Order PO-2554.

⁷ Orders M-909, PO-3649 and PO-2592.

a “blanket search” by name alone, and that it required claim numbers as a starting point.

[19] The WSIB also submitted an affidavit sworn by its Manager of Privacy, Access and Risk in its Privacy and Freedom of Information Office describing the search for responsive records. She states in her affidavit that she sent an email retrieval callout to seven employees who were involved in the appellant’s claims and that each, identified by name and role, responded to indicate whether they did or did not locate responsive records.

She also explained that:

- records related to a WSIB claim are maintained within the official WSIB claim file
- while there may be some extraneous communications related to a claim file, any records that have a material impact on a decision or outcomes of a WSIB claim are maintained within the official WSIB claims repository, known as the Accounts and Claims Enterprise System (ACES)
- because a WSIB claims benefits decision is appealable to the Workplace Safety and Insurance Appeals Tribunal, the WSIB claim file in ACES is the official record of the claim
- pursuant to the WSIB’s records management policy, the WSIB email system is not an authorized repository for records. Most emails are transitory in nature and can be regularly deleted, and any records of business decisions related to a WSIB claim file are added to the ACES claims repository.⁸

Analysis and findings

[20] I find that clarifying the request by adding two of the appellant’s claim numbers was neither unilateral nor inappropriate in the circumstances. The appellant did not object to the clarification request at the time it was made and provided his two claim numbers in response.

[21] The appellant now asserts that the WSIB narrowed the scope of his request by adding the claim numbers in bad faith to restrict its search for responsive records, thereby limiting the appellant’s access. To the extent that identifying the relevant claim numbers resulted in a narrowing of the request, I find that the WSIB did not act unilaterally or without the appellant’s consent in doing so. In his email providing the two claim numbers, the appellant wrote that the WSIB “knew and ought to have reasonably known” the claim numbers, implying that the request was, in fact, related to the two claims.

[22] Regarding the appellant’s proviso in his email that he was seeking access to “everything not already turned over,” including but not limited to the two claims, I accept

⁸ The WSIB included a copy of its records management policy as an exhibit to the affidavit describing its search for responsive records.

the WSIB's explanation that it needed a starting point for its search and that it could not conduct a "blanket search" by name alone as reasonable in the circumstances. On reviewing the wording of the request, I reject the appellant's assertion that it was inappropriate for the WSIB to ask for claim numbers, given that the request references, among other things, "WSIB claims," "case reviews," "reviews of decisions" and "all previous requests for information."

[23] To the extent that the appellant argues that adding the claim numbers resulted in narrowing the request (rather than merely clarifying it), I find that the appellant accepted this purported narrowing when he provided the two claim numbers to the WSIB. I find that the appellant participated in the request's clarification and cannot now claim that the WSIB unilaterally narrowed its scope.

[24] I also uphold the WSIB's search for responsive records as reasonable.

[25] I am satisfied that it conducted a reasonable search for responsive records. The WSIB's affidavit demonstrates that experienced employees, knowledgeable in the records related to the subject matter of the request, made reasonable efforts to locate responsive records. This includes searches by individual caseworkers who were involved in handling the appellant's claims.

[26] Although a requester will rarely be in a position to indicate which records an institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁹ The appellant has not described any additional records he believes might exist and has not provided me with a reasonable basis to conclude that additional records exist in response to the request that have not been located by the WSIB. In the circumstances, I uphold the WSIB's search for responsive records as reasonable.

[27] I will next consider whether the information at issue that the WSIB withheld from an email is exempt under section 49(b).

Issue B: Does the record contain "personal information" as defined in section 2(1), and if so, whose?

[28] To decide which section of the *Act* applies, I must first decide whether the record contains "personal information," and if so, whose. Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual."

[29] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about them. Information is about an "identifiable individual" if it is reasonable to expect that the individual can be identified from the information, either by itself or if combined with other

⁹ Order MO-2246.

information.¹⁰ Section 2(1) of the *Act* gives a list of examples of personal information. The list is not exhaustive, meaning that other kinds of information may also be personal information, even if not listed in section 2(1).¹¹

Representations

[30] The WSIB says that the record contains personal information belonging to the appellant and to another WSIB claimant, an individual unknown and unrelated to the appellant.

[31] The appellant did not comment on whether the record contains personal information.

Analysis and findings

[32] I find that the record contains personal information belonging to both the appellant and another identifiable person.

[33] The record is an email from a claims manager to another manager, providing a status update on the WSIB claims of the appellant and the other person. I find that it contains each of their personal information as that term is defined in section 2(1) because it contains a claim number assigned to each of them,¹² and their names together with a status update about their respective WSIB claims which, in turn, would reveal that they had claims associated with workplace injuries.¹³

[34] Because I have found that the records contain both the appellant's and another individual's personal information, I must consider the application of the discretionary personal privacy exemption in section 49(b) to the personal information at issue and to which the WSIB has denied access.

Issue C: Would disclosure of the information at issue constitute an unjustified invasion of personal privacy under section 49(b)?

[35] Under section 49(b) of the *Act*, if a record contains the personal information of both the requester and another individual, the institution may refuse to disclose the other individual's personal information to the requester if disclosing that information would be an unjustified invasion of the other individual's personal privacy.

[36] The section 49(b) exemption is discretionary. This means that the institution can decide to disclose another individual's personal information to a requester even if this

¹⁰ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v Pascoe*, [2002] O.J. No. 4300 (C.A.).

¹¹ Order 11.

¹² Paragraph (c) of the definition of "personal information" in section 2(1).

¹³ Paragraph (h) of the definition of "personal information" in section 2(1).

would result in an unjustified invasion of the other individual's personal privacy.

[37] Sections 21(1) to (4) provide guidance in determining whether disclosure would be an unjustified invasion of personal privacy under section 49(b). Section 21(2) provides a list of factors for the WSIB to consider in making this determination. The factors in sections 21(2)(a) to (d) favour disclosure if they apply, while the factors in sections 21(2)(e) to (i) weigh in favour of privacy protection and against disclosure. An institution must also consider any unlisted factors that may be relevant. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy, while section 21(4) sets out certain types of information whose disclosure is not an unjustified invasion of personal privacy.

[38] In determining whether the disclosure of the withheld information in the record would be an unjustified invasion of personal privacy under section 49(b), I will consider and weigh the factors and presumptions in sections 21(2) and (3) and balance the interests of the parties.

Representations

[39] The WSIB says that the information at issue is exempt under section 49(b) and the disclosure would be an unjustified invasion of the personal privacy of the other individual's personal privacy. It says that disclosure of another individual's personal information to the appellant is not justified simply because the appellant does not believe the comments are not about him.

[40] The appellant made no representations on the application of section 49(b).

[41] Neither party has cited any factors or presumptions they say might be relevant to this finding or to the application of section 49(b).

Analysis and findings

[42] I have already found above that the record contains personal information belonging to the appellant and another individual, and that the information at issue is the other individual's personal information, relating to their own WSIB claim, and unrelated to the appellant or his claim.

[43] I find that no factors in section 21(2) apply to favour the disclosure of information at issue, namely the other individual's personal information, to the appellant. However, I find that the factor in section 21(2)(f) (highly sensitive) applies in the circumstances to favour protection of the other individual's personal privacy and that it weighs against disclosure of the information at issue.

[44] In determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, section 21(2)(f) requires me to consider whether the personal information is highly sensitive. To be considered highly sensitive, there must

be a reasonable expectation of significant personal distress if the information is disclosed.¹⁴

[45] In this case, I find that disclosure of another individual's personal information to the appellant could reasonably be expected to cause that person significant personal distress because disclosure would reveal their name, the fact of a work-related injury and the fact and details of an associated WSIB claim.

[46] I find that no other factors, listed or unlisted, weigh in favour of disclosing the affected party's personal information contained in the records. I also find that no presumptions in section 21(3) or circumstances in 21(4) apply in this case. Balancing this with the interests of the parties, I find that the information at issue is exempt under section 49(b), and I uphold the WSIB's decision to deny the appellant access to it.

The WSIB exercised its discretion under section 49(b) appropriately

[47] The WSIB submits that it considered that the records contain the appellant's personal information, but also the other person's personal information. It says that it considered that the fact that the appellant does not believe that the email contains comments that are not about him is not a reason to violate the privacy of another individual who has a claim with the WSIB.

[48] The appellant did not address the WSIB's exercise of discretion in his representations.

[49] I am satisfied that the WSIB considered relevant factors in exercising its discretion to deny access to the other person's personal information under section 49(b). I find that the WSIB considered that the record contains the appellant's own personal information and weighed this against the fact that the information at issue belonging to another individual would, if disclosed, identify that individual and reveal other personal information about them, including that they have their own WSIB claim. I find that the WSIB disclosed the appellant's personal information contained in the record without disclosing material that is exempt, and I find no basis to conclude that the WSIB exercised its discretion in bad faith or that it took into account irrelevant considerations. I uphold the WSIB's exercise of discretion to deny access to the information at issue as reasonable.

[50] For these reasons, I find that the information at issue is exempt from disclosure under section 49(b). I uphold the WSIB's decision to deny access to it.

ORDER:

I uphold the WSIB's decision and dismiss this appeal.

¹⁴ Order P-99.

Original Signed By: _____
Jessica Kowalski
Adjudicator

July 9, 2024 _____