



## **REVIEW REPORT 023-2016**

### **Saskatchewan Workers' Compensation Board**

**May 20, 2016**

**Summary:**

The Applicant made an access request for two types of information about himself to the Saskatchewan Workers' Compensation Board (WCB). The Commissioner found that FOIP did not apply to one of the types of responsive records. He did not find that WCB performed a reasonable search for records. He also disagreed with WCB's assertions that FOIP did not apply to records found in its Fair Practices Office. Finally, he found that WCB could not apply subsection 7(4) of FOIP and refuse to confirm or deny that records exist at this time.

#### **I BACKGROUND**

[1] The Saskatchewan Workers' Compensation Board (WCB) received an access to information request from a worker on January 7, 2016. The Applicant's request had two parts:

1. He requested information related to informants that have provided information about himself to WCB.
2. He requested information about himself that was in the possession of WCB and outside his claim file.

[2] On January 29, 2016, WCB responded to the Applicant indicating that records responsive to his request were not found. The response also stated that WCB refused to confirm or deny whether responsive records were found in the Fair Practices Office.

[3] On February 18, 2016, the Applicant requested a review by my office. On February 22, 2016 we provided notification to WCB of our intention to undertake a review. On February 23, 2016, we notified the Applicant.

## II RECORDS AT ISSUE

[4] WCB has either indicated that responsive records do not exist or that it refuses to confirm or deny that responsive records exist.

## III DISCUSSION OF THE ISSUES

### 1. How does FOIP apply in this situation?

[5] The WCB qualifies as a government institution for the purposes of *The Freedom of Information and Protection of Privacy Act* (FOIP) pursuant to subsection 2(d)(ii).

[6] However, section 23 of FOIP provides:

23(1) Where a provision of:

(a) any other Act; or

(b) a regulation made pursuant to any other Act;

that restricts or prohibits access by any person to a record or information in the possession or under the control of a government institution conflicts with this Act or the regulations made pursuant to it, the provisions of this Act and the regulations made pursuant to it shall prevail.

(2) Subject to subsection (3), subsection (1) applies notwithstanding any provision in the other Act or regulation that states that the provision is to apply notwithstanding any other Act or law.

(3) Subsection (1) does not apply to:

...

(k) sections 172 to 174 of *The Workers' Compensation Act, 2013*;

...

and the provisions mentioned in clauses (a) to (m) shall prevail.

[7] It should be noted that subsection 23(3) was amended in 2013 when *The Workers' Compensation Act, 2013* (WCA) was passed by the Legislature. This recent amendment makes it clear that the Legislature intended sections 172 to 174 to prevail over FOIP but intended FOIP to prevail over all other sections of the WCA.

[8] The relevant sections of WCA are:

**173(2)** Subject to subsection (4), the board shall allow access to information respecting a worker collected or otherwise gathered pursuant to this Act by the board if a written request for that information is made by:

(a) the worker;

(b) any worker's representative; or

(c) in the case of a deceased worker, any of the worker's dependants.

...

**174(2)** If an employer has requested a reconsideration of or applied for a review of a decision made pursuant to this Act with respect to a worker's claim for compensation, notwithstanding that the employer is not a party to the reconsideration or review, the board may on written request, in accordance with this section, grant the employer or the employer's representative access to the information that the board used to make its decision with respect to:

(a) the facts of the situation in which the injury occurred; or

(b) the percentage of the cost of compensation that has been assigned by the board to the injury cost record of that employer with respect to the injury of the worker arising out of and in the course of the worker's employment with the employer.

[9] The information described in sections 173 and 174 of the WCA relate to information about an individual's claim file and how a worker may access that information. FOIP does not apply where these sections of the WCA do.

[10] WCB, in its submission to my office, indicated that it does not use "informants" as referenced by the Applicant. However, it indicated that if an individual contacts WCB to provide information about a worker, the information is placed on the worker's claim file. As such, the worker would have access to that information through sections 173 and 174

of the WCA and FOIP would not apply. Therefore, my office cannot address this part of the Applicant's request.

[11] However, the Applicant also requested information about himself that is outside of his claim file. I find that FOIP does apply to information outside of a claim file and I will proceed to review WCB's response on this basis.

## **2. Did WCB perform a reasonable search for records?**

[12] Section 5 of FOIP provides the right of access as follows:

5 Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution.

[13] Section 5 is clear that access can be granted provided the records are in the possession or under the control of the government institution. FOIP does not require a government institution to prove with absolute certainty that records do not exist. It must, however, demonstrate that it has made a reasonable effort to identify and locate responsive records.

[14] A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request. The threshold that must be met is one of "reasonableness". In other words, it is not a standard of perfection, but rather what a fair and rational person would expect to be done or consider acceptable.

[15] The level of detail that can be provided to my office is outlined in my office's resource, *IPC Guide to Exemptions*. Each case requires different search strategies and details depending on the nature of the records and the way an organization manages them.

[16] In its submission, WCB provided details of the departments and areas that might possibly have responsive records. It explained who performed the search and what was searched. I am satisfied that WCB has performed a reasonable search for records with the exception of the search of the Fair Practices Office.

[17] In its response to the Applicant and submission to my office, WCB has not indicated whether it searched the Fair Practices Office, as will be discussed further in this Report. As such, I find that WCB did not perform a reasonable search for records in this area.

**3. Are the records of the Fair Practices Office in the possession or under the control of WCB?**

[18] As noted above, section 5 of FOIP provides the right access to “records that are in the possession or under the control of a government institution”.

[19] WCB’s submission to our office quotes its Fair Practices Office Policy (POL 14/2013) that states:

The Fair Practices Office does not enter any information on any WCB claim or employer file. The database established by the Fair Practices Office is only accessible by staff of the Fair Practices Office and this information is considered privileged and, therefore, is not accessible under the provisions of *The Freedom of Information and Protection of Privacy Act*. This privilege belongs to the Fair Practices Officer, rather than to any party to an issue. Others cannot waive this privilege.

[20] WCB indicated that it enclosed a copy of this policy and claimed that it “provides the background and justification for the FPO not being bound by *The Freedom of Information and Protection of Privacy Act* in terms of access requests.”

[21] There is no provision in FOIP that gives a government institution the ability to exempt a portion of an organization by policy.

[22] WCB’s submission states that the Fair Practices Office was established in 2003 as an “internal ombudsman for workers...”. I find that as the Fair Practices Office is internal to WCB and therefore WCB has possession of its records. As a result it is fully subject to the provisions of FOIP. WCB may only withhold records if the limited and specific exemptions in FOIP apply.

**4. Did the WCB properly apply subsection 7(4) of FOIP to the records requested?**

[23] Section 7 of FOIP requires that a government institution respond to an access request within 30 days in one of six specific manners. WCB has maintained that FOIP did not apply to records in the Fair Practices Office. However, I have found in this Report that FOIP does apply.

[24] In WCB's response to the access request, it indicated to the Applicant that it would neither confirm nor deny that responsive records exist. A government institution is able to rely on subsection 7(4) of FOIP to do so. Subsection 7(4) states:

7(4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.

[25] In order for subsection 7(4) of FOIP to be found to apply, there must be specific exemption(s) that could be relied upon to withhold the records if they existed.

[26] By invoking subsection 7(4) of FOIP, WCB is denying the Applicant the right to know whether a record exists. This subsection provides government institutions with a significant discretionary power that should be exercised only in rare cases. In my opinion, this provision, and its identical provision in *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP), are meant to protect highly sensitive records where confirming or denying the mere existence of a record would in itself impose significant risk. The types of risks could include risks to national security, an individual causing physical harm to others or risks to others by revealing a law enforcement investigation is underway. Although there are exemptions to protect records that fall into these categories, this provision enables the public body to address risks that could occur just by revealing a record exists. It is not meant to protect a public body from a possible lawsuit, embarrassment or negative public scrutiny. This matter is discussed thoroughly in Review Report 223-2015 & 224-2015.

[27] In this case, there is no indication that WCB has searched for responsive records in the Fair Practices Office. If the records have not been identified, then exemptions cannot be properly applied. As noted above, subsection 7(4) of FOIP may only be applied in rare circumstances. WCB has not demonstrated that those circumstances exist in this case. As such, WCB cannot rely on subsection 7(4) of FOIP at this time.

[28] If it has not already done so, WCB should search the Fair Practices Office for records responsive to the Applicant's request. It should provide a new section 7 response to the Applicant, indicating if any exemptions apply.

#### **IV FINDINGS**

[29] I find that FOIP does not apply to records responsive to the first part of the Applicant's request as they are kept in his claim file. I find that FOIP applies to records outside of the Applicant's claim file.

[30] I find that WCB performed a reasonable search for records, with the exception of its search for records in the Fair Practices Office.

[31] I find that WCB has possession of the records found in the Fair Practices Office; therefore FOIP applies to these records.

[32] I find that WCB cannot rely on subsection 7(4) of FOIP at this time.

**V RECOMMENDATIONS**

[33] I recommend that WCB change its policy and procedure with respect to the application of FOIP to records in the Fair Practices Office.

[34] If it has not already done so, I recommend WCB search the Fair Practices Office for records responsive to the Applicant's request and provide a new section 7 response to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 20th day of May, 2016.

Ronald J. Kruzeniski, Q.C.  
Saskatchewan Information and Privacy  
Commissioner