



REVIEW REPORT 110-2017

Ministry of Labour Relations and Workplace Safety

February 28, 2018

Summary: The Applicant requested a copy of his/her case file from Labour Relations and Workplace Safety (LRWS). LRWS provided partial access to the file. Upon receipt, the Applicant believed records were missing from the copy of the record received. LRWS denied that records were missing. The Applicant requested a review by the Office of the Information and Privacy Commissioner (IPC). Upon review, the Commissioner found that the search conducted by LRWS for records responsive to the Applicant's access to information request was reasonable and adequate for purposes of FOIP. The Commissioner recommended that LRWS take no further action.

I BACKGROUND

[1] On April 19, 2017, the Ministry of Labour Relations and Workplace Safety (LRWS) received an access to information request from the Applicant for:

Year 2000/2001 complaint [Applicant] [name of employer]

[Applicant] contacted Labor Board in Nov 2000 as he was being discriminated by against by [sic] [name of employer]. Should be letters to [LRWS employee]. Any and all letters, notes, emails, entire file, including handwritten notes

[2] LRWS responded to the request by a letter dated May 12, 2017, indicating that access was partially granted. LRWS advised the Applicant that portions of the record were being withheld pursuant to subsection 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On May 31, 2017, my office received a Request for Review from the Applicant. The Applicant asserted that records were missing from the package he received from LRWS and requested my office conduct a review.

[4] My office notified LRWS and the Applicant of our intention to undertake a review on June 2, 2017. In my office's notification to LRWS, my office requested a submission outlining the search efforts undertaken by LRWS to locate the records alleged to be missing.

[5] On June 12, 2017, LRWS provided a submission to my office.

II RECORDS AT ISSUE

[6] The Applicant asserted that the following four records were missing:

1. A letter explaining the outcome of the investigation. A letter dated December 4, 2000 was provided which states "an officer will investigate your claim and report upon completion";
2. Management was found guilty under *The Labour Standards Act*, there should be a letter explaining the infractions. One of the pages of the handwritten notes states "... filed a grievance using *The Labour Standards Act*, showing a violation";
3. A hearing decision; and
4. A decision dated December 18 with a guilty finding.

[7] LRWS has asserted that the records do not exist. Therefore, the focus of this review is the search efforts conducted by LRWS.

III DISCUSSION OF THE ISSUES

[8] LRWS is a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP.

1. Did LRWS conduct an adequate search?

[9] Section 5 of FOIP provides an Applicant the right of access to records in the possession or control of a government institution:

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.

[10] Section 5 is clear that access to records must be granted if they are in the possession or under the control of the government institution subject to any exemptions under Part III of FOIP.

[11] FOIP does not require a government institution to prove with absolute certainty that records responsive to an access to information request do not exist. It must, however, demonstrate that it has conducted a reasonable search to locate them.

[12] A *reasonable search* is one in which an employee, experienced in the subject matter, expends a reasonable effort to locate records which are reasonably related to the request. A reasonable effort is the level of effort you would expect of any fair, sensible person searching areas where records are likely to be stored. What is reasonable depends on the request and related circumstances.

[13] When conducting a review of a government institution's search efforts, details are requested that help my office understand the level of effort made to locate the records. The government institution's submission to my office should outline the search strategy conducted which can include:

- For personal information requests – explain how the individual is involved with the public body (i.e. client, employee, former employee etc.) and why certain departments/divisions/branches were included in the search.
- For general requests – tie the subject matter of the request to the departments/divisions/branches included in the search. In other words, explain why certain areas were searched and not others.

- Identify the employee(s) involved in the search and explain how the employee(s) is experienced in the subject matter.
- Explain how the records management system is organized (both paper & electronic) in the departments/divisions/branches included in the search:
 - Describe how records are classified within the records management system. For example, are the records classified by:
 - alphabet
 - year
 - function
 - subject
 - Consider providing a copy of your organizations record schedule and screen shots of the electronic directory (folders & subfolders).
 - If the record has been destroyed, provide copies of record schedules and/or destruction certificates.
 - Explain how you have considered records stored off-site.
 - Explain how records that may be in the possession of a third party but in the public body's control have been searched such as a contractor or information service provider.
 - Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Which folders within the records management system were searched and explain how these folders link back to the subject matter requested?
 - For electronic folders – indicate what key terms were used to search if applicable.
- On what dates did each employee search?
- How long did the search take for each employee?
- What were the results of each employee's search?
 - Consider having the employee that is searching provide an affidavit to support the position that no record exists or to support the details provided. For more on this, see the IPC resource, *Using Affidavits in a Review with the IPC* available on our website.

[14] The above list is meant to be a guide. Each case will require different search strategies and details depending on the records requested.

[15] In its submission, LRWS broke down the search it conducted. Attached to its submission was a copy of its *Operational Records Retention, Classification and Disposal Schedule, No 410*. LRWS conducted its search on or about April 19, 2017. An employee with 20 years of experience and responsibility for filing of closed files conducted the search and it took approximately two hours. Closed files are filed according to the year it was closed and then alphabetically. The files are stored on-site. LRWS also has an electronic case management system called Oracle. Initially, a name search was conducted in Oracle. The search was successful. Some officers' notes were located on Oracle. Following this, the search for the paper file commenced. The paper file was located in a file cabinet fully intact.

[16] Regarding the four records the Applicant claims were missing, LRWS stated that it provided the Applicant with the entire file. Further, it asserted the Applicant is speculating that these records are missing and therefore LRWS' response to my office is largely speculation. LRWS addressed the four records that are alleged to be missing as follows:

- 1. A letter explaining the outcome of the investigation. A letter dated December 4, 2000 was provided which states "an officer will investigate your claim and report upon completion."***

The file contains a letter to the Applicant dated January 22, 2001, from the Labour Standards Officer at the time and indicates the file was looked into and finalized.

According to LRWS, the letter specifically states:

"Following our telephone conversation of this morning, this is to advise that since [name of employer] has re-instated the same salary and that you are being re-imbursed to November 4, 2000, the situation is rectified in accordance to the *Labour Standards Act*. Since the company has complied with the legislation this office will not be pursuing any further action and your file is closed."

Based on this, LRWS asserts that there was no formal "report" rather the file was closed via written response to the Applicant. LRWS states that this type of response is common practice.

- 2. Management was found guilty under The Labour Standards Act, there should be a letter explaining the infractions. One of the pages of the handwritten notes states "...filed a grievance using The Labour Standards Act, showing a violation."***

LRWS asserted that the Applicant received a copy of the file as requested. In the copy, page 49 is a handwritten note. The handwritten note states “[name removed] filed a grievance using *The Labour Standards Act*, showing a violation.” The identifiable personal information of another individual was removed from the Applicant’s version.

The sections referenced in the handwritten note (sections 74(1) and 44.2) are sections from the previous *Labour Standards Act* which refer to discrimination and termination. LRWS states that it has no knowledge of the outcome of this possible grievance.

Further, LRWS states that the comment made on page 49 also states “August 6, November 1, December 18 – found guilty on charge”. LRWS states that the Applicant’s claim was from December 4, 2000 to January 22, 2001, therefore, the dates could not be in relation to the Applicant’s employment standards file. It was before the Applicant filed a claim.

3. *A hearing decision*

LRWS speculated that the Applicant may believe there to be a hearing decision because of a comment made on page 49 which states “Hearing decision-if injuries continue over time he’ll eventually be let go.”

LRWS states it has no knowledge of any hearing decision related to this matter. The Labour Standards officer at the time has been retired for a long time and LRWS cannot comment on her handwritten notes. LRWS further states it has no record of a hearing decision for the Applicant’s case. Hearing decisions are made public and kept on file. LRWS asserted that the handwritten note could be referencing another hearing decision with another division or third party such as Occupational Health and Safety or the Applicant’s union at the time.

A letter from Executive Director of Employment Standards on July 10, 2017 explained to the Applicant that he had searched the directory and had no record of any hearings on the matter.

4. *A decision dated December 18 with a guilty finding*

LRWS asserted that as explained above, there are no indications of any prosecution laid by Labour Standards. In fact, it asserts, there were no prosecutions in Labour Standards in the years 2000 and 2001 as it did not have prosecutorial authority at that time. LRWS suggests the guilty finding may have been with another government institution or public body.

[17] As noted earlier, a government institution does not have to prove with absolute certainty that records responsive to an access request do not exist. It must, however, demonstrate that it has conducted a reasonable search to locate them. The threshold that must be met

is one of “reasonableness”. Reasonableness does not mean perfection but rather an effort that is objectively diligent and prudent in all the circumstances.

[18] Based on what has been provided to my office, I find that LRWS has demonstrated that its search for records was reasonable and adequate for purposes of FOIP. The Applicant’s claim that the records exist is largely based on speculation and conclusions drawn from snippets of information in the copy of the file the Applicant received. I am persuaded by LRWS’ attempts to explain why the four records do not exist.

IV FINDING

[19] I find that LRWS has demonstrated that its search for records responsive to the Applicant’s access to information request was reasonable and adequate for purposes of FOIP.

V RECOMMENDATION

[20] I recommend LRWS take no further action.

Dated at Regina, in the Province of Saskatchewan, this 28th day of February, 2018.

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