



REVIEW REPORT 248-2020, 167-2021

Ministry of Labour Relations and Workplace Safety

August 27, 2021

Summary:

The Applicant submitted an access to information request to the Ministry of Labour Relations and Workplace Safety (LRWS). LRWS responded by providing the Applicant access to partially redacted records withholding pursuant to subsections 17(1)(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). It also provided the Applicant access to body camera footage by allowing the Applicant to view the footage in-person. The Applicant appealed to the Commissioner. In the course of the review, LRWS also raised subsections 15(1)(c) and (k) of FOIP as reasons for withholding portions of the records. The Commissioner found that LRWS did not respond to the Applicant's access request within the legislated timeline and that subsection 17(1)(a) of FOIP did not apply to the two-page draft policy. However, he found that subsection 15(1)(c) of FOIP applied to the redacted portions of the records. Further, he found that LRWS conducted a reasonable search for records. Finally, he found that LRWS was not obligated under FOIP to provide the Applicant with a copy of the body camera footage filmed pursuant to subsection 10(3)(c) of FOIP. The Commissioner recommended that LRWS release a copy of the draft policy to the Applicant, but to continue to withhold the redacted portions of pages 1 to 3, 7, and 8 of the records at issue.

I BACKGROUND

[1] On October 5, 2020, the Ministry of Labour Relations and Workplace Safety (LRWS) received the following access to information request:

- 1 – Policy regarding Body Camera usage for Occupational Health and Safety Officers
- 2 – Body Camera Footage from Officer Kliever Sept 22, 2020 at above named address
- 3 – Body Camera Footage from Officer Kliever Sept 28, 2020 at above named address
- 4 – Workers [sic] Compensation Board documents/files/reference material utilized by Officer Kliever in Report #1-00012341

5 – Any photographs or other documentation, including but not limited to notes, taken by Officer Kliever on Sept 22, 2020 and Sept 28, 2020 at above named address

6 – Any photographs or other documentation, including but not limited to notes, taken by Officer Tallmadge on Sept 22, 2020 and Sept 28, 2020 at above named address

- [2] In a letter dated November 4, 2020, LRWS responded to the Applicant. Even though the letter was dated November 4, 2020, the letter was emailed to the Applicant on November 5, 2020. The letter provided as follows:

Thank you for your access to information request received in this office on October 5, 2020.

Please find attached records responsive to your request. Please note, pursuant to sections 29(1) and 17(b)(a) [sic] of *The Freedom of Information and Protection of Privacy Act* (the Act) some of the information contained in the record has been redacted and withheld. If released, the records would disclose personal information about an identifiable individual and would reveal policy options and advice from officials.

As for the footage captured by the body cams, please note that pursuant to section 10(3) of the Act, a head may give access to a record that is a [sic] produced for visual reception by permitting the applicant to view the record. Therefore, please contact Jenna Orban, Access Coordinator at 306-787-6613 to arrange to view the footage.

If you would like to exercise your right to request a review of this decision, you may do so by completing a “Request for Review” form and forwarding it to the Saskatchewan Information and Privacy Commissioner within one year of this notice. Your completed form can be sent to #503 - 1801 Hamilton Street, Regina, Saskatchewan, S4P 4B4. This form is available at the same location which you applied for access or by contacting the Office of the Information and Privacy Commissioner at 306-787-8350.

- [3] As mentioned in LRWS’ letter to the Applicant, LRWS indicated that the Applicant could view the footage captured by body cameras pursuant to subsection 10(3) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Therefore, between November 5, 2020 and November 12, 2020, LRWS and the Applicant exchanged emails to arrange for a time for the Applicant to view the body camera footage that they had requested. In an email dated November 10, 2020 to the Applicant, LRWS revealed that the officer did not film on September 22, 2020. Therefore, only body camera footage filmed on September 28, 2020 would be viewed. The Applicant viewed the footage on November 13, 2020.

- [4] On November 30, 2020, the Applicant requested a review by my office. The Applicant requested that my office review whether LRWS met the 30 calendar day requirement, whether subsection 29(1) of FOIP was properly applied, and the fact that the body camera policy was being withheld even though they were told they could gain access if they submitted an access request.
- [5] On December 2, 2020, LRWS indicated to my office there was a typo in its letter dated November 4, 2020 to the Applicant. It said it was relying on subsection 17(1)(a) of FOIP to withhold the body camera policy, and not “17(b)(a)”.
- [6] In an email dated December 3, 2020, the Applicant requested that my office review the following:
- LRWS withholding the body camera policy;
 - LRWS’ reliance on subsection 29(1) of FOIP;
 - LRWS’ not indicating in its letter dated November 4, 2020 that body camera footage from September 22, 2020 did not exist pursuant to subsection 7(2)(e) of FOIP;
 - LRWS’ only allowing the Applicant to view footage instead of receiving a copy of the record; and
 - Whether LRWS met the legislated timeline to respond to the access request.
- [7] In an email dated December 9, 2020, the Applicant also requested that my office review whether LRWS’ efforts to search for body camera footage filmed on September 22, 2020 was reasonable.
- [8] On December 11, 2020, my office notified both LRWS and the Applicant that it would be undertaking a review of all the issues noted above.
- [9] In its submission to my office, LRWS raised subsections 15(1)(c) and (k) of FOIP as additional reasons for refusing the Applicant access to portions of records.

II RECORDS AT ISSUE

[10] At issue are the Officers’ notes and the draft policy on body worn cameras.

Pages	Description	Release/Withheld	Exemptions
1 to 5	OHS Officer Notes (Officer Kliewer) September 22, 2020	Released to the Applicant in part	29(1), 15(1)(c), (k)
7 to 10	OHS Officer Notes (Officer Tallmadge) September 22, 2020	Released to the Applicant in part	29(1), 15(1)(c), (k)
N/A	Draft Occupational Health and Safety Division Policy A16 – Body Worn Camera Technology (BWC Technology Policy)	Withheld in full	17(1)(a)

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[11] LRWS is a “government institution” as defined by subsection 2(1)(d)(i) of FOIP. Therefore, I find that I have jurisdiction to review this matter.

2. Did LRWS’ response to the Applicant meet the requirements of section 7 of FOIP?

a. Did LRWS respond to the Applicant’s access request within the legislated timeline?

[12] Subsection 7(2) of FOIP provides that a government institution is to respond to an Applicant’s access request within 30 days. Subsection 7(2) of FOIP provides:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

...

[13] In my Review Report 152-2020, I said the following on how to determine when the 30-day clock begins:

Section 2-28 of *The Legislation Act* provides guidance on the computation of time and can be applied to the 30 day calculation as follows:

- a. The first day the access request is received is excluded in the calculation of time;
- b. If the due date falls on a holiday, the time is extended to the next day that is not a holiday;
- c. If the due date falls on a weekend, the time is extended to the next day the office is open; and
- d. As [FOIP] expresses the time in a number of days, this is interpreted as 30 calendar days, not business days.

[14] In the background of this Report, I noted how LRWS received the Applicant's access request on October 5, 2020. As such, LRWS had until November 4, 2020 to respond to the Applicant's access request.

[15] LRWS responded to the Applicant's access request in a letter dated November 4, 2020. However, the letter was not sent via email to the Applicant until November 5, 2020. This was one day past the due date. Therefore, I find that LRWS did not respond to the Applicant's access request within the legislated timeline.

[16] In its submission, LRWS acknowledged that it did not respond within the legislated timeline. It indicated that its Deputy Minister signed the letter on November 4, 2020. However, the letter was not sent until the morning of November 5, 2020.

b. Should LRWS have responded to the Applicant's access request pursuant to subsection 7(2)(e) of FOIP?

[17] In addition to requiring government institutions to respond to access requests within 30 days, subsections 7(2)(a) to (e) of FOIP provide what the content of the written response should be. Subsections 7(2)(a) to (e) of FOIP provide:

7(2) The head shall give written notice to the applicant within 30 days after the application is made:

- (a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;
- (b) if the record requested is published, referring the applicant to the publication;
- (c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;
- (d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;
- (e) stating that access is refused for the reason that the record does not exist;
- (f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4); or
- (g) stating that the request has been disregarded pursuant to section 45.1, and setting out the reason for which the request was disregarded.

[18] Also, subsection 5.1(1) of FOIP places the duty upon government institutions to respond to applicants openly, accurately, and completely. It provides:

5.1(1) Subject to this Act and the regulations, a government institution shall respond to a written request for access openly, accurately and completely.

[19] As I said in Review Report 347-2019, I explained that to respond *openly* means to provide access to all or part of a record and to be upfront in the reasons for refusing access. To respond *accurately* means to understand every part of the access request, and to clarify the nature if required. To respond *completely* means to not leave any gaps in a response to an applicant, thereby eliminating confusion.

[20] In the background of this Report, I quoted the Applicant's access request. Among the six records that the Applicant requested, the Applicant requested footage from body cameras filmed on September 22, 2020 and September 28, 2020.

[21] In its letter dated November 4, 2020 to the Applicant's access request, LRWS indicated that some of the information contained within the records were being withheld pursuant to

subsections 29(1) and 17(b)(a) of FOIP. (LRWS clarified it meant to cite subsection 17(1)(a) of FOIP instead of the typo “17(b)(a)”.) Therefore, LRWS provided a response pursuant to subsection 7(2)(a) and (d) of FOIP. LRWS’ response did not indicate that any of the six records did not exist pursuant to subsection 7(2)(e) of FOIP.

[22] In its submission to my office, LRWS asserted that when it receives an access request with multiple components, FOIP requires that it provide one response to the Applicant. It asserted that FOIP does not require it to provide a response to every component of the Applicant’s access request. It argued that if it did respond to every component of an applicant’s access request, it would result in a convoluted response. It argued that this “holistic approach” is one adopted in other sections of FOIP as well. For example, it argued that a fee estimate issued pursuant to section 9 of FOIP is based on the whole access request rather than each component.

[23] It is difficult to accept LRWS’ argument that its November 4, 2020 letter to the Applicant would have become convoluted to have indicated that body camera footage from September 22, 2020 did not exist. I do not find that omitting this detail is a “holistic approach,” but rather an incomplete one. Without such information, an applicant will not know what to appeal to my office if they receive an incomplete response pursuant to section 7 of FOIP and their right to appeal to my office is hindered. Subsection 49(1) of FOIP provides that the Applicant may request a review by the Commissioner if they are not satisfied with the head’s decision pursuant to section 7 of FOIP. Subsection 49(1)(a) of FOIP provides:

49(1) Where:

(a) an applicant is not satisfied with the decision of a head pursuant to section 7, 12 or 37;

...

the applicant or individual may apply in the prescribed form and manner to the commissioner for a review of the matter.

- [24] As such, LRWS should have indicated that body camera footage from September 22, 2020 did not exist in its November 4, 2020 letter to the Applicant. I find that LRWS' section 7 response was deficient.
- [25] In this case, it was fortunate that the Applicant followed up with LRWS so that there was an opportunity for the Applicant to learn LRWS' position was that the body camera footage from September 28, 2020 did not exist. This enabled the Applicant to request that my office review the issue of a deficient section 7 response.
- [26] I note that LRWS indicated to the Applicant in an email (also dated November 10, 2020), that it would "aim to be more clear" in its responses going forward.
- [27] I find that LRWS should have responded to the Applicant pursuant to subsection 7(2)(e) of FOIP in regards to the Applicant's request for the body camera footage from September 22, 2020. I recommend that the LRWS review its policies and procedures and make the necessary changes so that it provides complete responses to applicants pursuant to section 7 of FOIP.

3. Did LRWS properly apply subsection 17(1)(a) of FOIP?

- [28] LRWS applied subsection 17(1)(a) of FOIP to its two-page draft policy entitled "#A16 - Body Worn Camera Technology" (BWC Technology Policy).
- [29] Subsection 17(1)(a) of FOIP provides:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

- [30] My office uses the following two-part test to determine if subsection 17(1)(a) of FOIP applies:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

(*Guide to FOIP, Chapter 4: Exemptions from the Right of Access*, Updated April 30, 2021, at pp. 124 to 126 (Guide to FOIP))

[31] Below, I will analyze to determine if subsection 17(1)(a) of FOIP applies to the two-page policy.

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[32] *Advice* is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. A *proposal* is something offered for consideration or acceptance. A *recommendation* is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. *Analyses* is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements. *Policy options* are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made (Guide to FOIP, pp. 124 to 126).

[33] In its submission, LRWS indicated that the policy was in its draft form. It asserted that the draft policy constitutes “advice” with respect to the issue of body worn camera technology. It said it applied subsection 17(1)(a) of FOIP to the entire draft policy because it was in draft form and was not complete. It said that, at the time of the access request, there was no formal policy.

- [34] In the course of the review, my office sought additional information regarding this matter, including if there was no formal policy, then which policy/procedure/guidelines were the Officers relying on when conducting their inspections of the Applicant's business?
- [35] LRWS indicated that the draft policy was authored by a Senior Policy Analyst. It was approved by the Executive Director of Occupational Health and Safety (who has since retired). It indicated that the draft policy still had to be approved by the Assistant Deputy Minister and then the Deputy Minister. LRWS also clarified that "body camera usage was part of a pilot project. The draft policy was viewed as a living document to be reviewed and updated as the body camera usage was assessed." LRWS explained that there still is no final policy since the pilot project is still underway. It said that the policy (and procedures) document around the use of body cameras can only be finalized after the pilot project is complete.
- [36] LRWS cited paragraph 44 of the Supreme Court of Canada's (SCC) decision *John Doe v Ontario (Finance)*, 2014 SCC 36 (*John Doe v Ontario (Finance)*), which states:

[44] In my opinion, Evans J. (as he then was) in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245, persuasively explained the rationale for the exemption for advice given by public servants. Although written about the equivalent federal exemption, the purpose and function of the federal and Ontario advice and recommendations exemptions are the same. I cannot improve upon the language of Evans J. and his explanation and I adopt them as my own:

To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.

It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighting of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. [paras. 30-31]

[Emphasis added]

- [37] I note that the records at issue in *John Doe v Ontario (Finance)* are distinct from the draft policy at issue in this review. In *John Doe v Ontario (Finance)*, there were five records that were undated drafts of a policy options paper. These undated drafts of a policy options paper presented an express recommendation against some options and advice regarding all the options. The paper provides the author's opinion as to the advantages and disadvantages of alternative effective dates of amendments. The paper was prepared to serve as the basis for making a decision between the presented options. Therefore, the draft policy options in the paper were not in effect.
- [38] However, the draft policy at issue in this review appears to have been in effect as it was a "living document" when the Officers inspected the Applicant's business. As a living document in a pilot project, it would seem as though the draft policy would provide instruction or guidance to officers. Amendments can be made to the draft policy based on the Officer's usage of the body worn camera since it is a living document.
- [39] As such, it is conceivable that the draft BWC Technology Policy as a living document provided instructions or guidelines for the Officers during the inspection at the Applicant's business. Instructions or guidelines do not qualify as advice, proposals, recommendations, analyses or policy options. In other words, the Officers relied on the draft policy as a living document in carrying out its activities at the time they were inspecting the Applicant's business. The draft policy did not provide advice, proposals, recommendations, analyses or policy options to the Officers to act upon as they conducted their inspection of the Applicant's workplace. Therefore, the first part of the test is not met.
- [40] Since all parts of the test must be met, I do not need to consider the second part of the test. I find that subsection 17(1)(a) of FOIP does not apply to the two-page draft BWC Technology Policy. I recommend that LRWS release the draft BWC Technology Policy to the Applicant so that the Applicant understands the basis for the Officer's actions with

regards to the usage of the body worn cameras at the time of the inspections at the Applicant's workplace.

4. Did LRWS properly apply subsection 15(1)(c) of FOIP?

[41] LRWS applied subsection 15(1)(c) of FOIP to portions of pages 1 to 3, 7, and 8, which were the Officers' notes. Subsection 15(1)(c) of FOIP provides:

15(1) A head may refuse to give access to a record, the release of which could:

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[42] My office applies the following two-part test to determine if subsection 15(1)(c) of FOIP applies:

1. Does the government institution's activity qualify as a "lawful investigation"?
2. Does one of the following exist?
 - a. Could release of the information interfere with a lawful investigation?
 - b. Could release of the information disclose information with respect to a lawful investigation?

(Guide to FOIP, pp. 52 to 53)

[43] I will analyze each part of the test below.

1. Does the government institution's activity qualify as a "lawful investigation"?

[44] Page 52 of the Guide to FOIP provides that a "lawful investigation" is an investigation that is authorized or required and permitted by law. In order to meet this part of the two-part test, the government institution should identify the legislation under which the investigation is occurring.

[45] In its submission, LRWS asserted that subsection 3-63(1) of *The Saskatchewan Employment Act* authorizes it to conduct an inspection. Subsection 3-63(1) of *The Saskatchewan Employment Act* provides:

3-63(1) Subject to subsection (4), an occupational health officer may enter any premises, place of employment, worksite or vehicle and conduct an inspection for the purpose of:

(a) preventing work-related incidents, injuries or illnesses;

(b) ascertaining the cause and particulars of a work-related incident, injury or illness or of an incident that had the potential to cause a work-related incident, injury or illness;

(c) making an inquiry in response to a complaint concerning occupational health and safety; or

(d) determining whether there is compliance with this Part, the regulations made pursuant to this Part, a compliance undertaking, a notice of contravention or an order issued pursuant to a prescribed Act or regulation.

[46] LRWS also explained that section 3-78 of *The Saskatchewan Employment Act* provides the offences that could result from an inspection and section 3-79 of *The Saskatchewan Employment Act* provides the penalties.

[47] I must determine if an “inspection” can qualify as a “lawful investigation”. In its submission, the LRWS asserted that an inspection falls within the definition of lawful investigation. It said that the “inspection at issue is one that is authorized or permitted by law that could lead to a penalty or sanction imposed under *The Saskatchewan Employment Act*”.

[48] In Review Report 381-2019 at paragraph [20], I found that inspections under *The Northern Municipalities Act* qualifies as a lawful investigation. In Order 96-019, the Office of the Information and Privacy Commissioner of Alberta (AB IPC) found that that the authority to inspect falls within the definition of “investigate” if the inspection has the potential to result in a penalty or sanction being imposed under the particular statute or regulation under consideration. AB IPC’s Order 96-019 provided:

[15.] Black’s Law Dictionary defines “investigation” as follows:

To follow up step by step by patient inquiry or observation. To trace or track; to search into; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.

[16.]...To fall within the definition, an investigation must have the potential ...to result in a penalty or sanction being imposed under the particular statute or regulation under consideration. It is not possible to determine in advance of an investigation whether a penalty or sanction will be imposed. ...

...

[19.] Under section 10 of the *Public Contributions Act*, the public body has the authority to inspect. In my view, the authority to inspect falls within the definition of “investigate”.

[49] In this case, I find that an inspection under subsection 3-63(1) of *The Saskatchewan Employment Act* qualifies as a lawful investigation because the inspection has the potential to result in a penalty or sanction under *The Saskatchewan Employment Act*. I find that the first part of the two-part test is met.

2. Does one of the following exist?

a. Could release of the information interfere with a lawful investigation?

b. Could release of the information disclose information with respect to a lawful investigation?

[50] In its submission, LRWS submitted that the release of the redacted portions would disclose information with respect to a lawful investigation. It asserted the records were in regards to the investigation undertaken pursuant to subsection 3-63(1) of *The Saskatchewan Employment Act*. Based on a review of the redacted portions of the officers’ notes, I find that they are with respect to a lawful investigation.

[51] Based on the above, both parts of the two-part test are met. I find that subsection 15(1)(c) of FOIP applies to the redacted portions of pages 1 to 3, 7, and 8 of the records at issue. I recommend that LRWS continue to withhold the redacted portions of pages 1 to 3, 7, and 8.

[52] I should note that LRWS also applied subsections 15(1)(k) and 29(1) of FOIP to the same portions of pages 1 to 3, 7, and 8 as it applied subsection 15(1)(c) of FOIP. Since I have found that subsection 15(1)(c) of FOIP applies to these portions, I do not need to consider subsections 15(1)(k) and 29(1) of FOIP.

5. Did LRWS conduct a reasonable search for records?

[53] Section 5 of FOIP provides an applicant the right of access to records in the possession or under the control of a government institution. Section 5 of FOIP provides:

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.

[54] As I found earlier in this Report, LRWS should have cited subsection 7(2)(e) of FOIP in its section 7 response to the Applicant. LRWS later indicated that body camera footage from September 22, 2020 did not exist.

[55] FOIP does not require a government institution to prove with absolute certainty that the record responsive to an access to information request does not exist. However, it must demonstrate that it has conducted a reasonable search to locate the record.

[56] 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 access 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 access request and related circumstances (Guide to FOIP, Chapter 3: Access to Records, Updated June 29, 2021 at page 7).

[57] When my office conducts 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 record in

question. The 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 government institution (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 organization’s 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 government institution’s control have been searched such as a contractor or information management service provider.
- Explain how a search of mobile electronic devices was conducted (i.e. laptops, smart phones, cell phones, tablets).
- Explain which folders within the records management system were searched and how these folders link back to the subject matter requested. For electronic folders – indicate what key terms were used to search if applicable.

- Indicate the calendar dates each employee searched.
- Indicate how long the search took for each employee.
- Indicate what the results were for 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 my office's resource, *Using Affidavits in a Review with the IPC* available on my office's website.

(Guide to FOIP, Chapter 3: Access to Records, Updated June 29, 2021 at pp. 9 to 10)

[58] The above list is meant to be a guide. It is not an exhaustive list of what could be considered by my office in a review. Providing the above details is not a guarantee that my office will find that the search efforts were reasonable. Each case will require different search strategies and details depending on the records requested.

Search efforts

[59] In its submission, the LRWS indicated that it was the Director of Risk Assessment and Planning that conducted the search for responsive records. LRWS asserted that the Director contacted the manager and supervisor (respectively) of the two officers who conducted the inspection to ensure all inspection records were in the folder. The manager and supervisor confirmed that all inspection records were in the folder. Further, the manager advised the Director that no body camera footage was recorded on September 22, 2020. Therefore, that particular record does not exist.

Handwritten notes by Officers

[60] Based on a review of the handwritten notes by each of the Officers, the Officer who conducted the inspection on September 28, 2020 made a note that said "BWC activated". As mentioned, the Applicant was provided access to the footage recorded on September 28, 2020. However, when I review the notes by the Officer who conducted the inspection on September 22, 2020, there is no notation indicating that the "BWC" (or body worn

camera) was activated. Therefore, this is another reason to believe that no footage was recorded during the September 22, 2020 inspection.

Requirements (or its lack of) for Officers to activate body worn camera

[61] In correspondence with my office when requesting a review by my office, the Applicant indicated that they strongly believed that Officers are required by policy (not regulation or law) to have their body camera on for all interactions. The Applicant noted that since they were denied access to the body camera policy, it is impossible for the Applicant to know if there is a video from September 22, 2020. The Applicant indicated that the Officer was in fact wearing a body camera on September 22, 2020.

[62] To determine if there was a basis for the Applicant's belief that Officers are required to have their body worn camera turned on for all interactions, I reviewed its draft BWC Technology policy and its "Appendix XIII – The Body Worn Camera (BWC) Technology Procedure Manual" (BWC Procedure Manual). Since LRWS treated the draft policy as a living document in its pilot project, perhaps the draft policy or draft procedure *at the time* of the inspections would have provided guidance to the Officers when they conducted their inspections of the Applicant's workplace. If either the draft BWC Technology Policy or the BWC Procedure Manual required the Officers to have their body worn cameras activated, that would provide a basis for believing that a recording from September 22, 2020 does exist.

[63] First, based on a review, the draft BWC Technology Policy does not require an Officer to have the body worn camera turned on during interactions. Second, when I review the BWC Procedure Manual provided to my office during this review, I must note that the effective date is April 28, 2021. Therefore, this particular version of the procedure was not in effect at the time of the access request. I asked LRWS if there was a previous version of the BWC Procedure Manual (which could have provided guidance to the Officers when conducting their inspections of the Applicant's workplace). LRWS indicated there were no older versions of the procedure manual that were available. As such, I cannot conclude that a version of the BWC Procedure Manual would have existed at the time of the Officer's

inspections that would have required the Officers to activate their body worn cameras when they inspected the Applicant's workplace.

[64] Based on what has been provided to me, I am satisfied that LRWS conducted a reasonable search for records.

6. Does LRWS have an obligation to provide the record in the format requested by the Applicant?

[65] As described in the background section of this Report, LRWS provided the Applicant access to records by enabling them to view the body camera footage filmed on September 28, 2020. It did not provide a copy of the camera footage to the Applicant. The Applicant requested that my office review the manner in which the LRWS provided access to the record. The Applicant indicated the following with regards to this matter:

- that by only allowing them to view the record, access to the record was delayed by nine days;
- that by only allowing them to view the record, LRWS placed an unnecessary burden upon the Applicant to arrange transportation, to investigate security and health protocols;
- that two Occupational Health and Safety Officers which were required to observe the Applicant while they viewed the record was "a waste of government resources"; and
- that requiring them to attend LRWS' premises during the pandemic increased risk upon the Applicant's health and safety, along with their entire team and business.

[66] Section 10 of FOIP provides:

10(1) If an applicant is entitled to access pursuant to subsection 9(1), a head shall provide the applicant with access to the record in accordance with this section.

(2) Subject to subsection (3), if a record is in electronic form, a head shall give access to the record in electronic form if:

- (a) it can be produced using the normal computer hardware and software and technical expertise of the government institution;

(b) producing it would not interfere unreasonably with the operations of the government institution; and(c)it is reasonably practicable to do so.

(3) If a record is a microfilm, film, sound or video recording or machine-readable record, a head may give access to the record:

(a) by permitting the applicant to examine a transcript of the record;

(b) by providing the applicant with a copy of the transcript of the record; or

(c) in the case of a record produced for visual or aural reception, by permitting the applicant to view or hear the record or by providing the applicant with a copy of it.

(4) A head may give access to a record:

(a) by providing the applicant with a copy of the record; or

(b) if it is not reasonable to reproduce the record, by giving the applicant an opportunity to examine the record.

[67] In its submission, LRWS indicated that FOIP does not require it to provide a copy of the video recording to the Applicant. It also asserted that FOIP does not require it to demonstrate that providing a copy of the video record was not possible or not reasonable.

[68] In my Review Report 138-2015, I said the following in regards to the manner of access:

Section 10 concerns how access will be given. Subsection 10(3)(c) clearly provides that the public body has the option to provide access by way of viewing when the record is produced for visual or aural reception. There is no qualifier that must be met by the public body when opting for this mode of access other than the record being produced for visual or aural reception. It is at the discretion of the public body. Therefore, I find that Justice is not obligated under FOIP to provide the Applicant with a copy of the video recordings in this case pursuant to subsection 10(3)(c) of FOIP.

[69] There is no qualifier that must be met by the government institution when opting to provide access pursuant to subsection 10(3)(c) of FOIP. Therefore, I find that LRWS is not obligated under FOIP to provide the Applicant with a copy of the body camera footage filmed on September 28, 2020 in this case pursuant to subsection 10(3)(c) of FOIP.

IV FINDINGS

- [70] I find that I have jurisdiction to review this matter.
- [71] I find that LRWS did not respond to the Applicant's access request within the legislated timeline.
- [72] I find that LRWS' section 7 response was deficient.
- [73] I find that LRWS should have cited subsection 7(2)(e) of FOIP in its section 7 response to the Applicant in regards to the Applicant's request for the body camera footage from September 22, 2020.
- [74] I find that subsection 17(1)(a) of FOIP does not apply to the two-page draft BWC Technology Policy.
- [75] I find that subsection 15(1)(c) of FOIP applies to the redacted portions of pages 1 to 3, 7, and 8.
- [76] I find that LRWS has conducted a reasonable search for records.
- [77] I find that LRWS is not obligated under FOIP to provide the Applicant with a copy of the body camera footage filmed on September 28, 2020 in this case pursuant to subsection 10(3)(c) of FOIP.

V RECOMMENDATIONS

- [78] I recommend that LRWS review its policies and procedures and make the necessary changes so that it provides complete responses to applicants pursuant to section 7 of FOIP.
- [79] I recommend that LRWS release the draft BWC Technology Policy to the Applicant.

[80] I recommend that LRWS continue to withhold the redacted portions of pages 1 to 3, 7, and 8 of the records at issue.

Dated at Regina, in the Province of Saskatchewan, this 27th day of August, 2021.

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