SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT F-2012-002

Saskatchewan Workers' Compensation Board

Summary: The Applicant submitted a request for access to the Saskatchewan Workers' Compensation Board (WCB) for records involving the Members of the Board of WCB including minutes and correspondence with the Labour Minister and external bodies. In response, WCB provided only a copy of the "claim file". The Applicant clarified that he was not seeking his claim file but rather other documents and materials involving the Board and its Members. WCB initially took the position that there would be no records responsive to the access request in any place other than on his claim file and maintained that position for almost three years. Thirty-four months after the request for access was made, WCB acknowledged that there were additional records related to the Applicant and his dealings with WCB but that these records were no longer available. The Commissioner found that WCB failed to discharge its implicit duty to assist and failed to conduct an adequate search for responsive records. The Commissioner found that in the absence of any WCB policy framework for notes and records created by Members of the Board, and in the absence of such notes and records, he was unable to conclude that such notes and records could not be captured by the scope of FOIP.

He recommended that WCB immediately improve its policy dealing with the search for responsive records regardless of whether they should be part of the "claim file". This should include appropriate documentation of search efforts. He further recommended that WCB develop a policy and undertake training for Members of the Board with respect to any records generated by the Board collectively or Members of the Board individually with respect to individuals and claimants.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, s. 2(1)(e), 5 and 60; *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1, ss. 171, 171.1, 171.2; *The Archives Act, 2004*, S.S. 2004, c. A-26.1, s. 2(f); Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 as am., s. 4(1)(b); British Columbia's *Freedom of Information and Protection of Privacy Act*, R.S.B.C.1996, c. 165, as am, s. 3(1)(b); Manitoba's *The Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50 as am., s. 4(b); New Brunswick's *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6, s. 4(c); Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*, S.N. 2002, c.-A-1.1, as am., s. 5(b); Nova Scotia's *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 as am., s. 4(2)(d); Prince Edward Island's *Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2001, c. 37 as am. s. 4(1)(b).

Authorities Cited: Saskatchewan OIPC Review Reports F-2010-001, F-2008-001, F-2006-004, F-2004-005, F-2004-003 and LA-2004-001, Investigation Reports F-2009-001, F-2007-001, F-2005-001; Alberta OIPC Order 99-032; British Columbia OIPC Order 01-47; *Canada (Privacy Commissioner)* v. *Canada (Labour Relations Board)* [1996] 3 F.C.J. No. 1076.

Other Sources Cited: Saskatchewan OIPC, *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests, Submission to the Workers' Compensation Board Review Committee, Administrative Tribunals, Privacy and the Net*; Saskatchewan Archives Board, *Records Disposition System (RDS) for Provincial Government*; Saskatchewan Workers' Compensation Board, *Procedure Manual*; Saskatchewan Ministry of Labour Relations and Workplace Safety, *Workers' Compensation Act Committee of Review Final Report, 2011*; D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, Fourth Edition, Toronto: Thomson Carswell, 2004.

I BACKGROUND

[1] On or about July 15, 2007 the Applicant sent to the Saskatchewan Workers' Compensation Board (WCB) a formal access request under *The Freedom of Information and Protection of Privacy Act* (FOIP)[1] for the following:

> copies of all records pertaining to myself and the abovementioned WCB claim. These records are to include, but are not limited to: fax and email transmissions, memorandums, minutes, and all manner of correspondence between your offices and those of WCB, the Labour Minister, and all other persons/offices both governmental, and non-governmental.

[2] On or about July 19, 2007 a letter was sent to the Applicant from the WCB Case Manager Support person which stated in part as follows:

> This letter is a follow up to your July 15, 2007 correspondence, at which time you requested that WCB provide you with any and all medical records and reports regarding yourself/your WCB claim.
>
> According to file documentation, you were provided with a complete copy of your file on November 9, 2004 and an update to and including May 16, 2007.
>
> Please be advised, that as you have been forwarded a complete copy of your claim file, the only additional information on your file since the update of May 16, 2007, is your correspondence to Members of the Board, dated June 6, 2007, [name of WCB employee]'s response of June 12, 2007, and the Office of the Minister's response, dated June 21, 2007.
>
> As you have already received the information you have requested, there would be no additional information to forward to you.

[3] On or about July 23, 2007 the Applicant sent to WCB a letter addressed to "Members of the Board – Confidential SK Workers' Compensation Board" which included the following:

> The following is further to my July 15, 2007 correspondence to your office which included an "Access to Information Request Form".

[1] *The Freedom of Information and Protection of Privacy Act* (hereinafter FOIP), S.S. 1990-91, c. F-22.01.

> I recently received a letter from a [Case Manager Support] regarding the aforementioned correspondence/form. [Case Manager Support] is of the impression that I'm requesting a copy of my WCB file, where in fact I've made no such request. My July 15th, 2007 correspondence/form was not directed to WCB but rather its government-appointed Board Members.
>
> Once again, I hereby request copies of any and all information on file with your offices, regarding myself, and/or my WCB claim. Please find the completed "Access to Information Request Form" attached. In the event your offices are in possession of any medical records/reports regarding myself, and/or my WCB claim, I hereby request copies of such information under the provisions of the *Health Information Protection Act.*

[4] By letter dated August 22, 2007, WCB responded to the Applicant as follows:

> I have received your Access to Information Request under *The Freedom of Information and Protection of Privacy Act* dated July 23, 2007. In reviewing your request and previous correspondence between yourself and your Case Manager, it is apparent that all documents relative to your claim have been previously provided to you. The claim record contains all the documents that are relevant to your claim and there are no other documents.
>
> I can further advise that access to the claim record is governed by *The Workers' Compensation Act, 1979* and not *The Freedom of Information and Protection of Privacy Act*. I draw your attention to section 23(3)(k), of *The Freedom of Information and Protection of Privacy Act* (a copy of which is enclosed).

[5] By letter dated November 13, 2007 the Applicant then requested our office review the decision on his access request. He noted that he disagreed with WCB's position that there were no other documents for the following reason. Minutes/memorandums are missing from his claim file for WCB decisions made on the following dates: July 13, 1999, September 22, 1999, November 25, 1999, January 15, 2004, September 29, 2004 and April 23, 2007. He notes that WCB Board Members have the status of the Court of Queen's Bench and that their decisions arise from oral hearings. Thus, the Applicant argued that "it stands to reason that there is some form of transcript", especially since "the majority of the appeal issues raised are neither acknowledged, nor addressed in the aforementioned decisions". He also noted that there are in fact minutes/memorandums in the claim record regarding other appeal hearings.

[6] The WCB access and privacy officer then wrote the Applicant on November 27, 2007 as follows:

> Your correspondence dated November 13, 2007 addressed to Mr. Gary Dickson, a copy of which was provided to the Members of the Board, has been forwarded to the writer for a response. In the aforementioned correspondence you have raised two concerns:
>
> **1. Minutes and memorandums are missing from your claims record.**
>
> You have referenced the following Board Decisions from your claim file:
>
> - July 13, 1999;
> - September 22, 1999;
> - November 25, 1999;
> - January 15, 2004;
> - September 29, 2004; and
> - April 23, 2007
>
> I have checked with the Board and it is my understanding that the Board did not conduct hearings on the aforementioned dates. The Board's consideration of your appeals on each of the above dates was based upon a review of file documentation, with no oral hearing conducted.
>
> No record or transcript of the deliberations the Board undertakes is kept or required when the appeal is based upon a "paper review" of the file. The decision that the Board provides after such deliberation forms the record and is placed on the claim file.
>
> I understand that there was an oral hearing relating to one of your appeals in March, 1999 and a record of this hearing was placed on the file in the form of a memo from [name of WCB employee] dated March 19, 1999.
>
> It is section 171 of *The Workers' Compensation Act, 1979* that governs the recording and placing of information on the claim file. Such actions are not governed by *The Freedom of Information and Protection of Privacy Act*.
>
> **2. Absence of the audit report of your employer records of February 4, 1999.**
>
> From my review of your file there was a letter dated April 19, 2001 from [name of WCB employee] to counsel for [name of a physician] indicating that the results of the audit were attached; however, it is evident that the audit was not placed on your file and should have been. Please find enclosed a copy of the audit report.

[7] In our letter dated January 10, 2008 notifying WCB of this Review, we questioned whether there would be recorded information maintained in other files, i.e. whether there would be files other than the claim file. We indicated that the initial issue on this file relates to the adequacy of the search for responsive records. The relevant portion of our letter included the following:

> It appears that [the Applicant] has already received some of the records relating to his claim. We are not clear precisely what is or is not recorded in or migrates to an injured worker's claim file and whether there are separate types of files for any given worker. Also, we don't know if there may be recorded information about any given worker that is maintained in other files or places within your records holdings. What he seeks apparently is documents that may not be part of the claim file but which would be in the possession or the control of WCB including notes, memoranda or documents prepared by or for members of the Board or others not directly involved in processing claims. You will appreciate that the responsive record may be much broader than the "claim file". In the letter from [name of employee of WCB] to the Applicant dated July 19, 2007 there is reference to correspondence to the Members of the Board, dated June 6, 2007, [name of WCB employee]'s response of June 12, 2007 and the Office of the Minister's response, dated June 21, 2007. I expect that those documents would be responsive to the request as well as any associated documents including meeting minutes, notes, Board member notes, etc.
>
> The initial question relates to the adequacy of the search that was undertaken by WCB. We will require particulars from you of that search. In this regard, we refer you to our new procedure dealing with defects in the section 7 response to an access request. A copy of that procedure is highlighted in the revised Helpful Tips sheet.
>
> We will require advice from you detailing the search effort and particularly the effort to determine if there are any responsive records that were not part of the claim file for [the Applicant]. Once we have resolved the question of the adequacy of the search we can then proceed to deal with the Review in the normal course.

[8] On January 31, 2008 the access and privacy officer for WCB addressed the adequacy of the search for responsive records as follows:

> Without accepting your jurisdiction to conduct such a review, as the claim record is subject to access under *The Workers' Compensation Act, 1979* and not FOIP, I can advise that on several occasions I discussed the matter of [the Applicant's] records with the Board Members' staff, and they assured me that all records pertaining to the claim are contained within the claim record. I have also consulted with the Board Members who have assured me that all records pertaining to the claim are contained within the claim record. I have also consulted with the Board Members who have

> assured me unequivocally that all documents used in making decisions on this claim or any other claim are placed on the claim record.

[9] Our July 10, 2008 letter to WCB indicated as follows:

> Thank you for your submission regarding the adequacy of the search for records responsive to [name of the Applicant]'s access to information request. However, we would appreciate further details of your search efforts. Specifically we would like to know how WCB's file management system is maintained, in other words, are any files kept separate from claim record, such as any shadow files, files maintained by the board members etc. Any information you can provide on how your paper records are maintained as compared to any electronic records, would also be helpful in our review. In addition, we would like to know the specific steps you took in searching for responsive records, the individuals you spoke to, when that occurred etc. If you performed such contact by way of e-mails or letters, please provide a copy of such correspondence.
>
> In preparing your response, please also take into account the letter from Mr. Gary Dickson dated January 10, 2008 in which he references other correspondence and examples of other documents that would appear to be responsive to [the Applicant]'s access request.

[10] On September 10, 2008 WCB wrote with further information about the adjudicative record when there is an appeal considered by the Board. This letter included the following information:

> The memos that are prepared by Board Assistants represent a summary of oral hearings, and they are also placed on the electronic claim record. These memos constitute what you refer to as "minutes" of the Board hearing.
>
> Any notes that the Tribunal members may make for their personal use during their deliberations would not be placed on the electronic claim record and would not be subject to disclosure.
>
> If there is not an oral hearing the Board Assistants do not prepare a summary memo, it is the decision of the Board that constitutes the record of the appeal. When no oral hearing is conducted the decision of the Tribunal is based upon a thorough review of the claim record.

[11] My office wrote WCB again on December 11, 2009 referring to the inference that notes made by the Tribunal members were not subject to FOIP and observed that:

> Although we appreciate your position on this question, you have not provided any analysis or case law to support your statement.
>
> Essentially this appears to involve the question of whether such notes are "in the possession or under the control of a government institution". ...

[12] Finally, on February 4, 2010, WCB advised that "I have canvassed the Board Members to determine if "Board Members Notes" as referred to in your correspondence of December 11, 2009, exist and can advise there are no such notes."

[13] My office wrote to WCB again on May 10, 2010 and stated in part as follows:

> Regarding your search efforts for "board member's notes", I have considered this issue in the context of each of your submissions as well as that of the Applicant. At this point, it appears that WCB has not yet met its burden of proof to establish that notes of some kind would not have been prepared for the purposes of the Applicant's multiple appeals before the WCB. I understand from your submissions that the practice of WCB is to have Board Assistants prepare memos as a summary of oral appeal hearings, but in the case of the Applicant's appeals that oral hearings were not conducted. In such a case, the appeal is considered on the basis of the file documentation and the decision of the Board forms the record. You also indicated in your most recent correspondence that you canvassed the Board Members to determine if board member's notes exist, and indicated that "there are no such notes". Please advise if my understanding of this is incorrect.
>
> However, the Applicant asserts that it would be implausible that no record or notes of the deliberations would be made when reviewing his file and appeals, particularly since there are multiple issues and extensive evidence. The Applicant has noted that one of his most recent appeals was 34 pages in length.
>
> Indeed, it appears likely that when reviewing such extensive materials that the board members or staff involved in the appeal would prepare notes of their review of the file or of the oral deliberations they engaged in as a Board. Further, notes taken for the purposes of preparing a draft decision would also appear likely to have been prepared, even if they no longer exist at this time.
>
> As discussed in my letter of December 11, 2009, at this point we are not considering the legal question of whether such notes are within the control of the WCB and thus subject to access, but rather to first determine the existence of notes. As such, in order to meet your burden of proof we would appreciate receiving further evidence regarding your assertion that notes were not prepared and do not exist. Such evidence would include records of contact you made with the board members or other staff inquiring into whether notes were ever prepared for the purposes of the Applicant's appeals (this might be by way of phone calls, emails, internal memos etc.). In

> addition, we request copies of any policies or procedures regarding the keeping of notes, recording of deliberations, draft decisions etc., as well as any policies surrounding record retention and disposition generally. If such policies and procedures are not set out in a formal document, we request a submission which sets out in detail the expectations of staff and board members in this regard.

[14] On May 26, 2010 WCB's access and privacy officer wrote to us to advise in part as follows:

> Regarding the Applicant's assertion that it is implausible that no record or notes of deliberations would be made, I should explain that claims involving thousands of pages of claim documents, seen many times before and recently by the Board Members, are well-remembered and often require no "notes" to add to what is already well documented on the claim. In addition, **if notes were taken they were plausibly transitory in nature and would no longer exist.**
>
> I have informed you that no such notes exist and will be providing no further evidence on this point. For your information I will say that some of the **people I spoke to recalled having handwritten notes, drafts, or emails concerning the Applicant's claim at some point in time,** but no longer have them.
>
> [emphasis added]

[15] WCB has not referred us to any particular WCB policy or procedure that explicitly discusses documents created by Members of the Board in the course of hearing and disposing of workers' appeals.

II RECORDS AT ISSUE

[16] A review of the background noted materials readily supports a conclusion that the access request was for documents that related to activities of the actual Board and that went beyond the contents of the Applicant's claim file. The response from WCB has been that no such records exist.

III ISSUES

1. What is the applicable law?

2. Did WCB perform an adequate search for records responsive to the Applicant's access to information request?

3. Are notes prepared by WCB Board Members while deliberating on appeals in the possession or under the control of WCB?

4. Did WCB meet its implicit duty to assist the Applicant?

IV DISCUSSION OF THE ISSUES

1. What is the applicable law?

[17] As is apparent from the background section of this Report, WCB takes the position that the applicable law is *The Workers' Compensation Act, 1979* (WCA)[2] and not FOIP.

[18] This issue of the applicable law has been explored in considerable detail in two earlier OIPC Investigation Reports.[3] I might summarize the position I have taken in those Investigation Reports as follows.

[19] WCB is a government institution and is subject to FOIP. Section 23 of FOIP provides that FOIP is paramount to other provincial laws but that in the event of a conflict between FOIP and sections 171 to 171.2 of WCA, the latter provisions should prevail. In other words, FOIP is paramount to WCA in the event that the two laws cannot be read together except for three sections of WCA. In the event that to obey one law is to violate the other, FOIP prevails but for sections 171 to 171.2 of WCA. Section 171 is a general prohibition against disclosure of information, including information about the injured

[2] *The Workers' Compensation Act, 1979*, S.S. 1979, c. W-17.1.
[3] Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC), Investigation Reports F-2007-001 at [16] to [176] and F-2009-001 at [19] to [53], available at: www.oipc.sk.ca/reviews.htm.

worker, outside of disclosure for purposes of the performance of duties by the WCB employee or under the authority of the WCB Board.[4] The issue in this Review however is the right of the Applicant to view his own personal information in the possession or under the control of WCB. Section 171.2 has no application on these facts.[5] Section 171.1 defines a right that any injured worker who has elected to seek reconsideration or a review of a decision of WCB is entitled to access his or her claim file.[6] Section 171.1 is not exhaustive of the rights of an injured worker since it is focused on the 'appeal process' available to an aggrieved worker and that process alone. It operates to obviate a formal access request under FOIP every time an injured worker prepares for an appeal of a WCB decision. Section 171 and 171.1 can be viewed as complementary to FOIP and the general right of access guaranteed by FOIP. There is no conflict which would trigger the paramountcy provision in section 23(3)(k) of FOIP. In the result, FOIP prevails.

[20] Notwithstanding those Reports which reflect a consistent approach taken by this office to access requests and privacy complaints from injured workers, WCB has not changed its position. I should note that the Workers' Compensation Act Committee of Review (Committee of Review) of 2006 agreed with our approach[7] and made a recommendation to the Saskatchewan Government to clarify that FOIP and *The Health Information Protection Act* (HIPA) apply fully to WCB but that has not been WCA acted upon. A new Committee of Review was struck in 2011 to undertake a further statutory review of WCA. In the *Workers' Compensation Act Committee of Review Final Report, 2011*, the Committee observed as follows:

> We firmly believe that the operational efficiency of WCB and the perception of WCB by stakeholders and the public will greatly improve if freer access to files and information is provided to all relevant parties. Access to information is a hallmark of a free and democratic society.
>
> The Committee examined the WCB's relationship to FOIP and HIPA and heard opposing opinions on what should be done. The Committee reviewed these opinions

[4] *Supra* note 2, s. 171.
[5] *Supra* note 2, s. 171.2.
[6] *Supra* note 2, s. 171.1.
[7] SK OIPC, *Submission to the Workers' Compensation Board Review Committee* (October 24, 2006), available at: www.oipc.sk.ca/Resources.

> but was not able to conduct a thorough legal analysis. We suggest that future Committees examine this issue further.[8]

[21] In the discussion of Recommendation 21, the 2011 Committee of Review commented as follows:

> It should also be noted that sometimes the right time to gain access to a file or information may not be connected to the appeal process. **Access to files should be restrained only by privacy legislation and should not be limited to having an appeal in process.** We are concerned that many unnecessary appeals are filed and much unnecessary work generated when the issue could have been easily and quickly settled by access to files and information.
>
> Claimants should always have access to their complete files.

[22] Recommendation 52 in the 2011 Report is as follows:

> All workers and employers have timely access to files without the need to file an appeal. A good rationale such as privacy legislation must be provided for any access that is denied.

[23] Since my statutory mandate does not permit me to seek a trial of an issue at the Court of Queen's Bench to resolve this matter once and for all, injured workers in Saskatchewan are left in the unsatisfactory position of being able to appeal to our office but they are denied redress since WCB insists that our office has no jurisdiction to require compliance with HIPA and FOIP by WCB. I have met with the Chairman of WCB and the Minister formerly responsible for WCA but this has not resulted in any change in the approach taken by WCB. I am mindful that an aggrieved applicant has the right to initiate an appeal *de novo* in the Court of Queen's Bench.

[24] I incorporate by reference my commentary in both of those earlier Investigation Reports and expressly adopt the same for purposes of this Report.

[8] Ministry of Labour Relations and Workplace Safety, *Workers' Compensation Act Committee of Review Final Report, 2011*, p. 53, available at http://www.lrws.gov.sk.ca/committee-of-review-final-report-2011.

2. Did WCB perform an adequate search for records responsive to the Applicant's access to information request?

[25] Section 5 of FOIP provides 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**.[9]
>
> [emphasis added]

[26] Our office discussed the search for responsive records in some detail in our Report F-2008-001. I adopted the following approach described in Ontario Order PO-2257 of the Ontario Information and Privacy Commissioner's (IPC) Office.

> …the Act does not require the Ministry to prove with absolute certainty that records do not exist. The Ministry must, however, provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request (Order M-909).[10]

[27] A similar approach had been taken by the British Columbia IPC in his Order 01-47 as follows:

> ...Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In any inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also include how the searches were done and how much time its staff spent searching for the records.[11]

[28] In addition, we address search efforts in the following excerpts from our office's resource, *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests*:

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[9] *Supra* note 1, s. 5.
[10] SK OIPC, Report F-2008-001 at [38], available at: www.oipc.sk.ca/reviews.htm.
[11] Office of the Information and Privacy Commissioner of British Columbia, Order 01-47 at [32], available at: www.oipc.bc.ca.

> The public body/trustee has a duty to search for, identify and consider all responsive records. We highly recommend that public bodies/trustees thoroughly document their search efforts. To ensure a complete and adequate search, the public body/trustee should utilize a search strategy which considers the following:
>
> - Were records in any form or format considered (i.e. electronic, paper, other)?
> - Is the original access request very broad and could include information developed over a wide open time period? If so, how did you define the search?
> - How did you search for records in the public body's possession?
>   - Did you search yourself?
>   - Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?
>   - Did you send out an email to other units, etc?
> - Could records also exist that are responsive to this access request that are not in your possession, but in your control?
>   - Did agents, consultants or other contracted services have any role in the project the access request is referencing?
>   - If yes, are these records included in the package provided to the OIPC?[12]

[29] Based on all of the above, it appears that WCB failed to undertake an adequate search for responsive records. Our attempts to elicit the kind of information necessary to establish whether an adequate search was undertaken have been protracted and persistent. In fact it has taken almost three years of pursuit to elicit an acknowledgement that there were additional records that may have been responsive but these apparently no longer exist. When we asked WCB for further details and evidence to satisfy this question, WCB stated that they would not be providing any further evidence.

[30] We note that in the emails attached to the September 10, 2008 letter from WCB, reference is made to an "REA file". We received no other details as to what such a file might contain, whether it was searched, or whether it would have records that would be responsive to this access request. Indeed, in the same email it is noteworthy that a document is discussed as being just then provided to "[name of WCB employee]" and that it will be scanned to the Applicant's claim file. This would certainly seem to suggest

[12]SK OIPC, *Helpful Tips: Best Practices for Public Bodies/Trustees for the Processing of Access Requests*, p. 6, available at www.oipc.sk.ca/resources.htm.

that other files are maintained by WCB beyond just the claim file. Such other files were not addressed by WCB when we inquired as to other sources/file locations of responsive records.

[31] We are also concerned about the reference to the possible one time existence of emails, notes or drafts. We received no details about what such materials were, why or when they would have been destroyed or whether this is material that should have been accounted for in the search for responsive records. WCB is subject to *The Archives Act, 2004* since it qualifies as a "government institution" within the meaning of section 2(f) of that Act.[13] There are specific requirements in that Act for the destruction of administrative or operational records of a government institution. For example, in the *Records Disposition System (RDS) for Provincial Government* document on the Saskatchewan Archives Board website, there is the following statement:

> Although the disposal process for administrative and operational records is defined differently by *The Archives Act, 2004*, there are a number of requirements that must be met prior to using the disposal process for administrative records as defined in the Act. These requirements are discussed in detail in Section 2. **Prior to meeting these requirements, all departments, agencies, crown corporations, etc. must use the disposal procedures detailed in Section 1 for all records, whether administrative or operational.**[14]

[32] WCB has not provided any information or material as to whether or how it complied with *The Archives Act, 2004* in disposing or allowing the disposal of any material created by Members of the Board that would have been responsive to the subject access request.

[33] Lastly, I reviewed the WCB *Procedure Manual* excerpt "Storage of Information (PRO 06/2008)", which states: "WCB encourages the scanning, microfilming, and imaging of all paper records in order to improve service and reduce costs."[15] Other than this comment, there appears to be nothing else in the manual that references their alleged

[13] *The Archives Act, 2004*, S.S. 2004, c. A-26.1.
[14] Saskatchewan Archives Board, *Records Disposition System (RDS) for Provincial Government*, available at: www.saskarchives.com/web/Disposal-of-Records.html.
[15] Saskatchewan Workers' Compensation Board, *Procedure Manual* (May 21, 2008), s. 10.0, p. 11, available at: www.wcbsask.com/WCBPortalWeb/ShowProperty?nodePath=/WCBRepository/pdfs/PolicyManual.

policy to electronically scan paper documents and to then store those paper copies for 365 days before destruction.

[34] The same document addresses record retention and destruction, and references the following issues:

- Environmental aspects of proper storage are discussed.
- Responsibility is on the Corporate Solicitor for arranging for storage and destruction of documents no longer needed.
- Specific methods of destruction are listed (shredding, pulverizing, disintegrating or burning), and for electronic.
- Records Managers are to keep a log of all records dispositions, using the form developed by the Saskatchewan Archives Board's "Records Disposition System" and is reviewed quarterly by the Corporate Solicitor.[16]

[35] This document makes no reference to notes or documents created by Members of the Board nor does it appear to describe any procedures for the retention or destruction of such notes or documents.

[36] The Applicant submitted the following argument in a letter dated January 16, 2008 on the question of adequacy of the search:

> It is important to note that the majority of my appeals contain extensive evidence and documentation, relating to multiple issues. The most recent of these appeals was 34 pages in length. The premise that 3 Board Members and their assistant deliberated on such evidence/documentation without keeping a record of their proceedings for referencing purposes, is highly questionable, if not implausible.

[37] Indeed, I also question this. As a body experienced in reviewing file material that often involves many issues and many pages of submissions and documents, it is standard practice that notes are made as the file is reviewed, issues are considered and decisions made. I find it unlikely that notes were not created for the purposes of the Applicant's appeal. In fact in his May 26, 2010 correspondence the WCB access and privacy officer acknowledged that "some of the people I spoke to recalled having handwritten notes,

[16] *Ibid.*

drafts, or emails concerning the Applicant's claim at some point in time, but no longer have them." Interestingly, this is the first acknowledgement of such records yet it occurs a full 34 months after the Applicant submitted his original request for access. Unhelpfully, WCB cannot advise when in that 34 month period the "handwritten notes, drafts or emails" went missing or were destroyed.

3. Are notes prepared by WCB Board Members while deliberating on appeals in the possession or under the control of WCB?

[38] WCB, at least when it operates as the 'Board Appeal Tribunal', could be said to be carrying out a quasi-judicial function. I base this on the privative clause[17] in section 22 of WCA, the powers conferred on the Board in sections 23 to 27 inclusive and the abolition of court actions in sections 166 to 168 inclusive.

[39] I note that in a number of other jurisdictions such notes would likely be excluded from FOIP. This however is a function of an express exclusion such as is found in the freedom of information laws in Alberta[18], British Columbia[19], Manitoba[20], New Brunswick[21], Newfoundland and Labrador[22], Nova Scotia[23] and Prince Edward Island.[24] There are exclusions in Saskatchewan's FOIP in sections 3 and 4 but none that are relevant in this review. As well there is an express exclusion in the section 2 definition of "government institution" for the Court of Appeal, the Court of Queen's Bench and for the Provincial Court. Unlike these other provinces mentioned above there is however no carve out for the records of administrative tribunals or quasi-judicial records as is the case in the above

[17]"Although the Canadian courts have consistently held that neither federal nor provincial legislation can prevent judicial determination of the constitutional validity of legislation itself, the doctrine of the Sovereignty of Parliament means that the legislative branch could oust the courts' ability to review actions taken by statutory delegates. Such legislation provisions are often called "privative clauses" because they deprive the courts of their inherent authority to review actions taken by statutory delegates." D.P. Jones and A.S. de Villars, *Principles of Administrative Law*, Fourth Edition (Toronto: Thomson Carswell, 2004), pp. 13-14.
[18]*Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 as am., s. 4(1)(b).
[19]*Freedom of Information and Protection of Privacy Act*, R.S.B.C.1996, c. 165, as am, s. 3(1)(b).
[20]*The Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50 as am., s. 4(b).
[21]*Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6, s. 4(c).
[22]*Access to Information and Protection of Privacy Act*, S.N. 2002, c.-A-1.1, as am., s. 5(b).
[23]*Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 as am., s. 4(2)(d).
[24]*Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2001, c. 37 as am. s. 4(1)(b).

mentioned jurisdictions.[25] I conclude that it was not the intention of the Legislative Assembly to treat the records of administrative tribunals in any different way than the records of any other government institution insofar as FOIP is concerned.

[40] WCB has not argued or directed us to any relevant provision in its policies and procedures that would bear on the question in issue. In my review of the WCB enabling legislation, policies and procedures, I have not found any directly relevant provision. WCA does not specifically address the keeping of notes or any other records by the Board Members. I note as well that the *Policy 9.6 Appeals – Board Appeal Tribunal (POL 30/2010)* does not address this question. The following provision was the only one found that addresses what makes up the record of Board decisions:

> 49 Where the board is unable to determine an issue in favour of the person claiming compensation, it **shall provide that person with written reasons** for its decision.
>
> [emphasis added]

[41] The starting point is to recognize that a right of access, as prescribed by section 5 of FOIP, cannot apply if the records in question are neither in the possession of the government institution nor under its control.

[42] In my Report LA-2004-001 I considered the matter of whether notes taken by an employee of the local authority were 'personal notes' not subject to release under an access request or instead were materials that qualify as a record under the control of the public body, which must then be accounted for when addressing the search for responsive records. In that case, the employee stated that the notes were a "personal reminder" of meeting details, a meeting which the employee attended in the course of employment. I concluded that the record should not be classified as a personal record as urged by the local authority. I asked in that case: "Does the record or document provide evidence of a business activity, decision or transaction related to the functions and activities of the

[25]That an administrative tribunal is treated like any other government institution by Saskatchewan law was considered in some detail in SK OIPC Investigation Report F-2005-001. This is also discussed in the SK OIPC document: *Administrative Tribunals, Privacy and the Net*. Both are available at www.oipc.sk.ca.

organization? I answered that question in the affirmative."[26] Consequently, I found that the missing notes should have been classified and retained by the local authority. I also considered whether such notes would be "transitory records" that were properly destroyed. I determined that: "A transitory record is a record of temporary usefulness needed only for a limited period of time; to complete a routine task or to prepare an ongoing document. Once they have served their purpose, they would be destroyed."[27] The difficulty here is that it is up to WCB to advance that argument and they failed to do so.

[43] The question of whether the records of individual members of a school board constituted records in the custody or under the control of a public body was considered by the Alberta IPC in Order 99-032. The Alberta Commissioner answered that question in the affirmative for the following reasons:

- One of the records was created by an officer or member of the Public Body.
- The Records are in the possession of the Public Body.
- The Records are closely integrated with other records of the Public Body.
- The Records relate to the Public Body's mandate and functions.[28]

[44] I have previously considered the question of control in my Report LA-2010-002. I referenced past reports of this office and also considered 15 different non-exhaustive criteria:

1. The record was created by a staff member, an officer, or a member of the public body in the course of his or her duties performed for the public body;
2. The record was created by an outside consultant for the public body;
3. The public body possesses the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory or statutory or employment requirement;
4. An employee of the public body possesses the record for the purposes of his or her duties performed for the public body;

[26]SK OIPC, Report LA-2004-001 at [23], available at: www.oipc.sk.ca/reviews.htm.
[27]*Ibid.*, at [22].
[28]Office of the Information and Privacy Commissioner of Alberta, Order 99-032 at [para 66], available online at www.oipc.ab.ca.

5. The record is specified in a contract as being under the control of a public body and there is no understanding or agreement that the records are not to be disclosed;
6. The content of the record relates to the public body's mandate and core, central or basic functions;
7. The public body has a right of possession of the record;
8. The public body has the authority to regulate the record's use and disposition;
9. The public body paid for the creation of the records;
10. The public body has relied upon the record to a substantial extent;
11. The record is closely integrated with other records held by the public body;
12. The contract permits the public body to inspect, review, possess or copy records produced, received or acquired by the contractor as a result of the contract;
13. The public body's customary practice in relation to possession or control of records of this nature in similar circumstances;
14. The customary practice of other bodies in a similar trade, calling or profession in relation to possession or control of records of this nature in similar circumstances; and
15. The owner of the records.

[45] Applying those criteria to the facts of this case and utilizing the same numbering system, I observe:

1. The author of any notes would be the one or more of the three Board Members of WCB. They may not be considered employees of WCB, but are clearly acting under the authority of WCB and the governing legislation. The notes were presumably created during the Board Members' deliberations on each of the Applicant's claims or in other discussions about the Applicant. WCB states that some people recalled having notes about the Applicant's claims, but that they no longer have them. Other than this, we have nothing to indicate how they were created, used or retained. WCB apparently has no policy or procedure that addresses notes made by Board Members while discharging their statutory function.
4. There appears to currently be no physical possession as any notes were not retained. There is no information to determine whether at one time notes were physically in any official WCB files at any time.
6. The content of the notes would relate to the WCB mandate and core, central or basic functions insofar as the Board is mandated to sit as an appeal committee and make determinations about the entitlement of injured workers. Adjudication is clearly central to their mandate and function.

10. Again, we do not have much from WCB to answer this question. Presumably if notes were created of the claim, they were used as a memory aid when reviewing the vast amount of information and documents in the claim and/or were used in preparation of the written decision. It would seem that notes, if taken, were taken for a specific purpose and thus would have been relied on in the carrying out of the Board Members' duties, to deliberate, to draft a written decision etc. However, as the notes are not retained they appear to not have been further relied on by WCB itself for future appeals etc.

[46] I find that the other criteria (Items #2, 3, 5, 7, 8, 9, 12, 13, 14 and 15) and analysis of same would require more information than WCB has provided to our office. It would not be appropriate to speculate in the absence of clear and granular information from WCB that has not been forthcoming.

[47] Since the burden of proof is for WCB to meet and given the difficulty this office has encountered in gathering information to this point, I find that the burden of proof has not been met by WCB.

[48] I should note that although not raised by WCB, account must be taken of the Federal Court decision in *Canada (Privacy Commissioner)* v. *Canada (Labour Relations Board)*.[29] The facts in that case appear to be similar to those in this case. In addition, as the WCB Board Member decisions are final and cannot be appealed to the courts, this is also consistent with the context in that Court case. My difficulty is that, in the absence of adequate information to assess the 15 above described criteria, I am unable to conclude that this court decision is directly on point and not distinguishable.

[49] There is a need for policy that specifically addresses how to search for responsive records. There is also a need for policy and training for Members of the Board with respect to any records generated by the Board collectively or Members of the Board individually with respect to individuals and claimants.

[29] *Canada (Privacy Commissioner)* v. *Canada (Labour Relations Board)* [1996] 3 F.C.J. No. 1076.

4. Did WCB meet its implicit duty to assist the Applicant?

[50] I have in a number of past Reports discussed a 'duty to assist' that is implicit in FOIP.[30] In this case, WCB was either not sufficiently diligent in learning what the Applicant was explicitly seeking or deliberately chose not to respond to the specific request from the Applicant. In my Investigation Report F-2009-001, I discussed the fact that the "case file" may be different and presumably less than all of the personal information in the possession or control of WCB.[31] In that same Report I also identified that there may be correspondence with the WCB Board or Chairman that may not be captured in the "claim file" but which nonetheless would be responsive to an access to information request. The Applicant was clear that he was looking for something different than his "claim file" but it took WCB an unreasonable length of time to respond to that specific request. It is important that FOIP Coordinators and others tasked with the job of responding to access requests ensure they read the request carefully, contact the applicant if there is anything ambiguous or unclear about the request to clarify the request and then respond appropriately in accordance with the requirements of Part II and III of FOIP.

[51] Interestingly, in this case, the response to the Applicant after he submitted his formal access request was from a Case Manager Support person who appears to have not read the request carefully and failed to understand the scope of WCB's responsibility under FOIP in responding to an access request. This is one of the reasons our office recommends that all formal access requests be reviewed at least, if not answered, by the FOIP Coordinator who should have a comfortable understanding of FOIP requirements and practices. If WCB intends to task Case Manager Support persons with responsibility for responding to formal access requests, it needs to ensure they have appropriate training to ensure compliance with FOIP. This should also involve an appropriate instrument for delegation of the head's powers pursuant to section 60 of FOIP.[32]

[30]SK OIPC Reports F-2004-003, F-2004-005, F-2006-004, F-2008-001 and F-2010-001, available online at: www.oipc.sk.ca/reviews.htm.
[31]SK OIPC Investigation Report F-2009-001 at [48] to [50], available online at: www.oipc.sk.ca/reviews.htm.
[32]The definition of "head" is found in section 2(1)(e) of FOIP. Section 60 of FOIP states that the head may delegate power to one or more officers of the government institution. The delegation must be in writing and may contain limitations, restrictions, conditions or requirements.

V FINDINGS

[52] I find that the Saskatchewan Workers' Compensation Board failed to undertake an adequate search for responsive records.

[53] I find that the Saskatchewan Workers' Compensation Board failed to meet the implied duty to assist the Applicant.

VI RECOMMENDATIONS

[54] I recommend that the Saskatchewan Workers' Compensation Board undertake an adequate search to determine if there are any responsive records that relate to activities of the Board and to provide a revised section 7 response to the Applicant.

[55] I recommend that the Saskatchewan Workers' Compensation Board reconsider its policies and procedures to capture records that contain the personal information or personal health information of applicants but which may not be included in that applicant's "claim file".

[56] I recommend that the Saskatchewan Workers' Compensation Board develop a policy for personal information or personal health information of individuals that may be collected, used or disclosed in connection with activities of the Board or Board Appeal Tribunal and which may not be part of the individual's "claim file".

[57] I recommend that the Saskatchewan Workers' Compensation Board develop a policy for notes of any kind made by Members of the Board and Board Appeal Tribunal in the course of their mandated work under *The Workers' Compensation Act, 1979*.

[58] I recommend that the Saskatchewan Workers' Compensation Board take such further steps that may be necessary to ensure that the Saskatchewan Workers' Compensation Board employees understand the duty to assist and how to meet it in all requests that are

submitted to the Saskatchewan Workers' Compensation Board under *The Freedom of Information and Protection of Privacy Act* or *The Health Information Protection Act*.

[59] I recommend that the Minister responsible for the Saskatchewan Workers' Compensation Board take steps to resolve the issue of the applicability of *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act* to the Saskatchewan Workers' Compensation Board records.

Dated at Regina, in the Province of Saskatchewan, this 30th day of January, 2012.

R. GARY DICKSON, Q.C.
Saskatchewan Information and Privacy Commissioner