SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REVIEW REPORT F-2013-001

Saskatchewan Workers' Compensation Board

Summary: The Applicant, an employee of the Saskatchewan Workers' Compensation Board (WCB), made a request to WCB for records pertaining to her employment and specifically an incident that occurred at work. WCB responded by providing the Applicant with certain responsive records. The Applicant made a Request for Review claiming there should be more responsive material. In the course of the review, WCB was asked for details of its search efforts and information regarding specific records as clarified by the Applicant. In response, WCB indicated that it would not confirm or deny the existence of such records, pursuant to section 7(2)(f) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and any records could be withheld pursuant to sections 17(1)(a) and 17(1)(b) of FOIP. The Commissioner informed WCB that it could only rely on section 7(2)(f) of FOIP if it had done so when it issued its section 7 response to the Applicant; it failed to do so. The Commissioner asked that WCB provide copies of any responsive records to this office. WCB then argued that the responsive material was not captured by the Applicant's original request and refused to provide copies of the record to our office. The Commissioner suggested that he could issue a *subpoena duce tecum* pursuant to section 54 of FOIP. WCB then provided further material to the Commissioner. The Commissioner found that WCB did not meet the implied duty to assist when responding to the Applicant. He recommended WCB provide the Applicant with copies of all responsive material.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01, ss. 5, 7, 7(2), 7(2)(b), 7(2)(f), 7(4), 17(1)(a), 17(1)(b), 24(1), 46(4)(b), 54; *The Health Information Protection Act*, S.S. 1999, c. H-0.021, ss. 2(m), 12, 32, 36.

Authorities Cited: Saskatchewan OIPC Review Reports F-2004-003, F-2004-007, F-2005-002, F-2005-006, F-2006-004, F-2012-001/LA-2012-001, F-2012-002, LA-2007-002, LA-2009-002/H-2009-001, LA-2011-003, LA-2011-004; Saskatchewan OIPC Investigation Reports F-2007-001, F-2009-001, F-2012-002, F-2012-003, F-2012-004.

Other Sources Cited: Saskatchewan OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review.*

I BACKGROUND

[1] On or about March 31, 2011, the Applicant, an employee of the Saskatchewan Workers' Compensation Board (WCB), made a request to WCB for the following:

- Human Resources efforts to date to explore modifying the bonafide occupational requirements of the [name of Applicant's position] up to the point of undue hardship for my accommodation
- A list of all WCB staff **and others** who have been informed of the incident on January 14, 2011 and/or have been privy to communications re my RTW, including any supporting documentation, including but not limited to emails, letters, memos, and hand written notes
- Any communications, oral or written, with WCB staff **and others** re the false claim that I am a risk to others
- Any communications, oral or written, re my health and well-being, with WCB staff **and others**

[emphasis added]

[2] It appears that the access request was received by WCB on or about April 6, 2011 and it replied to the request with a letter dated May 3, 2011 which released certain records.

[3] On or about May 9, 2011, the Applicant submitted further clarification to her request to WCB which stated:

> …Please include all missing information as requested in my letter dated March 31, 2011 re **any communications, oral or written, with WCB staff and others**, re the

> incident on January 14, 2011, my health and well-being, and my RTW not included in your May 3, 2011 response.
>
> [emphasis added]

[4] On May 13, 2011, my office received a Request for Review from the Applicant which stated:

> The information provided by... the WCB's privacy officer, does not include:
>
> - A list of all WCB staff and others who have been informed of the incident on January 14, 2011 and/or have been privy to communications re my RTW, including any supporting documentation, including but not limited to emails, letters, memos, and hand written notes
>   - At the very least, I am aware of communications with Ministry staff that were not included in the information provided
> - A record of all communications, oral or written, with WCB staff and others re the false claim that I am a risk to others
>   - I am aware of inscope [sic] staff who were told the above and who were not included in the information provided. I am particularly concerned re the potential impact of the communication of this false information on my work relations with other WCB staff in the future.
>   - I was not provided with any information as to the Board being informed.
> - A complete record of all communications, oral of written, re my health and well-being, with WCB staff and others
>   - I am aware that my health has been discussed with inscope staff as pertains to the false claim that I am a risk to others

[5] My office provided notification letters regarding our intention to undertake a review to both WCB and the Applicant dated September 14, 2011. My office asked WCB to provide details of its search efforts for records the Applicant claimed were not identified by WCB.

[6] On or about October 4, 2011, WCB provided a submission regarding its search efforts.

[7] On October 21, 2011, I received from the Applicant a copy of the responsive records that had been sent to her by WCB.

[8] My office provided a preliminary analysis to WCB dated October 1, 2012. The analysis indicated that the details of the search provided by WCB were not sufficient. It also asked WCB to address the search for specific types of records identified by the Applicant in her Request for Review dated May 9, 2011, including "communications with Ministry staff."[1]

[9] In a letter to my office dated October 29, 2012, WCB indicated that it would neither confirm nor deny the existence of responsive records involving "communications with Ministry staff". It also stated that it was relying on sections 17(1)(a) and 17(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP)[2] to do so. My office advised WCB that while it might take such a position in its section 7 response to an applicant, it cannot refuse this office's request for a copy of withheld responsive records. Examination of the responsive records is an integral part of this office's statutory review process. My office replied in a letter dated November 6, 2012 insisting that WCB provide the responsive record, as clarified.

[10] Instead, by letter dated December 7, 2012, WCB asserted that the Applicant was not specific in her original request and that the records requested in my office's letter of October 29, 2012 were beyond the scope of the original access request. My office again communicated my view that the records more specifically enumerated in our correspondence were caught by a fair and reasonable interpretation of the Applicant's original access request. My office advised that WCB was 'reading down' the Applicant's request and applied a very narrow interpretation that is inconsistent with the purpose of FOIP and our understanding of the implied duty to assist.

[1]It is unclear what the Applicant meant by "communications with Ministry staff". It was up to the Saskatchewan Workers' Compensation Board (hereinafter WCB) to clarify this with the Applicant. Based on the responsive material identified by WCB in February 2013, this means communications with the Minister of Justice and Attorney General, the Minister of Labour Relations and Workplace Safety and the Minister Responsible for WCB, as well as officials in those ministries.
[2]*The Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. F-22.01.

[11] When the records were not forthcoming, my office again wrote to WCB in a letter dated December 28, 2012 advising that if the records were not provided quickly that I would resort to a *subpoena duce tecum* to obtain the records in question and also was prepared to require the attendance of key officials in WCB who would have some responsibility for the type of records in question to be examined under oath.

[12] On February 6, 2013, my office received further material from WCB.

[13] My office provided a preliminary analysis to WCB dated March 27, 2013. WCB replied in a letter dated April 23, 2013 stating it would not comply.

II RECORDS AT ISSUE

[14] In this case, although WCB provided its section 7 response to the Applicant on May 3, 2012, some five months later WCB advised our office that it would "neither confirm nor deny the existence of responsive records involving communications with Ministry staff." FOIP is reasonably clear that such an assertion is to be made at the time and as an integral part of the section 7 response, not when my office has commenced a review that is well underway. In the circumstances, the late raising of this claim must be regarded as an abuse of section 7 of FOIP and a disregard for the implied duty to assist. Nonetheless, I am mindful of section 46(4)(b) of FOIP which states:

> **46**(4) When making a disclosure pursuant to subsection (3), the commissioner shall take every reasonable precaution to avoid disclosure, and shall not disclose:
>
> …
>
> (b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.[3]

[15] Since this is the first time I have addressed this circumstance in a formal report, I will, for purposes of this Report only, refrain from identifying what, if any, records were received that involved communications with the Ministry of Justice, the Minister responsible for WCB, the Ministry of Labour Relations and Workplace Safety or the Occupational

[3] *Ibid.* at section 46(4)(b).

Health Officer from the Ministry of Labour Relations and Workplace Safety. In the future, my approach will be that if this claim is not properly raised as part of the section 7 response, but is raised only once the review is underway, section 7(4) of FOIP is inapplicable. In addition, I will take the position that section 46(4)(b) of FOIP does not prevent me from particularizing any records and their source that would be the subject of what might otherwise be a section 7(4) of FOIP assertion.

III ISSUES

1. What is the scope of *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act* regarding access to information not in recorded form?

2. Did the Saskatchewan Workers' Compensation Board meet the duty to assist and respond openly, accurately and completely in its section 7 response (FOIP) and its section 36 response (HIPA) to the Applicant?

3. Is the Saskatchewan Workers' Compensation Board entitled to withhold the record when it failed to provide an appropriate section 7 response in the particular circumstances of this case?

IV DISCUSSION OF THE ISSUES

[16] WCB is both a "government institution"[4] for the purposes of FOIP and a "trustee"[5] for the purposes of *The Health Information Protection Act* (HIPA).[6]

[4]Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Report F-2012-002 at [19]; Investigation Reports F-2012-004 at [24], F-2012-003 at [14], F-2012-002 at [9], F-2009-001 at [22], F-2007-001 at [9], all available at: www.oipc.sk.ca/reviews.htm.
[5]SK OIPC Investigation Reports F-2012-004 at [24], F-2007-001 at [9], both available at: www.oipc.sk.ca/reviews.htm.
[6]*The Health Information Protection Act*, S.S. 1999, c. H-0.021.

1. What is the scope of *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act* regarding access to information not in recorded form?

[17] The Applicant has requested recorded information, as well as information regarding oral communications about an incident in which she was involved and information about her health and well-being.

[18] Section 5 of FOIP states:

> **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.[7]
>
> [emphasis added]

[19] Section 24(1) of FOIP states:

> **24**(1) Subject to subsections (1.1) and (2), **"personal information"** means personal information about an identifiable individual **that is recorded in any form**, and includes:
>
> …[8]
>
> [emphasis added]

[20] As such, a government institution has no obligation to create a record, such as an account of conversations between different employees, for the purposes of responding to an access request. I have commented on this in my Review Report F-2004-003 as follows:

> [26] **My conclusion is that as a general rule, the obligation on a government institution to assist an applicant does not include an obligation to create records which do not currently exist.** There may be some unusual circumstances that might make it appropriate to require that the institution create a record as suggested by Commissioner Linden but I find no such circumstances here. In some provinces there is an explicit requirement to go further if the information is in electronic format. The

[7] *Supra* note 2 at section 5.
[8] *Ibid.* at section 24(1).

> Saskatchewan Act has no such provision. In any event the information sought is not available in electronic format.[9]
>
> [emphasis added]

[21] Therefore, FOIP would not apply to certain portions of the Applicant's request as they do not appear to be tangible records.

[22] Further, some information sought by the Applicant may appear to qualify as "personal health information" pursuant to section 2(m) of HIPA. HIPA, however, has the same requirement as FOIP, that access provisions only apply to records in recorded form as reflected in sections 12 and 32 of HIPA as follows:

> **12** In accordance with Part V, an individual has the right to request access to personal health information about himself or herself that is **contained in a record** in the custody or control of a trustee.
>
> …
>
> **32** Subject to this Part, on making a written request for access, an individual has the right to obtain access to personal health information about himself or herself that is **contained in a record** in the custody or control of a trustee.[10]
>
> [emphasis added]

[23] As such, for the above noted reasons, if no record exists, some of the following information requested by the Applicant is not subject to FOIP or HIPA:

- Any communications, **oral** or written, with WCB staff and others re the false claim that I am a risk to others
- Any communications, **oral** or written, re my health and well-being, with WCB staff and others

> [emphasis added]

[24] Therefore, this review does not cover any information not already existing in recorded form at the time of the access to information request.

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[9] SK OIPC Review Report F-2004-003 at [26], available at: www.oipc.sk.ca/Reports/2004-003.pdf.
[10] *Supra* note 6 at sections 12 and 32.

2. Did the Saskatchewan Workers' Compensation Board meet the duty to assist and respond openly, accurately and completely in its section 7 response (FOIP) and its section 36 response (HIPA) to the Applicant?

[25] Section 7 of FOIP describes the duties imposed upon a government institution when it receives a request for information.

> **7**(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:
>
> (a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or
>
> (b) transfer the application to another government institution in accordance with section 11.
>
> (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; or
>
> (f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4).
>
> (3) A notice given pursuant to subsection (2) is to state that the applicant may request a review by the commissioner within one year after the notice is given.
>
> (4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.

(5) A head who fails to give notice pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.[11]

[26] Section 36 of HIPA imposes a similar requirement as follows:

36(1) Within 30 days after receiving a written request for access, a trustee must respond to the request in one of the following ways:

(a) by making the personal health information available for examination and providing a copy, if requested, to the applicant;

(b) by informing the applicant that the information does not exist or cannot be found;

(c) by refusing the written request for access, in whole or in part, and informing the applicant:

(i) of the refusal and the reasons for the refusal; and

(ii) of the applicant's right to request a review of the refusal pursuant to Part VI;

(d) by transferring the written request for access to another trustee if the personal health information is in the custody or control of the other trustee.

(2) A trustee that transfers a written request for access pursuant to clause (1)(d) must notify the applicant of the transfer as soon as reasonably possible, and the trustee to whom the written request for access is transferred must respond to it within 30 days after the date of transfer.

(3) The failure of a trustee to respond to a written request for access within the period mentioned in subsection (1) or (2) is deemed to be a decision to refuse to provide access to the personal health information, unless the written request for access is transferred to another trustee pursuant to clause (1)(d).[12]

[27] I have commented on these duties in my Review Report LA-2009-002/H-2009-001. I stated:

[39] HIPA contains an explicit duty to assist. Section 35 reads:

[11] *Supra* note 2 at section 7.
[12] *Supra* note 6 at section 36.

Duty to assist

> **35**(1) Subject to sections 36 to 38, a trustee shall respond to a written request for access openly, accurately and completely.
>
> (2) On the request of an Applicant, a trustee shall:
>
> (a) provide an explanation of any term, code or abbreviation used in the personal health information; or
>
> (b) if the trustee is unable to provide an explanation in accordance with clause (a) refer the Applicant to a trustee that is able to provide an explanation.

> [40] In my Report F-2004-003, I concluded that under FOIP there is an implicit duty on the part of a government institution to make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely. This also means that the government institution must undertake an adequate search for all records responsive to the access request.
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> [41] This position was confirmed in my Reports F-2006-001; F-2006-002; F-2005-005, F-2004-007 and F-2004-005.[13]

[28] As detailed above, pursuant to section 7(2) of FOIP, WCB responded to the Applicant's request on May 3, 2011, within 30 days of receiving it. However, during the course of this review, it has become evident that this response was deficient in several ways.

[29] A government institution must perform a complete search within the 30 day period set out by section 7(2) of FOIP so that it can respond to an access request openly, accurately and completely. I have explained in my Review Report F-2004-003, that this is part of the implied duty to assist.[14]

[30] Further, in my Review Report F-2012-001/LA-2012-001, I noted the following:

> [81] It is my position that local authorities and government institutions have a duty to assist all applicants and interpret access requests broadly, quite different from the application of an exemption which needs to be interpreted narrowly. Our office has also explained this position in the *Helpful Tips* document.

[13] SK OIPC Review Report LA-2009-002/H-2009-001at [39] to [41], available at: www.oipc.sk.ca/Reports/LA-2009-002%20and%20H-2009-001,%20December%2017,%202009.pdf.
[14] *Supra* note 9 at [12] to [15].

> FOIP and LA FOIP do not stipulate a duty to assist applicants. The OIPC however takes the position that there is an implied duty on the part of public bodies to take reasonable steps to ensure that they respond to access requests openly, accurately and completely. The duty to assist is explicit in HIPA.
>
> While applicants have a responsibility to *"specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record,"* many applicants do not have detailed knowledge about the types of records a public body/trustee maintains. In our view this kind of implied duty to assist is essential to meet the purpose of FOIP and LA FOIP. This is the standard that is clearly stated in HIPA.
>
> It may be useful for a FOIP/HIPA Coordinator to contact an applicant directly to determine (a) if what the applicant is looking for is clear; (b) if the request can be accommodated informally outside of the FOIP, LA FOIP or HIPA; and (c) if the request can be clarified in the interests of focusing on certain key records and avoiding unnecessary costs to the applicant.

> [82] I believe the request made by the Applicant should be interpreted to capture antecedent and related documents including the RFP response submitted by the Mayor of RVFS to the Ministry. Therefore, the proposals in question would qualify as a responsive record.[15]

[31] WCB provided a number of documents to the Applicant when it initially responded to her on May 3, 2011. The section 7 response made no mention of the other documents that may or may not exist, but which would be responsive to the request.

[32] Further, the May 3, 2011 response by WCB turned out to be confusing and misleading. The response stated that: "This notification has been provided pursuant to section 7(2)(b) of *The Freedom of Information and Protection of Privacy Act*." That section provides as follows:

> **7**(2) The head shall give written notice to the applicant within 30 days after the application is made:
>
> ...
>
> (b) if the record requested is published, referring the applicant to the publication;[16]

[15]SK OIPC Review Report F-2012-001/LA-2012-001 at [81] to [82], available at: www.oipc.sk.ca/Reports/Report%20F-2012-001-LA-2012-001.pdf.
[16]*Supra* note 2 at section 7(2)(b).

[33] I note that WCB has never explicitly abandoned this claim, but it is noteworthy that it made no effort to explain or to support such a claim. WCB certainly has not met the burden of proof of establishing, on a balance of probabilities, that this response was accurate. This is especially confusing since new exemptions were claimed by WCB well into this review. The section 7 response to the applicant is fundamentally important and requires that it be considered carefully by the government institution. No explanation has been forthcoming from WCB to make sense of the section 7 response of May 3, 2011. I suspect it was made in error.

[34] The Applicant, in her Request for Review dated May 9, 2011, claimed that there should be further responsive records. She was more specific in this request as follows:

> The information provided by... the WCB's privacy officer, does not include:
>
> - A list of all WCB staff and others who have been informed of the incident on January 14, 2011 and/or have been privy to communications re my RTW, including any supporting documentation, including but not limited to emails, letters, memos, and hand written notes
>   - At the very least, I am aware of communications with Ministry staff that were not included in the information provided
> - A record of all communications, oral or written, with WCB staff and others re the false claim that I am a risk to others
>   - I am aware of inscope staff who were told the above and who were not included in the information provided. I am particularly concerned re the potential impact of the communication of this false information on my work relations with other WCB staff in the future.
>   - I was not provided with any information as to the Board being informed.
> - A complete record of all communications, oral of written, re my health and well-being, with WCB staff and others
>   - I am aware that my health has been discussed with inscope staff as pertains to the false claim that I am a risk to others

[35] Upon consideration all of the above could be captured by her original request.

[36] In my office's preliminary analysis of October 1, 2012, in which we concluded that WCB had not provided enough detail to demonstrate that an adequate search had been performed, my office asked WCB to provide specific details as follows:

> Further, the Applicant has identified items that would be responsive to her request in her letter to us dated May 13, 2011 [sic] that may not have been captured by WCB's response. These include correspondence with Ministry officials and the Board of WCB.

[37] In response, WCB did not immediately provide additional records and instead provided brief responses to a list of 17 questions posed in our October 1, 2012 letter. These skeletal responses did not provide sufficient detail to demonstrate that an adequate search had been performed. WCB did not, at any other time during this review, provide further details of its search. I have previously commented on WBC's lack of rigour in searching for records responsive to an access request in my Review Report F-2012-002.[17] I recommended that WCB reconsider its policies and procedures when responding to access requests.[18]

[38] More significantly, with respect to a question from our office about "communications with Ministry staff" that concerned the Applicant, WCB's response stated as follows:

> Communications with Ministry Staff
>
> I can neither confirm nor deny the existence of such records. This is because if such records did exist the WCB would rely on paragraphs 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* in refusing to disclose such records.

[39] This response, which is inappropriate and non-responsive to our query, will be revisited in the discussion to follow with respect to the last issue.

[40] In a letter dated November 6, 2012, my office asked WCB to provide copies of any responsive records to our office.

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[17]SK OIPC Review Report F-2012-002 at [25] to [37], available at: www.oipc.sk.ca/Reports/F-2012-002.pdf.
[18]*Ibid.* at [55].

[41] My office received a letter dated December 7, 2012 from WCB advising the following:

> [The Applicant], who is very knowledgeable of the various structures and channels of our operations, did not indicate that "others' should mean the executive level of government to whom she had herself communicated, and which she could have easily indicated in her supplementary response. When, in your letter of October 1, 2012, the issue of the Minister is first raised, we provided the response that we are advised from the Office of the Information and Privacy Commissioner and informed by FOIP is the appropriate response, that is, neither confirming nor denying the existence of record and then referring to the appropriate exemption in FOIP should such records exists.

[42] As noted above, and consistently by my office, access to information requests must be interpreted broadly. It appears to have been the position of WCB that since the Applicant may have had knowledge of the records held by WCB, she needed to have been more specific in her request. It is inappropriate for WCB's FOIP Coordinator/Privacy Officer to create a non-statutory and arbitrary threshold for an employee who may be "very knowledgeable of the various structures and channels of our operations." If the employee was satisfied with internal and informal means of retrieving records about herself, presumably she would not have needed to make a formal access request. Once she makes a formal request she is entitled to be treated as any other applicant.

[43] Further, FOIP must be applied by government institutions in a consistent manner to all applicants. They cannot prejudice an applicant based on a perception by the FOIP Coordinator/Privacy Officer about what an applicant may know of records maintained by the institution. In other words, just because the Applicant is an employee of WCB, does not mean that unless she requests each document specifically, WCB can ignore her requests or make assumptions that narrow the scope of the request.

[44] As noted in the Background section of this Review Report, in a letter dated December 28, 2012, our office once again asked that WCB provide us with copies of the responsive records. In the alternative, my office suggested the following:

> We will require [copies of the responsive material] no later than January 18, 2013. Failing that, I anticipate that the Commissioner may issue a *subpoena duce tecum* or *subpoenas* to require you and the directors of each of the departments listed in your October 29, 2012 letter to attend at our office with all relevant documents including

> all documents relevant to the clarified access request and be examined under oath pursuant to section 54 of FOIP.[19]

[45] On February 6, 2013, my office received further material from WCB. Because of section 46(4)(b) of FOIP, I am not at liberty to acknowledge whether this material is responsive to the Applicant's request, but can confirm that they were not previously provided to the Applicant or acknowledged in the section 7 response of May 3, 2011. My office provided an analysis to WCB on March 27, 2013 which explained my view on duty to assist. I concluded that a complete search was not performed within the 30 day window provided by section 7 of FOIP. In reviewing the correspondence from WCB's FOIP Coordinator/Privacy Officer, I note that there is no evidence that, at the time of the search, he was unaware of the additional material provided to my office in February 2013. The analysis also noted that if he was uncertain about the relevance of the newly identified responsive records, he should have contacted the Applicant to discuss her request and clarify same. In a letter of April 23, 2013, WCB provided the following:

> Given the nature of the Applicant's request, that is, the efforts of the Workers' Compensation Board (the "WCB") in accommodating a return to work and any discussion regarding an at work incident of January 14, 2011 involving the Applicant, there was no reasonable grounds upon which to ascertain and conclude that the records being sought by the Applicant would include those involving the Minister or Ministerial officials.
>
> You have suggested that the WCB failed in its duty to assist the Applicant, **however I can inform you that on May 25, 2011, I spoke with the Applicant to determine with greater certainty what type of documentation she was requesting**. In that conversation she indicated to me that she wanted access to missing information, **specifically a list of names of all staff who were aware of the January 14, 2011 incident**. She expressed concern that WCB management was discussing her personal matters with others. At no point in our conversation was there any indication that the Ministry was part of her concern. It is certainly of note that my conversation with the Applicant on May 25, 2011, took place after May 13, 2011, which is the point at which she raised the issue of the communications with the Ministry as part of her

[19] *Supra* note 2 at section 54 states: **54**(1) Notwithstanding any other Act or any privilege that is available at law, the commissioner may, in a review: (a) require to be produced and examine any record that is in the possession or under the control of a government institution; and (b) enter and inspect any premises occupied by a government institution. (2) For the purposes of conducting a review, the commissioner may summon and enforce the appearance of persons before the commissioner and compel them: (a) to give oral or written evidence on oath or affirmation; and (b) to produce any documents or things; that the commissioner considers necessary for a full review, in the same manner and to the same extent as the court. (3) For the purposes of subsection (2), the commissioner may administer an oath or affirmation.

> request for review of the WCB's response to her access to information request. It was in your correspondence of October 1, 2012, to our office which to our understanding was part of your review, that the WCB first became aware that the Applicant was seeking records which were beyond the scope of her original request.
>
> [emphasis added]

[46] I note that WCB's FOIP Coordinator/Privacy Officer only attempted to clarify the Applicant's request on May 25, 2011, after the May 3, 2011 section 7 response was provided to the Applicant. I also note that the Applicant also had privacy concerns regarding the incident in question, which are alluded to in the above excerpt. These have been dealt with by my office in a separate file. It is unclear whether the conversation that took place on May 25, 2011 was in respect to the access request or the privacy concerns. WCB has not provided any record of this conversation to support its claim.

[47] WCB's letter of April 23, 2013 also stated:

> **It did not appear reasonable that records of the type that the Applicant was seeking in her initial request would include those involving the Minister or Ministerial staff because she was looking for operational records relating to her claim or human resources file**. The WCB provided the records in question to your office as part of your review, and raised the exemption sections from *The Freedom of information and Protection of Privacy Act* ("FOIP") in the context of that review. As you will note from the discussion above at no time prior to this was the WCB aware that these records would be responsive to the Applicant's request despite seeking clarification from her on May 25, 2011.
>
> [emphasis added]

[48] I also question why responsive records qualifying as correspondence regarding the Applicant involving the ministries, or anyone else, would not be kept on her personnel file.

[49] For reasons I am prohibited to discuss, pursuant to section 46(4)(b) of FOIP, I find that WCB has not demonstrated it has performed an adequate search. Further, because it should have identified all responsive material earlier and WCB did not attempt to clarify the access request with the Applicant before it issued its response, I find WCB failed to

meet the duty to assist and failed to respond to her requests openly, accurately and completely.

3. Is the Saskatchewan Workers' Compensation Board entitled to withhold the record when it failed to provide an appropriate section 7 response in the particular circumstances of this case?

[50] As noted above, WCB has indicated that it does not wish to confirm or deny the existence of the responsive records identified late in the review. In its letter to our office dated October 29, 2012, WCB stated:

- Communications with Ministry staff

  I can neither confirm nor deny the existence of such records. This is because if such records did exist the WCB would rely on paragraphs 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* in refusing to disclose such record.

[51] FOIP provides a mechanism to government institutions that allows them to refuse to confirm or deny to the applicant the existence of records to which an exemption would apply. That mechanism is sections 7(2)(f) and 7(4) of FOIP as follows:

> **7**(2) The head shall give written notice to the applicant **within 30 days** after the application is made:
>
> ...
>
> (f) **stating** that confirmation or denial of the existence of the record is refused pursuant to subsection (4).
>
> ...
>
> (4) Where an application is made with respect to a record that is exempt from access pursuant to this Act, the head may refuse to confirm or deny that the record exists or ever did exist.[20]
>
> [emphasis added]

[20] *Ibid.* at sections 7(2)(f) and 7(4).

[52] However, this mechanism is specifically related to section 7 of FOIP and the official response from a public body to an Applicant's access request. In this case, WCB did not signal to the Applicant, in its response dated May 3, 2011, that it refused to confirm or deny the existence of records. Apparently, WCB made no effort to clarify with the applicant the request, before issuing the section 7 response.

[53] Therefore, the opportunity to do so has passed and I find that it can no longer rely on sections 7(2)(f) and 7(4) of FOIP.

[54] This position is consistent with my office's policy on the consideration of new discretionary exemptions that were not raised in the section 7 response. My office's resource, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* states: "Our practice is that we will not normally consider a new discretionary exemption once we commence our review unless the public body/trustee can demonstrate that this will not prejudice the applicant."[21] I have stated as much in many Review Reports.[22]

[55] Section 7(4) of FOIP states that a government institution may only refuse to confirm or deny the existence of records if the records qualify for an exemption. In this case, WCB also claimed that the record qualify for exemptions pursuant to section 17(1)(a) and 17(1)(b) of FOIP which state as follows:

> **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;
>
> (b) consultations or deliberations involving:
>
> (i) officers or employees of a government institution;

[21]SK OIPC, *Helpful Tips: OIPC Guidelines for Public Bodies/Trustees in Preparing for a Review* at p. 8, available at: www.oipc.sk.ca/resources.htm.
[22]SK OIPC Review Reports F-2004-007 at [16], F-2005-006 at [6], F-2006-004 at [18], LA-2007-002 at [16] to [22], LA-2011-003 at [17] and LA-2011-004 at [8], all available at: www.oipc.sk.ca/reviews.htm.

(ii) a member of the Executive Council; or

(iii) the staff of a member of the Executive Council;[23]

[56] In my Review Report F-2005-002, I had opportunity to consider whether another government institution had properly invoked section 7(4) of FOIP. I stated the following:

> [15] **[Section 7(4) of FOIP] is a significant derogation from the principle of openness and transparency that underlies the Act. Unlike other Canadian jurisdictions, it is not limited to only certain kinds of exemptions but would apply to the full range of three mandatory exemptions and seven discretionary exemptions provided for in the Act. For example, in British Columbia and Ontario, such a power can only be invoked if the exemption relates to an unjustified invasion of personal privacy or interference with law enforcement. In Alberta, Prince Edward Island and Manitoba a third ground exists for refusing to confirm or deny the existence of a record namely, where disclosure would threaten health or safety. We recommend that the Legislative Assembly consider narrowing the scope for this discretionary power in line with these other provinces.**
>
> [16] The Saskatchewan provision is similar to the provision in the federal Access to Information Act. The federal provision was considered by the Federal Court in X v. Canada (Minister of National Defence). I find that discussion not particularly helpful since the decision of the Court revolved around certain confidential records the existence of which was apparently acknowledged by the public body in its response to the applicant. The Court did observe that:
>
> > As I am obliged by subsection 47(1) of the Act to take every reasonable precaution to avoid the disclosure of information which the head of an institution may be authorized to refuse to disclose, and since I must therefore avoid an irrevocable disclosure at this point because my decision might be successfully appealed, I must refer to the evidence and the reasons for my conclusions in very general terms only.
>
> [17] Section 47(1) of the federal Act has its Saskatchewan counterpart. Section 58(3)(b) provides as follows:
>
> > **58**(3) The court shall take every reasonable precaution, including, where appropriate, receiving representations ex parte and conducting hearings in camera, to avoid disclosure by the court or any person of:
> >
> > …
> >
> > (b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.

[23] *Supra* note 2 at sections 17(1)(a) and 17(1)(b).

[18] According to the authors of *Government Information: Access and Privacy*:

> **Any review by the federal or Saskatchewan Information Commissioner of such a response to a request… must preserve silence as to the existence of the information. Of course, if that official recommends that the information be disclosed, should it exist, that will certainly suggest that the information is, indeed, to be found in the institution's records.**

[19] Although there is no statutory reason why Justice cannot invoke section 7(4) in these circumstances, we find the decision troubling for a number of reasons.

[20] **The decision to invoke section 7(4) is discretionary. I do not wish to substitute my discretion for that of the head of Justice however I am required to assess whether there was a reasonable basis for this decision of Justice.**

[21] Acknowledging the existence of a responsive record in no way weakens the right of the Department to rely on any applicable exemptions. On the other hand, invoking section 7(4) creates an aura of secrecy around what may be a significant expenditure of public moneys.

[22] **The applicant is usually in an awkward position on any review under the Act since he or she has to make submissions although they have not and cannot actually view the record in issue. The Applicant in such a case is left to make educated guesses as to what is in the record. That awkwardness is compounded when the applicant must make submissions to our office without any idea of whether there is a responsive document.**

[23] I can see no particular prejudice to Justice in this case if it acknowledged responsive records, if they exist. If a responsive record exists, that would likely just conform to public expectations that in litigation involving the government, some assessment would be made at some point in the proceedings as to the risks and exposure to an adverse judgment, damages and costs. On the other hand, if there was no responsive record, the public would reasonably expect that the claim was seen as so spurious that no assessment was required or may well conclude that the Department was not adequately protecting the public treasury. These considerations may be interesting but, in my view, would not be proper reasons to refuse to acknowledge whether responsive records exist. The exercise of the discretion must be based on some legal or business prejudice to the Department and not public sentiment or reaction, actual or anticipated.

[24] I do not believe that there was a reasonable basis for the exercise of the statutory discretion to invoke section 7(4). In the result, I find that Justice should have disclosed whether or not a responsive record exists.[24]

[emphasis added]

[24] SK OIPC Review Report F-2005-002 at [15] to [24], available at: www.oipc.sk.ca/Reports/2005-002.pdf.

[57] I find WCB failed to meet its duty to assist the Applicant and it failed to identify all responsive records before its section 7 response was issued to the Applicant. WCB then refused to confirm or deny the existence of the record and finally purported to invoke new discretionary exemptions, 17 months after its original section 7 response. All of these actions considered together prejudice the Applicant and her statutory right of access. Therefore, WCB should release the records to the Applicant.

V FINDINGS

[58] *The Freedom of Information and Protection of Privacy Act* and *The Health Information Protection Act* does not apply to information not in recorded form as requested by the Applicant.

[59] The Saskatchewan Workers' Compensation Board has no obligation to create records to respond to access requests.

[60] The Saskatchewan Workers' Compensation Board failed to demonstrate it performed an adequate search.

[61] The Saskatchewan Workers' Compensation Board did not meet the implied duty to assist under *The Freedom of Information and Protection of Privacy Act* and the explicit duty under *The Health Information Protection Act* and did not respond to the Applicant's access to information request openly, accurately and completely.

[62] The Saskatchewan Workers' Compensation Board did not invoke sections 7(2)(f) or 7(4) of *The Freedom of Information and Protection of Privacy Act* in its section 7 response, therefore it cannot rely on these provisions at this late date.

[63] The Saskatchewan Workers' Compensation Board did not identify discretionary exemptions of sections 17(1)(a) and 17(1)(b) of *The Freedom of Information and Protection of Privacy Act* in its section 7 response to the Applicant. Therefore, it cannot apply discretionary exemptions at this late date.

VI RECOMMENDATIONS

[64] The Saskatchewan Workers' Compensation Board should provide to the Applicant copies of any records that are responsive to the request for access including any records that may involve the Ministry of Justice, the Minister responsible for WCB, the Ministry of Labour Relations and Workplace Safety or the Occupational Health Officer from the Ministry of Labour Relations and Workplace Safety or any other third party.

Dated at Regina, in the Province of Saskatchewan, this 29th day of October, 2013.

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