

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-30

July 24, 2014

**APPEALS COMMISSION FOR ALBERTA WORKERS'
COMPENSATION**

Case File Number F6163

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Alberta Workers' Compensation Appeals Commission (the Public Body) for statistics regarding the number of appeals conducted by the Public Body addressing a specific policy and how many of those appeals were granted.

The Public Body responded that there were no records that were responsive to the Applicant's request, and it directed the Applicant to the Canadian Legal Information Institute (CanLII) website, which contains the Public Body's decisions as well as search functions that would allow the Applicant to conduct her own search.

The Applicant requested a review of the Public Body's response, arguing that the Public Body ought to have had responsive records or ought to have been able to create responsive records in relation to the request for statistics.

The Public Body argued that while it maintains a database that records its decisions, the decisions are not recorded to the level of detail that would be required to respond to the Applicant's request. It also argued that creating a record from its electronic database would unreasonably interfere with its operations.

The Adjudicator found the Public Body fulfilled its duty to assist the Applicant, but that it did not satisfy its burden to show that it did not have to create a record under section 10(2).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 72.

Authorities Cited: AB: Orders F2007-029, F2009-017, F2009-029, F2011-R-001, F2013-20, F2013-30.

I. BACKGROUND

[para 1] On January 12, 2012, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Appeals Commission for Alberta Workers' Compensation (the Public Body) for statistics regarding the number of appeals conducted by the Public Body addressing Policy 05-02 Part II Application 1, Question 3 "worker error in judgement" in the past five years and how many of those appeals were granted.

[para 2] The Public Body responded that there were no records that were responsive to the Applicant's request, and it directed the Applicant to the Canadian Legal Information Institute (CanLII) website, which contains the Public Body's decisions as well as search functions that would allow the Applicant to conduct her own search.

[para 3] The Applicant requested a review of the Public Body's response, arguing that the Public Body ought to have had responsive records or ought to have been able to create responsive records. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful and the Complainant requested an inquiry.

II. RECORDS AT ISSUE

[para 4] As there were no records created in response to the request for statistics, there are no records at issue.

III. ISSUES

[para 5] The issues as set out in the Notice of Inquiry are as follows:

- 1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?**
- 2. Does section 10(2) of the Act (duty to assist applicants) require the Public Body to create a record for the Applicant?**

IV. DISCUSSION OF ISSUES

1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist)?

[para 6] A public body's obligation to respond to an applicant's access request is set out in section 10, which states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

[para 7] An adequate search requires a public body to take every reasonable effort to search for the actual records requested. Where appropriate, the public body must tell the applicant in a timely manner what steps have been taken to search for the requested records (see Order F2009-017, at para. 53).

[para 8] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 9] The Public Body provided an affidavit from the employee involved in the search for records. The affiant states that the Public Body does keep copies of its decisions, but that it does not have an internal system of records that sort decisions to the level of detail requested by the Applicant.

[para 10] Although the Public Body has provided minimal information regarding its search for records, I am satisfied with the Public Body's explanation that it does not have records in its custody or control containing the specific statistics requested by the Applicant. Based on the submissions of both the Public Body and the Applicant, as well as the nature of the Applicant's request, the more relevant issue regarding the provision of records responsive to the Applicant's request is whether the Public Body had a duty to create responsive records. This issue will be discussed later in the Order.

Did the Public Body respond to the Applicant as required by section 10(1)?

[para 11] The Public Body stated in its response to the Applicant (dated February 17, 2012):

The program area has advised that in order to find the information you are seeking you may be able to utilize the search function on CanLii where a search can be made in *Appeals Commission Decisions* using "policy 05-02 Part II Application 1, Question 3."

[para 12] The Applicant does not indicate that this response from the Public Body is inadequate (other than disagreeing with the Public Body's decision communicated in the response). In my view, the Public Body's response to the Applicant was adequate to fulfill its duties under section 10(1).

[para 13] The Applicant does state that her search of the CanLII website for responsive decisions was not helpful. The Applicant provided, as part of her submission, screen shots of three different searches she conducted on CanLII, with the number of results from each search. She states that her searches resulted, variably, in 374 decisions, 1628 decisions and 9373 decisions, depending on whether she specified "worker" or "workers" and "judgement" or "judgment".

[para 14] I note that the Applicant has not properly set up her searches to locate a particular phrase within the decisions; to search for a phrase such as "worker error in judgement", the phrase must be enclosed in quotation marks. Although the Applicant states in her letter that she has done so, the screenshots she has provided indicate that she did not. Further, the CanLII website permits a querant to direct a search that includes plurals, or to specify that alternate words are permissible (e.g. judgment **or** judgement). The CanLII website includes tools to help an individual set up a proper search, and therefore I believe the Public Body was being sufficiently helpful in terms of its duty under section 10(1) when it directed her to this site.

2. Does section 10(2) of the Act (duty to assist applicants) require the Public Body to create a record for the Applicant?

[para 15] The Public Body notes that the Applicant appears before it as a party (by reference to her statement in her submission that she "continue[s] to be thwarted on appeals involving this Policy"). The Public Body argues that as an administrative

tribunal, taking the steps required to create a responsive record for the Applicant would amount to conducting research for a party appearing before it. It states:

It appears that the Applicant is attempting to obtain research from the Public Body which she can then use to support the appeals that she brings on behalf of her clients. While the Public Body is willing to take appropriate steps to assist appeal participants, it submits that conducting research that may support a particular appeal or type of appeal has the potential to create a reasonable apprehension of bias and is beyond the scope of its role as an independent decision-maker. (Initial submission, page 8)

[para 16] Although a requestor's motive may have some bearing on the application of particular provisions, generally speaking, the requestor's identity is not to influence how a request is processed. A public body has a duty to respond to an access request under the FOIP Act even if the requester is or will be a party before the Public Body in a Public Body proceeding. (That said, I do not understand the Public Body to be arguing that responding to any request from any applicant who is or might be a party to a proceeding would create a reasonable apprehension of bias regarding the Public Body as a decision-maker. Rather, the Public Body seems to be arguing that in this *particular* case, responding to the Applicant's request would exceed its duties under the Act and because of that, it would amount to conducting research on behalf of the Applicant. Nevertheless, the general comment respecting identity applies to the particular case.)

[para 17] I do not see that if the Public Body were to provide the Applicant with information to which she has a legal entitlement under the FOIP Act, this would create any sort of bias in the Public Body, either in favour of or against the Applicant, with respect to any future proceedings before it in which she participates.

[para 18] With respect to the requirement set out in section 10(2), this provision states the following:

10(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

[para 19] Section 10(2) requires a public body to create a record if that record can be created from another record that is in electronic form using the public body's normal computer hardware and software, and its expertise. This requirement is subject to the limit in section 10(2)(b) (unreasonable interference with public body operations). The duties imposed by section 10(2) have been described as "electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants" (see Orders F2011-R-001 at para. 19, Order F2013-20 at para. 46).

[para 20] In Orders F2013-20 and F2013-30, I reviewed past orders from this Office regarding the scope of section 10(2), as well as orders from the Offices of the Ontario and BC Information and Privacy Commissioners regarding the scope of similar provisions in the respective legislation, and found that these orders reach a very similar conclusion. Where a public body can create a record from information currently existing in electronic form by essentially manipulating the data, it has an obligation to do so in response to an access request, as long as it can be done using the public body's normal hardware, software and technical expertise and where creating the record would not unreasonably interfere with the public body's operations. Some incidental manual input may be required in order to do this, but such incidental input does not necessarily negate the duty. (However, this is in contrast to extensive manual review of data obtained electronically, to identify a data subset – in other words, to what would amount to a research project.)

[para 21] The Applicant's request was for statistics regarding the total number of appeals, as well as the number granted, regarding Policy 05-02, Part II Application 1, Question 3. This policy is from the WCB Policies and Information Manual, which is approved by the WCB Board of Directors and is binding on the decision-makers of both the WCB and the Public Body. This manual is available on the WCB website¹; having reviewed the manual, I note that it contains

- General Policies (01-01 to 01-09);
- Claimant & Health Care Services Policies (02-01 to 05-02); and
- Employer Services Policies (06-01 to 07-03).

Each of these policies contain between one and nine Applications. These Applications further break down into several questions. The Applicant's request then, was for decisions regarding a very specific issue.

[para 22] I note from the Policies and Information Manual that all of Policy 05-02 appears to relate to "cost relief"; this Policy includes 3 Applications and between 7 and 16 Questions under each Application.

[para 23] The Applicant provided an email sent from a Team Lead with the WCB to the Applicant in response to a question from the Applicant related to a similar request for records to that public body. In that email, the Team Lead mentioned another database (AMS) that is used by both the Dispute Resolution and Decision Review Body (which is part of the Workers' Compensation Board (WCB)) and the Public Body. The Applicant argues that the email indicates that the AMS database captures the requested information; specifically, the Team Lead indicates that the AMS captures (amongst other things) the Public Body's decision on a file, and the issue under review in that file.

[para 24] The Public Body responds that the AMS database

¹ http://www.wcb.ab.ca/public/policy/manual/policy_manual.asp, access on May 16, 2014.

permitted only very broad searches with respect to issue of appeal, the results of which would have required cross-referencing with either the Public Body's files or, more practically, the decisions posted on CanLII. (Initial submission, para. 21)

[para 25] The Public Body further states that at best it could search the AMS database for all appeals involving "cost relief" (which is the topic of all of Policy 05-02). In other words, the Public body argues that the narrowest search it could do would yield far more than just the requested decisions. It says:

AMS is not capable of searching at a more detailed level. In other words, it does not have the ability to search specifically for decisions that engage the issue of "worker's error in judgement". This search [I presume this refers to the search for "cost relief"] would generate a list of several hundred application numbers. (Initial submission, Tab 6, para.9)²

[para 26] The affiant states that she consulted with another Public Body employee, who has extensive experience with the AMS system. Using the Public Body's files, the steps required to create a record responsive to the Applicant's request would be as follows:

- Search AMS for all appeals where "cost relief" was an issue. AMS is not capable of searching at a more detailed level. In other words, it does not have the ability to search specifically for decisions that engage the issue of "worker's error in judgement". This search would generate a list of several hundred application numbers.
- Locate the file for each application number. Some files are stored electronically; others are paper files and would have to be recalled from our off-site storage facility.
- Locate the decision document on each file, and determine whether the decision engages the issue of "worker's error in judgement."
- Create a record that indicates how many appeals on "worker's error in judgment" were heard in the relevant time period, and of those appeals, how many were granted. (Initial submission, Tab 6, para.9)

[para 27] The affiant further states that she believes it would take a dedicated employee at least one month to compile the information using the Public Body's internal records. (Initial submission, Tab 6, para. 11)

[para 28] By letter dated June 17, 2014, I requested further information from the Public Body regarding what information is captured in its AMS database, as well as the search capabilities of the database; the Applicant also had an opportunity to respond. The Public Body provided me with screenshots from the database; these screenshots show the input

² It is not clear to me why the Public Body could not use a different 'key phrase' such as "worker error in judgment", or "Policy 15-02, Part II Application 1, Question 3", but even if it could, it is possible that such a search would be under-inclusive, since it is not clear that all responsive decisions would necessarily use such a phrase, or a reference in precisely these or similar terms. Conversely, if it could search "Policy 05-02", this, as described above, would be over-inclusive.

fields for the AMS database. It is clear from this evidence that the information entered into the database is minimal and appears mainly to be for the purpose of tracking the file through the Public Body's process, rather than recording the outcome. The screenshots also show that minimal detail about each file is entered into the database.

[para 29] The Public Body states that the database has a field to include the issue description for each case; however, "it was not mandatory for users to enter information in this area." It also states that in order to run a report (to search for decisions based on certain issues, presumably) the report had to be programmed by a technical support person. The Public Body had several programmed reports, but none that included the issue description field. It states:

This meant that the Appeals Commission did not have a tool to search the custom issue description field. Even if a search tool did exist, the results would not be determinative because there were no business rules regarding the information entered in that field.

[para 30] I disagree with the Applicant that the email from the WCB Team Lead to the Applicant means that the Public Body has the ability to locate the responsive decisions from the AMS database. I agree with the Public Body that the steps it would have to take to respond to the Applicant's request using the AMS database amount to more than mere incidental manual input by the Public Body, and exceed the Public Body's duty to create a record under section 10(2). I conclude from the evidence provided by the Public Body, including the screen shots of the database, that the information in the database is not recorded in a manner that would allow the Public Body to search for and identify all of the cases relating to a "worker error in judgment", or some similar variant, without unreasonably interfering with the operations of the Public Body.

[para 31] The Public Body has also stated that it keeps electronic copies of its decisions. I asked the Public Body to provide further information about the format of these copies and whether the Public Body could conduct a search of these copies to create the requested information. The Public Body responded as follows:

In October 2009, the Appeals Commission began publishing its decisions on the CanLII website on a go-forward basis. At that time, the Appeals Commission also undertook to publish all decisions from January 1, 2003 to date. Decisions from 2003 to 2009 were kept on a network drive in Word format and were not the signed final version of the decision. During that time, the signed final version of the decision was kept in paper format only on the file. Due to new records management processes starting in 2009, most decisions were saved in a different network drive in both Word and pdf formats.

The search function in Windows Explorer is not a comprehensive search tool, such as CanLII which tags keywords and allows the user to perform multiple queries. To our knowledge, the search function only permits keyword searches of file names, and not the full text of documents. Decision files were named based on a file naming convention that incorporated the finalized date and claim number only. This means that the Appeals Commission could not have conducted a keyword search for the decisions within its network drives.

[para 32] The Applicant's request includes records from 2007 to 2012. I understand the Public Body's first point to be that the Word (and/or pdf) copies of its decisions post-2009 were kept on one network drive, and the 2003-2009 copies were kept on another drive. Further, only the post-2009 Word copies are copies of the signed final version. However, it is unclear whether the Public Body was sending a paper copy of the signed versions of the 2003-2009 decisions to CanLII, or whether it sent a copy of the Word version that was *not* the official, signed version. If the latter, and the Public Body means to suggest that it cannot use these unofficial Word copies to create a record for the Applicant, I disagree. If the unofficial Word copy is sufficient to send to CanLII to be posted publicly, it is sufficient for the purposes of the Applicant's request.

[para 33] It may be that the Public Body is suggesting that it would need to create two separate records for the Applicant; one from the 2003-2009 decisions, and one from the post-2009 decisions, because these decisions are located in separate databases. If the requested information can be created from each database, it seems that the Public Body could add up the result from each database for the Applicant. Even if this is more than "incidental manual input", the Applicant might be satisfied with separate results from each database (which she could then add together herself).

[para 34] In any event, I am not satisfied with the Public Body's explanation that "to [its] knowledge" a search cannot be conducted of the Word files. It may very well be the case that a search may only be conducted of file names, which would not elicit the information requested by the Applicant. The Public Body has the burden of showing this to be the case and its explanation does not satisfy this burden. The Public Body might have provided me with an affidavit from an IT specialist stating that it is not possible to conduct the type of search of the Word files that would be required to create the record requested by the Applicant, and why. Or it might have listed the steps that would have been required to create the requested record and explained why these steps amount to more than incidental manual input.

[para 35] In any event, in order to satisfy its burden, the Public Body must explore the possibility of conducting such a search. Therefore, I will order the Public Body to investigate the possibility of creating the requested record from the Word copies of its decisions and provide a new response to the Applicant. If it is possible to create the requested record using the public body's normal computer hardware and software and only incidental manual input, the Public Body is to create the requested record. If it is not possible, the Public Body is to explain to the Applicant why the requested record cannot be created.

[para 36] The Applicant asks, in a letter originally sent to the portfolio officer conducting the investigation and also provided in her initial submission to the inquiry, the following question

If, indeed the correct result is 9,373 [referring to the number of decisions resulting from one of her searches on CanLII], I ask of your office, is it 'reasonable' to expect the requestor to review some 9,000 decisions for the

purpose of securing the information requested, when the Appeals Commission most certainly employs IT professionals to manage their systems?

[para 37] I have decided to order the Public Body to investigate the possibility of creating a record from its decisions in Word format. If the Public Body cannot create the requested statistical information from these decisions with only incidental manual input, then the Public Body need not take further steps to provide responsive records to the Applicant. While the Public Body may employ individuals who are more capable than the Applicant of conducting the type of search required to produce the information the Applicant seeks, this does not oblige the Public Body to ask its employees to do so.

V. ORDER

[para 38] I make this Order under section 72 of the Act.

[para 39] I find that the Public Body met its duty to assist under section 10(1) of the Act.

[para 40] I order the Public Body to investigate whether it can create the requested record within the terms of section 10(2) from the decisions kept in Word format, and respond to the Applicant accordingly.

[para 41] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator