



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER 201

Appeals 890020 and 890061

Workers' Compensation Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

O R D E R

INTRODUCTION:

On January 9, 1989, the requester wrote to the Workers' Compensation Board (the "institution") seeking access to:

...the reviews of W.C.A.T. Decisions prepared by the Workers' Compensation Board.

On January 18, 1989, the institution's Freedom of Information and Privacy Co_ordinator (the "Co_ordinator") wrote to the requester advising him that:

Unfortunately, I cannot consider your request complete as it is too general and requires further clarification.

For your information, the WRAC reports date back to October of 1986, the last one reviewing WCAT decisions rendered in the month of June, 1988.

I am enclosing a copy of the WRAC report for the month of December, 1987 as an example of what I am prepared to release from the monthly reports. As you will notice, parts of the report have been severed and are being withheld. More specifically, I am providing you with the factual and statistical parts of the report and I am withholding the part which would reveal the advice or recommendation of a public servant, any other person employed in the service of an institution or a consultant retained by an institution, as permitted by Section 13(1) of the Freedom of Information and Protection of Privacy Act. Furthermore, it has been decided that there is no compelling public interest which should override the application of the Section 13 exemption.

...

Should you wish to receive all the WRAC reports so severed, there would be a fee. The fee estimate per monthly report would be \$6.00 for 15 minutes of severing, \$.20 a page for photocopying and \$1.65 shipping costs. For the enclosed report, the total cost would be \$12.25. Other monthly reports may be more depending on their size.

It is your decision as to whether you wish to have copies of the statistical and factual parts with the advice and recommendation information severed of all WRAC reports from October, 1986 to June, 1988 for a fee or whether you wish to appeal the severance of the enclosed report immediately.

On February 7, 1989, the requester appealed the institution's decision to sever the December 1987 WRAC report. Subsection 50(1) of the Act gives a person who has made a request for access to a record under subsection 24(1) or a request for access to personal information under subsection 48(1) a right to appeal any decision of a head of an institution to the Commissioner. On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

In his letter of appeal, the appellant stated:

...The Workers' Compensation Board refuses to provide the full text of the WRAC Reports. Pursuant to Section 13(2)(k) and Section 13(2)(l) the public should have information from the Workers' Compensation Board as to how and for what reasons they disposed of Workers' Compensation Appeals Tribunal decisions brought before them.

On February 13, 1989, notice of this appeal (Appeal Number 890020) was given to the institution and the appellant.

On January 25, 1989, the same requester wrote to the institution seeking access to the WCAT Review Advisory Committee Reports for the months of July and August 1988 as referred to in Volume 3, No. 1 of the Communique. The Communique is a publication of the Workers' Compensation Board which provides highlights of the monthly Board of Directors meetings.

By letter dated February 13, 1989, the Co_ordinator wrote to the requester advising him that:

I am enclosing a copy of the "WRAC" Reports for the months of July and August 1988.

As you will notice parts of the report have been severed and are being withheld. More specifically, I am providing you with the factual and statistical parts of the report and I am withholding the part which would reveal the advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution, as permitted by Section 13(1) of the Freedom of Information and Protection of Privacy Act. Furthermore, it has been decided that there is no compelling public interest which should override the application of the Section 13 exemption (S.23).

...

The fee for the WRAC Reports is \$16.85. This has been calculated as follows: \$6.00 for 15 minutes of severing, \$9.20 for copying (46 pages at \$0.20) plus \$1.65 for shipping charges.

On March 9, 1989, the requester appealed the institution's decision stating:

I wish the WRAC reports of July and August provided to me uncensored.

On March 21, 1989, notice of this appeal (Appeal Number 890061) was given to the institution and the appellant.

The records containing the severed information at issue in each appeal were obtained and examined by the Appeals Officer assigned to the cases and efforts were made by the Appeals Officer to mediate a settlement of each appeal. There are five records at issue which when combined total 69 pages. For a detailed description of these records, please refer to Appendix A. The records contain the following:

- (a) memoranda from the Chairman of the institution to its Board of Directors;
- (b) memoranda from the Chairperson of the WCAT Review Advisory Committee (the "WRAC Committee") to the institution's Executive Committee (the "board of directors") containing an executive summary of the monthly WRAC Committee Report (the "WRAC Report"); and
- (c) memoranda from the Chairperson of the WRAC Committee to the institution's board of directors containing the full monthly WRAC Report.

As settlement of the appeals could not be effected, notice that an inquiry was being conducted to review the decision of the head, in each of the above-noted appeals, was sent to the appellant and the institution. Enclosed with each notice letter were reports prepared by the Appeals Officer intended to assist the parties in making their representations concerning the subject matter of the appeals. The Appeals Officer's Reports outline the facts of the appeals and set out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeals.

These reports indicate that the parties, in making their representations, need not limit themselves to the questions set out in the reports.

The appellant and the institution each submitted one set of written representations to address both appeals. On February 12, 1990, written clarification on several points was requested from the institution. Additional representations were received from the institution shortly thereafter. I have considered all of these representations in making this Order.

As Appeal Numbers 890020 and 890061 involve the same type of information withheld from disclosure and the same parties, I have decided to deal with them by way of one Order.

PURPOSES OF THE ACT/BURDEN OF PROOF:

The purposes of the Act as set out in section 1 should be noted at the outset. Subsection 1(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter_balancing privacy protection purpose of the Act. This provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions, and should provide individuals with a right of access to their own personal information.

Further, section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the

specified exemptions in the Act lies with the head of the institution.

BACKGROUND :

In 1984, amendments to the Workers' Compensation Act, R.S.O. 1980, c. 539, created the Workers' Compensation Appeals Tribunal (the "WCAT"). One of the primary functions of WCAT is to hear appeals from decisions, orders, or rulings of the institution respecting the provision of health care, vocational rehabilitation, entitlement to compensation or benefits, assessments, penalties or the transfer of costs. While subsection 86(g)(3) of the Workers' Compensation Act indicates that an order or direction of WCAT with respect to an appeal is final, conclusive and not open to question or review in any court, subsection 86n. of that Act provides the board of directors of the institution with the discretion to direct the WCAT to reconsider a matter in specific circumstances.

Subsection 86n. of the Workers' Compensation Act states:

- (1) Where a decision of the Appeals Tribunal turns upon an interpretation of the policy and general law of this Act, the board of directors of the Board may in its discretion review and determine the issue of interpretation of the policy and general law of this Act and may direct the Appeals Tribunal to reconsider the matter in light of the determination of the board of directors.
- (2) Where the board of directors of the Board in the exercise of discretion under subsection (1) considers that a review is warranted, it shall either hold a hearing and afford the parties likely to be affected by its determination an opportunity to make oral or

written submissions or it may dispense with a hearing if it permits the parties likely to be affected by its determination to make written submissions, as the board may direct.

- (3) The board of directors of the Board shall give its determination and direction, if any, under this section in writing together with its reasons therefor.
- (4) Pending its determination, the board of directors of the Board, with respect to the decision that is the subject-matter of the review, may stay the enforcement or execution of the order made under the decision or may vacate the order if it has been implemented.

In order to assist the board of directors of the institution with its review of WCAT decisions, the WRAC Committee was created. This internal Committee reviews every WCAT decision and provides the board of directors of the institution with a report, the WRAC Report, which includes advice and recommendations with respect to whether a decision of WCAT should be reviewed under section 86n.

ISSUES/DISCUSSION:

Although the records in issue in these appeals contain numerous severances which were withheld from disclosure, the institution did release significant portions of the records to the appellant. The institution advised that it had released factual and statistical information contained in the records.

The sole issue in these appeals is as follows:

Whether the head has properly applied the discretionary exemption provided by subsection 13(1) of the Act to the severed portions of the records.

Subsection 13(1) of the Act reads as follows:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

With respect to the information severed from the records and not released to the appellant, the institution submitted that:

...the severed portions of the requested records contain "advice or recommendations" of a "public servant", within the meaning of section 13(1) of FIPPA. The mandate of the WRAC Committee is to provide advice or recommendations which may raise a section 86n review issue or which may be of interest with respect to Board practice or procedures. The severed portions of the WRAC Reports outline the recommendations of the WRAC Committee as to the course of action the board of directors might consider with respect to a particular decision. The members of the WRAC Committee are employees within the institution and fall within the scope of section 13(1).

Commissioner Sidney B. Linden discussed the general purpose of the exemption provided by section 13 of the Act, in Order 94 (Appeal Number 890137) dated September 22, 1989. At page 5 of that Order, he stated that:

... in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making.

Commissioner Linden addressed the section 13 exemption further in Order 118 (Appeal Number 890172) dated November 15, 1989. At page 4 of that Order he stated that:

In my view, 'advice' for the purposes of subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertains to the submission of a future course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

I agree with the views of Commissioner Linden with respect to section 13 of the Act and adopt them for the purposes of these appeals.

In my view, the severances made to the five records at issue in these appeals can be divided into the following three categories:

1. Severance of Information;
2. Severance of Advice and Recommendations in areas other than Section 86n. Reviews; and
3. Severance of Recommendations Related to Section 86n. Reviews.

1. Severances of Information

The first category of severances found within the records contain information that informs the board of directors of the institution that discussions in named WCAT decisions "may be of interest to" certain named departments within the institution, or that the WRAC Committee has referred a decision to a named department within the institution.

The majority of the severances in the five records are of this nature. In my view, these severances do not contain advice or recommendations of a suggested course of action that will be determined by the board of directors. Rather, the information contained in these severances can be classified as mere reportage. Their purpose is to provide for the sharing of information within the institution. There is no specific course of action offered to the board of directors for deliberation leading to a decision. In my opinion, the severances falling within this category do not qualify for exemption under section 13(1) of the Act. Accordingly, the information in these severances should be disclosed to the appellant.

2. Severance of Advice and Recommendations in areas other than Section 86n. Reviews

The second category of severance made by the institution can be described as advice or recommendations of the WRAC Committee to the board of directors in areas other than section 86n. reviews under the Workers' Compensation Act. These severances contain recommendations for a suggested course of action that is ultimately decided upon by the board. I am satisfied that these severances qualify as advice or recommendations of a public servant for the purposes of subsection 13(1) of the Act.

I have reviewed subsection 13(2) of the Act, which contains certain exceptions to the application of subsection 13(1), and I find none of the exceptions apply to these severances.

Subsection 13(1) also provides the head with the discretion to release a record even if it meets the test of the exemption. I

find nothing improper in the way in which the head has exercised his discretion and would not alter it on appeal.

3. Severance of Recommendations Related to Section 86n. Reviews

The third and final category of severances made by the institution contain the recommendations of the WRAC Committee prepared for the board of directors with respect to possible reviews of decisions of WCAT pursuant to section 86n. of the Workers' Compensation Act.

Portions of these severances do not, in my opinion, reveal advice or recommendations of a public servant but rather contain factual information as to why a section 86n. review should be considered. There is no specific course of action offered to the board of directors for deliberation leading to a decision. In my opinion, the factual portions of the severances do not qualify for exemption under section 13(1) of the Act. Therefore, the information in these severances should be disclosed to the appellant.

It is my view that some of the severances in this category do contain the advice or recommendations of the WRAC Committee as to a course of action in relation to possible section 86n. reviews which would be accepted or rejected by the institution's board of directors. I find that these severances do qualify for exemption as "advice or recommendations" for the purposes of subsection 13(1) of the Act.

Having found that some of the severances do contain "advice or recommendations" for the purposes of subsection 13(1) of the

Act, I must look at whether any of the subsection 13(2) exceptions apply.

I shall first consider whether subsection 13(2)(1) of the Act applies to the advice or recommendations severed from the records at issue in these appeals which relate solely to section 86n. reviews under the Workers' Compensation Act. Subsection 13(2)(1) is unusual in the context of the Act in that it is a mandatory exception to the application of an exemption. In other words, even if the record or severances at issue contain advice or recommendations pursuant to subsection 13(1), the head must disclose the advice or recommendations if subsection 13(2)(1) applies.

Subsection 13(2)(1) of the Act provides that:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

(1) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

(i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or

(ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

The institution provided the following overview of the role and purpose of the WRAC Committee with respect to the review of WCAT decisions pursuant to subsection 86n. of the Workers' Compensation Act. Although the overview is quite lengthy, it is reproduced in full as I feel it is essential to an understanding of my Order:

1. The Mandate and Purpose of the WRAC Committee

Pursuant to section 86n of the Workers' Compensation Act (the "Act"), the board of directors of the Workers' Compensation Board (the "Board") has the discretion to review a decision of the Workers' Compensation Appeals Tribunal ("WCAT") where the decision turns upon an interpretation of the policy and general law of the Act. Where the board of directors decides to invoke this review power, it may also:

- . determine the issue of the interpretation of the relevant policy and general law of the Act;
- . stay the implementation of the WCAT decision pending a determination of the issue;
- . direct WCAT to reconsider the decision in light of its determination.

To assist in the performance of this statutory responsibility, the board of directors has established an internal committee, called the WCAT Review Advisory Committee (the "WRAC Committee"), The WRAC Committee

is chaired by the General Counsel of the Board and is composed of representatives from the General Counsel's Office and from senior management within the Board. The WRAC Committee reviews and analyzes all WCAT decisions and reports to the board of directors, through the Chairman of the Board. The board of directors has delegated to the WRAC Committee the following tasks:

- . to identify cases which it believes may warrant a review under section 86n of the Act;
- . to review applications from parties for the review of individual WCAT decisions under section 86n of the Act;
- . to identify decisions which may impact on Board policies and practices but may not warrant a review under section 86n of the Act.

To assist the WRAC Committee, a Sub-Committee has been established and reports to the WRAC Committee. The Sub-Committee is chaired by a representative from the office of the General Counsel and consists of representatives from the Board's operating areas. It meets twice a month to review and analyze the approximately 100 decisions issued by WCAT each month. It also prepares statistical material which documents information such as the number of WCAT decisions issued per month, the number of appeals from workers or employers and the percentage of successful and unsuccessful appeals.

2. What is the system?

The WRAC Committee, assisted by the Sub-Committee, prepares a monthly report (the "WRAC Report") to the Chairman of the Board on the WCAT decisions issued in the particular month.

The WRAC Report consists of factual summaries of the decisions which have been highlighted by the WRAC Committee. In general, each summary is followed by an analysis of that decision and recommendations as to the appropriate course of action to be considered by the board of directors with respect to the decision. The recommendations often contain legal analysis and advice regarding the issues raised in the decision.

The identification of cases which may be appropriate for a section 86n review recommendation, or which raise issues of particular interest to the Board, involves a thorough understanding of Board practice and procedure. The internal composition of both the WRAC Committee and Sub-Committee reflects the need to have the input of representatives from various departments within the Board.

The WRAC Report provides a method of informing the board of directors of decisions which may necessitate the action of, or be of interest to, the board of directors. As well, after the board of directors has reviewed the report, it is circulated within the Board on a restricted basis and provides an informative method of communicating decisions of interest to senior Board staff.

3. Who does the Committee report to?

The WRAC Committee reports to the Chairman of the Board who in turn forwards the report to the board of directors with his recommendations.

Once the report receives approval from the board of directors, it forms a part of the minutes of the board of directors.

In its representations the institution submitted that:

The WRAC Report contains advise or recommendations within the meaning of section 13(1). It does not contain the reasons for the board of directors and cannot be viewed as the reasons for any subsequent action taken by the board of directors pursuant to section 86n. of the [Workers' Compensation Act]. Rather, the WRAC Report

identifies issues contained in the WCAT decisions and makes recommendations for the consideration of the board of directors.

The institution further submitted that:

...section 13(2)(1) pertains to a decision relating to the exercise of an actual discretionary power, not to a decision as to whether or not the discretionary power will be exercised. This view is buttressed by the wording of that subsection which refers to a decision, ruling or order made during or at the conclusion of the exercise of the power. The clear wording of the subsection anticipates that the exercise of the power is underway or has been concluded. The considerations whether or not to enter into an exercise of a particular discretionary power are irrelevant for the purposes of subsection 13(2)(1) of FIPPA.

With respect to a section 86n review pursuant to the Act, the board of directors of the Board considers recommendations of the WRAC Committee regarding various decisions of the Workers' Compensation Appeals Tribunal ("WCAT"). It is submitted therefore, that a determination made by the board of directors regarding whether to exercise its actual discretionary power to review is not a "final decision" within the meaning of subsection 13(2)(1) of FIPPA.

...Therefore, the question of whether the WRAC recommendations can be considered to be the "reasons" of the board of directors is inapplicable in light of this submission.

I do not agree with the position advanced by the institution. I believe that it is in keeping with the stated purposes of the Act that subsection 13(2)(1) and for that matter the other exceptions listed in subsection 13(2) be given a broad application.

Subsection 86n.(1) of the Workers' Compensation Act confers upon the board of directors of the institution the discretion to review the decisions of WCAT and determine the issue of interpretation of the policy and general law of that Act, where in the board of directors' opinion a WCAT decision turns upon an interpretation of the policy and general law of that Act. This subsection also indicates how such a review should proceed.

In order to make the determination of whether to exercise its discretion with respect to a section 86n. review of a WCAT decision, the board of directors of the institution relies upon the advice and recommendations of the WRAC Committee. As I have not been provided with any submissions to the contrary, it is my view that once the board of directors exercises this discretionary power its decision is final.

It is my view that the the board of directors' final decisions made in relation to the records at issue in these appeals, were made during or at the conclusion of the exercise of a discretionary power conferred by subsection 86n.(1) of the Workers' Compensation Act.

In my opinion, the board of directors' reasons for its final decisions and the advice or recommendations of the WRAC Committee which have been severed from the records at issue in these appeals, are in fact one and the same. My opinion is based upon the institution's description of the process with respect to section 86n. reviews, the wording of the Chairman's memoranda to the board of directors and the minutes of the meeting of the board of directors in relation to the records at issue in these appeals.

Therefore, I find that the exception under subsection 13(2)(1) of the Act applies to the advice or recommendations relating to section 86n. reviews which have been severed from the records at issue in these appeals.

In most appeals it is possible to set out a more detailed explanation of my decision. However, in this case, my concern with not disclosing the content of the records at issue in the Order itself has caused me to limit my explanatory remarks to those deemed necessary.

ORDER:

1. I order the head to disclose the records at issue in these appeals to the appellant within 20 days from the date of this Order, in accordance with the highlighted copy I have provided to the head. The portions of the records which have been highlighted indicate those portions which I have found to be exempt from disclosure to the appellant.
2. I further order the head to advise me in writing within 5 days from the date of disclosure, of the date on which disclosure was made. The notice concerning disclosure should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:
Tom A. Wright
Assistant Commissioner

October 16, 1990
Date

APPENDIX A

Appeal Number 890020

- Record 1.** (a) A two page memorandum dated June 22, 1988, from the Chairman of the institution to the Board of Directors, which has attached to it;
- (b) a five page memorandum dated June 15, 1988, from the Acting Chairperson, WRAC Committee, to the Executive Committee, containing an executive summary of the WRAC Report for the month of December, 1987; and
- (c) a sixteen page memorandum dated June 15, 1988, from the Acting Chairperson, WRAC Committee, to the Executive Committee, containing the WRAC Report for the month of December, 1987.

Appeal Number 890061

- Record 2.** (a) A one page memorandum dated December 20, 1988, from the Chairman to the Board of Directors, which has attached to it;
- (b) a two page memorandum dated December 14, 1988, from the Chairperson, WRAC Committee, to the Executive Committee, containing an executive summary of the WRAC Report for the month of July, 1988; and
- (c) a fifteen page memorandum dated December 14, 1988, from the Chairperson, WRAC Committee, to the Executive Committee, containing the WRAC Report for the month of July, 1988.
- Record 3.** (a) A two page memorandum dated December 20, 1988, from the Chairman to the Board of Directors, which has attached to it;

- (b) a four page memorandum dated December 14, 1988, from the Chairperson, WRAC Committee, to the Executive Committee, containing the WRAC Report for the month of July, 1988 _ possible Section 86n. reviews; and
- (c) a fifteen page memorandum dated December 14, 1988, for the Chairperson, WRAC Committee to the Executive Committee containing the WRAC report for the month of December, 1988.

- Record 4.**
- (a) A one page memorandum dated December 20, 1988, from the Chairman to the Board of Directors, which has attached to it;
 - (b) a two page memorandum dated December 12, 1988, from the Acting Chairperson, WRAC Committee, to the Executive Committee, containing an executive summary of the WRAC Report for the month of August, 1988; and
 - (c) a sixteen page memorandum dated December 12, 1988, from the Chairperson, WRAC Committee, to the Executive Committee, containing the WRAC Report for the month of August, 1988.

- Record 5.**
- (a) A one page memorandum dated December 20, 1988, from the Chairman to the Board of Directors, which has attached to it; and
 - (b) a two page memorandum dated December 12, 1988, from the Chairperson, WRAC Committee, to the Executive Committee, containing the WRAC Report for August 1988 _ possible Section 86n. reviews.