Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2940

Appeal PA09-43

Workplace Safety and Insurance Board

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NATURE OF THE APPEAL:

This order addresses the issues raised by a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) submitted to the Workplace Safety and Insurance Board (WSIB). The request was for access to copies of all records related to WSIB's policy entitled "Fatal Claims Premium Adjustment" (the policy), and specifically, for all records relating to the development of, amendments to, debate on, and passage of, this policy.

WSIB identified one responsive record, a legal opinion, and denied access to the record in full, relying on the solicitor-client privilege exemption set out in section 19 of the *Act*. In addition, WSIB advised the requester that it would not apply the section 23 "public interest override" to disclose the record.

The requester (now the appellant) appealed WSIB's decision and an appeal file was opened. During mediation of the appeal, the appellant indicated that he believed further responsive records existed. As a result, WSIB conducted a further search for records and identified three more responsive records, which it disclosed to the appellant in their entirety. The appellant confirmed that he was satisfied that all responsive records relating to his request were located, and reasonable search is therefore no longer an issue in this case.

A mediated resolution regarding access to the legal opinion was not possible, and the appellant advised that he wished to have the appeal proceed to adjudication. The file was therefore moved on to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. The appeal was assigned to me as adjudicator.

As explained in more detail later in this order, the "public interest override" at section 23 of the *Act* does not list section 19 as one of the exemptions that can be overridden in the public interest. In *Criminal Lawyers' Association v. Ontario (Public Safety and Security) v. Ontario*, 2007 ONCA 392, the Ontario Court of Appeal found that section 23 was constitutionally under-inclusive because of this omission, and read the exemptions found in sections 14 and 19 of the *Act* into section 23 as exemptions that could be overridden. This decision was appealed to the Supreme Court of Canada. The Supreme Court heard argument on this matter in December 2008, and reserved its decision.

The appeal before me, addressed in this order, was filed in January 2009. It was placed on hold when it reached the adjudication stage of the process, pending the Supreme Court's decision. The Supreme Court issued its reasons in June 2010, allowing the appeal [*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (*Criminal Lawyers' Association*).] Shortly afterwards, this appeal was re-activated and I commenced the inquiry.

I sent Notices of Inquiry to WSIB and the appellant, outlining the issues in the appeal and inviting them to provide representations on the issues. Representations were received from both parties and shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

RECORD:

The sole record at issue is an internal memorandum from WSIB's senior legal counsel to WSIB's chief corporate services officer.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

Section 19 of the *Act* states as follows:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege;
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or
>
> (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 contains two branches as described below. Branch 1 arises from the common law and section 19(a). Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c).

Branch 1 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Common law solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

In its representations, WSIB indicates that the record is subject to solicitor-client privilege in that it is direct and confidential communication between a solicitor and client made for the purpose of giving professional legal advice. WSIB also relies on the Supreme Court of Canada's decision in *Criminal Lawyers' Association*, in which the Court held that solicitor-client privilege is all but absolute. In addition, WSIB states that the Court also confirmed that solicitor-client privilege

"will only yield in certain clearly defined circumstances and does not involve a balancing of interests on a case-by-case basis." (para. 75).

The appellant's representations do not specifically challenge WSIB's claim that the record is subject to common law solicitor-client privilege, nor is there any argument that privilege has been waived. Instead, the appellant focuses on WSIB's decision to exercise its discretion by applying section 19 and withholding the record. I will return to that subject later in this order.

I have carefully reviewed the record. As previously indicated, it is a memorandum written by WSIB's legal counsel to WSIB's chief corporate officer. It is marked as being confidential and subject to solicitor-client privilege. In reviewing the contents of the record, it is clearly communication between a solicitor and her client, whose purpose and entire focus is the provision of legal advice. Therefore, the whole record is clearly subject to solicitor-client privilege, and is not subject to severance.

There is no evidence to suggest that privilege has been waived, or than any other exception to privilege applies. I therefore find that the entire record qualifies for exemption under section 19(a) of the *Act*, subject to the discussion of section 23, below, and the analysis that follows concerning WSIB's exercise of discretion. Having found that section 19(a) applies, it is not necessary to address sections 19(b) or (c).

PUBLIC INTEREST OVERRIDE AND *CRIMINAL LAWYERS' ASSOCIATION*

Section 23 of the *Act* states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

Section 19 of the *Act* is not included as an exemption subject to the public interest override found at section 23. As noted, the appellant initially argued that section 23 applied, but in *Criminal Lawyers' Association*, the Supreme Court overturned the Court of Appeal's ruling that sections 14 and 19 should be read into section 23, and affirmed that section 23, as enacted by the Legislature, is constitutional.

Accordingly, there is no basis to apply section 23 in the circumstances of this appeal, since it cannot apply to a record that qualifies for exemption under section 19(a), which I have already found applicable to the record at issue.

The constitutional issue in *Criminal Lawyers' Association* arose from the guarantee of freedom of expression found in section 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court found that such an interest could only impact an access request under the *Act* "where meaningful public discussion and criticism on matters or public interest would be substantially impeded" without disclosure of the requested record.

With respect to section 2(b) of the *Charter*, WSIB submits that the disclosure of the record at issue is not a "necessary precondition of meaningful expression" on WSIB's policy, as the appellant has already been provided with a number of responsive records that would enable "meaningful commentary and discussion" on the policy.

The appellant does not specifically make arguments referring to section 2(b) of the *Charter*, nor did he provide a Notice of Constitutional Question, which is a required underpinning of such an argument. Rather, the appellant's representations refer to the consideration of the public interest in the context of WSIB's exercise of discretion, as discussed below.

In any event, I agree with WSIB on the section 2(b) issue. The appellant has a copy of the policy itself, as well as other responsive records, including the minutes of a meeting of WSIB's board of directors and records relating to a presentation on the subject. In these circumstances, the appellant is not precluded from commenting on the policy's impact on employers and on the workers' compensation scheme, and *Criminal Lawyers' Association* would therefore not support a conclusion that there is any breach of section 2(b) of the *Charter*.

EXERCISE OF DISCRETION

The section 19 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

WSIB submits that it exercised its discretion under section 19 and, in doing so, considered the nature of the exemption, the importance of the solicitor-client relationship, and its focus on the preservation of confidentiality of communications in the course of seeking and giving legal advice. WSIB also advised that it considered its historic practice, which has consistently protected the confidentiality of solicitor-client communications. Elsewhere in its representations, as noted above, WSIB submits that the records already in the public domain are sufficient to permit "meaningful comment and discussion on the WSIB's policy."

In addition, WSIB's representations refer to the dicta of the Supreme Court in *Criminal Lawyers' Association* to the effect that the balancing of the public interest is built into the discretionary character of section 19 (para. 43 of the judgment).

The appellant submits that WSIB failed to properly exercise its discretion as a public tribunal, which is a tribunal that holds a position of trust in regard to employers in Ontario. Because of this position of trust, the appellant argues, employers have a certain right as stakeholders in the workers' compensation system, including being able to have access to the record at issue.

Like WSIB, the appellant also mentions that, in *Criminal Lawyers' Association*, the Court emphasized that the public interest is already a fundamental consideration in applying section 19. Therefore, the appellant states, the Court's decision emphasizes that considering the public interest is part of the institution's exercise of discretion when determining whether to disclose privileged documents.

The appellant argues that by denying access, WSIB is effectively blocking the public, and in particular, employers, from receiving this information. The appellant also submits that WSIB exercised its discretion in bad faith. In particular, the appellant submits that the policy was enacted by WSIB as a political move in response to criticism it received in the press, and not as a result of sound policy decisions. According to the appellant, the decision to implement this policy was made against the public interest, harming employers and undermining the overall workplace safety compensation scheme.

Further, the appellant states that employers and the public have a right to know WSIB's basis for implementing the policy, which the appellant describes "arbitrarily passed without any explanation" and as a "rash response to media attention." The appellant argues that the legal opinion provided to WSIB must be disclosed to the public in order to serve the public interest, as the policy, in his view, has many serious shortcomings, including failing to prevent and reduce the occurrence of workplace injuries and occupational diseases.

It is evident from WSIB's submissions that, although its primary focus in deciding to apply section 19(a) was the preservation of privilege, WSIB has considered the public interest. In fact, WSIB disclosed other records to the appellant, as already noted. WSIB also argues that there is enough information in the public domain, including the policy itself, to permit informed discussion. I agree with these submissions.

I also note that, in *Criminal Lawyers' Association*, the Supreme Court remitted the appeal back to the Commissioner to examine the exercise of discretion by the Ministry of Public Safety and Correctional Services under the section 14 law enforcement exemption, but did not remit the Ministry's exercise of discretion under section 19. The Court explained its different approach to section 19 as follows:

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have

been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:

> . . . solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis added; para. 35.]

In my view, WSIB properly considered all relevant factors, including the public interest, as articulated by the Supreme Court in *Criminal Lawyers' Association*, in exercising its discretion. Similar to the approach taken by the Court, WSIB gave significant weight to the nature of solicitor-client privilege. There is no evidence before me that WSIB exercised its discretion in bad faith. Similarly, there is no evidence that WSIB considered irrelevant factors in exercising its discretion.

Accordingly, I find that WSIB has not erred in exercising its discretion to deny access to the record.

ORDER:

I uphold WSIB's decision and dismiss the appeal.

Original Signed By: December 23, 2010
John Higgins
Senior Adjudicator