

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3693-I

Appeal PA14-252-2

Workplace Safety and Insurance Board

January 31, 2017

Summary: This appeal is from a decision of the WSIB to deny access to its drug formularies and the names of the board's drug advisory committee members pursuant to sections 13(1) (advice or recommendations), 18(1)(c) (economic or other interests) and 21(1) (personal privacy) of the *Act*. The appellant also raised the issue of the reasonableness of the board's search for records relating to updates or changes to the formularies. During the inquiry the board disclosed the formularies to the appellant and this record was removed from the scope of the appeal. The adjudicator finds that the names of the drug advisory committee members is not personal information and orders this information disclosed. Further, the adjudicator orders the board to conduct a further search for records relating to updates or changes to the formularies.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) and (3) definition of personal information and 13(1).

Orders and Investigation Reports Considered: Orders PO-2773 and PO-3365.

OVERVIEW:

[1] The appellant made a request to the Workplace Safety and Insurance Board (WSIB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

Kindly provide any and all information, including but not limited to:

Minutes

Reports

Emails

Members List

Application documents

And all other internal documents and communications

For the Drug Advisory Committee and all other committees/individuals consisting of external healthcare professional and/or organizations and/or WSIB staff that communicate/advise about which drugs are funded by the WSIB Drug Benefit Program.

[2] Upon receiving the request, the WSIB contacted the appellant to discuss narrowing and clarifying the request. The appellant modified the request and in response, the WSIB provided an interim access decision and fee estimate. Following receipt of the interim access decision, the appellant had discussions with the WSIB and paid the fees for portions of the request. The WSIB provided the appellant with a second interim access decision which was appealed to this office.

[3] During mediation, the appellant agreed to further narrow the scope of her request and advised that she was only pursuing the appeal on the WSIB's refusal to disclose the names of the DAC¹ members and their *curriculum vitae* and its refusal to provide access to the drug formularies and records that provide directions on the formularies.

[4] The WSIB provided a final decision to the appellant's narrowed appeal which the appellant appealed.

[5] Also during mediation, the WSIB confirmed that it claimed the discretionary exemption in section 13(1) (advice or recommendations) and the mandatory exemption in section 21(1) to withhold the names of the DAC members.

[6] The appellant confirmed with the mediator that she is appealing WSIB's decision that the scope of her request does not include the DAC member's *curriculum vitae*.

[7] The WSIB maintained its position that access to the drug formularies is denied in accordance with section 18(1). The WSIB provided the appellant with a number of Formulary Drug Listing Decisions and other documents and advised that no additional records exist "that provide directions on updates to the formularies". The appellant contends that additional records should exist.

[8] Finally, the appellant submits that there is a public interest in disclosing the names of the DAC members and the WSIB's drug formulary that would outweigh the

¹ DAC – Drug Advisory Committee

exemptions claimed by the WSIB. Accordingly, the application of section 23 was added as an issue in the appeal.

[9] Mediation did not resolve the appeal and the file was moved to the adjudication stage of the appeal process. Representations were sought and received from the WSIB, the appellant and several affected parties. Representations were shared in accordance with the IPC's *Practice Direction 7*.

[10] In her representations, the appellant removed the issue of access to the DAC member *curriculum vitae*s from the scope of the appeal. Accordingly, these records are not addressed further in this appeal.

[11] Also, during the inquiry, the WSIB revised its decision on access to the drug formularies and withdrew its reliance on section 18(1)(c) to exempt this information. The WSIB has now granted access to the formularies. Accordingly, access to this information is removed from the scope of this appeal.

[12] In this order, I do not uphold WSIB's decision to deny access to the names of the DAC members and I order the WSIB to conduct a further search for responsive records.

RECORDS:

The remaining record at issue is a list of the DAC members' names.

ISSUES:

- A. Does the discretionary exemption at section 13(1) apply to the list of the names of the DAC members?
- B. Does the list of DAC members' names contain "personal information" for the purposes of section 2(1) of the *Act*, and if so, to whom does it relate?
- C. Was the WSIB's search for records relating to the drug formularies reasonable?

DISCUSSION:

Issue A: Does the discretionary exemption at section 13(1) apply to the list of the names of the DAC members?

[13] Section 13(1) states:

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.

[14] The purpose of section 13 is to preserve an effective and neutral public service

by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.²

[15] *Advice* and *recommendations* have distinct meanings. *Recommendations* refer to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[16] *Advice* has a broader meaning than recommendations. It includes policy options which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. Advice includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.³

[17] *Advice* involves an evaluative analysis of information. Neither of the terms *advice* or *recommendations* extends to *objective information* or factual material.

[18] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁴

[19] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.⁵

Representations

[20] The WSIB explains that through its drug benefit program, it pays for medications required by workers who have sustained personal injury arising out of and in the course of employment or who suffer from occupational disease. The DAC, formed in 2008, assists the WSIB in the administration of the drug benefit program. The WSIB further states:

² John Doe v. Ontario (Finance), 2014 SCC 36, at para. 43.

³ See above at paras. 26 and 47.

⁴ Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

⁵ John Doe v.

The DAC consists of WSIB staff and highly qualified independent experts in drug therapy and evaluation from a variety of relevant clinical practice backgrounds in medicine, pharmacy, and nursing. The committee consists of a minimum of five and a maximum of eight voting members, and the DAC meets at least once a year to fulfill its mandate which is, primarily, to provide drug formulary management advice, including formulary listing recommendations and conditions and/or criteria for coverage.

Adopting an evidence-based approach, the DAC reviews comprehensive scientific reviews carried out by external, independent providers and makes recommendations to the WSIB regarding the composition and management of its drug formularies to ensure safe and appropriate pharmacotherapy for injured/ill workers.

...

Members of the DAC comprise physicians, nurses, and pharmacists with diverse backgrounds and expertise in pharmacology, clinical research, formulary management, pain treatment, and adverse drug reactions.

[21] The WSIB submits that Order PO-3365 is relevant in the circumstances. In that order, the adjudicator, with reference to the Supreme Court of Canada decision in *John Doe v. Ontario (Finance)* cites, "the purpose of section 13 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making". With this in mind, the WSIB submits that disclosing the names of the DAC members would impede the ability of the DAC members to freely and frankly provide advice.

[22] The WSIB states:

While the purpose of the DAC is to provide recommendations to the WSIB, they cannot do so if their identities are known and if the recommendations themselves could be called into question; releasing the names of these DAC members would put the integrity of this committee and its ability to provide advice to government at risk; moreover, individuals who know their work may be subject to public scrutiny may be less likely to be completely candid.

[23] The WSIB likens the work and composition of its DAC committee with the catastrophic impairment expert panel considered in Order PO-3365. The WSIB states:

Similar to the FSCO panel, the WSIB's DAC provides a forum for confidential deliberations with respect to comprehensive scientific reviews carried out by external, independent providers. Through literature reviews, DAC members utilize their clinical experience and subject matter

expertise to make recommendations that lead to the Board's Drug Formulary Listing Decisions.

[24] Finally, the WSIB argues that while the names of the DAC members are the record at issue, I should consider the greater context which is that disclosure of the names would "...allow for the correlation of personal views and opinions of individuals who advise governments on complex topics". The WSIB submits that the consequences of disclosure would be the following:

- A reluctance or unwillingness of experts to participate in future panels, resulting in a reduction in the quality or quantity of willing experts;
- Self-censoring of opinions by panel members due to the potential damage to their reputation;
- A decrease in the frankness of discussion, resulting in an impoverished discussion, poorer quality of debate, or less thorough exploration of all aspects of the issue at hand; and
- A final product that is of poorer quality, which could have a substantial and negative impact on the public interest.

[25] The appellant argues that section 13(1) does not apply to the names of the DAC members as this information is not advice or recommendations for the purposes of the *Act*. Further, the appellant submits that section 13(1) does not apply to facts or background information.

[26] The appellant further cites Order 94 where former Commissioner Sidney Linden stated, "section 13 was not intended to exempt all communications between public servants...exemptions from the right of access should be limited and specific." The appellant submits that the names of the DAC members cannot be construed as advice or recommendations to government. Rather, they are simply facts or information and so are not exempt from disclosure.

Analysis and Finding

[27] I find that Order PO-3365 does not support the WSIB's position that the application of section 13(1) should be expanded to preclude disclosure of the names of the DAC members. In Order PO-3365, Adjudicator Cathy Hamilton considered the application of section 13(1) to emails and communications between members of the catastrophic impairment expert panel. I note that the names of the panel members were not at issue in that appeal. In finding that section 13(1) applied to some of the information, Adjudicator Hamilton stated the following:

I find that the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or

recommendations, or would disclose the actual advice and recommendations made to the Superintendent.

[28] The WSIB has not established that disclosure of the DAC member names would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations given by the DAC members. Furthermore, I find that the names of the DAC members are not themselves advice or recommendation for the purposes of section 13(1) of the *Act*. I agree with the appellant, that in the present case, the names of DAC members is factual information.

[29] The WSIB's submission that I consider the greater context of disclosing the DAC member names would not be keeping with the purposes of the *Act* set out in section 1 that "necessary exemptions from the right of access should be limited and specific." The exemptions in sections 12 to 22 of the *Act* consist of either records or harms-based exemptions. Section 13(1) of the *Act* is a record-based exemption because it exempts from disclosure records that contain advice or recommendations regardless of whether harm could result from that disclosure. Section 13(2) contains a mandatory list of exceptions. If the information falls into one of these categories, it cannot be withheld under section 13. The WSIB asks that I consider the harm in disclosure of the DAC member names even though the names themselves are not advice or recommendation. I find that applying section 13(1) to information that is not actual advice or recommendations or would permit the accurate inference of such information would be applying this exemption in a manner that was not intended. Accordingly, I find that section 13(1) does not apply to the DAC member names.

Issue B: Does the list of DAC members' names contain "personal information" for the purposes of section 2(1) of the *Act*, and if so, to whom does it relate?

[30] The WSIB also claimed that the names of the DAC members are personal information for the purposes of section 2(1) of the *Act* and thus exempt from disclosure under section 21(1). Personal information is defined in section 2(1) as recorded information about an identifiable individual including:

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual

[31] Section 2(3) of the *Act* also relates to the definition of personal information. It states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[32] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be *about* the individual.

Representations

[33] The WSIB submits that the names of the DAC members are not business identity information within the meaning of section 2(3) of the *Act*. The WSIB submits that combining the names of the individual DAC members and their identification as a committee member and drug reviewer would reveal personal information about an identifiable individual. The WSIB states:

..specifically [it would reveal] that they reviewed a particular medication and could lead to inappropriate assumptions of independent member's views and positions. In this context, the expert's name is considered to be sensitive, and, if combined with publically available contact information, the release of this information could unfairly expose the individual to pecuniary or other harms (such as lobbying), ultimately damaging his/her reputation and/or putting them at risk.

[34] The WSIB goes on to state:

While the names of the individuals who sit on the DAC are not directly correlated with a particular drug or opinion, their reviews and role on the committee is in direct relation to their specific medical expertise, expertise that has been gathered over the years from educational training, clinical experience, and subject matter expertise acquired during their personal and professional time.

[35] The DAC members were also asked whether their names constituted personal information for the purposes of the *Act*. Six members responded and consented to the disclosure of their names. These individuals did not make representations on whether this information constituted their personal information. Another individual asked that their name not be shared and set out the harms which, in their view, would result from disclosure of this information. Two other individuals submitted that they relied on the arguments made by WSIB on this issue, but would consent to the disclosure of their names if I find that the information is not their personal information. Finally, one individual submitted that their name did not constitute personal information.

[36] The appellant submits that the names of the DAC members does not constitute personal information for the purposes of section 2(1) and refers to section 2(3) to support their position that the information is professional and not personal. The

appellant notes that the members of the DAC are appointed because of their professional qualifications and serve on the DAC in a professional capacity.

[37] The appellant submits that using the two-step analysis set out in Order PO-2225 would also result in the same determination that the names of the DAC members is professional information and not personal. The appellant states:

WSIB's contention that the disclosure of the DAC members' names should be considered personal information because combining the name and their identification as a committee member would reveal personal information, specifically that they reviewed a particular medication...is not persuasive. Nor is the idea that DAC members make recommendations based on personal experience and that therefore the disclosure would reveal personal information about the DAC member.

The fact that a DAC member reviewed a medication in the course of her professional work for the WSIB is not information of a personal nature about the individual. It is obviously information related to the DAC member in a professional or business capacity.

[38] During the inquiry into this appeal, I asked both parties to comment on the application of Order PO-2773 where Adjudicator Diane Smith found that the names of reviewers on the Committee to Evaluate Drugs (CED) were not personal information for the purposes of the *Act*. WSIB submits that PO-2773 does not apply in the circumstances of this appeal. WSIB states:

After reviewing the order, it is the Board's position that the CED and its purpose is significantly different from the DAC. The CED reviews submissions made by drug manufacturers who wish to have their products recommended for listing on the Ontario Drug Benefit Formulary Comparative Drug Index (the Formulary)... Unlike the CED, the DAC does not receive submissions from manufacturers in a standardized format. Also, the WSIB does not deal with manufacturers but rather commissions literature reviews. These literature reviews then inform the DAC's recommendation about whether to list certain drugs; therefore, Order PO-2773 does not apply.

[39] The appellant submits that contrary to the WSIB's representations, Order PO-2773 is directly relevant to the current appeal. The appellant submits that the fact that there are differences between the DAC and the Ministry of Health's Committee to Evaluate Drugs is irrelevant to the question of whether the names of the DAC members constitute personal information.

[40] The appellant further notes that WSIB's speculation about the possible lobbying of DAC members is not relevant to the determination of whether the information being disclosed is personal information. The appellant states:

While some previous cases had considered whether reviewers or consultants might be lobbied in determining whether their names were *personal information*, as outlined in Order PO-2773, these cases pre-dated the inclusion of section 2(3) in the *Act* on April 1, 2007 and therefore are of limited usefulness in interpreting the current legislation.

Analysis and Finding

[41] In Order PO-2773, Adjudicator Smith considered whether the names of two affected persons, one a consultant to the CED and one an external reviewer to the CED, were personal information for the purposes of the *Act*. In finding that the names were not personal information, Adjudicator Smith noted that prior orders that found the names of reviewers or consultants reviewing specific drugs to be personal information predated the inclusion of section 2(3) in the *Act*. Applying section 2(3), Adjudicator Smith states:

I find that the information at issue, namely the names of the affected persons, is not personal information, but information associated with the affected persons in their professional capacity. The affected persons were acting in their professional capacity in reviewing the named drug for the Ministry. The information at issue does not reveal something of a personal nature about these individuals. Review of a drug by an expert in the pharmaceutical field is a professional undertaking and is not personal information. Disclosure of the affected persons' names does not reveal other personal information about them.

[42] I agree with Adjudicator Smith's approach. I further find that the distinction between the roles of the CED and the DAC is insignificant for the purposes of my analysis as to whether the names of the DAC members are personal information. I find that the DAC members act in a professional capacity when they make recommendations to WSIB regarding the composition and management of its drug formularies. Moreover, I find that the DAC members conduct their work on the DAC in a professional capacity, and I find that disclosure of the members' names would not reveal personal information about them.

[43] I also find that WSIB's submissions regarding potential lobbying of the DAC members to be unhelpful in my determination. The consequence of disclosure of the personal information is only a consideration once I determine that the information is personal information.

[44] Accordingly, as I have found that the names of the DAC members are not the personal information of these individuals, the personal privacy exemption in section 21(1) cannot apply to this information. As no other mandatory exemption applies to this information and no further discretionary exemptions have been claimed, I will order the names of the DAC members to be disclosed to the appellant.

Issue C: Was WSIB's search for records relating to the drug formularies reasonable?

[45] The appellant submits that WSIB's search for records relating to the drug formularies was not reasonable.

[46] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.⁶ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order future searches.

[47] The Act does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁷ To be responsive, a record must be *reasonably related* to the request.⁸

[48] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.

[49] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁹

[50] During the inquiry, the WSIB was asked to provide a written summary of all the steps taken in response to the request including:

...details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? Please include details of any searches carried out to respond to the request.

[51] The WSIB was also asked to address the issue of whether records existed but no longer exist and to provide details of when records may have been destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[52] The WSIB did not provide a summary of its search. Its representations state that all the records related to the drug formularies have already been provided.

[53] During mediation, the mediator asked the WSIB to provide a copy of the records

⁶ Orders P-85, P-221 and PO-1954-I.

⁷ Orders P-624 and PO-2559.

⁸ Order PO-2554.

⁹ Order MO-2185.

that were disclosed to the appellant relating to the drug formularies as the appellant had raised the issue of reasonable search. The WSIB provided the records disclosed to the appellant.

[54] The appellant submits that the WSIB's search was not reasonable. The appellant states:

The WSIB maintains that it has no records that provide direction on updates to the formularies. We query whether this is the case, and ask that the IPC consider whether the WSIB has conducted a reasonable search. The WSIB's representations state that the formularies are dynamic and continuously being reviewed. We cannot understand how so many changes are made to the formularies without any additional documentation being created about how the updates are made (e.g. guidelines for staff on updating the formularies, templates for updates, etc.).

Finding

[55] I have reviewed the records disclosed to the appellant in response to the part of the request relating to records about updates to the drug formularies. Many of these records appear to be internal WSIB documents about medications and guidelines about various medications. While this information appears to be responsive to this part of the appellant's request, I find that the WSIB has not provided the evidence necessary for me to establish that it has conducted a reasonable search.

[56] The WSIB has not provided me with the details of how its search was conducted and who conducted its search. Without this information, I am unable to find that the WSIB's search was reasonable in the circumstances. Accordingly, I will order the WSIB to conduct another search for responsive records and to provide me with details and representations on that new search.

ORDER:

1. I order the WSIB to disclose to the appellant a copy of the record listing the DAC members' names by **March 8, 2017** but not before **March 3, 2017**.
2. I order the WSIB to conduct a further search for records responsive to the appellant's request for records relating to changes or updates to the drug formularies.
3. I order the WSIB to issue an access decision to the appellant regarding access to any additional records located as a result of the search ordered in provision 2, in accordance with the *Act*, treating the date of this order as the date of the request.

4. I order the WSIB to provide me with a copy of any decision issued to the appellant in accordance with order provision 3.
5. I order the WSIB to provide me with its representations on the further search referred to in provision 2 and to provide me with an affidavit outlining the following:
 - a. The names and positions of the individuals who conducted the searches;
 - b. Information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and
 - c. The results of the search.
 - d. The WSIB's representations and affidavit may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's Practice Direction Number 7, which is available on the IPC's website. The WSIB should indicate whether it consents to the sharing of its representations and affidavit with the appellant.
6. I remain seized of this appeal in order to deal with any outstanding issues arising from this interim order.

Original Signed By: _____

Stephanie Haly
Adjudicator

January 31, 2017