Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3910

Appeal PA17-513

Workplace Safety and Insurance Board

December 10, 2018

Summary: The Workplace Safety and Insurance Board (the board) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the 2018 premium rates originally announced and then amended. The board located responsive records, and issued a decision granting partial access to them. The board withheld some information on the basis of the exemption at section 13(1) (advice or recommendations) of the *Act*. The requester appealed the decision, and through mediation, received additional disclosure. However, the board continued to rely on section 13(1) to withhold some information in the records. The appellant also raised the public interest override at section 23 of the *Act*. In this order, the adjudicator upholds the board's decision and finds that the public interest override does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13 and 23.

Orders Considered: Order P-1919.

OVERVIEW:

[1] The Workplace Safety and Insurance Board (the board) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

> We request any and all documentation, including Board of Director ["BoD"] minutes, memos, orders, and department and/or inter-department memos, directives, background material etc. (this is an example of the type of material, not an exhaustive list) as applicable with

> respect to the 2018 premium rate recommendations made to the WSIB BoD, and any material presented or reviewed by the BoD in consideration and approval of the 2018 premium rates. The request includes all material/information linked to:
>
> > 1. The 2018 premium rates originally announced/released at the September 20, 2017 WSIB AGM and uploaded/released on the WSIB's website later that morning (and removed from the website shortly thereafter), and
> >
> > 2. The amended 2018 premium rates uploaded/released on the WSIB's website late on September 21, 2017.
>
> We understand such was discussed/considered/approved at the September 21, 2017 BoD meeting, however this request is not limited to information from this BoD meeting date only and includes any and all information the BoD considered with respect to the 2018 premium rates (including the amended rates).

[2] The board located several slide decks in response to the request.

[3] The board then issued an access decision, which indicated that the Director, Chair's Office and Corporate Secretary would be responding to item one of the request and providing copies of those records though the Chair's Office. In response to item two of the request, the board granted access to the records in part. The board relied on section 13 (advice or recommendations) of the *Act* to withhold access to some of the requested records.

[4] The requester, now the appellant, appealed the decision of the board to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] Mediation through this office led to the board issuing two revised decisions and releasing additional information to the appellant. The board relied on section 13 of the *Act* to withhold access to the remainder of the records. The appellant raised the possible application of the public interest override to the records. As a result, section 23 of the *Act* was added as an issue in this appeal. The appellant advised the mediator that he continued to seek full access to records 1, 2, 4a and 5 to which the board had provided partial access, and that he wished to proceed to the adjudication stage.

[6] Accordingly, this file was referred to adjudication. I sought and received written representations from the parties during my inquiry under the *Act* in response to a Notice of Inquiry, setting out the facts and issues on appeal.

[7] For the reasons that follow, I uphold the board's access decision and dismiss this appeal.

RECORDS:

[8] The information at issue is in the following records:

Record number	Board's Description of the Slide Decks
1	Preliminary Recommended 2018 Rate Strategy and Premium Rate – Board of Directors – August 17, 2017
2	Recommended 2018 Rate Strategy and Premium Rate – Board of Directors – September 13, 2017
4a	Preliminary 2018 Rate Strategy and Premium Rate – Board of Directors – June 21, 2017
5	2018 Premium Rate Discussion – Executive Committee – May 2017

ISSUES:

A. Does the discretionary exemption at section 13(1) apply to the records?

B. Did the board exercise its discretion under section 13? If so, should this office uphold the exercise of discretion?

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

DISCUSSION:

Issue A: Does the discretionary exemption at section 13(1) apply to the records?

[9] Below, I will explain why I find that the discretionary exemption at section 13(1) (advice or recommendations) applies to the records at issue.

[10] 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.

[11] 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.[1]

[12] A party resisting disclosure has the burden that the record or part of the record falls within one of the specified exemptions in the *Act*.

[13] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers 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.

[14] "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. [2]

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

[16] 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.[3]

[17] 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 board 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 since that intention is inherent to the job of policy development, whether by a public servant or consultant.[4]

[18] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 13(1).[5]

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[1] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[2] See above at paras. 26 and 47.
[3] 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.
[4] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[5] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

[19] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information[6]
- a supervisor's direction to staff on how to conduct an investigation[7]
- information prepared for public dissemination[8]

[20] The appellant's submissions about the applicability of the section 13(1) are understandably limited due to the fact that the appellant has not seen the information withheld. The appellant, therefore, asked that this office review the information at issue to determine whether the exemption applies, and whether an exception to the exemption applies (which is discussed separately, below).

[21] The board submits, and I find, that the responsive records in this appeal fall within the parameters of the section 13(1) exemption. Based on my review of the records, I find that they are slide decks/presentations to senior management and the Board of Directors that contain information with an evaluative component, which includes the opinion of the author of the records on the advantages and disadvantages of alternative options. Most of the content within these records has already been disclosed to the appellant. The board submits, and I accept, that these records were prepared to support decision making by senior management and the Board of Directors on setting premium rates for 2018. Based on my review of each severance, I find that each severance contains information that constitutes advice or recommendations, and that section 13(1) applies to that information.

Does an exception apply to the section 13(1) exemption in relation to the records at issue?

[22] As I will explain, I find that an exception does not apply to the portions of information that have been withheld from disclosure.

[23] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

[24] The appellant submits, and I accept, that it is difficult for the appellant to determine whether the withheld information meets an exception to the exemption.

[25] The appellant argues that if there is actuarial and/or factual compilation of information within the materials withheld, such information falls under the exceptions to the exemption found in sections 13(2)(a) (factual material) and/or 13(2)(c) (report of a

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[6] Order PO-3315.
[7] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[8] Order PO-2677.

valuator).

[26] Sections 13(2) and (3) state, in part:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> . . .
>
> (c) a report by a valuator, whether or not the valuator is an officer of the institution;
>
> . . .
>
> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

[27] Paragraphs (a) and (c) are examples of objective information. They do not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature. Under section 13(2)(a), factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[9] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[10] With respect to section 13(2)(c), this office has defined the word "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.[11]

[28] The board submits that the information withheld does not fall under the exceptions at section 13(2)(a) or 13(3) of the *Act*. Based on my review of the records, I accept the board's submission that it released portions of the records that were purely factual in nature, and withheld factual information that is interwoven with the advice or recommendations in such a way that it cannot be reasonably considered a separate and distinct body of facts. I also find that the withheld information is not a report of a valuator, as contemplated by section 13(2)(c). In addition, the board submits, and I find, that disclosure of withheld information would have permitted accurate inferences about the nature of the actual advice or recommendations. I, therefore, do not accept the appellant's suggestion that the exceptions at sections 13(2)(a) and/or 13(2)(c) could apply. Based on my review of the information at issue, I find that none of the

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[9] Order 24.
[10] Order PO-2097.
[11] Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

exceptions to section 13(1) in sections 13(2) or 13(3) apply to it.

[29] I will now consider whether the board exercised its discretion properly and whether the public interest override applies to the information I have found subject to section 13(1).

Issue B: Did the board exercise its discretion under section 13? If so, should this office uphold the exercise of discretion?

[30] On the basis of the following, I find that the board properly exercised its discretion.

[31] The section 13 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.

[32] 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.

[33] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[12] This office may not, however, substitute its own discretion for that of the institution.[13]

[34] The appellant submits that there are three relevant considerations the board should have, but did not, take into account:

- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person; and
- the historic practice of the institution with respect to similar information.

[35] Given the volume and detail already disclosed by the board, I reject the appellant's submission that disclosure of the remaining information withheld would increase public confidence in the operation of the board. The appellant submits that the board erred in the exercise of one of its core responsibilities, the establishment of

[12] Order MO-1573.
[13] Section 54(2) of the *Act*.

premium rates in 2017 and 2018, and that this is unprecedented. The appellant argues that the decision to withhold information in the records adds to a lack of public confidence. However, I find that this argument does not sufficiently take into consideration the fact that the board disclosed a significant portion of the records, and withheld relatively few portions of information within them.

[36] The high level of disclosure already made also leads me to reject the appellant's submissions that the board failed to consider the nature of the information requested, its importance to the appellant and those for whom the appellant advocates, and that the board broke with its historic practice. With respect to the latter, while it does appear that the board released the similar information to the appellant in 2011, that fact alone is insufficient for me to find that the board improperly exercised its discretion in this instance. While historic practice is just one consideration, it is highly contextual, and does not necessarily bind an institution. As the board argues, the IPC has held that previous disclosure does not mean that a requester has an automatic right of access, and that these determinations are tied to the facts and circumstances of a particular case.[14] I am unpersuaded that the board's decision to apply the section 13(1) exemption in this case to discrete portions of the records is inconsistent with the *Act* (or the board's "own assertion that it is an open and transparent organization", as the appellant argues).

[37] For its part, the board submits that, keeping in mind the purpose of section 13 and the importance of decision making in good faith, it took the following relevant considerations into account, including the three raised by the appellant:

- the purposes of the *Act*, including the principles that information should be available to the public and that exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;
- whether disclosure will increase public confidence in the operation of the institution;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information;
- the historic practice of the institution with respect to similar information;

[14] Order P-1919.

- the confidence of the public in the operation of the board; and
- the impact on public servants' ability to provide free and frank advice and recommendations in the future

[38] I find that these are relevant and proper considerations, and I accept the board's submission that it exercised its discretion properly and in good faith. I do not accept the board's submission that full disclosure of records that are exempt under section 13 would be "inconsistent" with the purpose of section 13 (section 13 is a discretionary exemption, and so the board can choose to disclose information exempt under section 13). Overall, however, it is clear that the board was aware that it could choose to disclose this information but elected to exercise its discretion in favour of non-disclosure.

[39] Especially given the volume of detailed records disclosed, I am satisfied that the board considered the factors listed above in good faith and not in bad faith. There is no evidence before me that the board took into consideration any irrelevant factors. Therefore, I uphold the exercise of discretion by the board.

Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

[40] Section 23 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.

[41] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[42] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[15]

Compelling public interest

[43] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[16] Previous orders

[15] Order P-244.
[16] Orders P-984 and PO-2607.

have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[17]

[44] A public interest does not exist where the interests being advanced are essentially private in nature.[18] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[19]

[45] In this case, I accept that the interests of the appellant, as an advocate for Ontario employers and trade associations, is public, not private.

[46] The appellant also submits, and I find, that the establishment and setting of premium rates (the subject matter of the records) is not a private transaction.

[47] However, given the high level of engagement between the parties and disclosure already made through this appeal to the appellant, I reject the appellant's submission that the public interest at stake is compelling.

[48] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[20] Any public interest in *non*-disclosure that may exist also must be considered.[21] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[22]

[49] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[23]
- the integrity of the criminal justice system has been called into question[24]
- public safety issues relating to the operation of nuclear facilities have been raised[25]
- disclosure would shed light on the safe operation of petrochemical facilities[26] or the province's ability to prepare for a nuclear emergency[27]

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[17] Orders P-984 and PO-2556.
[18] Orders P-12, P-347 and P-1439.
[19] Order MO-1564.
[20] Order P-984.
[21] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[22] Orders PO-2072-F, PO-2098-R and PO-3197.
[23] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[24] Order PO-1779.
[25] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

- the records contain information about contributions to municipal election campaigns[28]

[50] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[29]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[30]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[31]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[32]
- the records do not respond to the applicable public interest raised by appellant[33]

[51] Here, the appellant submits that because the board erred with respect to the premium rates in both 2017 and 2018, the board "is clearly fallible and the requester has a right to the information which the [b]oard used to consider and render a decision on both the original and revised 2018 premium rates." The appellant has not led me to any legal authority in support of this submission, and I reject the argument that the publishing of erroneous information by an institution automatically leads to a legal right of access to information under the *Act*. The board, like any institution, is capable of erring (and correcting its mistakes). I find that the appellant has failed to establish how that in itself calls into question the integrity of the board's processes, as argued by the appellant, or why that ability to make mistakes leads to a right of access to exempt information.

[52] I also reject the appellant's submission that the information already disclosed (and published on the board's public website) is insufficient for an understanding of the considerations the board reviews when determining final annual premiums. I do not find that the appellant has established that the remaining information at issue is necessary to address the public interest identified. In addition, from the representations of both parties, it is clear that the appellant is an active stakeholder and advocate. This engagement has allowed the appellant's open questioning of previously published errors, and led to the correction of those errors. Such a relationship between the parties

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[26] Order P-1175.
[27] Order P-901.
[28] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[29] Orders P-123/124, P-391 and M-539.
[30] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[31] Orders M-249 and M-317.
[32] Order P-613.
[33] Orders MO-1994 and PO-2607.

weighs towards finding that the information disclosed is sufficient to allow for meaningful engagement with the board and to satisfy the public interest. This, in turn, weighs towards finding that the public interest in disclosure of the remaining information is not "compelling".

[53] Taking all of these factors into consideration, I find that the public interest at stake is not "compelling" in this case. It is, therefore, unnecessary for me to discuss the purpose of the section 13(1) exemption, as the public interest override at section 23 of the *Act* cannot be made out without a public interest that is "compelling."

[54] Because I have found that the public interest override does not apply in this case, I uphold the board's decision to withhold information as exempt under section 13(1).

ORDER:

I uphold the board's access decision and dismiss this appeal.

Original Signed by: December 10, 2018

Marian Sami
Adjudicator