

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3991

Appeal PA16-591

Workplace Safety and Insurance Board

September 23, 2019

Summary: This is an appeal from a decision of WSIB to deny access to portions of its board policy branch memorandum dealing with loss of earnings benefits pursuant to sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*. The appellant raised the issue of the possible application of the public interest override in section 23. In this order, the adjudicator upholds the application of sections 13 and 19 and finds that the appellant has not established a compelling public interest in the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F31 sections 13(1), 19 and 23.

OVERVIEW:

[1] The appellant made a request to the Workplace Safety & Insurance Board (the WSIB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a specified WSIB memo from its Chief Operation Officer and Vice President, Strategic Communications, Policy and Research.

[2] In response, the WSIB granted partial access to the requested records, relying on sections 13 (advice or recommendations), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act* to withhold access to some of the records in whole or in part.

[3] During mediation, the WSIB produced and shared an index of records with the appellant. The appellant indicated that he was only interested in pursuing access to the information withheld in records 9 – 13.

[4] In the interests of mediation, the WSIB prepared a chart describing further the records withheld under section 19 of the *Act*. The WSIB shared the chart with the appellant and the mediator. After reviewing the chart, the appellant advised that he was no longer interested in pursuing access to the information withheld under section 19 in Record 13.

[5] The appellant raised the issue of the possible application of the public interest override in section 23 of the *Act* to the records at issue. Accordingly, this issue was added to the scope of the appeal.

[6] Mediation did not resolve the appeal and it was moved the adjudication stage where an inquiry was conducted.

[7] Representations were sought and received from both parties in the appeal. Representations were shared in accordance with the IPC's *Code of Procedure*.

[8] Also, during the inquiry, the WSIB issued a revised decision letter granting additional access to information in Record 9.

[9] In this order, I uphold WSIB's decision and dismiss the appeal.

RECORDS:

[10] The information at issue consists of the withheld information in records 9, 10, 11, 12 and 13. As stated above, the information withheld under section 19 in Record 13 is no longer at issue.

Record number	Description	Withheld	Exemption claimed
9	Entitlement to Loss of Earnings & Survivors' Periodic Benefits in the Absence of Earnings at the Time of Injury (Sept. 3/09)	In part	13, 19
10	Entitlement to Loss of Earnings & Survivors' Periodic Benefits in the Absence of Earnings at the Time of Injury (Sept. 11/09)	In part	13, 19
11	WSIB Briefing/Issue Note (Dec. 2/09)	In full	19
12	Directives Document: No Earnings on the Date of Injury (Dec. 10/09)	In part	19
13	New Methods Relating to Establishing Net Average Earnings (NAE) in claims	In part	13

	where the worker is not earning a wage on the date of injury (Jan. 5/10)		
--	--	--	--

ISSUES:

- A. Does the discretionary exemption at section 13(1) apply to the withheld information?
- B. Does the discretionary exemption at section 19 apply to the withheld information?
- C. Was WSIB's exercise of discretion in claiming sections 13 and 19 proper in the circumstances?
- D. 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 withheld information?

[11] 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.

[12] 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

[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

¹ *John Doe v. Ontario (Finance)*, 2015 SCC 36, at para. 43.

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 options 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 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.⁴

Representations

[18] The WSIB provided the following background of the content of the records in order to provide context for its exemption claims. It states that its operational practice from January 1, 1998 to December 6, 2009, where a worker was not earning a wage on the date of the injury, was to establish net average earnings (NAE) using the average wage a person employed in the occupation or trade in which the worker's disease was contracted. Loss of earnings (LOE) benefits were paid to these workers based on the established NAE.

[19] Several Workplace Safety and Insurance Appeal Tribunal (WSIAT) decisions reversed WSIB's decisions and held that workers who were not earning at the time of injury were not entitled to receive LOE benefits. The Benefits Policy Branch (BPB) reviewed the WSIAT decisions and conducted an extensive review of entitlement

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.

practices in occupational disease claims registered on or after January 1, 1998. It was concluded that the approach taken by WSIAT was more consistent with section 43 of the *Workplace Safety Insurance Act (WSIA)*. As a result, the WSIB changed its practice for determining entitlement to LOE benefits in cases where there were no earnings on the date of injury to the following:

1. In order to be entitled to LOE benefits, a worker must have a loss of earnings on the date of injury.
2. WSIB decision-makers do have limited discretion to decide whether a loss of earnings exists based on the facts and circumstances of the case when the worker is not earning on the date of injury but has not necessarily *left* the workforce.

[20] The decision to change the manner in which LOE was calculated was communicated in the *Slinger memo* and was effective December 7, 2009 prospectively to all entitlement decisions for LOE benefits for accidents on or after January 1, 1998. The change primarily affected occupational disease claims; however, it equally applied to the adjudication of cases where a worker claimed for a physical or psychological impairment that was not diagnosed until after the worker had left the workforce.

[21] The board submits that section 13(1) applies to exempt the information withheld in records 9, 10 and 13. In Record 9, the board submits that the portions of pages 7, 8 and 9⁵ that were withheld as disclosure of these portions would reveal advice regarding the proposed criteria for assisting decision-makers in determining LOE benefit entitlement where there was no earnings on the date of injury. The board states, "It also provides different implementation dates and recommendations with pros/cons for each."

[22] Regarding Record 10, the board argues that the withheld information provides a recommendation for payment of LOE benefits in the absence of earnings on the date of injury, options for implementation and effective dates (with pros/cons for each), and the recommendation.

[23] Finally, for Record 13, the board submits that the withheld information provides recommendations for how to determine net average earnings in long latency occupational disease claims, including pros/cons of options for employment scenarios.

[24] The board notes that all three records contains withheld information relating to survivors' benefits that is actually not responsive to the request. Finally, the board states:

⁵ The board clarifies that these parts of Record 9 were incorrectly identified as withheld under section 19 in the October 24, 2017 decision letter.

The information in these records regarding the advice and recommendations squarely fits within this exemption. There is a clear evaluative component and not merely factual background or information as to decisions that are already made or events that are anticipated in accordance with those decisions (PO-2344). This information went to senior management for decision-making and consists of the advantages/disadvantages of alternatives; they were prepared to serve as the basis for making a decision between presented options, as part of the decision-making process, and the details around the options and recommendations have not been disclosed or made public (whereas other advice/recommendations that have been made public were released).

[25] The board submits that its exemption claim is not affected by the fact that the institution has already made a decision about the matter to which the advice or recommendations were directed.

[26] The appellant's representations do not focus on whether section 13 applies to the withheld information in records 9, 10 and 13. Instead the appellant argues that the board did not properly exercise its discretion to claim section 13. I will consider the appellant's arguments on the board's exercise of discretion below under Issue C.

Finding

[27] I accept the board's submissions that section 13 applies to the withheld information in records 9, 10 and 13.

[28] As the WSIB describes, these records are all Benefits Policy Branch memoranda relating to the entitlement of claimants to LOE and survivors' benefits. I confirm that the portions withheld by WSIB under section 13 are comprised of proposed criteria, implementation dates including pros and cons of choosing certain dates, and, recommendations. The information withheld under section 13 in Record 13 includes recommendations relating to NAE for claimants not earning a wage on the date of injury and various employment scenarios on the date of injury. I accept the WSIB's submissions that the information withheld in all of these records squarely fits within the type of information that is exempt under section 13. The recommendations made by the Benefits Policy Branch were clearly made to address the decisions made by WSIAT and to provide WSIB with recommendations to deal with claimants on a go forward basis.

[29] I further accept WSIB's submission that "the protection afforded by this exemption does not disappear once an institution has made a decision about the matter to which the advice or recommendations were directed."

[30] I further confirm that the withheld information does not contain factual information which would not be exempt under the mandatory exception in section 13(2)(a).

[31] Accordingly, subject to my review of WSIB's exercise of discretion, I find the information withheld under section 13(1) to be exempt from disclosure.

ISSUE B: Does the discretionary exemption at section 19 apply to the withheld information?

[32] WSIB submits that information withheld under section 19 is solicitor-client privileged within the meaning of section 19 of the *Act*. Section 19 states, in part:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege

[33] Section 19 contains two branches and WSIB's claim is under Branch 1. Branch 1 (*subject to solicitor-client privilege*) is based on the common law. WSIB must establish that the branch applies.

[34] At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication and litigation privilege. The WSIB claims that solicitor-client communication privilege applies.

[35] 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.⁶ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.⁷ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.⁸

[36] Confidentiality is an essential component of the privilege. Therefore the WSIB must demonstrate that the communication was made in confidence, either expressly or by implication.⁹

Representations

[37] WSIB submits that the exempted portions of the records contain advice given by legal counsel and provided an affidavit in support of its claim. WSIB did not actually provide an unsevered copy of the information withheld under section 19 to this office.

[38] The affiant is legal counsel at WSIB who provides advice on matters of access to

⁶ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁷ Orders PO-2441, MO-2166 and MO-1925.

⁸ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

⁹ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

information and privacy protection, including the application of exemptions under the *Act*. She attests that she reviewed the portions of the records at issue and affirms the following:

Document 9 – pages 3 – 5 and 7

The withheld content is a summary of legal advice on the intent of, and interpretation of, ss. 43 and 48 of the Workplace Safety and Insurance Act, 1997 (the WSIA).

The advice appears, based on a reference to meetings on June 26, 2009 in Document 27 (withheld under s. 19 and not at issue in this appeal), to have been given verbally on that date by one of the WSIB's lawyers to the project team reporting to the author of Document 9.

[She] believe[s] the verbal legal advice to be faithfully summarized by the author of Document 9 based on my review of other advice given by the same lawyer on similar matters of statutory interpretation including an opinion dated July 22, 2009 which is not responsive to this request, as well as the reiteration of the same advice in Documents 23, 25 and 27, all of which were authored by the same lawyer.

Document 10 – fourth bullet of slide 4

In this bullet, a conclusion reached by a WSIB lawyer regarding a then-recent WSIAT decision is summarized.

Document 11 – two bullets at the bottom of page 2

The first of the two bullets repeats the same conclusion found in the fourth bullet of slide 4 of Document 10.

The second bullet contains legislative interpretation of one element of s. 48 provided by a WSIB lawyer.

Document 12 – page 3

The legal advice and analysis reproduced on this page is extremely similar, and in fact at some points identical, to that found in Document 9. The same explanation on my part regarding the application of privilege, therefore, applies to this document.

[39] The appellant disputes that the information withheld in records 9, 10, 11 and 12 is exempt under section 19 as he submits that because other records identified by WSIB as solicitor-client privileged were later than the earlier records (9, 10, 11 and 12), the earlier records would not be solicitor-client privileged as they would not yet contain the legal advice or opinion withheld in later records. The appellant submits:

...the board was/is attempting to withhold information developed before the legal opinions by WSIB employees, only because the WSIB employees' documents and the later produced legal opinions both reached the same conclusion.

[40] The appellant also submits that the affiant who swore the affidavit provided by WSIB in support of its exemption claim was not properly informed of the records. The appellant states:

The deponent does not indicate that she inquired with the WSIB lawyer regarding the referenced June 26, 2009 meeting and what was discussed during that meeting. She surmises that as the information in Record 9 is similar to that provided by the same lawyer on similar matters of statutory interpretation, including a non responsive opinion dated July 22, 2009, and the fact that this same advice is reflected in Records 23, 25, & 27 (which were withheld and which we did not appeal), that it falls under the same exemption.

[41] The appellant also argues that the information withheld in records 10 and 11 does not fall under legal advice and he reiterates the description of the withheld information provided in the affidavit and set out above.

Finding

[42] Based on my review of the records¹⁰, the affidavit, and the parties' representations, I find that the withheld information is exempt under Branch 1 of section 19 as solicitor-client communication privileged.

[43] I accept the affidavit evidence provided by WSIB regarding the information withheld as exempt. The affiant describes the withheld information as either legal advice, including legislative interpretation or a summarizing conclusion of a WSIAT decision. I do not accept the appellant's argument that these types of information are not legal advice for the purposes of section 19. Moreover, I do not accept the appellant's arguments that the affiant was only claiming section 19 for information already withheld under section 19. The appellant's arguments regarding this are confusing and convoluted. It is clear from the context of the withheld information that the withheld information contains legal advice by WSIB lawyers regarding the matters being discussed in the memoranda.

[44] Finally, I accept that the records at issue were confidential communications within the WSIB and the communication between WSIB's Benefits Policy Branch and the

¹⁰ As the WSIB only withheld portions of records, I was able to review the remainder of the information that was not severed under section 19.

Policy and Research Division were meant to be confidential. I further find that there is no indication that WSIB waived the privilege of the information claimed as solicitor-client privileged. Accordingly, subject to my review of WSIB's exercise of discretion, I uphold the application of section 19 to the information at issue.

ISSUE C: Was WSIB's exercise of discretion in claiming sections 13 and 19 proper in the circumstances?

[45] The section 13 and 19 exemptions are discretionary, and permit 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.

[46] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹¹ This office may not, however, substitute its own discretion for that of an institution [section 54(2)].

Representations

[47] In exercising its discretion, WSIB took into consideration: balancing the purpose of FIPPA, interpreting the wording of the exemption and the interests it seeks to protect, and deciding whether disclosure will increase public confidence in the operation of the institution. WSIB submits that it properly exercised its discretion in withholding information under sections 13 and 19 to portions of the responsive records.

[48] The appellant submits that WSIB failed to consider a number of factors when it exercised its discretion to withhold information under section 13(1). In particular, the appellant argues that WSIB improperly treated the section 13(1) exemption as a mandatory rather than a discretionary one. The appellant states:

We submit that the refusal to disclose a record where the disclosure would reveal advice or recommendation is not mandatory. It is discretionary. We submit that the discretion must be exercised in

¹¹ Order MO-1573.

accordance with the guiding principle that *information should be available to the public*.

We further submit that the WSIB has improperly interpreted and applied the [Act]. Rather than heeding the governing principle of disclosure, the WSIB instead acts as if a permissible exemption is mandatory. In other words, if it can withhold, it will. Not only does this offend the governing principle of information disclosure, it offends and cuts against the WSIB's own declared principle of openness and transparency, rendering those public declarations as hollow unfulfilled slogans.

[49] The appellant does not address WSIB's exercise of discretion in applying section 19.

[50] In response to the appellant's submissions on its exercise of discretion, the WSIB repeated its submission that it appropriately exercised its discretion in applying the section 13 and 19 exemptions to portions of the records. WSIB submits:

As advice to government is a discretionary exemption, the WSIB considered whether or not it would be appropriate to release the exempted portions of the record despite the clear application of s. 13. Having so considered, the WSIB determined that releasing the records would impede the ability of staff to freely and frankly provide advice to senior management.

Finding

[51] Based on my review of the information withheld by WSIB and the parties' representations, I find that WSIB's exercise of discretion to withhold information under sections 13(1) and 19 was proper in the circumstances. I find the appellant's argument that the WSIB did not exercise its discretion when applying section 13 to be unsubstantiated given the nature of the withheld information. Furthermore, I accept that WSIB properly considered the purposes of the exemptions and the rights sought to be protected. Accordingly, I uphold WSIB's exercise of discretion.

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

[52] Section 23 states:

An exemption from disclosure of the 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.

[53] 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.

[54] 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.¹² Previous orders 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.¹³

[55] A public interest does not exist where the interests being advanced are essentially private in nature.¹⁴ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹⁵

[56] The word compelling has been defined in past previous orders as *rousing strong interest or attention*.¹⁶

[57] Any public interest in non-disclosure that may exist also must be considered.¹⁷ A public interest in non-disclosure of the record may bring the public interest in disclosure below the threshold of *compelling*.¹⁸

Representations

[58] The appellant submits that section 23 applies to the information withheld under section 13(1) in records 9, 10 and 13, as this information will help with the public's understanding of why injured workers who are retired do not receive LOE benefits.¹⁹ The appellant submits that his interest in the records is not private and he details his client's circumstances and the reasons why disclosure of the information in the record would be in the public interest. He states that disclosure will serve the public interest in the following manner:

This will allow the public to understand the background of the issue and intelligently advocate to the WSIB and the government to implement a change to repair this gap in WSIB benefits and ensure that injured

¹² Orders P-984 and PO-2607.

¹³ Orders P-984 and PO-2556.

¹⁴ Orders P-12, P-347 and P-1439.

¹⁵ Order MO-1564.

¹⁶ Order P-984.

¹⁷ *Ontario Hydro v. Mitchinson*, [1996] O.J. No.4636 (Div. Ct.).

¹⁸ Orders PO-2072-F, PO-2098-R and PO-3197.

¹⁹ The appellant did not argue the application of section 23 to the information withheld under section 19. Section 23 cannot apply to information that is exempt under section 19.

workers in such a circumstance are compensated fairly for injuries caused by their work in Ontario.

[59] Citing the factors in Order PO-2556 which outline examples of circumstances where a compelling public interest has not been found, the appellant submits that these circumstances do not apply in the present appeal:

- a. Another public process or forum has not been established to address public interest in this matter, i.e. the integrity of the development and release of the annual premium rates for two consecutive years);
- b. A significant amount of information has not already been disclosed. We submit that this is not adequate to address any public interests;
- c. A court process does not provide another alternative dispute mechanism; and
- d. There has not already been wide public coverage or debate on the issue. As such we submit that the records would shed further light and allow for debate over the integrity of the premium rate setting at the WSIB.

[60] The appellant submits that Ontarians need to have confidence in the WSIB's ability to implement the WSIA and provide benefits to injured workers.

[61] WSIB submits that disclosure of the portions of the records withheld under section 13(1) would not serve to inform or enlighten people about the activities of their government or its agencies or enhance openness or improve transparency into the inner workings of the government of Ontario. WSIB submits:

There is already significant information about the rationale behind the change in practice that has already been released to the appellant. There has to be space that is free from public scrutiny wherein decision-makers determine which of several openly and frankly assessed options they would like to approve and pursue.

[62] After reviewing the appellant's representations on this issue, the WSIB reiterated its position that they considered whether or not it would be appropriate to release the exempted portions of the record despite the clear application of the section 13(1) exemption. WSIB states, "Having so considered, the WSIB determined that releasing the records would impede the ability of staff to freely and frankly provide advice to senior management." And WSIB reiterated its position that it would not be appropriate to apply the public interest override to the information withheld from the records.

Analysis and finding

[63] I find that the public interest override does not apply to the information withheld

under section 13(1) in the circumstances of this appeal.

[64] I accept that there is a public interest in information relating WSIB's decision regarding LOE payments to injured workers. However, the appellant did not provide me with evidence to establish that this interest is a compelling one for the purposes of section 23. Furthermore, I accept WSIB's argument that there has been significant disclosure of information to the appellant about the rationale for the change in its policy. WSIB only withheld discreet portions of the memoranda at issue. Moreover, I note that the WSIAT decisions which resulted in the changes to WSIB's policy are public documents.

[65] I have reviewed the information withheld under section 13(1) which includes a review of various options and the pros and cons of dates of implementation. Given the fact that the information withheld squarely fits within the type of information to be protected by the exemption and the fact that the appellant has information regarding WSIB's policy change, I am unable to find that the public interest identified by the appellant would override the purpose of the section 13(1) exemption. In addition, I accept that the WSIB's decision to change its policy regarding LOE payments is one that should benefit from free and frank advice of WSIB staff.

[66] Accordingly, I find that the appellant has not established a compelling public interest in the disclosure of the information I have found exempt under section 13(1) that would override the purpose of that exemption. I uphold the decision of WSIB to withhold the information at issue pursuant to section 13(1).

ORDER:

I uphold WSIB's decision and dismiss the appeal.

Original signed by _____
Stephanie Haly
Adjudicator

September 23, 2019 _____