Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3992

Appeal PA18-123

Workplace Safety and Insurance Board

September 25, 2019

Summary: The appellant submitted an access request to the Workplace Safety and Insurance Board (the WSIB) under the *Freedom of Information and Protection of Privacy Act for* communications between the WSIB and a named company regarding contracts, work orders, purchase orders, and standing agreements, as well as news reports about this company. The WSIB denied access to the responsive records in part, citing the application of the mandatory third party information exemption in section 17(1) and the discretionary solicitor-client privilege exemption in section 19.

In this order, the adjudicator finds that the information at issue in an internal WSIB email is not exempt under section 17(1) and orders it disclosed. She upholds the WSIB's decision that the information at issue in the remaining records is exempt under section 19.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 , as amended, sections 17(1)(a), 17(1)(c) and 19.

OVERVIEW:

[1] The appellant submitted an access request to the Workplace Safety and Insurance Board (the WSIB) under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), which was later clarified as seeking the following information:

> Communications between the WSIB and [a named company, the affected party] regarding contracts, work orders, purchase orders, standing agreements, etc., also news reports of [the affected party] where they are

> the subject of dozens [of Ministry of Labour] complaints for non-payment of its sub-contractors, excluding communications between the WSIB and [the affected party] regarding day to day translation requests.

[2] The WSIB issued an access decision granting partial access to 24 records, citing sections 19 (solicitor-client privilege) and 21(1) (personal privacy) to deny access to portions of the records. In the accompanying index of records, the WSIB also noted that non-responsiveness to the request was the basis for withholding information in one record.

[3] The WSIB subsequently issued a further access decision regarding Record 25, which is an internal WSIB email, following its notification of an affected party pursuant to section 28 of the *Act.* The WSIB's decision was to grant partial access, citing section 17(1) (third party information) to deny access to portions of this record.

[4] The WSIB also notified the individuals with respect to whom information had been withheld under section 21(1) and obtained consent for disclosure from one individual.

[5] The appellant filed an appeal of the WSIB's access decision.

[6] During the mediation stage, the appellant advised the mediator that he would not be pursuing access to the information withheld under section 21(1), but he did wish to pursue the records for which section 17(1) (Record 25) and section 19 have been claimed (Records 3 to 10, 13, 14 and 16). The appellant also asserted that there is a public interest in disclosure of the records, thereby raising the application of section 23, which can only apply to Record 25.[1]

[7] The appeal could not be resolved at the mediation stage and proceeded to the adjudication stage, where an adjudicator conducts an inquiry.

[8] I sought the representations of the affected party on sections 17(1) and 23 and the WSIB on these sections as well as section 19.

[9] The WSIB then decided to disclose the information remaining at issue in Record 25 and advised the affected party. The affected party objected to disclosure of the information remaining at issue in Record 25, which concerns the rates charged by it to the WSIB.

[10] I sought the appellant's representations on the application of sections 17(1) and 23 to the information remaining at issue in Record 25. I also sought the WSIB's

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[1] The public interest override in section 23 does not apply to override the application of the solicitor-client privilege exemption in section 19.

representations on the application of section 19 to Records 3 to 10, 13, 14, and 16.

[11] The appellant provided representations in response, which I shared with the affected party. The affected party provided representations in response.

[12] In this order, I find that the information at issue in the Record 25 is not exempt under section 17(1) and I order it disclosed. I also uphold the WSIB's decision that section 19 applies to the records for which it has claimed that exemption.

RECORDS:

[13] The records at issue are emails identified as Records 3 to 10, 13, 14, 16 and 25.

[14] The WSIB has claimed the application of section 19 to all the records, except Record 25.

[15] The affected party has claimed the application of sections 17(1)(a) and (c) to the undisclosed portions of Record 25, which is an internal WSIB email. At issue in this email is the information containing the affected party's fee schedule. The remainder of Record 25 has been disclosed to the appellant.

ISSUES:

Issue A: Does the mandatory third party information exemption at sections 17(1)(a) or (c) apply to the information remaining at issue in Record 25?

Issue B: Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 3 to 10, 13, 14 and 16?

Issue C: Did the WSIB exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the mandatory third party information exemption at sections 17(1)(a) or (c) apply to the information remaining at issue in Record 25?

[16] Sections 17(1)(a) and (c) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

> supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[17] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[3]

[18] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

[19] The affected party states that the portions of the record at issue consist of the rates it billed to WSIB for translation and/or interpretation services and that this is commercial and financial information.

[20] The appellant states that the redacted portions of the record shows hourly rates and states that he does not admit that the information is commercial information.

Analysis/Findings re: part 1

[21] The types of information listed by the affected party in section 17(1) have been

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[2] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[4] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[5]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[6]

[22] Record 25 is an internal WSIB email dated April 2, 2015. Severed from this record are the rates charged by the affected party to the WSIB for various translation services from 2008 until 2013, as well as its current rates as of the date of this record.

[23] Based on my review of the information at issue, I agree with the affected party that it consists of commercial information related to the selling of the affected party's translation services to the WSIB. It also consists of financial information as it contains the prices charged by the affected party for various translation services.

[24] Therefore, I find that part 1 of the test under section 17(1) has been met.

Part 2: supplied in confidence

[25] The affected party states that in its negotiations with the WSIB, it had an implicit expectation that the rates and the terms of the negotiations were made in confidence and would be kept strictly confidential.

[26] The appellant states that the rates the affected party was charging the WSIB were not supplied in confidence as they stem from the affected party's services agreement with the WSIB or from agreed terms of business between the WSIB and the affected party.

[27] The appellant submits that as the record is an internal WSIB email in which WSIB staff are discussing these purported rates among themselves, there is no guarantee the numbers they list are accurate and there is no evidence proving that they derived the numbers from any possibly confidential records sent to them by the

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[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.

affected party. The appellant states that the WSIB may have derived these numbers from its accounting systems, for instance, by taking the aggregate of payments to the affected party for a particular service over a particular period, and dividing by the aggregate number of hours of that service that were provided by the affected party. He states:

> Without a chain of custody showing where these employees' emails got those numbers from, no claim of confidentiality can survive. And even with such "chain of custody" evidence, it is almost certain that the information came from a contract, agreement, or mutually agreed terms of business that, as the IPC backgrounder points out, cannot be said to have been "supplied" to the WSIB.

[28] On the "in confidence" issue, the appellant submits that there are no reasonable or, especially, objective grounds to hold that the amount a public agency such as WSIB pays to a supplier for the provision of regular, publicly available services could be considered confidential. He states that translation/interpretation services are not in themselves something that is supplied through trade secrets or proprietary intellectual property.

[29] In reply, the affected party states that its rates are not public.

Analysis/Findings re: part 2

Supplied

[30] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[7]

[31] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[8]

[32] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a

[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.

single party.[9]

[33] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[10] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[11]

[34] Whether or not the information at issue in the email that comprises Record 25 is considered to have been "supplied" to the WSIB depends on whether the information was mutually agreed upon and arises from a contract negotiated between the parties. Where the information at issue merely reflect the terms of an agreement between an institution and a third party, it has been found that such information was not "supplied" to the institution.[12]

[35] The disclosed portions of Record 25, an internal WSIB email, indicate that the rates at issue were provided to the WSIB directly by the affected party, prior to contracts being signed with the affected party.

[36] There are two sets of rates at issue in Record 25.

[37] The first set of rates reflects a set of rates charged by the affected party over a six-year period. It does not indicate that there was one specific contract for this set of rates. I find that the information in the first set of rates in Record 25 was supplied by the affected party to the WSIB.

[38] The second set of rates in Record 25 indicates that this information is set out in a specific contract between the WSIB and the affected party. Therefore, I find that this second set of rates was not supplied to the WSIB and part 2 of the test has not been met for this second set of rates in Record 25. I will order this information disclosed. Nevertheless, for the sake of completeness, I will consider whether the in confidence portion of part 2 and part 3 of the test under section 17(1) applies to this information.

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[9] This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[10] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[11] *Miller Transit*, above at para. 34.
[12] See, for example, Orders MO-3462, MO-3258 and MO-3372.

In confidence

[39] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[13]

[40] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[14]

[41] I accept the affected party's submission that it had a reasonable expectation of confidentiality when it supplied its rate information to the WSIB. I find that the rate information at issue:

- was communicated to the WSIB in on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the affected party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure

[42] Therefore, I find that part 2 of the test has been met for the information at issue in Record 25.

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[13] Order PO-2020.
[14] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

Part 3: harms

[43] The party resisting disclosure must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[15]

[44] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[16]

[45] The affected party states that the release of the information could reasonably be expected to significantly prejudice the competitive position or interfere significantly with other negotiations as it relates to providing competitive rates for any Request for Proposal (RFP) to the WSIB or other entities.

[46] The affected party states that its rates are not public and disclosing them would make them public, thereby, removing the competitive secrecy in any procurement process. It submits that as the rates of other WSIB providers are not being released, this would place the affected party at a significant disadvantage.

[47] The appellant submits that any hypothetical harm the affected party is asserting might accrue from disclosure is conjectural, remote, and immaterial. As well, from his research, the appellant understands that the affected party is in severe financial distress. Thus, he submits that it is highly unlikely the affected party will ever be in a position again to bid on or supply services to the WSIB. Therefore, the appellant submits that the affected party's competitive position will not be harmed by the disclosure of the information at issue.

[48] In reply, the affected party points out that the information of other WSIB providers is not being released and as such, disclosure of its rates would prejudice its competitive position and result in undue loss to it or undue gain to its competitors.

[49] The affected party states that the appellant is speculating on its financial situation regarding which he has no concrete information and he is erroneously assuming that the affected party is not in any position to bid on contracts. It submits that releasing its financial information will severely compromise the affected party's

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[15] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[16] Order PO-2435.

ability to bid on contracts, as its competitors as well as clients will know its rates before the RFPs can be analyzed.

Analysis/Findings re: part 3

[50] Record 25 is dated April 2, 2015. It contains two sets of rates for translation and interpretation, one for the period of 2008 to 2013 and one that is current as of the date of the record in April 2015. I do not accept the affected party's submission that disclosure of this information could reasonably be expected to cause the harms set out in sections 17(1)(a) or (c).

[51] The first set of rates are the ones charged over a six-year period from 2008 until 2013. The list is not broken down into a per year amount. Similarly, the second set of rates marked as current as of the date of the email comprising Record 25, April 2, 2015, does not indicate the contract start and end date.

[52] Some of the rates indicate a range of rates, which depend on the language requested. The rates for each language are not set out in this record.

[53] Based on my review of the record, it appears that the rates in the record were at some point eventually set out in contracts between the affected party and the WSIB, although those contracts are not before me.

[54] Taking into consideration the nature of the information in the record, as well as the age of the record, I conclude that I do not have sufficient evidence to find that the harms set out in sections 17(1)(a) or (c) could reasonably be expected to occur with its disclosure.

[55] In particular, I am not persuaded that disclosure of the information at issue in the record could reasonably be expected to significantly prejudice the affected party's competitive position, interfere significantly with its negotiations, cause the affected party undue loss, or result in undue gain to the affected party's competitors.

[56] Accordingly, I find that part 3 of the test under section 17(1) has not been met for the rates at issue in Record 25. Given this conclusion, I find that the information at issue in Record 25 is not exempt under section 17(1) and I will order it disclosed. Therefore, there is no need for me to also consider whether the public interest override in section 23 applies to the information at issue in Record 25.

Issue B: Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 3 to 10, 13, 14 and 16?

[57] 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 or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[58] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[59] The WSIB states that the records at issue are subject to both communication privilege and litigation privilege. It states that the records at issue contain communications between employees at the WSIB and WSIB legal counsel wherein legal advice is both sought and given. It submits that as the advice sought revolved around a litigation process, litigation privilege also applies.

[60] The WSIB states that the communications in the records took place between a WSIB lawyer and WSIB employees who needed the advice, or from whom the lawyer needed information. The WSIB maintains that privilege applies to the records at issue and that privilege has been neither waived nor lost.

[61] The appellant states that the WSIB may be claiming privilege over the communications it received from counsel for garnishors in relation to garnishments received by the WSIB, including those in which the WSIB is a third party to the litigation between translators or interpreters and the affected party. He submits that some of the records at issue may not be privileged such as garnishment requests from garnishors' counsel and communications received by the WSIB.

[62] In reply, the WSIB states that it is not asserting privilege over communications received by the WSIB from outside parties and that those communications were disclosed to the appellant. It states that privilege is being asserted solely over communications between WSIB lawyers and WSIB staff.

[63] The WSIB maintains that in addition to communication privilege, litigation privilege also applies to communications between WSIB lawyers and other employees of the WSIB regarding garnishments.

[64] The WSIB states that, as a garnishee, it is liable to make payments into court, and could have faced an order against it, or a requirement to appear at a court hearing on matters affecting its rights. It states that the effect of the Small Claims Court Rules regarding garnishments is to make it necessary for the WSIB to engage its lawyers in order to respond to the garnishment proceedings in a manner that best protect its interests. It submits that communications with its lawyers about these matters would be subject to litigation privilege.

[65] In sur-reply, the appellant states that the following would not merit a section 19 exemption:

> …a WSIB lawyer forwarding an email from an outside lawyer, or communicating with an outside lawyer, or just generally communicating with a WSIB staff member but not on a legal issue or not in the context of providing legal advice.

[66] The appellant points out that in its representations the WSIB does not mention outside communications it sent, for example, from its lawyers to an outside lawyer for a garnishor.

[67] The appellant states that the WSIB only disclosed to him outside communications sent to the WSIB's Regulatory Services Division or to its Customer Experience managers in respect of complaints from individual translators/interpreters about not being paid by the affected party. As such, he states that he did not receive outside communications with WSIB legal personnel related to garnishments, except for an email found in the disclosed portion of both Records 5 and 6. This email was sent to the WSIB from a senior manager of the affected party and relates to a Notice of Garnishment dated November 21, 2017.

[68] The appellant states that, according to court records, the WSIB has been named as a garnishee in at least five Small Claims Court actions since December 2016. The appellant submits that it is difficult to imagine that the WSIB was named five times as a garnishee in lawsuits and yet has no outside communications related to these garnishments.

[69] Except for the November 21, 2017 garnishment email referred to above, the appellant states that the WSIB has not released any other records related to that Notice of Garnishment, such as the email or communication by which it received the Notice of Garnishment and any communications with the garnishor or their legal counsel. He also refers to one redacted email to a lawyer at the WSIB that suggests that the email was forwarded to, or shared with, other WSIB personnel. To the extent that any portions of those communications do not consist of legal advice, the appellant submits that they should be disclosed, including but not limited to the email headers (from, to, cc., date, and subject fields).

[70] In reply to the appellant's sur-reply representations, the WSIB states that it continues to assert privilege over the records.

Analysis/Findings

[71] As noted above, section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 (prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital) is a statutory privilege. The WSIB must establish that one or the other (or

both) branches apply.

[72] At common law, branch 1 solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege, and (ii) litigation privilege.

[73] 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.[17] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[18] 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.[19]

[74] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[20]

[75] 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.[21] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[22]

[76] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[23]

[77] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[24] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[25]

[78] Branch 2 is a statutory privilege that applies where the records were prepared by or for Crown counsel or counsel employed or retained by an educational institution or hospital "for use in giving legal advice or in contemplation of or for use in litigation."

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[17] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[18] Orders PO-2441, MO-2166 and MO-1925.
[19] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)
[20] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[21] v *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[22] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)
[23] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[24] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[25] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.

The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[79] The statutory litigation privilege under branch 2 does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[26]

[80] The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.[27]

[81] In contrast to the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[28]

[82] The WSIB has claimed that the records are subject to both communication privilege and litigation privilege.

[83] The appellant sought access to communications between the WSIB and the affected party. In his request, the appellant identifies the affected party as being the subject of dozens of Ministry of Labour complaints for non-payment of its sub-contractors. The appellant in his representations identifies the affected party as being the garnishee in at least five garnishment court proceedings.

[84] The appellant's positon is that responsive records regarding communications with outside parties about the garnishment proceedings are not privileged. The appellant acknowledges that the WSIB disclosed outside communications to him only in respect of complaints from individual translators/interpreters about not being paid by the affected party, and only in respect of such complaints sent to the WSIB's Regulatory Services Division or to its Customer Experience managers.

[85] The appellant is looking for responsive records that contain outside communications with WSIB legal personnel about the affected party.

[86] The appellant is also seeking communications related to garnishments of the affected party where the WSIB was named as a garnishee. The appellant provided a list of five court actions where the WSIB has been named as garnishee.

[87] The WSIB has claimed section 19 for Records 3 to 10, 13, 14 and 16. It has identified each record as an email type of record. It has not provided me with a copy of

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[26] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[27] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.
[28] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, cited above.

the information withheld under section 19. In the circumstances of this appeal, I have decided that I am able to reach a decision on the application of section 19 based on my review of the parties' representations and the information that the WSIB has disclosed to the requester in other records not subject to section 19.

[88] All of Records 3 to 10, 13, 14 and 16 have been withheld in full except for Records 5 and 6, in which one email from the affected party to the WSIB has been disclosed.[29] This one email is the same email and is found at the end of Records 5 and 6. This email is from the affected party and concerns one garnishment proceeding and says that this garnishment proceeding has been terminated.

[89] For the explanation as to why each record is privileged, the WSIB categorizes each record as subject to both communication and litigation privilege. It expands on this by stating that the records contain communications between employees at the WSIB and WSIB legal counsel wherein legal advice is both sought and given. As the advice sought revolved around the litigation process, it submits that litigation privilege also applies. It also states that the recipients of the communications would all have copies of the emails.

[90] For the subject matter of the record, the WSIB lists the name of the affected party and for an explanation as to why it is privileged, it states that each record is "Legal Privileged - Email from Business to Legal Counsel." It states that within the WSIB, it refers to its work units as 'business areas', which are also sometimes in government referred to as 'program areas' or 'work units'.

[91] Based on my review of the WSIB's representations and the records already disclosed to the appellant, I find that the information at issue in the responsive emails consists of internal staff emails, namely emails between employees at the WSIB and WSIB legal counsel.

[92] Based on my review of the parties' representations, I find that the statutory communication privilege in branch 2, "prepared by or for Crown counsel for use in giving legal advice" applies to the information at issue in the records. As internal WSIB emails between WSIB counsel and staff, the records at issue were prepared by or for Crown counsel for use in giving legal advice. I have no evidence that this privilege has been waived or lost.

[93] The appellant has provided detailed representations about records that he thinks should be included in the emails at issue, such as emails about Notices of Garnishment concerning the affected party and any related communications with the garnishor or

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[29] Of this disclosed email, one name has been withheld under section 21(1). The same email has been disclosed from Records 5 and 6.

their legal counsel. However, I note that the appellant's request does not seek this information. His request seeks communications between the WSIB and the affected party "…regarding contracts, work orders, purchase orders, standing agreements, etc., also news reports..."

[94] I find that the appellant's request, in his representations, for communications from garnishors' counsel to the WSIB is for information that falls outside the scope of the request at issue in this appeal. I will not address it further.

[95] As I have found the information at issue subject to branch 2 communication privilege, there is no need for me to also consider whether it is also subject to branch 2 litigation privilege or subject to branch 1 privilege.

[96] Therefore, subject to my review of the WSIB's exercise of discretion, I find that the information at issue in Records 3 to 10, 13, 14 and 16 is exempt under section 19.

Issue C: Did the WSIB exercise its discretion under section 19? If so, should this office uphold the exercise of discretion?

[97] 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.

[98] 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.

[99] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[30] This office may not, however, substitute its own discretion for that of the institution.[31]

[100] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[32]

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[30] Order MO-1573.
[31] Section 54(2).
[32] Orders P-344 and MO-1573.

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- 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.

[101] The WSIB states that in exercising its discretion it considered the purpose of *FIPPA*, the wording of the section 19 exemption and the interests it seeks to protect, and whether disclosure will increase public confidence in the operation of the WSIB. It is the WSIB's position that discretion was appropriately exercised in applying section 19 to the responsive records. Furthermore, it states that in accordance with the obligations set out in section 10(2) of *FIPPA*, the WSIB disclosed as much of the records as possible without disclosing exempt material.

[102] The appellant did not provide representations on this issue.

Analysis/Findings

[103] The records at issue contain internal WSIB communications between the WSIB lawyer and the WSIB staff for the purpose of giving or receiving legal advice.

[104] I find that in denying access to the information at issue in the records, the WSIB exercised its discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations.

[105] In particular, in deciding to withhold access to the information at issue, the WSIB took into account the purpose of the section 19 exemption, which is to ensure that a client may freely confide in his or her lawyer on a legal matter. It also took into account whether disclosure of the information at issue in the records, internal WSIB emails containing legal advice, would increase public confidence in the WSIB.

[106] Therefore, I am upholding the WSIB's exercise of discretion and find that the information at issue in Records 3 to 10, 13, 14 and 16 is exempt under section 19.

ORDER:

1. I order the WSIB to disclose the responsive information in Record 25 to the appellant by **October 31, 2019**, but not before **October 28, 2019**.

2. I uphold the WSIB's decision to withhold access to the information at issue in Records 3 to 10, 13, 14 and 16.

Original Signed by: September 25, 2019

Diane Smith
Adjudicator