

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4115-I

Appeal PA18-10

Workplace Safety and Insurance Board

February 24, 2021

Summary: This order determines whether the remaining withheld information relating to the Workplace Safety and Insurance Board's (WSIB) new Chronic Mental Stress Policy is exempt under the discretionary solicitor-client privilege exemption at section 19 of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In Interim Order PO-4072-I, the adjudicator partially upheld the WSIB's access decision, and deferred her decision about the WSIB's section 19 claim pending receipt of additional evidence. In this order, the adjudicator finds that section 19(a) applies to the remaining withheld information to exempt it from disclosure under the *Act*, but orders the WSIB to re-exercise its discretion under section 19(a).

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

Orders Considered: Order PO-4072-I.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

OVERVIEW:

[1] This second interim order addresses the issue of access under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to information related to the Workplace Safety and Insurance Board's (WSIB) new Chronic Mental Stress Policy. The appellant, a legal clinic that represents injured workers, submitted a multi-part request under the *Act* to the board for access to records related to the introduction of, and changes to, the WSIB's new Chronic Mental Stress Policy.

[2] The WSIB issued a decision granting partial access to the responsive records with severances under sections 12 (Cabinet records), 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*.

[3] The requester, now appellant, appealed the WSIB's decision to the Information and Privacy Commissioner (the IPC).

[4] During the course of mediation, the WSIB issued another revised decision releasing several records that were previously withheld under section 13(1) to the appellant. The WSIB also provided a revised index of records identifying the remaining records to which it continued to apply section 13(1) and certain records now being withheld under section 19, which were previously withheld under section 13(1). The appellant confirmed the records it wanted to pursue at adjudication, and raised the public interest override for records 23 and 31.¹

[5] As no further mediation was possible, the appeal proceeded to the adjudication stage, where I conducted an inquiry under the *Act*. I invited and received representations from both the WSIB and the appellant, which were shared in accordance with this office's *Practice Direction 7: Sharing of Representations*. The WSIB was given an opportunity to reply to the representations of the appellant, but it declined.

[6] In Interim Order PO-4072-I, I partially upheld the WSIB's decision, finding that section 13(1) (advice or recommendations) applied in part, and finding that the section 23 public interest override did not apply to override the application of section 13(1) to the exempt portions of the records. I deferred my decision about the WSIB's section 19 claim, pending receipt of additional evidence from the WSIB.

[7] I requested from the WSIB a detailed affidavit outlining the reasons why it claims portions of two records are subject to the solicitor-client privilege exemption in section 19 of the *Act*. I referred the WSIB to the IPC guidance document, *IPC protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC*, which provided the basis of my request for this affidavit. I received the affidavit from the WSIB and shared it with the appellant. I invited, and received, representations regarding the affidavit from the appellant.

[8] In this order, I uphold the WSIB's decision to withhold portions of two records (records 4 and 7) under the discretionary solicitor-client privilege exemption at section 19(a) of the *Act*. However, I find that the WSIB did not consider all relevant factors in its exercise of discretion under section 19, and I order it to re-exercise its discretion.

¹ The WSIB did not claim section 12 to withhold any of the records that proceeded to the adjudication stage and so this exemption was not considered in Interim Order PO-4072-I.

RECORDS:

[9] The information remaining at issue in this appeal is contained in records 4 and 7 as indicated in the WSIB's revised index of records. Records 4 and 7 are documents from the WSIB's Board of Director (BOD) meeting minutes including slide decks of presentations made to the BOD. Record 4 is from the August 17, 2017 meeting and record 7 is from the September 21, 2017 meeting.

ISSUES:

- A. Does the discretionary solicitor-client privilege exemption at section 19 apply to the withheld information in records 4 and 7?
- B. Did the WSIB exercise its discretion under section 19? If so, should I uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary solicitor-client privilege exemption at section 19 apply to the withheld information in records 4 and 7?

[10] The WSIB claims that the common law solicitor-client privilege exemption at section 19(a) of the *Act* applies to portions of records 4 and 7. The appellant argues that it does not.

[11] The relevant part of section 19 of the *Act* states:

A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

Common law solicitor-client privilege

[12] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. At issue in this appeal is the first type.

Solicitor-client communication privilege

[13] 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.² The rationale for this

² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.³ 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.⁴

[14] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁵

[15] 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.⁶ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁷

Loss of privilege

[16] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.⁸

[17] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.⁹

[18] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.¹⁰ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.¹¹

The parties' representations before Interim Order PO-4072-I

Representations of the WSIB

[19] Relying on Order P-1363, the WSIB states it considered several principles when determining whether the common law solicitor-client communication privilege applies to

³ Orders PO-2441, MO-2166 and MO-1925.

⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.) (*Balabel*).

⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.)

⁸ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁹ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

¹⁰ 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.).

¹¹ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

the withheld portions of records 4 and 7. These principles are:

- Communications between a solicitor and client for the purpose of obtaining legal advice, broadly construed, attract solicitor-client privilege;
- The mere presence of a solicitor at a meeting does not automatically extend an “umbrella of privilege” over all of the proceedings and in some instances it would be appropriate to recognize the claim as to some portions and disallow it as to others;
- In some instances, it is appropriate to edit documents so that non-privileged parts may be disclosed; and
- Decisions about which parts of meeting minutes attract solicitor-client privilege and which parts do not should be made with great care, so that privilege may be preserved where appropriate, in order to permit frank exchanges between solicitor and client in relation to legal advice.

[20] The WSIB submits that portions of records 4 and 7 are exempt from disclosure under the common law solicitor-client privilege exemption at section 19 of the *Act*. It submits that prior to bringing information and recommendations to the BOD, WSIB staff sought advice on the interpretation of Bill 127, its impacts, and the implications of a number of different policy responses the WSIB could undertake respecting the bill. The WSIB submits that the advice given by legal counsel is contained in withheld portions of records 4 and 7, and that some of the advice is contained in an opinion, while other advice is woven into analysis presented to the BOD in support of its decision-making in response to Bill 127. The WSIB submits that privilege over these records has been properly claimed, and has been neither lost nor waived.

Representations of the appellant

[21] The appellant submits that while the WSIB asserts that it withholds portions of records 4 and 7 based on solicitor-client privilege, it has not established that the withheld sections consist of direct communications of a confidential nature between a solicitor and client for “the purposes of professional legal advice”. The appellant submits that it is more likely that these records consist of information about WSIB decision-making or recommendations to its BOD, not solicitor-client communications.

[22] The appellant submits that the slide deck in record 7 appears to be a presentation made by WSIB management to the BOD of the WSIB on September 21, 2017, the day it passed the final Chronic Mental Stress Policy. The appellant observes that the WSIB does not assert that these slides were prepared by legal counsel, and only asserts that parts of records 4 and 7 include analysis presented to the BOD with legal advice “woven” into the analysis.

[23] The appellant submits that the slides in record 7 may reflect WSIB decision-making after receiving legal advice, but that does not make them protected by solicitor-

client privilege. The appellant argues that they are only protected if they are directly related to seeking, formulating or giving legal advice or assistance. The appellant further argues that solicitor-client privilege does not attach to WSIB staff's interpretation and recommendations on a policy matter just because WSIB staff may have considered legal advice in developing these recommendations. The appellant argues that privilege only attaches to confidential communications around the advice itself or information which would disclose these confidential communications.

[24] The appellant submits that in Order PO-2677, the adjudicator found that the section 19 common law solicitor-client privilege exemption did not apply to two sets of slide decks, where the slides were prepared "in consultation with legal," and "with Crown counsel input and comments", but did not contain privileged communications. The appellant argues that in other words, the WSIB cannot assert solicitor-client privilege to shield public access to its recommendations to the BOD, unless these recommendations actually disclose solicitor-client communications made for the purposes of confidential legal advice.

[25] The appellant states that the WSIB has chosen to withhold the 45-page slide deck found in record 7, asserting that the entire document is protected by solicitor-client privilege. The appellant argues, however, that it is unlikely that all the information contained in the 45-page slide deck is covered by solicitor-client privilege, and that portions of this slide deck may contain information that is not. The appellant submits that the portions of the slide deck that are not covered by solicitor-client privilege should be severed and disclosed.

The parties' representations after the Interim Order

The WSIB's affidavit

[26] As noted above, after Interim Order PO-4072-I was issued, I sought and received an affidavit from the WSIB with respect to the application of the section 19 exemption to portions of records 4 and 7. This affidavit is sworn by legal counsel for the WSIB. The relevant portions of this affidavit are as follows:

- The individual swearing the affidavit is legal counsel for the WSIB and provides advice on matters of access to information and privacy protection to the WSIB, including the application of exemptions to records sought under the *Act*.
- He has reviewed records 4 and 7, which contain portions that were withheld under section 19 of the *Act*. He is satisfied that their contents are protected by solicitor-client privilege, specifically communication privilege. He is satisfied that all of the information in question constitutes either legal advice or information provided to WSIB legal counsel for the purpose of providing legal advice.
- Record 4 is a 31-page document, which contains three sections of information that have been withheld under section 19.

- The third section, on pages 12-16 (pages 10-14 of the slide deck), contains a legal/risk analysis of the new Chronic Mental Stress legislation, including analysis of the various policy options under consideration. This information is legal advice provided by Legal Services. This includes supporting information produced by the WSIB's Risk Management Division at the written request of WSIB's general counsel for informing the legal advice that Legal Services provided to senior leadership at the WSIB. Pages 12-16 were all marked as "Privileged and Confidential. Not for distribution."
- The first section, on page 1, and the second section, on page 10 (page 8 of the slide deck) contain a brief summary of the information contained in the third section.
- The parties to the information in record 4 were external legal counsel retained by the WSIB, internal legal counsel at the WSIB, senior management in the WSIB's Risk Management Division, the WSIB's executive committee, and the WSIB BOD. Privilege has not been waived for this information, and this information has not been sent to any third parties.
- Record 7 is a 65-page document, which contains two sections of information that have been withheld under section 19.
 - The first section, on pages 6-17 (pages 2-13 of the slide deck), is an expanded legal/risk analysis, similar to that contained in record 4. Pages 6-17 are all marked as "Privileged and Confidential. Not for distribution". This information is legal advice provided by Legal Services. As above, part of this information was produced by the WSIB's Risk Management Division at the written request of WSIB's general counsel for informing the legal advice provided by Legal Services to senior leadership at the WSIB. This is detailed on page 7, which indicates that the legal/risk analysis was prepared to assist Legal Services with preparing a legal opinion on the risks associated with the Chronic Mental Stress Policy choices under consideration.
 - The second section, on pages 23-53, is a formal legal opinion prepared by external counsel to the WSIB, which contains a legal analysis of the WSIB's proposed Chronic Mental Stress Policy options. This legal opinion attached and incorporated the legal/risk analysis described above in its analysis.
 - The parties to the information contained in record 7 were external legal counsel retained by the WSIB, internal legal counsel at the WSIB, senior management in the WSIB's Risk Management Division, the WSIB's executive committee, and the WSIB BOD. Privilege has not been waived

for this information, and this information has not been sent to any third parties.

The appellant's reply to the WSIB's affidavit

[27] As noted above, I shared the WSIB's affidavit with the appellant to provide an opportunity to submit representations in reply.

[28] The appellant submits that it has no way of knowing or verifying that the withheld information legitimately falls under the section 19 solicitor-client privilege exemption, or if the application of the section 19 exemption by the WSIB is overly broad. The appellant submits that it is important that due diligence be taken by the IPC, because there is a strong public interest in knowing what information the WSIB took into consideration when developing the Chronic Mental Stress Policy. The appellant submits that the legal clinic is seeking the withheld information to better understand the policy, to communicate the policy rationale to stakeholders, and to advise injured workers who might be affected by the policy on its application. The appellant notes that in 2019 alone, over 250,000 people were injured at work in Ontario, and workers who face injuries at work are disproportionately young, in precarious circumstances, and/or are immigrant workers. The appellant further submits that it is important to promote transparent and well-reasoned decision-making at the WSIB through access to information.

Analysis and findings

[29] Although the WSIB did not provide unredacted copies of records 4 and 7 to the IPC, I am now satisfied, based on the additional affidavit evidence submitted by the WSIB following Interim Order PO-4072-I, that I have sufficient evidence upon which to base a decision about the application of section 19 of the *Act* to the withheld portions of the records.

[30] Based on the WSIB's affidavit, the representations of the parties, and the circumstances of this appeal, I find that the withheld information in records 4 and 7 is exempt under the common law solicitor-client privilege exemption at section 19(a) of the *Act*. In particular, I am satisfied that the withheld portions of the records at issue represent, or would reveal, confidential communications between solicitor and client, or their agents or employees, for the purpose of seeking or giving legal advice.

[31] I accept the evidence provided by WSIB's legal counsel in his affidavit. Specifically, I accept his description of the withheld information in records 4 and 7 as either legal advice or information that had been provided to WSIB legal counsel for the purpose of providing or seeking legal advice. I also accept that the information provided to WSIB legal counsel in both records was produced by the WSIB's Risk Management Division, at the written request of WSIB's General Counsel, for WSIB Legal Services to use in providing legal advice about the Chronic Mental Stress Policy. Further, I accept the WSIB's submission that the withheld portions reflect confidential communications within the WSIB and with external legal counsel retained by the WSIB about the WSIB's

Chronic Mental Stress Policy. I accept that the withheld portions of the records were meant to be confidential, given that the WSIB marked them as such.

[32] WSIB's legal counsel describes the withheld portions in record 4 as legal advice and analysis about the WSIB's Chronic Mental Stress Policy provided by WSIB's Legal Services, and summaries of that advice. He describes the withheld portions in record 7 as legal advice and analysis about the WSIB's Chronic Mental Stress Policy provided by WSIB's Legal Services, and a legal opinion about the policy options, provided by external legal counsel retained by the WSIB. I accept the WSIB's evidence that disclosure of these portions of the records would reveal the content of solicitor-client communications about the WSIB's Chronic Mental Stress Policy. I note that, as set out above, 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.¹²

[33] The appellant argues that section 19 does not apply to the withheld portions of records 4 and 7, especially not the entirety of the 45-page slide deck in record 7. In support of this argument, the appellant relies on Order PO-2677 where the adjudicator found that the section 19 common law solicitor-client privilege exemption did not apply to two sets of slide decks, where the slides were prepared with legal counsel's input, but did not contain privileged communications. The appellant argues that the WSIB cannot use solicitor-client privilege to prevent access to recommendations to the BOD, unless these recommendations actually disclose solicitor-client communications made for the purposes of providing confidential legal advice.

[34] In my view, the finding in Order PO-2677 was specific to the facts of that appeal, where the institution, the Ministry of Municipal Affairs and Housing submitted that two slide decks were solicitor-client privileged because they had been "prepared in consultation with legal." The adjudicator rejected the ministry's submissions and found that the withheld records did not contain privileged communications noting that, other than the institution's brief representations, "and the fact that these pages of records are located in the Legal Services Branch file," there was no additional evidence supporting the application of the section 19 exemption to the records.¹³ In contrast, in the circumstances of this appeal, I accept the WSIB's affidavit evidence that the withheld portions of the records are themselves confidential privileged communications or that their disclosure would reveal the content of confidential solicitor-client communications. Therefore, I find that Order PO-2677 is distinguishable in my determination of the application of the section 19 exemption to the withheld information in this appeal.

[35] Regarding the issue of waiver, there is no indication that the WSIB has waived privilege over the withheld information that it has claimed as solicitor-client privileged.

¹² *Balabel*, cited above.

¹³ Order PO-2677, at page 25.

Based on the WSIB's evidence, and the circumstances of this appeal, I find that it has not been waived.

[36] The appellant has raised the application of the section 23 public interest override in the circumstances of this appeal. Section 23 is not available to override the application of the section 19 exemption.¹⁴ Therefore, I have not considered the appellant's public interest arguments in my determination of the application of the section 19 exemption to the withheld portions of records 4 and 7. However, the WSIB is required in its exercise of discretion under section 19 to consider the public interest,¹⁵ and I will canvas the appellant's public interest concerns below in my review of the WSIB's exercise of discretion under section 19.

[37] Accordingly, subject to my findings on the WSIB's exercise of discretion, below, I uphold the WSIB's application of the section 19 solicitor-client privilege exemption to the withheld information in records 4 and 7.

B. Did the WSIB exercise its discretion under section 19? If so, should I uphold the exercise of discretion?

[38] 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.

[39] 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.

[40] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁶ I may not, however, substitute my own discretion for that of the institution.¹⁷

[41] Relevant considerations may include those listed below. However, not all those

¹⁴ Section 23 states: An exemption from disclosure of a record under sections 13, 15, 15.1, 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.

¹⁵ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815.

¹⁶ Order MO-1573.

¹⁷ Section 54(2) of the *Act*.

listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁸

- 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.

Representations of the parties

[42] The WSIB notes that in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, the Supreme Court of Canada (SCC) held that “solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice” and that “solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary”.

[43] The WSIB submits that it has taken into consideration the fundamental

¹⁸ Orders P-344 and MO-1573.

importance of solicitor-client privilege, and exercised its discretion appropriately in applying the section 19 exemption to the withheld portions of records 4 and 7. The WSIB submits that it understands that the presence of a solicitor does not automatically extend an “umbrella of privilege” over all of the records. The WSIB argues that it only applied section 19 to portions of records 4 and 7, where it was clear that legal advice was either sought or provided.

[44] The WSIB submits that in exercising its discretion to withhold portions of records 4 and 7 under section 19, it took into consideration all relevant factors. The WSIB submits that it considered the purpose of the *Act* by interpreting the wording of the exemption and the interests it seeks to protect. The WSIB further submits that it also considered whether disclosure would increase public confidence in its operation. The WSIB also submits that it did not exercise its discretion in bad faith, and that it released as much of the records as possible in accordance with section 10(2) of the *Act* without disclosing exempt information.

[45] The appellant made the same arguments with respect to the WSIB’s exercise of discretion for both the sections 13(1) and 19 exemptions. However, I will only address these arguments with respect to the section 19 exemption, as I dealt with section 13(1) in Interim Order PO-4072-I.

[46] The appellant submits that while the WSIB disclosed a number of records in response to the access request, it has chosen to withhold the records that are necessary for the legal clinic and its clients to understand why the WSIB chose to change its decision to adjudicate mental stress disability cases the same way as other types of injuries. The appellant submits that the WSIB may have considered irrelevant factors in exercising its discretion under section 19. The appellant submits, in particular, that it is unclear why the WSIB continues to withhold access to the documents that immediately precede its decision to adopt the more onerous test in evaluating workers with mental stress injuries, while it has largely released documents regarding its initial decision to adjudicate all benefit claims using the same legal test. The appellant submits, for example, that record 2, which is a slide deck that also appears to be a presentation from WSIB management to the BOD, was released in full. The appellant notes that it is dated April 26, 2017, and it recommended that the WSIB adopt the “significant contributing factor” test. The appellant submits that this suggests that the WSIB may have considered irrelevant factors in its exercise of discretion, such as the desire to prevent public access to information that is more contentious in order to avoid increased public debate.

[47] The appellant submits that the WSIB may have failed to take account of relevant factors including:

- The requested disclosure will increase public confidence in the operation of the institution.
 - The requested information is needed to understand a significant change in position taken by the WSIB, to the detriment of among its most vulnerable

stakeholders: workers who are suffering from disabling mental health conditions because of dangers like harassment on the job.

- The requested information would explain why, following public policy consultation in which stakeholders advised the WSIB it would be discriminatory to impose a higher legal onus on workers with mental stress injuries, the WSIB decided to impose a different standard on these vulnerable workers.
- This information is more important because of the long history of discriminatory exclusion of workers with mental stress injuries from workers' compensation. The changes effective January 1, 2018 were supposed to end that exclusion, but because of the WSIB's policy choices, that exclusion continues. The impact of the WSIB policy on the ongoing exclusion of workers with mental health injuries is evident in the 94% denial rate of chronic mental stress claims since the new law and policy came into effect.
- The appellant's compelling need to receive the information.
 - The appellant is a publicly funded legal clinic that serves a highly marginalized population. Many of the appellant's clients and members are workers with mental health disabilities. The appellant's members and clients are adversely affected by the WSIB's decision to continue to apply unfair burdens on workers with mental health disabilities.

Analysis and findings

[48] From my review of the WSIB's affidavit and the representations of the parties, I find that the WSIB did not properly exercise its discretion in considering whether to disclose the withheld information, despite the solicitor-client privilege attached to it.

[49] As noted above, the Commissioner may review an institution's exercise of discretion under section 19. The Supreme Court of Canada has affirmed that the IPC may decide not to uphold an institution's exercise of discretion and may return the matter for a proper exercise of discretion where: the discretion was exercised in bad faith or for any improper purpose; or the institution took into account irrelevant considerations or failed to take into account relevant ones.¹⁹

[50] Based on the evidence before me, I am not satisfied that the WSIB took into account all relevant factors in the exercise of its discretion under section 19. In particular, I am not satisfied that the WSIB properly considered whether disclosure of the remaining information at issue would increase public confidence in the WSIB's

¹⁹ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, cited above.

operation, whether the appellant had a compelling need for the withheld information, and the public interest in disclosure of the withheld information.

[51] As noted above, the appellant made the same arguments with respect to the WSIB's exercise of discretion for both the sections 13(1) and 19 exemptions. In Interim Order PO-4072-I, I upheld the WSIB's exercise of discretion with respect to section 13(1). However, I note that the WSIB made different representations with respect to its exercise of discretion under section 13(1).

[52] The WSIB submits that in exercising its discretion to withhold portions of records 4 and 7 under section 19, it took into consideration all relevant factors, including whether disclosure would increase public confidence in its operation. However, in concluding that the WSIB did not properly take into consideration all relevant factors in exercising its discretion under section 19, I note that it has only provided boilerplate statements about the factors it took into consideration in exercising its discretion without providing any further detail or explanation. The WSIB also did not explain how these factors apply to the specific facts and circumstances of this appeal.

[53] The SCC explained an institution's obligation in exercising its discretion under section 19 of the *Act* in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*,²⁰ as follows:

...the "head" making a decision under ss. 14 and 19 of the *Act* has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made. [Emphasis added].

[54] I find that the WSIB did not exercise its discretion on the basis of the facts and circumstances of this particular case. I find that the WSIB did not consider whether disclosure of the withheld information would increase public confidence in the operation of the WSIB, or the public interest in knowing what information the WSIB considered when developing the Chronic Mental Stress Policy described by the appellant. In particular, I accept the appellant's submissions and find that the WSIB did not consider whether the withheld information:

²⁰ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, cited above.

- is needed to understand a significant change in position taken by the WSIB, to the detriment of workers who are suffering from disabling mental health conditions; and
- would explain why, following public policy consultation in which stakeholders advised the WSIB it would be discriminatory to impose a higher legal onus on workers with mental stress injuries, the WSIB decided to impose a different standard.

[55] I also find that the WSIB did not consider whether the appellant had a compelling need to receive the information. This was not a factor addressed by the WSIB in its representations on its exercise of discretion under section 19. Given that the appellant is a publicly funded legal clinic that serves workers who, I accept, may be adversely affected by the WSIB's new Chronic Mental Stress Policy, I find that the compelling need identified by the appellant is a relevant consideration that the WSIB should have taken into account in exercising its discretion under section 19.

[56] I note that the WSIB was given an opportunity to respond to the appellant's representations, including the appellant's arguments with respect to the WSIB's exercise of discretion in applying the section 19 exemption, but the WSIB declined to submit a reply.

[57] While it is clear that the WSIB considered the fundamental importance of solicitor-client privilege and the protection of solicitor-client privileged information, it did not consider all relevant factors based on the facts and circumstances of this appeal. As a result, I find that the WSIB failed to exercise its discretion in an appropriate manner, and I do not uphold it. Accordingly, I will order the WSIB to re-exercise its discretion under section 19.

ORDER:

1. I do not uphold the WSIB's exercise of discretion under section 19, and order it to re-exercise its discretion under section 19 in accordance with the analysis set out above.
2. If the WSIB continues to withhold all or part of the information remaining at issue in this appeal, I also order it to provide the appellant with an explanation of the basis for its decision to do so and to provide a copy of that explanation to me.
3. The WSIB is required to send the results of its re-exercise of discretion, and its explanation to the appellant, with a copy to this office, by no later than **April 26, 2021**.

4. The timelines noted in order provisions 2 and 3 may be extended if the WSIB is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any such extension requests.

Original Signed by: _____

Anna Truong
Adjudicator

February 24, 2021 _____