

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER PO-4154-F

Appeal PA18-10

Workplace Safety and Insurance Board

June 2, 2021

**Summary:** This final order determines whether the Workplace Safety and Insurance Board (WSIB) properly re-exercised its discretion to withhold portions of two records relating to the WSIB's new Chronic Mental Stress Policy under the solicitor-client privilege exemption at section 19 of the *Freedom of Information and Protection of Privacy Act* (the *Act*). In Interim Order PO- 4115-I, the adjudicator upheld the WSIB's access decision to withhold portions of two records under section 19(a) of the *Act*. However, she found that the WSIB did not consider all relevant factors in its exercise of discretion under section 19, and ordered it to re-exercise its discretion. In this order, the adjudicator upholds the WSIB's re-exercise of discretion and finds portions of the two records at issue are exempt 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:** Orders PO-4072-I and PO-4115-I.

### OVERVIEW:

[1] This final order addresses the Workplace Safety and Insurance Board's (WSIB) re-exercise of discretion with respect to its decision to withhold portions of two records relating to its new Chronic Mental Stress Policy under the section 19 solicitor-client privilege exemption. The appellant, a legal clinic that represents injured workers, submitted a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the WSIB 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 other records being withheld under section 19, which had previously been 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, the records that had been withheld under section 13(1).<sup>1</sup>

[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) 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 records 23 and 31. I deferred my decision about the WSIB's section 19 claim, pending receipt of additional evidence from the WSIB.

[7] After receiving additional evidence in the form of an affidavit from the WSIB, in Interim Order PO-4115-I, I upheld 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 found that the WSIB did not consider all relevant factors in its exercise of discretion under section 19, and I ordered it to re-exercise its discretion.

[8] In this order, I find that the WSIB did not err in re-exercising its discretion to withhold portions of two records under the discretionary solicitor-client privilege exemption at section 19(a) of the *Act*, and I uphold the denial of access on that basis.

## **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.

---

<sup>1</sup> 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.

## **DISCUSSION:**

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

[10] The sole issue remaining at issue in this appeal is whether the WSIB properly exercised its discretion to withhold portions of records 4 and 7 under section 19(a) of the *Act*.

[11] 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.

[12] 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.

[13] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>2</sup> I may not, however, substitute my own discretion for that of the institution.<sup>3</sup>

[14] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>4</sup>

- 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

---

<sup>2</sup> Order MO-1573.

<sup>3</sup> Section 54(2) of the *Act*.

<sup>4</sup> Orders P-344 and MO-1573.

- 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.

[15] In Interim Order PO-4115-I, in finding that the WSIB did not properly exercise its discretion, I stated:

[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:

- 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.

### ***Representations of the WSIB***

[16] The WSIB submits that it has re-exercised its discretion and maintains that the withheld portions of records 4 and 7 should continue to be withheld under section 19 of the *Act*. The WSIB further submits that it re-exercised its discretion not to release the withheld portions of records 4 and 7 in good faith, with full appreciation of the relevant facts of the request, and upon proper application of the relevant principles of law.

[17] The WSIB submits that the factors it considered in coming to its decision, include those noted in Interim Order PO-4115-I, and the following:

- the interests inherent in the section 19 exemption;
- the privileged context behind the records' creation;
- the ability of legal counsel to provide frank and candid advice;
- the appellant's interest in gaining access to the records as a publicly funded legal clinic;
- the amount of information released to the appellant through the request and appeal, or that was made available to the public and stakeholders by the WSIB; and
- the law and principles as stated by the IPC and various levels of court regarding records that are solicitor-client privileged.

[18] The WSIB submits that it anticipated that the appellant would assert that:

- there is a public interest in knowing the information the WSIB considered when developing the Chronic Mental Stress policy;
- the appellant has a compelling need to receive the withheld information as a legal clinic representing individuals to whom the policy applies; and
- disclosure of the withheld information would increase public confidence in the operation of the WSIB.

[19] The WSIB submits that anticipation of these very assertions is why the WSIB conducted and published the results of a public consultation on the Chronic Mental Stress policy. The WSIB submits that the WSIB Chronic Mental Stress Policy Consultation Summary specifically includes:

#### Stakeholder Feedback

Some worker stakeholders are of the view that the SWS [Substantial Work-related Stressor] criteria have the effect of setting a higher standard for mental injuries as compared to physical injuries and are thus not consistent with the Canadian Charter of Rights and Freedoms (the Charter) or the Ontario Human Rights Code (OHRC).

#### WSIB Response

The SWS criteria are:

- consistent with the requirement that there be an "accident" or "injuring process" in order for there to be entitlement under section 13 of the WSIA [*Workplace Safety and Insurance Act*]; and
- similar to the criteria adopted in other Provinces, e.g., British Columbia and Alberta.

[20] The WSIB submits that the amount of information that has either been released to

the appellant through this request and appeal, or made available to the public through the consultation process that was conducted and published allows meaningful comment, discussion, and representation by the appellant. The WSIB argues, therefore, that:

- any public interest in the privileged information does not outweigh the purpose of section 19 of the *Act*, which serves a public interest in its own right to protect the solicitor-client relationship and the confidentiality of privileged documents and communications;
- any increase in public confidence does not outweigh the purpose of section 19 of the *Act* and has already been achieved through broad disclosure in response to this request and appeal, or publicly; and
- any compelling interest the appellant may have in the privileged information does not outweigh the purpose of section 19 of the *Act* and has also been addressed through broad disclosure in response to this request and appeal, or publicly.

[21] The WSIB submits, for the reasons above, that it properly re-exercised its discretion and that the withheld portions of records 4 and 7 should be exempt under section 19.

### ***Representations of the appellant***

[22] The appellant argues that the reasons the WSIB listed above do not include specific considerations related to the public's interest in understanding the WSIB's significant change in position affecting "a historically marginalized community", or the need to impose a "differential and widely-held to be adverse and discriminatory standard".

[23] The appellant argues that it is not acceptable for the WSIB to rely on boilerplate statements asserting that "any public interest," "any public confidence in the institution," and "any compelling interest that the applicant may have" is outweighed by the importance of maintaining solicitor-client privilege. The appellant submits that by providing boilerplate statements such as these, the WSIB fails to acknowledge the specific and relevant considerations addressed in Interim Order PO-4072-I, and all relevant factors based on the facts and circumstances of this appeal. The appellant submits that in particular, the WSIB does not meaningfully consider whether the withheld information 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
- 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.

[24] The appellant argues that the WSIB did not acknowledge these specific considerations and so cannot be said to have weighed them. The appellant argues, therefore, that the IPC should order the WSIB to re-exercise its discretion.

### ***Analysis and findings***

[25] Based on the representations of the parties in response to Interim Order PO-4115-

I, I find that the WSIB did not err in re-exercising its discretion to withhold portions of records 4 and 7 under section 19(a) of the *Act*.

[26] I find that the WSIB has now properly considered the relevant factors and specific considerations outlined in Interim Order PO-4115-I. In deciding to withhold portions of records 4 and 7 under the solicitor-client privilege, I find that the WSIB has now exercised its discretion based on the facts and circumstances of this particular case. I accept the WSIB's evidence that it has considered whether disclosure of the withheld information would increase public confidence in the operation of the WSIB, and the public interest in knowing what information it considered when developing the Chronic Mental Stress Policy. I also find that the WSIB has now considered whether the appellant had a compelling need to receive the information.

[27] I am persuaded by the WSIB's submission that in making these considerations, it considered the amount of information released to the appellant through this request and appeal, as well as the information made available to the public and stakeholders, including the results of the public consultation. I am satisfied that the WSIB weighed these considerations against the inherent interests and purpose of the section 19 exemption. Furthermore, I find that the WSIB has acknowledged and considered that the appellant is a publicly funded legal clinic that requires information about the WSIB's new Chronic Mental Stress policy to serve its workers, because in exercising its discretion, the WSIB decided that the amount of information already available was enough for "meaningful comment, discussion, and representation by the appellant". I note that in considering the WSIB's re-exercise of discretion, I may not substitute my own discretion for that of the WSIB.

[28] The appellant argues that the WSIB failed to acknowledge and meaningfully consider whether the withheld information is needed to understand the significant change in position taken by the WSIB, and why the WSIB decided to impose a higher standard despite stakeholders' feedback that it would be discriminatory to do so. I am not persuaded by the appellant's argument. I find that the WSIB acknowledges these specific considerations by providing an excerpt of the WSIB Chronic Mental Stress Policy Consultation Summary, the results of a public consultation on the Chronic Mental Stress policy. This excerpt addresses the WSIB's decision to adopt the higher SWS criteria despite stakeholder feedback that this sets a higher standard for mental injuries. Therefore, this supports the WSIB's position that it has considered the factors argued by the appellant in re-exercising its discretion. While the WSIB's response may not be as comprehensive as the appellant would like, this does not provide any basis for me to interfere with the WSIB's exercise of discretion.<sup>5</sup>

[29] Accordingly, I am satisfied that the WSIB has now properly re-exercised its discretion with respect to the withheld portions of records 4 and 7. Therefore, I uphold the WSIB's re-exercise of discretion to withhold them under section 19(a) of the *Act*.

---

<sup>5</sup> Section 54(2) of the *Act*.

**ORDER:**

I uphold the WSIB's re-exercise of discretion and find that the withheld portions of records 4 and 7 are exempt under section 19(a).

Original signed by: \_\_\_\_\_

Anna Truong  
Adjudicator

\_\_\_\_\_ June 2, 2021