

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4306

Appeal PA19-00489

Workplace Safety and Insurance Board

September 27, 2022

Summary: At issue in this appeal is whether records responsive to a request made to the Workplace Safety and Insurance Board (the WSIB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) are subject to solicitor-client privilege and exempt from disclosure on that basis. In this order, the adjudicator finds that the records are exempt from disclosure under section 49(a) (discretion to refuse a requester's information), read with the solicitor-client privilege exemption in section 19(a) of the *Act*. The appeal is dismissed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, as amended, sections 2(1) (definition of "personal information"), 19, 47(1), and 49(a).

Cases Considered: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.

OVERVIEW:

[1] As background, the requester had his work-related injury claim re-opened by the Workplace Safety and Insurance Board (the WSIB) 18 months after the WSIB had determined that it did not have jurisdiction to hear his claim. The requester then made the following request to the WSIB under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

In relation to claim [the requester's claim number]: All records, including internal and external correspondence, internal legal advice and/or

memoranda, and records of decision. In particular, please provide the rationale for WSIB accepting to hear my claim after refusing to do so for over a year, and any record of the underlying discussion/analysis.

[2] The WSIB issued a decision granting partial access to the records that it identified as being responsive to the request. The WSIB withheld some information based on the solicitor-client privilege and personal privacy exemptions in sections 19 and 21(1) of the *Act*, respectively.

[3] The requester (now the appellant) appealed the WSIB's decision to the Information and Privacy Commissioner of Ontario (the IPC), and a mediator was assigned to explore the possibility of resolving the appeal.

[4] During the mediation stage of the appeal process, the appellant advised the mediator that he only wished to pursue access to the records withheld under section 19 of the *Act*. Accordingly, the information withheld under section 21(1) is no longer at issue.

[5] The WSIB maintained its position that the records were subject to the solicitor-client privilege exemption, and therefore would not be disclosed to the appellant.

[6] A mediated resolution was not achieved and the appeal was moved to the adjudication stage. The original adjudicator assigned to this appeal raised the possible application of section 49(a) to the information claimed exempt under section 19. She invited representations from the parties which were received and shared in accordance with the IPC's *Code of Procedure*. The WSIB representations were shared in their entirety while the original adjudicator agreed to withhold parts of the appellant's representations. Ultimately, the appeal was assigned to me to continue with the adjudication of the appeal.¹

[7] In this order, I uphold the WSIB's decision to deny access to the records because I find they are exempt under section 49(a), read with section 19(a) (solicitor-client privilege) of the *Act*. I dismiss the appeal.

RECORDS:

[8] The WSIB did not provide the records at issue to the IPC, but provided an affidavit sworn by its legal counsel and a detailed index regarding the records at issue in this appeal. There are thirteen records, consisting of emails and a memo, some of which have been partially disclosed (records 1, 2, 12, 13 and 14). Records 1A, 3, 7, 8, 9, 10 and 11 were fully withheld.

¹ I have reviewed all the file materials and determined that I did not need to seek further representations from the parties before rendering my decision.

ISSUES:

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 49(a), read with section 19, apply to the information to which the appellant otherwise has a right of access under section 47(1)?
- C. Did the institution exercise its discretion under section 49(a) read with section 19? If so, should I uphold the exercise of discretion?

DISCUSSION:

Preliminary Issue: Is the WSIB required to produce the records at issue to the IPC?

[9] As noted, the WSIB has not provided the IPC with a copy of the records that were withheld in this appeal, instead providing a detailed affidavit. The appellant has requested that I review the records themselves in order to "fairly decide the issue." The appellant also suggests that because the WSIB failed to exercise its discretion under section 49(a) for some of the records, the records need to be reviewed in full to determine the extent to which the WSIB has failed to meet its obligations under the *Act*.

[10] There is a production power in section 52 of the *Act* that may be exercised when necessary to adjudicate appeals where records are claimed to be exempt under section 19, but have not been provided to the Commissioner. Specifically, the powers of the IPC during an inquiry include section 52(4), which states:

In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this *Act* or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

[11] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*,² 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." I note that because the WSIB did not provide a copy of the records, the original adjudicator requested that the WSIB provide a detailed affidavit addressing the records with sufficient detail that a

² 2016 SCC 53.

determination can be made regarding the exemption claimed. This request was in keeping with 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*.³

[12] The WSIB provided a detailed affidavit with its representations, addressing all of the records in this appeal. The WSIB set out the dates of each email contained in the records, the author of the email and to whom it was addressed, as well as a general description of the type of legal advice that was requested and/or given. When reviewing the WSIB's representations and the affidavit, which were fully shared with the appellant, I found that they provided sufficient detail about the contents of the records to enable me to fully and properly adjudicate this appeal. Further, although the appellant suggested multiple times that it was necessary to review the records in full, he does not address the WSIB's affidavit and why it is lacking so that it is necessary to review these records.

[13] In my view, the WSIB has provided sufficient detail to enable me to decide the question of whether or not the section 19 exemption applies, and whether it properly exercised its discretion. In these circumstances, it is not required to provide the records themselves.

Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[14] The WSIB relies on the solicitor-client privilege exemption at section 19 of the *Act* to deny access to the records. Section 19 is an exemption under Part II of the *Act*. It applies when a requester seeks access to records of general information.⁴ However, if the record contains the requester's own personal information, access to the record must be considered under Part III of the *Act*.⁵ Therefore, if the records at issue contain the requester's personal information, the appropriate exemption to consider is section 49(a), read with the solicitor-client privilege exemption at section 19, which is the exemption under Part III.

[15] Accordingly, I must first determine whether the record contains personal information and, if so, to whom that personal information relates.

[16] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the records contain "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

³ Link: [IPC protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC - IPC](#)

⁴ A requester's right of access to general records is set out in section 10(1) of the *Act*, subject to limited exemptions.

⁵ A requester's right of access to their own personal information is set out in section 47(1), subject to limited exemptions.

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[17] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.⁶

[18] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

⁶ Order 11.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[19] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.⁷ However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.⁸

[20] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.⁹

Representations

[21] The WSIB submits that records 1, 2, and 14 contain the personal information of the appellant. It submits that the information in the record qualifies as the appellant’s personal information as it is information relating to his WSIB claim. It submits that the personal information within the records includes the appellant’s name in conjunction with:

- his WSIB claim number (paragraph (c) of the definition of “personal information”);
- nature of injury (paragraph (b) of the definition of “personal information”);
- employment history leading up to and after his workplace injury (paragraph (b) of the definition of “personal information”);
- history of application(s) to other compensation board(s) (paragraph (b) of the definition of “personal information”)
- The appellant suggests that all of the withheld information may constitute or contain his personal information since the records involve the appellant’s claim before the WSIB.

[22] In its reply, the WSIB confirms that the appellant’s name and claim number appear in records 1A, 3, 7, 8, 9, 10, 11, 12 and 13 and submits that these records do not contain any additional personal information of the appellant. It submits that information redacted from these records was either personal information about WSIB

⁷ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

⁸ Orders P-1409, R-980015, PO-2225 and MO-2344.

⁹ Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

employees or solicitor-client communication.

Finding

[23] It is apparent that all of the records at issue contain information that qualifies as the appellant's personal information. The WSIB submits that only records 1, 2 and 14 contain the appellant's personal information and that the remaining records only contain his name and WSIB number. However, given the content of these records, as set out in the WSIB's affidavit, coupled with the fact that the appellant's name appears with his WSIB number (paragraph (c) of the definition of personal information in section 2(1)), I find that these records also contain the personal information of the appellant. I note that the records also contain information that qualifies as the personal information of other identifiable individuals. However, the appellant is not seeking access to the personal information of other individuals.

[24] As all the records contain the appellant's personal information, his right of access under the *Act* must be determined under section 47(1) in Part III, which gives requesters a general right of access to their own personal information, subject to limited exemptions.¹⁰ As the WSIB relies on the solicitor-client privilege exemption to withhold the record, I must consider whether the exemption in section 49(a), read with the solicitor-client privilege exemption at section 19, applies.

Issue B: Does the exemption in the *Act* at section 49(a), read with the solicitor-client privilege exemption in section 19, apply to the information to which the appellant otherwise has a right of access under section 47(1) of the *Act*?

[25] The WSIB claims that all of the withheld information in the records is exempt under section 19 because it is privileged solicitor-client information. Having found that the information includes the personal information of the appellant, as explained above, I will consider whether the records are exempt from disclosure under section 49(a), read with the solicitor-client privilege exemption in section 19.

[26] Section 47(1) gives individuals a general right of access to their own personal information held by an institution. Section 49 provides a number of exemptions from this right.

[27] Section 49(a) reads:

¹⁰ Section 10(1) of the *Act* gives a requester a right of access to records in the custody or control of an institution, subject to limited exemptions. Section 47(1) gives a requester a right of access to their own personal information in the custody or control of an institution, subject to limited exemptions. For the purpose of determining whether a requester's access rights under the *Act* are through section 10(1) or 47(1), a determination must be made regarding whether the record contains the requester's personal information. If it does, then the requester's right of access is determined under section 47(1), and it is irrelevant whether the specific information at issue in the record contains the requester's personal information.

A head may refuse to disclose to the individual to whom the information relates personal information,

if section 12, 13, 14, 14.1, 14.2, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[28] Section 49(a) of the *Act* recognizes the special nature of requests for one's own personal information ("may" refuse to disclose") and the desire of the legislature to give institutions the power to grant requesters access to their personal information.¹¹

[29] Where access is denied under section 49(a), the institution must demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester because the record contains his or her personal information.

[30] Section 19 of the *Act* states, in part, 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

[31] Section 19 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution...") is a statutory privilege. The institution must establish that one or the other (or both) branches apply. Below, I find that the records are exempt under Branch 1 (common law) communication privilege and so it is not necessary for me to address Branch 2 (statutory privilege).

Branch 1: common law privilege

[32] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. Here, the WSIB claims that both solicitor-client communication privilege and litigation privilege apply. As I explain below, I find that solicitor-client communication privilege applies. As such, I do not need to consider whether litigation privilege applies.

Solicitor-client communication privilege

[33] Common-law 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.¹² The rationale for this privilege is to ensure that a client may freely confide in their

¹¹ Order M-352.

¹² *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

lawyer on a legal matter.¹³ 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.¹⁴

[34] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.¹⁵

[35] 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.¹⁶ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁷

Representations

WSIB representations

[36] The WSIB submits that the withheld information is subject to the solicitor-client communication privilege. It submits that the exempted portions of the records contain advice given by its legal counsel, as attested to in the affidavit it attached to the representations.

[37] As noted, the WSIB did not provide a copy of the records to the IPC and instead provided detailed submissions and an affidavit about the records. It provided a significant amount of detail in the affidavit about the records over which privilege was, and continues to be, asserted, including:

- the date on which the record was created
- the title/general description of the record
- the record's document type
- the record's general subject matter
- the name of the record's creator
- recipients of the record
- individuals copied as recipients of the record
- number of pages

¹³ Orders PO-2441, MO-2166 and MO-1925.

¹⁴ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

¹⁵ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁶ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁷ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

- exemption(s) applied
- an explanation of why the record is privileged.

[38] The WSIB submits that the amount of information provided arguably exceeds the level of detail expected in the "Schedule B" of an affidavit of documents in a civil proceeding. It submits that it has provided this information in an effort to be as transparent as possible with the appellant without risking a loss of privilege.

[39] The WSIB submits that the records are subject to both solicitor-client communication privilege and litigation privilege. It says the records contain communications between employees at the WSIB and WSIB legal counsel wherein legal advice is both sought and given. It notes that privilege continues to be asserted. The WSIB maintains that privilege applies to the records and that privilege has been neither waived nor lost.

The appellant's representations

[40] The appellant submits that he is entitled to the information to the greatest extent that the *Act* and any exemptions allow, particularly given the reasons which compel him to seek the records.

[41] The appellant submits that the WSIB failed to articulate to him why it reopened his work-related injury claim 18 months after determining that it did not have the jurisdiction to hear the claim. The appellant refers to the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)*¹⁸, which supports that "when the decision has important significance for the individual, or when there is a statutory right of appeal, the duty of procedural fairness will require a written explanation for a decision."

[42] The appellant submits that the WSIB's failure to provide an explanation for reopening his claim amounts to the WSIB saying that it has no obligation to provide reasons for its decisions.

[43] The appellant submits that he has a right to know the WSIB's reasons for decisions it has made within the exercise of its jurisdiction and that have substantially affected his rights. He submits that solicitor-client privilege is not intended as a means for an administrative tribunal to, in effect, conceal the reasons for decisions it takes under its exclusive jurisdiction.

Reply representations

[44] In reply, the WSIB reaffirms that the withheld content in the records at issue is communication between WSIB employees and WSIB legal counsel wherein legal advice

¹⁸ [1999] 2 SCR 817.

was both sought and given and is subject to solicitor-client privilege.

[45] The WSIB submits that the importance of solicitor-client privilege has been continually restated by Canadian courts, most particularly by the Supreme Court of Canada (SCC) in *IPC v. University of Calgary*.¹⁹

[46] In his sur-reply, the appellant concedes that the IPC is not the proper venue to appeal or challenge adjudicative decisions made by the WSIB under the *Workplace Safety and Insurance Act (WSIA)*. However, he submits that the purpose of the present appeal is to obtain the reasons for an adjudicative decision rendered under the *WSIA*: specifically, the reasons which led the WSIB to reopen the appellant's claim 18 months after adjudicating it. The appellant submits that the WSIB's duty to provide those reasons is not lessened because it has opted to record the information elsewhere than in the decision record.

[47] The appellant submits that he is not asking the IPC to change the WSIB's decisions, whether on the appellant's eligibility to file a claim, or on the merits of the claim itself. He also submits that he is not asking the IPC to pronounce on the soundness of the aforementioned decisions. The appellant submits that the purpose of this appeal is to challenge the WSIB's refusal to provide the record of reasons for a decision made under its exclusive jurisdiction. The appellant submits that if his submissions refer to issues of procedural fairness and natural justice, it is to articulate why he believes it is important and appropriate that the WSIB disclose the requested information.

Analysis and finding

[48] Based on my review of the WSIB's representations, including its affidavit and shared index of records, and for the reasons set out below, I accept that the withheld information in the records qualifies for exemption under section 19(a) of the *Act* because the information consists of privileged solicitor-client communications

[49] As noted, the WSIB's affidavit, sworn by its legal counsel, references all of the records it withheld under section 19.

[50] The WSIB's counsel attests that record 1 includes fifteen e-mails that are entirely withheld, and one e-mail from which some content has been withheld. The withheld content consists of e-mails sent and received between WSIB employees and WSIB internal legal counsel. The WSIB legal counsel provides details concerning the email chain in his affidavit, including the names of legal counsel and other WSIB employees involved in the email exchange. He attests that a solicitor-client relationship was in place as all the persons sending or receiving the withheld content were employees of the WSIB and the nature of the communication in the withheld content was the seeking of and provision of legal advice.

¹⁹ [2016] SCC 53.

[51] The WSIB's legal counsel attests that the withheld content contains the nature of the employee requests for legal advice as well as the content of the legal advice provided in response to the requests for legal advice. He also attests that the nature of the legal advice sought and legal advice given relates to a non-Ontario resident's out-of-province coverage under the federal *Government Employees Compensation Act* ("GECA") and Ontario's *Workplace Safety and Insurance Act, 1997* ("WSIA").

[52] The WSIB's legal counsel attests that the withheld information in record 1A is a legal opinion and provides the date, who authored the legal opinion and who it was directed to at the WSIB. He attests that the document is a formal legal opinion relating to the issue of injured worker coverage and entitlement under GECA and the WSIA and the factors and legislative provisions to be considered in adjudicating such a claim.

[53] The WSIB's legal counsel attests that the withheld information in records 2, 7, 8, 9, 10 and 14 is the same thread of e-mails contained in record 1. The affiant attests that although record 8 is the same thread of emails in record 1, it also contains one additional e-mail that has been withheld. The affiant attests that this e-mail is from a WSIB Manager to WSIB legal counsel and relates to a request for a legal opinion. The affiant attests that the content of this e-mail was meant to provide additional information to internal legal counsel for the purpose of providing a legal opinion.

[54] The WSIB's legal counsel attests that the withheld information in record 3 is an email from the WSIB's executive director to a WSIB manager, forwarding an e-mail from WSIB legal counsel. The affiant attests that the forwarded e-mail contains a legal opinion from WSIB internal legal counsel to a WSIB employee on the issue of coverage and entitlement as it relates to GECA and the WSIA. The affiant attests that this e-mail has been appropriately withheld under section 19 of the *Act* because the content is a legal opinion.

[55] The WSIB's legal counsel attests that the withheld information in record 12 is a legal opinion of WSIB internal legal counsel and includes the e-mail thread, initiated by WSIB employees with the purpose of seeking legal advice from WSIB internal legal counsel. The affiant attests that the nature of the legal advice sought and legal advice given relates to a non-Ontario resident's out-of-province coverage under the GECA and WSIA.

[56] The WSIB's legal counsel attests that the withheld information in record 13 relates to a forwarding of the legal opinion of WSIB legal counsel, previously described relating to record 1.

[57] The WSIB's legal counsel attests that the withheld information in record 14 references the legal opinion mentioned in record 1. The affiant attests that the information is appropriately withheld as it references the seeking of advice and the resulting legal opinion provided by internal legal counsel.

[58] As noted, the appellant does not directly address the information set out in the affidavit or challenge that the information at issue is solicitor-client privileged information. The appellant has referred to the reason for his access request, noting his dissatisfaction with the adjudication process of the WSIB in that it failed to provide him reasons in relation to his work-related injury claim. He suggests that the records at issue contain the “only official records” that document the WSIB’s reasons. However, he does not refer to the affidavit and explain why these records should not be considered solicitor-client privileged given how they were created as clearly set out.

[59] In my view, the WSIB has provided sufficient information for a finding that the records form part of the continuum of communications between a lawyer and their client for the purpose of seeking or obtaining legal advice with respect to the issue of coverage under the GECA and WSIA.

[60] I also find that there is no evidence that the WSIB has waived its privilege with respect to communications with its lawyer in relation to the relevant matter.

[61] I accept therefore, that the withheld information in the records falls under the solicitor-client communication privilege component of the common law solicitor-client privilege set out in section 19(a) of the *Act*.

[62] Because of my finding that the information at issue falls under the solicitor-client communication privilege component of the common law solicitor-client privilege set out in section 19(a) of the *Act*, I find that the exemption at section 49(a), read with section 19(a), applies to the record. As section 49(a) is also a discretionary exemption, this finding is subject to my review of the WSIB’s exercise of discretion, which I consider below.

Issue C: Should the WSIB’s exercise of discretion under section 49(a) read with the section 19 exemption be upheld?

[63] Section 49(a) of the *Act* is a discretionary exemption. Where an exemption is discretionary, the WSIB has the discretion to grant access to information despite the fact that it could withhold it. The WSIB must exercise its discretion. I must determine whether the WSIB exercised its discretion under section 49(a) and whether its exercise of discretion was appropriate.

[64] Through orders issued under the *Act*, the IPC has developed a list of considerations that may be relevant to an institution’s exercise of discretion. These include:

- 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.

[65] Not all these considerations will necessarily be relevant, and additional unlisted considerations may be relevant.²⁰

[66] If I determine that the WSIB failed to exercise its discretion, or that it erred in exercising its discretion, I may send the matter back to the WSIB for a re-exercise of discretion. However, I may not substitute my own discretion for that of the WSIB.²¹

Representations

[67] The WSIB submits that an institution may choose (or choose not) to rely on discretionary exemptions when processing a freedom of information request. However, it submits that, in exercising discretion, considerations need to be taken into account, including, but not limited to: balancing the purpose of the *Act*, interpreting the wording of the exemption and the interests it seeks to protect, and deciding whether disclosure will increase public confidence in the operation of the institution. The WSIB submits that discretion was appropriately exercised to apply the exemptions contemplated in section

²⁰ Orders P-344 and MO-1573.

²¹ Section 54(2) of the *Act*.

19 to the responsive records. It submits that its claim of section 19 was made neither in bad faith nor for an improper purpose and all relevant factors were taken into consideration. Furthermore, in accordance with the obligations set out in section 10(2), the WSIB disclosed as much of the records as possible without disclosing exempt material.

[68] The appellant submits that the WSIB must properly exercise its discretion under the exemptions at sections 19 and 49(a). Referring to Order M-352, he submits that this requires the WSIB to "be seen to" exercise its discretion and to do so with due recognition of "the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information." The appellant submits that the WSIB failed to exercise its discretion under section 49(a) and exercised its discretion under section 19 in bad faith, taking into account irrelevant considerations and failing to take into account relevant ones.

[69] The appellant submits that the WSIB cannot credibly assert that it correctly exercised its discretion under section 49(a) when it denied access to the records under section 19 alone. The appellant suggests that having omitted to exercise its discretion under section 49(a) at the time, the WSIB is unable to now "demonstrate that, in exercising its discretion, it considered whether a record should be released to the requester [...]". The appellant submits that the WSIB's mention of section 49(a), in its representations, which omit again to demonstrate the exercise of discretion under section 49(a), is further testimony to this fact, and to the WSIB's bad faith.

[70] Further, the appellant contends that the WSIB is relying improperly on discretionary exemptions under section 19 in order to conceal the reasons for a decision it has made within its sole jurisdiction and for which it was obligated to provide reasons. The appellant notes that the WSIB stated in its representations that, in exercising its discretion not to disclose, it was concerned with "whether disclosure will increase public confidence in the operation of the institution." The appellant submits that the WSIB clearly feels that disclosing the withheld information will not increase public confidence in its operations. The appellant submits that for a tribunal to refuse to disclose the reasons for decisions under its sole purview is profoundly detrimental to "public confidence in the operations of the institution." The appellant submits that by invoking solicitor-client privilege in order to conceal the reasons for a decision from the appellant the WSIB is acting like a party in the affair it is adjudicating.

[71] In its reply representations, the WSIB submits that the appellant is dissatisfied with an adjudicative decision made by the WSIB and is attempting to challenge the decision through an appeal to the IPC. It submits that arguments related to procedural fairness, natural justice, or the sufficiency of reasons in a WSIB claim decision can be raised through WSIB's Appeals Services Division and/or the independent Workplace Safety and Insurance Appeals Tribunal (WSIAT), but have no relevance or bearing on whether or not discretion was correctly exercised under the *Act* in an access request.

[72] Further, the WSIB submits that its privacy and FOI office has no involvement in, or knowledge of, the details of the adjudicative decisions in the appellant's WSIB claim. It submits that it processes freedom of access requests independently of any adjudicative claim decisions.

[73] The WSIB submits that it has exercised its discretion in good faith in accordance with sections 10, 19 and 47 of the *Act*, including disclosing as much of the records as possible without disclosing exempt material. The WSIB reaffirms its application under section 49(a) in Part III of the *Act* and asserts that it has correctly applied the exemptions contemplated in section 19 to the responsive records.

[74] The WSIB submits that the application of the exemption in section 19 of the *Act*, incorporated through paragraph 49(a), is straightforward. It submits that the decision-maker must first ask:

- Is the record subject to solicitor-client privilege?
- If yes, would the WSIB consider releasing this record regardless of the solicitor-client privilege (i.e. waive privilege)?

[75] The WSIB submits that in this case, it has considered the exemption, has confirmed through legal counsel that the records are, in fact, solicitor-client privileged records, and that the WSIB has declined to waive privilege. It submits that this is a basic, good faith exercise of discretion by the delegated head of WSIB under the *Act*.

[76] In his sur-reply representations, the appellant agrees that the IPC is not the proper venue to appeal or challenge rights conferred by the WSIA in respect of adjudicative decisions. However, he submits that this should not distract from the purpose of the present appeal, which is to obtain the reasons for an adjudicative decision rendered under the WSIA: specifically, the reasons which led the WSIB to reopen the appellant's claim 18 months after adjudicating it. The appellant submits that the WSIB's duty to provide those reasons is not lessened because it has opted to record the information elsewhere than in its decision relating to the workplace injury claim.

[77] The appellant submits that he is not asking the IPC to change the WSIB's decisions, nor is he asking the IPC to itself pronounce on the soundness of the WSIB's decisions made under the *WSIA*. He submits that the purpose of this appeal is to challenge the WSIB's refusal to provide the record of reasons for a decision made under its exclusive jurisdiction. The appellant submits that his references to issues of procedural fairness and natural justice are made to articulate to the IPC why he believes it is important and appropriate that the WSIB disclose the requested information.

Analysis and finding

[78] I find that in denying access to the record, the WSIB properly exercised its

discretion under section 49(a) of the *Act*. It is evident that the WSIB considered the appellant was seeking access to his own personal information as it attempted to disclose as much information as it could to him and only withheld information that was subject to section 19. I am satisfied that it considered the nature of the information in the record and the interests the solicitor-client privilege exemption seeks to protect, which are significant.

[79] There is no evidence before me to suggest that the WSIB took into account any irrelevant factors, acted in bad faith, or erred in its exercise of discretion. I am satisfied that the WSIB considered that the records related to the appellant and contained his personal information as a factor in its decision, but it is evident that other factors weighed more heavily in favour of its decision not to disclose the withheld information.

[80] When addressing the WSIB's use of discretion, the appellant suggests that refusing to disclose the reasons for decisions is profoundly detrimental to "public confidence in the operation of the institution." However, I accept the WSIB's claim that it considered whether disclosure of this information would increase public confidence in its operation and decided that it was appropriate to apply the exemption contemplated in section 19. Despite the appellant's suggestion that the WSIB acted in bad faith, the WSIB confirmed, and I accept, that its privacy and FOI office have no involvement in, or knowledge of, the details of the adjudication decision in the appellant's claim because its privacy office processes requests independently of any adjudicative workplace injury claim decisions. Further, I accept, as confirmed by the appellant, that there are appeal processes in place under the *WSIA* where arguments related to natural justice and procedural fairness in the WSIB process can be made.

[81] Therefore, I uphold the WSIB's exercise of discretion and its decision to deny access to the records under section 49(a) of the *Act*, read with section 19.

ORDER:

The appeal is dismissed.

Original Signed by: _____

Alec Fadel
Adjudicator

September 27, 2022 _____