

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3041

Appeal PA09-407

Workplace Safety and Insurance Board

January 20, 2012

Summary: The appellant submitted a request to the Workplace Safety and Insurance Board for access to records relating to his WSIB claim and the prosecution of a company by the Regulatory Services Branch of the WSIB. The WSIB granted access to some records, but denied access to the remaining records, relying on section 19(b) of the *Act*. In this order, the adjudicator upholds the WSIB's decision and dismisses the appeal. The adjudicator finds that the exemption at section 19(b) of the *Act* applies to the records and the WSIB properly exercised its discretion in not disclosing the records.

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

Orders and Investigation Reports Considered: PO-2773, PO-2824, PO-2871, PO-2993.

OVERVIEW:

[1] The Workplace Safety and Insurance Board (WSIB) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of all information on file with the WSIB related to the requester's specified WSIB claim, and also related to the prosecution of a named company (the company) by the Regulatory Services Branch of the WSIB.

[2] The WSIB issued a decision letter and provided partial access to the requested records. The WSIB stated that it was providing the requester with copies of his claim

file and statements he provided during the course of the WSIB investigation of the company. The WSIB also confirmed that the company had been charged under the *Provincial Offences Act*, and in turn, prosecuted by the WSIB for breaches of the *Workplace Safety and Insurance Act (WSIA)*.

[3] The WSIB also indicated that the company had been convicted on five counts under the *WSIA* but only count one pertained to the requester. The other four counts pertained to four other individuals. The WSIB provided the requester with copies of documents relating to the prosecution proceedings against the company, namely the Agreed Statement of Facts and the Joint Submissions as to Sentence. The names of four other individuals who had also made claims were severed in order to protect their personal privacy.

[4] In addition, the WSIB provided the requester with copies of its “offences and penalties” policies and the sections of the *WSIA* that were relevant to the investigation involving the requester.

[5] The WSIB went on to explain in its decision letter to the requester that it was denying access to the remainder of the records, relying on section 19(b) of the *Act* (solicitor-client litigation privilege), on the basis that they were prepared by or for the Crown in contemplation of, or for use in, litigation. The WSIB stated:

The remaining records relating to the prosecution of [the named company] (about 4,000 to 5,000 documents) that were not provided to you in response to your requests to the Executive Director, Regulatory Services, include investigation records, interviews, notes, workers’ claim files and communications between counsel. All the documents were prepared by or for the lawyer(s) in the Regulatory Services Branch of the WSIB in the normal course of preparing a case for litigation, considered a Crown brief in criminal/quasi-criminal prosecutions after charges have been laid. The Crown brief is prepared for the purpose of the prosecution and is considered privileged information and not intended to be made available to others including you, event though one of the counts in the prosecution was based on your claim with the WSIB.

[6] The requester (now the appellant) appealed the WSIB’s decision to this office.

[7] During the mediation of the appeal, the WSIB provided the appellant with an index of documents, which lists all the records relating to the request.

[8] The parties were unable to reach a resolution of the appeal during mediation and the appeal was forwarded to the adjudication stage, in which an adjudicator conducts an inquiry. The adjudicator assigned to this appeal sought, and received, representations from the WSIB and the appellant. The WSIB’s representations were

shared with the appellant in accordance with this office's *Practice Direction 7*. The appellant indicated in his representations that he did not want his information or any part of his correspondence with this office shared with the WSIB.

[9] The appeal was then transferred to me for final disposition. Staff from this office attempted to contact the appellant to seek his consent to share his representations and refer to them in this order. Those attempts were unsuccessful. Consequently, I have reviewed and considered all of the representations made by the appellant in this appeal, but they will not be referred to in this order. For the reasons that follow, I uphold the WSIB's decision and dismiss the appeal.

RECORDS:

[10] The records at issue are described in the index as "documents and records in [the] possession of the Regulatory Services Division [of the WSIB] in relation to [the] investigation, prosecution and sentencing of [the company]." During the inquiry stage, the adjudicator initially assigned to the appeal received a package of documents from the WSIB, which included samples of all categories of records that it withheld.

ISSUES:

A: Does the discretionary exemption at section 19 apply to the records?

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

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

A: Does the discretionary exemption at section 19 apply to the records?

[11] The WSIB is relying on section 19(b) of the *Act* in denying access to the records at issue. Section 19(b) states:

A head may refuse to disclose a record,

that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;

[12] Section 19 contains two branches. Branch 2 is a statutory privilege and arises from section 19(b), or in the case of an educational institution, from section 19(c). The

institution must establish that at least one branch applies. In this case, it is clear that section 19(c) does not apply.

[13] Branch 2 is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

[14] Branch 2 applies to a record that was prepared by or for Crown counsel "in contemplation of or for use in litigation."

[15] Records that form part of the Crown brief, including copies of materials provided to prosecutors by police, and other materials created by or for counsel, are exempt under the statutory litigation privilege aspect of branch 2.¹ However, "branch 2 of section 19 does not exempt records in the possession of the police, created in the course of an investigation, just because copies later become part of the Crown brief."²

[16] Documents not originally created in contemplation of or for use in litigation, which are copied for the Crown brief as the result of counsel's skill and knowledge, are exempt under branch 2 statutory litigation privilege.³

[17] Termination of litigation does not affect the application of statutory litigation privilege under branch 2.⁴

[18] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution*⁵ and
- the lack of a "zone of privacy" in connection with records prepared for use in or in contemplation of litigation.⁶

[19] The WSIB submits that the records at issue are part of the Crown brief prepared in relation to the investigation, prosecution and sentencing of a company. The records, the WSIB states, were prepared by or for counsel in the Regulatory Services Branch of the WSIB in the course of preparing for, and undertaking a prosecution against, an

¹ Order PO-2733.

² Orders PO-2494, PO-2532-R and PO-2498, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 952; leave to appeal pending.

³ *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 290 D.L.R. (4th) 102, [2008] O.J. No. 289 and Order PO-2733.

⁴ *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).

⁵ See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

⁶ See note 5.

employer for offences under the *WSIA*. In this case, the prosecution resulted in a guilty plea by the defendant. The WSIB states that all of the records at issue were prepared for use in litigation and the settlement or disposition of that litigation. The WSIB also states that the privilege it has claimed has not been waived by the head of the institution, and that the exemption provided by the second branch of section 19 provides permanent protection for Crown counsel's work product gathered or produced in preparation for litigation.⁷

[20] The WSIB also argues that the purpose of the section 19 exemption is to protect solicitor-client privilege, which has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship.⁸

[21] Finally, the WSIB submits that a plain reading of the second branch of section 19 demonstrates that the legislature intended to exempt records that were "prepared by or for Crown counsel **for use** in giving legal advice or in contemplation of or **for use** in litigation." The WSIB argues that this language is not to be interpreted as being limited to records that fall within the common law privilege absent clear and explicit statutory privilege.⁹ In addition, the WSIB states, the second branch of the exemption has also been held to include mediation and settlement discussions, including records prepared by or for Crown counsel for use in these settlement discussions.¹⁰

[22] In Order PO-2733, former Senior Adjudicator John Higgins reviewed the case law of this office relating to section 19(b), and concluded:

...that among other records capable of falling within its terms, branch 2 of the exemption exists to protect the Crown brief from being accessible to the public "upon simple request" and thus provides a form of blanket protection for prosecution records in the hands of Crown counsel, including copies of police records, without the need for showing interference with a particular law enforcement, prosecutorial or personal privacy interest. The Legislature has thus deemed it appropriate to provide somewhat greater protection for copies of records in the hands of Crown counsel than for the original records in the hands of police, given the additional use to which the Crown puts these records in performing its prosecutorial functions and the importance of the role Crown counsel plays in this respect, as evidenced by the need to make protection of their work product permanent in that context.

[23] Senior Adjudicator Higgins' reasoning in PO-2733 has been applied in subsequent appeals to this office involving similar records, and was most recently applied in Orders

⁷ See note 2.

⁸ *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLii) at para. 53.

⁹ *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 at paras. 37-38.

¹⁰ See note 9 at para. 44.

PO-2824, PO-2871 and PO-2993, where it was again held that the Crown brief in the hands of the prosecuting agency was exempt from disclosure under section 19(b).

[24] I agree with the reasons of Senior Adjudicator Higgins in Order PO-2733, and adopt these reasons for the purposes of this appeal. The records at issue in the present appeal constitute a Crown brief in the hands of the prosecuting agency, the WSIB. Based on my review of the sample records provided and the WSIB's representations, I find that the records were prepared by or for Crown counsel in contemplation of and for use in proceedings. I also find that they were in the possession of the WSIB, the prosecuting agency. For the reasons set out above, I find that branch 2 of section 19 applies to the records. As I have found that the records are privileged under section 19(b), I find that they qualify for exemption subject to my finding on the WSIB's exercise of discretion.

EXERCISE OF DISCRETION

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

[25] 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.

[26] 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

[27] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[28] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that information should be available to the public, that individuals should have a right of access to

their own personal information, that exemptions from the right of access should be limited and specific and that 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

[29] The WSIB submits that it exercised its discretion in a reasonable manner and in consideration of the appropriate relevant factors and that no irrelevant factors were considered or relied upon to deny access. In exercising its discretion, the WSIB states, it considered the following factors:

- the nature of the exemption at section 19;
- the importance of the solicitor-client relationship and its focus on the preservation of confidentiality of communications in the course of seeking and giving legal advice;
- the fact that the appellant has a right of access to his own personal information and was provided with access to records concerning him;
- the need to protect the privacy of other individuals who may be identified if access to the records is provided;
- the lack of any compelling need for the appellant to receive access to these records; and
- the historic practice of the WSIB to deny access to records that were prepared for and used in the prosecution of a company and to protect the confidentiality of solicitor and client communications.

[30] I have considered the WSIB's representations on the factors it considered in its exercise of discretion, and I find that the WSIB properly exercised its discretion to withhold the records at issue. The appellant made representations on the WSIB's exercise of discretion, but I was not persuaded by them. In my view, the WSIB properly considered the section 19 exemption, and the interests protected by the section 19(b) exemption, including the importance of the confidentiality of the solicitor-client relationship and the privacy interests of other individuals. Further, the WSIB has disclosed several records to the appellant, including all of the records that relate to him. I find that the WSIB has considered only relevant factors and I uphold its exercise of discretion to deny access to the remaining records.

[31] In conclusion, I find that the exemption at section 19(b) applies to the records. I also find that the WSIB properly exercised its discretion.

ORDER:

I uphold the WSIB's decision and dismiss the appeal.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ January 20, 2012