Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3915

Appeal PA18-72

Workplace Safety and Insurance Board

December 20, 2018

Summary: The Workplace Safety and Insurance Board (the board) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the new minimum wage for injured workers in Ontario. The board located responsive records to part of the request, and issued a decision granting partial access to those records. The board withheld some information on the basis of the exemption at section 13(1) (advice or recommendations) of the *Act* (and other exemptions, which are no longer at issue). The requester appealed the decision. The board continued to rely on section 13(1), and the appellant raised the public interest override at section 23 of the *Act*. In this order, the adjudicator upholds the board's decision and finds that the public interest override does not apply.

Statutes Considered: *Employment Standards Act, 2000*, S.O. 2000, c. 41, section 23.1(1)(2); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 13 and 23; *Making Ontario Open for Business Act, 2018*, S.O. 2018, c. 14 - Bill 47, Schedule 1, section 6(2).

Orders Considered: Order P-1919.

OVERVIEW:

[1] The Workplace Safety and Insurance Board (WSIB, or the board) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

> Documents and/or records that contain information about the [b]oard's consideration of and determination of how the [b]oard will be implementing the new minimum wage for injured workers (see a copy of the WSIB webpage at Appendix A)
>
> In addition, we have reviewed the WSIB website and did not find a policy specific to this issue. We are also requesting any document and/or records that contain details and/or considerations of the [b]oard with respect to the development of a policy. If the policy exists, we request a copy of the policy and any background documents leading to its development.

[2] The board located briefing notes, slide decks, and other records in response to the first part of the request.

[3] The board then issued an access decision, granting partial access to the records located. It relied on sections 13 (advice or recommendations), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act* to withhold access to the requested records in whole or in part. It also withheld information it identified as non-responsive to the request. In response to the second part of the request, the board indicated that, "there was no policy developed in regards to the new minimum wage, nor any background documents. The records you are requesting do not exist."

[4] The requester, now the appellant, appealed the decision of the board to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] Through mediation, the request was narrowed to exclude non-responsive information and information withheld under sections 19 and 21(1) of the *Act*. The appellant was only pursuing the information withheld at section 13(1), but also raised the public interest override at section 23 of the *Act*, so this issue was added to the scope of the appeal. As further mediation was not possible, the appeal moved to adjudication.

[6] At adjudication, I sought and received written representations from the parties in response to a Notice of Inquiry, setting out the facts and issues on appeal. Representations were shared in accordance with *Practice Direction 7* of the IPC's *Code of Conduct*.

[7] For the reasons that follow, I uphold the board's access decision and dismiss this appeal.

RECORDS:

[8] The information at issue is found in the following twenty-one records.

Record number	Description

2	Briefing note and attached slide deck marked "Confidential: Advice to Government" re: WSIB Board of directors' response to minimum wage increase – December 13 and 14, 2017
3	Draft Enterprise risk-based decision support (ERADS)[1], marked "PRIVILEGED AND CONFIDENTIAL" re: determined earnings and minimum wage increase – October 13, 2017
4	Draft ERADS re: determined earnings and minimum wage increase; second page marked "PRIVILEGED AND CONFIDENTIAL" – October 16, 2017
5	Draft ERADS marked "PRIVILEGED AND CONFIDENTIAL" re: determined earnings and minimum wage increase – October 20, 2017
6	Draft ERADS marked "PRIVILEGED AND CONFIDENTIAL" re: determined earnings and minimum wage increase – October 23, 2017
7	Draft ERADS marked "PRIVILEGED AND CONFIDENTIAL" re: determined earnings and minimum wage increase – October 31, 2017
8	ERADS marked "PRIVILEGED AND CONFIDENTIAL" re: determined earnings and minimum wage increase – November 23, 2017
9	ERADS (slide deck) marked "CONFIDENTIAL – not for distribution" re: determined earnings and minimum wage increase draft – November 23, 2017
13	Slide deck marked "Confidential: Advice to Government" re: Minimum wage increase executive committee briefing – November 29, 2017
14	Slide deck marked "Confidential: Advice to Government" re: Special measure approaches
15	Operations and deck examples (tables)
19	Document marked "Confidential: Advice to Government" re: minimum wage increase (WSIA)
20	Draft slide deck marked "Confidential: Advice to Government" re: Minimum wage increase: additional considerations – November 3, 2017
21	Slide deck marked "Confidential: Advice to Government" re: Minimum wage increase special measure considerations – November 15, 2017

[1] Unless otherwise described, these records are briefing notes about "designated topic[s]" and accompanying chart(s).

23	Executive committee memorandum – board response to minimum wage increase – November 1, 2017
24	Slide deck marked "Confidential: Advice to Government" re: Minimum wage increase executive committee briefing – November 1, 2017
25	Document re: Minimum wage example
27	Document re: Minimum wage examples
28	Document re: Minimum wage deck examples
33	Slide deck marked "Confidential: Advice to Government" re: Determining earnings & minimum wage increase: Ministry of Labour briefing – October 26, 2017
35	WSIB briefing note: determined earnings and minimum wage increase – June 26, 2017

ISSUES:

A. Does the discretionary exemption at section 13(1) apply to the records?

B. Did the board exercise its discretion under section 13? If so, should this office uphold the exercise of discretion?

C. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

DISCUSSION:

Issue A: Does the discretionary exemption at section 13(1) apply to the records?

[9] For the reasons that follow, I find that the discretionary exemption at section 13(1) (advice or recommendations) applies to the records at issue.

[10] Section 13(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[11] The purpose of section 13 is to preserve an effective and neutral public service

by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[2]

[12] A party resisting disclosure has the burden of proving that the record or part of the record falls within one of the specified exemptions in the *Act*.

[13] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[14] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [3]

[15] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[16] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[4]

[17] The application of section 13(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 13(1) does not require the board to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 13(1) to apply since that intention is inherent to the job of policy development, whether by a public servant or consultant.[5]

[18] Section 13(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of

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[2] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[3] See above at paras. 26 and 47.
[4] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[5] *John Doe v. Ontario (Finance)*, cited above, at para. 51.

the deliberative process leading to a final decision and are protected by s. 13(1).[6]

[19] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information[7]
- a supervisor's direction to staff on how to conduct an investigation[8]
- information prepared for public dissemination[9]

[20] The appellant submits that section 13(1) does not apply to the information withheld, but that even if it does, the information should be disclosed through the public interest override at section 23 (which is discussed later in this order). The appellant does not dispute the board's ability to exercise its discretion under section 13(1), but argues that the board has improperly interpreted and applied the *Act* to withhold information in this case, treating the exemption as a mandatory one. I do not accept these submissions because they do not reflect the high degree of detailed disclosure already made by the board in response to the request, including disclosure of records clearly marked as confidential due to being advice to government.

[21] The board submits, and I find, that the responsive records in this appeal fall within the parameters of the section 13(1) exemption. Based on my review of the records, I find that they contain more than factual or background information. The records consist of the evaluative analysis and opinions of public servants on the options, advantages, and disadvantages of a particular course of action in response to the legislated minimum wage increases and the potential impact on workers' loss of employment (LOE) benefits. I accept the board's submission that these records were prepared to support decision making by senior management and the Board of Directors on how the board would approach the changes to minimum wage in Ontario. A significant portion of these records has already been disclosed to the appellant, again, including records clearly marked as confidential for being advice to government. Based on my review of each severance, I find that each severance contains information that constitutes advice or recommendations, and that section 13(1) applies to that information.

Does an exception apply to the section 13(1) exemption in relation to the records at issue?

[22] For the reasons that follow, I find that an exception does not apply to the portions of information that have been withheld from disclosure.

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[6] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.
[7] Order PO-3315.
[8] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[9] Order PO-2677.

[23] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13.

[24] The relevant portions of sections 13(2) and (3) state:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> (a) factual material;
>
> . . .
>
> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

[25] The appellant did not address whether any specific exceptions apply, but I accept that this would have been difficult without having seen the information withheld.

[26] Factual information, covered by section 13(2)(a), is an example of objective information. This type of information does not contain a public servant's opinion pertaining to a decision that is to be made but rather provide information on matters that are largely factual in nature. Under section 13(2)(a), factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.[10] Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) may not apply.[11]

[27] The board submits that the information withheld does not fall under the exception at section 13(2)(a), or the exception at section 13(3), of the *Act*. Based on my review of the records, I accept the board's submission that it released portions of the records that were purely factual in nature (such as Records 2, 8, 13, 21, 24, 33, and 35), and withheld factual information that is interwoven with the advice or recommendations in such a way that it cannot be reasonably considered a separate and distinct body of facts. In addition, the board submits, and I find, that disclosure of certain withheld information (such as in Records 4, 5, 6, 7, 9, 14, 15, 19, 20, 21, 23, 24, 25, 27, 28, and 35) would have permitted accurate inferences about the nature of the actual advice or recommendations. On my review of the information at issue, I find that none of the exceptions to section 13(1) in sections 13(2) or 13(3) apply to it.

[28] I will now consider whether the board exercised its discretion properly and whether the public interest override applies to the information I have found subject to section 13(1).

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[10] Order 24.
[11] Order PO-2097.

Issue B: Did the board exercise its discretion under section 13? If so, should this office uphold the exercise of discretion?

[29] On the basis of the following, I find that the board properly exercised its discretion.

[30] The section 13 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.

[31] 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.

[32] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[12] This office may not, however, substitute its own discretion for that of the institution.[13]

[33] The appellant submits that there are three relevant considerations in this case, and that the board did not properly take them into account. They are:

- 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; and
- the historic practice of the institution with respect to similar information.

[34] With respect to the first consideration, public confidence in the board, the appellant submits that disclosure would increase it "particularly since the [b]oard has instituted a 'work around' to address the January 1, 2018 and expected January 1, 2019 increase in the Ontario minimum wage in relation to the payment of [LOE] benefits for some recipients." The appellant does acknowledge that the board has explained the implementation of its "'work-around'" online and has set out its actions to the board's advisory committees, but it submits that the board has not fully explained the inequities that will result in this action, or the legal authority to take it. Whether or not that is the case, I accept that the board considered the public interest, given the volume and detail of responsive information already disclosed by the board to the appellant – and to the

[12] Order MO-1573.
[13] Section 54(2) of the *Act*.

public, on the board's website.

[35] Similarly, the level and detail of disclosure already made by the board dissuades me from accepting the appellant's submission that the board failed to consider the significance of the information withheld to the appellant, and any affected person ("all Ontario [board] employers who are legally required to pay premiums to the [board]"). The board's background discussion about its treatment of the minimum wage increases, and its correspondence with the appellant on its legal authority for that, also persuade me to accept the board's submission that it considered the importance of the information to those who could be affected by it. Whether or not the board's response to the minimum wage increases would "create vast unfairness to some injured workers," as the appellant argues, is not what I am to evaluate when considering the board's exercise of discretion. My role is to determine what factors the board considered and whether those factors were relevant and considered in good faith.

[36] Finally, I also do not accept the appellant's submissions about the historical practice of the board. The appellant submits that the board has historically released "similar information," pointing to a 2011 request about premium rates in response to which the appellant received all records in full. Even if I consider information about premium rates to be similar to information about minimum wage increases, a previous release of similar information alone is insufficient for me to find that the board improperly exercised its discretion in this instance. While historic practice is a consideration, it is highly contextual, and does not necessarily bind an institution. As the board argues, the IPC has held that previous disclosure does not mean that a requester has an automatic right of access, and that these determinations are tied to the facts and circumstances of a particular case.[14] I am unpersuaded that the board's decision to apply the section 13(1) exemption in this case to portions of the records is inconsistent with the *Act* (or the board's "own assertion that it is an open and transparent organization", as the appellant argues).

[37] For its part, the board submits that, keeping in mind the purpose of section 13 and the importance of decision making in good faith, it took the following relevant considerations into account, including the three raised by the appellant:

- the purposes of the *Act*, including the principles that information should be available to the public and that exemptions from the right of access should be limited and specific
- the wording of the exemption and the interests it seeks to protect;
- whether the requester has a sympathetic or compelling need to receive the information;
- whether the requester is an individual or an organization;

[14] Order P-1919.

- 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;
- the confidence of the public in the operation of the board; and
- the impact on public servants' ability to provide free and frank advice and recommendations in the future

[38] I find that these are relevant and proper considerations, and I accept the board's submission that it exercised its discretion properly and in good faith. I do not accept the board's submission that full disclosure of records that are exempt under section 13 would be "inconsistent" with the purpose of section 13 (section 13 is a discretionary exemption, and so the board can choose to disclose information exempt under section 13). Overall, however, it is clear that the board was aware that it could choose to disclose this information but elected to exercise its discretion in favour of non-disclosure.

[39] Especially given the volume of detailed records disclosed, I am satisfied that the board considered the factors listed above in good faith and not in bad faith. There is no evidence before me that the board took into consideration any irrelevant factors. Therefore, I uphold the exercise of discretion by the board.

Issue C: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13 exemption?

[40] Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 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.

[41] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[42] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest

in disclosure which clearly outweighs the purpose of the exemption.[15]

Compelling public interest

[43] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[16] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[17]

[44] A public interest does not exist where the interests being advanced are essentially private in nature.[18] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[19] In this case, because the subject matter of the request relates to minimum wage increases across Ontario, I accept the appellant's submission that the interests at stake are public, not private.

[45] However, given the significant level of disclosure already made through this appeal to the appellant, and to the public on the board's website, I find that the appellant has not established that the public interest involved is compelling.

[46] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[20] Any public interest in *non*-disclosure that may exist also must be considered.[21] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[22]

[47] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[23]
- the integrity of the criminal justice system has been called into question[24]
- public safety issues relating to the operation of nuclear facilities have been raised[25]

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[15] Order P-244.
[16] Orders P-984 and PO-2607.
[17] Orders P-984 and PO-2556.
[18] Orders P-12, P-347 and P-1439.
[19] Order MO-1564.
[20] Order P-984.
[21] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[22] Orders PO-2072-F, PO-2098-R and PO-3197.
[23] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[24] Order PO-1779.

- disclosure would shed light on the safe operation of petrochemical facilities[26] or the province's ability to prepare for a nuclear emergency.[27]

[48] The appellant submits that the interests of Ontario employers regarding "the integrity of the [board] minimum wage 'policy' implementation, in a public interest context, parallels the interest of the Canadian public in relation to the criminal justice system." In my view, the appellant has not provided evidence for this assertion, or the one stating that "[t]he Ontario public has a right to that information." It does not. As I have already explained, the board was within its rights to exercise its discretion to withhold the information at issue as exempt under section 13(1).

[49] The appellant also submits that the following circumstances, which are examples where a compelling public interest has been found *not* to exist, do not apply in this appeal:

- another public process or forum has been established to address public interest considerations[28]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[29]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[30]

[50] I find that there is evidence of the first two listed circumstances. The board submits that it held information sessions with stakeholders, and engaged with the Schedule 2 employer's group executive and the Chair's Advisory Committee to brief them on the board's response to the minimum wage increases. I accept that this promoted access to additional information to the public. I also find that a significant amount of information has already been disclosed, adequately addressing the public interest considerations. As discussed, the board has released a significant amount of information about the minimum wage issue to the appellant, and online, to the public.

[51] The board submits, and I find, that as the IPC found in Order MO-381, when the public has already been given a considerable amount of information, there is unlikely to be a compelling public interest in disclosure that outweighs the purpose of an exemption.[31]

[52] In addition, though not argued by the parties, in my view, recent developments

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[25] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.
[26] Order P-1175.
[27] Order P-901.
[28] Orders P-123/124, P-391 and M-539.
[29] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[30] Orders M-249 and M-317.
[31] Order MO-381.

with respect to the planned increase in minimum wage on January 1, 2019 are relevant to whether there is a "compelling" public interest in the disclosure of some of the information at issue. The law that would have increased minimum wage on January 1, 2019 will be repealed on that date.[32] Therefore, I find that there is not a "compelling" public interest in the disclosure of the withheld information that relates to the cancelled planned increase.

[53] Taking all of these factors into consideration, I find that the public interest at stake is not "compelling" in this case. It is, therefore, unnecessary for me to discuss the purpose of the section 13(1) exemption, as the public interest override at section 23 of the *Act* cannot be made out without a public interest that is "compelling."

[54] Because I have found that the public interest override does not apply in this case, I uphold the board's decision to withhold the information as exempt under section 13(1).

ORDER:

I uphold the board's access decision and dismiss this appeal.

Original Signed by: December 20, 2018

Marian Sami
Adjudicator

[32] See *Employment Standards Act, 2000*, S.O. 2000, c. 41, section 23.1(1)(2) available online at https://www.ontario.ca/laws/statute/00e41#BK56 and *Making Ontario Open for Business Act, 2018*, S.O. 2018, c. 14 - Bill 47, Schedule 1, section 6(2) available online at https://www.ontario.ca/laws/statute/S18014#sched1s1s1