

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4072-I

Appeal PA18-10

Workplace Safety and Insurance Board

October 1, 2020

Summary: The Workplace Safety and Insurance Board (WSIB) received a multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the WSIB's chronic mental stress (CMS) policy and claims. The WSIB issued a decision granting partial access to the responsive records, relying on sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act* to withhold records. The requester, now the appellant, appealed the WSIB's decision to this office. In this order, the adjudicator partially upholds the WSIB's decision, finding that section 13(1) applies in part, and finding that the section 23 (public interest override) does not apply to the information at issue. She defers her decision about the WSIB's section 19 claim pending receipt of additional evidence from the WSIB.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 13(1), 19 and 23.

OVERVIEW:

[1] The appellant, a legal clinic that represents injured workers, submitted a request to the Workplace Safety and Insurance Board (WSIB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following records:

- The minutes, and any accompanying documents, of the September 21, 2017 WSIB Board of Directors meeting in which the Board of Directors discussed and

approved the final version of the recently released Operational Policy Manual Document 15-03-14, Chronic Mental Stress [CMS].

- The minutes, and any accompanying documents, of the WSIB Board of Directors meeting or meetings in which the WSIB Board of Directors discussed any draft versions of the recently released Operational Policy Manual document 15-03-14, Chronic Mental Stress.
- The record of how each member of the WSIB Board of Directors voted at all of the above-listed meetings discussing the draft and final versions of the Chronic Mental Stress policy.
- Any costing or other auditing or financial accounting done by or for the WSIB to determine the cost consequences of:
 - the Bill 127 legislative changes allowing chronic mental stress claims (including costing done before or after passage of the Bill); and/or
 - the Board's draft or final policy about chronic mental stress.
- Any other reports, research or recommendations generated by WSIB staff or management or Board of Directors about the WSIB's policy approach to the legislative changes allowing chronic mental stress claims.
- Any minutes or other notes, letters, emails, text messages or other records of communications between any WSIB staff, management or Board of Directors with any members of the Office of the Premier of Ontario or the Ontario Ministry of Labour regarding:
 - The legislative changes made to the Workplace Safety and Insurance Act, 1997 by Bill 127, Stronger, Healthier Ontario Act (Budget Measures), 2017. For clarity, we want communications made both before and after the passage of Bill 127, including any communications pre-dating the introduction of the Bill and occurring in contemplation of the Bill; and
 - The content or process for consultation regarding the WSIB's new Operational Policy Manual Document 15- 03-14, Chronic Mental Stress.

[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 this office.

[4] At the outset of mediation, the WSIB issued a revised decision and index of records that included attachments to previously identified records not outlined in its

original decision. The revised decision also indicated that a record (record 11) was removed because it had been deemed non-responsive to the request. The appellant did not object. Accordingly, record 11 is no longer at issue in the appeal.

[5] During the course of mediation, the WSIB issued another revised decision releasing several records that were previously withheld under section 13(1) to the appellant. The WSIB also provided a revised index of records identifying the remaining records to which it continued to apply section 13(1) and certain records now being withheld under section 19, which were previously withheld under section 13(1). The appellant confirmed the records it wanted to pursue at adjudication, and raised the public interest override for records 23 and 31.

[6] 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.

[7] In this order, I partially uphold the WSIB's decision. I find that section 13(1) applies to portions of records 23 and 31 and that the public interest override in section 23 does not apply in the circumstances. Based on the information the WSIB provided, I am unable to make a determination on the application of section 19 to records 4 and 7. As such, I will require additional information from the WSIB about these records before I make a determination on whether the section 19 exemption applies to them.

RECORDS:

[8] The records at issue, based on the Revised Index of Records dated May 2, 2018, consist of:

Record No.	General Description of Record	Number of pages	Release Yes/No	Section(s) Applied	Comments/ Explanations
4	BOD minutes – August 17, 2017	31 pages	Yes – in part	19	Solicitor-client privileged information
7	BOD minutes – September 21, 2017	65 pages	Yes – in part	19	Solicitor-client privileged information
23	Memorandum: August 16, 2017	14 pages	No	13(1)	Provides advice/recommendations

31	WSIB Briefing Note – CMS Policy Consultation	10 pages	No	13(1)	Provides advice/recommendations
----	--	----------	----	-------	---------------------------------

ISSUES:

- A. Does the discretionary exemption at section 19 (solicitor-client privilege) apply to records 4 and 7?
- B. Does the discretionary exemption at section 13(1) (advice and recommendations) apply to records 23 and 31?
- C. Did the WSIB exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?
- D. Is there a compelling public interest in disclosure of the information that is exempt under section 13(1) that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

A. Does the discretionary exemption at section 19 apply to the information withheld from records 4 and 7?

[9] The WSIB disclosed records 4 and 7 in part. It submits that the information withheld from records 4 and 7 is exempt from disclosure under the common-law solicitor- client privilege exemption at section 19 of the *Act*.

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

A head may refuse to disclose a record,

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

Branch 1: common law privilege

[11] At common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

[12] 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.¹ The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.² 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.³

[13] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁴

[14] 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.⁵ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.⁶

Loss of privilege

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

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.⁷

[16] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.⁸ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.⁹

Representations

[17] Both parties made representations on this issue, but I will not set them out in this order. For reasons explained below, I will defer my decision about the WSIB's section 19 claim pending receipt of additional evidence from the WSIB.

¹ *Descôteaux v. Mierzewski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

² Orders PO-2441, MO-1925 and MO-2166.

³ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁴ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

⁵ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

⁶ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

⁷ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

⁸ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

⁹ *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

Analysis and findings

[18] The WSIB did not provide an unredacted copy of records 4 and 7. I have reviewed the redacted copy of records 4 and 7, and the representations of the parties. Based on the information the WSIB provided to me during the inquiry, I am unable to make a determination on the application of section 19 to records 4 and 7. As such, I will require additional information from the WSIB about these records before I am able to make a determination on whether the section 19 exemption applies to them.

[19] The WSIB should review its section 19 claim in relation to these records for the purpose of preparing additional evidence for my consideration, the particulars of which request I will convey to the WSIB in correspondence to follow this order. The WSIB may wish to refer to the recent IPC guidance document, the *IPC protocol for appeals involving solicitor-client privilege claims where the institution does not provide the records at issue to the IPC*, which will form the basis of my request for this additional evidence.

B. Does the discretionary exemption at section 13(1) (advice and recommendations) apply to records 23 and 31?

[20] The WSIB submits that records 23 and 31, which consist of a memorandum to the WSIB's Chief Corporate Services Officer and a briefing note written by an operational policy analyst, are both exempt under section 13(1) in their entirety.

[21] 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.

[22] 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.¹⁰

[23] "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.

[24] "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

¹⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

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.¹¹

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

[26] 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.¹²

[27] 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 institution 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 as that intention is inherent to the job of policy development, whether by a public servant or consultant.¹³

[28] 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 the deliberative process leading to a final decision and are protected by s. 13(1).¹⁴

WSIB's representations

[29] The WSIB submits that records 23 and 31 are both exempt under section 13(1). Relying on Order PO-3365 with reference to *John Doe v. Ontario (Finance)*, the WSIB submits the following with respect to the scope of section 13(1):

- "advice" includes the opinions of a public servant as to the range of alternative policy options;

¹¹ See above at paras. 26 and 47.

¹² 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.

¹³ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

¹⁴ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

- policy options constitute an evaluative analysis as opposed to objective information, and can serve as the basis for making decision between the presented options;
- records containing policy options can take many forms;
- the nature of the deliberative process is to draft and re-draft advice and recommendations until the writer is sufficiently satisfied that he is prepared to communicate the results to someone else;
- all of the information in earlier drafts informs the end result even if the content of any one draft is not included in the final version; and
- prior drafts fall under the exemption, as they are part of the deliberative process; and the advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank.

[30] The WSIB submits that the purpose of the exemption in section 13(1) as stated in *John Doe v. Ontario (Finance)* is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice. The WSIB submits that Order P-1398 also outlines that the purpose of section 13(1) is to ensure that persons employed in the public service are able to advise and make recommendations freely and frankly, and that heads of institutions should be able to take action and make decisions without unfair pressure. The WSIB further submits that the purpose of the exemption is to protect the free flow of advice or recommendations within the deliberative process of government decision making and policymaking. The WSIB adds that this is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice to senior management.

[31] The WSIB submits that records 23 and 31 reflect the evaluative analysis and opinions of a public servant on the options, risks, advantages, and disadvantages of developing the new chronic mental health stress policy in response to Bill 127. The WSIB submits that these records were prepared for decision-making.

[32] The WSIB submits that the mandatory exception in section 13(3) does not apply in this case, because neither record 23 nor 31 has been cited publicly as the basis for making decisions, nor are they more than twenty years old. The WSIB further submits that it is important to note that the protection afforded by section 13 does not disappear once an institution has made a decision about the matter (which the WSIB has in this case) to which the advice or recommendations were directed, as this would "be contrary to the purpose of the exemption."

The appellant's representations

[33] The appellant submits that section 13(1) does not apply to records 23 and 31. The appellant notes that the purpose of the *Act* is to provide a right of access to information under the control of institutions and that the *Act* includes the principle that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. The appellant correctly points out that 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*. The appellant argues that the WSIB has not met that burden.

[34] The appellant submits that the WSIB has provided almost no information about the two documents and has withheld the entirety of both documents. The appellant submits that it is unable to determine how, or if, these documents pertain to government policy-making because the WSIB did not indicate who made the "recommendation", to whom the records were addressed, or, in one case, even the date the document was created.

[35] The appellant submits that the records likely contain factual or background information that should be disclosed, or other content that should be disclosed under exceptions in section 13(2). The appellant argues that section 13(2)(a) states that despite subsection (1), factual material will not be withheld, and that this office held in Order P- 643 that names and addresses do not qualify as "advice to government," so at a minimum the WSIB must disclose that information. The appellant further argues that all other factual material contained in these records must also be disclosed.

[36] The appellant submits that it is also possible that records 23 and 31 contain other information that cannot be withheld based on section 13(1). In particular, the appellant submits that the records may include a cost estimate or feasibility study relating to a government policy for the purpose of the exception in section 13(2)(g).

Analysis and findings

[37] Record 23 is a memorandum written by a public servant to a senior member of the WSIB. Record 31 is a briefing note prepared by the same public servant, and while it does not explicitly state who the briefing note is addressed to, information from record 23 indicates that it was approved by a manager and provided to the same senior member of the WSIB.

[38] After reviewing the representations of the parties and the records at issue, I find that section 13(1) applies to portions of records 23 and 31, and that neither of the exceptions in section 13(2) raised by the appellant applies in the circumstances of this appeal. I begin by generally describing the information that I find to be exempt under section 13(1).

Record 23

[39] I find that the section 13(1) exemption applies to portions of pages 2-6 and the entirety of pages 11-14 of record 23, because these portions contain the advice and recommendations of a public servant to a senior member of the WSIB.

[40] Portions of pages 2-6 contain the public servant's outline of alternative approaches to sections of the draft policy with an analysis of the advantages and disadvantages of certain proposed changes, and recommendations on how they should be applied. Additionally, these portions also contain discussion of other matters relevant to the draft policy.

[41] Pages 11-14 contain the public servant's clarification on the practical implementation, requirements, and integration of the draft policy with the current operations of the WSIB, as well as the public servant's analysis of various legal concepts and stakeholder submissions.

[42] While some portions of pages 2-6 and 11-14 do not contain any specific recommendations as to which course of action should be taken, these identified portions contain information that qualifies as advice under section 13(1), because they contain the public servant's evaluative analysis of various areas related to the draft policy. The information is not merely factual in nature. Therefore, I find that the section 13(1) exemption apply to these portions of pages 2-6 and 11-14 of record 23.

[43] I find, however, that the section 13(1) exemption does not apply to the remaining information in record 23.

[44] The top of page 1 contains the date, to, from and re: lines as well as a summary of the categories in the memo, which are descriptive and do not contain any advice or recommendations, nor would this information reveal any advice or recommendations. Page 1 also contains a reproduced section of the *Workplace Safety and Insurance Act* (WSIA), and portions of pages 1 and 2 contain a summary of a Workplace Safety Insurance Appeals Tribunal (WSIAT) decision. Both the WSIA and WSIAT decision are factual and objective information, and the summary of the WSIAT decision does not provide any evaluative analysis of that decision. Therefore, disclosure of these portions would not reveal any advice or recommendations, and I find that section 13(1) does not apply to them.

[45] I also find that the section 13(1) exemption does not apply to portions of pages 4-6. A portion of page 4 contains a reproduction of the publicly released draft policy. Portions of pages 5-6 contain a definition from the *Occupational Health and Safety Act* and highlight modifications made to the definition that were included in the publicly released draft policy. These portions of the record contain publicly available, objective factual information, and do not contain any advice or recommendations, nor would their disclosure reveal any advice or recommendations.

[46] A portion of page 7, and pages 8-10 contain a chart, which summarizes the comments of stakeholders with respect to the constitutionality of a criterion included in the draft policy. These stakeholder comments are drawn from publicly available stakeholder submissions, which were provided to the WSIB by the various stakeholders during the public consultation process of the WSIB's draft policy. The submissions are available on the WSIB's website and were provided by the appellant with its representations. These portions are a descriptive summary of publicly available information, and do not provide any analysis or evaluation, or otherwise offer any input from the public servant who authored the memo that would amount to advice or recommendations. On this basis, I find that portions of page 7 and all of pages 8-10 are not exempt under section 13(1).

Record 31

[47] With respect to record 31, a briefing note prepared by a public servant, I find that the section 13(1) exemption applies to portions of pages 1-2, 10, and pages 3-9, in full. The information contains the advice and recommendations of a public servant. I accept the WSIB's description of these records as consisting of the evaluative analysis and opinions of a public servant on the options, risks, advantages, and disadvantages of developing the new chronic mental health stress policy. Furthermore, I find that these pages contain the public servant's summary of stakeholder submissions and their evaluative analysis of them.

[48] I find, however, that the section 13(1) exemption does not apply to the remaining information. The top portion of page 1, which consists of the title, issue, and "relevant policies" lines, does not contain any advice or recommendations. The last portion of page 10, which consists of the analyst's name, the name of the manager that approved the briefing note, and the date of the note, also does not contain any advice or recommendations. The rest of page 1 and the top of page 2 contain a factual status update on the draft policy, specifically, when the draft policy will come into effect, and when the WSIB conducted public consultation on the draft policy. A portion of page 2 of the record contains background information about the draft policy. All this information is descriptive and publicly available, contains no evaluative analysis, and does not qualify as advice or recommendations for the purpose of section 13(1), nor would disclosing it reveal advice or recommendations. Therefore, I find that section 13(1) does not apply to those portions of record 31.

Exceptions to section 13(1)

[49] The appellant argues that the exception at section 13(2)(a) applies to records 23 and 31, and that any factual material contained in those records should be disclosed. I considered whether the exempt information in records 23 and 31 consists of factual information, which would fit under the mandatory exception to section 13(1) found at section 13(2)(a), and I find that it does not. I do note that the information I found should be withheld under the section 13(1) exemption contains some information that is

of a factual nature. However, factual material does not refer to occasional assertions of fact in a record, but to a coherent body of facts separate and distinct from the advice and recommendations the record contains.¹⁵ Where the factual information is inextricably intertwined with the advice or recommendations, section 13(2)(a) will not apply.¹⁶

[50] I find that the information that is of a factual nature in the exempt portions of records 23 and 31 is interwoven with the advice itself and cannot reasonably be severed from the actual advice. Furthermore, I find that its disclosure would permit accurate inferences to be made about the nature of the actual advice or recommendations contained in the records at issue. Therefore, I find that the exception in section 13(2)(a) does not apply, as it is not a coherent body of facts separate and distinct from the advice or recommendations.

[51] The appellant further argues that the records may include a cost estimate or feasibility study relating to a government policy which falls within the exception in section 13(2)(g). After reviewing the records, I find that the exempt portions of the records at issue do not contain information that would fall under the section 13(2)(g) exception. The two records at issue consist of a memorandum and a briefing note, which, as noted above, contain a public servant's advice with respect to the advantages and disadvantages of certain aspects of the draft policy. The records do not contain any information with respect to the cost or feasibility of the new policy, or a cost estimate.

Conclusion

[52] To summarize, subject to my findings on the WSIB's exercise of discretion in Issue C below, as well as my consideration of the public interest override in Issue D, I uphold the WSIB's decision to withhold portions of pages 2, 4-7, and pages 3 and 11-14, in full, in record 23. I also uphold the WSIB's decision to withhold portions of pages 1-2, 10, and pages 3-9, in full, of record 31. I find that section 13(1) was properly applied to those portions of the records.

[53] However, I find that section 13(1) does not apply, and I do not uphold the WSIB's decision to withhold on that basis, pages 1 and 8-10, in full, and portions of pages 2, 4- 7 of record 23. I also do not uphold the WSIB's decision to withhold portions of page 1- 2 and 10 of record 31 under section 13(1). I will order these portions of the records to be disclosed to the appellant.

C. Did the WSIB exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

[54] The section 13(1) exemption is discretionary, and permits an institution to

¹⁵ Order 24.

¹⁶ Order PO-2097.

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.

[55] 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.

[56] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁷ This office may not, however, substitute its own discretion for that of the institution.¹⁸

[57] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:¹⁹

- 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

¹⁷ Order MO-1573.

¹⁸ Section 54(2) of the *Act*.

¹⁹ Orders P-344 and MO-1573.

- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations of the parties

[58] The WSIB submits that keeping in mind the purpose of section 13 and the importance of making a decision in good faith, it considered relevant factors when it exercised its discretion to withhold records 23 and 31 pursuant to section 13.

[59] The WSIB submits that it exercised its discretion appropriately and in good faith. The WSIB further submits that taking into consideration the relevant information, the WSIB released a significant number of records, and only withheld records that pertained to advice and recommendations of public servants (or from which the advice or recommendations could be inferred if released). The WSIB submits that it should be noted that during mediation, the WSIB reviewed the records and, where possible, ceased to rely on section 13 to withhold portions of several records, including records 4 and 7, which continue to be at issue in this appeal under section 19.

[60] The WSIB submits that full disclosure of the records would be inconsistent with the purpose of section 13(1). The WSIB submits that the advice and recommendations of the public servants who authored the records at issue in this appeal fall within the purview of section 13, and the WSIB appropriately exercised its discretion to withhold the records from disclosure. The WSIB submits that to do otherwise would discourage the production of free and frank advice and recommendations in the future, and would deprive senior management and the Board of Directors of the best possible thinking from staff whose input and analysis are critical to making policy decisions, such as how to approach WSIB benefits for chronic mental stress. The WSIB argues that the disclosure of these records would not affect public confidence in the operation of the institution and would decrease the confidence of public servants to provide the advice necessary for a healthy and efficient government agency.

[61] The appellant submits that while the WSIB provided a number of records, it has chosen to withhold the records that are necessary for the legal clinic, and its clients and members to understand why the WSIB chose to change its decision to adjudicate mental stress disability cases the same way as other types of injuries. The appellant submits that the WSIB may have considered irrelevant factors in exercising its discretion. The appellant submits, in particular, that it is unclear why the WSIB continues to withhold access to the documents that immediately precede its decision to adopt the more onerous test in evaluating workers with mental stress injuries, while it

has largely released documents regarding its initial decision to adjudicate all claims using the same legal test. The appellant submits, for example, that record 2, which is a slide deck that also appears to be a presentation from WSIB management to the Board of Directors, was released in full. The appellant notes that it is dated April 26, 2017, and it recommended that the WSIB adopt the “significant contributing factor” test. The appellant submits that this suggests that the WSIB may have considered irrelevant factors in its exercise of discretion, such as the desire to prevent public access to information that is more contentious to preclude increased public debate.

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

- The requested disclosure will increase public confidence in the operation of the institution.
 - The requested information is needed to understand a significant change in position taken by the WSIB, to the detriment of among its most vulnerable stakeholders: workers who are suffering from disabling mental health conditions because of dangers like harassment on the job.
 - The requested information would explain why, following public policy consultation in which stakeholders advised the WSIB it would be discriminatory to impose a higher legal onus on workers with mental stress injuries, the WSIB decided to impose a different standard on these vulnerable workers.
 - This information is more important because of the long history of discriminatory exclusion of workers with mental stress injuries from workers’ compensation. The changes effective January 1, 2018 were supposed to end that exclusion, but because of the WSIB’s policy choices that exclusion continues. The impact of the WSIB policy on the ongoing exclusion of workers with mental health injuries is evident in the 94% denial rate of chronic mental stress claims since the new law and policy came into effect.
- The appellant’s compelling need to receive the information.
 - The appellant is a publicly funded legal clinic that serves a highly marginalized population. Many of the appellant’s clients and members are workers with mental health disabilities. The appellant’s members and clients are adversely affected by the WSIB’s decision to continue to apply unfair burdens on workers with mental health disabilities.

Analysis and findings

[63] Since I did not uphold the WSIB’s decision in full with respect to its application of

the section 13(1) exemption and I have ordered the WSIB to release portions of the records at issue, I will only be addressing whether the WSIB properly exercised its discretion with respect to the remaining information that I found to be exempt under section 13(1).

[64] Based on my review of the withheld information, the representations of the parties and the circumstances of this appeal, I find that the WSIB did not err in exercising its discretion to withhold information under section 13(1) of the *Act*.

[65] I am not persuaded by the appellant's argument that the WSIB may have considered irrelevant factors, or that the WSIB failed to account for relevant factors, in exercising its discretion. Based on the information before me, I am satisfied that the WSIB did not exercise its discretion in bad faith or for an improper purpose. I am also satisfied that the WSIB considered relevant factors and did not consider irrelevant factors in the exercise of its discretion. In particular, I am satisfied that the WSIB properly considered the purpose of the exemption and the rights sought to be protected under section 13(1), and whether or not disclosure of the remaining information at issue would increase public confidence in the institution.

[66] With respect to the WSIB's decision to disclose other information that might have been eligible to withhold under section 13(1), this fact alone is not enough for me to conclude that the WSIB considered improper factors in its exercise of discretion here.

[67] Accordingly, I see nothing improper in the WSIB's exercise of discretion, and I uphold it.

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

[68] The appellant claims that the public interest override applies in the circumstances of this appeal. In this appeal, I will review it only in relation to section 13(1).²⁰ 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.

[69] 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.

[70] The *Act* is silent as to who bears the burden of proof in respect of section 23.

²⁰ Even if I had made a finding under section 19, section 23 is not available to override the application of that exemption.

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.²¹

[71] 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.²² 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.²³

[72] A public interest does not exist where the interests being advanced are essentially private in nature.²⁴ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.²⁵ A public interest is not automatically established where the requester is a member of the media.²⁶ The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.²⁷

[73] Any public interest in *non*-disclosure that may exist also must be considered.²⁸ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.²⁹

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

- the records relate to the economic impact of Quebec separation³⁰
- the integrity of the criminal justice system has been called into question³¹

²¹ Order P-244.

²² Orders P-984 and PO-2607.

²³ Orders P-984 and PO-2556.

²⁴ Orders P-12, P-347 and P-1439.

²⁵ Order MO-1564.

²⁶ Orders M-773 and M-1074.

²⁷ Order P-984.

²⁸ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

²⁹ Orders PO-2072-F, PO-2098-R and PO-3197.

³⁰ 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.).

³¹ Order PO-1779.

- public safety issues relating to the operation of nuclear facilities have been raised³²
- disclosure would shed light on the safe operation of petrochemical facilities³³ or the province's ability to prepare for a nuclear emergency³⁴
- the records contain information about contributions to municipal election campaigns³⁵

[75] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations³⁶
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations³⁷
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding³⁸
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter³⁹
- the records do not respond to the applicable public interest raised by appellant⁴⁰

[76] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[77] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.⁴¹

³² 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.

³³ Order P-1175.

³⁴ Order P-901.

³⁵ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

³⁶ Orders P-123/124, P-391 and M-539.

³⁷ Orders P-532, P-568, PO-2472, PO-2614 and PO-2626.

³⁸ Orders M-249 and M-317.

³⁹ Order P-613.

⁴⁰ Orders MO-1994 and PO-2607.

⁴¹ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

Representations

[78] Noting the principles outlined above, the WSIB submits that there is no "compelling public interest" in the release of the redacted portions of the records. The WSIB submits that the information would not help the public to express its opinion or to make political choices, because the records are advice documents created by public servants for senior management regarding potential new policy on chronic mental stress in response to legislated changes.

[79] Relying on Order M-381, the WSIB argues that when the public has previously been provided with a considerable amount of information, there is unlikely to be a compelling public interest in the disclosure that outweighs the purpose of the exemption. Referring to Order PO-2472, and the principle that "a compelling public interest does not exist where another public process or forum has been established to address public interest considerations", the WSIB argues that it engaged in extensive consultations with the public and stakeholder groups to receive input on the new chronic mental stress policy. The WSIB submits that it has released a substantial amount of information and those materials already provide ample insight into the activities and decision-making process of the WSIB with respect to this matter.

[80] The WSIB submits that any public interest has been more than adequately addressed. The WSIB further submits, for example, that when possible, it posted information on its website so that the public knew about the chronic mental stress policy. The WSIB argues that releasing these specific records would not enhance the public's ability to engage with the WSIB on this subject, and it would be inappropriate to use the public interest override in this case to release the records withheld under section 13(1).

[81] The appellant submits that there is a compelling public interest in the disclosure of records 23 and 31. The appellant submits that workers with mental stress injuries have been excluded from workers' compensation for years, and their ongoing exclusion because of the WSIB's discriminatory policy has attracted significant public and media interest because it is a matter of fundamental health and safety and equality. In support of this argument, the appellant submitted links to several online news articles.

[82] The appellant submits that the WSIB's decision to impose a higher burden on workers with mental stress injuries has had significant health and safety consequences for workers across the province. The appellant submits that since the WSIB implemented its discriminatory policy on January 1, 2018, it has denied coverage in 94% of chronic mental stress cases, and exclusion of these workers from compensation is not just a matter of financial benefits. The appellant submits that the Supreme Court of Canada has recognized that people who are denied access to benefits under the *Workplace Safety and Insurance Act* are denied access to: health care to recover from their devastating mental health injuries, help to get back to work, and assistance in accommodation on the job. The appellant further submits that these denials undermine

their dignity.⁴²

[83] The appellant submits that the information sought would help the public to express its opinion or to make political choices, as the WSIB has never publicly addressed why it decided to implement the higher onus despite its likely discriminatory effect. The appellant further submits that the WSIB has never explained what factors it concluded outweighed the discriminatory impact of such a policy, and the public is entitled to understand what those factors were.

[84] Some of the appellant's arguments with respect to the WSIB's exercise of discretion are relevant to this issue, including where they argue that disclosure would increase public confidence in the WSIB, or shed light on its operations. The appellant argues that there is a long history of discriminatory exclusion of workers with mental stress injuries from workers' compensation, and the requested information is needed to understand why the WSIB chose to impose a higher legal onus for mental stress injuries despite advice from stakeholders that it would be discriminatory.

[85] The appellant further argues that it has a compelling need to receive the information, because it is a publicly funded legal clinic that serves a highly marginalized population, and many of the appellant's clients and members are workers with mental health disabilities.

Analysis and findings

[86] After reviewing the representations of the parties, I find that the public interest override in section 23 does not apply to the information that is exempt under section 13(1) in the circumstances of this appeal.

[87] The information at issue is the information that I have found the WSIB properly withheld from records 23 and 31 on the basis that it would reveal the advice or recommendations of a public servant with respect to the WSIB's new CMS policy.

[88] As stated above, in order for section 23 to apply, there are two requirements, which must be met: there must be a compelling public interest in disclosure of the records, and this interest must clearly outweigh the purpose of the section 13 exemption. I accept the appellant's argument that there is a public interest in the withheld information relating to the WSIB's new CMS policy, because the WSIB has never publicly addressed why it implemented the higher onus for establishing a claim than previously proposed.

[89] The next question is whether the public interest in disclosure of the information that I have found exempt is a compelling one, that is, whether it is the subject of

⁴² The appellant relies on *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, [2003] 2 SCR 504, 2003 SCC 54, para. 104.

"rousing strong interest or attention".⁴³ In answering this question, I considered 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 initial consultation process that was conducted with the public and stakeholders by the WSIB. Given these prior disclosures, I find that it has not been established that this interest is a compelling one under section 23. Based on the content of the exempt portions of records 23 and 31, and the information that is already publicly available, I am not convinced that disclosure of the exempt information would help the public to express its opinion or to make political choices in a more meaningful manner; nor am I persuaded that its disclosure would increase public confidence in the operations of the WSIB.

[90] As the appellant has not established a compelling public interest in the disclosure of the portions of records 23 and 31 that I found exempt under section 13(1), I find that the first part of the test for section 23 to apply has not been met. Accordingly, I find that section 23 does not apply, and I uphold the WSIB's decision to withhold the portions of records 23 and 31 that I have found to be exempt under section 13(1).

ORDER:

1. I order the WSIB to disclose to the appellant the non-exempt portions of records 23 and 31. For the sake of clarity, I have highlighted the portions of the records to be withheld in the copy of the records that accompanies the WSIB's copy of this order. The rest of the information, the unhighlighted information, is to be disclosed to the appellant by **November 9, 2020** but not before **November 2, 2020**.
2. In order to verify compliance with order provision 1, I reserve the right to require the WSIB to provide me with a copy of the records disclosed to the appellant.
3. The timeline noted in order provision 1 may be extended if the WSIB is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any requests for extension.
4. I defer my findings on the application of section 19 to records 4 and 7 pending receipt of additional evidence from the WSIB, which I will seek following the issuance of this order.

Original signed by: _____

Anna Truong
Adjudicator

October 1, 2020 _____

⁴³ Order P-984.