

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4197

Appeal PA18-00560

Workplace Safety and Insurance Board

October 8, 2021

Summary: The appellant seeks access to records relating to the WSIB's Operational Policy on occupational aluminum exposure. The WSIB located a large number of responsive records and granted the appellant access to them, in part. The WSIB withheld portions of the records from disclosure under sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*. The WSIB also withheld some information as not responsive to the request. The appellant appealed the WSIB's decision and raised the application of the public interest override. In this order, the adjudicator upholds the WSIB's decision, in part. She upholds the WSIB's decision to withhold portions of one record as not responsive and its application of section 19. She finds some portions of the records are exempt under section 13(1), but finds that other portions do not qualify for exemption under section 13(1) and orders the WSIB to disclose them to the appellant. The adjudicator upholds the WSIB's exercise of discretion to withhold the information that qualifies for exemption under sections 13(1) and 19. Finally, the adjudicator finds the public interest override has no application to the information found to be exempt under section 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F31 sections 13(1), 19, 23 and 24.

Orders and Investigation Reports Considered: Orders 24 and PO-4005.

Case Considered: *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.).

OVERVIEW:

[1] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Workplace Safety and Insurance Board (the WSIB) for records relating to “the creation, implementation, review and revocation of the Operational Policy on occupational aluminum exposure.” The appellant stated she sought access to records such as memoranda, research reports, administrative and executive reports, minutes and other records of meetings and various communications.

[2] The WSIB issued six access decisions between July and November 2018 and disclosed a number of responsive records to the appellant, in whole or in part.¹ The WSIB claimed a number of exemptions to withhold some or part of the records. Relevant to this order, the WSIB claimed the application of the discretionary exemptions in sections 13 (advice or recommendations) and 19 (solicitor-client privilege) of the *Act*. The WSIB also withheld portions of the records as not responsive to the appellant’s request.

[3] The appellant appealed the WSIB’s access decisions to the Information and Privacy Commissioner of Ontario (IPC). One appeal file, Appeal PA18-00560, was opened to join the appellant’s appeals.

[4] During mediation, the appellant reviewed the records the WSIB had disclosed to her and the WSIB’s index of records. The appellant confirmed her interest in pursuing access to some of the withheld records. The WSIB confirmed its position regarding access to these records. The appellant raised the possible application of the public interest override in section 23 of the *Act* to the records. I note the public interest override cannot apply to information found to be not responsive to a request or exempt under the solicitor- client privilege exemption in section 19. In other words, if I find certain portions of the records are not responsive or exempt under section 19, I cannot consider whether the public interest override would apply to require disclosure of them.²

[5] No further mediation was possible and the appeal transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I am the adjudicator in this appeal and I began my inquiry by inviting the WSIB to submit representations in response to a Notice of Inquiry, which summarized the facts and issues under appeal. The WSIB submitted representations and issued a revised access decision, granting the appellant access to an additional eleven records, in full, and three records, in part. I then invited the appellant to make submissions in response to the Notice of Inquiry and the WSIB’s representations, which were shared in accordance with Practice Direction Number 7 of the IPC’s *Code of Procedure*. The appellant submitted representations and

¹ The WSIB initially issued a fee estimate and interim access decision. The appellant appealed the fee estimate and the WSIB’s denial of her fee waiver request and Appeal PA18-329 was opened. Appeal PA18- 329 resulted in Order PO-4005, which ordered the WSIB to grant the appellant a partial fee waiver.

² Please refer to section 23 of the *Act*, which is reproduced under Issue E below.

confirmed she only pursued access to seven of the responsive records, which are identified in the Records section below. I then sought and received reply representations from the WSIB in response to the appellant's submissions.

[6] In the discussion that follows, I uphold the WSIB's decision, in part. I uphold the WSIB's decision to withhold portions of Record 1747 as not responsive to the request. I also uphold the WSIB's decision to withhold portions of the records at issue under sections 13(1) and 19, with the exception of some portions of Record 1771A, which I order the WSIB to disclose to the appellant. I uphold the WSIB's exercise of discretion to withhold portions of the records under sections 13(1) and 19. Finally, I find the public interest override does not apply to the information that I found exempt under section 13(1) of the *Act*.

RECORDS:

[7] The records at issue are described as follows in the WSIB's representations:

Record No.	Description	Basis for withholding
119	Email dated May 27, 2017 (2 pages)	Section 19 (denied in part)
802	Emails dated July 12, 2017 (2 pages)	Section 13(1) (denied in part)
850	Emails (4 pages)	Section 19 (denied in full)
1747	2016 Standing Committee Issues Briefing (56 pages)	Non-responsive (denied in part)
1766	Emails dated October 3, 2017 (2 pages)	Section 13(1) (denied in part)
1771A	Briefing Package dated June 24, 2016 (34 pages)	Section 13(1) (denied in full)
2027	Email (3 pages)	Section 19 (denied in full)

ISSUES:

- A. What is the scope of the request? Is record 1747 responsive to the request?
- B. Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the emails and Briefing Package at records 802, 1766 and 1771A?
- C. Does the discretionary solicitor-client privilege exemption at section 19 apply to the emails at records 119, 850 and 2027?

- D. Did the WSIB exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?
- E. Is there a compelling public interest in the disclosure of the records I have found to be exempt under section 13(1) that clearly outweighs the purpose of the exemption?

DISCUSSION:

Issue A: What is the scope of the request? Is record 1747 responsive to the request?

[8] WSIB claims the majority of record 1747 is not responsive to the appellant's request. Record 1747 is a 2016 Standing Committee Issues Briefing package.

[9] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record...

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[10] Institutions should adopt a liberal interpretation of a request to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.³ To be considered responsive to the request, records must *reasonably relate* to the request.⁴

[11] The appellant's access request reads as follows:

All records relevant to the creation, implementation, review and revocation of the Operational Policy on occupational aluminum exposure

³ Orders P-134 and P-880.

⁴ Orders P-880 and PO-2661.

(which was first given the number 04-03-13, and later 16-01-10), in making a request for "all records" your client expects the Workplace Safety and Insurance Board (WSIB) search to include, but not limited to records such as:

- Memoranda;
- Research reports;
- Administrative and executive reports;
- Minutes and other records of meetings;
- Internal communications among WSIB staff and/or the Board of Directors, including letters, emails and other forms of paper and electronic communication; and
- Incoming and outgoing communications between the WSIB and external people and organizations, including letters, emails and other forms of paper and electronic communication with government officials, the staff of Ministries and public agencies, and persons and organizations in the private sector.

[12] I invited the WSIB to make submissions on whether the portions at issue in record 1747 are responsive to the appellant's request. The WSIB did not make any submissions beyond confirming it withheld portions of record 1747 as not responsive.

[13] In her representations, the appellant states it is not possible to make a meaningful submission on whether the information at issue in record 1747 is responsive to her request. The appellant asks me to consider the following points in reviewing the record:

- The fundamental principle that information should be available to the public under the *Act*; and
- The broad scope of the appellant's request.

[14] I reviewed the information withheld as not responsive in record 1747 and I find it is not responsive to the appellant's request. From my review, the briefing package at record 1747 encompasses a wide variety of issues, of which McIntyre Powder and the related Operational Policy on occupational aluminum exposure was one. I reviewed the entirety of record 1747 and find the WSIB has disclosed the responsive information to the appellant and the remainder of the record does not contain information that would be considered to be *reasonably related* to her request. Therefore, I uphold the WSIB's decision to withhold portions of record 1747 from disclosure because they are not responsive to the appellant's request.

Issue B: Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the emails and Briefing Package at records 802, 1766 and 1771A?

[15] The WSIB applied the discretionary exemption at section 13(1) of the *Act* to withhold portion of records 802 and 1766 and the entirety of Record 1771A. Records 802 and 1766 are email chains and Record 1771A is a Briefing Package. Section 13(1) of the *Act* states,

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

[16] In *John Doe v. Ontario (Finance)*,⁵ the Supreme Court of Canada held that the purpose of section 13(1) 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.⁶

[17] *Advice* and *recommendations* have distinct meanings. *Recommendations* refers to materials that relate to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[18] *Advice* has a broader meaning than *recommendations*. It includes *policy options*, which are lists of alternative courses of actions to be accepted or rejected in relation to a decision 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.⁷

[19] Advice or recommendations may be revealed in two ways: (1) the information itself consists of advice or recommendations; (2) the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁸

[20] 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

⁵ 2014 SCC 36. (*John Doe*)

⁶ *Ibid.*, at para 43.

⁷ *Ibid.*, at paras 26 and 47.

⁸ 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.), affirmed [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.

institution to prove the advice or recommendations 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.⁹

[21] Examples of the types of communication found *not* to qualify as advice or recommendations include factual or background information,¹⁰ a supervisor's direction to staff on how to conduct an investigation,¹¹ and information prepared for public dissemination.¹²

[22] Section 13(2) creates a list of mandatory exceptions to the section 13(1) exemption. These mandatory exceptions can be divided into two categories: objective information and specific types of records that could contain advice or recommendations.¹³

[23] Section 13(3) provides another exception to section 13(1), requiring disclosure where the record is more than 20 years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

[24] The WSIB submits that section 13(1) applies to records 802, 1766, and 1771A. The WSIB claims the exempted portions of these records contain the advice and recommendations of WSIB employees. Specifically, the WSIB submits the records contain deliberations and discussions about research contract administration, assessment and discussion of risks related to the delivery of workplace insurance, and options for overall WSIB external communication. The WSIB asserts the redacted material does not contain factual information, but frank advice and recommendations between public servants. The WSIB also submits the mandatory exception in section 13(3) of the *Act* does not apply to records 802, 1766, and 1771A because the information subject to its section 13(1) claim was not cited publicly as the basis for making decisions and is not older than 20 years old.

[25] The appellant states she has not reviewed the information subject to the WSIB's section 13(1) claim. As such, she could not "make meaningful submission on whether the exemption applies." The appellant refers to the purpose of the *Act* in section 1, which requires that exemptions from the right of access be limited and specific. The appellant also refers to section 10(2), which requires a head to disclose as much of a record as can reasonably be severed without disclosing exempt information.

[26] I have reviewed records 802, 1766, and 1771A. I find the majority of the

⁹ *John Doe, supra* note 3 at para 51.

¹⁰ Order PO-3315.

¹¹ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/91 (Ont. Div. Ct.).

¹² Order PO-2667.

¹³ *John Doe, supra* note 3 at para 30.

information withheld from these records contains the advice and/or recommendations of WSIB staff and is exempt under section 13(1) of the *Act*.

[27] Specifically, I find all of the withheld information contained in the emails in records 802 and 1766 consists of advice, recommendations, policy options, or other information that would allow one to accurately infer the advice or recommendations. Further, I find the information at issue in these records to represent part of the deliberative process leading to a final decision.

[28] With respect to record 1771A, I find that the majority of the information in it qualifies for exemption under section 13(1) of the *Act*. Record 1771A is a Briefing Package prepared by WSIB staff for senior WSIB staff in advance of a meeting with an external organization. The information contained in the package includes advice or recommendations regarding the current issues faced by the WSIB as well as information relating to external communications. Furthermore, I find the record contains information that would, if disclosed, allow one to accurately infer the advice or recommendations.

[29] However, I find that portions of record 1771A can reasonably be severed without disclosing exempt information pursuant to section 10(2) of the *Act*. First, I find the professional information of members of the external organization in pages 1 and 2 does not qualify for exemption under section 13(1) of the *Act*. The professional information of the members of the external organization does not qualify for exemption under section 13(1) as it is factual information relating to these individuals in a professional context. In the context of considering whether the mandatory personal privacy exemption in section 21 could apply, I have considered whether this information is personal information within the meaning of section 2(1) of the *Act*. I find it is not because it does not reveal anything of a personal nature about the members. I also find that no other mandatory exemption would apply to this information and will therefore order the WSIB to disclose it to the appellant.

[30] In addition, I find that pages 29 to 34 of record 1771A that list the media articles discussing the WSIB contain information that does not qualify for exemption, with the exception of the bulleted summaries or notations below some of the article citations. The list of articles themselves does not contain any advice or recommendations that WSIB staff would have prepared or provided; rather, it is merely a list of the published articles relating to the WSIB. I am also not satisfied that disclosure of the list would reveal any advice or recommendations. I confirm only the article citations (date, title, author, hyperlink) are not exempt under section 13(1). The bulleted notations that appear under some of the articles do qualify for exemption because they contain information that would accurately infer to advice or recommendations provided to the WSIB.

[31] In sum, I find the professional biographical information of the external organizations and the list of media articles in record 1771A do not qualify for exemption

under section 13(1). I will order the WSIB to disclose these portions to the appellant.

[32] I have reviewed the exceptions to the section 13(1) exemption enumerated in section 13(2) and find none apply. Certain discrete portions of record 1771A contain factual information; but, this information is inextricably intertwined with the advice or recommendations in the record. I agree with Order 24 that found that occasional assertions of fact would not fit within the section 13(2) exception. Rather, *factual* material contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in the record. Furthermore, based on my review of these portions, I find that the disclosure of this factual information could allow for accurate inferences to be made regarding the policy options or advice offered.

[33] I also considered whether section 13(3) has any application to the records and find it does not. None of the records are more than 20 years old and it does not appear the WSIB has publicly cited the record as the basis for making a decision or formulating a policy.

[34] I reviewed the information I found exempt under section 13(1) and considered whether the WSIB could have severed any non-exempt information under section 10(2) of the *Act*. In the circumstances, and upon review of the records, I find that severance is not reasonably possible and would only result in the disclosure of disconnected snippets that would be meaningless to the appellant.

[35] In conclusion, I find that records 802, 1766, and 1771A qualify for exemption under section 13(1). I will review the WSIB's exercise of discretion to withhold the portions of records 802, 1766 and 1771A below under Issue D. I will order the WSIB to disclose the non-exempt information, which is the professional biographical information of the external organization's members in pages 1 and 2 and the list of media articles in pages 29 through 34 of record 1771A.

Issue C: Does the discretionary solicitor-client privilege exemption at section 19 apply to the emails at records 119, 850 and 2027?

[36] The WSIB withheld portions of record 119, and records 850 and 2027 in their entirety on the basis of the discretionary solicitor-client privilege exemption in section 19 of the *Act*. These three records are all email chains where the WSIB's counsel is a recipient or sender of the email. Section 19 states, in part,

A head may refuse to disclose a record,

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

(b) that was prepared by or for Crown Counsel for use in giving legal advice or in contemplation of or for use in litigation[.]

[37] The solicitor-client privilege exemption in section 19(a) (Branch 1) is based on

the common law, while the privilege in section 19(b) (Branch 2) is statutory.¹⁴ The privilege in both sections 19(a) and (b) encompasses solicitor-client communication privilege, which 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.¹⁵ The privilege covers the document containing the legal advice, the request for legal advice, and the information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁶ Confidentiality is an essential component of the privilege. Therefore, the WSIB is required to demonstrate the communication was made in confidence, either expressly or by implication.¹⁷

[38] The WSIB did not provide the IPC with copies of the information in records 119, 850 and 2027 claimed to be exempt under section 19. The WSIB provided an appendix describing the records subject to its exemption claim with its representations, which it agreed to share with the appellant. The WSIB submits the information subject to its solicitor-client privilege exemption claim contain confidential communications between WSIB employees and WSIB legal counsel where legal advice was sought and/or received. Referring to Order PO-3992, the WSIB submits the information at issue in the records include communications created by or for its legal counsel for use in providing legal advice. In the more detailed description of the records, the WSIB states records 119, 850, and 2027 contain confidential professional communications passing between the WSIB, or its agent, and the WSIB's legal counsel directly related to the seeking or receiving legal advice or legal assistance.

[39] In her representations, the appellant states that since she has not reviewed the information subject to the WSIB's section 19 claim, she cannot "make meaningful submission on whether the exemption applies." The appellant refers to the purpose of the *Act* in section 1, which requires that exemptions from the right of access be limited and specific. The appellant also refers to section 10(2), which requires a head to disclose as much of a record as can reasonably be severed without disclosing exempt information.

[40] Based on my review of the description of the records, a consideration of the context surrounding the creation of the records, and the parties' representations, I find the information withheld under section 19 in records 119, 850, and 2027 qualifies for exemption under section 19(a) of the *Act*. The WSIB has demonstrated to my satisfaction that the emails subject to its section 19 claim contain confidential communications between WSIB staff and legal counsel relating to the seeking or receiving of legal advice. From a review of the WSIB's description of the records it

¹⁴ There is also section 19(c) of the Act, which protects records "prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation." This section has no application in the circumstances.

¹⁵ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁶ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)

¹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 OR (3d) 321 (CA); Order MO-2936.

withheld under section 19, it appears that at least one of its legal counsel is a correspondent in the email chains in records 119, 850 and 2027. Furthermore, given the nature of the request and the types of records that were located, I am satisfied the information at issue in records 119, 850 and 2027 would contain confidential communications between WSIB staff and legal counsel in which legal advice was sought and/or received.

[41] I have also considered whether the records I have found exempt under section 19 could also be severed under section 10(2). However, previous orders have found that while some records containing information that qualifies for exemption under section 19 may be severed and partially disclosed, direct communications between solicitor and client that relate to the client seeking and receiving legal advice are protected by a class-based privilege and cannot be severed.¹⁸ As noted in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)*¹⁹, "Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege." I agree with and adopt this principle for the purposes of this analysis. Based on my review of the WSIB's representations and affidavit, I am satisfied that records 119, 850 and 2027 are solicitor-client communication records relating to the WSIB seeking or receiving legal advice. Accordingly, I find these records are subject to a class-based privilege and cannot be severed.

[42] Therefore, I find the information subject to the WSIB's section 19 claim in records 119, 850, and 2027 qualifies for exemption subject to my review of the WSIB's exercise of discretion below.

Issue D Did the WSIB exercise its discretion under sections 13(1) and 19? If so, should this office uphold the exercise of discretion?

[43] The exemptions in sections 13(1) and 19 are discretionary and permit 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 must exercise its discretion. In addition, the Commissioner may find the institution erred in exercising its decision where, for example: it does so in bad faith or for an improper purpose; it takes into account irrelevant considerations; or it fails to take into account relevant considerations.

[44] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁰ However, this office may not substitute its own discretion for that of the institution.²¹

¹⁸ See, for example: Orders MO-3409, PO-2051, and PO-3419-R.

¹⁹ (1997) 102 O.A.C. 71, 46 Admin L.R. (2d) 115, [1997] O.J. No. 1465 (Div. Ct.).

²⁰ Order MO-1573.

²¹ Section 54(2) of the *Act*.

[45] The WSIB submits it exercised its discretion to withhold the records at issue under sections 13(1) and 19 properly and in good faith. The WSIB states it disclosed a significant number of records, both initially and through the appeal process, and only redacted portions of the records that fit within the exemptions claimed.

[46] The WSIB states it considered the following factors in applying section 13(1) to withhold records 802, 1766 and 1771A:

- The purpose 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,
- Whether the 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, and
- The historic practice of the institution with respect to similar information.

The WSIB submits that full disclosure of records 802, 1766 and 1771A would be inconsistent with the purpose of section 13(1). The WSIB states it exercised its discretion under section 13(1) to protect the free flow of advice and recommendations that are necessary for good government decision-making. Further, the WSIB withheld the information subject to its section 13(1) claim because to do otherwise would discourage free and frank advice and recommendations within the WSIB in the future. Finally, the WSIB submits the disclosure of the records would not affect public confidence in the operation of the institution, but would reduce the confidence of public servants to provide the advice necessary for a government agency to be effective and efficient.

[47] The WSIB submits that it exercised its discretion to withhold records 119, 850 and 2027 pursuant to section 19 in good faith, with full appreciation of the relevant facts surrounding the request, and upon proper application of the relevant legal principles. The WSIB states it considered the following factors in its exercise of discretion:

- The interests protected by the section 19 exemption,
- The appellant's interest in gaining access to the records,
- The privileged context behind the records' creation,
- The ability of legal counsel to provide frank and candid advice – disclosure could undermine the WSIB's role to administer its purpose,
- The public disclosure of the 2020 Ontario Health (Cancer Care Ontario) report on McIntyre Powder exposure, and
- The laws and principles as stated by the IPC and various levels of courts regarding privileged records.

[48] The appellant accepts the WSIB's assertion that it acted in good faith in exercising its discretion. However, the appellant does not accept the WSIB's claim that it exercised its discretion properly because the WSIB has not provided reasons that contain a "meaningful justification" of its decision to withhold the records under sections 13(1) and 19. Therefore, the appellant submits it is impossible to determine whether the WSIB considered all of the relevant factors, or considered irrelevant factors, when it decided to withhold the records.

[49] The appellant submits it is not possible for the IPC to independently review whether the WSIB considered the relevant factors or considered irrelevant factors because it did not provide any explanation regarding its exercise of discretion. The appellant submits the WSIB's submissions amount to no more than a bald assertion that it considered the relevant factors rather than providing meaningful information that would enable the IPC to conduct an independent review. Given these circumstances, the appellant submits that I should send the matter back to the WSIB for an exercise of discretion based on proper considerations.

[50] Based on my review of the parties' representations, I am satisfied the WSIB properly exercised its discretion under sections 13(1) and 19 in deciding to withhold the records at issue. I find the WSIB considered the nature of the information in the records and the interests the claimed exemptions seek to protect, which are significant. In addition, I find the WSIB considered a number of other relevant factors including the purposes of the *Act*, the need to protect the frank and free flow of advice and recommendations between staff, and the need to protect the solicitor-client relationship. I am also satisfied the WSIB acted in good faith and did not take into account irrelevant considerations.

[51] I acknowledge the appellant's concerns regarding the WSIB's "bald assertions" and whether it provided a sufficient explanation of its exercise of discretion. However, upon review of the records that were provided to me and the evidence provided by the WSIB, I find the WSIB provided sufficient evidence to demonstrate that it considered

the relevant considerations and did not consider irrelevant considerations in exercising its discretion to withhold the information at issue. I find further support for this finding in the fact that the WSIB disclosed a significant portion of the records to the appellant in response to her request and during the appeal process.

[52] Accordingly, I find the WSIB exercised its discretion under sections 13(1) and 19 appropriately and I uphold its exercise of discretion.

Issue E: Is there a compelling public interest in the disclosure of the records I have found to be exempt under section 13 that clearly outweighs the purpose of the exemption?

[53] The appellant raised the application of the public interest override in section 23 to the information at issue. 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.

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.

[54] As noted above, section 19 is not listed as one of the exemptions to which the public interest override may apply. Section 13, however, is.

[55] 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.²²

[56] In considering whether there is a *public interest* in disclosure of the record, the first question is to ask whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.²³ 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

²² Order P-244.

²³ Orders P-984 and PO-2607.

opinion or to make political choices.²⁴

[57] A public interest does not exist where the interests being advanced are essentially private in nature.²⁵ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.²⁶ A public interest is not automatically established where the requester is a member of the media.²⁷

[58] The word *compelling* has been defined in previous orders as “rousing strong interest or attention.”²⁸

[59] Any public interest in *non*-disclosure that may exist must also be considered.²⁹ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of *compelling*.³⁰

[60] 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 this case, section 13(1)) in the specific circumstances. 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.³¹

The parties' representations

[61] The WSIB submits there is no compelling public interest in the disclosure of the records exempt under section 13(1). Specifically, the WSIB states,

- There is another public process to address public interest considerations. The WSIB refers to the section of its website dedicated to the McIntyre Powder matter which includes previous and current research on the topic.
- A significant amount of information has already been disclosed. The WSIB states the appellant's request has resulted in over 2,000 records being processed and released.

²⁴ Orders P-984 and PO-2556.

²⁵ Orders P-12, P-347 and P-1439.

²⁶ Order MO-1564.

²⁷ Orders M-773 and MO-1074.

²⁸ Order P-984.

²⁹ *Ontario Hydro v. Mitchinson*, [1996] OJ No. 4636 (Div. Ct.).

³⁰ Orders PO-2072-F, PO-2098-R and PO-3197.

³¹ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1998] O.J. No. 420 (Div. Ct.), leave to appeal granted [1998] O.J. No. 2261 (C.A.). Appeal allowed [1999], 118 O.A.C. 108 (C.A.). Leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.). the methods and processes it engaged to undertake accredited scientific research into the potential health consequences of occupational aluminum powder exposure.

- There has been wide public coverage or debate of the issue and the records subject to the WSIB's section 13(1) claim would not shed further light on the matter.
- The records do not respond to the public interest raised by the appellant.

The WSIB submits it has already disseminated extensive information on occupational aluminum exposure. The WSIB states it has also provided information the public about

[62] The WSIB submits the records remaining at issue relate to contract negotiations, risk assessments, external communication advice, and private individuals' names and claim file numbers.

[63] The appellant again states it is not possible for her to make meaningful submissions on the specifics of the records because she does not know the content of the information withheld under section 13(1). However, the appellant refers to Order PO- 4005, which concerned this request and the same parties. In Order PO-4005, the adjudicator considered the WSIB's fee estimate and refusal of the appellant's request for a fee waiver. The adjudicator found that records relating to the effects of occupational aluminium exposure and the WSIB's occupational aluminum exposure policy-making process are matters of public interest.³² In her determination of whether the appellant was entitled to a fee waiver, the adjudicator found that the records relate directly to a public health and safety issue pursuant to section 57(4)(c). The appellant submits this finding demonstrates there is a *compelling* public interest in the disclosure of the records exempt under section 13(1). Finally, the appellant states the adjudicator found that "the dissemination of records relating to the creation, implementation, review and revocation of the WSIB's former occupational aluminum policy would benefit public health or safety."³³

[64] Given these findings in Order PO-4005, the appellant submits there is clearly a compelling public interest in the disclosure of the records that outweighs the purposes of the exemption in section 13(1) of the *Act*.

[65] In response, the WSIB refers to paragraphs 57 and 58 of Order PO-4005, in which the adjudicator stated she was not persuaded that the disclosure of *all* of the records responsive to the appellant's request will benefit public health and safety as required by section 54(4)(c). The adjudicator accepted the WSIB's submission that the scope of the request was broad and likely captured records "relatively benign in nature and would not serve to identify or further advance the understanding of a public health or safety concern, or otherwise benefit public health or safety." In this case, the WSIB reiterates the information that remains at issue relate to contract negotiations, risk assessments, and external communication advice. The WSIB submits there is not compelling public interest in the disclosure of these records that would clearly outweigh

³² Order PO-4005 at para 53.

³³ *Ibid.*, at para 59.

the purpose of the section 13(1) exemption.

Analysis and Findings

[66] I find the public interest override in section 23 does not apply to the information withheld under section 13(1) in the circumstances of this appeal.

[67] The information at issue is the information that I have found the WSIB properly withheld from records 802, 1766 and 1771A on the basis that it would reveal the advice or recommendations of a public servant with respect to occupational aluminum exposure and the WSIB's Operational Policy regarding its use.

[68] As stated above, there are two requirements for the application of section 23: 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.

[69] I agree with the finding in Order PO-4005 that the dissemination of records relating to the creation, implementation, review and revocation of the WSIB's former occupational aluminum policy would benefit public health or safety. I also accept the appellant's submission that one can infer there is a compelling public interest in the disclosure of information that would benefit public health or safety. Specifically, I accept there is a compelling public interest in information relating to the effect of occupational aluminum exposure and the WSIB's occupational aluminum exposure policy-making process.

[70] However, none of the information that remains at issue would serve the purpose of shedding light on the operations of government or the development and of the operational policy regarding occupational aluminum exposure. The information that remains at issue relates to McIntyre Powder and the WSIB's operational policies in a general way. I find it would not, if disclosed, serve the purpose of informing or enlightening the citizenry about the activities of the WSIB in the creation, implementation, review and revocation of the Operational Policy relating to occupational aluminum exposure. Therefore, while I agree there is a compelling public interest in information relating to the use and effects of occupational aluminum and policies relating to its use, I find the information at issue is not particularly relevant to the public interest identified by the appellant and Order PO-4005. I note that in Order PO-4005, the adjudicator was not persuaded that dissemination of *all* of the responsive records would benefit health or safety and that, as a result of the broad scope of her request, some of the responsive records are "relatively benign in nature."³⁴ Based on my review, I find that the information at issue in records 802, 1766 and 1771A is benign in nature and its disclosure would not serve to enlighten the citizenry about the use and effects of occupational aluminium and the WSIB's policies relating to it.

[71] In any case, even if I were to find that there is a compelling public interest in the

³⁴ Order PO-4005, at para 57.

disclosure of the information at issue in records 802, 1766 and 1771A, I find the interest in the information at issue would not outweigh the purposes of section 13(1). I have carefully reviewed the information withheld under section 13(1), which includes contain advice, recommendations, policy options, or information that would allow one to accurately infer the advice or recommendations. Further, the information at issue in these records represents a part of the deliberative process leading to a final decision. The purpose of section 13(1) is to protect the frank and free flow of advice and recommendations in an institution.

[72] Given these circumstances, I am unable to find that the public interest identified by the appellant would override the purpose of the section 13(1) exemption in relation to the information that remains at issue.

[73] Accordingly, I find the appellant has not established a compelling public interest in the disclosure of the information I found exempt under section 13(1) that would override the purpose of that exemption. I uphold the decision of the WSIB to withhold the information at issue in records 802, 1766 and 1771A under section 13(1).

ORDER:

1. I order the WSIB to disclose the following portions of Record 1771A to the appellant by **November 15, 2021** but not before **November 10, 2021**
 - Professional biographical information of the members of the external organization at pages 1 and 2; and
 - The list of media articles (date, title, author, hyperlink) with the exception of any bulleted notations at pages 29-34.
2. I uphold the WSIB's decision to withhold the remainder of the information at issue.
3. 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 information disclosed to the appellant.

Original signed by _____

Justine Wai
Adjudicator

October 8, 2021 _____