OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F20-44

WORKERS' COMPENSATION BOARD

Ian C. Davis
Adjudicator

October 5, 2020

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Summary: The applicant made a request to the Workers' Compensation Board (WorkSafeBC) for access to records relating to two of his worker's compensation claims. WorkSafeBC refused to disclose the disputed information under s. 13(1) (advice or recommendations) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that some, but not all, of the withheld information was advice or recommendations under s. 13(1). The adjudicator also found that s. 13(2) did not apply to the advice or recommendations and, therefore, WorkSafeBC properly withheld that information under s. 13(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 13(2)(a), 13(2)(g) and 13(2)(n).

INTRODUCTION

[1] The applicant made a request to the Workers' Compensation Board (WorkSafeBC) for access to records relating to two of his worker's compensation claims. WorkSafeBC disclosed parts of the records to the applicant, but withheld the remaining information under ss. 13(1) (advice or recommendations) and 22(1) (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review WorkSafeBC's decision. During mediation, WorkSafeBC disclosed further information to the applicant and withdrew its reliance on s. 22(1). Mediation failed to resolve the remaining s. 13(1) issue and the matter proceeded to inquiry.

PRELIMINARY MATTER

[3] In the applicant's written submissions, he argues that WorkSafeBC failed to identify all of the records responsive to his request, contrary to s. 6 (duty to assist applicants) of FIPPA.[1] He also raises s. 25(1)(b) of FIPPA (disclosure clearly in the public interest) and suggests that the *Canadian Charter of Rights and Freedoms* may require disclosure of the disputed information.[2]

[4] WorkSafeBC submits that these issues are new and I should decline to add them to the inquiry at this late stage.[3] WorkSafeBC says the issues were not in the OIPC Investigator's fact report or the notice of inquiry and the applicant did not seek permission to add them. WorkSafeBC submits that it would be prejudiced by the addition of these new issues because it "has not had an adequate opportunity to make submissions or provide evidence regarding these matters".[4]

[5] The applicant says the absence of these issues in the fact report "may have been an oversight or an effort to maintain brevity" on the part of the OIPC investigator.[5]

[6] I decline, for the following reasons, to add the issues raised by the applicant to this inquiry. Based on the material before me, I find these issues are new. Parties may raise new issues at the inquiry stage only if they request and receive permission from the OIPC to do so.[6] I find the applicant did not seek permission to add these new issues and the OIPC did not grant permission to add them. There is also nothing in the materials before me to indicate that the applicant informed the OIPC that the fact report and the notice of inquiry did not accurately reflect the inquiry issues.

[7] Further, there is no evidence that the applicant raised these new issues earlier in the OIPC process. Therefore, the parties have not had the benefit of the OIPC mediation process on these issues, which could possibly have resolved or at least clarified them. In my view, it would undermine the OIPC mediation process and prejudice WorkSafeBC to add the new issues to the inquiry now.

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[1] Applicant's submissions at pp. 9-10 and 14.
[2] Applicant's submissions at pp. 11-12 and 14.
[3] WorkSafeBC's reply submissions at paras. 1-4.
[4] WorkSafeBC's reply submissions at para. 4.
[5] Applicant's submissions at p. 14.
[6] Order F16-30, 2016 BCIPC 33 (CanLII) at para. 13.

ISSUE

[8] The only issue in this inquiry is whether WorkSafeBC is authorized under s. 13(1) to refuse to disclose the disputed information. Based on s. 57(1) of FIPPA, the burden is on WorkSafeBC to show that s. 13(1) applies.

BACKGROUND

[9] Under the *Workers Compensation Act*, WorkSafeBC's mandate is to rehabilitate injured workers, facilitate their timely return to work and compensate them for loss of wages while they recover from workplace injuries.[7]

[10] The applicant injured his back in early 2008. He submitted a claim to WorkSafeBC for a thoracic strain/sprain. WorkSafeBC accepted that claim. The applicant then re-injured his back in 2010. He submitted another claim, which WorkSafeBC also accepted.

[11] In 2017, an MRI scan suggested that the applicant had a further injury that his physician attributed to the 2008 injury. The applicant sought a decision from WorkSafeBC based on this new medical evidence. In 2018, WorkSafeBC rejected the 2017 MRI findings and the applicant's claim of chronic thoracic back pain (the 2018 decisions).

[12] The applicant sought a review of the 2018 decisions. A WorkSafeBC review officer varied the 2018 decisions, accepting both the injury demonstrated in the 2017 MRI scan and the chronic thoracic back pain.

INFORMATION IN DISPUTE

[13] The information that WorkSafeBC is withholding under s. 13(1) is parts of 11 pages of emails relating to the applicant worker's compensation claims. The emails were sent in 2018 between WorkSafeBC employees.

SECTION 13 – ADVICE OR RECOMMENDATIONS

[14] Section 13(1) states that the head of a public body must refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[15] The purpose of s. 13 is to allow for full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that

[7] The information in this background section is based on WorkSafeBC's initial submissions at para. 3 and the applicant's submissions at Appendix D (Review Decision), which I accept.

would occur if the deliberative process of government decisions and policy-making were subject to excessive scrutiny.[8]

[16] The principles that apply to the s. 13 analysis are well-established and include the following:

- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.[9]
- Recommendations involve "a suggested course of action that will ultimately be accepted or rejected by the person being advised" and can be express or inferred.[10]
- "Advice" has a broader meaning than "recommendations".[11] Advice includes providing an evaluative analysis of options or an opinion that involves exercising judgment and skill, even if the opinion does not include a communication about future action.[12]
- The compilation of factual information and weighing the significance of matters of fact is an integral component of an expert's advice and informs the decision-making process. Thus, s. 13(1) applies to factual information compiled and selected by the expert using his or her expertise, judgment and skill to provide explanations necessary to the public body's deliberative process.[13]

[17] The first step in the s. 13 analysis is to consider whether the disputed information is advice or recommendations under s. 13(1). The second step is to consider whether the disputed information falls within s. 13(2), which sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1).[14]

Applicant's submissions

[18] The applicant submits that s. 13(1) does not apply to the disputed information in this case.[15] However, his supporting arguments are, in general, not

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[8] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 43-44 [*John Doe*]; Order F15-61, 2015 BCIPC 67 (CanLII) at para. 28.
[9] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135.
[10] *John Doe*, *supra* note 8 at paras. 23-24.
[11] *John Doe*, *ibid* at para. 24.
[12] *John Doe*, *ibid* at para. 26; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras. 103 and 113 [*College*].
[13] *College*, *ibid* at para. 111; *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.
[14] Section 13(3) does not apply in this case because the disputed information has not been in existence for 10 or more years.
[15] Applicant's submissions at p. 11.

focused on the legal requirements of ss. 13(1) and 13(2). Rather, his position is that his worker's compensation claims were "mishandled in such an unfair manner that full disclosure of records is necessary to restore some level of fairness."[16] He says WorkSafeBC caused unreasonable delay, breached his privacy rights and made decisions that were clearly flawed. The applicant argues that, given the mishandling of his claim, the withheld information should be disclosed "for transparency".[17]

[19] In response, WorkSafeBC says that, "[a]t its core, the Applicant's issue is that he feels aggrieved by the manner in which his claim was handled."[18] WorkSafeBC submits that "the OIPC does not have authority under FIPPA to address the fairness of WorkSafeBC claims handling and the merits of workers' compensation claims decisions".[19] WorkSafeBC notes that there is a robust appeal scheme under the *Workers Compensation Act*. WorkSafeBC also says that the "language of s. 13 of FIPPA does not in any way suggest that its scope is limited by whether an Applicant perceives they have been prejudiced by a public body's actions."[20]

[20] I recognize that the applicant feels that WorkSafeBC seriously mishandled his claims, which he says has had "an incredibly negative impact" on his life.[21] Much of the information he provides in his submissions is helpful context for this inquiry. However, I find many of the points the applicant makes in his submissions are not relevant to whether s. 13(1) applies to the disputed information in this inquiry and I do not have the jurisdiction to address them.[22]

[21] As noted above, the applicant's main argument is that WorkSafeBC should be ordered to disclose the withheld information "to restore some level of fairness". He says his situation "begs for complete disclosure to assure transparency and accountability into a grossly mishandled process that caused unnecessary pain, delays and financial hardship."[23] As I understand the applicant, he is arguing that disclosure of the withheld information is fair compensation for WorkSafeBC mishandling his claims.

[22] I see no legal basis for the applicant's approach to s. 13 or FIPPA generally, and the applicant did not cite any caselaw in support. My authority and role under FIPPA is not, as the applicant suggests, to "restore some level of fairness" in the workers' compensation process. The only issue I have the

[16] Applicant's submissions at p. 1.
[17] Applicant's submissions at pp. 10-11.
[18] WorkSafeBC's reply submissions at para. 3.
[19] WorkSafeBC's reply submissions, *ibid*.
[20] WorkSafeBC's reply submissions at para. 10.
[21] Applicant's submissions at p. 3.
[22] However, I accept that some of the applicant's points are relevant to whether WorkSafeBC properly exercised its discretion in this case. I address that issue below.
[23] Applicant's submissions at p. 14.

authority to decide is whether WorkSafeBC properly withheld the disputed information under s. 13(1). The fact that the applicant believes that WorkSafeBC harmed him with its handling of his claims does not alter the scope and application of s. 13.

Section 13(1)

[23] WorkSafeBC says the emails in dispute were sent prior to, and in the course of making, the 2018 decisions and are between "WorkSafeBC's Case Managers and the claims management team consisting of the Manager Client Services, Directors and the Vice President of Claims Services."[24] WorkSafeBC's evidence is that Case Managers are responsible for gathering and assessing claims information and adjudicating claims, while the Manager Client Services is responsible for providing direction, advice and oversight to Case Managers.[25]

[24] WorkSafeBC submits that the withheld information is clearly advice and recommendations developed by or for a public body.[26] WorkSafeBC argues that the information relates to the process of adjudicating the applicant's claims and includes deliberations, the seeking of advice, possible options for future actions, opinions on an internal plan of action, and discussions of recommended options for managing the applicant's claim.[27]

[25] Based on my review of the records and the parties' submissions, I agree that the disputed emails are internal communications between WorkSafeBC employees involved in the handling of the applicant's claims. The emails were all sent in 2018 prior to WorkSafeBC making the 2018 decisions. I accept WorkSafeBC's evidence that the Case Managers are the principal decision-makers. I also find, based on WorkSafeBC's submissions and the records, that the process leading up to the 2018 decisions was a team effort that involved preliminary decisions made by various WorkSafeBC team members about how to manage the applicant's file.

[26] In my view, s. 13(1) only applies to a relatively small amount of the withheld information. In one email, a Case Manager appears to be providing an update on the status of the applicant's claims to the Manager Client Services.[28] I find that the withheld information in the updates is advice. I find this information consists of, or would reveal, the Case Manager providing the Manager Client Services with an evaluative analysis of options, based on the Case Manager's claims management expertise, in the context of deciding as a team how to proceed with the applicant's file.

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[24] WorkSafeBC's initial submissions at para. 11.
[25] Affidavit #1 of Manager Client Services at paras. 4-5.
[26] WorkSafeBC's initial submissions at paras. 21.
[27] WorkSafeBC's initial submissions at paras. 23-27.
[28] Records at p. 1.

[27] In another email, a member of the case management team provides a briefing note for the Vice President of Claims Services about the applicant's claims.[29] I find that part of the withheld information qualifies as recommendations because the information is recommended options about how to proceed with an investigation.

[28] I also find that s. 13(1) applies to parts of two emails between members of the claims management team.[30] In my view, this information qualifies as advice because it reveals the Case Manager's and the Manager Client Services' opinions on the merits of the applicant's claims, which I accept is based on claims adjudication expertise. I am satisfied that this information forms part of WorkSafeBC's deliberative process in deciding whether to accept the applicant's claims.

[29] As for the balance of the withheld information, I find it is not advice or recommendations under s. 13(1). In Order F19-41, the adjudicator found that advice or recommendations does not include "straightforward information of a narrative and factual type … about what was said and done, decisions made and instructions given."[31] Further, past orders establish that advice or recommendations does not typically include requests for advice or information, even when the request discloses the scope of the advice or information requested.[32] Past orders have also said that a decision that has already been made does not qualify as advice or recommendations under s. 13(1).[33]

[30] In my view, the balance of the withheld information falls into these categories because it is:

- decisions WorkSafeBC has already made;[34]
- factual information about the state of affairs or events that occurred during the handling of the applicant's claims,[35] work already completed, next steps that do not reveal anything about the substance of the deliberative process, or about workload, scheduling or coordination;[36]

[29] Records at p. 2.
[30] Records at pp. 10-11 (August 9, 2018, 1:18 PM and 12:28 PM emails).
[31] Order F19-41, 2019 BCIPC 46 (CanLII) at paras. 24.
[32] Order F15-33, 2015 BCIPC 36 (CanLII) at para. 24; Order F17-39, 2017 BCIPC 43 (CanLII) at para. 37.
[33] Order F19-41, 2019 BCIPC 46 (CanLII) at para. 24; Order F19-27, 2019 BCIPC 29 (CanLII) at para. 29 (fourth bullet).
[34] Records at pp. 2 and 6.
[35] Records at pp. 5 and 10-11 (August 9, 2018, 1:18 PM and 12:28 PM emails).
[36] Records at pp. 8 (June 6, 2018, 8:44 AM email) and 10-11 (August 9, 2018, 1:18 PM and 12:28 PM emails).

- a request for an update, including related factual statements, that does not reveal advice or recommendations;[37]
- a request for advice that does not reveal the advice requested and which provides purely administrative direction;[38] and
- a simple question and answer that does not reveal any advice or recommendations.[39]

[31] In my view, none of the information in the list immediately above reveals advice or recommendations, directly or through inference.

Section 13(2)

[32] The next step is to consider whether any of the information that I found is, or would reveal, advice or recommendations falls within s. 13(2). Section 13(2) sets out various kinds of records and information that the head of a public body must not refuse to disclose under s. 13(1).

[33] The applicant quoted ss. 13(2)(a), (g) and (n) in his submissions.[40] Those subsections provide as follows:

> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material, …
>
> (g) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities, …
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

[34] WorkSafeBC submits that the withheld information does not fall under any of the subsections of s. 13(2).[41] However, it only addressed s. 13(2)(n) in any detail. With respect to that subsection, WorkSafeBC submits that:

> If the applicant is suggesting section 13(2)(n) applies to all decisions made in the course of arriving at the final adjudicative decision, then WorkSafeBC respectfully disagrees. Section 13(2)(n) applies to the final decision made in the exercise of the statutory discretion. To apply it to every decision in the course of arriving at the final decision would disclose the deliberative

[37] Records at p. 8 (July 9, 2018, 12:55 email).
[38] Records at pp. 10-11 (August 9, 2018, 12:28 PM emails).
[39] Records at p. 10 (August 9, 2018, 12:39 PM emails).
[40] Applicant's submissions at p. 13.
[41] WorkSafeBC's initial submissions at para. 28; WorkSafeBC's reply submissions at para. 9.

> process and it is clearly established at law that section 13 protects the deliberative process. In accordance with WorkSafeBC's policy, WorkSafeBC has already communicated the claim decision to the Applicant in a decision letter which explains the evidence considered and the reasons for the decision.[42]

[35] In my view, s. 13(2)(n) does not apply to the withheld information. I find that, in this context, the 2018 decisions were expressed in decision letters, which are not the records at issue here. Based on my review of the records, I find that the withheld information does not comprise a decision, but rather is part of the deliberative process leading up to the 2018 decisions.

[36] Further, I am satisfied that the withheld information is not factual material under s. 13(2)(a). As I found above, this information is opinions and recommended options for WorkSafeBC's future decisions or actions.

[37] I also find that s. 13(2)(g) does not apply because the withheld information is internal email communications, not the kind of final report or final audit described in s. 13(2)(g).

[38] Finally, I am satisfied that the other parts of s. 13(2) that the parties did not address clearly do not apply to the withheld information in this case.

Summary – ss. 13(1) and 13(2)

[39] To summarize, I found that some, but not all, of the withheld information is advice or recommendations under s. 13(1). WorkSafeBC is not authorized to withhold the information that I found is not advice or recommendations under s. 13(1). With respect to the information that is advice or recommendations, I found that none of the subsections in s. 13(2) apply. Therefore, WorkSafeBC is authorized to withhold this information under s. 13(1).

Exercise of Discretion

[40] The final issue in this inquiry relates to WorkSafeBC's exercise of discretion. Section 13(1) is a discretionary exception to access under FIPPA. The public body must establish that they have considered, in all the circumstances, whether to disclose the information even though the discretionary exemption applies. If the public body has not exercised its discretion, the Commissioner can require it to do so.

[41] The public body must also exercise its discretion appropriately. This means that the decision must not have been made in bad faith or for an improper purpose, and the public body must have considered all relevant factors and no

[42] WorkSafeBC's reply submissions at para. 9.

irrelevant factors.[43] If the Commissioner determines that the public body exercised its discretion improperly when it refused access to the records, the Commissioner can require the public body to reconsider.

[42] WorkSafeBC submits that it exercised its discretion under s. 13(1) and did so appropriately.[44] WorkSafeBC says it considered "the nature and sensitivity of the information, whether disclosure will increase public confidence in the operation of WorkSafeBC, as well as whether there is sympathetic or compelling need to release the information."[45] WorkSafeBC submits that the relevant considerations did not require it to exercise its discretion to disclose the disputed information.

[43] The applicant submits that WorkSafeBC's decision to refuse access to the disputed information is a "discretionary convenience" for WorkSafeBC that is outweighed by the importance of the information to the applicant and the "need for transparency, accountability, and fairness".[46]

[44] I accept WorkSafeBC's sworn evidence that it did consider whether to disclose the disputed information despite the application of s. 13(1). I also find there is no basis to interfere with WorkSafeBC's exercise of discretion in this case. In my view, WorkSafeBC's evidence establishes that it considered the relevant factors, including the ones mentioned by the applicant. I am satisfied that WorkSafeBC did not consider any irrelevant factors and I see no evidence to suggest that WorkSafeBC made its decision in bad faith or for an improper purpose.

CONCLUSION

[45] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to subparagraph 2 below, I confirm in part WorkSafeBC's decision to withhold the disputed information under s. 13(1) of FIPPA.

2. WorkSafeBC is not authorized to refuse to disclose the information I have highlighted in a copy of the records that will be provided to it with this order. WorkSafeBC is required to give the applicant access to the highlighted information.

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[43] *John Doe*, *supra* note 8 at para. 52.
[44] WorkSafeBC's initial submissions at para. 29; Affidavit #1 of Manager Client Services at para. 12.
[45] Affidavit #1 of Manager Client Services, *ibid*.
[46] Applicant's submissions at pp. 1 and 4.

3. WorkSafeBC must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

Pursuant to s. 59 of FIPPA, WorkSafeBC is required to comply with this order by November 18, 2020.

October 5, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F18-77177