Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2551

Appeal PA-060097-1

Workplace Safety and Insurance Board

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NATURE OF THE APPEAL:

The Workplace Safety and Insurance Board (the Board) received a request from a member of the media for access to information from the injury claims database from 2000 to the date of the request, including fields that reveal the following information:

> Filing date, firm name, municipality, business group, occupation, nature of injury and claims status.

The requester subsequently amended the request by indicating that he was seeking this information for firms whose names appear more than five times in the five year time period mentioned. He also indicated that the request was for lost time claims from the injury database and should include the following fields of information:

> Firm name, municipality, industry sector, claim registration date, status, occupation, nature of injury, and any fields that measure time lost from work.

The requester also asked that the fee be waived pursuant to section 57(4)(c) of the *Act*.

In response to the request, the Board issued a decision letter in which it denied access in full to the information on the basis that the record contained personal information that must be withheld pursuant to the mandatory personal privacy exemption found at section 21(1) of the *Act*. The Board also indicated that the presumptions of an unjustified invasion of privacy found in sections 21(3)(a) and (c) of the *Act* applied to the record.

The Board took the position that there was a reasonable expectation that individual workers could be identified by the linkage of this data to information available to the requester from other sources but that it would be prepared to provide the requester with access to the information in its entirety, if the requester signed an undertaking not to link the data to other information or data that related to a specific individual. On this basis, the Board concluded that the requested information qualifies as personal information, as required for section 21(1) to apply.

The requester (now the appellant) appealed the decision of the Board.

Although mediation was not successful, the Board confirmed that it would waive the fee in this appeal. As a result, fee waiver is no longer an issue between the parties. Also, at mediation, the appellant raised the application of section 23 of the *Act*, suggesting that it is in the public interest that the requested information be released. Mediation did not resolve the remaining issues, and the appeal moved to the adjudication stage of the appeal process.

I began this adjudication by issuing a Notice of Inquiry to the Board, inviting the Board to submit representations, which I received. I then issued a modified Notice of Inquiry to the appellant and provided him with a complete copy of the Board's representations. I invited the appellant to submit representations, which I subsequently received. I then provided the Board with a complete copy of the appellant's representations and invited the Board to file representations in reply, which I received.

RECORDS:

The record at issue is an electronic database of lost time claims from January, 2000 to December, 2005 for firms whose names appear more than five times in this period. The database requested includes the following fields of information:

> Firm name, municipality, industry sector, claim registration date, claim status, occupation, nature of injury, and the number of days lost from work.

To be clear, the record does not contain the name of the injured worker related to each claim.

DISCUSSION:

As noted above, the Board takes the position that the information contained in the responsive record is personal information and is subject to the personal privacy exemption (section 21(1)) in the *Act*. The Board also argues that the public interest override provision (section 23) of the *Act* does not apply in the circumstances of this appeal.

PERSONAL INFORMATION

In order to determine whether section 21(1) of the *Act* applies to the record at issue, I must initially decide whether the record contains "personal information" and, if so, to whom it relates. If it is determined that the record does not contain personal information, then section 21(1) cannot be relied on to withhold the record.

Personal information is defined in section 2(1) of the Act which reads, in part:

> "personal information" means recorded information about *an identifiable* individual" [emphasis added]

As noted above, the record at issue does not name any individuals but rather contains the following information for each injury claim: firm name, municipality, industry sector, claim registration date, claim status, occupation, nature of injury, and the number of days lost from work.

The Board submits that the information requested by the appellant in this appeal is personal information as defined in the *Act* because there is a reasonable expectation that individuals may be identified if the information is disclosed. In its representations, the Board states:

> First, it is likely that the requested information could be combined with other information otherwise available to, and accessible by, the appellant such that individuals could be identified. The appellant is a member of the media and conducts investigative reporting. If the requested information is disclosed, the appellant will be able to:
>
> - determine the location of an employer's business,
> - know that an individual has been absent from work for a particular period of time due to a specific type of injury, and
> - determine the benefit eligibility status of an individual's claim.
>
> This information could be combined with information the appellant obtains from other accessible sources such as reported cases, witnesses and especially the workplace to identify particular individuals.
>
> Second, and more importantly, the appellant has explicitly declined to sign a confidentiality undertaking on at least two occasions because it is his intent to conduct investigative reporting to uncover public interest stories for which he has acknowledged that interviewing individual claimants is necessary. In other words, identifying particular individuals is necessary for the appellant to carry out his undertaking. It is, therefore, not only a reasonable expectation that individuals may be identified, but the express intentions of the appellant make the identification of individuals likely.
>
> The WSIB submits that the circumstances of this appeal fit within the tests developed and applied by the IPC to determine whether the information at issue is "personal information" for the purpose of section 2(1) of FIPPA. Specifically, there is a reasonable expectation that disclosure of the requested information will result in the identification of an individual(s).

The appellant takes the position that the record does not contain personal information. He notes that he has not asked for the names, addresses, birth dates or sex of any individuals and that this data "is for all intents and purposes anonymous." The appellant states:

> It is not reasonable to expect that the identity of individuals will be disclosed. In its representations, *the WSIB provides no evidence that we will be able to identify individuals. They assert that I said I will be "interviewing individual claimants" but neglect to say how I will access them*. At the Toronto Star, we are continually contacted by individuals who wish to tell their story. Among those are WSIB claimants. Also, it is very easy with or without these records, to contact a union and ask them to pass on a request to workers to speak with us. (emphasis added)

In representations filed in reply, the Board states that it is of the view that individuals may be identified by the release of this information as it may easily be linked to articles in the press, reported cases and through investigative reporting. The Board adds:

> As previously submitted, [identification] could clearly be accomplished if the appellant obtained access to the information such as claim registration date, nature of injury and occupation in conjunction with other information particular to an employer. A firm name defines a distinct population of individuals or employees. Through a combination of the variables requested, use of social engineering, matching with other databases or internet searches, it is reasonably foreseeable to identify specific individuals who have experienced an injury while working for that employer.

Analysis

I have carefully reviewed the representations of the parties and the record at issue. I am not satisfied that there is a reasonable expectation that individuals can be identified as a result of the disclosure of the record. Therefore, I find that the information requested by the appellant is not personal information as that term is defined in the *Act*.

The Board makes two principle arguments relating to this issue. The Board argues that the appellant will have information relating to the name of the company, the number of days absent from work, and the benefit eligibility status as a result of the disclosure of the record and will be able to combine the information in the record with other sources of information such as reported cases, articles in the press, witnesses and the workplace to identify particular individuals.

The Board's second argument is that the appellant has explicitly declined to sign a confidentiality undertaking on at least two occasions because it is his intent to conduct investigative reporting to uncover public interest stories and, the Board concludes from this, that it is the intention of the appellant to identify particular individuals using the record that is at issue.

The following test for the determination of whether an individual is "identifiable" and therefore whether information is "personal" has been applied by this office in a number of previous orders:

> If there is a reasonable expectation that the individual can be identified from information, then such information qualifies under subsection 2(1) as personal information. [Order P-230]

This approach was approved by the Court of Appeal in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.), affirming a decision of the Divisional Court (reported at [2001] O.J. No. 4987) on a judicial review application, and I adopt it here.

A number of previous orders from this office have also dealt with the nature of the evidence required to establish a reasonable expectation that individuals can be identified by the disclosure of the information that is at issue. In Order P-1389, Adjudicator Donald Hale dealt with a request made to the Ministry of Health and Long-Term Care for the total billing amounts relating to the ten highest billing general practitioners in Toronto. In considering the Ministry's representations on the issue of whether individuals could be identified, Adjudicator Hale stated:

> The Ministry further submits that there is a strong possibility that there exists some external information in the public domain or in the general practitioner community which could be linked to the information at issue to make a connection between a particular billing amount in the record and the practitioner associated with that billing.
>
> ...
>
> In my view, the Ministry's arguments rely on the unproven possibility that there **may** exist a belief or knowledge of the type described. I have not been provided with any substantive evidence that information exists outside the Ministry which could be used to connect the dollar amounts to specific doctors. The scenario described by the Ministry is, in my view, too hypothetical and remote to persuade me that individual practitioners could actually be identified from the dollar amounts contained in the record. I find, therefore, that the information at issue is not about an **identifiable** individual and does not, therefore, meet the definition of "personal information" contained in section 2(1) of the *Act* [original emphasis].

This issue was also considered by former Adjudicator Irena Pascoe in Order PO-1880, which was affirmed by the Court of Appeal in the decision referred to above. The information at issue was the top ten items that the top billing general practitioner in Toronto billed for, the number of times he or she billed for those items and an explanation of those items. The Ministry had a "small cell count" policy that stated that there was a possibility that an individual might be identified by the disclosure of anonymized personal health information where it appeared in tabulations of less than five. The Ministry relied on this policy to support its decision to withhold the requested information. In that order, former Adjudicator Pascoe stated:

> With respect to the current appeal, although the Ministry refers to a number of previous orders and correctly identifies the conclusions reached in those cases, the Ministry does not provide any evidence applying these general principles to the circumstances of this appeal. For example, although the Ministry refers to Order P-316 and states that "the reasonable expectation of identification is based on a combination of information sought and otherwise available", it does not provide any evidence as to what the "otherwise available" information might be. Similarly, in referring to Orders P-651, P-1208 and 27, the Ministry does not provide any specific information as to how it would be possible to identify the affected person given the circumstances of this particular case.

Former Adjudicator Pascoe found that there was no reasonable expectation that individuals might be identified by the disclosure of the information at issue in that order. On the judicial review application, in the judgment affirmed by the Court of Appeal, the Divisional Court stated:

> The Ministry, apart from its small cell count finding, did not proffer any submissions establishing a nexus connecting the record, or any other information, with the affected person. Any connection between the record and the affected person, in the absence of evidence, is merely speculative. The Ministry made no submissions explaining its small cell count finding or showing how it applied to the facts of the case. No other information was identified by the Ministry or by the affected person that could link the record to an identifiable individual.

In Order PO-2037 (upheld on Judicial Review in *Ontario (Attorney General v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)), former Senior Adjudicator David Goodis also had an opportunity to consider this issue in the context of a request for access to an accounting of costs, incurred by the Ministry of the Attorney General, for bringing a number of witnesses to Canada to testify at a preliminary hearing and trial. In the Ministry's representations, it submitted that the information in the records was the personal information of the accused and potential witnesses. Former Senior Adjudicator Goodis, after referring to the Divisional Court judgment in *Pascoe*, stated:

> [T]he Ministry provides no evidence to indicate how the individual witnesses might be identified based on a combination of information sought and what otherwise may be available. Based on my review of the records, there is nothing to indicate that, once the names and other personal identifiers are removed, it would be reasonably possible to link a particular receipt or expense record to a specific individual or a very small number of individuals, especially given the relatively large number of witnesses.
>
> As a result, once the necessary severances are made, the records do not constitute the personal information of the witnesses as that term is defined in section 2(1) of the *Act*.

In upholding Order PO-2037, the Divisional Court stated:

> We are further satisfied that the interpretations placed on … sections 2(1) and 21, were not unreasonable and that the adjudicator was reasonable in his conclusion that the Attorney General had not discharged the burden on it to demonstrate that these exemptions were applicable.

I adopt the approach of the Divisional Court in *Pascoe* and the previous orders of this office referred to above in concluding that the record does not contain personal information. I find that the Board has not provided me with sufficient evidence to establish a reasonable expectation that individuals can be identified by linking the information in the record to the other information sources that it refers to. In particular, it is not clear to me how the information in the database can be linked to reported cases, media stories, witnesses, other databases, internet sources and "the workplace" to reveal the identity of the individuals. The Board has not provided me with any examples or details to support what appears to be a bald assertion or mere speculation on its part.

The appellant's representations raise the issue of the adequacy of the Board's evidence to support a finding that individuals were personally identifiable in the circumstances of this appeal. The Board was given an opportunity to respond to this position when I shared the appellant's representations with it and invited it to file representations in reply. Although it filed reply representations, the Board did not take advantage of the opportunity to provide any further evidence to support its position in this appeal. As noted above, the Board merely stated that through the use of "social engineering" and matching with unidentified databases and internet searches, a link could be made to identifiable individuals. In my view, the reference to "social engineering", without any definition of that term or concrete examples of how it would lead to the identification of individual workers is, at best, speculative. I also have no evidence before me as to what databases or internet sources might be used to make a linkage of this information to particular individuals.

I note the Board's position that a linkage can be made through the use of reported cases to identifiable individuals. I have taken into account the fact that the reported cases of the Workplace Safety and Insurance Appeals Tribunal are public records and can be found on the Tribunal's website. However, I note from a review of these reported cases, that the reports are anonymized so that the names of the claimants, employers and witnesses do not appear in the reported decisions. Having reviewed the record and the reported cases, it is not clear that these reported cases will provide an effective link to an identifiable individual. If the Board was referring to reported cases other than those on the Board's website, I have been provided with no particulars on those cases. Similar detail is lacking with respect to the other information sources that the Board identifies as possible links to identifiable individuals.

I have also carefully reviewed the record at issue. There is nothing in the record itself to suggest that any individuals might be identifiable from a possible disclosure of the record. It may be true that the appellant, by assiduously questioning workers at a particular company, may be able to identify a particular claimant. However, the appellant would be able to question workers at a

company without the record and still identify workers who had been injured on the job. In addition, as noted by the appellant, there are far easier methods available to the appellant to identify injured workers.

To use the language of the Divisional Court in *Pasco*e, the Board has failed to provide me with sufficient evidence to establish a nexus connecting the information in the record, to any other information that would result in the identity of an individual being revealed.

As well, I do not accept the Board's argument regarding the appellant's refusal to sign a confidentiality undertaking. The appellant's position regarding the confidentiality undertaking is not relevant to a determination of whether the information is personal information or not. Moreover, the reasons for the request for access and the intentions of the appellant with respect to the use of that information are not matters that need be considered by this office in arriving at a determination as to whether information is personal information. Rather, the question before me is whether or not there is a reasonable expectation of identification of the individuals in question.

I am sympathetic to the Board's statutory responsibility to keep a worker's personal information confidential. However, before I can apply the statutory exemptions in the *Act* to the information at issue, I must first find that the record contains personal information. As previously noted, I do not have sufficient evidence before me to make that finding in this appeal.

For all of these reasons, I am not satisfied that the information at issue falls within the definition of "personal information" set out in section 2(1) of the *Act*. Accordingly, section 21(1) of the *Act*, does not apply to this record. As no other mandatory exemptions apply and no other discretionary exemptions have been claimed for the record, I will order its disclosure to the appellant.

Because I have found that the information in the record does not qualify as personal information, it is not necessary for me to consider the parties' arguments regarding the application of the public interest override found in section 23 of the *Act*.

ORDER:

1. I order the Board to disclose the information requested from the database to the appellant by sending him an electronic copy of the information from the database no later than **April 4, 2007**.

2. To verify compliance with this order, I reserve the right to require the Board to provide me with copies of the information disclosed to the appellant pursuant to provision 2 above.

Original Signed by: February 28, 2007
Brian Beamish
Assistant Commissioner