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

ORDER PO-2716

Appeal PA07-108

Ministry of Labour

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NATURE OF THE APPEAL:

The Ministry of Labour (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the investigative file relating to a workplace accident involving a named individual. The request was submitted by a lawyer on behalf of her client, the named individual. The client provided his consent to have his lawyer seek access to his personal information.

The Ministry advised the requester that, as the investigation was ongoing, no records would be released. The Ministry cited sections 14(1)(a), (b) and 14(2)(a) (law enforcement) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision to this office.

During mediation, the parties agreed to place the appeal on hold pending the completion of the Ministry's investigation into the accident at issue.

Upon the completion of the investigation, the Ministry issued a revised decision letter granting the appellant partial access to the requested information. Access to the remaining portions of the records were denied pursuant to sections 21(1) (personal privacy) and 13 (advice and recommendations) of the *Act*. In its decision letter, the Ministry advised that it would not be releasing an occurrence report as well as the notes of Toronto Police Service officers. The Ministry directed the appellant to submit a request with the Toronto Police Services Board for access to this information.

Following discussions with the mediator, the Ministry subsequently issued a revised decision regarding the occurrence report and police officer's notes, which the Ministry obtained from the Toronto Police Services Board during the course of its investigation. The Ministry granted partial access to this information and denied access to the remaining portions pursuant to section 21(1) of the *Act*.

The Ministry advised the mediator that it would no longer be relying on section 13 of the *Act* to deny access to the remaining information and that it would provide the appellant with access to the information for which that exemption was claimed.

After reviewing the records disclosed to her, the appellant advised that she would not be pursuing access to five of the remaining pages at issue.

The mediator attempted to contact the affected parties to determine whether they would consent to the disclosure of the information relating to them. No consent was obtained.

As the records at issue appear to relate to the appellant as well as to the affected parties, the mediator raised the possible application of section 49(b) (personal privacy) of the *Act*.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process.

I began my inquiry into this appeal by sending this Notice of Inquiry, setting out the facts and issues, to the Ministry. The Ministry responded to the Notice of Inquiry with representations. In

its representations, it advised that it takes the position that there are only 26 pages of records at issue in this appeal rather than the 28 pages that I identified in the Notice of Inquiry. To clarify this confusion, the Ministry issued a letter to the appellant enclosing a copy of three pages of records that it had previously disclosed to the appellant, two pages of which were included in the 28 that I originally had noted are at issue. This letter confirmed that the appellant was granted access to those pages. I was copied on the letter and also provided with copies of the three pages that were enclosed. As a result, I agree with the Ministry's position that 26, and not 28, pages of records remain at issue in this appeal. I have modified the Notice of Inquiry to reflect this change. The appellant was asked to advise me in her representations if she disagreed with the change in the number of records at issue.

I also sent the Notice of Inquiry to five affected parties, inviting them to provide me with their views on the disclosure of the information that relates to them. None of the affected parties provided representations in response.

Although there is a sixth affected party, this office has sent several letters for this and a related appeal to the address that appears on the records. All letters have been returned by the current occupant of that address who advises that the affected party does not live at the address and never has. A current address for that affected party could not be located. As a result I did not send a Notice of Inquiry to the sixth affected party.

I then sent the Notice of Inquiry to the appellant, enclosing a copy of the Ministry's representations, in their entirety. The appellant provided representations in response.

RECORDS:

The information that remains at issue is found in the following portions of the following four records:

- Ministry of Labour Document (List of Witnesses) - pages 6, and 8 to 10
- Notes from the Occupational Health and Safety Officer – pages 170 to 181, 184, 185, and 198 to 200
- Toronto Police Service Occurrence Report – pages 1 to 4
- Toronto Police Service Officer's Memorandum Book Notes – pages 11 to 14, and 16 to 20

DISCUSSION:

PERSONAL INFORMATION

Under the *Act*, different exemptions may apply depending on whether a record at issue contains or does not contain the personal information of the requester [see Order M-352]. Where records contain the requester's own information, access to the records is addressed under Part III of the

Act and the exemptions at section 49 may apply. Where the records contain the personal information belonging to individuals other than the appellant, access to the records is addressed under Part II of the *Act* and the exemptions found at sections 12 to 22 may apply.

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except where they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal

information [Order 11]. To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225], but even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Having reviewed the records at issue, I find that all of the records (the Ministry of Labour Document, the Notes from the Occupational Health and Safety Officer, the Toronto Police Service Occurrence Report, and the Toronto Police Service Officer's Memorandum Book Notes) contain the personal information of the appellant's client, including his address and telephone number (paragraph (d)), his age (paragraph (a)), and medical information (paragraph (b)) as well as his name and other personal information relating to him (paragraph (h)). These records also contain the personal information of other identifiable individuals including their addresses and telephone numbers (paragraph (d)), their age and family or marital status (paragraph (a)), as well as their personal views and opinions (paragraph (e)) and their names along with other personal information relating to them (paragraph (h)), including statements made to the Toronto Police.

As noted above, previous orders have established that where a record contains both the personal information of the appellant and another individual, the request falls under Part III of the *Act* and the decision regarding access must be made in accordance with the exemptions at section 49 [Order M-353]. As I have found that all of the records contain the personal information of the appellant's client together with that of other identifiable individuals, I must now determine whether the exemption at section 49(b) applies to exempt the information that remains at issue from disclosure.

PERSONAL PRIVACY

Section 49(b) of the *Act* is the relevant personal privacy exemption under Part III of the *Act*. It provides:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the disclosure would constitute an unjustified invasion of another individual's personal privacy.

The personal privacy exemptions under the *Act* are *mandatory* at section 21(1) under Part II and *discretionary* at section 49(b) under Part III. Put another way, where a record contains the

personal information of both the appellant and another individual, section 49(b) in Part III of the *Act* permits an institution to disclose information that it could not disclose if the exemption at section 21(1) in Part II was applied [Order MO-1757].

Section 49(b) introduces a balancing principle, which involves weighing the requester's right of access to his own personal information against the other individual's right to protection of their privacy. The institution retains the discretion to deny the appellant access to information if it determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure of the information *would* constitute an unjustified invasion of another individual's personal privacy [Order M-1146].

In order for disclosure to "constitute an unjustified invasion of another individual's personal privacy" under either the discretionary exemption at section 49(b) or the mandatory exemption at section 21(1), the information in question must contain the personal information of an individual or individuals other than the person requesting it.

The factors and presumptions in sections 21(2) to (4) provide guidance in determining whether the "unjustified invasion of personal privacy" threshold is met. Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy. In this case the Ministry relies on section 21(3)(b).

The Divisional Court has stated that once a presumption against disclosure has been established under section 21(3), it cannot be rebutted by either one or a combination of the factors set out in section 21(2) [*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767 (*John Doe*)] though it can be overcome if the personal information at issue falls under section 21(4) of the *Act*, or if a finding is made under section 23 of the *Act* that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the exemption. [See Order PO-1764]

Section 21(3)(b): identifiable as part of an investigation into a possible violation of law

The Ministry submits that the presumption at section 21(3)(b) applies to all of the information at issue in this appeal. Section 21(3)(b) provides:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is

> necessary to prosecute the violation or to continue the investigation.

Representations

The Ministry submits that the information at issue "squarely falls within the presumption in section 21(3)(b) of [the *Act*]" because it "collected the information within the course of an investigation that was conducted concerning the requester's accident pursuant to the enforcement provisions of the *OHSA* [*Ontario Health and Safety Act*]." The Ministry further submits:

> [D]isclosure of these records would, therefore, constitute a presumed unjustified invasion of privacy under section 21(3)(b) of the *Act*. The Information and Privacy Commissioner has recognized that investigations under the *OHSA* do fall within the definition of "law enforcement" for the purpose of [the *Act*] (see Orders P-1011, P-1119 and P-1527).
>
> In addition, Order P-1301, P-1519, and PO-1669 have upheld the Ministry's position in withholding documents that were collected from affected persons in the context of an *OHSA* investigation based on the section 21(3)(b) presumption. It is respectfully submitted that the rationale in those decisions applies equally to the records in issue.
>
> In regards to the police's records, the information contained in it was compiled during the course of its investigation. Where there is accident (fatal or critical) at a workplace, police are called to investigate to determine whether there has been a violation of law, specifically the *Criminal Code*. In MO-1365, the IPC recognized that the police investigation concerning the fatal workplace accident was consistent with the provisions of the *Criminal Code*. This thereby permits the application of the presumption in section 21(3)(b) of [the *Act*]. This presumption still applies, even if, as in the present case, no charges were laid (see Orders P-223, P-237 and P-1225).

The appellant agrees that the information "constitutes personal information which was compiled as part of an investigation into what they contend was a violation of law." However, the appellant submits that "the exemption in section 23 should apply as the public interest in disclosure outweighs the purpose of the exemption (refusal to disclose)."

Analysis and findings

Based on careful review of the personal information at issue, I find that the nature and content of the records demonstrate that they were compiled and are identifiable as part of a Ministry of Labour investigation into a workplace accident. As a result, I find that the records were compiled by the Ministry and are identifiable as part of that investigation, the purpose of which

was to determine whether there has been a possible violation of law under the *OHSA*. Accordingly, I find that the presumption at section 21(3)(b) applies.

As I have found that section 21(3)(b) applies and, as noted above, it cannot be rebutted by factors in section 21(2), it is not necessary for me to determine whether any of the factors in section 21(2) apply. Additionally, in my view, section 21(4) does not apply to any of the records information. However, as the appellant has raised the possible application of the public interest override at section 23 of the *Act*, I will go on to determine whether or not that section applies to rebut the presumption at section 21(3)(b) and override the application of the exemption at section 49(b).

PUBLIC INTEREST OVERRIDE

As noted above, the appellant submits that the public interest override provision in section 23 applies in the circumstances of this appeal.

Section 23 reads:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (application for leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.)), the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial *Act* are to be "read in" as exemptions that may be overridden by section 23 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

As the records contain both the personal information of the appellant and other individuals, I have found that the information at issue is exempt under the personal privacy exemption at section 49(b) in Part III. Section 23 does not refer specifically to this exemption. This matter has been previously considered by Inquiry Officer Anita Fineberg in Order P-541 where she made the following comment concerning sections 23, 49(b) and 21 of the *Act*:

> In my view, where an institution has properly exercised its discretion under section 49(b) of the *Act*, relying on the application of sections 21(2) and/or (3), the appellant should be able to raise the application of section 23 in the same manner as an individual who is applying for access to the personal information of

> another individual in which the personal information is considered under section 21.

I agree with Inquiry Officer Fineberg's statement and will consider the possible application of section 23 to the information which I have found to qualify for exemption under section 49(b).

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 [Order P-1396, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)].

In considering whether there is a "public interest" in the disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. 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 the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

A compelling public interest has been found not to exist where, for example:

- Another public process or forum has been established to address public interest considerations [Orders P-123, P-124, P-391, M-539].

- A significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568].

- A court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317].

Representations

The appellant submits that section 23 should apply to override the exemption at section 49(b) (read with section 21(3)(b)). She submits:

[T]he disclosure will assist in the administration of justice, the fair adjudication and determination of the appellant's rights and entitlement to WSIB [Workplace Safety and Insurance Board] benefits. The appellant has issues currently under appeal at the Workplace Safety and Insurance Board, one of which is entitlement to WSIB Benefits as a result of the August 24, 2006 workplace accident.

The appellant is currently receiving benefits under the *Workplace Safety and Insurance Act*. However, the employer is appealing initial entitlement to those benefits on the basis that they submit that the incident was not an accident. The appellant strictly denies that it wasn't an accident. The information contained in the statements of the affected parties could assist in the determination of whether this incident was an accident, and in determination of his entitlement to WSIB benefits.

We are in possession of the names of some of the witnesses to the August 24, 2006 workplace accident however, we do not have the contact information for the said witnesses and the contents of the statements for some witnesses. We are seeking disclosure of the names, contact information and statements of the said individuals and witnesses.

…

We submit that the information requested, being the content of statements, is not "general information" as submitted by the Ministry of Labour. We submit that this information pertains to the appellant, and, as such is personal information and the Ministry of Labour should not rely on section 49(b) of the *Act* to refuse disclosure of this information to the appellant.

We further submit that even though the information was collected and charges/tickets were issued against the employer as a result of the August 24, 2006 workplace accident, this information should be disclosed to the appellant, as the investigation has concluded. We submit that it is in the interests of justice and the public, that this information be disclosed to assist in the determination of [the appellant's] entitlement to WSIB claims.

We are requesting disclosure of said information to enable us to fully investigate and advance the WSIB claims on behalf of the appellant as a result of the August 24, 2006 workplace accident.

The appellant sustained serious and permanent physical and mental injuries including a brain injury as a result of the August 24, 2006 workplace accident. It is submitted that the disclosure of the witnesses' names, contact information and contents of their statements would assist in the administration and exercise of justice by providing necessary relevant evidence pertaining to the matters at issue

> in the WSIB Hearing. The disclosure will assist in the fair determination of [the appellant's] rights and the adequate provision of care for [the appellant].
>
> We submit that the decision of *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767, is applicable to the within request, in that there is a compelling public interest in the disclosure of this information.

The Ministry submits that there is no public interest in the disclosure of any of the information contained in the records and, therefore, that section 23 has no application in the circumstances of this appeal.

Analysis and findings

The appellant states that she seeks access to the information at issue to assist in arguing a claim for entitlement to benefits for her client before the WSIB. Although I am sympathetic to the appellant's client's circumstances, in my view, his interests in the disclosure of the information at issue are essentially of a personal and private nature, rather than a public one. Moreover, I do not find that his private interest raises issues of more general application that could be said to amount to a public interest. The WSIB receives its mandate from the *Workplace Safety and Insurance Act*. In my view, the existing statutory scheme is designed to address any public interest element arising from the appellant's claim for benefits. Accordingly, I find that not only are the appellant's interests not public in nature but given the existing statutory scheme they are also not sufficiently compelling to satisfy the requirements of section 23.

Moreover, even if a compelling public interest in the disclosure of the information were to exist, for the section 23 override provision to apply, that compelling public interest must be shown to clearly outweigh the purpose of the exemption claim. In this case, the purpose of the exemption at section 49(b) is the protection of the privacy of the affected parties which reflects one of the two key purposes of the *Act*: to protect the privacy of individuals with respect to personal information about themselves held by institutions. In my opinion, the personal interests of the appellant in this case do not outweigh the privacy interests of the affected parties.

Accordingly, I am not satisfied that there exists a compelling public interest in the disclosure of the remaining personal information in the record. Therefore, I find that the "public interest override" at section 23 does not apply in these circumstances and, subject to my finding on whether the Ministry properly exercised its discretion, the exemption at section 49(b) applies to exempt the information at issue from disclosure.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. On appeal, this office may review the institution's decision in order to determine whether it exercised its discretion, and, if so, to determine whether it erred in doing so.

Because section 49(b) is a discretionary exemption and I have found that the Ministry has properly applied it to exempt the portions of the records that remain at issue, I must review the Ministry's exercise of discretion in deciding to deny access to portions of those records.

I may find that the Ministry erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant consideration
- it fails to take into account relevant considerations

In either case, this office may send the matter back to the Ministry for an exercise of discretion based on proper consideration [Order MO-1573].

The Ministry submits:

> [I]n balancing the appellant's client's right of access to his or her own personal information against the other individuals' right to protection of their privacy, much weight was afforded towards the privacy protection of the affected parties as opposed to the rights of access of the appellant's client.
>
> It should be noted that the affected parties provided the information in compliance to the requirements set out in the *OHSA* and/or *Criminal Code*. The information provided by the affected individuals are an integral part of the investigation structure. Their views are essential to the inspector's thought process and are relied upon in creating a well-balanced and impartial decision.
>
> …
>
> The Ministry submits that it has exercised its discretion in good faith and has adhered to the purpose for which the information was collected.
>
> The Ministry contends that in determining whose right displays a considerable impact when decisions as whether to withhold or disclose are carried out, perspectives from both sides had been carefully viewed. All criteria in determining whether disclosure would constitute an unjustified invasion of personal privacy had been assessed, and it believes it has made a fair and balanced decision.

I have reviewed the information at issue for which I have found section 49(b) applies. In the circumstances of this appeal and given the nature and sensitivity of the information, I am satisfied that the Ministry has properly taken relevant factors, and not irrelevant ones, into consideration in exercising their discretion to withhold the information at issue. In particular,

based on its representations and the severances made to the records, it appears that the Ministry considered the sensitive nature of the information at issue and balanced the appellant's right to access the information against the affected parties' right to their personal privacy. I agree with the Ministry that disclosure of the information would constitute an unjustified invasion of the personal privacy of the affected parties.

Accordingly, I conclude that the Ministry properly exercised its discretion in deciding to withhold the information at issue from the appellant and find that it is properly exempt under section 49(b).

ORDER:

I uphold the Ministry's decision to deny access to the information at issue.

Original signed by: September 17, 2008
Catherine Corban
Adjudicator