

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3290

Appeal PA12-385

Workplace Safety and Insurance Board

December 31, 2013

Summary: A school board submitted a request for access to records relating to the diagnosis of mesothelioma with respect to a deceased former employee who had filed a claim for benefits with the Workplace Safety and Insurance Board. The WSIB denied access to the responsive records relying on the mandatory personal privacy exemption in section 21(1). The school board appealed the decision. It argued that the public interest override in section 23 of the *Act* applies because it seeks to pursue its subrogation rights in respect of the deceased employee's claim against a trust fund established to compensate asbestos related losses. The appellant also argued that the disclosure exception in section 42(1)(c) of Part III of the *Act* applies to permit disclosure of the records. The WSIB's decision is upheld and the public interest override is found not to apply. As well, section 42(1)(c) is found to have no application in this appeal which arises from an access decision under Part II of the *Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 2(1), 21(1), 21(3)(a), 21(3)(d), 23 and 42(1)(c).

Cases Considered: *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

OVERVIEW:

[1] The Workplace Safety and Insurance Board (WSIB) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records related to two deceased workers of a specified school:

1. A copy of the biopsy and/or pathology report that confirms the diagnosis of the mesothelioma and other information that would confirm this diagnosis; and
1. Records relating to the work history of the worker, including details of the worker's full employment history and reported exposure to asbestos.

[2] The request was submitted by the legal counsel representing a school board. For ease and clarity, I will refer to the actions and statements of the requester as those of the school board.

[3] The backdrop of this request is the school board's pursuit of subrogated claims for the two deceased workers who were diagnosed with an asbestos related disease, against the Asbestos Compensation Trust Funds established in the United States.

[4] The request stated that pursuant to section 30(11) of the *Workplace Safety and Insurance Act* (the *WSIA*) the school board "is subrogated to the rights of its workers who have suffered injuries and have elected to claim [WSIB] benefits" and accordingly, the board is entitled to the records without the need to make a request for access under the *Act*.

[5] WSIB located records responsive to the request which contained the medical and employment history of the deceased workers. WSIB issued a decision denying access to the records based on the mandatory personal privacy exemption in section 21(1) of the *Act*. WSIB indicated that the subrogation rights referred to by the school board required the consent of the workers or their personal representatives. WSIB added that its records showed that the school board sought the consent of the two deceased workers' estates and obtained consent from one. Accordingly, a copy of the WSIB claim file relating to this deceased worker was sent to the school board's counsel. WSIB declined to seek the consent of the second worker's estate.

[6] The school board, now the appellant, appealed WSIB's decision with respect to the records relating to the second worker only. Accordingly, the records relating to the first worker whose estate provided consent to disclosure are not at issue in this appeal.

[7] During mediation, WSIB confirmed that the estate of the worker in question had been contacted about disclosure previously, but did not respond. WSIB also advised that some medical records of the worker had been previously disclosed to the appellant.

[8] Also during mediation, the appellant advised that there was an application for judicial review before the Divisional Court regarding the interpretation of school boards' subrogated rights under the *WSIA*.

[9] Mediation did not resolve the issues in this appeal, and the file was moved to the adjudication stage of the appeal process for an inquiry under the *Act*.

[10] I began my inquiry by seeking representations from WSIB and the estate of the deceased worker. I also asked the estate for its position on disclosure of the records. The estate refused to consent to disclosure of the records, which it asserted would be an unjustified invasion of the deceased worker's personal privacy. WSIB provided representations and I shared these, in their entirety, with the appellant.

[11] After receiving WSIB's representations, the appellant requested that the appeal be placed on hold pending a decision in the related proceeding before the Divisional Court. The appellant advised that the proceeding was a judicial review of WSIB's decision not to disclose the same type of records at issue in this appeal to a number of school boards, and that the central issue in the proceeding was whether an employer's statutory subrogation right under section 30(11) of the *WSIA* entitles the employer to access the personal information of an employee in order to pursue a claim against the person who caused the loss to that employee. The appellant advised that the proceeding involved an interpretation of both the *WSIA* and the *Act*.

[12] The appellant subsequently provided a copy of the decision of the Divisional Court issued on February 26, 2013. In its decision, the Court found that section 30(11) of the *WSIA* does not include any language that suggests a right of the employer to have access to an employee's personal information, nor does it confer any duty on WSIB to disclose information. The Court held that WSIB correctly concluded that the school boards have no right to obtain employee information under section 30(11). With respect to the *Act*, and the interpretation of sections 42(1)(c) and 43 in particular, the Court found that it was premature for the school boards to challenge WSIB's interpretation. The Court stated that it was preferable for the appellant to proceed with this appeal, as it is a less costly and more convenient alternative remedy to pursue in seeking an employee's personal information.

[13] After receiving the Court's decision, the appellant reactivated the appeal, and provided its representations.

[14] In this order, I uphold WSIB's decision and dismiss the appeal.

RECORDS:

[15] The records at issue in this appeal are a claims investigation report, a surgical pathology report, and two WSIB memoranda.

ISSUES:

- A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory exemption at section 21(1) apply to the information at issue?
- C. Does the public interest override in section 23 apply to the exempt information?

DISCUSSION:

A. Does the record contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[16] 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 if 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 where 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;

[17] 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.¹

[18] Section 2(2) also relates to the definition of personal information and states:

Personal information does not include information about an individual who has been dead for more than thirty years.

[19] To qualify as personal information, the information must be about the individual in a personal capacity, and it must be reasonable to expect that an individual may be identified if the information is disclosed.²

Analysis and findings

[20] There is no dispute that the records at issue contain the personal information of the deceased board employee, and that he would be identified if the information were disclosed. The records consist of a claims investigation report, a surgical pathology report, and two WSIB memoranda, all of which contain the deceased's name and other personal information about him that would identify him. The records also contain medical and employment information about the deceased that qualify as personal information under paragraph (b) of the definition of section 2(1). Accordingly, I find that the records contain the deceased's personal information as that term is defined in section 2(1) of the *Act*.

[21] Both parties provide representations on the significance of section 2(2) in this appeal, and these representations are set out under Issue B below.

[22] I also note that some of the records at issue contain the personal information of other identifiable individuals. However, due to my findings below, it is unnecessary for

¹ Order 11.

² Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

me to address this personal information. Accordingly, I will not refer to the personal information of other individuals again in this order.

B. Does the mandatory exemption at section 21(1) apply to the information at issue?

[23] Where a requester seeks personal information of another individual, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

[24] The section 21(1)(a) to (e) exceptions are relatively straightforward. The section 21(1)(f) exception, allowing disclosure if it would not be an unjustified invasion of personal privacy, is more complex, and requires a consideration of additional parts of section 21.

[25] Sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 21(4) lists situations that would not be an unjustified invasion of personal privacy.

[26] If any of paragraphs (a) to (h) of section 21(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 21. Once established, a presumed unjustified invasion of personal privacy under section 21(3) can only be overcome if section 21(4) or the "public interest override" at section 23 applies.³ A presumed unjustified invasion of personal privacy under section 21(3) cannot be rebutted by one or more factors or circumstances under section 21(2).⁴

WSIB's representations

[27] WSIB submits that the presumptions in paragraphs (a) and (d) of section 21(3) apply in this appeal as the records contain personal information related to the deceased's medical and employment history. Those provisions state:

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

(a) relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

(d) relates to employment or educational history;

[28] WSIB argues that the presumptions in sections 21(3)(a) and (d) cannot be rebutted unless section 21(4) or the public interest override in section 23 applies. It

³ *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

⁴ *Ibid.*

further argues that none of the exceptions in section 21(4) nor section 23 applies. WSIB relies on Order PO-2998 to assert that "once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2)." WSIB submits that because disclosure of the withheld information is presumed to be an unjustified invasion of personal privacy, the exemption in section 21(1) applies.

[29] Regarding the passing of the deceased in 2007, WSIB states that section 2(2) of the *Act* makes it clear that information about an individual remains his personal information until 30 years following his death. It relies on Order PO-1736 to assert that section 2(2) signals a strong intention to protect the privacy rights of deceased individuals. It also notes that the family of the deceased is still alive and has refused to consent to disclosure in this appeal. WSIB adds that although Order M-50 found that the privacy interest associated with an individual's personal information diminishes upon his death, this finding cannot be applied unilaterally.

[30] Finally, on the issue of the appellant's subrogation rights under the *WSIA*, WSIB states that while it understands why the appellant seeks the personal information of the deceased, it does not interpret section 30(11) of the *WSIA* as compelling or authorizing it to disclose personal information in the context of subrogation. It asserts that the right of subrogation is distinct from the right of access and this distinction is maintained in the *WSIA*. It states:

The right of subrogation only allows the employer to advance a right of action; how and by what means the right is to be advanced is not part of the right of subrogation. The right to access is not expressly stated in [section] 30(11) nor can it be reasonably implied.

[31] WSIB concludes its representations by stating that it is not aware of any other statute that would allow for the disclosure of the information at issue.

The appellant's representations

[32] The appellant characterizes the central issue in this appeal as being whether it is entitled, as an institution under the *Act*, to certain personal information of one of its workers held by WSIB under the *Act*, for the purpose of pursuing its statutory right of subrogation under the *WSIA*. It explains that the Asbestos Compensation Trust Funds (Trusts) that have been established by companies that were formerly involved in manufacturing and supplying materials containing asbestos, have trust distribution procedures governing their claims process. It continues that in order to pursue a claim against the Trusts, the claimant must file a proof of claim form that requires the claimant to disclose certain personal information, including, the person's name, social insurance number, death certificate if applicable, medical documentation confirming the

diagnosis of an asbestos related disease, and employment and asbestos exposure history (employee information).

[33] The appellant states that it and other Ontario school boards, have retained a law firm to pursue their subrogated rights against the Trusts and have made various unsuccessful efforts to obtain the employee information needed to pursue the claims. These include: seeking employee consent to disclosure; meeting with WSIB; engaging this office to seek this office's input on the issue; seeking a judicial review of WSIB's decision and interpretation of the subrogation provisions of the *WSIA*; and submitting an access request to WSIB under the *Act*, which has been denied. It states that the school boards do not have the necessary employee information for those who have suffered from mesothelioma or lung cancer in order to substantiate their claims against the Trusts. It argues that the school boards have been prohibited from pursuing claims against those who are legally responsible for causing the losses to their employees and from seeking compensation for the public monies they have expended as a result of these losses.

[34] The appellant states that WSIB administers Ontario's no-fault workplace insurance for employers and their workers. It then sets out WSIB's right of subrogation under section 30(10) of the *WSIA* and compares this to its own subrogation right under section 30(11). These provisions state:

Subrogation, Schedule 1 employer

(10) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 1 employer or the deceased worker was so employed, the Board is subrogated to the rights of the worker or survivor in respect of the action. The Board is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms. 1997, c. 16, Sched. A, s. 30 (10).

Same, Schedule 2 employer

(11) If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 2 employer or the deceased worker was so employed, the employer is subrogated to the rights of the worker or survivor in respect of the action. The employer is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms. 1997, c. 16, Sched. A, s. 30 (11).

[35] The appellant continues that a worker who elects to claim benefits under WSIB's insurance plan must fill out an initial claim for benefits called a Form 6; the notice of collection in Form 6 states:

Personal information about you will be collected throughout your claim under the authority of the Freedom of Information and Protection of Privacy Act and will be used to administer the Workplace Safety and Insurance Act, 1997, your claims and programs of the Board . . . Information may only be disclosed to the employer, external medical, vocational and safety agencies, external payment and service providers, researchers and others as authorized by the Workplace Safety and Insurance Act and the Freedom of Information and Protection of Privacy Act.

[36] The appellant adds that WSIB has published a privacy statement for workers, which provides information relating to its use, retention and disclosure of personal information. It notes the following excerpt from WSIB's privacy statement and adds emphasis in bold:

*There may be times . . . where confidential information including personal health information related to your claim may be disclosed to your employer **without your consent**. This is in accordance with the Workplace Safety and Insurance Act and the Freedom of Information and Protection of Privacy Act.*

[37] The appellant states that absent the express consent of the worker, WSIB has consistently denied Ontario school boards access to the employee information they need to pursue their statutory subrogation rights. It notes however, that WSIB actively pursues subrogated claims against the Trusts in relation to a range of asbestos related injuries and diseases through its US lawyers; and aside from the notice of collection in Form 6, WSIB does not ask workers to sign a separate consent form before it uses and discloses a worker's personal information to make a claim against the Trusts. The appellant asserts that evidence shows WSIB does not always receive the express consent of a worker before pursuing its subrogated rights under the *WSIA*.

[38] The appellant contrasts WSIB's right and pursuit of subrogation to its own. It states that it, like WSIB, is subrogated to the rights of its workers who have suffered from asbestos related injuries and have elected to claim benefits under WSIB's insurance plan to pursue claims against the Trusts. It further states that as a Schedule 2 employer under the *WSIA*, it is individually responsible for the full costs of accident claims under WSIB's insurance plan filed by its workers. However, it states, WSIB maintains full authority over the entitlement process of claims by workers of Schedule 2 employers and bills them the actual benefit costs plus an annual administration fee.

[39] The appellant argues that WSIB erroneously interpreted both the privacy provisions in Part III of the *Act*, and the access provisions in Part II, and therefore, wrongly withheld the information at issue.

[40] Regarding Part III of the *Act*, it acknowledges that the personal information at issue includes information about the deceased's medical and employment history. However, it relies on section 42(1)(b) and (c) to argue that WSIB is permitted to disclose personal information where the person to whom the information relates has consented to its disclosure or where the disclosure is "for the purpose for which it was obtained or compiled or for a consistent purpose." The appellant states section 43 of the *Act* "provides that where personal information has been collected directly from the individual to whom it relates, the purpose of the disclosure of that information is a consistent purpose only if the individual might reasonably have expected such a use or disclosure."

[41] The appellant relies on Investigation Report 195-008M of this office to assert that where personal information has been collected indirectly, a "consistent purpose" is one that is "reasonably compatible" with the purpose for which the personal information has been obtained. It relies on Privacy Complaint MC-050017-1 to submit that a "consistent purpose" is "premised on the notion of balance between the right to personal privacy and the right of institutions to collect, use and [disclose] personal information as required in order to carry out legitimate activities." It also submits that WSIB has held in Decision No. 169/94⁵ that disclosure of medical records to allow an employer to pursue a valid workers' compensation purpose is disclosure for a purpose which is consistent with the purpose for which the information was obtained under the *Act*.

[42] According to the appellant, the purpose for which the employee information at issue was collected by WSIB was to administer the *WSIA*, and thus, disclosure of the information to it to allow it to pursue its subrogated rights under the *WSIA*, would be disclosure for a consistent purpose, permissible under section 42(1)(c).

[43] Despite the Divisional Court's ruling that section 30(11) of the *WSIA* does not confer a right to information on it, the appellant takes the position that section 30(11) considered together with the notice of collection and WSIB's privacy statement "would allow workers to reasonably expect that their personal information would be disclosed under [the *Act*] to Schedule 2 employers like [it] to pursue their subrogation rights." It argues that the deceased would have known when applying for benefits and filling out Form 6, that his information would be disclosed to administer the *WSIA* to his employer as authorized under the *WSIA* and the *Act*. It further argues that under WSIB's privacy statement, the deceased would have known that his personal information might be disclosed to it without his consent in accordance with the same two statutes. As a result, the appellant asserts that disclosure of the employee information at issue without the explicit consent of the deceased or his estate, is permitted under the *Act* for its legitimate activity in pursuing its subrogation rights under the *WSIA*.

⁵ [1994] O.W.C.A.T.D No. 331 at p.3.

[44] The appellant concludes this part of its representations by stating that, in light of the Divisional Court's decision that school boards cannot access the information they require under the subrogation provisions of the *WSIA*, it would be an absurd result if it were also not able to access the information it requires under the *Act* for the "limited and specific purpose of pursuing [its] statutory and substantive right of subrogation." It states that its right of subrogation is essentially meaningless if it cannot access the information it requires, and "[t]his absurdity is exacerbated by the inequity that is apparent with [WSIB's] ability to pursue its statutory right of subrogation with the employee information while [school boards] cannot although [sections] 30(10) and (11) mirror one another." It urges me to apply the well-established principle of statutory interpretation that the legislature does not intend to produce absurd consequences.

[45] Regarding Part II of the *Act*, the appellant states that it seeks the information to pursue its subrogation right and it argues that disclosure of the information does not constitute an unjustified invasion of personal privacy for the three reasons detailed below.

[46] First, the information at issue is relevant to a fair determination of its rights under subsection 21(2)(d), which states:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

[47] While it acknowledges that section 21(2)(d) "is not enough to rebut the presumption of an unjustified invasion of privacy" under section 21(3), the appellant submits that WSIB has misinterpreted section 21(2)(d) in considering whether the personal information sought is relevant to a fair determination of its subrogated claim against the Trusts. It asserts that it has established the four components necessary for section 21(2)(d) to apply since:

(a) the right in question is its statutory right of subrogation under the *WSIA*;

(b) the statutory right of subrogation is related to a claim in the US against the Trusts that it intends to pursue once it obtains the necessary employee information;

(c) the personal information it seeks is key and significant to the determination of its right to compensation under the Trusts;

(d) the personal information is required in order to make a claim against the Trusts and ensure an impartial determination.

[48] The appellant asserts that section 21(2)(d) weighs in favour of disclosure. The appellant also argues that there is a diminished privacy interest in the personal information of the deceased employee as a result of his death. It relies on Order PO-2998 to argue that personal information of an individual who had died four years earlier can be disclosed due to the "diminished privacy interest after death." It argues that due to the diminished privacy interest in this appeal as a result of the death of the deceased employee more than six years ago, disclosure would not constitute an unjustified invasion of privacy under section 21(1) of the *Act*.

Analysis and findings

[49] As a preliminary matter, I will address the appellant's reliance on section 42(1)(c) of the *Act*. Section 42(1)(c) is found in Part III of the *Act*, which deals with protection of privacy. Part III establishes rules governing the collection, retention, use and disclosure of personal information by institutions in the course of administering their public responsibilities. This Part of the *Act* does not create a right of access; it does not require WSIB to provide access to records. Rather, in section 42, it prohibits WSIB from disclosing personal information except in listed circumstances. Section 42(1)(c) is therefore not relevant to and does not assist the appellant in asserting a right to access the records sought.⁶

[50] It is Part II of the *Act* that establishes a right of access to records held by an institution. It is therefore the provisions of Part II that I must apply in determining whether the appellant has a right of access to the records at issue in this appeal.

[51] WSIB has withheld the information at issue on the basis that it is exempt under section 21(1) as its disclosure is presumed to be an unjustified invasion of privacy under sections 21(3)(a) and (d). Having regard to the submissions before me and the records at issue, I agree with WSIB's position.

[52] I find that the records all contain personal information that relate to the deceased's medical history and/or his employment history and therefore, the presumptions in sections 21(3)(a) and (d) apply in this appeal. The Divisional Court has held that a presumed unjustified invasion of personal privacy under section 21(3) cannot be rebutted by the factors or circumstances under section 21(2), and this office has consistently followed this approach.⁷ The appellant acknowledges in its representations that the section 21(2)(d) factor it relies on to argue that the

⁶ See Order M-96 which rejected a similar submission in the context of an appeal of an access decision, and Orders PO-2219, PO-2723 and PO-2860 which adopted the reasoning in Order M-96.

⁷ *Supra*, note 3.

information should be disclosed, is not enough to rebut the presumption of an unjustified invasion of privacy under section 21(3).

[53] Accordingly, I find that the presumptions in sections 21(3)(a) and (d) that apply in this appeal cannot be rebutted by the factor in section 21(2)(d). I find that the withheld information is thus exempt under the mandatory personal privacy exemption in section 21(1).

[54] The only section relied on by the appellant that is capable of overcoming the presumptions in sections 21(3)(a) and (d), is the public interest override in section 23. Thus, I will consider its possible application in this appeal.

C. Does the public interest override in section 23 apply to the exempt information?

[55] In its representations, the appellant argues that if the information at issue is exempt under section 21(1), the public interest override in section 23 applies to permit disclosure. 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.

[56] For section 23 to apply, there must be a compelling public interest in disclosure of the records, and this interest must clearly outweigh the purpose of the exemption.

[57] 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 its 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, this office 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.⁸

[58] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.⁹ 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

⁸ Order P-244.

⁹ Orders P-984 and PO-2607.

the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹⁰

[59] A public interest does not exist where the interests being advanced are essentially private in nature.¹¹ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.¹²

[60] The word “compelling” has been defined in previous orders as “rousing strong interest or attention.”¹³

[61] Any public interest in *non*-disclosure that may exist also must be considered.¹⁴ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling.”¹⁵

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

- the records relate to the economic impact of Quebec separation¹⁶
- the integrity of the criminal justice system has been called into question¹⁷
- public safety issues relating to the operation of nuclear facilities have been raised¹⁸
- disclosure would shed light on the safe operation of petrochemical facilities¹⁹ or the province’s ability to prepare for a nuclear emergency²⁰
- the records contain information about contributions to municipal election campaigns.²¹

¹⁰ Orders P-984 and PO-2556.

¹¹ Orders P-12, P-347 and P-1439.

¹² Order MO-1564.

¹³ Order P-984.

¹⁴ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

¹⁵ Orders PO-2072-F, PO-2098-R and PO-3197.

¹⁶ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

¹⁷ Order PO-1779.

¹⁸ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

¹⁹ Order P-1175.

²⁰ Order P-901.

²¹ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

[63] 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 considerations²²
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations.²³
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding²⁴
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter²⁵
- the records do not respond to the applicable public interest raised by appellant.²⁶

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

[65] 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.²⁷

[66] The appellant asserts that there is a compelling public interest in the disclosure of the employee information that clearly outweighs the purpose of the exemption in section 21(1); namely, so that it may pursue its subrogation rights against the Trusts and so that it may claim back, as WSIB has been able to do, the monies it paid for the deceased employee's claim from the responsible asbestos companies. It states WSIB's decision to deny it access prohibits it as a public institution, from pursuing claims against the persons who are legally responsible for causing the loss to its employees. The appellant adopts the words of the Supreme Court of Canada in asserting that the overarching purpose of access to information is to facilitate democracy and to allow the public to access government held information to improve how government works and make it more effective, responsible and accountable.²⁸

²² Orders P-123/124, P-391 and M-539.

²³ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

²⁴ Orders M-249 and M-317.

²⁵ Order P-613.

²⁶ Orders MO-1994 and PO-2607.

²⁷ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

²⁸ *Dagg v. Canada (Ministry of Finance)*, [1997] S.C.R. 403 at para 63.

[67] While the appellant acknowledges that in order for a compelling public interest in disclosure to be found, a relationship must exist between the record and the *Act's* central purpose of shedding light on the operation of government, and disclosure of the record should inform the public about government activities and add to the expression of public opinion or to the exercise of political choices, it does not address how disclosure of the personal information at issue would satisfy these principles. The appellant does not provide evidence on how disclosure of the deceased worker's personal information would shed light on government activities or add to the information available to the public to make political choices or express public opinion. It simply asserts that the public interest override in section 23 should apply in this appeal because it is in the public interest that it be able to claim against the Trusts and be compensated for asbestos related losses by the Trusts.

[68] I accept that there is a public interest of some nature in publicly funded institutions like the appellant being able to pursue subrogated claims and receive compensation from those responsible for their losses. However, having regard to the manner in which this provision has been applied, I find that the appellant's interest in recovering its economic losses is not the sort of transparency interest that section 23 serves to advance. The fact that the appellant is a public institution does not on its own give rise to a public interest in disclosure of the records within the meaning of section 23, where the purpose of disclosure relates to the pursuit of the appellant's financial interests and does not relate to the illumination of government activities. As such, I find that there is no compelling public interest in disclosure of the deceased's personal information in this appeal.

[69] I appreciate the appellant's predicament and agree with its contention about the absurd situation it finds itself in as a publicly funded institution that is unable to exercise its subrogation rights in order to be compensated by the Trusts for its losses. However, an appeal of an access decision under the *Act* is not the appropriate forum to resolve what appears to be a legislative gap or anomaly.

[70] Moreover, even if I were to accept that a compelling public interest in disclosure of the information at issue exists, in order for me to find that section 23 applies to override the exemption at section 21(1), I would have to also be satisfied that the compelling public interest clearly outweighs the purpose of the exemption. The personal privacy exemption in section 21(1) protects the personal information of individuals held by public institutions, which is one of the two central purposes of the *Act*. The records at issue contain intimate details of the deceased employee's employment history and his medical diagnosis, condition and history. Disclosure of this information is presumed to be an unjustified invasion of personal privacy. The importance of the section 21(1) exemption is reflected by the fact that it is a mandatory exemption that institutions are required to apply. The appellant has not provided any evidence or representations to demonstrate how or why the compelling public interest it argues exists clearly outweighs the purpose of the mandatory personal privacy exemption in section 21(1).

[71] Accordingly, I find that the public interest override in section 23 does not apply in the circumstances of this appeal.

ORDER:

I uphold WSIB's decision and dismiss the appeal.

Original Signed By:
Stella Ball
Adjudicator

December 31, 2013