



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

ORDER P-1216

Appeal P-9600047

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 access to all background notes prepared by a Ministry Employment Standards Officer in the course of an investigation of a claim pursuant to section 65(1) of the Employment Standards Act (the ESA). The claim was filed by a former employee of the requester who was seeking termination and severance pay under the ESA from the requester. The Ministry located a number of records responsive to the request and denied access to them, in their entirety, claiming the application of the following exemption contained in the Act:

- invasion of privacy - section 21

The requester (now the appellant) appealed the Ministry's decision to deny access to the records. A Notice of Inquiry was provided to the Ministry, the appellant, the former employee and another individual whose rights may be affected by the disclosure of the records (the affected persons). Representations were received from the Ministry, the appellant and one of the affected persons.

DISCUSSION:

INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the information contained in the record and find that it qualifies as "personal information" within the meaning of section 2(1) and that it relates only to the two affected persons. While reference is made to other individuals in parts of the records, I find that these persons are described in their professional or employment capacities, rather than their personal capacities.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Where one of the presumptions in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is if the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions in section 21(3) apply, the Ministry must consider the application of the factors listed in section 21(2) of the Act, as well as all other circumstances that are relevant in the circumstances of the case.

The Ministry submits that disclosure of the information in the records would give rise to a presumed unjustified invasion of personal privacy under section 21(3)(b) of the Act. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where 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;

The appellant argues that the exception contained in the presumption must be considered in the circumstances of this appeal. He argues that the disclosure of the records is restrained only at the investigatory stage of the proceeding and that disclosure is necessary in order to comply with the rules of natural justice at the prosecution stage. In summary, the appellant submits that upon filing for a review of the Investigating Officer's decision, disclosure of all of the relevant information to the party who is the subject of the decision is required as a means of ensuring that the initial prosecution was justified.

The appellant also argues that the considerations listed in sections 21(2)(a) (public scrutiny) and (d) (fair determination of rights) which favour the disclosure of information apply to the information contained in the records. The appellant's submissions also infer that the release of the records will ensure an adequate degree of disclosure in its proceedings under the ESA. This is an unlisted factor which favours the disclosure of the information contained in the records.

In my view, the appellant's interpretation of the wording of the exception contained in section 21(3)(b) is incorrect. I am not satisfied that the disclosure of the information to the appellant is necessary to either prosecute the violation or to continue the investigation. While the appellant may disagree with the degree of disclosure which was provided to him when the prosecution under the ESA took place, my responsibility in this appeal is solely to review the head's decision in order to ensure that it conforms to the provisions of the Act. Any remedies which the appellant may wish to pursue regarding the disclosure made to him in the course of the ESA prosecution do not fall within the purview of this Act.

The Ministry submits that an investigation undertaken pursuant to the ESA satisfies the definition of a law enforcement investigation for the purposes of section 21(3)(b). It argues, therefore, that the personal information compiled during the course of such an investigation is covered by the presumption. The Ministry relies on the findings made by Inquiry Officer Anita Fineberg in Order P-990, an appeal involving a request for similar records compiled in the course of a Ministry investigation under the ESA. In that order, Inquiry Officer Fineberg found that the personal information contained in the records was compiled and was identifiable as part of an investigation into a possible violation of law, the ESA, and that the disclosure of this information would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b).

I adopt the reasoning of Inquiry Officer Fineberg in Order P-990 with regard to the application of the section 21(3)(b) presumption to records compiled in the course of an ESA investigation.

Accordingly, I find that the disclosure of this information would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b) of the Act. Section 21(4) does not apply to the information and the section 21(2) factors relied upon, either alone or in combination, are not sufficient to overcome the section 21(3)(b) presumption (Order M-170). I find, therefore, that the disclosure of the information contained in the records would constitute a presumed unjustified invasion of personal privacy and that the information qualifies for exemption under section 21.

PUBLIC INTEREST IN DISCLOSURE

The appellant has raised the possible application of section 23 in the circumstances of this appeal. This section states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (Emphasis added)

The Act is silent as to who bears the burden of proof in respect of section 23. However, it is a general principle that a party asserting a right or a duty has the onus of proving its case and, therefore, the burden of establishing that section 23 applies is on the appellant. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed the records which I have found to be subject to exemption under section 21, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

Again, the appellant argues that the rules of natural justice require that he be given access to all of the information compiled by the Employment Standards Officer in the course of his investigation. I find that there does not exist a public interest, compelling or otherwise, in the disclosure of the records at issue. The interest which the appellant seeks to promote is a private one. Accordingly, I find that section 23 has no application in the present appeal and the records are properly exempt from disclosure under section 21.

ORDER:

I uphold the Ministry's decision.

June 25, 1996

Donald Hale
Inquiry Officer