



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

# ORDER P-1301

Appeal P\_9600300

Ministry of Labour



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## **NATURE OF THE APPEAL:**

The appellant's son, a Forestry Technician, was fatally injured in December 1995 in a work related accident. The appellant subsequently submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Labour (the Ministry) for a copy of the final investigation report regarding the accident.

The Ministry located records responsive to the request and determined that the interests of three individuals would be affected by disclosure of the information. The Ministry notified the three individuals pursuant to section 28 of the Act, and requested their comments regarding release of the information contained in the report. Two individuals consented to the release of their statements. The third individual consented to the release of his statement and training records but objected to disclosure of portions of the investigating officer's notes concerning his role in the accident.

The Ministry then issued a decision in which it granted partial access to the records. The Ministry denied access to eight lines of the investigating officer's notes (Record 1) which refer to the third individual mentioned above (the affected person) pursuant to section 21(1) of the Act (invasion of privacy). The Ministry also denied access to two other records under section 19 of the Act (solicitor-client privilege). These two records consist of a one-page legal opinion request form (Record 2) and a one-page unsigned opinion which was attached to the request form (Record 3).

The appellant appealed the Ministry's decision.

This office provided a Notice of Inquiry to the Ministry, the appellant and the affected person. Representations were received from the Ministry only.

## **DISCUSSION:**

### **INVASION OF PRIVACY**

Section 2(1) of the Act defines personal information, in part, as "recorded information about an identifiable individual". I have reviewed the information contained in the records at issue and I find that all three records contain information pertaining to the affected person. Accordingly, I find that this information qualifies as his personal information. None of the information in the records pertains to the appellant.

In my view, the information contained in Records 2 and 3 should more properly be analysed under section 19. I will, therefore, only consider the information which has been withheld from the investigating officer's notes (Record 1) in the ensuing discussion.

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). In order for this section to apply, I must find that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the 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 contained 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 it.

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 which are relevant in the circumstances of the case.

The Ministry submits that the information contained in Record 1 was compiled and is identifiable as part of an investigation into a possible violation of law (the Occupational Health and Safety Act (the OHSA), and its disclosure would thus constitute a presumed unjustified invasion of privacy under section 21(3)(b) of the Act. The Ministry relies on previous orders of this office concerning its mandate under the OHSA (Orders P-1011 and P-1119). These orders have found that such investigations satisfy the definition of law enforcement in section 2(1) of the Act.

In Order P-1011, which also concerned a decision of the Ministry, Inquiry Officer John Higgins stated:

The Ministry submits that its investigation is being conducted under the Occupational Health and Safety Act (the OHSA), whose enforcement is within its mandate, and that violations of the OHSA can lead to prosecutions. Where prosecution occurs, the trial is conducted in the criminal courts, and fines can be imposed on both corporate and individual defendants in such proceedings. These submissions are consistent with the provisions of the OHSA, and I find that the definition of "law enforcement" has been satisfied in connection with the investigation and the records at issue.

I agree with these findings. In my view, this reasoning is equally applicable to a finding that Record 1 was compiled and is identifiable as part of an investigation into a possible violation of law, that is the OHSA. Accordingly, I find that disclosure of the information in the investigating officer's notes would constitute a presumed unjustified invasion of personal privacy under section 21(3)(b).

As I previously indicated, a presumption in section 21(3) may only be overcome by the application of section 21(4) or section 23 of the Act. The information does not fall within the types of information listed in section 21(4). The appellant has not raised the possible application of section 23, and I find that it does not apply. Therefore, I find that the

withheld portions of the investigating officer's notes (Record 1) are properly exempt under section 21(1).

### **SOLICITOR-CLIENT PRIVILEGE**

Under section 19 of the Act, the Ministry may refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The Ministry relies on both branches of section 19 to withhold access to the record. I will begin my analysis with Branch 2.

For a record to qualify for exemption under Branch 2, the Ministry must establish that the document was prepared by or for Crown counsel and that the record was prepared (1) for use in giving legal advice, or (2) in contemplation of litigation, or (3) for use in litigation.

Record 3 contains a brief summary of the occurrence and indicates who is to be charged. The record sets out the recommendation of the investigating inspector as to whether prosecution should occur. Record 2, which is directed to the Ministry's legal branch, reflects the information contained in Record 3 and provides for the approval or disapproval of that recommendation by a number of Ministry employees. The Ministry submits, in its representations, that the record was prepared for Crown counsel in contemplation of litigation and for use in giving legal advice. The Ministry submits that this document is directly related to the seeking of legal advice from its legal branch on whether or not there was a sufficient basis for a prosecution under the OHSA.

I have reviewed the records and the Ministry's representations. Based on the evidence, I am satisfied that the records were prepared for Crown counsel. In my view, the records were prepared so that Crown counsel could advise the Ministry with respect to a prosecution under the OHSA. Therefore, I am also satisfied that the records were prepared for use in giving legal advice. Accordingly, I find that Records 2 and 3 have met the requirements for exemption under Branch 2 and both records qualify for exemption under section 19 of the Act.

Because of the way I have determined this issue, it is not necessary for me to consider the application of the first branch of section 19 of the Act.

### **ORDER:**

I uphold the Ministry's decision.

Original signed by: \_\_\_\_\_ November 22, 1996  
Laurel Cropley  
Inquiry Officer