



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

ORDER PO-1669

Appeal PA-980258-1

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 a copy of the investigation report prepared in relation to a fatal industrial accident which occurred on September 9, 1996 at a specified site in Ottawa.

Pursuant to section 28 of the Act, the Ministry notified nine individuals whose interests might be affected (the affected persons) by the request. Four of these affected persons consented to disclosure of any information relating to them. Of the five remaining affected persons, one objected to disclosure, two did not respond, one had died, and one had moved and could not be located.

The Ministry then issued its decision letter to the requester, granting partial access to the responsive records. Section 21(1) (invasion of privacy) was the sole basis relied on by the Ministry for denying access to the remaining records or partial records.

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

During mediation, the Ministry disclosed one additional page, and the appellant agreed that he did not require several of the undisclosed records. The appellant also raised the possible application of section 23 of the Act to the records which remain at issue.

The records remaining at issue in this appeal are three witness reports, and the undisclosed portions of the investigator's report and his handwritten notes. The Ministry claims that this undisclosed information is the personal information of the remaining three affected persons, and that disclosure would constitute an unjustified invasion of their privacy.

I sent a Notice of Inquiry to the Ministry, the appellant and these three affected persons. Representations were received from the Ministry, the appellant and one of the affected persons.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual.

The records pertain to the investigation of a fatal industrial accident, pursuant to the Occupational Health and Safety Act (the OHSA). The Ministry states that the information at issue was collected from the affected persons in the context of this investigation.

It is clear that an investigation was undertaken with a view to determining whether any wrongdoing occurred and whether charges under the OHSA should be laid. Statements from various individuals were an integral part of this investigation. The investigator also created handwritten notes during interviews prior to

completing the formal investigation, and these notes contain the investigator's views and opinions in respect of the conduct of various individuals, including the affected persons. I find that the undisclosed records clearly contain the personal information of the three affected persons pursuant to section 2(1) of the Act. None of the information in the records pertains to the appellant.

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 of the individual to whom the information relates. Section 21(2) provides some criteria for the head 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.

The Ontario Court of Justice (General Division) determined in the case of John Doe et al. v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, that the only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) or where a finding is made under section 23 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 21 exemption.

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:

All of the information in issue consists of information collected from or generated by the Ministry with respect to specific individuals in the context of the Ministry's investigation of a fatal workplace accident. It is the Ministry's position that this places all of this information squarely within section 21(3)(b) which means that it cannot be disclosed unless there is consent or unless the section 23 override applies.

The affected person who provided representations concurs, and so do I. A number of previous orders involving similar records have established that investigations under the OHSA qualify as "law enforcement" activities (Orders P-1011, P-1119, P-1301 and P-1519), and it is clear that the records were compiled as part of an investigation into the possible violation of this law. Accordingly, I find that disclosure of the records would constitute a presumed unjustified invasion of the personal privacy of the three affected persons under section 21(3)(b).

The information is not within the types of information listed in section 21(4), and I find that the records are properly exempt under section 21(1).

COMPELLING PUBLIC INTEREST

Section 23 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]

It has been established in a number of orders that in order for section 23 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [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.)].

In Order P-984, Adjudicator Holly Big Canoe described the criteria for the first requirement mentioned in the preceding paragraph, as follows:

In order to find that there is a compelling public interest in disclosure, the information contained in a 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.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 21(1). Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption (Order P-1398).

I agree with these approaches to the analysis under section 23.

The appellant is an Association mandated by legislation to regulate the practice of members of its profession. The appellant points to this regulatory function in support of its position that section 23 applies. The appellant states:

The Association's regulatory function includes the undertaking of investigations to determine whether or not the ... work performed by members meets acceptable standards. In undertaking investigations regarding the work performed by [its members], we require access to all relevant information regarding any matter being investigated. ...

[IPC Order PO-1670/April 28, 1999]

...

... In this regard, we believe that there is indeed a compelling public interest to uncover all of the facts pertaining to the fatal accident, in order to allow the Association to continue its investigation, and deal with this matter in accordance with our mandate. Only by determining whether or not the actions of the [individuals] involved in the accident, should be the subject of a peer review, can the public be protected from similar accidents occurring again at some time in the future.

The OHSA creates a process for investigating workplace accidents, and gives the Ministry a mandate to determine whether fault is present and charges under the OHSA are warranted. In my view, this mandate is designed to address the public interest in ensuring workplace safety. Given this existing statutory scheme, I find that the appellant's interests are not sufficiently compelling to satisfy the public interest requirements of section 23. Even if they were, in my view, they would not outweigh the purpose of the mandatory personal information exemption claim, 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".

I do not dispute that the Association has a role to play in regulating the profession, and that its mandate addresses public interest considerations. However, the statutory scheme under which the Association operates has a comprehensive complaint investigation and disciplinary process that can be invoked to deal with matters involving members of the profession. If any of the various types of investigations permitted under this statute are warranted in the circumstances, the requisite powers and authorities are available, and an investigation can be conducted quite independently of the investigation conducted by the Ministry under the OHSA.

Accordingly, I find that the requirements of section 23 have not been established, and this section does not apply in the circumstances of this appeal.

ORDER:

I uphold the Ministry's decision.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

_____ April 28, 1999