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

ORDER PO-2517

Appeal PA-040348-1

Ministry of Labour

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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*) the Ministry of Labour (the Ministry) received a request for "the list of workplaces with the highest injury rate in Ontario (top 5,000)" [emphasis in original].

In its decision, the Ministry indicated that access to the requested list was being denied under sections 14(1)(c) and (g) of the *Act* (law enforcement). In support of its assertion that the records are exempt under these sections, the Ministry provided the requester with a copy of my decision in Order PO-2330, in which I upheld the Ministry's denial of access to a list of workplaces targeted as priorities for inspection by its Hamilton District Office for the 2003-2004 fiscal year. The Ministry's position was that my order addressed a request that was similar to that of the requester and that its response was the same as that which I upheld in Order PO-2330.

The requester (now the appellant) appealed the Ministry's decision.

At mediation, the scope of the request became an issue. Initially, the appellant attempted to differentiate its request from the one under consideration in Order PO-2330 by arguing that it is seeking access to workplaces with the highest rate of injury, not those that are targeted for inspection. The appellant's position changed during the course of mediation, however, and this is addressed in more detail below.

A Notice of Inquiry, accompanied by a copy of Order PO-2330, was sent to the Ministry, initially. In the Notice of Inquiry, I invited the parties to address the application of that order to the matters in issue in this appeal. The Ministry provided representations in response. The Ministry asked that a portion of an appendix to its representations be withheld due to confidentiality concerns. I then sent the Notice of Inquiry, accompanied by a copy of Order PO-2330 and the Ministry's non-confidential representations, to the appellant. The appellant provided representations in response to the Notice. As the appellant's representations raised issues to which I determined the Ministry should be given an opportunity to reply, I provided a copy of them to the Ministry. The Ministry filed representations by way of reply.

SCOPE OF THE REQUEST

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

That said, parties may agree to alter the scope of the request and the appeal at the mediation stage. As set out in the Mediator's Report:

> During mediation, the mediator attempted to clarify the request. The appellant stated that it is not just interested in 5000 employer names but also the statistics on the frequency rate of injuries for each.

Accordingly, the Mediator then sought the Ministry's position on this addition to the request. The Ministry identified a statistic called the "Lost Time Injury" (LTI) rates and advised that the list of employers with the highest LTI would not be the same as those on its target list of high risk employers. Furthermore, the Ministry advised that it does not maintain statistics on LTI rates, but instead relies on the Workplace Safety and Insurance Board (WSIB) to supply it with such data. The Ministry suggested that, unless it was the high risk employer list that the appellant was seeking, the request should be made to the WSIB.

As set out in the Mediator's Report:

> The appellant confirmed that it is, in fact, the list of high risk employers targeted by the Ministry that it seeks access to.

The Mediator's Report clearly identifies the "List of High Risk Firms" as being the relevant record and the record remaining at issue in the appeal.

The Mediator's Report was sent to both the Ministry and the appellant at the conclusion of mediation. In accordance with this office's practice, the covering letter to the Mediator's Report asked the recipients to review the report and advise the Mediator of any errors or omissions. The appellant chose not to make any comment and the Notice of Inquiry I sent to the parties reflects the amended scope of the request and appeal. The Ministry made its representations based on the amendment. However, the appellant's representations address the original request, rather than the amended one. In reply, the Ministry recounts the steps taken in the processing of the appeal to support its position that the initial request was consensually amended during mediation.

Analysis

In my view, in the circumstances of this appeal, the appellant cannot now take the position that the request and the scope of the appeal were not amended at mediation. The appellant initiated the amendment and confirmed it with the Mediator. Although the appellant could have taken issue with the consensual amendment to the request and the scope of the appeal when it was set out in the Mediator's Report, the appellant chose not to. To allow the appellant to again re-amend its request and the scope of the appeal at this stage of the process would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely resolution of the issues raised in the appeal.

As a result, I will consider the issues in this appeal to be governed by the amendment to the request and the scope of the appeal made at mediation; namely, a request for a list of high risk firms targeted for inspection by the Ministry. A request for any other information can be addressed through another access request.

RECORD:

The record at issue is a list of high risk firms that have been identified as inspection priorities by the Ministry for enhanced enforcements by its inspector's in 2004-2005. The Ministry provided this office with a representative sample of the list, which consists of a company name followed by a series of populated columns with headings.

DISCUSSION:

LAW ENFORCEMENT

Sections 14(1)(c) and (g) of the *Act* read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> …
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons …

In order to establish that the particular harm in question under section 14(1)(c) or (g) "could reasonably be expected" to result from disclosure of the list, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-

1772; see also Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Under section 2(1) of the *Act*, "law enforcement" is defined to mean:

> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in (b).

Section 14(1)(g)

The purpose of section 14(1)(g) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information.

In Order M-202, Inquiry Officer Asfaw Seife had the occasion to consider six of the exemptions contained in section 8(1) of the Municipal Freedom of Information and Protection of Privacy *Act* (MFIPPA), which is equivalent to section 14(1) of the *Act*. He stated with respect to 8(1)(g) of MFIPPA (the equivalent of section 14(1)(g) of the *Act*):

> In my view, in order for a record to qualify for exemption under section 8(1)(g) of the *Act*, the Police must establish that disclosure of the record could reasonably be expected to:
>
> > (a) interfere with the gathering of law enforcement intelligence information respecting organizations or persons, **or**
> >
> > (b) reveal law enforcement intelligence information respecting organizations or persons.
>
> The term "intelligence" is not defined in the *Act*. The *Concise Oxford Dictionary*, eighth edition, defines "intelligence" as "the collection of information, [especially] of military or political value", and "intelligence department" as "a [usually] government department engaged in collecting [especially] secret information".

The Williams Commission in its report entitled *Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980,* Volume II at pages 298-99, states:

> Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offences. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.

In my view, for the purposes of section 8(1)(g) of the *Act*, "intelligence" information may be described as information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.

I agree with this definition which has been applied in a number of subsequent orders of this office [see, for example recent Orders PO-2330 and PO-2459].

Representations

The Ministry submits that the list of high risk firms that have been identified as inspection priorities by the Ministry for enhanced enforcements by its inspector's in 2004-2005 is critically important to its mandate to enforce the provisions of the *Occupational Health and Safety Act* (*OHSA*) and that disclosure of the list would compromise that mandate. The Ministry explains that the requested list was extracted from a document that was generated in response to recommendations contained in an internal audit report issued in November 2001. The audit report recommended that in order to use resources more effectively and enhance enforcement, the Ministry should make greater use of targeted workplace inspections aimed at high-risk workplaces.

The list of high priority firms at issue in this appeal was prepared in 2004, using the methodology established in 2003, and is part of the Ministry's 2004 targeted enforcement plan. It was based on data provided from the Workplace Safety and Insurance Board (WSIB) and extracted from the Ministry's Merged Information System. The Ministry verifies the

information on the list with WSIB information and databases. I note that this is the same way that the list under consideration in Order PO-2330 was prepared. The Ministry submits that the list reflects a clear policy of targeted enforcement; it includes a list of potential targets and it contains information that facilitates selection of specific targets from the list. The Ministry submits in particular that the "Rank of Severity" column in the list is to be used by inspectors in identifying targeted workplaces for inspection. The Ministry states that the list has not been shared with any outside parties, and is not publicly available.

The Ministry advises that the information on the list will remain largely current as the list reflects data collected over a four-year period and changes from one year to the next cannot be expected to be dramatic given the four-year basis for assessing risk.

As set out in the materials provided, it is the policy of the Ministry not to give notification before a routine inspection unless agreed to by a Director (as defined in the *OHSA*) after the employer and union or workers representative submit a joint proposal for an announced inspection. Even if there is such an agreement, inspections without prior notice may occur if there is a significant deterioration in a company's accident or compliance record.

The Ministry relies on section 54(1)(a) of the *OHSA* as its authority to conduct unannounced inspections. That section provides that an inspector may, for the purposes of carrying out his or her duties and powers under the *OHSA* and the regulations, subject to section 54(2), enter in or upon any workplace at any time without warrant or notice. Section 54(2) of the *OHSA* sets out that an inspector may only enter a dwelling, or that part of a dwelling, actually being used as a workplace with the consent of the occupier or under the authority of a warrant issued under the *OHSA* or the *Provincial Offences Act*.

The Ministry submits that disclosure of the list would cause harm, because it would:

a) Undermine the clear statutory policy supporting unannounced inspections set out in section 54(1)(a) of the *OHSA*,

b) Allow some workplaces to have an opportunity to restructure their affairs to present an impression of compliance that does not reflect the day-to-day state of affairs,

c) Encourage firms that do not appear on the list to be less vigilant, and

d) Unjustly harm the reputation of some organizations that would be unfairly viewed as "bad actors".

In its representations the Ministry submits that proactive inspections are designed to promote compliance with the *OHSA* as well as prevent non-compliance with that statute. The Ministry submits that while Order P-1305 sets out that the words "intelligence information" in section 14(1)(g) meant that information had to be gathered in a "covert" manner, the meaning of

"covert" has not been clearly defined. Relying on definitions contained in the Concise Oxford Dictionary, 8th edition, 1990, the Ministry urges an expansive definition. It submits that "covert" is defined to mean "secret", and "secret" is defined to mean "kept or meant to be private". Following this line of reasoning the Ministry says it points to a reliance on confidential information. This, it submits, is consistent with its use of internally generated data from the Ministry and the WSIB to produce the list. It also submits that this is consonant with the dictionary meaning of "intelligence" which is "the collection of information". As this is information relating to on-going prevention rather than compilation of information about a single occurrence, it was generated in a law enforcement context and used solely for that purpose. Because of the harm that disclosure of the list would cause, the Ministry submits that the exemption set out in section 14(1)(g) applies.

Unfortunately, the appellant's representations focus on distinguishing the request for "the list of workplaces with the highest injury rate in Ontario (top 5,000)" from the request for a list of high risk firms that have been identified as inspection priorities by the Ministry for enhanced enforcement. It is the latter information that I have determined to be at issue in this appeal. As a result, the appellant's representations do not address the record that I have determined to be at issue here.

Analysis and Findings

As noted previously, in order to qualify for exemption under section 14(1)(g), the Ministry must demonstrate that disclosure would either interfere with the gathering of or reveal "law enforcement" intelligence information respecting organizations or persons.

Thus the information to be gathered or revealed must meet the definition of "law enforcement" in section 2(1) of the *Act*. I find that, in the circumstances before me, the process of enforcing the provisions of the *OHSA* involves investigations or inspections which could lead to proceedings in a court or tribunal where penalties could be imposed (notably, under section 66 of the *OHSA*) and, therefore, the list meets part (b) of the definition of "law enforcement" under the *Act*.

I will now consider whether disclosure could reasonably be expected to interfere with the gathering of or reveal intelligence information.

In Order MO-1261, a case dealing with 8(1)(g) of MFIPPA (again, the equivalent of section 14(1)(g) of the *Act*), the Toronto Police Services Board submitted that the gathering of intelligence information by the intelligence units of police agencies enables the police to take a proactive approach in dealing with various groups and activities. In addition, they submitted that disclosure of information which was obtained as part of this "intelligence gathering" could have a number of consequences, including identification of individuals who are being monitored and could result in individuals or groups going "underground" or otherwise taking active steps to conceal their activities or associations. Considering all the representations in that case and after reviewing the records at issue it was determined that disclosure of the requested information

would reveal law enforcement intelligence gathered by the police. Accordingly, access to this type of information was denied.

I find the discussion in Order MO-1261 to be of assistance here. In the matter before me, the firms on the requested list are there because of the firm's past history. A firm on the list, may more likely than not, be subject to an inspection and then, depending on what is discovered, be subject to investigation and potential penalty or sanction. Just as the police in Order MO-1261 submitted that the identification of the names of individuals or groups that were being monitored could result in their going "underground" or otherwise taking steps to conceal their activities, the Ministry now expresses similar concerns, but in another way. They are concerned that if a firm is aware of an impending unannounced inspection it can modify its activities to provide an illusion of compliance. Furthermore, firms that are not on the list may relax their standards.

I am satisfied of the currency of use of the list at issue, and in my opinion this list is the type of information that qualifies as "law enforcement intelligence information" under section 14(1)(g) and should not be required to be divulged. In my view the information was gathered in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is not compiled and identifiable as part of the investigation of a specific occurrence.

I therefore find that the list is exempt under section 14(1)(g) of the *Act*. Having reached this conclusion, it is not necessary for me to consider section 14(1)(c).

ORDER:

I uphold the Ministry's decision.

Original Signed By: October 31, 2006
Steven Faughnan
Adjudicator