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

ORDER PO-2703

Appeal PA07-260

Workplace Safety and Insurance Board

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NATURE OF THE APPEAL:

The Workplace Safety and Insurance Board (WSIB) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "any information" the WSIB may have on the requester himself, who is identified by name.

In responding to the request, the WSIB located a number of responsive records containing references to the requester. They form part of the materials assembled by the WSIB in preparation for a number of prosecutions under the *Workplace Safety and Insurance Act* (the WSIA). The WSIB issued a decision denying access to these records. In its decision, the WSIB relies on the provision found at 65(5.2) of the *Act*, which provides that certain prosecution-related records are excluded from the scope of the *Act*.

For the purposes of this appeal, it is important to note that when a record is excluded from the scope of the *Act* by a provision like section 65(5.2), the records are not subject to any portion of the *Act*, including its access-to-information provisions. This means that the records cannot be accessed by requesting them under the *Act*.

In its decision, the WSIB states:

> Access is denied under section 65(5.2) of [the *Act*]. Section 65(5.2) excludes records from [the *Act*] relating to a prosecution until all proceedings are completed. As you are aware, there is an ongoing prosecution by the Workplace Safety and Insurance Board (WSIB) of [franchises operating under a specified business name] for failure to register and also to submit a statement of wages under sections 75 and 78 of the Workplace Safety and Insurance Act (WSIA) which are offences under subsections 151(1) and 152(1.1) of the WSIA.

The requester, now the appellant, appealed this decision. In his notice of appeal, the appellant seeks to distinguish information relating to himself from information about the franchises to which the prosecution relates. Notwithstanding that the references to him in the responsive records identified by the WSIB appear in materials assembled in preparation for a number of prosecutions under the WSIA (proceedings he was clearly aware of, since he has acted as agent for a number of the accused individuals), the appellant's letter of appeal argues that section 65(5.2) does not apply because, as an individual, he is "disjunctive" from "persons or corporations" under prosecution, and that he himself is not under prosecution. I will discuss this argument further in the context of whether section 65(5.2) applies to the records at issue, below.

The appellant's notice of appeal also argues that the WSIB has not named any of the exemptions found at sections 12 through 22 of the *Act* as the basis for denying access, and as a consequence, that the WSIB has "no statutory grounds" for denying access. This argument has no basis in law. As noted above, the WSIB relies on section 65(5.2), and if that section applies, the *Act* and its access regime do not apply to the requested records. That is the issue before me in this appeal. I will not refer to this argument again.

Before being transferred to me for adjudication, this appeal was assigned to a mediator to attempt settlement. During mediation, the appellant made the same observation I have referred to above from his notice of appeal, that is, he is seeking information that relates to himself, not information that relates to the businesses under prosecution. No mediation was possible, so this appeal advanced to adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

By way of further background, the Board's prosecution involves 98 charges laid against 12 individuals or corporations operating under the specified business name. The charges concern alleged violations of sections 75 and 78 of the WSIA for failure to register with the WSIB as an employer, and failure to report payroll. These charges, if proved, would constitute offences under sections 151 and 152 of the WSIA, and would result in a penalty under section 158(1) of that statute.

I began my inquiry by sending a Notice of Inquiry to the WSIB, in which I outlined the background and issues in this appeal, and invited the WSIB to provide representations. The WSIB responded with representations. In its representations, the WSIB indicated that it had reconsidered its original decision and decided to disclose the following records to the appellant:

1. 2003 Annual Report of the College of Opticians;

2. Copy of WSIB system screens relevant to the appellant and [specified business name];

3. Copies of advertisements in various publications of [specified business name]; and

4. 28 pages of correspondence between the appellant and WSIB.

I have confirmed that those records have in fact been disclosed and they are therefore no longer at issue.

After receiving the WSIB's representations, I sent the Notice of Inquiry to the appellant, along with the WSIB's complete representations, and invited the appellant to provide representations, which he did. I subsequently forwarded the representations of the appellant to the WSIB, inviting it to provide reply representations, which it did.

The WSIB has identified portions of its prosecution materials as responsive to the request. These materials are voluminous. The WSIB requested that I review the records at its premises rather than requiring copies to be produced. Accordingly, I attended at the WSIB office and reviewed the records onsite.

RECORDS:

The WSIB produced the following materials and indicated that they contain the information that is responsive to this request:

- "Court Brief" looseleaf volumes prepared for 9 different business locations;
- 11 binders of original disclosure materials previously provided to the defendants;
- 25 binders of materials received by means of search warrants.

The WSIB takes the position that records referring to the appellant are the responsive records.

PROSECUTION-RELATED RECORDS

Section 65(5.2) states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

The WSIB's initial representations indicate that "[t]he appellant may be called as a witness in this prosecution." The WSIB further submits that "the records at issue clearly relate to a prosecution", and goes on to refer to the charges laid under the WSIA. The WSIB also states that "[t]he records are intended to be used as part of the [WSIB]'s prosecution of these charges and would be used in the potential examination of the appellant."

In his representations, the appellant continues to rely on the fact that he has not been charged. As noted above, he had previously raised this in his letter of appeal and at mediation. In his representations, he argues that, under the circumstances, to find that records naming him are records "relating to a prosecution" would be an absurdity and an abuse of process.

I am puzzled by the appellant's repeated reliance on this argument. The appellant has requested information "about" himself. If that information appears in records gathered or used in a prosecution, and which otherwise qualify under section 65(5.2), the fact that he has not been individually charged has no impact whatsoever on the application of this section. Moreover, in that situation, it would not be absurd or an abuse of process to find that this section applies. Accordingly, I will not refer to this argument again. Instead, I will consider whether, based on the evidence before me, the responsive records are in fact records "relating to a prosecution in respect of which not all proceedings have been completed" and are thus excluded from the scope of the *Act* under section 65(5.2).

In its representations, the WSIB states:

> The WSIB submits this section should be interpreted in its plain and ordinary meaning. Accordingly, the [*Act*] will not apply to a record that,
>
> 1. relate[s] to a prosecution; and
>
> 2. if all proceedings in respect of the prosecution have not been completed.

In my view, the interpretation of this section is not as straightforward as the WSIB suggests. To begin with, the discussion of how to interpret phrases such as, "relating to", "in relation to", "respecting" and "associated with" in previous orders (discussed in more detail below) indicates that the degree of connection between the records and a prosecution, required to establish the application of the section, is a topic requiring exploration. In my view, this entails consideration of the legislative purpose behind the provision.

As well, it is necessary to consider what records "relate to a prosecution" and the effect of this provision on records or copies located outside the prosecution materials examined by me, whose initial purpose was something other than prosecution, of which copies have been made and included in a court brief or other prosecution materials. This raises the subsidiary question of when an intention to prosecute arises.

Even without these difficulties of interpretation, consideration of legislative purpose is, in any event, the hallmark of contemporary statutory interpretation. Indeed, the Supreme Court of Canada has stated that this approach is essential to statutory interpretation. For example, in *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, Justice Bastarache states as follows (at para. 21):

> Although much has been written about the interpretation of legislation [citations omitted], Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense *harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*. [My emphasis.]

This approach is commonly referred to as the "modern" principle of statutory interpretation. A more recent articulation of the rule appears in *Sullivan and Driedger on the Construction of Statutes*, 4th ed., by Ruth Sullivan (Toronto: Butterworths, 2002) at p. 3:

> [A]fter taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.

Thus, in my view, the purposes of the *Act* as set out in section 1 are important in the interpretation and application of its provisions, including section 65. Section 1 states, in part, as follows:

> The purposes of this Act are:
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; …

In applying the modern principle of interpretation to section 65(5.2), it is equally important to consider the legislative purpose that underlies the addition of this provision to the *Act*. The accompanying note with Bill 152, the *Ministry of Government Services Consumer Protection and Services Modernization Act, 2006*, which enacted this amendment as part of Schedule C, offers little insight beyond the wording of the amendment. It states that the intent of this amendment is to do the following:

> Provide for the Acts not to apply to records relating to a prosecution if not all proceedings have been completed. (See FIPPA, subsection 65 (5.2) […].)

I have also reviewed the legislative and committee debates concerning this bill and found no specific reference to this provision.

In my view, section 65(5.2) is aimed at protecting prosecutors from having to address access-to-information requests for records that are part of their prosecution file where the matter is ongoing. The apparent rationale for doing this would be avoidance of the distractions that would

be caused to Crown prosecutors, who are well known to have heavy caseloads, if they were required to address access-to-information requests, including which exemptions to claim, while proceedings are ongoing. Similar considerations apply to provincial offences officers, who prosecute provincial offences such as the outstanding charges under the WSIA in this case. The fact that materials of this kind can be voluminous, to say the least, provides further reinforcement for this rationale.

While it might be argued that section 65(5.2) has the further purpose of preventing premature disclosure of prosecution-related information, or put slightly differently, protecting the integrity of the criminal justice system, I would not impute this purpose to the legislature since it is already addressed by the law enforcement exemption found at section 14 of the *Act*. As well, given the public interest in subjecting the criminal justice system to public scrutiny and holding it accountable, I would expect that if this were the purpose of the provision, this would have been identified in the accompanying material or in debate.

Similarly, one could argue that the purpose of section 65(5.2) is to protect personal privacy. In my view, this purpose is already accomplished by the personal privacy exemption found at section 21, as well as the privacy rules and exemptions in Part III of the *Act* (for example, sections 42 and 49(b)).

As noted previously, the amendment must be interpreted in the context of the Act as a whole, including its purposes, one of which is "to provide a right of access to information under the control of institutions in accordance with the principle[] that information should be available to the public."

I now turn to consider section 65(5.2). This section, being interpreted and applied in this order for the first time, raises a number of interpretive and other questions in the context of this appeal. These are:

(1) What constitutes a "prosecution"? Do charges under the WSIA qualify as a "prosecution"?

(2) What is required to find that a record is "relating to" a prosecution?

(3) Where records are not part of a court brief or Crown brief, what criteria apply to determine whether a record may be described as "relating to" a prosecution?

(4) What considerations must be taken into account in determining whether all proceedings in respect of a prosecution have been completed?

I will address these questions in turn.

(1) What constitutes a "prosecution"? Do charges under the WSIA qualify as a "prosecution"?

The *Act* does not define "prosecution," and as this is the first application of section 65(5.2), the meaning of this term must be considered. In that regard, the British Columbia *Freedom of Information and Protection of Privacy Act* has a similar provision that has been interpreted by the Information and Privacy Commissioner of that province. Section 3(1)(h) of the British Columbia *Freedom of Information and Protection of Privacy Act* states:

> This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> > (h) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

Unlike the Ontario statute, which does not define "prosecution", the British Columbia Legislature has defined the term, "prosecution" in Schedule 1 of its *Freedom of Information and Protection of Privacy Act*, as follows:

> "prosecution" means the prosecution of an offence under an enactment of British Columbia or Canada;

The meaning of "offence" in this provision has been discussed in orders of the Information and Privacy Commissioner of British Columbia. The British Columbia Commissioner has further interpreted the term "prosecution" as the "prosecution of a criminal or quasi-criminal offence," not including a proceeding of a regulatory or disciplinary nature. In Order No 290-1999, the Information and Privacy Commissioner of British Columbia dealt with records relating to an investigation under the British Columbia *Police Act*. Former Commissioner David H. Flaherty states:

> I have concluded below that a "prosecution" within the meaning of the Act includes neither the internal disciplinary process nor the citizen complaint process under the *Police Act* and the *Police (Discipline) Regulation*. As a result, it is unnecessary to establish which stream(s) under the *Police Act* or the *Police (Discipline) Regulation* the proceedings between the applicant and the Police Department have been or are flowing. Since neither process is a "prosecution" under Section 3(1)(h), the exclusion from the scope of the Act does not apply, whether or not the proceedings are concluded…
>
> The risk of penalty or sanction referred to in the definition of "law enforcement" is wider than true penal consequences associated with offence prosecutions under Section 11 of the *Charter* and has been so interpreted in conjunction with the Section 15 exception in the Act. Thus the Act distinguishes between "law enforcement" matters which may be criminal, quasi-criminal, regulatory, or

> disciplinary in nature, and "prosecution" matters which are limited criminal or quasi-criminal processes.
>
> In my opinion, "prosecution" in Schedule 1 of the Act, and thus also in Section 3(1)(h) of the Act, means a prosecution of a criminal or quasi-criminal offence.

This approach is reiterated in later orders of the British Columbia Commissioner, including Order F05-26 issued by the current Commissioner, David Loukidelis.

While the Ontario *Act* differs from that of British Columbia in not providing a definition of "prosecution", it does include a definition of "law enforcement" that is similar to the one referred to by the British Columbia Commissioner. I also note that, like the British Columbia Legislature, the Ontario Legislature opted against referring to "law enforcement" in section 65(5.2), despite it being a defined term in the *Act*; rather, it chose the term "prosecution," which in my view ought to be given a different meaning, as the British Columbia Commissioner has done. If the Ontario Legislature had intended to apply this exclusion to the broad range of activities encompassed within "law enforcement," it would have used that term in section 65(5.2).

Accordingly, although the Ontario Legislature did not adopt the definition of "prosecution" used in the British Columbia statute, I nevertheless consider it to be apt, and in my view, therefore, "prosecution" in the context of section 65(5.2) the *Act* means "the prosecution of an offence under an enactment of Ontario or Canada." However, the question remains as to what would qualify as an "offence". Relying on jurisprudence under section 11 of the *Canadian Charter of Rights and Freedoms* (the *Charter*), the British Columbia Commissioner concludes that an offence must be criminal or quasi-criminal in order to attract the application of section 3.1 of the British Columbia statute.

Section 11 of the *Charter* sets out rights accruing to persons charged with "an offence". In *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, the Supreme Court of Canada discusses the criteria for deciding that something constitutes an "offence" within the meaning of section 11 of the *Charter*. In that case, the Court deals with whether a charge that an officer had committed a "major service offence" under the *Royal Canadian Mounted Police Act* is an "offence" under section 11 of the *Charter*. In making this assessment, Wilson J., for the majority, discusses the distinction between regulatory proceedings and offences of a penal nature. She states:

> While it is easy to state that those involved in a criminal or penal matter are to enjoy the rights guaranteed by s. 11 [of the *Charter*], it is difficult to formulate a precise test to be applied in determining whether specific proceedings are proceedings in respect of a criminal or penal matter so as to fall within the ambit of the section. The phrase "criminal and penal matters" which appears in the marginal note [to section 11] would seem to suggest that a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. I believe that a matter could fall within s. 11 under either branch. [para. 21]

…

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity. … Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply. [para. 23]
>
> This is not to say that if a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline, integrity or to regulate conduct within a limited private sphere of activity, he or she can never possess the rights guaranteed under s. 11. Some of these matters may well fall within s. 11, not because they are the classic kind of matters intended to fall within the section, but because they involve the imposition of true penal consequences. In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity. … If an individual is to be subject to penal consequences such as imprisonment -- the most severe deprivation of liberty known to our law -- then he or she, in my opinion, should be entitled to the highest procedural protection known to our law. [para. 24]

In this case, the Court noted the disciplinary character of the legislation in question, but nevertheless decided that a "major service offence" constitutes an "offence" because it carries true penal consequences. The provision in question imposes penalties including fines or imprisonment for up to one year.

In my view, accordingly, the term "prosecution" in section 65(5.2) of the *Act* means proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Ontario or Canada and may include regulatory offences that carry "true penal consequences" such as imprisonment of a significant fine.

Turning to the appeal before me, the provisions of the statute governing the proceedings and stipulating the penalty to be applied must be considered. The relevant portions of the WSIA, an enactment of the Ontario Legislature, state as follows:

> 75. (1) Every Schedule 1 and Schedule 2 employer shall register with the Board within 10 days after becoming such an employer.
>
> 78. (1) Every year on or before the date specified by the Board, a Schedule 1 employer shall give the Board a statement setting out the total wages earned during the preceding year by all workers and such other information as the Board may request.
>
> 151. (1) An employer who fails to register or to provide the information required under section 75 is guilty of an offence.
>
> 152. (1) An employer who fails to comply with subsection 78(1), (2) or (3) or 80(1) is guilty of an offence.
>
> 158. (1) A person who is convicted of an offence is liable to the following penalty:
>
> > 1. If the person is an individual, he or she is liable to a fine not exceeding $25,000 or to imprisonment not exceeding six months or to both.
> >
> > 2. If the person is not an individual, the person is liable to a fine not exceeding $100,000.

In this regard, I note that section 158(1) refers to a "conviction" and the penalties include fines and imprisonment. In view of the magnitude of the fines, and the fact that an individual charged may face imprisonment, I am satisfied that charges under these provisions of the WSIA entail true penal consequences. I therefore find that they constitute "offences", and proceedings in respect of charges under sections 151 and/or 152 of the WSIA constitute a "prosecution" within the meaning of section 65(5.2).

(2) What is required to find that a record is "relating to" a prosecution?

As noted above, the words, "relating to" and similar phrases such as "in relation to", "respecting" and "associated with" have been the subject of previous interpretation by this office. I summarized these decisions in my recent Order PO-2694, in considering the meaning of "respecting or associated with research" in section 65(8.1)(a) of the *Act*. Like section 65(5.2), section 65(8.1)(a) excludes records from the application of the *Act*, and in particular, records "respecting or associated with" research. I stated:

> For the reasons that follow, I have concluded that the words "respecting or associated with" *require that there be a substantial connection between the records and actual or proposed research. In my view, the purpose of the section must be considered in assessing whether the connection between the records and*

the actual or proposed research is sufficient to establish the necessary substantial connection in a particular case. [Emphasis added.]

When the Legislature enacted section 65(8.1)(a) it did so in the context of the *Act* and it is presumed that the intention was that it would be read in the context of the *Act* as a whole. While the words "respecting or associated with" do not appear elsewhere in the *Act*, some aid in their interpretation can be found in previous orders of this office that interpret the words "in relation to" used in section 65(6), referred to above in my discussion of the *Solicitor General* and *Ministry of Correctional Services v. Goodis* cases.

Section 65(6) states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution *in relation to* any of the following:
>
> > 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
> >
> > 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
> >
> > 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> …
>
> In Order MO-2024-I, I reviewed the jurisprudence of this office on the meaning of "in relation to" in section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*), the equivalent of section 65(6) of the *Act*. The appellant in that appeal sought access to the total amount paid by the City of Toronto to a law firm defending a lawsuit brought by a former employee. The City denied access on the basis that the records were excluded by section 52(3)1 of the municipal *Act*. I stated:

The consequence of a finding that section 52(3)1 applies is a serious one – the total exclusion of the record from the scope of the access and privacy provisions of the *Act*. In this case, as the appellant points out, the record relates to the expenditure of public funds to defend a legal action. This type of information has a strong connection to government accountability, which the Supreme Court of Canada refers to as an "overarching" purpose of access legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.)). In my view, this purpose, which relates to the right of public access to government-held records identified in sections 1 and 4 of the *Act*, must be kept in mind in assessing the proper meaning of "in relation to" in this case.

…

As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

> Having considered all the authorities referred to above, including the dictionary definitions cited, and the French version of the provision, I conclude that "respecting or associated with" has a similar meaning to "in relation to" in previous decisions of this office. All these phrases describe a similar degree of connection. In my view, like "in relation to", "respecting or associated with" should be interpreted to mean "for the purpose of, as a result of, or substantially connected to." Also, and similar to the cautionary note in Order MO-2024-I, meeting this definition requires more than a superficial connection between the records and the research in question. …

Having reviewed these authorities, I have decided that the following principles should be followed in the interpretation and application of section 65(5.2):

- "relating to" should be interpreted in the same manner as "in relation to", that is it means "for the purpose of, as the result of, or substantially connected to";

- there must be a substantial connection between the records and the prosecution, and the connection must not be merely superficial; and

- the purpose of the provision must be taken into account in deciding whether the connection is sufficient to justify the application of this exclusion.

I also conclude that this interpretation is plausible; that is, it complies with the legislative text; it is "efficacious" because it respects the legislative purpose of both the amendment and the *Act*, and it is acceptable, because its consequences do not violate legal norms, and are reasonable and just.

In this case, it is clear that the records maintained in "court brief" binders were either prepared for provincial offences officers' use in the prosecution, or are copies of other records that have been expressly made and included in the court brief for that same purpose. These records are clearly distinguishable from the legal bills under consideration in Order MO-2024-I, which lacked the necessary substantial connection to the actual conduct of the proceedings for me to

find that they were "in relation to" those proceedings. The opposite is the case here. These materials have the necessary substantial connection and I find that they are records "relating to" the prosecution of the companies and/or individuals that have been charged. On this same basis, I also conclude that the contents of the disclosure binders and additional binders of material seized under a warrant "relate to" these prosecutions; clearly these records are closely connected to the prosecution, and I find that they are "substantially connected" to it.

I note, however, that parts of the "court brief" binders represent certified extracts from the WSIB's non-prosecution files, and in particular, files maintained by its customer services representatives. Certified copies or extracts from these files are found in these binders behind the tab entitled "firm fiche." Some, but not all, of this material has been disclosed to the appellant. For example, correspondence from September and October 2005 has not been disclosed. The copies of this correspondence actually contained in the "firm fiche" materials in the court brief records clearly relate to a prosecution. However, the identification of these records as certified copies or extracts suggests the existence of original or other copies of these records located in non-prosecution files such as those maintained by customer service representatives. The question of whether those original records or other copies would also "relate to" the prosecution must be considered. I will discuss this further below.

As well, given that the records in the "firm fiche" sections of the court brief binders are "certified extracts or copies" taken from other WSIB files, I conclude that there may be additional records in those files that mention the appellant and would be responsive to his request. The WSIB has not indicated that the customer service representatives' files were searched in order to locate responsive records. None were produced to me as responsive, and I therefore conclude that the actual prosecution materials were viewed as the only source of responsive information. Like the undisclosed customer service records which have been copied for the court briefs, the status of additional responsive records in customer service files, if they exist, must be considered. I will discuss this further below.

(3) Where records are not part of a court brief or Crown brief, what criteria apply to determine whether a record may be described as "relating to" a prosecution?

In my view, in assessing whether a record found outside the prosecution materials "relates to" a prosecution where the original purpose is not clear, it is necessary to consider: (a) the original purpose for preparing the record, (b) when the intent to prosecute became crystallized, and (c) the date the record was originally prepared or created.

If the purpose of preparing records found outside the court brief and other prosecution materials was to assist or to be used in a prosecution, and the intent to prosecute had already crystallized when the records were created, such original records clearly "relate to" the prosecution for the purposes of section 65(5.2).

The question of when the intent to prosecute has crystallized is therefore a crucial one for records of this nature. It has been addressed in jurisprudence of the Supreme Court of Canada in relation to the right to be free from unreasonable search and seizure under section 8 of the *Canadian*

Charter of Rights and Freedoms, with respect to when a regulator must obtain a warrant to continue an investigation.

In the leading case of *R v. Jarvis* (2002), 219 D.L.R. (4th) 233, the Court reviewed the conduct of an audit under the *Income Tax Act* that subsequently became a "penal" investigation (that is, one whose purpose was to prosecute) under the tax evasion provisions within that statute. The auditor, whose role is that of a regulatory inspector, turned her file over to the investigations unit of Revenue Canada, which subsequently obtained a search warrant. After turning the file over, and without informing the taxpayer that she had done so, the auditor received documentation she had requested from the taxpayer and forwarded it to the investigations unit. Justices Major and Iacobucci, writing for a unanimous Court, found that despite its significant penal provisions, the *Income Tax Act* is "a regulatory statute, but non-compliance with its mandatory provisions can in some instances lead to criminal charges being laid".

As regards the conversion of an audit into a penal investigation, the Court stated:

> In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.
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> To begin with, the mere existence of reasonable grounds that an offence may have occurred is by itself insufficient to support the conclusion that the predominant purpose of an inquiry is the determination of penal liability. Even where reasonable grounds to suspect an offence exist, it will not always be true that the predominant purpose of an inquiry is the determination of penal liability. In this regard, courts must guard against creating procedural shackles on regulatory officials; it would be undesirable to "force the regulatory hand" by removing the possibility of seeking the lesser administrative penalties on every occasion in which reasonable grounds existed of more culpable conduct.
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> All the more, the test cannot be set at the level of mere suspicion that an offence has occurred. Auditors may, during the course of their inspections, suspect all manner of taxpayer wrongdoing, but it certainly cannot be the case that, from the moment such suspicion is formed, an investigation has begun. On what evidence could investigators ever obtain a search warrant if the whiff of suspicion were enough to freeze auditorial fact-finding? …

> The other pole of the continuum is no more attractive. It would be a fiction to say that the adversarial relationship only comes into being when charges are laid. Logically, this will only happen once the investigators believe that they have obtained evidence that indicates wrongdoing.

In its concurrently issued decision in *R. v. Ling* (2002), 219 D.L.R. (4th) 279 (S.C.C.) the Court excluded evidence obtained during an audit under the *Income Tax Act* as having been obtained in violation of section 8 of the *Charter*. The Court stated the issue as "whether Revenue Canada was conducting an investigation into the commission of an offence when it gathered evidence from the appellant pursuant to the requirements power", and went on to ask, "[a]t what point did the adversarial relationship crystallize?" The Court went on to say:

> As stated in Jarvis, an audit and an investigation are not mutually exclusive. Revenue Canada may conduct both concurrently. Revenue Canada must be careful, however, not to use the requirement power of the audit to gather further evidence for an investigation after it has commenced. If it does so it violates the Charter rights of the investigated taxpayer.

The Court decided there had been a *Charter* violation because they determined that, at a certain point, the officials began to investigate the taxpayer's penal liability, or put slightly differently, the focus of the investigation had shifted towards prosecution. This provides some amplification of the commentary in *Jarvis* to the effect that, while mere suspicion of an offence having been committed is not enough to demonstrate an intent to prosecute, neither is it a requirement that charges have been laid. The purpose or intent at the relevant point in time is the determining factor.

For copies of responsive records found in locations outside the court briefs and other prosecution materials produced in this case, the decision as to whether they "relate to" a prosecution will depend on whether an intent to prosecute had been formed when the record was created, and if so, the nature of the connection between the record and the prosecution.

In the case of a record prepared before the intent to prosecute was formed, or prepared for a different purpose, a further question arises as to whether the inclusion of a copy of that record in the prosecution file affects the status of the original, or of other copies of that record found in locations other than the court brief or other prosecution records. A similar question was considered by Adjudicator Steven Faughnan in Order PO-2678. In that case, the Ministry of Community Safety and Correctional Services responded to a request for all records pertaining to the requester's arrest by the Ontario Provincial Police. The requester had made a complaint under the *Police Services Act* (PSA), leading to an investigation of the police officers who arrested him. The Ministry only identified the PSA investigation records, not the records originally compiled in connection with the arrest, as responsive. The Ministry claimed that the PSA records were excluded from the *Act* under section 65(6), an exclusion from the application of the *Act* similar to section 65(5.2), but applicable to labour relations and employment-related records.

Adjudicator Faughnan distinguished between the original records and those in the PSA investigation file, finding that the latter were excluded under section 65(6). He found that the *Act* applies to the original records and ordered the Ministry to search for them and make an access decision under the *Act*. He stated:

> In Order M-927 Senior Adjudicator John Higgins drew a distinction between a request for the contents of an original police investigative file on the one hand and a request for information relating to allegations of misconduct against the officers who conducted that original investigation, on the other. That order dealt with section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), the municipal equivalent of section 65(6) of the *Act*. Senior Adjudicator Higgins found that the main investigation file housing the original incident reports and related officers' notebook entries, would remain subject to the *Act*, even if copies of these same records made their way into the file relating to a review of a police officer's conduct.
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> …
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> In Order MO-2131, adjudicator Frank DeVries applied the reasoning in Order M-927 and held that an original accident report, although duplicated in a police complaints file, was not excluded from the purview of *MFIPPA*. In that appeal, the Toronto Police Services did not assert that the accident report was excluded from the *Act*, but rather claimed that it was subject to exemption. In making his finding that the accident report was subject to the *Act*, Adjudicator DeVries wrote that:
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> > … Senior Adjudicator Higgins clearly identified the important distinction between records or copies of records which relate to day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and copies of those same records which may reside in a file relating to an investigation of a police officer's conduct. I accept this distinction for the purpose of my review of the records at issue in this appeal, and the possible application of section 52(3).
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> …
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> The request before me is not solely for the contents of the PSB complaint file. It is a broadly worded request that also seeks copies of the records in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries and related entries in officers' notebooks. As described in Order M-927, this would encompass copies of records in the main investigation file housing the original incident reports, copies of related officers' notebooks, etc.

…

> … [W]hen responding to a request of the type before me, (i.e. one that explicitly seeks access to original police investigative records) it is incumbent on the Ministry to identify as responsive to the request the contents of the original police investigative file, or files, as the case may be. It is not sufficient that the Ministry simply identify the contents of the file relating to the review of a police officer's conduct in that investigation as being responsive to the request. I will, accordingly, be ordering the Ministry to conduct a search for the former category of records and provide an access decision to the appellant.

In my view, similar considerations apply here. The appellant's request is broadly worded and seeks access to "any information [the WSIB] may have" concerning him. Clearly, this would include not only prosecution files but any files referring to the appellant maintained by the WSIB's customer service representatives. And, similar to the result under section 65(6), as referred to in Orders PO-2678 and M-927 (dealing with the equivalent provision in the *Municipal Freedom of Information and Protection of Privacy Act*), it is my view that records found outside the prosecution materials such as court briefs, and which were not originally created for the purpose of a prosecution, are not excluded by this provision.

Accordingly, the WSIB will be required to do the following: (1) to search for responsive records outside the court briefs and other prosecution materials; (2) to consider whether an intent to prosecute had been formed when they were created; and (3) if so, to consider whether they were written for the purpose of the prosecution or for some unrelated purpose. In the case of records or copies found outside the prosecution files, they would only be excluded if they post-date the formulation of prosecutorial intent, and if the purpose for their creation is substantially connected to the prosecution.

These considerations do not apply to records found in the court brief, including copies or extracts of records that originated elsewhere. These clearly relate to a prosecution (or prosecutions), and the only outstanding question is whether all proceedings in relation to the prosecution(s) have been completed.

(4) What considerations must be taken into account in determining whether all proceedings in respect of a prosecution have been completed?

To begin with the simplest scenario, it is clear that if the trial has not yet taken place and charges remain in place, all proceedings have not been completed. However, once a trial has been completed, the question of a possible appeal arises. Only after the expiration of any appeal period can it be said that all proceedings in respect of the prosecution have been completed. This question will have to be decided based on the facts of each case.

In the present appeal, the trials of the accused individuals have not concluded. I therefore find that not all proceedings in respect of them have been completed, and this requirement in section 65(5.2) is therefore satisfied.

To conclude, I find that all of the responsive records examined by me, which form part of the prosecution materials assembled by the WSIB, are records relating to a prosecution or prosecutions, and all proceedings in relation to the prosecutions have not been completed. Therefore, those records are excluded from the application of the *Act* under section 65(5.2).

As mentioned above, I will order the WSIB to review its record holdings, aside from the prosecution materials examined by me, to determine whether they contain records or copies of records concerning the appellant, and to assess whether they are "records relating to a prosecution" to which section 65(5.2) applies, based on the considerations set out in this order, and to send an access decision to the appellant regarding any such records. If the WSIB concludes that they are not records relating to a prosecution to which section 65(5.2) applies, WSIB will be required to decide whether to grant access or claim an exemption from disclosure under the *Act*. Any decision to claim section 65(5.2) or an exemption under the *Act*, or any other "decision of the head" made concerning these records may be appealed to this office.

ORDER:

1. I uphold the WSIB's decision that the records it has identified as responsive are excluded from the scope of the *Act* under section 65(5.2).

2. I order the WSIB to search its non-prosecution files that may contain information about the appellant, and in particular, its customer service files, to look for records or copies of records containing information about the appellant, whether or not copies of them are included in the court brief binders and other prosecution materials already identified as containing responsive information.

3. In the event that records are located, I order the WSIB to make an access decision concerning these records to determine whether section 65(5.2) applies to them, applying the criteria at pp. 13-19 of this order and summarized in the second full paragraph on page 18. If the WSIB decides that section 65(5.2) does not apply to any such record or records, I order it to make a decision as to whether it will grant access or claim exemptions under the *Act*.

4. In conducting the further search pursuant to provision 2 and making a decision pursuant to provision 3, I order the WSIB to treat the date of this order as the date of the request, and to comply with all relevant provisions of the *Act* including sections 26, 28 and 29.

5. I further order the WSIB to provide me with a copy of any decision issued pursuant to order provision 3, above.

6. For greater certainty, the appellant may appeal any decision(s) issued pursuant to order provision 3, above, to this office by filing an appeal in writing within 30 days after the date of the decision(s).

Original Signed by: July 30, 2008
John Higgins
Senior Adjudicator