Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4416

Appeals PA18-217 and PA18-00723

Workplace Safety and Insurance Board

July 6, 2023

Summary: A journalist made two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Workplace Safety and Insurance Board (WSIB) for records involving a named company (the company) and the death of a worker at one of the company's facilities. WSIB decided to grant partial access to the records, relying on the exemptions at sections 21(1) (personal privacy) and 17(1) (third party information) of the *Act* to withhold information.

During the inquiry, the company claimed that two additional exemptions at section 13 (advice and recommendations) and 20 (danger to safety or health) apply to the records.

In this order, the adjudicator decides not to consider the section 13 exemption. In addition, the adjudicator finds that some of the information is exempt from disclosure under the exemptions at sections 17, 20 and 21. Further, the adjudicator finds that some of the information that is exempt under section 17 must be disclosed due to the application of the section 23 "public interest override." As a result, the adjudicator orders WSIB to disclose certain portions of the records to the requester.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 1(1), 2(1), 2(2), 13(1), 17(1), 20, 21(1), 21(2), 23, 29(1); *Workplace Safety and Insurance Act, 1997*, c. 16, as amended, section 1.

Orders and Investigation Reports Considered: Orders P-12, P-123, P-124, P-347, P-373, P- 391, P-532, P-568, P-613, P-901, P-984, P-1175, P-1190, P-1398, P-1439, P-1688, PO-1779, PO-1805, PO-2018, PO-2072-F, PO-2098-R, PO-2184, PO-2226, PO-2435, PO-2472, PO-2556, PO-2607, PO-2614, PO-2626, PO-3917, PO-3060, PO-3321, PO-3429, PO-4044-R, PO-4084, PO-

4328, PO-4375, M-249, M-317, M-539, MO-1706, MO-1994, MO-2363, PO-2607, MO-2792, MO-2635, MO-3684-I and MO-3844.

Cases Considered: *John Doe v. Ontario* (*Finance*), 2014 SCC 36; *Ontario* (*Public Safety and Security*) *v. Criminal Lawyers' Association,* 2010 SCC 23; *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31; *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), 2005 CanLII 24249 (ON SCDC); *Ontario* (*Workers' Compensation Board*) *v. Ontario* (*Assistant Information & Privacy Commissioner*), 1998 CanLII 7154 (ON CA); *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23; *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616; *Barker v. Ontario* (*Information & Privacy Commissioner*), 2019 ONCA 275; *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*), [1996] O.J. No. 4636 (Div. Ct.); *Ontario* (*Ministry of Finance*) *v. Ontario* (*Information and Privacy Commissioner*), [1999] O.J. No. 488 (C.A.); *Gombu v. Ontario* (*Assistant Information and Privacy Commissioner*) (2002), 59 O.R. (3d) 773 (Div. Ct.).

OVERVIEW:

[1] A journalist (the requester) made two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Workplace Safety and Insurance Board (WSIB) for records involving a named company (the company) and the death of a worker at one of the company's facilities. The worker was an employee of a staffing agency that provided workers to the company.

[2] Prior to issuing access decisions, WSIB notified the company and sought its views on disclosure of the responsive records. After receiving the company's representations, WSIB issued its two access decisions.

[3] In its decisions, WSIB said it was granting the requester partial access to the records. It decided some of the information in the records should be severed and withheld based on the exemptions at sections 21(1) (personal privacy) and 17(1) (third party information) of the *Act*. The company appealed both of WSIB's partial access decisions to the Information and Privacy Commissioner of Ontario (IPC). The requester did not appeal either of WSIB's decisions to withhold information.

[4] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry under the *Act*.

[5] The IPC decided to conduct a single inquiry into both appeals. The IPC adjudicator commenced the inquiry by seeking representations from the company on the issues set out in a notice of inquiry. The company provided extensive representations in response. The IPC then sought representations from WSIB, and provided WSIB with a copy of the company's representations. The WSIB provided brief responding representations.

[6] Because the records contain information about a deceased individual, the IPC also invited that individual's spouse to submit representations as to whether the records contain his deceased spouse's personal information and, if so, whether it is exempt from disclosure under section 21(1). The spouse did not submit any representations in response.

[7] The IPC then sought representations from the requester by sending the requester a notice of inquiry and a condensed and severed version[1] of the company's representations. The requester provided representations in response.

[8] The IPC then provided the company and the deceased individual's spouse with an opportunity to reply to the requester's representations. Only the company did so.

[9] The appeals were then transferred to me to continue the adjudication of them. Having reviewed all of the file material, including the records at issue and the parties' representations, I have decided that no further information is required before rendering a decision.

[10] In this order, I find that some of the information that the WSIB decided to disclose qualifies for exemption under sections 17(1), 20 and 21(1), but that some information I find to be exempt under section 17(1) must nonetheless be disclosed due to the application of the public interest override at section 23 of the *Act*. As a result, I uphold the WSIB's decision, in part.

RECORDS:

[11] In the chart below, I briefly describe the 13 records that were at issue at the outset of the inquiry, and list the exemptions that the company claims apply to each of the records. As I explain further below, only the first ten records remain at issue.

Appeal PA18-00217		
Record Number	Description	Exemptions claimed by the company
8	Validation Unit Decision Memo	13, 17, 20, 21
18	Pre-Operative Line Checks	17
19	Pre-Operative Line Checks	17
21	Health and Safety Program & Training Sign Offs	17, 20, 21

[1] Portions of the company's representations were withheld in accordance with the confidentiality criteria set out in IPC *Practice Direction 7*.

22	Pre-Operative Line Checks	17
23	Pre-Operative Line Checks	17
24	Pre-Operative Line Checks	17
25	Pre-Operative Line Checks	17
26(2)	Pre-Operative Line Checks	17
27	Training and Operation Manual & Training Sign Offs	17, 20, 21
Appeal PA18-00723		
12E	Decision memo	13, 17, 20, 21
14A	Decision memo	13, 17, 20, 21
17A	Decision memo	13, 17, 20, 21

[12] Record 8 in Appeal PA18-00217 is a 25-page document called "Validation Unit, Regulatory Services Division Decision Memo." The three records in Appeal PA18-00723 (Records 12E, 14A, 17A) are nearly identical versions of Record 8 in Appeal PA18-00217, with very minor differences. WSIB made redactions to all four documents that are similar, but also not identical.

[13] WSIB advised the IPC that it made fewer redactions to Record 8 than it did to Records 12E, 14A and 17A, and that it would like the IPC to consider its redactions to Record 8 as the redactions the IPC should consider as its final position on what should be disclosed and what should be withheld from that record.

[14] I have decided that it would serve no useful purpose for me to consider the application of the exemptions to Records 12E, 14A and 17A because:

- the records are nearly identical to one another, and to Record 8, and the differences are minor and inconsequential
- the WSIB has asked the IPC to rule on Record 8 and its severances as its ultimate decision on this record
- considering the version of the document with the least proposed severances is most consistent with the purposes of the *Act* that (i) information should be available to the public, and (ii) necessary exemptions from the right of access should be limited and specific [see s. 1(a)].

[15] Since I will be considering Record 8, I will order WSIB to withhold the three nearly- identical records in Appeal PA18-00723 from the requester, and this order will

dispose of the issues in Appeal PA18-00723. I am making this ruling without prejudice to the requester's right to make a new request to WSIB for access to these three records, should the requester so desire after reviewing the records disclosed as a result of this order.

[16] The only records remaining at issue in this inquiry, therefore, are the 10 records in Appeal PA19-00217.

ISSUES:

A. Can the company raise the application of section 13(1) (advice and recommendations) and 20 (danger to safety or health) discretionary exemptions?

B. Does the section 20 (danger to safety or health) discretionary exemption apply?

C. Do the records contain personal information that is subject to the section 21(1) (personal privacy) mandatory exemption?

D. Does the section 17(1) (third party commercial information) mandatory exemption apply?

E. Under section 23, is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of any applicable exemptions?

DISCUSSION:

Issue A: Can the company raise the application of the section 13(1) (advice and recommendations) and 20 (danger to safety or health) discretionary exemptions?

[17] In its access decisions, WSIB relied on only two exemptions to withhold information: sections 17(1) (third party commercial information) and 21(1) (personal privacy). Those two exemptions are mandatory, meaning the WSIB must claim them if they apply. As I noted above, the information the WSIB decided to withhold is not at issue before me because the requester did not appeal the WSIB's decision.

[18] The WSIB did not claim any discretionary exemptions. The company believes it should have claimed two discretionary exemptions to withhold additional information, namely, sections 13(1) (advice and recommendations) and 20 (danger to safety and health).

[19] For the reasons set out below, I will not consider the application of section 13(1) to the records, but I will consider whether section 20 applies.

Background

[20] Where a requester, or as is the case before me, an affected third party such as the company, appeals an institution's access decision under the *Act*, the IPC may conduct an inquiry into that decision.[2] In this inquiry, the IPC's role is to review the institution's access decision and determine whether it should be upheld, modified or reversed.

[21] In most cases, where an institution relies on exemptions to withhold records, the IPC considers only those exemptions. However, there are exceptional circumstances in which the IPC might consider additional discretionary exemptions not claimed by the institution in its access decision, but raised by a third party.

[22] WSIB has not sought to raise new discretionary exemptions and in fact opposes the company's attempt to do so. As I explain in more detail below, it is only in the rare case that the IPC will allow a third party to raise a discretionary exemption that the institution itself has not relied on. This is because of the distinction between mandatory and discretionary exemptions.

[23] *Mandatory* exemptions are those where the *Act* says the institution "shall" refuse to disclose a record. These exemptions are generally designed to protect the interests of individuals or organizations outside the institution. For example, the purpose of section 17(1) is to protect the commercial interests of private companies, and the goal of section 21(1) is to protect the personal privacy interests of individuals.

[24] The IPC has on occasion considered a mandatory exemption that the institution did not rely on, either because one of the parties raises it or the IPC believes it could apply based on reviewing the records at issue. The IPC is more likely to consider a new mandatory exemption, in contrast to a new discretionary exemption, because to refuse to do so could potentially harm an outside party.

[25] On the other hand, *discretionary* exemptions are those where the *Act* says the institution "may" refuse to disclose a record. These exemptions are generally designed to protect the interests of the *institution*, which is why the Legislature gave institutions the discretion to claim or waive them. Where a discretionary exemption applies to a record, the institution may withhold it, but may also decide to disclose it. In other words, it must exercise its discretion.

[26] The IPC takes a strict view when it comes to a third party's attempt to claim discretionary exemptions, and gives the institution's decision not to claim discretionary exemptions more weight. The main reasons for this are (i) it is normally the institution's own interests that are at stake and more proper for it to decide, and (ii) refusing to permit new discretionary exemption claims strengthens the integrity of the access to information system by allowing requesters to rely on the institution's decision to claim

[2] Section 52(1).

or not claim discretionary exemptions as final (subject to the exceptions described below).

[27] The IPC has considered the question of whether a party other than the institution can claim a discretionary exemption in a number of orders, although this kind of situation is rare.[3] Generally, where an affected party raises the possible application of a discretionary exemption, the adjudicator must consider the matter in the context of the purposes of the *Act* to decide whether the appeal might constitute the "most unusual of circumstances" in which such a claim should be allowed. As noted in previous IPC orders, one of the "most unusual of circumstances" may be when the interests of third parties are at stake.

Company's position on new exemptions

[28] The company takes the position that it should be permitted to raise the section 13(1) and 20 discretionary exemptions, even though the WSIB did not rely on these sections of the *Act* to withhold information. WSIB takes the position that its decisions on which exemptions should be applied to the records should stand. The requester agrees with WSIB that the IPC should not permit the company to raise new exemptions.

Section 20 (danger to safety or health)

[29] The company seeks to rely on the section 20 exemption. The company submits that due to significant media coverage of the company stemming in part from the fatal accident, its employees "have received threats to their physical safety and wellbeing." On this basis, the company submits that the employees' names and photos should be withheld from Records 8, 21 and 27 under section 20. The company adds that its fire safety plan should also be withheld under this exemption.

[30] Section 20 is an anomalous discretionary exemption. Although it is couched in discretionary language (it uses the word "may") it is clearly designed to protect the health and safety interests of individuals, not the interests of the institution. Accordingly, the IPC has allowed a third party to raise it in a number of cases even where the institution has not relied on it.

[31] For example, in Order PO-3917, the requester sought records held by the Ministry of Community Safety and Correctional Services relating to complaints made about a private security company. The ministry decided to withhold some of the records under section 17(1) (third party commercial information), but claimed no other exemptions. The company appealed the ministry's decision to the IPC. In the inquiry, the company submitted that section 20 should apply to certain information due to what it said was a threat to the health or safety of its employees. The adjudicator in that case accepted this submission, and stated:

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[3] See for example Orders PO-4328, PO-4084, MO-2635 and MO-2792.

> I have…considered the purpose of the section 20 exemption and the arguments made by the company as to why this exemption applies to the records. Because of the requester's past conduct, the company believes that disclosing the records could reasonably be expected to seriously threaten the safety of its employees. Given that the claim that disclosing such information might seriously affect the interests of the company's employees, I find that the fact circumstances here fall within the "most unusual of cases" standard established in Order P-1137 and I will allow the company to claim the discretionary exemption in section 20, even though it has not been raised by the head of the ministry.

[32] I agree with the approach taken by the adjudicator in Order PO-3917. In the circumstances of this appeal, I am satisfied that there are third party interests at stake. In addition, the company's submissions on section 20, on their face, do not appear frivolous or without foundation. In the circumstances, I have decided that this case falls within the "most unusual of cases" standard and I will consider below whether the section 20 exemption applies to information about the employees found in records 8, 21 and 27.

Section 13(1) (advice and recommendations)

[33] The company submits that all of Record 8 should be withheld under the section 13(1) exemption despite the WSIB not claiming it. It argues that the record as a whole constitutes advice to an institution from an employee of the institution.

[34] Unlike the section 20 discretionary exemption I considered above that raises non- institutional interests, section 13(1) is an exemption designed to protect the interests of the institution. More specifically, the purpose of this exemption is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[4] It is not designed to protect the interests of third parties like the company.

Company's submissions on exercise of discretion

[35] The company argues, in essence, that WSIB erred in exercising discretion not to claim the section 13(1) exemption. The company says WSIB did not raise section 13(1) due to "institutional bias." The company further submits that WSIB failed to meet its duty of procedural fairness to provide the company with reasons for its decisions not to claim the section 13(1) exemption, which is further proof of "institutional bias."

[36] The company submits that there is evidence of a reasonable apprehension of bias on the part of the WSIB, and it provided the IPC with documents to support this

[4] *John Doe v. Ontario* (*Finance*), 2014 SCC 36, at para. 43.

submission. In particular, the company argues that WSIB's motivation in deciding not to claim any discretionary exemptions was to "punish" the company. The company provides copies of a number of internal WSIB documents which the company says demonstrate this improper motive.

[37] The company also points to past disclosures that WSIB made in response to requests under the *Act*, and about which WSIB did not notify the company.

[38] Finally, the company argues that WSIB's failure to provide reasons for its decision not to claim discretionary exemptions is further evidence of a reasonable apprehension of bias on its part.

WSIB's submissions on exercise of discretion

[39] WSIB submits that in deciding which exemptions to claim in this case, it considered the potential application of all of the exemptions under the *Act* as it does with all requests. It states that as a result of its review of the records, it "…did not find that the discretionary exemptions could be applied because they did not meet the criteria for the said exemptions."

[40] Further, WSIB states:

> We did not exercise our discretion in bad faith. The freedom of information process is independent of all other functions at the WSIB and we treat all of our requests with confidentiality and respect. [We approach] all request[s] with a "default to release" unless otherwise advised when dealing with all requests regardless of the nature. These requests were handled the same way all other requests of this nature have been.

[41] On the question of whether it took into account relevant considerations, WSIB submits:

> An institution may choose (or choose not) to rely on discretionary exemptions when processing a freedom of information request. However, in exercising discretion, considerations need to be made, including, but not limited to: balancing the purpose of [the *Act*], interpreting the wording of the exemption and the interests it seeks to protect, and deciding whether disclosure will increase public confidence in the operation of the institution…

[42] WSIB goes on to state that it applied the mandatory section 17(1) and 21(1) exemptions, and appropriately exercised its discretion not to claim the application of any discretionary exemptions. WSIB states that it took into account "all relevant factors" and did not make its decision in bad faith.

[43] Finally, WSIB says that it met its fairness obligations to the company by notifying the company of the access request and giving it an opportunity to explain any concerns it may have about releasing the records.

Analysis

[44] An institution receiving a request under the *Act* has a duty to (i) review the records and consider the application of any mandatory or discretionary exemptions under the *Act*, and (ii) make a decision as to which exemption or exemptions to claim, if any.[5]

[45] Where an institution claims that a discretionary exemption applies, the IPC will:

- review the record and determine whether the exemption applies to it and, if the exemption applies,
- consider the institution's submissions on how it exercised its discretion to withhold the record or part, and decide whether to uphold the exercise of discretion.

[46] The Supreme Court of Canada in *Ontario* (*Public Safety and Security*) *v. Criminal Lawyers' Association* ruled that the IPC has a duty to review an institution's exercise of discretion as described in the second bullet point above.[6]

[47] It is clear that the IPC must review an institution's exercise of discretion *in cases where an institution has claimed a discretionary exemption.* This careful, two-step review of an institution's decision to withhold a record accords with one of the key purposes of the *Act*, 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.[7]

[48] By contrast, I do not believe there is a basis for the IPC to review an institution's exercise of discretion to *not* claim an exemption. A decision to not claim a discretionary exemption is one that furthers the transparency purpose of the *Act* as described above. In addition, a plausible interpretive implication of the opposite finding is that, in every appeal, the IPC has a duty to seek submissions from an institution on why it did *not* claim each and every one of the 13 discretionary exemptions in the *Act* for each and every record. In my view, this would be an absurd result that would undermine the integrity of the *Act* by placing an unreasonable and unnecessary burden on both institutions and the IPC.

[49] In any event, I am not persuaded that any of the evidence and arguments

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[5] Section 29(1).
[6] 2010 SCC 23, paras. 66-71.
[7] Section 1(a)(i).

provided by the company are sufficient for me to make a finding that WSIB erred in exercising its discretion, assuming that section 13(1) does, in fact, apply to some of the information the WSIB decided to disclose in record 8.

[50] The company's bald assertion that the WSIB wanted to "punish" it does not provide a basis to find that there was a reasonable apprehension of bias on the part of WSIB in reaching a separate and distinct decision, that is, its decision not to claim discretionary exemptions under the *Act*. I have no evidence before me that would indicate that the WSIB's access decision was motivated by anything other than the appropriate considerations. I also have WSIB's submissions on its exercise of discretion, which support my finding that WSIB did not err in exercising its discretion.

[51] The company's argument is also undermined by the fact that WSIB in part agreed with the company and applied the (albeit mandatory) section 17(1) exemption to certain information in the records. If WSIB was motivated by "bad faith", would it not simply decide that the exemption did not apply at all?

[52] On the issue of past disclosures of information relating to the company, I have no basis to believe that these disclosures were made in anything other than the usual course of processing freedom of information requests under the *Act*.

[53] The company provides additional reasons why it should be permitted to raise the section 13(1) exemption, as follows:

- it is the only non-employer[8] of a deceased worker to have been subjected to a section 82 investigation under the *Workplace Safety and Insurance Act*
- there is a potential for a chilling effect on employer participation in fatality investigations if the information supplied to WSIB was to become public
- the findings of the Validation Unit report are under appeal

[54] First, while the company may be the first non-employer of a deceased worker to have been subjected to such an investigation, this does not support the notion that I should consider the section 13(1) exemption despite WSIB's decision not to claim it.

[55] Second, employers are statutorily required to cooperate with WSIB investigations, and disclosure of information in record 8 will have no impact on this legal requirement. Further, the requester notes that both Alberta and British Columbia publish workplace incident investigation reports, and that such transparency has not led to the chilling effect contemplated by the company.

[56] Third, the fact that WSIB's decision is under appeal does not suggest that I should depart from the usual practice of not considering discretionary exemptions not

[8] The deceased worker's employer was the staffing agency.

claimed by the institution.

[57] I have decided that this case does not fall within the "most unusual of cases" standard and I will not consider the application of section 13(1) to record 8.

Issue B: Does the section 20 (danger to safety or health) discretionary exemption apply?

[58] The company submits that section 20 applies to exempt the employees' names and pictures and its fire safety plan from disclosure. Based on the discussion below, I find that section 20 applies to some of the withheld information.

[59] Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[60] For this exemption to apply, the institution (or the company in this case, as the party resisting disclosure) must provide evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[9]

[61] The company submits that due to significant media coverage of the company stemming in part from the fatal accident, its employees "have received threats to their physical safety and wellbeing." The company says that it has reported these threats to the police and that the police are currently investigating these matters.

[62] On this basis, the company submits that the employees' names and photos should be withheld from records 8, 21 and 27 under section 20. I note that none of the information at issue in the three records (that is, the information the WSIB proposes to disclose) includes employee photos, so only the employee names are at issue under section 20.

[63] The company adds that disclosure of its fire safety plan may place the security of the facility, the employees, and the integrity of the products at even greater risk than already exists.

[64] The requester submits that this information will be disclosed to "a reputable member of the media," who is "bound by applicable journalistic ethics." The requester says that any information containing employee names can be redacted by the requester

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[9] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31, paras. 52-54.

if necessary. As a result, the requester submits that the company's concerns are founded on unrealistic hypotheticals.

[65] The company's submissions on this point are brief. That said, I have no reason to disbelieve the company's assertion that its employees have been threatened as a result of this incident, and that the police responded to these concerns by initiating an investigation. This takes the company's evidence and arguments beyond merely possible or speculative.

[66] As for the requester's submission on this point, I have no doubt that the requester would abide by journalistic ethics. However, I must treat disclosure to the requester as having the potential for "disclosure to the world." The records will enter the public domain and I must consider the consequences of disclosure on the assumption that the public will have access to them.[10]

[67] As a result, I find that the names of individual employees that appear in records 8, 21 and 27 should be withheld under section 20. Record 8 is essentially an investigation report reviewing the circumstances surrounding the incident. As such, the names of individuals appear because they had some connection to the incident. I also accept that the names of individuals who are employees of staffing and other companies connected to the matter in these three records should be withheld under this section. In some cases, I have also accepted that other information such as direct line telephone numbers and signatures also qualify for exemption, because these individuals could easily be identified from this information.

[68] However, I do not accept that the names of the staffing companies in the three records should be withheld under section 20. Disclosing just the companies' names without the names of individuals simply does not present the kind of health and safety risk posed by the disclosure of individual employee names.

[69] With respect to the fire safety plan (record 21, pages 175-204, 277-319), I accept that it should be withheld under section 20. The plan contains detailed information about the company's facility, including about specific materials used in the construction of the building, floor plans, electrical systems, and various fire safety measures in place. This type of information, if publicly available, could provide an individual with a roadmap as to how to cause damage to the building and possibly harm individuals.

[70] As a result, I find that the employee names in record 8, 21 and 27 (highlighted in the copies of these records attached to WSIB's copy of this order) are exempt under section 20. In addition, the fire safety plan in record 21 (pages 175-204, 277-319) is exempt under section 20.

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[10] Order PO-3429, para. 45.

Issue C: Do the records contain personal information that is subject to the section 21(1) (personal privacy) mandatory exemption?

[71] The company submits that records 8 and 21 contain personal information that is exempt under section 21(1) of the *Act*. Specifically, the company states that these records contain confidential statements given by individuals who witnessed or investigated the incident. The company also indicates in its suggested severances to record 8 that I should withhold certain personal information relating to the deceased individual.

[72] I found above that the employee names and other identifying information qualified for exemptions under section 20. As a result, I need not consider whether this information is also exempt under section 21(1).

[73] In the discussion below, I find that some of the other personal information is exempt under section 21(1).

Do the records contain personal information of the deceased?

[74] Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual." That section gives a non-exhaustive list of examples of personal information.

[75] Records 8 and 21 contain personal information of the deceased.[11] This includes information about the training given to the deceased, her actions leading up to and during the incident, and other information about the circumstances of her death. This information appears in record 8 on pages 1, 2, 4-6, 7, 11, 15-18, 20-21, and 23-24, and in record 21 on pages 326 and 330.

Is the deceased's personal information exempt under section 21?

[76] Where a requester seeks personal information of other individuals, section 21(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. In this case, the only potentially applicable exception to the prohibition against disclosure is section 21(1)(f), which requires disclosure of other individuals' personal information if that disclosure would not be an unjustified invasion of their personal privacy.

[77] The factors and presumptions in sections 21(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy.

[78] I found above that records 8 and 21 contain personal information of the deceased, including information about her training, her actions surrounding the

[11] Section 2(2) of the *Act* states that the definition of "personal information" excludes information about an individual who has been deceased for more than thirty years. That is not the case here.

incident, and other information about the circumstances of her death.

[79] The parties provided very little if any submissions on whether the deceased's personal information is exempt under section 21(1).

[80] I find that some of her personal information in records 8 and 21 is exempt under section 21(1), while most is not exempt.

[81] The exempt information describes the nature of her injuries arising from the incident and actions taken to provide her with medical assistance. This information (contained in record 8 only, on pages 1, 6, 11 and 15) is presumed to be an unjustified invasion of her privacy under section 21(3)(a) of the *Act* (medical history). As a result, it cannot be disclosed unless the section 23 "public interest override" applies to it (see Issue E below).

[82] The remaining "non-medical" personal information about the deceased in records 8 and 21 does not fit within the scope of any of the section 21(3) presumptions.

[83] Turning to the factors at section 21(2) as they may apply to this information, I find that none of the factors weighing against disclosure are applicable to the non-medical information, such as information about her employment and training. While the "highly sensitive" factor could apply to the medical information, the remaining information does not have a similarly sensitive nature. On the other hand, there are several factors weighing in favour of disclosure that apply. I will discuss each of these below.

[84] Section 21(2)(b) applies where access to the personal information may promote public health and safety. The requester submits, and I agree, that the information in the records is "fundamentally linked to public health and safety." The requester continues:

> In [disclosing this information], the public will be able to gauge the effectiveness of government responses to such concerns, and the additional scrutiny may in turn encourage continued safety measures.

[85] The information about the deceased in records 8 and 21 is very much at the heart of the tragic incident in question, and would serve to shed light on the circumstances surrounding it. In this way, disclosure may promote health and safety as the requester explains. In my view, moderate weight should be assigned to this factor.

[86] The requester also submits that the unlisted factor of "diminished privacy interest after death" weighs in favour of disclosure. The requester cites a number of cases to support this submission.

[87] Section 2(2) of the *Act* provides that personal information does not include information about an individual who has been dead for more than thirty years. The

Legislature has thus declared that the personal information of more recently deceased individuals is to be protected.

[88] IPC adjudicators have, however, found that there is a diminished expectation of privacy with respect to a deceased individual's personal information in some circumstances. In Order PO-3060, the IPC held that this factor can weigh in favour of disclosure, especially when more than one year has passed since the date of death. Other IPC decisions have applied "moderate weight" in favour of disclosure when the individual has been deceased for four years.[12]

[89] The incident in question occurred more than six years ago. In addition, the information at issue is not particularly sensitive. In the circumstances, I find that some weight should be given to this unlisted factor.

[90] Given that there are no factors weighing against disclosure, and two moderately significant factors weighing for disclosure, I find that this is sufficient to establish that disclosure of the deceased's non-medical information would not constitute an unjustified invasion of her privacy. Therefore, this information in records 8 and 21 is not exempt under section 21(1). Because no other exemptions have been claimed for this information, I will order it disclosed.

[91] Before considering whether the public interest override applies to the exempt medical information (which I address at Issue E), I next address the application of the third party information exemption to the company's information.

Issue D: Does the section 17(1) (third party commercial information) mandatory exemption apply?

[92] The company claims that all ten of the records at issue (records 8, 18-19, 21-25, 26(2), 27) are either partially or fully exempt under section 17(1) of the *Act*. As I explain below, I find that section 17(1) does not apply to the records.

[93] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[13] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[14]

[94] For section 17(1) to apply, the company must satisfy each part of the following three-part test:

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[12] Order PO-3321.
[13] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), 2005 CanLII 24249 (ON SCDC), leave to appeal refused, Doc. M32858 (C.A.) ("*Boeing*").
[14] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in section 17(1) will occur.

Part 1: type of information

[95] I will discuss below on a record by record basis what information qualifies as a trade secret or scientific, technical, commercial, financial or labour relations information. To reiterate what I stated at the outset, the information that WSIB decided to withhold is not at issue in this appeal. The following information is information that WSIB decided to disclose and that the company asserts should be withheld.

Record 8

[96] The company submits that information on pages 1, 3-5, 7-8, 10-14, 18, 21-22, and 25 contains the types of information required by part one of the three-part test.

WSIB account numbers (page 1)

[97] The company submits, and I accept, that these numbers, if disclosed, could reveal information about the company's organizational structure, financials, and other WSIB- related information that the company supplied to WSIB. I find that these WSIB-assigned account numbers constitute commercial and/or financial information.

Descriptions and photos of the company's equipment used and manufacturing processes (pages 1, 5, 8, 12-14, 21-22)

[98] I accept that the company's proposed redactions for this category of information contain technical information.

Information about number and type of staff working at the facility (pages 3, 18)

[99] I accept that this information qualifies as labour relations information.

Name of the staffing company used by the company (page 4)

[100] This information qualifies as commercial information.

WSIB's classification of the company, including its "Experience Rating Rebate" (pages 4, 24)

[101] This information qualifies as financial information.

Prior health and safety incidents involving the company (page 7)

[102] This information qualifies as labour relations information.

Information describing the company's equipment purchasing and modifications program, and its personal protective equipment program (page 10)

[103] This information qualifies as technical information that discloses, among other things, the type of machinery used for the company's products.

Information about health and safety meeting agendas and minutes (page 11)

[104] This information qualifies as labour relations information.

Records 18, 19, 22, 23, 24, 25

[105] These records consist of a large number of completed forms entitled "Pre-Operational Line Checks." These are the company's internal safety checklists it uses to ensure safety in its operations. They list a number of safety checks of equipment, and other items and areas, that the employee filling out the list should conduct before the manufacturing line becomes operational. The items are categorized with various headings such as "Operational", "Cleanliness" and "Safety."

[106] The company states that these records contain trade secret information it developed to ensure safety in its operations. It says that:

> The technique of formulating concise and effective checklists and coding systems plays a significant role in creating high quality products and achieving the top grade of AA by the British Retail Consortium (BRC) Global Standards for Food Safety.
>
> Originally developed and published in 1998, the British Retail Consortium's Global Standard for Food Safety (GSFS) is a globally-accepted food safety standard that specifies safety, quality and operational criteria for food producers and suppliers. BRC will conduct audits, which include reviewing pre-operative checklists in order to "grade" an organization according to a standardized quality, safety, and operational criteria.
>
> If the checklists were disclosed, other bakery operations would have the knowledge-base and techniques related to the set up of lines of operation and product specifications, including the machinery used and pre-operative processes that would achieve the highest grade in Global Standards for Food Safety.

[107] Although the company refers to these records as "trade secrets", it has submitted that only very specific information should be redacted under section 17(1) (in

particular, a list of 11 words and phrases describing certain equipment.)

[108] It is clear that this information qualifies as technical information under section 17(1).

[109] In addition, page 159 of record 25 contains a detailed description of how the company manufactures one of its products. This information also qualifies as technical information.

Record 21

[110] The company submits that information on pages 53-54, 56-57, 59, 61, 124-126, 226-228, 320, 325-326, 328-329, 331, 332-333, 335 contain the types of information required by part one of the three-part test. Note that I have already found that the fire safety plan at pages 175-204, and 277-319 is exempt under section 20. Accordingly, it is not necessary for me to consider whether these pages of record 21 are exempt under section 17(1).

Descriptions and photos of the company's equipment used and manufacturing processes (pages 53-54, 56-57, 59, 61, 124-126, 226-228, 326, 331, 335)

[111] I accept that these proposed redactions for this category of information contain technical information.

Name of company the company used to conduct testing (pages 320)

[112] This information qualifies as commercial information.

Prior health and safety incidents involving the company (page 325)

[113] This information qualifies as labour relations information.

Information about technical steps taken or to be taken to comply with Ministry of Labour health and safety orders (pages 328-329)

[114] This information qualifies as labour relations information.

Contract with staffing company (pages 332-333)

[115] This information qualifies as labour relations information.

Record 26(2)

[116] The company submits that information on page 20 contains the types of information required by part one of the three-part test.

[117] This information reveals information about the equipment the company uses in

its manufacturing process. This information qualifies as technical information.

Record 27

[118] The company submits that information on pages 45, 94, 100 and 105 contains the types of information required by part one of the three-part test. This information includes descriptions of safety equipment the company uses, and descriptions of how the company manufactures certain products.

[119] I find that all of the information at issue on these pages consists of technical information.

Part 2: supplied in confidence

Supplied

[120] The requirement that the information be "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[15]

[121] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

Record 8

WSIB account numbers (page 1)

[122] The account numbers are assigned by the WSIB and not supplied by the company. However, as I found above, disclosure of the WSIB account numbers could in turn reveal information about the company's organizational structure, financials, and other WSIB- related information that the company supplied to WSIB. Therefore, this information meets the supplied test.

Descriptions and photos of the company's equipment used and manufacturing processes (pages 1, 5, 8, 12-14, 21-22)

[123] I accept that this information was supplied by the company to WSIB.

Information about number and type of staff working at the facility (pages 3, 18)

[124] I accept that the company supplied this information to WSIB.

Name of the staffing company used by the company (page 4)

[125] I agree that the company supplied this information to WSIB.

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[15] Order MO-1706.

WSIB's classification of the company, including its "Experience Rating Rebate" (pages 4, 24)

[126] This information does not qualify as having been supplied by the company to WSIB. In Order P-373,[16] the IPC ruled that the surcharges to which employers are subject under workers' compensation legislation do not represent information that has been supplied by employers, even though those amounts are calculated on the basis of information provided by employers, since the latter information is not revealed by the surcharges. I find that similar reasoning applies here. Accordingly, this information fails the "supplied" test. Since all parts of the three-part test must be met for section 17(1) to apply, this information is not exempt and I will order it disclosed.

Prior health and safety incidents involving the company (page 7)

[127] I accept that this information would have been supplied by the company at the time WSIB investigated those incidents.

Information describing the company's equipment purchasing and modifications program, and its personal protective equipment program (page 10)

[128] This technical information was supplied by the company to WSIB.

Information about health and safety meeting agendas and minutes (page 11)

[129] I accept that the company would have supplied this information to WSIB.

Record 21

Descriptions and photos of the company's equipment used and manufacturing processes (pages 53-54, 56-57, 59, 61, 124-126, 226-228, 326, 331, 335)

[130] I accept that this information was supplied by the company to WSIB.

Name of company the company used to conduct testing (pages 320)

[131] I agree that the company supplied this information to WSIB.

Prior health and safety incidents involving the company (page 325)

[132] I accept that the company supplied this information to WSIB.

[16] This order was upheld on judicial review in *Ontario* (*Workers' Compensation Board*) *v. Ontario* (*Assistant Information & Privacy Commissioner*), 1998 CanLII 7154 (ON CA).

Information about technical steps taken or to be taken to comply with Ministry of Labour health and safety orders (pages 328-329)

[133] I accept that the company supplied this information to WSIB.

Contract with staffing company (pages 332-333)

[134] I accept that the company supplied this information to WSIB. Contracts between a government institution and an outside entity do not generally qualify as having been supplied, since they are typically the product of negotiation.[17] In this case, however, the contract is between the company and another, private staffing company. While that contract would have been negotiated between those parties, the WSIB would not have been party to the negotiations. Accordingly, the "negotiated" exception to the supplied test is not applicable here.

Records 18, 19, 22, 23, 24, 2518, 19, 22, 23, 24, 25, 26(2)

[135] I accept that the information at issue in these forms, as well as the description of the product in record 25 (p. 159) was supplied by the company to WSIB.

Record 27

Name of safety equipment supplier (page 45)

[136] I accept that the company supplied this information to WSIB.

Information about how the company organizes and stores its products and equipment (pages 94, 100, 105)

[137] I accept that the company supplied this information to WSIB.

In confidence

[138] The company must demonstrate that the information that was supplied was done so with an objectively reasonable expectation of confidentiality. This finding may be based in part on the content of the information itself, and the context in which it was provided to the institution.

[139] The company submits that it supplied the information at issue in the records to the WSIB "on the understanding and expectation that the information would be kept in the strictest confidence and would not be disclosed to the public..." It further submits that it is because of its expectation of confidentiality that it has been frank in its communications and dealings with WSIB regarding its efforts in running the plant safely and efficiently.

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[17] See *Boeing*, above.

[140] The company states that the implicit and objective expectation of confidentiality arises in that, as a competitive company in the baking industry, it would not otherwise disclose the records to the public, and that the records were also not prepared for a purpose which would entail disclosure.

Records 8, 18, 19, 21, 22, 23, 24, 25, 26(2), 27

[141] I accept the company's submission that all of the information that I have found was supplied to WSIB was supplied with an objectively reasonable expectation of confidentiality. It is reasonable to conclude that the company would have cooperated with WSIB in its efforts to investigate the incident and work with the company to make health and safety improvements to its operations. As part of this, the company would have taken steps to provide the information and documents WSIB asked for, and that the expectation on both sides would have been that those documents would be used for this narrow purpose and not for the purpose of making them available to the public.

Part 3: harms

[142] A party resisting disclosure of a record must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act.*[18]

[143] The party resisting disclosure must show that the risk of harm is real and not just a possibility.[19] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[20]

[144] The company has provided me with general submissions on harm under sections 17(1)(a) and (c). Under section 17(1)(a) ("prejudice to competitive position"), the company states:

> In order to perform its services, the company needs to maintain the confidence of the members of the community it serves. Disclosing the records would damage [its] reputation and erode the community confidence that it has established over many years. The investigation into the unfortunate incident…has been reported in a major newspaper, and

[18] Orders MO-2363 and PO-2435.
[19] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[20] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.

> [the company] has addressed many questions and concerns from members of the public and media outlets.

[145] This submission is not persuasive. There is already information in the public domain about health and safety concerns at the company's facilities arising from this incident and others. It is difficult to accept that disclosure of additional details about this incident would itself reasonably be expected to prejudice the company's competitive position.

[146] The company makes further submissions regarding harm from disclosure under section 17(1)(c) ("undue loss or gain"):

> Record 8 points out deficiencies in facilities and operations for the corrective action of plant management. The record contains objective comments on plant conditions which existed at the time of inspection but do not necessarily relate to the present situation. The report does not give a fair assessment of the overall operations of the plant in the sense that satisfactory conditions are not commented on.
>
> The sensationalist reporting of the incident, including information disclosed in contravention of the Act has already caused undue losses to [the company's] reputation in the industry and relationship with its partners and clients. Any further disclosure would only aggravate the existing harm caused to [the company].

[147] On the first point, this in itself does not support a finding of "undue loss or gain." Any reasonable person reviewing the records would be fully aware of the fact that it speaks to conditions at the plant close to the time of the incident, and that the records do not constitute a current or comprehensive review of every aspect of health and safety at the company's facilities. As to the reputational harm, I refer to my statements above with regard to the amount of disclosure that has already taken place regarding this and other incidents.

[148] Although I find that the company's submissions on harm are not persuasive, I will discuss below whether there is an objective basis to make a finding of harm under sections 17(1)(a) or (c) based on the information itself and the context in which the records appear.

Record 8

WSIB account numbers (page 1)

[149] Since disclosure of the WSIB account numbers could in turn reveal information about the company's organizational structure, financials, and WSIB-related information that the company supplied to WSIB in confidence, I accept that disclosure of this information could reasonably be expected to cause competitive harm to the company.

Descriptions and photos of the company's equipment used and manufacturing processes (pages 1, 5, 8, 12-14, 21-22)

[150] I accept that the equipment the company uses is not generally known in the industry, and that disclosure of this information could reasonably be expected to cause competitive harm to the company.

Information about number and type of staff working at the facility (pages 3, 18)

[151] I accept that this detailed information as to how many and what type of staff work at the facility would not be generally known in the industry and, in the particular circumstances of this case, could reasonably be expected to cause competitive harm to the company.

Name of the staffing company used by the company (page 4)

[152] I do not accept that the mere fact that the company retains the services of a particular, named staffing company is the kind of information that could reasonably be expected to cause competitive harm to the company. I have no evidence before me that explains how this information would be seen as useful to a competitor. The company's bare assertions of harm on this point are not sufficient.

Information about prior health and safety incidents involving the company (page 7)

[153] This information reveals some basic information about two prior health and safety incidents at the company's facilities. Consistent with my comments above, the media has already published articles about workplace health and safety concerns at the company's facilities. It is difficult to accept that disclosure of minimal information about these prior incidents could reasonably be expected to cause additional harm to the company's reputation or competitive position. I find that this information does not meet the harms test.

Information describing the company's equipment purchasing and modifications program, and its personal protective equipment program (page 10)

[154] I accept that disclosure of this information could reasonably be expected to harm

the company's competitive position in the food manufacturing business. Information about health and safety meeting agendas and minutes (page 11)

[155] I accept that disclosure of this information could reasonably be expected to harm the company's competitive position. Disclosure of this information could provide the company's competitors with useful information about its manufacturing processes.

Record 21

Descriptions and photos of the company's equipment used and manufacturing processes (pages 53-54, 56-57, 59, 61, 124-126, 226-228, 326, 331, 335)

[156] I accept that the equipment the company uses is not generally known in the industry, and that disclosure of this information could reasonably be expected to cause competitive harm to the company.

Name of company the company used to conduct testing (pages 320)

[157] I do not accept that the mere fact that the company retains the services of a particular company to conduct a type of testing is the kind of information that could reasonably be expected to cause competitive harm to the company. I have no evidence before me that explains how this information would be seen as useful to a competitor. The company's bare assertions of harm on this point are not sufficient.

Prior health and safety incidents involving the company (page 325)

[158] This information reveals some basic information about a prior health and safety incident at the company's facilities. Consistent with my comments above, the media has already published articles about workplace health and safety concerns at the company's facilities. It is difficult to accept that disclosure of minimal information about this incident could reasonably be expected to cause additional harm to the company's reputation or competitive position. I find that this information does not meet the harms test.

Information about technical steps taken or to be taken to comply with Ministry of Labour health and safety orders (pages 328-329)

[159] I accept that this information could reveal information about certain structural aspects of the company's facilities that could cause competitive harm.

Contract with staffing company (pages 332-333)

[160] The company submits that this contract is information which relates to the provision of temporary help workers. It says that the contract provisions are not standardized clauses which would be generally known, and that they pertain specifically to the company's operations, such as which entrance employees enter from, which supervisor they report to, and which policies employees must adhere to.

[161] I accept that provisions of the contract were negotiated specifically for the company's needs and purposes, and that they would reveal information that is not generally known, which could be useful for competitors. Therefore, I find that the contract meets the harm requirements under sections 17(1)(a) and (c).

Records 18, 19, 22, 23, 24, 25, 26(2)

[162] As I explained above, these records consist of a large number of completed forms entitled "Pre-Operational Line Checks." These are the company's internal safety checklists it uses to ensure safety in its operations. They list a number of safety checks of equipment, and other items and areas, that the employee filling out the list should conduct before the manufacturing line becomes operational. The items are categorized with various headings such as "Operational", "Cleanliness" and "Safety."

[163] The company submits that if these checklists were disclosed, other bakery operations would have the knowledge base and techniques related to the set up of lines of operation and product specifications, including the machinery used and pre-operative processes that would achieve the highest grade in Global Standards for Food Safety.

[164] Although the company seems to take the position that the checklists in their entirety would reveal confidential information that could cause harm to the company, it also has clearly submitted that only very specific information should be redacted under section 17(1) (in particular, a list of 11 words and phrases describing certain equipment).

[165] I accept that disclosure of the 11 words and phrases would reveal certain equipment and techniques used by the company that is not generally known in the industry, and that this disclosure could reasonably be expected to cause competitive harm or undue loss under sections 17(1)(a) and (c) of the *Act*. My finding also applies to the page 159 of record 25, which contains a detailed description of how the company manufactures one of its products.

Record 27

Name of safety equipment supplier (page 45)

[166] I do not accept that the mere fact that the company contracts with a particular supplier of safety equipment could reasonably be expected to cause competitive harm to the company. I have no evidence before me that explains how this information would be seen as useful to a competitor. The company's bare assertions of harm on this point are not sufficient.

Information about how the company organizes and stores its products and equipment (pages 94, 100, 105)

[167] I accept that this detailed information, if disclosed, could reasonably be expected to cause competitive harm to the company.

Conclusion

[168] I find that the following information qualifies for exemption under section 17(1)

of the *Act*:

Record 8

[169] Portions of pages 1-2, 5, 8, 10-13, 14, 18, 21, 22.

Records 18, 19, 22, 23, 24, 25, 26(2)

[170] Portions of all of the pages of these records.

Record 21

[171] Portions of pages 53-54, 56-57, 59, 61, 124-126, 226-228, 326, 328-329, 331, 332-333, 335.

Record 27

[172] Portions of pages 94, 100, 105.

[173] Having found that some information qualifies for exemption under sections 17(1), 20 and 21(1), I now turn to whether the public interest override applies to require disclosure of that information notwithstanding the application of an exemption to it.

[174] I need not consider the application of the public interest override to the information that I have found not to qualify for an exemption. As I have noted above, I will order disclosure of the non-exempt information.

Issue E: Under section 23, is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of any applicable exemptions?

[175] I have found above that certain information is exempt under sections 17(1), 20 and 21(1). However, section 23 provides for the disclosure of exempt information in some circumstances where there is a compelling public interest. It states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, **17**, 18, **20**, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.[21]

[176] The section 23 "public interest override" provides for disclosure of information that is otherwise exempt under sections 17(1), 20 and 21(1). Two requirements must be met: first, there must be a compelling public interest in disclosure of the records;

[21] Emphasis added.

second, this public interest must clearly outweigh the purpose of these exemptions.[22]

Is there a compelling public interest?

[177] In considering whether there is a "public interest" in disclosure of a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[23] In previous orders, the IPC has stated that to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the population about the activities of their government or its agencies, 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.[24] The IPC has defined "compelling" as "rousing strong interest or attention."[25]

[178] Any public interest in non-disclosure that may exist also must be considered.[26] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[27]

[179] A "public interest" does not exist where the interests advanced are essentially private in nature.[28]

[180] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation,[29]
- the integrity of the criminal justice system has been called into question,[30]
- public safety issues relating to the operation of nuclear facilities have been raised,[31]
- disclosure would shed light on the safe operation of petrochemical facilities,[32] or the province's ability to prepare for a nuclear emergency,[33]

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[22] *Barker v. Ontario* (*Information & Privacy Commissioner*), 2019 ONCA 275.
[23] Orders P-984 and PO-2607.
[24] Orders P-984 and PO-2556.
[25] Order P-984.
[26] *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.).
[27] Orders PO-2072-F and PO-2098-R.
[28] Orders P-12, P-347 and P-1439.
[29] 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.).
[30] Order PO-1779.
[31] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*), supra note 26, Order PO-1805.
[32] Order P-1175.

- the records contain information about contributions to municipal election campaigns,[34]
- the records show how much Ontarians are paying for electricity generated by a nuclear power station over a 49-year period,[35]
- the records show the salaries of top administrators employed by a municipal institution,[36] and
- the records show whether or not the supervision of a probationer convicted of assault was adequate, given that he went on to murder several men.[37]

[181] A compelling public interest has been found not to exist where, for example:

- another public process or forum has been established to address public interest considerations,[38]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations,[39]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding,[40]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter,[41] or
- the records do not respond to the applicable public interest raised by the requester.[42]

Requester's representations

[182] The requester submits that the information at issue is about a matter of public interest. I have summarized below the requester's overall explanation as to why there is a public interest in disclosure and why it is compelling:

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[33] Order P-901.
[34] *Gombu v. Ontario* (*Assistant Information and Privacy Commissioner*) (2002), 59 O.R. (3d) 773 (Div. Ct.).
[35] Reconsideration Order PO-4044-R.
[36] Order MO-3844 and Interim Order MO-3684-I.
[37] Order PO-4375.
[38] Orders P-123/124, P-391 and M-539.
[39] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[40] Orders M-249 and M-317.
[41] Order P-613.
[42] Orders MO-1994 and PO-2607.

- the information will enlighten the citizenry about the actions of a crucial workplace compensation agency and the conditions of a large employer that has experienced five fatalities and employs a large number of temporary workers

- disclosure will allow the public to be further engaged in the issue of public health and safety and the government response to concerns, specifically within the temporary worker context

- the public interest in conditions at the company is evident from the response to the investigative pieces published in the media

- the pieces revealed concerns about the company's workplace practices and led to immediate reactions from the provincial government and labour organizations

- this resulted in promises of stronger temporary worker agency regulations and improved health and safety protections

- health and safety issues remain an ongoing concern at the company; the initial media investigation report was published in 2017; since then, two other temporary workers have died in accidents within the company's facilities

[183] The requester says that workplace protections enacted by the government following the 2017 investigation were rolled back by the next (current) government. These rollbacks include the removal of measures that made it easier for vulnerable temporary workers to unionize; additionally, temporary workers are no longer entitled to be paid the same wage for doing the same job as permanent workers. Finally, according to the requester, the current government has not implemented legislation meant to ensure all companies who use temporary workers are responsive for their injuries in respect of workers' compensation coverage. As a result, temporary workers remain a vulnerable population.

[184] The requester submits that, in particular, the information in the investigation record (Record 8) will provide a deeper understanding of a large employer's safety record and the thoroughness of WSIB's response to the 2016 workplace death. She says that any substantive information in the records will further the public interest goal of accountability. The public must be informed of workplace concerns and the conclusions in the investigation could have wider implications regarding similar job sites in the province, especially those that employ temporary workers.

[185] Further, the requester states that the public should know the effectiveness of the provincial workplace safety system and ensure the government addresses fatal industrial accidents with the seriousness they deserve. In the process, the public will understand how government agencies respond to workplace deaths, workplace conditions of major employers, and the need for further pressure on the current provincial government.

[186] The requester submits that, given the above, the public interest in the information is "compelling" in that it rouses "strong interest or attention." There is clear strong interest and attention in the issues related to this appeal.

[187] The requester says that the issues raised in this appeal are analogous to those present in past findings of compelling public interest by the IPC. The requester cites the examples of the integrity of the criminal justice system and safety surrounding nuclear and petrochemical facilities, cases where the IPC found a compelling public interest.

[188] Finally, the requester submits that the government does not publish workplace fatality-related investigations, which means that making a freedom of information request is the only avenue for obtaining such information. She says that this contrasts with other provinces, like Alberta and British Columbia.

Company's submissions

[189] The company submits that there is already sufficient information about health and safety matters relating to the company in the public domain. The company states that the Ontario government provides extensive disclosure in respect of this objective in the following ways:

- the activities of Ontario's provincial government are recorded and publicly available in the House Hansard index
- WSIB publishes conviction notices, which typically include the name of the employer, charge, date of the conviction, and the penalty
- WSIB maintains "Safety Check," an online database of all WSIB- registered businesses across Ontario, including the company
- the Ministry of Labour, Immigration, Training and Skills Development publishes court bulletins regarding convictions resulting from workplace injuries
- proceedings under the *Occupational Health and Safety Act* are public, and
- the company's submissions supporting its appeal of WSIB's decision to penalize it under the *Workplace Safety and Insurance Act* are public

[190] The company submits that WSIB disclosed other records relating to it to the requester, and says this disclosure was improper. It states further that "without a proper accounting" of which records WSIB previously disclosed, and to whom, "the IPC does not have the requisite information to determine whether the state of the public record favours further disclosure."

[191] In response to the requester's point about Ontario not publishing workplace fatality information, unlike Alberta and British Columbia, the company submits this must

mean that Ontario has made a legislative choice not to make this information public. The company says that the *Act* should not be used as a "back door to circumvent a legislative regime and compel the production of the documents of a private corporation" to whom the *Act* does not apply. It submits that if the requester wishes to challenge the Ontario government's decision not to legislate the publication of workplace investigation reports, the requester "is at liberty to do so through the appropriate channels."

[192] The company submits that the requester's reliance on her own published articles "is a form of bootstrapping: a member of the media asserts there is a 'compelling public interest' because the media is reporting on the topic." The company says the requester does not offer any evidence in support of the claim that the responses relied upon (i.e. responses by the legislature and organized labour) were causally linked to the media articles cited.

[193] The company submits that the IPC regularly considers access requests by members of the media, and that it has found that a public interest is not automatically established because a requester is a member of the media.[43] It follows that the publication of newspaper articles does not, by itself, establish a public interest.

Findings

[194] I find that the requester has established that there is a compelling public interest in disclosure of information in the records that would shed light on the circumstances surrounding the accident, including in relation to:

- information about the equipment involved in the accident, such as safety checks of, and modifications to, these items
- information about safety checks made to other equipment around the time of the accident
- information about the number of people performing work at the facility, and whether they are temporary or full-time staff
- the nature of the health and safety training the company provided to the deceased and other workers at the plant
- the steps taken by the company to ensure the safety of its operations, particularly with respect to the operations of the line at which the accident occurred
- discussions within the company about health and safety of its facility

[43] The company cites Order PO-4277.

- the nature of the relationship among the deceased and other temporary workers, the company itself, and the employment firms retained by the company (including contracts)

- the investigatory and remedial steps taken by WSIB in response to the incident

[195] I agree with the requester that disclosure of this information would serve the public interest in enlightening the citizenry about the actions of WSIB in relation to the health and safety conditions at the company, a major employer that employs a large number of temporary employees and that has experienced a significant number of fatalities. Further, I find that disclosure of this information will help to inform the public debate, involving the provincial government and labour organizations, about the adequacy of current health and safety laws.

[196] I note that one of the key purposes of the *Workplace Safety and Insurance Act* is "to promote health and safety in workplaces." The requester has persuaded me that disclosure of information in the records I described above is likely to advance this fundamental purpose.[44]

[197] In addition, unlike in previous cases,[45] there is no other public process or forum which will address public interest considerations, such as a future court or tribunal hearing.

[198] I accept that the information in the records I described above meets the threshold of rousing "strong interest or attention."

[199] I do not accept the company's "bootstrapping" point. It is true that the requester has published articles about health and safety at the company. But these articles were written in response to publicly known and serious incidents that included fatalities. This is not a case where a journalist has engaged in speculation about a possible public interest concern. Some information about the seriousness of the health and safety concerns about the company was already on the public record when the requester wrote the articles. Furthermore, it is disingenuous of the company to assert that the requester has manufactured a public interest when five workers have died at its facility.

[200] I acknowledge that there is already some information available to the public about health and safety concerns at the company, some by way of the transparency mechanisms the company has referred to. However, there is detailed information in the records that is not publicly available that would add important context and colour to the information that is already available.

[201] I find, however, that some information I have found exempt does not meet the "compelling public interest" threshold. This information includes

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[44] *Workplace Safety and Insurance Act, 1997*, s. 1(1).
[45] Orders P-123/124, P-391 and M539.

- names of employees I found exempt under the section 21 personal privacy exemption
- WSIB account numbers
- the fire safety plan
- product ingredient lists

[202] This information, while potentially useful to shed some light on the circumstances surrounding the accident and the health and safety issues at the company, does not have sufficient relevance to these matters to establish a "compelling" public interest in its disclosure.

Does the compelling public interest clearly outweigh the exemptions at sections 17(1), 20 and 21(1)?

[203] The existence of a compelling public interest is not sufficient to require disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[204] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[46]

[205] I found above that there is a compelling public interest in disclosure of information which I had found to be exempt under section 17(1). However, I did not find that there was a compelling public interest in disclosure of any of the information I found to be exempt under sections 20 or 21(1). Therefore, I will consider whether the compelling public interest in disclosure outweighs the purpose of section 17(1), but I need not consider the purposes of sections 20 or 21(1).

Section 17(1)

[206] The purposes of section 17(1) of the *Act* were articulated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2* (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> ...The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for

[46] Order P-1398, upheld on judicial review in *Ontario* (*Ministry of Finance*) *v. Ontario* (*Information and Privacy Commissioner*), supra note 28.

> two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.[47]

[207] In Order PO-2226,[48] the IPC explained the purpose of section 17(1) as follows:

> Section 17(1) recognizes that in the course of carrying out public responsibilities, government bodies receive information about the activities of private businesses, and the exemption is designed to protect the "informational assets" of businesses or other organizations that provide information to the government in this context (Order PO-1805). Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of information that, while held by government, constitutes confidential information of third parties which could be exploited in the marketplace.

[208] The purposes of the section 17(1) exemption are serious, and are intended to protect the public interest in the manner expressed by the Williams Commission and this office.

Requester's submissions

[209] The requester submits that the records include information related to the company's health and safety practices, and that she seeks them "to hold the company accountable for failing to ensure safe conditions for their employees and encouraging prevention of future fatal incidents." The requester says that "employee safety outweighs the commercial interests of the company," and that "disclosure of the records would certainly help to address workplace health and safety concerns."

Company's submissions

[210] The company submits that the requester's stated intention is to hold the company accountable, and that this purpose is contrary to *FIPPA*'s purpose, which is "concerned with the actions of state entities."

[211] The company further says that there is "no evidence" provided by the requester that disclosure of the company's commercial records would improve accountability of state actors or otherwise shed light into the activities of government. The company adds that the information that is exempt under section 17(1) is "not related" to the important issue of employee safety.

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[47] At p. 313.
[48] Upheld on judicial review in *Boeing*, above.

Findings

[212] I find that the public interest in protecting the business interests of the company is clearly outweighed by the compelling public interest in disclosure of information in the records for the purposes of:

- shedding light on the activities of the WSIB in overseeing health and safety matters at the company (both generally and specifically relating to the accident),
- advancing the public debate about legislative responses to health and safety concerns, and
- enhancing workplace health and safety.

[213] Therefore, I find that section 23 applies to override the application of section 17(1) in this case.

[214] My finding that the public interest override applies here is supported by the legislative history of the *Act*. There is strong evidence that the Legislature intended that the public interest in protecting business by way of the section 17(1) exemption should yield in circumstances where disclosure of the information is in the public interest because it relates to matters of health and safety. In discussing whether or not the proposed commercial information exemption should be subject to a public interest override, the Williams Commission stated:

> …In short, if the public interest in disclosure of matters relating to environmental protection, public health and safety and consumer protection is not explicitly stated, it is likely to appear in strained interpretations of other phrases in the exemption. For this reason, we recommend the adoption of a limitation of this kind…We recommend that the limitation make express reference to the public interest in such matters as the protection of the environment, consumer protection and public health and safety.

[215] Although ultimately the Legislature did not incorporate specific language in the section 23 public interest override referring to the public interest in the protection of the environment, consumer protection and public health and safety, in my view, it is reasonable to assume that in adopting more general language in section 23, the Legislature contemplated that the override could apply in these types of circumstances, among others. This view is reinforced by Assistant Commissioner Tom Mitchinson's finding in Order P-1190 with regard to nuclear safety records, and my finding in Order PO-1688 relating to the discharge of air emissions into the natural environment.

ORDER:

1. I order WSIB to withhold the three records in Appeal PA18-00723 from the requester, and otherwise dismiss that appeal without prejudice to the requester's right to make a new request to WSIB for access to these three records, should the requester so desire after reviewing the records disclosed as a result of this order.

2. I order WSIB to disclose, no later than **August 11, 2023**, but not earlier than **August 8, 2023**, the information in the ten records at issue in Appeal PA18-217, with redactions as indicated in highlighted copies of the records I am providing to WSIB with this order. To be clear, the highlighted portions are to be withheld and the remainder of the information at issue is to be disclosed. The portions that the WSIB itself decided to withhold and that the requester did not appeal should not be disclosed.

3. In order to verify compliance with this order, I reserve the right to require WSIB to provide me with a copy of the records disclosed to the requester.

Original Signed by: July 6, 2023

David Goodis
Adjudicator