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**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 32-1995  
January 26, 1995**

**INQUIRY RE: A Request for Access to Complaint Records of the Employment Standards Branch of the Ministry of Skills, Training and Labour**

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**1. Description of the review**

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on December 12, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arises out of a request by a lawyer on behalf of Sunco Drywall Ltd. (Sunco) for access to records related to complaints made against the company under the provincial Fair Wage Policy and the *Employment Standards Act*, S.B.C. 1980, c. 10. These records are held by the Employment Standards Branch of the Ministry of Skills, Training and Labour (the Ministry).

On June 27, 1994 the Ministry received the applicant's request for access to copies of all information and documentation, including a copy of the actual complaints, filed by thirteen named individuals against Sunco. In addition, the applicant requested copies of every closed, settled, or withdrawn complaint against Sunco made within the last two years, including complaints by unions, competitor contractors, and any other persons, including information filed by complainants in support of their alleged claims and any Employment Standards Branch memoranda, file notes, and correspondence in the Branch's files.

On July 25, 1994 the Ministry extended the response deadline by 30 days and, on August 22, 1994, replied to the applicant's request by refusing access to all records. It cited sections 14, 15, and 22 of the Act as its authority for withholding the information. On September 12, 1994 the applicant requested a review of the Ministry's decision by the Information and Privacy Commissioner.

On October 26, 1994 the Ministry disclosed to the applicant copies of correspondence between the applicant and the Ministry. On November 4, 1994 the Ministry disclosed to the applicant copies of some of the remaining relevant records. It withheld much of the information in those records under sections 14, 15, 21, and 22 of the Act.

## **2. Documentation of the inquiry process**

On November 29, 1994 the Office of the Information and Privacy Commissioner issued a Notice of Written Inquiry to take place December 12, 1994. The Office further provided the two parties involved in the inquiry with a one-page statement of facts (the Portfolio Officer's fact report), which was accepted by the parties. The Office requested submission of initial representations on December 8, 1994 and final representations on December 12, 1994.

Michael Yawney, Barrister and Solicitor with Nixon Wenger of Vernon, presented the applicant's case. Catherine Hunt, Barrister and Solicitor with the Legal Services Branch, Ministry of Attorney General, presented the public body's case.

## **3. The records in dispute**

The records in dispute in this case consist of complaints filed by employees of Sunco Drywall; supporting documentation filed with the complaints (e.g., records related to the employees' pay and hours worked); and complaints filed by labour unions.

## **4. Issues under review in the inquiry**

This inquiry examined the application of section 22 of the Act to some of the personal information of the complainants and the extent to which the Ministry can rely on sections 14, 15, and 21 to refuse to disclose the supporting documentation provided by the complainants to the Employment Standards Branch.

Under section 57(1), the burden of proof is on the public body to justify reliance on sections 14, 15, and 21 of the Act. Under section 57(2), the burden of proof is on the applicant to show that section 22 does not apply to the records.

## **5. The Ministry's case**

The public body takes the general position that the severed information: a) was prepared in contemplation of litigation (section 14 of the Act); b) could reasonably be expected to harm a law enforcement matter (section 15); c) constitutes commercial and labour relations information, disclosure of which could be harmful to the business interests of third parties (section 21); and/or d) would be an unreasonable invasion of the third parties' personal privacy, if it were disclosed (section 22).

The Ministry states that it has received approximately 24 complaints from individual employees and 18 from labour unions regarding the alleged failure of Sunco or companies allegedly associated with it to comply with the *Employment Standards Act*. The complaints refer to various forms of unfair labour practices, ranging from failure to pay overtime and holiday rates of pay, to exerting pressure on workers to sign away their employee status, to failure to deduct Unemployment Insurance premiums and Canada Pension Plan contributions from wages. Investigation of these complaints continues. (Submission of the Ministry, p. 4)

The Director of the Employment Standards Branch, and in some cases officers under the *Employment Standards Act*, are authorized by sections 12, 13, and 83-85 to issue orders for wages or payments owing to employees under that legislation to be paid on their behalf to the Director. Such orders may be confirmed by certificates, which may be then filed in Supreme Court of British Columbia and are enforceable as judgments (section 14). An appeal from a certificate of the Director lies to the Supreme Court (section 14(8)) and is heard as a trial *de novo* (section 14(5)).

Although the Ministry maintained that it could have relied on the confidentiality provision in section 99(1) of the *Employment Standards Act* to refuse disclosure of the records requested by the applicant, it has in fact released as much information as possible in accordance with the provisions of the *Freedom of Information and Protection of Privacy Act*: “The only information that has been withheld from the applicant relates to the personal information of third parties, third party labour relations information and information collected in the course of conducting law enforcement investigations.” (Submission, pp. 6-7)

The Ministry claims support for its non-disclosure of records from both section 15(1)(a) and 15(1)(d) of the Act, which read as follows:

- 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
- (a) harm a law enforcement matter,
  - ....
  - (d) reveal the identity of a confidential source of law enforcement information,
  - ....

The Ministry acted in accordance with its interpretation of Schedule 1 of the Act and the corresponding portions of the *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* (1994) (the Manual), which was prepared by the Information and Privacy Branch in the Ministry of Government Services (Manual, Section C.4.6, pp. 13 and 14). The thrust of its argument is that law enforcement includes enforcement by regulatory agencies that may impose penalties or sanctions, and that investigations are part of “law enforcement,” even if they do not actually result in

proceedings that lead to a penalty or sanction. With respect to section 15(1)(d), the Ministry noted that section 81 of the *Employment Standards Act* permits an employee to lodge a complaint anonymously.

With respect to its decision not to disclose personal information under the Act because it would be harmful to the personal privacy of the complainants, the Ministry relied explicitly on the following parts of section 22 of the Act:

- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- ....
- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence,
- ....
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- ....
- (d) the personal information relates to employment, occupational or educational history,
- ....
- (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness,
- ....

Furthermore, the Ministry argues that, in the circumstances of the present case, "the withheld information is clearly labour relations information and therefore s. 21 applies."

Section 21 of the Act, on which the Ministry further relies, reads in part:

- 21(1) The head of a public body must refuse to disclose to an applicant information
- (a) that would reveal
- ....
- (ii) commercial, financial, labour relations, scientific or technical information of a third party,

- (b) that is supplied, implicitly or explicitly, in confidence, and
- (c) the disclosure of which could reasonably be expected to  
....
- (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

The Ministry argues that the information in dispute was supplied in confidence, is treated confidentially by the Employment Standards Branch of the Ministry, and that its disclosure would reveal information pertaining to a labour relations dispute. (Submission of the Ministry, pp. 13-14)

The Ministry argues under section 14 of the Act (solicitor-client privilege) that the information it has withheld from disclosure is collected for ultimate use in court. Affidavit evidence from employees of the Employment Standards Branch asserts that “the purpose of gathering information in the investigation stage of a complaint is for use in litigation.” (Submission of the Ministry, p. 15)

## **6. The applicant’s case**

In summary, the applicant is of the opinion that the Ministry’s interpretation of “law enforcement” (section 15 of the Act) goes far beyond the intent of the legislation and cannot be supported in the circumstances. The applicant also believes that the Ministry applied section 22 improperly, since any person who levels an accusation against Sunco Drywall Ltd. and set into motion a groundless investigation by the Employment Standards Branch of the Ministry has no right to be insulated from the right of the applicant to ascertain the foundation of accusations leveled against it. In addition, the applicant states that the names of thirteen of the complainants were previously disclosed by the Ministry. The applicant also states that copies of complaints from competitor contractors made in 1993 were not among those provided to it, even though an official of the Ministry told the company that such a complaint existed.

The applicant does not dispute that the Ministry has conducted an extensive investigation of Sunco in respect of its compliance with the provincial Fair Wage Policy and with the *Employment Standards Act*. It asserts that this was prompted by the BC Council of Carpenters, a trade union which has attempted to unionize Sunco in the past.

The applicant argues that section 14 arguments against disclosure can only apply to documents or information produced by Ministry officials in the course of their dealings with the Ministry’s own legal counsel.

The applicant essentially argued that section 22 of the Act has no application in the current case. One point is that the complainants already consented to the disclosure of certain information about them to Sunco and thus should be perceived as having consented to disclose the rest. (Submission of the Applicant, December 8, 1994, p. 5)

## 7. Discussion

### *The appropriate venue for disclosure*

The positions of the competing parties above have been described by me in somewhat abbreviated form, but I have considered all representations carefully in making my Order. I have concluded that the positions taken by counsel for the applicant in particular are essentially without merit and/or do not assist in resolving this application under the Act. Many of the applicant's arguments about the need for disclosure of the information in dispute are directly relevant to a future event that may occur at a quasi-judicial level or in court, which is where these access to information issues should be settled for such particular purposes. (See Submission of the Applicant, December 8, 1994, pp. 4, 5; and Reply Submission of the Applicant, December 12, 1994, pp. 5, 7) A court or hearing room is the locale where information supplied by third parties can be subjected to appropriate scrutiny, if it is not accessible under the provisions of the Act.

The essential point is that an application for information under the Act is not a "proceeding" under the *Employment Standards Act*. (See Reply Submission of the Applicant, December 12, 1994, p. 4) I accept the position of the Ministry that the right of Sunco to know the case against it is met under the written procedures of the Employment Standards Branch itself. (Reply Submission of the Ministry, December 12, 1994, p. 4 and "Synopsis of Employment Standards Branch Procedures") These procedures specify, with respect to litigation, that:

Failing voluntary compliance [with the legislation], Employment Standards Branch commences the litigation process to enforce the statutory requirements. Once these matters come before the Courts, all of the information that is given to the Officer is provided to the employers.

I feel similarly skeptical about arguments made by applicants, including the present case, that under the Act there is a section 25 public interest in subjecting the activities of a public body, in this case the Employment Standards Branch and the Ministry, to public scrutiny. Thus "Sunco submits that the public interest requires that any person or corporation rightly or wrongly accused of breaching the laws of the Province of British Columbia should have the right to know what evidence there was against it and whom [sic] the accusers were." (Submission of the Applicant, December 8, 1994, p. 4) Normally, this is a matter for the courts. For present purposes, I accept the argument of the Ministry that "'public interest' means the interest of the general public or of a group of individuals. It does not include the interest of only one individual." The Ministry's position is that "the only interests that could be advanced from premature

disclosure of this information are those of Sunco.” (Reply Submission of the Ministry, December 12, 1994, p. 3)

The Ministry has disclosed approximately 275 pages of records to the applicant. Approximately 120 pages have been withheld, in whole or in part, from disclosure. The remaining avenue for access to them is in the courts.

### ***Section 15***

I accept the argument of the Ministry that the activities of its Employment Standards Branch, acting under the authority of the *Employment Standards Act*, qualify as “law enforcement” for purposes of the Act. I am following the lead of the Ontario Information and Privacy Commissioner, Sidney B. Linden, in his Order 94, Re: Ministry of Labour, September 22, 1989, p. 6. There is no question in my mind (in accordance with what the Ministry has argued) that premature disclosure of the basis of complaints that are fuelling an ongoing investigation by the Employment Standards Branch of the Ministry would hinder a law enforcement matter. Similarly, disclosure of the names and associated information of complainants might subject them to intimidation by an employer. (Submission of the Ministry, pp. 8-9)

On a related matter, I fully accept the Ministry’s point that:

... it is unreasonable to suppose that an employee will lodge a complaint about his employer that has the potential of grave consequences for his employer under the Employment Standards Act without an inherent assumption of confidentiality. [Submission of the Ministry, p. 10]

### ***Section 21***

I accept the arguments advanced by the Ministry with respect to preventing disclosures harmful to the business interests of a third party under section 21 of the Act. (Submission of the Ministry, pp. 13-14)

### ***Section 22***

I also accept the various arguments for non-disclosure of personal information advanced by the Ministry under section 22 of the Act, including the conclusion “that the harm to the complainant’s [sic] privacy more than outweighs the interests of the applicant in this case.” (Reply Submission of the Ministry, December 12, 1994, p. 5) In my further judgment, the applicant has not met the burden established under section 57(2) of the Act to prove that disclosure of the information would not be an unreasonable invasion of the third parties’ personal privacy.

### ***Section 14***

In view of my findings in respect of sections 15, 21, 22, and 25, I do not find it necessary to resolve the applicability of section 14 to the records withheld by the Ministry in this case.

**8. Order**

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry not to release the records in dispute to the applicant.

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David H. Flaherty  
Commissioner

January 26, 1995