

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

DECISION F2008-D-001

September 24, 2008

ALBERTA EMPLOYMENT AND IMMIGRATION
(formerly Alberta Human Resources and Employment)

Case File Number 3811

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant asked Alberta Employment and Immigration (the “Public Body”) for two lists containing the names and locations of employers who have been targeted by the Public Body in relation to compliance with employment standards in the area of wages and entitlements.

In the course of the inquiry, the Adjudicator advised the Applicant and the Public Body that he intended, under section 67(1)(a)(ii) of the Act, to notify the employers on the lists because they were affected by the Applicant’s request for review, and therefore should be entitled to make representations in the inquiry. The Public Body objected, so the Adjudicator allowed it and the Applicant to make submissions on whether the employers should be notified as affected parties.

The Adjudicator reviewed some of the facts and circumstances that may be considered in the exercise of discretion to notify affected parties under section 67(1)(a)(ii) of the Act. In particular, he reviewed them in the context of a request to access records that may contain the business information of a third party under section 16, or the personal information of a third party under section 17. He also considered what it means to give a copy of the request for review to affected parties “as soon as practicable”.

Among other relevant factors, the Adjudicator found that there was an arguable possibility that the requested information about the employers fell within the mandatory exception to disclosure under section 16 of the Act (disclosure harmful to business interests of a third party). He also believed that there could be an important impact on them, or serious consequences, if their information were disclosed. The Adjudicator also found that representations from the employers were necessary to determine whether section 16 applied, as the submissions from the Applicant and Public Body were insufficient to resolve that issue.

The Adjudicator rejected the Public Body's submission that he should first determine whether the Public Body properly applied a discretionary exception to disclosure before deciding whether the employers should be notified, as this would complicate the matter and delay its resolution.

On review of the relevant facts and circumstances, the Adjudicator concluded that the employers were affected under section 67(1)(a)(ii) of the Act, and that he was required to give them a copy of the Applicant's request for review.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 2(a), 2(e), 4(1), 7(1), 16, 16(1), 16(1)(a), 16(1)(a)(i) and (ii), 16(1)(b), 16(1)(c), 16(3)(b), 17, 17(1), 17(2), 17(2)(c), 17(5), 20, 24, 30(1), 59(2)(a), 59(3)(a), 67, 67(1)(a)(ii), 69(1), 69(3), 72 and 74(3). **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, ss. 50(3) and 52(13), as they read prior to April 1, 2007. **BC:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 54(b).

Authorities Cited: **AB:** Orders 99-029, 2000-021, 2001-002, 2001-008 and F2003-018. **CAN:** *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *R. v. Sharpe*, 2001 SCC 2. **ON:** Order P-395 (1993); *Kalin v. Ontario College of Teachers*, [2005] O.J. No. 2097 (QL) (S.C.J. Div. Ct.). **BC:** *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210. **Other:** E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983); D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986); Office of the Information and Privacy Commissioner for British Columbia, *Policies and Procedures*, November 2006.

I. BACKGROUND

[para 1] By letter dated June 29, 2006, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Human Resources and Employment, which is now called Alberta Employment and Immigration (the "Public Body"). The Applicant asked for the names and locations of employers identified for the "targeted employers – Business Relations Program" under employment standards enforcement, for the years 2005 and 2006.

[para 2] In a letter dated August 3, 2006, the Public Body refused the Applicant's information request, relying on certain of the discretionary exceptions to disclosure set out under section 24 of the Act (advice, etc.).

[para 3] By letter dated August 31, 2006, the Applicant requested a review of the Public Body's decision to refuse access. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry.

[para 4] The issue of whether the Public Body properly applied section 24 of the Act was set out in a Notice of Inquiry dated November 6, 2007. An Amended Notice of Inquiry, dated February 29, 2008, set out the additional issues of whether the requested information was subject to the mandatory exception to disclosure under section 16 (disclosure harmful to business interests of a third party) and/or section 17 (disclosure harmful to a third party's personal privacy).

[para 5] I arranged for the issues regarding section 16 and 17 of the Act to be added to the inquiry because, on review of the records requested by the Applicant, I believed that they could apply. As section 16 and 17 are mandatory provisions, they had to be addressed, whether or not the parties raised them (Order 2001-008 at para. 13; Order F2003-018 at para. 11). In response to the additional issues, the Public Body submitted that it could have applied section 16 to withhold the names and locations of all of the employers listed in the records requested by the Applicant, and could have also applied section 17 to withhold information relating to one of them.

[para 6] In the course of the inquiry, I indicated my intention to notify the employers whose names appear in the requested records as persons affected by the Applicant's request for review, so as to enable them to make representations. The Public Body objected and asked to make submissions on whether affected parties should be notified. This is my Decision in response to that objection and after consideration of the submissions of the Public Body and Applicant.

II. RECORDS AT ISSUE

[para 7] As this Decision addresses a procedural matter, there are no records directly at issue for the purpose of the Decision. Having said this, the records at issue in the main inquiry are two "targeted employers lists" that relate to compliance with employment standards in the area of wages and entitlements.

III. ISSUES

[para 8] By Amended Notice of Inquiry dated June 26, 2008, I sought the Public Body and Applicant's submissions on the following questions:

What does it mean to be "any other person who... is affected by the request" under section 67(1)(a)(ii) of the Act?

When is it “as soon as practicable” to give a copy of a request for review to an affected party under section 67(1)(a)(ii) of the Act?

Does procedural fairness require affected parties to be notified under section 67(1)(a)(ii) of the Act?

[para 9] I will discuss the above issues in sequence, and then apply them to the present inquiry, more directly, in a fourth section.

IV. DISCUSSION OF ISSUES

[para 10] Section 67(1)(a)(ii) of the Act reads as follows:

67(1) On receiving a request for a review, the Commissioner must as soon as practicable

(a) give a copy of the request

...

(ii) to any other person who in the opinion of the Commissioner is affected by the request,

...

[para 11] As the Commissioner’s delegate, I have the authority and am required to give a copy of the Applicant’s request for review to any person who, in my opinion, is affected by the request (i.e., an “affected party”).

A. What does it mean to be “any other person who... is affected by the request” under section 67(1)(a)(ii) of the Act?

1. Discretion in determining who is affected

[para 12] Section 67(1)(a)(ii) of the Act is mandatory in that – once a person is considered to be affected by a request for review in the opinion of the Commissioner – that person must be given a copy of the request. At the same time, in my view, the words “in the opinion of the Commissioner” indicate that the decision as to who is affected is discretionary. To properly exercise discretion, a decision-maker must assess the relevant facts and circumstances; assess the applicable law, including the objects of the enactment and the scope of the discretionary power, which includes any preconditions set on the exercise of discretion; and assess how to properly apply the law to the relevant facts and circumstances [Order 2000-021 at para. 50, citing D.J. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986), p. 7].

[para 13] In the context of section 67(1)(a)(ii), the Commissioner or his delegate is accordingly permitted to consider an appropriate range of facts and circumstances in determining whether a person qualifies as an affected party within the meaning of the

section. In considering what is just and proper in the circumstances, the decision-maker must take into account relevant factors, exclude irrelevant ones, and give the relevant factors their appropriate weight. In the following paragraphs, I will discuss some of the factors that I regard as potentially relevant in determining who may be an affected party in the context of an access request under the Act.

[para 14] This discussion as to who is affected by a request for review is restricted to a discussion of who may be affected in cases where a public body has denied an applicant access to information. Further, in this case, the specific context is one in which the records at issue appear to contain a third party's "personal information" [as defined under section 1(n) of the Act] and/or what I shall call "business information" [as set out in sections 16(1)(a)(i) and (ii)]. There are other contexts in which a person may be affected by a request for review under section 67(1)(a)(ii), including where the review involves requests for other types of information, other exceptions to disclosure, the decision of a public body to grant (as opposed to deny) access to information, or the alleged collection, use or disclosure of personal information under Part 2 of the Act.

[para 15] In interpreting who may be a person affected by a request for review under section 67(1)(a)(ii) of the Act, guidance may be obtained from section 30(1), which sets out when a public body must notify third parties in the context of an access request:

30(1) When the head of a public body is considering giving access to a record that may contain information

- (a) that affects the interests of a third party under section 16, or*
- (b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,*

the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).

[para 16] In referring to sections 16 and 17 of the Act, section 30(1) informs section 67(1)(a)(ii) with respect to two ways that a person might be an affected party under the latter section, and therefore be entitled to notice. In my view, one of the relevant factors suggesting that notice should be given to a third party under section 67(1)(a)(ii) is that there is an arguable possibility that the information requested by an applicant is information that affects the interests of the third party under section 16, or information the disclosure of which would be an unreasonable invasion of the third party's personal privacy under section 17. I say "arguable possibility" because, for instance, even where there is personal information of a third party in records requested by an applicant, it may be immediately clear that disclosure would not be an unreasonable invasion of personal privacy as a result of one of the enumerated situations under section 17(2), or as a result of a previous decision of this Office addressing essentially the same type of information in the same type of record.

[para 17] An earlier decision of this Office has stated that section 67(1)(a)(ii) of the Act applies where a person may be adversely and directly affected by the outcome of an inquiry, or request for review (Order 2001-002 at para. 6). I accordingly believe that a relevant factor to consider in determining whether a person is affected under section 67(1)(a)(ii) is whether the person is directly and adversely affected by an applicant's request for review, or may be directly and adversely affected by the ultimate decision resolving the access request. By implication, a person might not be affected if the person is only indirectly engaged by the proceeding, or there is no potential for negative consequences, or some degree of harm, if the person's information were disclosed.

[para 18] It is possible that section 67(1)(a)(ii) of the Act is intended to be a codification of the common law regarding notification to affected persons. Decisions in administrative law that have discussed whether a person should be entitled to have a hearing or participate in a proceeding have considered the seriousness of the matter to that person. The Supreme Court of Canada has stated: "There is a right to procedural fairness only if the decision is a significant one and has an important impact on the individual" [*Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at para. 35]. Further, in an Ontario decision, it was stated:

It is a fundamental precept of our system of justice that an individual is entitled to be heard before a decision affecting his interest can be made against him. That does not mean that [t]ribunals must cater to the convenience of the parties at all costs. However, the interests of fairness must at least be addressed and seriously considered before a [t]ribunal embarks on a hearing with serious consequences for the person affected. [*Kalin v. Ontario College of Teachers*, [2005] O.J. No. 2097 (QL) (S.C.J. Div. Ct.) at para. 39.]

[para 19] In referring to a "significant decision", an "important impact" and "serious consequences", the foregoing cases suggest that the potential for relatively minor, unimportant or insignificant consequences is not sufficient to entitle a person to participate in a proceeding. If these cases are applied to section 67(1)(a)(ii) of the Act, it follows that the mere presence of an individual or business's information in records that have been requested by an applicant is not *automatically* enough to make them affected parties so that they must be given notice and an opportunity to make representations.

[para 20] Guidance as to the relevant factors that may be considered in determining who constitutes an affected party under section 67(1)(a)(ii) of the Act may also be obtained from orders interpreting analogous provisions in other jurisdictions. A provision comparable but not identical to section 67(1)(a)(ii) has been interpreted by the Court of Appeal for British Columbia. Specifically, section 54(b) of B.C.'s *Freedom of Information and Protection of Privacy Act* requires the commissioner to give a copy of a request for review to "any other person that the commissioner considers appropriate". In restoring a decision not to notify particular parties or re-open an inquiry, the Court of Appeal stated that the commissioner "is to exercise his judgment as to who might reasonably be thought to be affected by his decision" [*Guide Outfitters Assoc. v. British*

Columbia (Information and Privacy Commissioner), 2004 BCCA 210 at para. 29]. The Court characterized the decision of whether to give notice to other parties as “deciding who ought to be found to have a sufficient interest in the inquiry proceedings to become a participant in the process” (also at para. 29).

[para 21] Although the wording of the B.C provision is different, I believe that the phrase “in the opinion of the Commissioner” in section 67(1)(a)(ii) of Alberta’s Act confers a discretion that is comparable to that given by the phrase “that the commissioner considers appropriate” in B.C.’s Act. It is therefore my view that the statements made in the B.C. decision, just cited, may be adopted for section 67(1)(a)(ii). In other words, third parties might be entitled to notice under section 67(1)(a)(ii) if they are “reasonably” or “sufficiently” affected by the request for review or inquiry. This interpretation is consistent with my conclusions above that persons may qualify as affected parties if they are directly and adversely affected by the review or decision, or there may be an important impact or serious consequences in relation to them if their information were disclosed. These factors suggest that the person is reasonably or sufficiently affected, and should therefore be given notice.

[para 22] Prior to amendments that took effect on April 1, 2007, Ontario’s *Freedom of Information and Protection of Privacy Act* was quite similar in wording to section 67(1)(a)(ii) of Alberta’s Act. Section 50(3) of the former version of Ontario’s Act required the Commissioner to inform “any other affected person” of a notice of appeal, and section 52(13) gave “any affected party” an opportunity to make representations to the Commissioner. In an order interpreting what it meant to be an affected party, the necessity or desirability of representations from additional persons was stated to be a factor in determining whether notice should be given to them:

There is no statutory right for an institution other than the one which has responded to an access request to be a party to an appeal; rather, it is the responsibility of the Commissioner or his delegate to consider the circumstances of a particular appeal and determine if any other person should be given the status of an “affected party”, based on the necessity or desirability of having those persons participate. [Order P-395 at p. 5 or para. 13.]

[para 23] Given the similarity of the former Ontario wording to that currently found in Alberta’s Act, I find it reasonable to consider the necessity or desirability of participation by third parties in a review or inquiry to be a relevant factor in determining whether they should be given a copy of a request for review under section 67(1)(a)(ii). This appears also to be consistent with the approach taken in British Columbia. In the context of notifying affected parties under section 54(b) of B.C.’s Act, which I cited earlier, it has been stated that notice to third parties may be warranted “where the matter cannot be fully considered without including the third parties” (Office of the Information and Privacy Commissioner for British Columbia, *Policies and Procedures*, November 2006, p. 6).

[para 24] I acknowledge an argument that section 67(1)(a)(ii) of the Act does not permit a consideration of whether representations from third parties are actually necessary, as this has nothing to do with whether they are “affected” by the request for review. One may argue that, if parties are believed to be affected, they must be notified whether or not their representations would add anything. In my view, however, if the representations of existing parties are enough to establish that requested information indeed falls within the mandatory exception to disclosure under section 16 or 17 of the Act, the third party is probably not affected because it would already be concluded that a mandatory exception to disclosure applies and the information of the third party will not be disclosed.

[para 25] Conversely, if the representations of existing parties are enough to establish that the requested information does *not* fall within the mandatory exception to disclosure under section 16 or 17 of the Act, the third party is probably not affected because there would be no arguable possibility that information of the third party must be withheld. For example, if the applicant or public body cites an Act of Alberta or Canada that authorizes or requires business or personal information to be disclosed under section 16(3)(b) or 17(2)(c), the mandatory exception to disclosure under section 16(1) or 17(1), as the case may be, cannot apply – regardless of any additional input to the decision-maker.

[para 26] While I conclude that the necessity or desirability of obtaining representations from third parties may be a relevant fact or circumstance in determining whether notice should be given to them under section 67(1)(a)(ii) of the Act, this factor – as with any factor considered in the exercise of discretion – should be given its appropriate weight. I also emphasize that the question of whether existing representations are sufficient to address whether a mandatory exception to disclosure applies will depend on the evidence presented in a given case, the specific provision of the Act under which that evidence is relevant, and previous decisions that may be on point. For instance, it may be relatively easy to conclude, from reviewing the submissions of existing parties, the records at issue and prior similar cases, that one of the situations enumerated in section 17(2) applies – according to which disclosure of personal information is deemed not to be an unreasonable invasion of personal privacy, and the mandatory exception to disclosure therefore cannot apply. By contrast, if section 17(5) is under consideration, it may be more difficult to fully consider all of the relevant circumstances under that provision, and therefore reach a conclusion as to whether disclosure would unreasonably invade privacy, without hearing from third parties.

2. Conclusion as to some relevant factors

[para 27] On consideration of all of the foregoing, I conclude that the following are among the relevant questions that may be considered when the Commissioner or his delegate is determining, under section 67(1)(a)(ii) of the Act, whether a person is affected by a request for review involving an access request:

- Is there an arguable possibility that the person has business or personal information falling within the mandatory exception to disclosure under section 16 or 17 of the Act?
- Does the request for review, or will the ultimate decision, directly and adversely affect the person?
- Will there be an important impact or serious consequences in relation to the person if their information were disclosed?
- Are representations from the person necessary or desirable in order to determine whether requested information falls within a mandatory exception to disclosure?

[para 28] As the above questions are derived from various sources that have considered the issue of who is an affected party in a proceeding, they are not necessarily discrete and there may be overlap between them. Moreover, I do not mean to say that all of the questions necessarily have to be considered in every case, or that any one of them is so important that it must be answered in the affirmative in order for a person to be granted the status of affected party under section 67(1)(a)(ii) of the Act. Each question must be given its appropriate weight, so that the answer to one may outweigh the answers to the others. Finally, the list of questions is not intended to be exhaustive. There may be other factors and circumstances to consider, depending on the inquiry or review. Again, I have restricted my discussion to persons who may be affected because information about them arguably falls within the mandatory exception to disclosure set out in section 16 or 17. Other reviews may involve other sections of the Act, which may need to be considered as they relate to the duty to notify affected parties.

[para 29] I will consider the foregoing questions, as they relate to the application of section 67(1)(a)(ii) in the present inquiry, in a later section of this Decision.

B. When is it “as soon as practicable” to give a copy of a request for review to an affected party under section 67(1)(a)(ii) of the Act?

[para 30] Section 67(1)(a)(ii) of the Act requires a copy of the request for review to be given to any person affected by it “as soon as practicable”. It has been stated that notice can be given to an affected party at any stage of the process (Order 2001-002 at para. 6).

[para 31] In my view, the reason that notice might be given to an affected party at various points in time is that the Commissioner or his delegate must have the requisite knowledge in order to determine whether a person is indeed affected by a request for review under section 67(1)(a)(ii). Sometimes, there might not be sufficient information until the decision-maker obtains and reviews the records at issue. Even that may not suffice. For instance, to determine whether the mandatory exception to disclosure under section 16 or 17 of the Act arguably applies, or to understand that there may be consequences to third parties if information about them were disclosed, one might first need to obtain and review the initial and rebuttal submissions of the applicant and public body.

[para 32] Given the foregoing, the point in this Office's processes when it becomes as soon as practicable to notify affected parties will vary among reviews and inquiries. While notifying them at the same time that an applicant and public body are asked to make their representations is the best way to resolve a matter quickly, this is not always practicable. It is appropriate, in my view, to avoid the unnecessary involvement of parties who, in the end, did not have to become involved. Automatically notifying persons at the outset, simply for the sake of expedience, may unnecessarily complicate certain reviews and inquiries. This may be particularly so where it is quite clear, on preliminary review of the records at issue, that the personal or business information of third parties is subject to a mandatory exception to disclosure and therefore will not be ordered to be disclosed.

C. Does procedural fairness require affected parties to be notified under section 67(1)(a)(ii) of the Act?

1. The opportunity to be heard

[para 33] Section 67(1)(a)(ii) of the Act is, in and of itself, a provision to ensure procedural fairness in that it allows third parties to know that they are affected by a request for review before this Office, and may therefore be affected by the ultimate decision. Under section 69(3), they become entitled to participate in the process leading up to the decision, as that provision automatically grants any person given a copy of a request for review the opportunity to make representations during an inquiry. This is all part of the *audi alteram partem* rule, by which one is given an opportunity to be heard.

[para 34] My earlier comments in this Decision have already suggested the extent to which procedural fairness and the right to be heard influences a determination of who is affected by a request for review and must therefore be given a copy of it. Among other things, notice to third parties may be required if information about them arguably falls under section 16 or 17 of the Act, they may be directly and adversely affected by the outcome of the review or inquiry, there may be an important impact or serious consequences if their information were disclosed, and/or their representations are necessary or desirable to dispose of the matter.

2. Undue delay

[para 35] The Applicant in the present inquiry has raised an aspect of procedural fairness that might militate *against* notifying affected parties. It argues that notifying affected parties, at this time, will undermine fairness by causing undue delay.

[para 36] I have already explained that affected parties may be notified at various stages of a review or inquiry, depending on what is "as soon as practicable" in the circumstances. Generally speaking, once the Commissioner or his delegate finds that there are affected parties, they must be notified regardless of the timing, as section 67(1)(a)(ii) would *require* notice. I do not believe that notifying affected parties at a relatively late point in the process would normally cause undue delay, as representations

from them may be obtained within a few weeks. Procedural fairness vis-à-vis an applicant (i.e., timely resolution of an access request) must be properly balanced against procedural fairness vis-à-vis affected parties (i.e., the right to be heard).

D. Application of section 67(1)(a)(ii) to the present inquiry

1. Suggestion to split the inquiry into two parts

[para 37] The Public Body submits that the employers named in the targeted lists do not have to be notified as affected parties under section 67(1)(a)(ii) of the Act if the Public Body properly withheld the records at issue in reliance on an exception to disclosure under the Act. In this particular case, it relied on three subsections of section 24 (advice, etc.) – although it also raised section 20 (harm to a law enforcement matter) during the inquiry itself. The Public Body argues that the exceptions that it applied in response to the Applicant’s access request should be addressed before determining whether there are potentially affected parties. It submits that if I notify the employers, but subsequently decide that the Public Body properly withheld the information from the Applicant in any event, the employers will have unnecessarily become involved and prepared an argument against disclosure, as well as found out that they were on a targeted employers list.

[para 38] As a result, the Public Body suggests that the inquiry should be split into two parts, the first to decide whether it properly applied the exceptions to disclosure on which it relied (during which affected parties would not have to be notified), and the second – if necessary – to decide whether section 16 or 17 of the Act applies (in which case affected parties might be notified). It argues that if its initial exceptions to disclosure are upheld, there are no affected parties and the matter ends. The Public Body cites, as a precedent, the inquiry of this Office that resulted in Order 99-029. In that case, the former Commissioner held part one of the inquiry to decide whether the requested records were excluded from the application of the Act under section 4(1). On deciding that the records were excluded and he therefore had no jurisdiction over them, the Commissioner found it unnecessary to hold part two of the inquiry, which would have been to consider whether the public body must provide access to the requested information (Order 99-029 at para. 41).

[para 39] In my view, the Commissioner or his delegate is not precluded from notifying affected parties even if a public body may already or subsequently be found to have properly applied an exception to disclosure under the Act. Under section 69(1), the Commissioner or his delegate “may decide all questions of law and fact arising in the course of an inquiry.” This can include the application of both mandatory and discretionary exceptions to disclosure. It is therefore open to the decision-maker to determine whether a mandatory exception to disclosure under section 16 or 17 applies in an inquiry, even though a discretionary exception might also apply. It must be remembered that, if there is a discretionary exception to disclosure, a public body may nonetheless grant access to the requested information, and therefore comparable information in a future situation. By contrast, if a mandatory exception applies, there is

no discretion to grant access. It may therefore be appropriate, in a given case, to go on to address a mandatory exception to disclosure so that the public body knows that it *must not* – rather than *may* – disclose particular information.

[para 40] In this inquiry, it is very debatable whether the discretionary exceptions to disclosure relied upon by the Public Body apply. If I determine that they do not, it will be necessary to proceed to a consideration of section 16 or 17. Even if a discretionary exception does apply, it is open to me to go on to consider the mandatory exceptions to disclosure, as they are a question of fact and law arising in the course of the inquiry. In either case, notifying any affected parties will have been appropriate. Where several sections of the Act are engaged in an inquiry, and both mandatory and discretionary exceptions to disclosure may apply, it is the normal practice of this Office to consider them at the same time rather than split the inquiry into more than one part.

[para 41] Moreover, separating the inquiry into two parts, and therefore possibly two decisions, has the potential to seriously complicate this matter. If I were to first release a decision that did not uphold the Public Body's application of a discretionary exception to disclosure, then notified affected parties and released a second decision, there would be two separate decisions – both dealing with the substance of the access request – available for judicial review. More problematically, there is the possibility of decisions with conflicting results – one finding that the Public Body *may not* refuse access (i.e., a first decision in which no discretionary exception is found to apply) and one finding that the Public Body *must* refuse access (i.e., a second decision in which a mandatory exception is found to apply).

[para 42] Depending on the outcome of my decisions, splitting the inquiry into two parts may give rise to an unnecessary or duplicate judicial review application on the part of one of the parties. If my first decision concludes that the discretionary exceptions to disclosure on which the Public Body initially relied do not apply, and the Public Body applies for judicial review, that application will possibly have been unnecessary if I subsequently find, in the second decision, that the records at issue must be withheld in any event. If my first decision concludes that the Public Body properly applied a discretionary exception, and the Applicant applies successfully for judicial review so that a second decision regarding the application of section 16 or 17 becomes necessary on my part, that second decision might likewise conclude that the Applicant cannot have access. Should the Applicant again apply for judicial review, my decision to split the inquiry into two parts will have caused him to seek judicial review twice, rather than once.

[para 43] Given the foregoing, I do not accept the Public Body's suggestion to split the inquiry into two parts and first deal with the exceptions to disclosure on which it initially relied to refuse to disclose the records at issue. Addressing both the mandatory and discretionary exceptions at the same time is the usual practice of this Office, is less complicated, and will permit a single judicial review if either the Applicant or Public Body wishes to bring such an application after considering the merits of one complete and final order. Even if there is no judicial review, a split inquiry has the potential to take much more time. By contrast, notifying any affected parties immediately will delay

completion of the entire inquiry by only a few weeks while they are given an opportunity to make their representations.

[para 44] I distinguish the inquiry that resulted in Order 99-029 because the decision to first address the jurisdictional issue was made at the start of the inquiry (see para. 4). Here, the request to split the inquiry has come much later in the process, and agreeing to the request risks significantly delaying what has already been a relatively long process. Moreover, an inquiry involving a preliminary jurisdictional issue differs from the present one, in that a lack of jurisdiction means that this Office has no authority to address any exceptions to disclosure, whereas the consideration of a mandatory exception to disclosure remains possible even if a discretionary exception was properly applied.

2. Are there affected parties in this inquiry?

[para 45] As indicated at the outset of this Decision, section 67(1)(a)(ii) of the Act requires me to give a copy of the Applicant's request for review to any person who, in my opinion, is affected by the request. The Public Body does not preclude altogether the possibility that the employers on the targeted lists may be affected, although it argues that the exceptions to disclosure on which it relied to deny the Applicant access to the lists should first be considered. I have already found it inappropriate to split the inquiry into two parts. If I determine that the employers are affected parties, I am authorized to notify them now.

[para 46] The Applicant submits that the presence of employers on the targeted lists is not sufficient to deem them affected parties. It argues that the interests of the employers have been given full consideration by the Public Body in its initial decision whether to disclose the requested records, and by this Office in the context of the review and the existing submissions. It argues that if the Commissioner or his delegate rules that section 16 of the Act does not apply, and the records are ordered to be disclosed, this will have been done following full consideration of the relevant considerations set out in that section.

[para 47] As discussed earlier, one of the factors suggesting that a person is affected by a request for review is that there is an arguable possibility that section 16 or 17 of the Act applies to the records at issue. The mandatory exception under section 16 applies if the records requested by an applicant contain information (a) that would reveal the third party's trade secrets or their commercial, financial, labour relations, scientific or technical information, (b) that was supplied, explicitly or implicitly, in confidence, and (c) the disclosure of which could reasonably be expected to result in any of four specified types of harm or consequences.

[para 48] The targeted employers lists contain the names and addresses of certain employers in Alberta who, in the Public Body's view, have demonstrated possible non-compliance with employment standards in the area of employee wages and entitlements. Such information arguably qualifies as labour relations information under section 16(1)(a) of the Act. The Public Body has also submitted that certain of the

information in the records requested by the Applicant was supplied in confidence under section 16(1)(b). Further, it is arguable that disclosure to the effect that a particular employer has demonstrated non-compliance with employment standards would harm its competitive position or result in undue financial loss under section 16(1)(c). I therefore believe that there is an arguable possibility that there is information about the employers, in the records requested by the Applicant, that falls within the mandatory exception to disclosure set out in section 16 of the Act.

[para 49] As discussed earlier, two other factors suggesting that third parties should be given notice under section 67(1)(a)(ii) are that the request for review or ultimate decision has the potential to directly and adversely affect them, and there may be an important impact or serious consequences if their information were disclosed. On consideration of these factors, I find that the employers on the targeted lists are directly and adversely affected by this matter. Their names and addresses form the whole of the records that are the subject of the request for review. They may be directly and adversely affected by my ultimate decision resolving the access request because, if I order disclosure, information about the employers' compliance with employment standards will be disclosed, which may affect their businesses or reputations. This could amount to an important impact with possibly serious consequences.

[para 50] As discussed earlier, the necessity or desirability of representations from third parties may be a relevant factor in determining whether they should receive a copy of a request for review and participate in the proceeding. Here, while the Public Body has submitted that the information in the targeted lists falls within the mandatory exception to disclosure under section 16 of the Act, and the Applicant has submitted that it does not, I find that the existing submissions are insufficient to resolve the issue either way. I therefore require representations from the employers as to whether, for instance, they believe that the information in the lists constitutes labour relations information, they provided any information, explicitly or implicitly, in confidence, and/or they would experience harm if information were disclosed.

[para 51] Because I have found that the business interests of the employers are sufficiently engaged under section 16 so as to suggest that they should be named affected parties, it is not necessary for me to discuss the extent to which any of the employers have personal information falling within the mandatory exception to disclosure under section 17, which might also suggest that they should be named affected parties.

[para 52] The Applicant argues that the Public Body has, in the past, disclosed employment standards orders issued against employers without the need to notify them. It submits that there is nothing – aside from possible provisions of the Act – to prevent the Public Body from also releasing the targeted employers lists to the public, of its own accord and with or without notification to the employers. Although it argues that I should not name the employers on the targeted lists as affected parties in this inquiry, the Applicant acknowledges the possible application of provisions of the Act. One of the issues in the inquiry is whether the mandatory exception to disclosure under section 16 applies to the records at issue and, if that is the case, the lists *must not* be disclosed. The

possible application of section 16 (or 17) of the Act is precisely what has led me to consider whether the employers must be notified under section 67(1)(a)(ii). In short, this inquiry involves particular exceptions to disclosure, and different records than the employment standards orders apparently previously disclosed.

[para 53] The Applicant argues that naming the employers as affected parties, at this point in the process, will undermine fairness by causing undue delay. I do not find that adding affected parties to the inquiry will delay resolution of the Applicant's access request in such a way as to be procedurally unfair. Although it has taken time for the review to progress thus far, representations may be obtained from the affected parties in a matter of weeks. Procedural fairness vis-à-vis the employers outweighs the Applicant's concerns regarding delay. Adding the employers as affected parties now is as soon as practicable because it was not until I reviewed and considered the existing parties' submissions that I found that section 16 arguably applies and that representations from the employers are necessary in order for me to decide.

[para 54] Given my consideration of the issues presented in this inquiry, the submissions of the existing parties, the records at issue, and the relevant facts and circumstances, it is my opinion that the employers on the targeted lists are persons affected by the Applicant's request for review under section 67(1)(a)(ii) of the Act. I must therefore give them a copy of the request for review.

3. Informing an employer that it is has been targeted

[para 55] The Public Body submits that another relevant fact to consider, in this particular matter, is that many of the employers do not know that they are on a targeted list. It suggests that to provide them with notice would be contrary to the reason for which the lists were created, namely to ensure that the employers on the lists are complying with employment standards and to take enforcement action against them if necessary. The Public Body further suggests that, because the parties identified on the lists are generally not aware of their status as targeted employers, they would not be in a position to provide a reasonably informed argument if they were notified of the possibility of disclosure of their information.

[para 56] It appears that the Public Body takes the view that the employers would only be notified under section 67(1)(a)(ii) of the Act that information relating to them is the subject of a request for review, but would not specifically be told that the Applicant requested the names and locations of employers identified for the targeted employers program. However, under section 59(2)(a), the Commissioner and those authorized or directed by him may disclose information that is necessary to conduct an investigation or inquiry. I consider it necessary to disclose, to each employer, the substance of the Applicant's access request, which was for "the names and locations of employers identified for the 'targeted employers – Business Relations Program' under employment standards enforcement, for the years 2005 and 2006." In order to participate meaningfully as an affected party and make effective representations if they so choose,

each employer must know that it is one of the targeted employers (of course, no employer would learn the identity of other employers).

[para 57] I also note, however, that section 59(3)(a) of the Act states that, in conducting an investigation or inquiry, the Commissioner and those authorized or directed by him “must take every reasonable precaution to avoid disclosing and must not disclose any information the head of a public body would be required or authorized to disclose if it were contained in a record requested under section 7(1)”. This poses a dilemma. If the Public Body is required or authorized to withhold the fact that an employer has been identified for the targeted employers program from that same employer, notice to that employer as an affected party under section 67(1)(a)(ii) might contravene section 59(3)(a). To this extent, the two provisions would be in conflict. One would appear to require what the other forbids.

[para 58] In reconciling this apparent conflict, I first note that the Public Body would not be able to rely on the mandatory exceptions to disclosure under section 16 or 17 of the Act to withhold, from an employer itself, the fact that the employer has been identified for the targeted employers program. This is because sections 16 and 17 can only apply where there is third party information, and the fact that an employer has been targeted is not third party information vis-à-vis that employer. In other words, a public body cannot rely on section 16 or 17 to withhold an applicant’s own information. Accordingly, the Public Body would only be able to rely on a *discretionary* exception to disclosure to refuse to tell an employer that it has been targeted.

[para 59] Because the Public Body states that notifying the employers would be contrary to the reason for which the lists were created, and the lists are enforcement tools, the suggestion is that the Public Body might be entitled to rely on section 20 of the Act (harm to a law enforcement matter) to refuse to tell an employer that it has been targeted. It might also choose to rely on section 24 (advice, etc.), in the same way that it relied on three of the discretionary exceptions to disclosure under that section in response to the access request by the Applicant. If either section 20 or 24 applies vis-à-vis the employers, the Public Body would be authorized (but not required) to refuse to disclose to the employers that they have been identified for the targeted employers program. Therefore, under section 59(3)(a), I would have to take every reasonable precaution to avoid disclosing the same information. I arguably could not disclose the information by conveying, through notice of the inquiry to a particular employer, that the particular employer is one of the targeted employers.

[para 60] While acknowledging the foregoing, I do not believe that I actually have to decide whether the Public Body would be entitled to rely on section 20 or 24 of the Act vis-à-vis the employers, should one of them hypothetically request their own information. It suffices, in my view, to know that these provisions set out discretionary, rather than mandatory, exceptions to disclosure. Conflicting with a possible discretionary exception, on the other hand, are section 67(1)(a)(ii), which requires notice to parties that are found to be affected by a request for review, and section 59(2)(a), which permits disclosure of information necessary to conduct an inquiry. Assuming that a discretionary exception to

disclosure would even apply to permit the Public Body to refuse to tell an employer that it has been targeted, such discretion to withhold information must, in my view, give way to the requirement placed on me to notify the employer of the request for review, and my conclusion that disclosure of the substance of the access request is necessary in order to enable it to make effective representations. To put the point another way, procedural fairness vis-à-vis the employers in this inquiry outweighs the hypothetical possibility that the Public Body might have the discretion to withhold information from them.

[para 61] The modern approach to statutory interpretation is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” [*R. v. Sharpe*, 2001 SCC 2 at para. 33, quoting E.A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), p. 87]. Here, one of the objects of the Act, set out in section 2(a), is to allow a right of access to records, subject to limited and specific exceptions. Section 2(e) accordingly gives the Commissioner the responsibility of resolving complaints and independently reviewing whether records have been properly withheld by a public body. To enable independent reviews and permit the resolution of complaints, the scheme of the Act is such that section 67(1)(a)(ii) imposes a duty on the Commissioner to notify persons who are, in the opinion of the Commissioner, affected by a request for review. This is to enable affected parties to make representations, if they wish, and therefore assist the Commissioner in determining whether information has or has not been properly withheld under the Act. Finally, it is the intention of the Legislature, given section 59(2)(a), for information to be disclosed to the extent that it is necessary to conduct an inquiry.

[para 62] Given the objects, scheme and intent of the Act, I find that section 59(3)(a) should not be interpreted in a way that precludes notice to affected parties – as well as disclosure of the information necessary to permit them to make effective representations – simply because a public body might have the discretion to withhold comparable information from those parties if they were to make an access request. In view of any potential conflict between the provisions just discussed, I conclude that notice to an employer as an affected party in this inquiry under section 67(1)(a)(ii) of the Act, and providing it with the substance of the Applicant’s access request under section 59(2)(a), are disclosures by this Office that are not precluded by section 59(3)(a).

V. DECISION

[para 63] I make this Decision under section 67 of the Act.

[para 64] It is my opinion that the employers on the targeted employers lists are persons affected by the Applicant’s request for review under section 67(1)(a)(ii) of the Act, that it is as soon as practicable to give them a copy of the request for review at this point in the process, and that I must therefore do so. I also consider, under section 59(2)(a), that disclosure of the substance of the Applicant’s access request to the employers is necessary to conduct the inquiry. In order to make effective representations,

each employer must know that the information that has been requested by the Applicant is the fact that the employer has been identified for the targeted employers program.

[para 65] As this is not an order falling within section 72 of the Act, section 74(3) does not apply to give the Public Body and Applicant the opportunity to make an application for judicial review within 45 days. I believe that it is open to me to notify the affected parties immediately. However, this would effectively preclude the Public Body or Applicant from obtaining practical relief in the event that either chooses to apply for judicial review of this Decision. I will therefore not give a copy of the Applicant's request for review to the employers on the targeted lists, or disclose to them the substance of the access request, any earlier than 15 days after the date of this Decision.

Wade Riordan Raaflaub
Adjudicator