

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

DECISION F2008-D-002

September 24, 2008

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

Case File Number 3810

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, among other things, lists containing the names and locations of employers targeted by the Public Body in relation to compliance with workplace health and safety standards.

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.

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.

Given that there were a very large number of employers on the requested lists, and therefore a significant cost and effort to engage them in the proceeding, the Adjudicator found that another relevant factor in determining whether the employers should be named as affected parties, in this particular case, was whether they wished to participate.

On review of the relevant facts and circumstances, the Adjudicator concluded that those employers who indicate that they wish to participate in the inquiry would be affected by the request for review under section 67(1)(a)(ii) of the Act, and that he would then provide those employers with 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), 1(n)(i), 2(a), 2(e), 4(1), 7(1), 16, 16(1)(a), 16(1)(a)(i) and (ii), 16(1)(b), 16(1)(c), 17, 24, 29, 59(2)(a), 59(3)(a), 67, 67(1)(a)(ii), 69(1), 69(3), 72, 72(5)(c) and 74(3).

Authorities Cited: AB: Orders 99-029, 2000-021, 2001-002, 2001-008 and F2003-018; Decision F2008-D-001. **CAN:** *R. v. Sharpe*, 2001 SCC 2. **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).

I. BACKGROUND

[para 1] By letter dated May 16, 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 inspection" program under Workplace Health and Safety (WHS), for the years 2005 and 2006. The Applicant also requested statistics showing the number of inspections and site visits conducted by WHS officers at the identified targeted employer worksites, as well as how many voluntary compliance certificates were issued, how many orders were issued, and how many prosecutions were launched against this group of employers.

[para 2] In a letter dated July 27, 2006, the Public Body refused the Applicant's information request, relying on discretionary exceptions to disclosure set out under section 24 (advice, etc.) and section 29 (information that is or will be available to the public) of the Act.

[para 3] By letter dated August 30, 2006, the Applicant requested that this Office review 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 Notice of Inquiry, dated April 3, 2008, set out the issues of whether the Public Body properly applied section 24 and 29 of the Act to the records/information. It also set out the issues of whether section 16 (disclosure harmful to business interests of a third party) and/or 17 (disclosure harmful to a third party's personal privacy) applied to the records/information.

[para 5] The issues regarding section 16 and 17 of the Act were included in 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 certain information.

[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 include three "targeted inspection lists" that relate to compliance with workplace health and safety standards. (There are three lists because, although the Applicant requested information for 2005 and 2006, the information appears on lists for 2004-2005, 2005-2006 and 2006-2007.)

[para 8] The Applicant also requested statistical information, but no specific employers would be identifiable as a result of that numerical data. The statistical information is therefore not relevant to this Decision regarding notice to affected parties.

III. ISSUES

[para 9] By Amended Notice of Inquiry dated July 2, 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 10] I discussed the foregoing issues, in detail, in Decision F2008-D-001, which involved the same two parties as this inquiry. I will therefore more briefly discuss these issues below, and then apply them to the present inquiry in a fourth section.

IV. DISCUSSION OF ISSUES

[para 11] 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 12] 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?

[para 13] 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 14] 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.

[para 15] In Decision F2008-D-001 (at paras. 14 to 26), I discussed 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, and in particular, where the records at issue appear to contain a third party's personal information, as defined under section 1(n) of the Act, and/or business information, as set out in sections 16(1)(a)(i) and (ii). This is also the specific context in this inquiry.

[para 16] In Decision F2008-D-001 (at para. 27), I concluded 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 17] 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 18] In Decision F2008-D-001 (at paras. 30 to 32), I confirmed a previous statement by this Office that notice can be given to an affected party at any stage of the process (Order 2001-002 at para. 6). I explained that the point in this Office's processes when it becomes “as soon as practicable” to give an affected party a copy of a request for review will vary, as the Commissioner or his delegate may first have to obtain and review the records at issue and/or the submissions of existing parties before having the requisite knowledge to determine whether a person is indeed affected under section 67(1)(a)(ii) of the Act.

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

[para 19] 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.

[para 20] In Decision F2008-D-001 (at paras. 35 and 36), I addressed the argument that notifying affected parties, at a relatively late point in time, may undermine fairness to an applicant by causing undue delay. I explained that 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 21] The Public Body submits that the employers named in the targeted inspection 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. 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 inspection list.

[para 22] 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 23] As I discussed in Decision F2008-D-001 (at paras. 39 and 40), 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. Moreover, in this inquiry, it is very debatable whether the discretionary exceptions to disclosure relied upon by the Public Body apply.

[para 24] Separating the inquiry into two parts also has the potential to seriously complicate this matter. A split inquiry raises the possibility of two separate decisions – both dealing with the substance of the access request – which would then be 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). Depending on the outcome of my decisions, splitting the inquiry into two parts may accordingly give rise to an unnecessary or duplicate judicial review application on the part of one of the parties. I discussed the nature of these complications, in greater detail, in Decision F2008-D-001 (at paras. 41 and 42).

[para 25] 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 and then proceeding to consider the entire inquiry will delay its completion by only a matter of weeks. I distinguish the decision to split the inquiry that gave rise to Order 99-029 for the same reasons that I discussed in Decision F2008-D-001 (at para. 44).

2. Are there affected parties in this inquiry?

[para 26] The Public Body does not preclude altogether the possibility that the employers on the targeted inspection 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 and when I determine that a particular employer is an affected party, I am authorized to notify it.

[para 27] The Applicant submits that the presence of employers on the targeted inspection 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 28] As stated earlier and discussed in more detail in Decision F2008-D-001, 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 29] The targeted inspection lists contain the names and addresses of certain employers in Alberta who, in the Public Body's view, are "high-risk" and have possibly demonstrated poor health and safety performance, including conduct resulting in worker injury. 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 poor health and safety performance 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 30] As stated earlier and discussed in more detail in Decision F2008-D-001, 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 inspection lists are directly and adversely affected by this matter. Their names and locations form the whole of the targeted lists that have been requested by the Applicant in this review. They may be directly and adversely affected by my ultimate decision resolving the access request because, if I order disclosure of the lists, information about the employers' health and safety performance will be disclosed, which may affect their businesses or reputations. This could amount to an important impact with possibly serious consequences.

[para 31] As stated earlier and discussed in more detail in Decision F2008-D-001, 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 inspection 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 32] 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 33] The three targeted inspection lists occasionally contain the name of a contact person for the employer. The name of such a person constitutes his or her personal information under section 1(n)(i) of the Act. However, the Applicant has indicated in its main submissions that it wishes only to obtain the names of the employers, not the names of any contact persons. The Applicant is therefore amenable to having the names of individual contact persons severed from the records, provided that the name of each employer remains. Because the Applicant does not wish to obtain the names of the contact persons, and I would therefore not order them to be disclosed, I do not find the contact persons to be directly and adversely affected by the request for review. There is no potential for any consequences to them in the form of having their personal information disclosed. It is unnecessary to consider the application of section 16 or 17 to the names of the contact persons and unnecessary to obtain representations from them. Accordingly, it is my opinion that the contact persons are not affected by the Applicant's request for review under section 67(1)(a)(ii), and I conclude that I am not required to give them a copy of the request for review.

[para 34] 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. I did not add any of the employers as affected parties earlier 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 35] The list of relevant factors to consider in determining who is affected by a request for review under section 67(1)(a)(ii) of the Act is not exhaustive (Decision F2008-D-001 at para. 28). In this inquiry, there is another relevant circumstance in that the number of employers on the three targeted inspection lists totals more than one thousand.

[para 36] If third parties are found to be affected by an inquiry, it raises the possibility that the Commissioner or his delegate might also find it appropriate to provide them with copies of the submissions of the applicant and public body. Although section 69(3) of the Act does not automatically grant a party access to the representations of other parties, it remains possible. In a case involving a very large number of third parties, this would entail the preparation of numerous copies of submissions for distribution. Further, if a very large number of persons receive a copy of a request for

review under section 67(1)(a)(ii), it means that a very large number would receive a copy of the final order, as section 72(5)(c) requires the Commissioner to give a copy of the order “to any other person given a copy of the request for review.” Finally, I note that section 74(3) appears to contemplate an application for judicial review of an order by anyone who is given a copy of it.

[para 37] In order to avoid unnecessary cost and effort on the part of this Office and existing parties to an inquiry – in relation to the possible preparation and distribution of additional copies of submissions as well as the required distribution of a final order – I find it reasonable, in a matter involving a large number of third parties, to first ascertain whether they wish to participate in the matter before finding them to be affected under section 67(1)(a)(ii) of the Act. In other words, I find that, in certain reviews and inquiries, another relevant factor in determining whether a person is an affected party may be whether that person wishes to participate. In this particular case, if an employer does not wish to participate, I see no reason to name the employer as an affected party, provide it with the submissions of other parties (if I determine that to be appropriate), and effectively oblige this Office to provide the employer with a copy of the final order. As suggested above, providing an indifferent party with a copy of a final order also raises the possibility of a judicial review application by someone who did not wish or choose to participate in the original proceeding.

[para 38] My decision not to immediately give a copy of the Applicant’s request for review to every employer on the targeted inspection lists may be alternatively explained in reference to section 67(1)(a)(ii) of the Act. The provision requires the Commissioner to give a copy of the request to an affected party “as soon as practicable”. In my view, it is not practicable to give a copy of a request for review to a large number of parties who may not even wish to participate in the review or inquiry. In this particular case, it will become as soon as practicable to give an employer a copy of the request for review if and when that employer indicates that it wishes to participate in the inquiry.

[para 39] I therefore consider it appropriate, in the circumstances of this inquiry, for this Office to first write to the employers named in the targeted inspection lists, provide them with the necessary background to the Applicant’s access request, and invite them to participate in the inquiry if they wish. If they so wish, I would then find them to be affected parties under section 67(1)(a)(ii) of the Act, and arrange for them to be given a copy of the Applicant’s request for review. I would then also consider whether it is appropriate, in the circumstances of this inquiry, to give the affected parties copies of the submissions of the Applicant and Public Body.

[para 40] Having reached the foregoing conclusions, I certainly do not mean to imply that the desire of a third party to participate in a review or inquiry is a precondition to naming them an affected party under section 67(1)(a)(ii) of the Act. This inquiry is unique in that there are potentially more than one thousand affected parties. Where the number of affected parties is limited and there would therefore be no significant cost or effort in giving all of them a copy of an applicant’s request for review, it is much more expedient to immediately find them to be affected within the meaning of section

67(1)(a)(ii). Indeed, this would be the appropriate course of action in most reviews and inquiries (as was the case in Decision F2008-D-001).

[para 41] 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 inspection lists – who indicate to this Office that they wish to participate in the inquiry – are persons affected by the Applicant’s request for review under section 67(1)(a)(ii) of the Act.

3. Informing an employer that it has been targeted

[para 42] 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 inspection list. It suggests that to provide them with notice would be contrary to the reason for which the lists were created, namely to monitor compliance with health and safety standards. The Public Body further suggests that, because many of the parties identified on the lists are 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 43] Under section 59(2)(a) of the Act, 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 inspection’ program under Workplace Health and Safety, for the years 2005 and 2006.” In order for them to decide whether they wish to participate in the inquiry, 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 44] As in Decision F2008-D-001 (at paras. 57 to 62), I considered the application of section 59(3)(a) of the Act in this inquiry. Section 59(3)(a) 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)”. Accordingly, if the Public Body is required or authorized to withhold the fact that an employer has been identified for the targeted inspection 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).

[para 45] Because the mandatory exceptions to disclosure under sections 16 and 17 of the Act can only apply where there is third party information, which would not be the case if an employer itself asked whether it has been targeted, the Public Body would only be able to rely on a *discretionary* exception to disclosure to refuse to provide such information to that employer. In other words, the Public Body may, at most, be

authorized – but not required – to refuse to tell an employer that it has been targeted. Assuming that a discretionary exception to disclosure would even apply, 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 to conduct the inquiry. 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 46] 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 47] 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 decide whether they wish to participate in a review or inquiry and to make effective representations if they so choose – 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 of this inquiry, and providing it with the substance of the Applicant’s access request, are disclosures by this Office that are not precluded by section 59(3)(a).

V. DECISION

[para 48] I make this Decision under section 67 of the Act.

[para 49] It is my opinion that the employers on the targeted inspection lists, who indicate to this Office that they wish to participate in the inquiry, are persons affected by the Applicant’s request for review under section 67(1)(a)(ii) of the Act. If and when an employer indicates that it wishes to participate, it would then be as soon as practicable to give it a copy of the request for review. 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 decide whether it wishes to participate in the inquiry and to make effective representations if it so chooses, 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 inspection program.

[para 50] 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 contact the employers 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 inform the employers on the targeted inspection lists of this matter, or disclose to them the substance of the Applicant's access request, any earlier than 15 days after the date of this Decision.

Wade Riordan Raaflaub
Adjudicator