

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2014-D-01

April 4, 2014

ALBERTA JOBS, SKILLS, TRAINING AND LABOUR

Case File Number F6441

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant asked the Public Body for information relating to the province’s “highest-risk employers” in terms of compliance with occupational health and safety standards. The Public Body withheld the requested information in reliance on sections 16(1), 20(1), 24(1) and 29(1) of the Act. The Applicant requested a review of that decision, which first involved a review of the application of the discretionary exceptions to disclosure set out in sections 20(1), 24(1) and 29(1). The application of section 16(1) would be addressed later, if none of the discretionary exceptions were properly applied.

The Adjudicator found that the Public Body had not properly applied section 20(1) of the Act to the requested information, as its disclosure could not reasonably be expected to harm a law enforcement matter, or to harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement.

The Adjudicator found that the Public Body had not properly applied section 24(1) of the Act to the requested information, as its disclosure could not reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council; to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council; or to reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations.

The Adjudicator found that the Public Body had not properly applied section 29(1) of the Act to the requested information, as it was not information that was readily available to the public.

The Applicant raised the possible application of section 32(1) of the Act, which requires a public body to disclose information if it is in the public interest. The Adjudicator found that the section was not engaged, as the requested information was not about a risk of significant harm to the health or safety of the public, and disclosure of the information was not clearly in the public interest.

In view of the Adjudicator's findings, he concluded that a review of the application of section 16(1) of the Act to the requested information could proceed, so as to determine whether disclosure of the information would be harmful to the business interests of any third party.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(h)(i), 1(h)(ii), 16(1), 16(1)(c), 20, 20(1), 20(1)(a), 20(1)(c), 20(5), 20(5)(a), 24, 24(1), 24(1)(a), 24(1)(b), 24(1)(c), 24(2), 29(1), 29(1)(a), 32, 32(1), 32(1)(a), 32(1)(b) and 71(1); *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, ss. 8, 19, 28.1 and 41; *Workers' Compensation Act*, R.S.A. 2000, c. W-15, ss. 18, 26, 32, 33 and 34.

Orders Cited: AB: Orders 96-003, 96-006, 96-011, 96-012, 96-019, 99-001, 99-013, F2002-024, F2002-028, F2004-024, F2004-026, F2005-009, F2005-030, F2007-013, F2009-018 and F2012-14.

Case Cited: AB: *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515.

I. BACKGROUND

[para 1] On July 30, 2012, CBC Edmonton (the "Applicant") made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Human Services. The Applicant asked for all records "related to a list, and/or database, of the province's highest-risk employers", implicitly referring to employers' compliance with occupational health and safety standards. It specified the time period of its access request as "May 1, 2011 to the present".

[para 2] By letter dated August 29, 2012, Alberta Human Services refused access to all of the requested information in reliance on section 16(1) (disclosure harmful to business interests of a third party), section 20(1)(a) (disclosure harmful to a law enforcement matter), sections 24(1)(a), (b) and (c) (advice from officials, etc.) and section 29(1)(a) (information readily available to the public).

[para 3] In correspondence dated September 18, 2012, the Applicant requested a review of the decision to withhold the requested information. Mediation was authorized but was not successful. The Applicant then requested an inquiry in correspondence dated February 6, 2013. A written inquiry was set down and was split into two parts. The first part, which is the subject of this Decision, would address the application of the discretionary exceptions to disclosure on

which Alberta Human Services relied, as well as the application of section 32(1) (disclosure in the public interest), which was raised by the Applicant in its request for review. The second part of the inquiry would be held, and would address the application of section 16(1), if none of the discretionary exceptions to disclosure were properly applied, and if section 32(1) did not require disclosure in the public interest.

[para 4] The information requested by the Applicant is compiled by the government's Occupational Health and Safety ("OHS") program, which was formerly part of Alberta Human Services. In December 2013, a new ministry called Alberta Jobs, Skills, Training and Labour (the "Public Body") was created, and it was given the responsibility for occupational health and safety. Alberta Jobs, Skills, Training and Labour therefore now has custody and control of the records at issue in this inquiry, and is the proper public body for the purpose of this Decision. This was confirmed, in a letter dated April 1, 2014, by the Acting Director/FOIP Coordinator of the Information and Privacy Office that processes access requests and makes inquiry submissions on behalf of both Alberta Human Services and Alberta Jobs, Skills, Training and Labour. For ease of reference, I will refer to the "Public Body" – being Alberta Jobs, Skills, Training and Labour – throughout this Decision, even though it was Alberta Human Services that responded to the access request and made the inquiry submissions. In short, Alberta Jobs, Skills, Training and Labour has effectively adopted the response to the access request and the inquiry submissions as its own.

II. RECORDS AT ISSUE

[para 5] The records at issue are two lists of employers, which lists include the names of the employers (legal names in all instances as well as trade names in some instances), their industry codes and their account numbers (the "Employer Lists" or simply "Lists"). One list is for "2011/2012", which I presume to be a reference to the government fiscal year, meaning that the list is for the period of May 1, 2011 (being the starting date specified in the Applicant's access request) to March 31, 2012 (being the end of the fiscal year). The other list is for "2012/2012", which I take to mean that it is for the period of April 1, 2012 (being the start of the next fiscal year) to July 30, 2012 (being the date of the Applicant's access request).

[para 6] At certain points in its inquiry submissions, the Public Body says that the Employer Lists do not actually, or necessarily, reflect the province's "highest-risk employers". As will be explained later in this Decision, the Lists were compiled using data on employers' disabling injury rates. The Public Body explains that this is only one measurable criterion with respect to an employer's compliance with occupational health and safety standards, and that an employer with a high disabling injury rate compared to the provincial average may actually be performing relatively well within its own industry. The Public Body adds that an employer on the Employer List may be performing well in other areas such as lost-time claims and duration, both provincially and within its particular industry. The Public Body further notes that an Employer List is simply a "snapshot in time", in that it is continuously updated as employers are removed from the List following further monitoring of their safety performance.

[para 7] While the Public Body appears to be suggesting that the Employer Lists are not actually responsive to the Applicant's access request, it states in its submissions that it decided

that they were. For clarity, I find that the Lists are indeed responsive to the access request. The Applicant asked for records “related to a list, and/or database, of the province’s highest-risk employers”. The Employer Lists are lists. They are also about the province’s highest-risk employers in matters pertaining to occupational health and safety, in that an employer’s disabling injury rate, while only one measurable criterion, is a factor associated with risk to worker safety. The term “risk” means that there is a *possibility* that an employer will have a poor safety record or be non-compliant with occupational health and safety standards; it does not mean that the foregoing is actually true. Finally, the fact that the information on the Employer Lists changes over time has no bearing on whether the information is responsive to the Applicant’s access request. The Employer Lists are responsive in that they are as they existed at the time of the Applicant’s access request and in view of the period specified in the access request.

III. ISSUES

[para 8] The Notice of Inquiry, dated September 20, 2013, set out the following issues:

Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information/records?

Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information/records?

Did the Public Body properly apply section 29(1) of the Act (information that is or will be available to the public) to the information/records?

Does section 32(1) of the Act require the Public Body to disclose the information/records in the public interest?

[para 9] Because the Public Body relies primarily on section 29(1) to withhold the Employer Lists, relying on sections 20(1) and 24(1) in the alternative, I will address the application of section 29(1) first.

[para 10] At times in its inquiry submissions, the Public Body alludes to some of the harms to an employer’s business interests that are set out in section 16(1)(c) of the Act. It submits for instance that, if the Employer Lists are disclosed, the employers may suffer damage to their reputation and therefore financial loss or harm to their competitive position. I consider these points only to the extent that they are relevant to any of the issues above. As explained earlier, the application of section 16(1) itself is not one of the subjects of this Decision.

IV. DISCUSSION OF ISSUES

A. **Did the Public Body properly apply section 29(1) of the Act (information that is or will be available to the public) to the information/records?**

[para 11] The Public Body specifically relies on section 29(1)(a) of the Act to withhold the Employer Lists. Section 29(1)(a) reads as follows:

29(1) The head of a public body may refuse to disclose to an applicant information

(a) that is readily available to the public,

[para 12] In accordance with section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the Employer Lists under section 29(1).

[para 13] The Public Body describes its compilation of the Employer Lists as follows:

The Public Body's Employer Illness and Injury Prevention Program (EIIPP) takes Workers' Compensation Board data on Disabling Injury Rates (DIR) and compares this single data set with the overall provincial average. It is not compared with the relevant industry averages. From this, employers with the highest DIR may be contacted and reviews of their OHS programs conducted. The intent of the EIIPP list is to identify employers that may require further monitoring or intervention.

[para 14] The Public Body then explains that there is a publicly accessible database that sets out employer records of work place injuries and fatalities. It describes the information that is publicly available as follows:

Albertans can obtain information about workplace injuries and fatalities involving over 150,000 employers insured by the Workers' Compensation Board - Alberta (WCB). Information can be searched by employer, by industry, and by town or city, and includes five years of data on:

- Number of lost-time claims by employer, and by industry and provincial totals
- Person-years estimate by employer, and by industry and provincial totals
- Lost-time claim rate by employer, and by industry and provincial totals
- Number of fatalities by employer, and by industry and provincial totals, including those resulting from work-related motor vehicle and workplace incidents, and occupational disease
- Whether each employer holds a Certificate of Recognition

The Public Body submits that the information requested by the Applicant is readily available to the public, within the terms of section 29(1)(a), because the Applicant can search the online database and determine for itself who it considers to be the highest-risk employers in matters pertaining to occupational health and safety.

[para 15] The Applicant responds that it is not seeking the unfiltered data that is publicly available, but rather government records that cast light on who the highest-risk employers in the province are. It says that the online database provides little, if any, insight into the comparative, evaluative answers that it wants. The Applicant adds that the Public Body has effectively acknowledged that the Employer Lists set out who the Public Body considers to be the highest-risk employers, as the employers are on the list for the purpose of identifying those that may require further monitoring or intervention.

[para 16] I find that section 29(1)(a) is not engaged in this inquiry. The records at issue are the Employer Lists. These lists are not readily available to the public. As noted earlier, the Public

Body implies that the Lists may not actually be responsive to the Applicant's access request, but I have found that they are. The Applicant requested both a "list" and a "database" indicating the province's highest-risk employers. While the database may be readily available to the public, the Employer Lists are not.

[para 17] I also accept that the objective of the Applicant's access request is to obtain what the government considers to be the highest-risk employers in the province, not simply data in order for the Applicant to conduct its own evaluation. While I note the Public Body's submission that the Employer Lists are derived from only one criterion, being the employers' disabling injury rates, the Public Body selected that single criterion in order to compile the Lists, meaning that it obviously considers that criterion to be indicative of employers who risk being non-compliant with occupational health and safety standards. In case anyone should raise it, I also make nothing of the reference in the access request to the "highest-risk" employers, as opposed to "high-risk" employers. The Employer Lists are used by the Public Body to monitor the compliance of the employers that are on it, and the employers may therefore be considered among the "highest-risk" employers in the province. In the context of this matter, the words "high" and "highest" can essentially be used interchangeably.

[para 18] While I have noted that the database is readily available to the public, this is not to say that, in addition to the Employer Lists, it is responsive to the Applicant's access request. As just noted, the intention of the request is to obtain the government's view of which employers risk being non-compliant with occupational health and safety standards. I do not need to decide whether the database is responsive, as the records at issue in this inquiry are only the Employer Lists.

[para 19] As the information in the Employer Lists does not fall within the terms of section 29(1)(a) of the Act, I conclude that the Public Body did not properly withhold the Lists in reliance on that section.

B. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information/records?

[para 20] Section 20 of the Act reads, in part, as follows:

20(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,

...

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

...

(5) Subsections (1) and (3) do not apply to

(a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act of Alberta, or

[para 21] In accordance with section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the Employer Lists under section 20(1).

[para 22] A public body cannot rely on section 20(1) to withhold information if section 20(5) is applicable. The Applicant argues that section 20(5)(a) is engaged in this inquiry, on the basis that the Employer Lists constitute reports prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act of Alberta. I disagree. While section 8 of the *Occupational Health and Safety Act* contemplates inspections of work sites, and section 18 of the *Workers' Compensation Act* contemplates investigations of workers' compensation matters, the employers generally do not appear on the Lists as a result of such inspections or investigations (although some of them may have been inspected or investigated).

[para 23] Rather, as explained by the Public Body, the employers appear on the Employer Lists by virtue of their disabling injury rates obtained from the Workers' Compensation Board. Information pertaining to worker injuries would normally be reported to the Workers' Compensation Board by the worker, employer or a physician after the particular worker's injury, as contemplated by sections 26, 32, 33 and 34 of the *Workers' Compensation Act*. The information would not be obtained as a result of a routine inspection. Finally, the fact that the Public Body uses the Employer Lists to monitor employers, and the possibility that it may decide to subsequently inspect the work sites of some of them under section 8 of the *Occupational Health and Safety Act*, does not mean that the Lists fall within the terms of section 20(5)(a) above. Again, most of the employers have not yet been inspected, and most may never be inspected.

[para 24] As I find that section 20(5) is not applicable in this inquiry, I will now turn to whether the information in the Employer Lists falls within the terms of section 20(1).

[para 25] In order for information to fall under section 20(1)(a), there must first be "law enforcement". Section 1(h) of the Act defines that term as follows:

1(h) "law enforcement" means

(i) policing, including criminal intelligence operations,

(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or

(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;

[para 26] The part of the foregoing definition that is relevant here is section 1(h)(ii). The Public Body can conduct administrative investigations under section 19 of the *Occupational Health and Safety Act*, which permits an officer to attend at the scene of an accident at a work site, and to make any inquiries that the officer considers necessary to determine the cause of the accident and the circumstances relating to the accident. However, as already noted in this Decision, the Employer Lists are derived from information regarding disabling injury rates provided by the Workers' Compensation Board. Given this, the information on the Lists was not gathered in the course of investigations under the *Occupational Health and Safety Act*. As also previously explained, the information was, for the most part, not gathered following investigations of workers' compensation matters under the *Worker's Compensation Act* (although some of it may have been).

[para 27] The Applicant accordingly argues that the activities carried out by the Public Body when it reviews and uses the Employer Lists is merely an initial attempt to ascertain whether an actual investigation will be warranted in a particular case. It submits that such ongoing review does not meet the definition of "law enforcement" in section 1(h) of the Act, but is simply ordinary "government oversight".

[para 28] Indeed, the Public Body explains that the Employer Lists are intended to identify employers *that may require* further monitoring or intervention under the *Occupational Health and Safety Act*. Still, the Public Body argues that the Lists relate to law enforcement, within the terms of section 1(h)(ii), on the basis of the following comments made in an order of this Office:

For the purposes of the Act, "law enforcement" activities include the activities of a public body that are directed towards investigation, and enforcing compliance with standards and duties imposed by a statute or regulation: Order 96-006. An "investigation" has been defined as: "to follow up step by step by patient inquiry or observation; to trace or track; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry": Order 96-019. Finally, for the purposes of the Act, an activity is "law enforcement" if it could lead to a penalty or sanction for the person in breach of the applicable law.

(Order F2002-024 at para. 31)

The Public Body further notes that section 41 of the *Occupational Health and Safety Act* sets out offences for persons, such as employers, who contravene that Act or the regulations under it.

[para 29] While the above excerpt refers to "law enforcement" as including activities "directed towards" investigation and enforcing compliance with standards and duties – which may suggest that an investigation may not actually have to yet occur – the excerpt goes on to define "investigation" in a manner that suggests that it does, in fact, have to occur. In any event, on my review of the definition set out in section 1(h) of the Act, I find that an investigation must actually occur on the part of the Public Body in order for there to be law enforcement. The reference to "the complaint giving rise to the investigation" implies that there must be some form of initiation of an actual investigation, whether following information provided by a member of the public or gathered by a public body itself. Further, section 1(h)(ii) does not refer more generally to "operations", as does section 1(h)(i). While the Legislature contemplated that police

and criminal intelligence activities falling short of an actual investigation are still law enforcement, it did not contemplate the same with respect to administrative activities.

[para 30] At the same time, however, it might be said that, simply on receiving the information about the various employers' disabling injury rates from the Workers' Compensation Board, the Public Body has commenced investigations of each of the employers, even though many of those investigations may not proceed any further. I am therefore prepared to say, for the purpose of further discussion, that the Employer Lists relate to law enforcement within the meaning of the Act. I will now consider whether disclosure of the information on the Lists could reasonably be expected to harm law enforcement, within the terms of section 20(1).

[para 31] The Public Body must satisfy the "harm test" that has been articulated in previous orders of this Office, in that there must be a clear cause and effect relationship between disclosure of the withheld information and the harm alleged; the harm that would be caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and the likelihood of the harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21; Order F2005-009 at para. 32). In order for the test to be met, explicit and sufficient evidence must be presented to show a reasonable expectation of harm (Order 96-003 at p. 6 or para. 20; Order F2002-024 at para. 35). The harm test and the requirement for an evidentiary foundation for assertions of harm – specifically in relation to law enforcement matters under section 20 of the Act – were upheld in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (at paras. 6, 59 and 60).

[para 32] The harm test must be applied on a record-by-record basis (Order F2002-024 at para. 36). In view of this, the Applicant argues that the Public Body certainly cannot meet the test with respect to *every* employer on the Employer Lists, given that this would require some link between disclosure of the name of the employer and harm to law enforcement in each particular case. It further notes that, while the fact that an employer appears on the Lists might be sensitive, this is not sufficient, as there must be a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue (Order 96-003 at p. 6 or para. 20; Order F2002-024 at para. 35).

[para 33] The Public Body submits that the Employer Lists fall within the terms of section 20(1) on the following basis:

The purpose of the list is to identify employers for investigations. The OHS Officers review the list to assist them in deciding upon which employers their efforts should be focused on. Releasing such information to the public would compromise such investigations by altering employer behaviour and adding a level of hostility to such investigations.

Presently, rapport between employers and the Public Body is good. Employers work cooperatively with the Public Body to make improvements, or correct, as necessary, matters involving processes/procedures.

This is viewed as a collaborative process, rather than a litigious one. Its success depends upon the ability of the Public Body to provide constructive feedback and for the employers to act upon the feedback, without there being any public identification of employers as “high-risk” or “non-compliant”. Publicly labeling employers as “high-risk” would cause undue harm by unfairly damaging their reputation. The Public Body submits that if that occurred it is reasonable to assume that employers would focus on challenging the label in order to “clear” their name, as opposed to working collaboratively with the Public Body to ensure the safety of Albertans. This would subsequently interfere with or harm their competitive position as public confidence in their operations/administration would be eroded.

The Public Body goes on to cite *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)* (at para. 53) for the proposition that there can be harm to law enforcement, within the terms of section 20(1) of the Act, where there is sufficient evidence to indicate how investigations could be compromised, or sufficient evidence of anticipated lack of future co-operation.

[para 34] The Public Body specifically cited section 20(1)(a) in its response to the Applicant’s access request and in its inquiry submissions. In making the argument above, the Public Body may also have meant to be withholding the Employer Lists in reliance on section 20(1)(c), which refers to harm to the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement. I have therefore considered the application of both provisions.

[para 35] I find that neither applies. The Public Body is merely speculating the impact that disclosure of the Employer Lists will have on its ability to deal with employers that have, or may have, failed to comply with occupational health and safety standards. The Public Body has provided insufficient evidence to demonstrate that employers will become “hostile” with OHS staff if the employers realize that the public knows that they are being monitored. It would presumably still be in an employer’s interest to work cooperatively with the Public Body so as to achieve compliance with occupational health and safety standards, or to be found to be compliant in the first place. I also doubt that many of them would defy the enforcement efforts of the Public Body, as that might further damage their reputations (to carry forward one of the Public Body’s own submissions above). Finally, the fact that an employer may “challenge the label” or try to “clear its name” is not antithetical, in my view, to its working toward compliance with occupational health and safety standards. The Public Body has noted that employers may be removed from the Employer Lists, and I see no significant difference between an employer correcting its non-compliance and showing that it was compliant in the first place. Either way, the objective is for the employer to demonstrate that worker health and safety has been, or will be, maintained.

[para 36] In short, the outcome that the Public Body suggests would arise on disclosure of the Employer Lists is speculative. Moreover, even if it did arise and employers became less cooperative with the Public Body, this would amount, at most, to minimal hindrance or interference in the Public Body’s efforts to achieve employer compliance with occupational health and safety standards. The Public Body has not satisfied the harm test.

[para 37] As the information in the Employer Lists does not fall within the terms of section 20(1)(a) or 20(1)(c) of the Act, I conclude that the Public Body did not properly withhold the Lists in reliance on either of those sections.

C. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information/records?

[para 38] Section 24 of the Act reads, in part, as follows:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council,

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,

...

(2) This section does not apply to information that

[various types of information, none of which exist here]

...

[para 39] In accordance with section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the Employer Lists under section 24(1).

[para 40] Section 24(2) states that section 24 does not apply to certain information, meaning that the Public Body cannot withhold that information in reliance on that section. I considered whether any of the provisions of section 24(2) were relevant to this inquiry, but found that none of them were.

[para 41] In its letter responding to the Applicant's access request, the Public Body specifically cited sections 24(1)(a), (b) and (c) as the sections under which it was withholding the Employer Lists. Although section 24(1)(c) was mentioned in that letter, as well as in an Index of Records that the Public Body prepared for this inquiry, the Public Body made no reference to that particular section in its inquiry submissions. It could be that the Public Body no longer

relies on section 24(1)(c) to withhold the Employer Lists, but I will nonetheless review the application of section 24(1)(c) below.

[para 42] In order to refuse access to information under section 24(1)(a), on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options, the information must meet the following criteria: (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2009-018 at para. 17).

[para 43] Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving its officers or employees. A "consultation" occurs when the views of other persons are sought as to the appropriateness of a particular proposal, and a "deliberation" is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order F2009-018 at para. 32). The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2009-018 at para. 18).

[para 44] Part (ii) of the test under both sections 24(1)(a) and 24(1)(b) is that the information must be directed toward taking an action. The information must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient (Order 96-006 at p. 8 or para. 39; Order F2007-013 at para. 108). Taking an action includes making a decision (Order 96-019 at para. 120; Order F2002-028 at para. 29).

[para 45] For information to fall under section 24(1)(c), it must reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government or a public body, or considerations that relate to those negotiations. The intent of section 24(1)(c) is similar to 24(1)(a) and (b), in that it is to protect information generated during the decision-making process, but not to protect the decision itself (Order 96-012 at para. 37; Order F2005-030 at paras. 71 and 72).

[para 46] To support its application of section 24(1) to the Employer Lists, the Public Body argues as follows:

OHS Officers are expected and required to analyze the information and provide the Minister with advice, proposals, analyses and policy options in order that he may decide how best to ensure healthy and safe work environments for all Albertans. In this case, the advice is to proceed with inspections, monitoring, and whatever else is required respecting employers in order to improve the health and safety of employer worksites. The decision rests with the Minister as to how best to accomplish this mandate.

Information is continuously being analyzed related to this program and factors into the respective proposals or recommendations to the Minister for a course of action to be taken. Employers who are identified for an inspection/investigation are advised, by way

of letter, that they will be inspected/monitored. However, publication of that information could harm the process, and prevent the ongoing analysis and review of their compliance with the legislation. Inspections/investigations can result in employers being removed from the list, or conversely, in more inspections/investigations. This is a dynamic process.

The Applicant argues that the Public Body has characterized the notions of advice and consultation so broadly as to render section 24(1) meaningless.

[para 47] I find that the Employer Lists do not fall within the terms of sections 24(1)(a), (b) or (c). The Employer Lists consist simply of the names of employers, along with their industry codes and account numbers, with no indication of whether or how OHS staff suggest proceeding in any particular case. The Public Body effectively says as much in its inquiry submissions. It variably writes that the “information is used *in preparation of recommendations* to the Minister in respect of actions to be taken against the identified employers”; that “the list is a record of employers obtained and created to assist in the analysis by OHS Officers *to determine a suggested course of action*”; that “the records at issue provide information that the OHS program *can, along with other information, use to advise officials*”; and that the Lists “*help to inform ongoing deliberations* as to the effectiveness of programs and strategies aimed at achieving compliance and safety at worksites” (my italics). The possibility that the information on the Employer Lists might be used to provide advice or recommendations, to assist in determining a suggested course of action or to inform consultations or deliberations does not make the information fall within the terms of section 24(1) of the Act.

[para 48] To put the point differently, the Employer Lists consist merely of a summary of raw information regarding employer disabling injury rates and is, at most, a starting point for possible future advice, proposals, recommendations, analyses, policy options, consultations, deliberations, positions, plans, procedures, criteria or instructions. The Lists do not actually reflect or reveal any of the foregoing. Section 24(1)(a) does not apply to the bare recitation of facts or summaries of information; facts may only be withheld if they are sufficiently interwoven with other advice, proposals, recommendations, analyses or policy options so that they cannot reasonably be considered separate or distinct (Order 99-001 at paras. 17 and 18; Order F2007-013 at para. 108). These same principles apply in the context of consultations and deliberations under section 24(1)(b) (Order 96-006 at p. 10 or para. 50; Order F2004-026 at para. 78). I extend these principles to the application of section 24(1)(c). While the fact that an employer has or had a high disabling injury rate may subsequently be used to develop, or may subsequently form part of, the kinds of information set out in section 24(1), that fact alone, as revealed by the Employer Lists, is not yet interwoven with, and may never be interwoven with, any of the kinds of information captured by section 24(1).

[para 49] In addition to making the submissions reproduced above, which are to the effect that the Public Body may use the information on the Employer Lists to achieve compliance with occupational health and safety standards, the Public Body writes that, if the Employer Lists were disclosed, one could or might infer that it constitutes advice to the Minister that he should publish the Lists under section 28.1 of the *Occupational Health and Safety Act*. That provision reads as follows:

28.1 *The Minister may, in order to enhance the protection of workers and the prevention of work site injuries by encouraging good and discouraging bad work site safety records,*

(a) establish indices and measurements of work site injury prevention,

(b) maintain a register consisting of the names of employers and their performance, as determined by the Minister, in relation to those indices and measurements,

(c) publish, or authorize a department or agency of the Government or any other entity to publish, the information contained in that register, and

(d) collect any information needed for that register from another public body that provides the information to the Minister.

[para 50] The Public Body makes it clear in its submissions that the Employer Lists are used by the OHS program to monitor employers' compliance with occupational health and safety standards, and that they do not serve as any advice or recommendation to the Minister that he should publish the names of the employers. Instead, the Public Body argues that the public *may think* that this is the reason for the Lists, and that the public may misinterpret the Lists by believing that the employers on them are more non-complaint than they really are. The Public Body reiterates that, after further monitoring, an employer may be found to have an acceptable safety record and be removed from the Employer List.

[para 51] A mistaken belief on the part of the public that the Employer Lists serve as advice or a recommendation to publish the names of employer under section 28.1 of the *Occupational Health and Safety Act* does not make the Lists some form of advice or recommendation. Should the Employer Lists be disclosed to the Applicant, this would be the result of the Applicant's access request, not a decision of the Minister under section 28.1. Further, if the Public Body is worried about any misinterpretation of the Employer Lists on the part of the public, it can take steps to disabuse the public, effectively by providing the same explanation regarding the reason for the Lists as it has done in this inquiry.

[para 52] As the information in the Employer Lists does not fall within the terms of section 24(1)(a), 24(1)(b) or 24(1)(c) of the Act, I conclude that the Public Body did not properly withhold the Lists in reliance on any of those sections.

D. Does section 32(1) of the Act require the Public Body to disclose the information/records in the public interest?

[para 53] Section 32 of the Act reads, in part, as follows:

32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

...

[para 54] The Applicant says that it seeks the Employer Lists in order to publicize high-risk behaviour in the province by employers in terms of their compliance with safety requirements. It argues that employee safety is clearly in the public interest, and that disclosure of the Lists could serve to prevent injury and even death. It adds that disclosure of the Lists is in the public interest because it will show the efforts being made by the Public Body to address safety issues in the work place.

[para 55] The Public Body notes that the Applicant has the burden of showing that disclosure of the Employer Lists is in the public interest under section 32(1) (Order 96-011 at p. 18 or para. 51). It submits that section 32(1) is not engaged in this inquiry, as there is no urgency or emergency requiring disclosure of the requested information. The Public Body says that, in appropriate cases, the OHS program already performs any necessary follow-up with respect to worker safety, and that it would alert affected individuals, or the entire public, of any risk to their health or safety.

[para 56] I first find that the Employer Lists do not warrant disclosure under section 32(1)(a). While the Lists are about the province's high-risk employers in terms of compliance with occupational health and safety standards, they are not about any risk of "significant harm" to health or safety.

[para 57] To be sure, the Applicant does not argue that section 32(1)(a) is the applicable section, as it instead relies on section 32(1)(b). In doing so, it notes my own comments in another order to the effect that section 32(1)(b) does not require the same sense of urgency or emergency as section 32(1)(a):

In my view, the sense of urgency required to engage section 32(1)(b) does not have to meet the same threshold as for section 32(1)(a). The reference to "without delay" in the introductory words of section 32 can depend on context, meaning that some information might require disclosure immediately while other information may not. The terms "urgent" and "emergency", which have been used to describe the kinds of situations that might give rise to disclosure in the public interest under section 32, are themselves relative.

(Order F2012-14 at para. 191)

[para 58] While the foregoing is true, I find that disclosure of the Employer Lists is not warranted under section 32(1)(b). Immediately after the comments just excerpted, I stated the following:

Still, there remains a high threshold in order to trigger section 32(1)(b). While the circumstances in question need not amount to an emergency – in the same sense as an emergency arising from a risk of significant harm to health, safety or the environment – the circumstances must be such that disclosure of information is “clearly” in the public interest.

(Order F2012-14 at para. 192)

I went on to note that, for section 32(1)(b) to apply, there must be circumstances “compelling” disclosure (Order F2004-024 at para. 57). I further noted that, regardless of whether it is section 32(1)(a) or 32(1)(b) that is under consideration, the override provided by section 32(1) means that it must be interpreted narrowly (Order 96-011 at p. 16 or para. 48).

[para 59] In this inquiry, the information in the Employer Lists does not reach the level of compelling disclosure. While the names of employers that the Public Body is monitoring, in terms of their compliance with occupational health and safety standards, may be of interest to the public, disclosure of the names and the accompanying industry codes and account numbers is not “clearly” in the public interest, within the terms of section 32(1)(b).

[para 60] I conclude that section 32(1) of the Act does not require the Public Body to disclose the Employer Lists.

V. DECISION

[para 61] I find that the Public Body did not properly apply section 20(1) of the Act to the Employer Lists, as their disclosure could not reasonably be expected to harm a law enforcement matter, or to harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement.

[para 62] I find that the Public Body did not properly apply section 24(1) of the Act to the Employer Lists, as their disclosure could not reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council; to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council; or to reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations.

[para 63] I find that the Public Body did not properly apply section 29(1) of the Act to the Employer Lists, as they do not consist of information that is readily available to the public.

[para 64] I find that section 32(1) of the Act does not require the Public Body to disclose the Employer Lists, as the information in them is not about a risk of significant harm to the health or safety of the public, and disclosure of the information is not clearly in the public interest.

[para 65] Given my findings above, the second part of this inquiry may now take place. However, I will not arrange for the second part of the inquiry to proceed any sooner than expiry of the period in which to bring an application for judicial review of this Decision.

Wade Raaflaub
Adjudicator