Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2330

Appeal PA-030337-1

Ministry of Labour

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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act* (the *Act*) the Ministry of Labour (the Ministry) received a request for access to a copy of the list of workplaces earmarked for pro-active inspection by inspectors of the Ministry of Labour under the provisions of the *Occupational Health and Safety Act* (*OHSA*). The scope of the request was subsequently narrowed by the requester (now the appellant) to a list of workplaces targeted for inspection by the Ministry's Hamilton Ontario District Office for the 2003 - 2004 fiscal year (the list).

In its decision the Ministry indicated that access to the list was being denied under section 14(1) of the *Act* (law enforcement) with particular reference to sections 14(1)(c) and (g). In support of its assertion that the records are exempt under these sections, the Ministry enclosed copies of three decisions of this office along with its denial of access to the list. The requester (now the appellant) appealed the Ministry's decision.

Mediation was unsuccessful and the matter moved to the adjudication stage. This office sent a Notice of Inquiry, initially, seeking representations on the issues in the appeal. The Ministry provided representations, which included an affidavit setting out certain facts relied upon by the Ministry in support of its representations. This office then sent the Notice of Inquiry to the appellant, together with a copy of the Ministry's representations. Although given ample opportunity, the appellant chose not to file representations in response. In his letter of appeal, the appellant commented on the exemptions claimed by the Ministry, and I have considered these comments in reaching my decision.

RECORD:

As confirmed by the appellant during mediation, the record at issue is a 53-page list of firms that were targeted as priorities by the Ministry's Hamilton Ontario District Office for inspection in 2003-2004.

DISCUSSION:

LAW ENFORCEMENT

Sections 14(1)(c) and (g) of the *Act* read as follows:

> 14. (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> …
>
> (g) interfere with the gathering of or reveal law enforcement intelligence information respecting organizations or persons …

In order to establish that the particular harm in question under section 14(1)(c) or (g) "could reasonably be expected" to result from disclosure of the list, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Under section 2(1) of the *Act*, "law enforcement" is defined to mean:

> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in (b).

Section 14(1)(g)

The purpose of section 14(1)(g) is to provide an institution with the discretion to preclude access to records in circumstances where disclosure would interfere with the gathering of or reveal law enforcement intelligence information.

In Order M-202, former Commissioner Tom Wright had the occasion to consider six of the exemptions contained in section 8(1) of the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA), which is equivalent to section 14(1) of the *Act*. He stated with respect to 8(1)(g) of MFIPPA (the equivalent of section 14(1)(g) of the *Act*):

> In my view, in order for a record to qualify for exemption under section 8(1)(g) of the Act, the Police must establish that disclosure of the record could reasonably be expected to:
>
> > (a) interfere with the gathering of law enforcement intelligence information respecting organizations or persons, **or**
> >
> > (b) reveal law enforcement intelligence information respecting organizations or persons.
>
> The term "intelligence" is not defined in the Act. The Concise Oxford Dictionary, eighth edition, defines "intelligence" as "the collection of information, [especially] of military or political value", and "intelligence department" as "a

> [usually] government department engaged in collecting [especially] secret information".
>
> The Williams Commission in its report entitled Public Government for Private People, the Report of the Commission on Freedom of Information and Protection of Privacy/1980, Volume II at pages 298-99, states:
>
> > Speaking very broadly, intelligence information may be distinguished from investigatory information by virtue of the fact that the former is generally unrelated to the investigation of the occurrence of specific offenses. For example, authorities may engage in surveillance of the activities of persons whom they suspect may be involved in criminal activity in the expectation that the information gathered will be useful in future investigations. In this sense, intelligence information may be derived from investigations of previous incidents which may or may not have resulted in trial and conviction of the individual under surveillance. Such information may be gathered through observation of the conduct of associates of known criminals or through similar surveillance activities.
>
> In my view, for the purposes of section 8(1)(g) of the Act, "intelligence" information may be described as information gathered by a law enforcement agency in a covert manner with respect to ongoing efforts devoted to the detection and prosecution of crime or the prevention of possible violation of law, and is distinct from information which is compiled and identifiable as part of the investigation of a specific occurrence.

I agree.

Representations

The Ministry submits that the list is critically important to its mandate to enforce the provisions of the *OHSA* and that disclosure of the list would compromise that mandate. The Ministry explains that the requested list was extracted from a document that was generated in response to recommendations contained in an internal audit report issued in November 2001. The audit report recommended that in order to use resources more effectively and enhance enforcement, the Ministry should make greater use of targeted workplace inspections aimed at high-risk workplaces.

The list of high priority firms was prepared in May 2003. It was based on data provided from the Workplace Safety and Insurance Board (WSIB) and extracted from the Ministry's Merged Information System. Ministry staff was advised which of the priority firms on the list would be

considered to be high risk. The list has not been shared with any outside parties, and is not publicly available.

The Ministry advises that the information on the list will remain largely current as the list reflects data collected over a four-year period and changes from one year to the next cannot be expected to be dramatic given the four-year basis for assessing risk.

It is the policy of the Ministry not to give notification before a routine inspection unless agreed to by a Director (as defined in the *OHSA*) after the employer and union or workers representative submit a joint proposal for an announced inspection. Even if there is such an agreement, inspections without prior notice may occur if there is a significant deterioration in a company's accident or compliance record.

The Ministry relies on section 54(1)(a) of the *OHSA* as its authority to conduct unannounced inspections. That section provides that an inspector may, for the purposes of carrying out his or her duties and powers under the *OHSA* and the regulations, subject to section 54(2), enter in or upon any workplace at any time without warrant or notice. Section 54(2) of the *OHSA* sets out that an inspector may only enter a dwelling or that part of a dwelling actually being used as a workplace with the consent of the occupier or under the authority of a warrant issued under the *OHSA* or the *Provincial Offences Act*.

The Ministry submits that disclosure of the list would cause harm, because it would:

a) Undermine the clear statutory policy supporting unannounced inspections set out in section 54(1)(a) of the *OHSA*,

b) Allow some workplaces to have an opportunity to restructure their affairs to present an impression of compliance that does not reflect the day-to-day state of affairs,

c) Encourage lower priority firms on the list to be less vigilant, and

d) Unjustly harm the reputation of some organizations that would be unfairly viewed as "bad actors".

In its representations the Ministry submits that proactive inspections are designed to promote compliance with the *OHSA* as well as prevent non-compliance with that statute. The Ministry submits that while Order P-1305 sets out that the words "intelligence information" in section 14(1)(g) meant that information had to be gathered in a "covert" manner, the meaning of "covert" has not been clearly defined. Relying on definitions contained in the Concise Oxford Dictionary, 8th edition, 1990, the Ministry urges an expansive definition. It submits that "covert" is defined to mean "secret", and "secret" is defined to mean "kept or meant to be private". Following this line of reasoning the Ministry says it points to a reliance on confidential information. This, it submits, is consistent with its use of internally generated data from the

Ministry and the WSIB to produce the list. It also submits that this is consonant with the dictionary meaning of "intelligence" which is "the collection of information". As this is information relating to on-going prevention rather than compilation of information about a single occurrence, it was generated in a law enforcement context and used solely for that purpose. Because of the harm that disclosure of the list would cause, the Ministry submits that the exemption set out in section 14(1)(g) applies.

Although the appellant did not file representations, he made submissions on some matters for consideration in his letter of appeal. As regards section 14(1)(g), the appellant submits that the requested list would not interfere with the gathering of, or reveal, law enforcement intelligence information. The appellant asserts that the request is for a list of workplaces and does not reveal any information on criteria for selection or what the expected outcome of inspection/investigation would be.

Analysis and Findings

As noted previously, in order to qualify for exemption under section 14(1)(g), the Ministry must demonstrate that disclosure would either interfere with the gathering of or reveal "law enforcement" intelligence information respecting organizations or persons.

Thus the information to be gathered or revealed must meet the definition of "law enforcement" in section 2(1) of the *Act*. Based on the sanctions found at section 66 of the *OHSA*, I am satisfied that the list meets part (b) of the definition of "law enforcement".

I will now consider whether disclosure could reasonably be expected to interfere with the gathering of or reveal intelligence information.

I believe that what distinguishes this appeal from many others is that the section of the Ministry in compiling the list is proactive. In Order MO-1261, a case dealing with 8(1)(g) of MFIPPA (again, the equivalent of section 14(1)(g) of the *Act*), the Toronto Police Services Board submitted that the gathering of intelligence information by the intelligence units of police agencies enables the police to take a proactive approach in dealing with various groups and activities. In addition, they submitted that disclosure of information which was obtained as part of this "intelligence gathering" could have a number of consequences, including identification of individuals who are being monitored and could result in individuals or groups going "underground" or otherwise taking active steps to conceal their activities or associations. Considering all the representations in that case and after reviewing the records at issue it was determined that disclosure of the requested information would reveal law enforcement intelligence gathered by the police. Accordingly, access to this type of information was denied.

I find the discussion in Order MO-1261 to be of assistance here. In the matter before me, the firms on the requested list are there because of the firm's past history. A firm on the list, may more likely than not, be subject to an inspection and then, depending on what is discovered, be subject to investigation and potential penalty or sanction. Just as the police in Order MO-1261

submitted that the identification of the names of individuals or groups that were being monitored could result in their going "underground" or otherwise taking steps to conceal their activities, the Ministry now expresses similar concerns, but in another way. They are concerned that if a firm is aware of an impending unannounced inspection it can modify its activities to provide an illusion of compliance. Furthermore, firms that are not on the list may relax their standards.

If the argument of the appellant that this list is not covered by the exemption in section 14(1)(g) is taken to its logical conclusion that would mean that agencies, including the police, that are engaged in "law enforcement" as defined under the *Act*, could be required to disclose lists of suspects who are targeted for investigation of a breach of a regulatory statute and/or criminal or quasi-criminal acts without an investigation having been undertaken. That would eviscerate the ability of the affected agency to conduct the type of proactive confidential or covert operation like the one here. This cannot be what the legislature intended. I am satisfied of the currency of use of the list at issue, and in my opinion this list is the type of information that qualifies as "law enforcement intelligence information" under section 14(1)(g) and should not be required to be divulged.

The appellant submits that precedent has been established in a similar request made under the Workplace Safety and Insurance Act. The appellant asserts that the WSIB prepares a similar list to identify workplaces that will undergo a Work Well Audit that is available through Freedom of Information.

As the appellant offers no factual background or authorities in support of his assertion, I am not in a position to order disclosure of the list at issue in this appeal on the basis of this submission.

I therefore find that the list is exempt under section 14(1)(g) of the *Act*. Having reached this conclusion, it is not necessary for me to consider section 14(1)(c).

ORDER:

I uphold the Ministry's decision not to disclose the list.

Original Signed By: October 6, 2004
Steven Faughnan
Adjudicator