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Immigration Law and International Recruitment

The Office of the Minister of Employment and Social Development Canada
Attention Senior Policy Advisor: Mr. Michael Bonner
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CONCERN ABOUT SECRECY AND LACK OF RESPONSE ABOUT POLICY/RULES ABOUT COMPLIANCE WITH WORKING CONDITIONS

Dear Mr. Bonner

1. As we both know, one of the major objectives of ESDC Foreign Worker Section is to ensure that employers comply with conditions (including working conditions), and to ensure that steps are taken to deal with employers who are non-compliant. This is critical, and commendable, as it ensures the proper treatment of foreign nationals, while indirectly protection Canadians.

   My complaint today concerns the potentially misuse of the Access to Information Act, in an attempt to redact valuable information in an Access to Information request. The public and myself have a right to, as fundamental to a transparent and healthy democracy.

2. On 8 July 2013, the government published proposed regulations with regards to working conditions in the Government Gazette (See Enclosure 1), most of which became effective on 31 Dec 2013. Amongst these was R 209.2 (1)(a), which now indicates that:

   > "(iii) the employer must provide the foreign national with employment in the same occupation as that set out in the foreign national's offer of employment and with wages and **working conditions** that are substantially the same as but not less favourable than those set out in that offer"

3. In addition, Immigration and Refugee Protection Regulation 203 (1)(e) indicates that:

"(e) during the period beginning two years before the day on which the request for an opinion under subsection (2) is received by the Department of Human Resources and Skills Development and ending on the day on which the application for the work permit is received by the Department,

(i) the employer making the offer provided each foreign national employed by the employer with wages, **working conditions** and employment in an occupation that were substantially the same as the wages, working conditions and occupation set out in the employer's offer of employment, or..."

4. The Regulatory Impact Assessment (in the above mentioned Government Gazette) the following is mentioned:

"Proof of employer compliance with the **conditions**
In order to demonstrate that they met the conditions imposed on them, employers would be required to retain documents that demonstrate their compliance with the conditions during the period of employment for which the work permit was issued" *Where is this from?*

5. On 30 December 2013 ESDC published a small portion of their own interpretation of these new regulations (See Enclosure 2):

"Employers that apply for and receive an LMO as of December 31, 2013, must uphold **certain conditions** and be prepared to demonstrate their compliance with those conditions during a period of 6 years beginning on the first day of the period of employment for which the work permit is issued to the foreign worker.

Employers must be prepared to demonstrate that they... have provided each foreign worker with employment in the same occupation as stated in the offer of employment and with wages and **working conditions** that are substantially the same as—but not less favourable than—those in the offer of employment. "

6. Copies of the ESDC Temporary Foreign Worker Manual were requested in December 2012 and provided in January 2013 under the Access to Information Act (file number: 2012-00360 /SS – See Enclosure 3).

I refer to the enclosed Section 3.5.5.2.7.2 and Section 3.5.5.2.13.1 of the Temporary Foreign Worker Manual.

In the enclosed Section 3.5.5.2.7.2 it is mentioned that a "comprehensive list of working conditions to be assessed and documents requested is found in section 3.5.5.2.13.1." However that "the most of Section 3.5.5.2.13.1 are redacted and not released pursuant to

Section 16.2 of the Access to Information Act." As you will see, page upon page contains blacked out information.

Ms. Jackie Holden (Manager of Access to Information at ESDC) was again requested to release this information today.

7. The *security* provision, section 16(2) of the Access to Information Act indicates the following:

> "(2) The head of a government institution may refuse to disclose any record requested under this Act that contains information that could reasonably be expected to facilitate the commission of an offence, including, without restricting the generality of the foregoing, any such information
> (*a*) on criminal methods or techniques;
> (*b*) that is technical information relating to weapons or potential weapons; or
> (*c*) on the vulnerability of particular buildings or other structures or systems, including computer or communication systems, or methods employed to protect such buildings or other structures or systems."

8. Please see the Enclosed "Investigator's Guide to the ATIA" on the website of the office of the Information Commissioner of Canada.

   Here, a clear explanation of the application of s 16 can be seen. The relevant information has been extracted and summarized as follows:

   Firstly, the retention of information under this provision, specifically s 16(2) is discretionary.

   Secondly, ss2 is for the use of information pertaining to:

   "1. Relating to the existence or nature of a particular investigation,
   2. that would reveal the identity of a confidential source of information, or
   3. that was obtained or prepared in the course of an investigation;"

   This excerpt, although easily attainable was not provided in the Information Request response's 'copy of the provision', further calling the genuine use of the provision into question.

   As per the case of *Air Atonabee v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (T.D.), the test pertaining to whether "disclosure could be reasonably expected to", is "whether, assuming use of the information, its disclosure would give rise to a reasonable expectation of probable harm." There must be an explanation provided as to how the disclosure would result in the "particular identifiable harm", but may be as an indirectly causal. As per the case of *Information Commissioner v. Immigration and Refugee Board*

(1997), 140 F.T.R. 140, "Where the harm foreseen by release of the records sought is one about which there can only be mere speculation or mere possibility of harm, the standard is not met. It must have an impact on a particular investigation, where it has been undertaken or is about to be undertaken." (See enclosure for evidencing harm)

It is suspected that rather than facilitating the commission of an offence or resulting in harm (unidentified and unproven), that the redacted information might facilitate the relevant and appropriate compliance. Employers invest effort and resources into to uphold this law.

9. Further, given the increasing importance of compliance to conditions (that include working conditions of foreign workers) by Canadian employers that employ foreign workers, it is a concern that internal rules about which conditions will be checked and *especially* which documents would be required are not being released. The reason for the concern is as follows:

   a. It is counter-productive, as employers do not know about all possible working conditions that could be part of a compliance review. It causes a waste of resources of employers, the government and myself by unnecessary discussions, emails, phone calls, guesswork, and another Access to Information Act request.

   b. There are doubts whether Section 16(2) of the Access to Information Act is genuinely applicable, as explained above. By extension, whether the discretion was exercised correctly is doubtful given the public interest, benefit and right to this information. It seems very Orwellian.

      It is accepted that this is a very general provision, and that the exemption does not need to fall within the non-exhaustive list of the categories of information. The alleged reason (which has not been provided), should be similar. It is difficult to accept that the nature of this document is such that it would facilitate a crime, when rather the public access towards it would aid the employers in their endeavors to evidence their compliance.

      It is no small feat to keep record of these requirements (generally), and it is unacceptable that despite efforts of employers, that at some time in the future they may be found non-compliant for a technical or administrative error that could have been prevented with the correct knowledge. Transparent and clear rules will actually support government objectives, ensure more compliance by many employers that are willing to follow the letter and intent of the law, indirectly increasing national well-being for all Canadian citizens.

   c. Transparent and clear rules also contributes to procedural fairness, as people being adjudicated may understand the standards involved and officers can be held accountable if the rules underlying decisions are known to the people being effected.

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The use of s 16(2) of the ATIA, the refusal to release information as discussed above viewed together with a lack of response to my letter to Minister Finley dated 2 Jan 2012 (in which 16 questions over 8 topics was asked, including questions about compliance with conditions) is a genuine concern to my office and some of the clients I represent.

Respectfully yours

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Enclosure
1: Extract from Government Gazette Part 1, Vol 147, No 23
2: Printout from HRSC Website about compliance
3: Extract from Access to Information request A-2012-00360/SS
4: Investigator's Guide to the ATIA