

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-018

February 12, 1998

WORKERS' COMPENSATION BOARD

Review Number 1336

I. BACKGROUND

[1.] The Applicant acts on behalf of a group of widows called the Disenfranchised Widows Action Group (the "Disenfranchised Widows"). This group is challenging former workers' compensation legislation. For the purposes of this Order, the Applicant has consented to being identified in this manner.

[2.] Prior to 1982, under the former Workers' Compensation legislation, widows who remarried or entered into a common law relationship received a lump sum payment in lieu of a life time pension. After 1981, the legislation was changed and a new system was implemented in which remarriage was no longer a factor in benefit eligibility. The revised legislation was not retroactive, so the pensions of widows who had remarried were not reinstated. The Disenfranchised Widows allege that the prior legislation was discriminatory and that they should be entitled to benefits regardless of their marital status. The Applicant is seeking other disenfranchised widows who are interested in challenging the legislation.

[3.] On June 25, 1997, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Workers' Compensation Board (the "Public Body") for access to the "names and current addresses of all Workers' Compensation Board widows who remarried prior to 1982".

The Public Body denied the request on the basis of 16(1) (disclosure that would be an unreasonable invasion of a third party's personal privacy) of the Act. On July 26, 1997 the Applicant requested that I review the Public Body's decision because the "issue has overriding public interest and affects many. Groups cannot be identified in any other way."

[4.] Mediation was authorized but was not successful. A public inquiry was held on October 29, 1997, where representations were made both in person and in writing by the Applicant and the Public Body.

[5.] Widows whose names and addresses have been requested by the Applicant are referred to as Third Parties in this Order.

II. ISSUES

[6.] There are four issues in this inquiry.

1. Did the Public Body correctly apply section 16 of the Act (personal information) when it refused to disclose the names and addresses of the Third Parties?
2. Has the Public Body breached its duty to assist the Applicant under section 9 of the Act?
3. Should the information be disclosed because it is clearly in the public interest as provided by section 31(1)(b) of the Act?
4. Would disclosure of the information requested be harmful to the economic interests of the Public Body under section 24 of the Act?

III. RECORDS AT ISSUE

[7.] In response to the request, the Public Body provided me with a listing of 2000 names of widows for the period 1918-1989. This listing does not contain addresses. According to the Public Body, this listing is not exhaustive because there have been 21 more widows who have received lump sum payments between 1989-1996. The Public Body stated that in order to locate all the addresses for these names, a manual or microfilm search of the original files would be required. The Public Body did not locate the addresses requested because it estimated that 15 minutes per file for a total of 500 hours would be required.

IV. DISCUSSION

1. Did the Public Body correctly apply section 16 of the Act (personal information) when it refused to disclose the names and addresses of the Third Parties?

a) Positions of the Parties

(i) Position of the Applicant

[8.] The Applicant submitted that the Public Body did not consider all of the relevant circumstances under section 16(3) when deciding whether disclosure of a Third Party's personal information would be an unreasonable invasion of a Third Party's personal privacy under section 16(1) and section 16(2). The Applicant said that section 16(3)(a) "desirable for subjecting the activities of the government to public scrutiny" is one such relevant circumstance. Moreover, the Applicant submitted that the disclosure would not be an unreasonable invasion of the Third Party's personal privacy if the Third Party consented as provided in section 16(4)(a).

[9.] The Applicant argued that the Public Body should give the Third Parties notification because many of the Third Parties may be interested in giving their consent to have their personal information disclosed to the Applicant. If consent is given, disclosure of the personal information would no longer be an unreasonable invasion of the Third Party's personal privacy. Consequently, section 16(1) and section 16(2) would no longer apply.

(ii) Position of the Public Body

[10.] Because the information which the Applicant is seeking is personal information about third parties, the Public Body said it must refuse to disclose that personal information under section 16(1) of the Act. The Public Body also stated that the presumptions under sections 16(2)(c) and 16(2)(g) of the Act are applicable to support its refusal to disclose under section 16(1). The Public Body submitted that it has no obligation to contact the Third Parties in order to obtain consent to disclose their personal information under section 16(4)(a).

b) Burden of Proof

[11.] Section 67(2) of the Act provides that if a public body refuses access to a record, and that record contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy.

c) Application of section 16(1) and section 16(2)

[12.] Under section 16(1) of the Act, the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[13.] Section 16(1) reads:

16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[14.] The Applicant conceded that the information requested is personal information as defined in section 1(1)(n)(i) of the Act (the individual's name, home or business address or home or business telephone number).

[15.] Section 16(2) of the Act lists several kinds of personal information, disclosure of which are presumed to be an unreasonable invasion of a third party's personal privacy. The Public Body said that sections 16(2)(c) (information relating to eligibility for income assistance or social benefits) and section 16(2)(g)(personal information consisting of the third party's name when it appears with other personal information about the third party) applied to support its refusal to disclose under section 16(1).

[16.] Section 16(2) reads:

(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

...

(g) the personal information consists of a third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

(i) Did the Public Body correctly apply section 16(2)(c)?

[17.] Under section 16(2)(c), the disclosure of personal information relating to eligibility for income assistance or social service benefits or to the determination of benefit levels is presumed to be an unreasonable invasion of a third party's personal privacy. Workers' compensation benefits would be included under section 16(2)(c). I find that a disclosure of a Third Party's name to the Applicant would also disclose that the Third Party was eligible for Workers' Compensation benefits. Therefore, the disclosure is presumed to be an unreasonable invasion of the Third Parties' personal privacy under section 16(2)(c).

(ii) Did the Public Body correctly apply section 16(2)(g)?

[18.] Under section 16(2)(g), the disclosure of a third party's name is presumed to be an unreasonable invasion of a third party's personal privacy when the name appears with other personal information about the third party or the disclosure of the name itself would reveal personal information about the third party. I agree with the Public Body that the disclosure of a Third Party' name would also be disclosing the following information:

- a) the Third Party was once married, or in a common-law relationship or had a child out of wedlock,
- b) was married to a worker under a former Worker's Compensation Act,
- c) had a spouse who died as a result of a work-related accident,
- d) was a dependant for compensation purposes,
- e) remarried, and
- f) received compensation benefits, including a lump sum, on remarriage.

[19.] Therefore, the criteria of section 16(2)(g)(ii) has been satisfied. Consequently, disclosure of that personal information is presumed to be an unreasonable invasion of the Third Parties' personal privacy for the purposes of section 16(1).

(d) What relevant circumstances did the Public Body consider under section 16(3) in determining whether disclosure of personal information would be an unreasonable invasion of a third party's personal information?

(i) General

[20.] In determining whether a disclosure of personal information would be "an unreasonable invasion of a third party's personal privacy" under section 16(1) and (2), the head of a public body must consider all the relevant circumstances, including a number of factors under section 16(3).

[21.] The Public Body said that it considered section 16(3)(a) (public scrutiny), section 16(3)(c) (personal information relevant for a fair determination of the applicant's rights), section 16(3)(f) (personal information supplied in confidence) and section 16(3)(g) (inaccurate or unreliable personal information). Those sections of the Act read:

(3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(f) the personal information has been supplied in confidence,

...

(g) the personal information is likely to be inaccurate or unreliable, and

[22.] I will deal with each circumstance as it has been raised.

(ii) Is the disclosure desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny (section 16(3)(a))?

[23.] If considered to be a relevant circumstance, section 16(3)(a) weighs in favour of disclosing personal information.

[24.] The Applicant believes that the disclosure of the Third Parties' names and addresses is desirable for the purpose of subjecting the activities of the Government of Alberta and the Public Body to public scrutiny. My understanding of the Applicant's argument is that by obtaining the names and addresses of the Third Parties, who are widows affected by the former workers' compensation legislation, the Applicant can then inform them of the potential

litigation. The greater the number of participants challenging the former legislation, the greater will be the public scrutiny regarding legislation which the Disenfranchised Widows say is discriminatory.

[25.] The Public Body submitted that the disclosure of the Third Parties' personal information is not necessary to subject the Public Body to scrutiny for four reasons:

- a) The subject matter of the Applicant's complaint arises solely from the operation of former workers' compensation statutes and not from any discretion exercised by the Public Body.
- b) Because the Board of Directors of the Public Body is comprised of workers, employers, and members of the general public, its activities are already subject to public scrutiny.
- c) The issue relating to the Disenfranchised Widows has been reported in the media and is thus already subject to public scrutiny.
- d) It is not necessary to identify further possible claimants to contest the validity of a piece of legislation. Whether there is one or a thousand individuals is immaterial for the purpose of subjecting the Public Body's activities to scrutiny.

[26.] In Order 97-002, I discussed the interpretation of section 16(3)(a). In that Order, I said evidence had to be provided to demonstrate that the activities of the public body had been called into question, necessitating disclosure of personal information to subject the activities of the public body to scrutiny. There was no evidence provided to show that the Applicant was questioning the activities of the Public Body, such as the way in which the Public Body administered the legislation. Based on the evidence, the Applicant wishes to challenge the lawfulness of the former workers' compensation legislation, rather than the activities of the Public Body itself.

[27.] Consequently, I find that section 16(3)(a) is not a relevant circumstance to consider when determining whether disclosure of the Third Parties' personal information would be an unreasonable invasion of the Third Parties' personal privacy under section 16(1) and section 16(2).

(ii) Is the personal information relevant to a fair determination of the Applicant's rights (section 16(3)(c))?

[28.] If considered to be a relevant circumstance, section 16(3)(c) weighs in favour of disclosing personal information.

[29.] I understand from the Applicant's arguments that the Public Body should have considered section 16(3)(c) when determining whether disclosure of the

Third Parties' personal information would be an unreasonable invasion of the Third Parties' personal privacy under section 16(1) and section 16(2).

[30.] The Public Body submitted that the names and addresses of the Third Parties are irrelevant to a fair determination of the Applicant's "rights" vis-à-vis the former workers' compensation legislation.

[31.] While I agree that it may be helpful for the Applicant in terms of financial and moral support to have other widows join in the litigation process, I find that it is not necessary in order to challenge the lawfulness of the particular Alberta legislation to disclose the Third Parties' names and addresses. I do not find that the personal information is relevant to a fair determination of the Applicant's "rights".

[32.] Consequently, I find that in this case section 16(3)(c) is not a relevant circumstance to consider when determining whether disclosure of the Third Parties' personal information would be an unreasonable invasion of the Third Parties' personal privacy under section 16(1) and section 16(2).

(iii) Has the personal information been supplied in confidence (section 16(3)(f))?

[33.] If considered to be a relevant circumstance, section 16(3)(f) weighs in favour of not disclosing personal information.

[34.] The Public Body said that it considered that section 16(3)(f) was a relevant circumstance when determining whether disclosure of the Third Parties' personal information would be an unreasonable invasion of the Third Parties' personal privacy under section 16(1) and section 16(2).

[35.] The Public Body submitted that the personal information has been supplied in confidence. Under section 141 of the *Workers' Compensation Act*, S.A. 1980, c. W-16, information received by the Public Body is recognized as being confidential and can only be divulged under certain circumstances. In addition, the Public Body stated that it is implicit in the compensation system that personal information received by it is supplied in confidence.

[36.] I agree with the Public Body that the Third Parties supplied their personal information to the Public Body in confidence. I find it reasonable to assume that the Third Parties would believe that their personal information was supplied in confidence, and would not expect it to be used for a purpose outside the *Workers' Compensation Act*. Therefore, I find that section 16(3)(f) is a relevant circumstance to consider when determining whether disclosure of the Third Parties' personal information would be an unreasonable invasion of the Third Parties' personal privacy under section 16(1) and section 16(2).

(iv) Is the personal information likely to be inaccurate or unreliable (section 16(3)(g))?

[37.] If considered to be a relevant circumstance, section 16(3)(g) weighs in favour of not disclosing personal information.

[38.] The Public Body submitted that many of the addresses would no longer be accurate and reliable given the age of the data and the rate that Canadians change residences and thus, no longer useful to the Applicant.

[39.] The Public Body has not given any direct evidence on this point, besides a sheet from Statistics Canada of the 1991 census regarding the rate in which Canadians move in general. Without more evidence, I find that the Public Body has not proven that the requested personal information is inaccurate and unreliable.

[40.] For this reason, I find that section 16(3)(g) is not a relevant circumstance.

(v) Conclusion under section 16(3)

[41.] The Public Body considered all the relevant circumstances, and determined that the relevant circumstances weighed in favour of not disclosing personal information. If, after considering all the relevant circumstances, including those listed under section 16(3), a public body determines that disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy, that public body must refuse to disclose that personal information, as provided by section 16(1).

[42.] My role under section 16(3) is to determine whether a public body used the right process. In this case, I find that the Public Body used the right process.

e) Did the Applicant meet the burden of proof under section 67(2)?

[43.] An applicant may meet the burden of proof under section 67(2) by showing that one of the circumstances listed in section 16(4) of the Act applies. Section 16(4) lists a number of circumstances where disclosure would not be an unreasonable invasion of a third party's personal privacy even if the criteria in section 16(1) or 16(2) has been satisfied. The Applicant said that if the Public Body gave notice to the Third Parties, and the Third Parties consented, then under section 16(4)(a), disclosure of those Third Parties' personal information would not be an unreasonable invasion of their personal privacy.

[44.] Section 16(4)(a) reads:

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure,

...

[45.] The Applicant submitted that the Third Parties should be given an opportunity to decide whether they wish their personal information to be disclosed. Given the nature of the litigation involving the Disenfranchised Widows, the Third Parties' rights may be affected. The Applicant stated that if a Third Party opposed the disclosure, the Applicant would accept the Third Party's refusal.

[46.] The Public Body argued that for section 16(4)(a) to apply, it is up to the Applicant to provide the Third Parties' consent. This is incorrect.

[47.] Sections 29(1) and 29(2) describe the process the Public Body must follow to notify the third party. Section 29(1) and section 29(2) (notifying the third party) read:

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

*(a) that affects the interests of a third party under section 15,
or*

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

the head must, subject to section 28, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (3).

(2) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 15 or 16, the head may give written notice to the third party in accordance with subsection (3).

[48.] Under section 29(1), if a public body is considering giving access that may be an unreasonable invasion of a third party's personal privacy under section 16, the public body must give written notice to the third party of its intention.

This notice gives the third party an opportunity to make representations concerning disclosure, and to provide consent or oppose the disclosure.

[49.] However, if the public body does not intend to give access to a record that contains information excepted from disclosure under section 16, the public body *may* give written notice to the third party under section 29(2). In this inquiry, the Public Body gave evidence that it does not intend to give access to the information requested. Therefore section 29(2) applies.

[50.] Section 29(2) uses the permissive “may” rather than the obligatory “must”. As a result, even though some of the Third Parties might give their consent if notified, the Public Body is not in contravention of the Act by refusing to notify the Third Parties under section 29(2) of the Act.

[51.] I sympathize with the Applicant’s arguments that many Third Parties would most likely give their consent to disclosing their names and addresses to the Applicant. However, the Act specifically states that the Public Body “may” give written notification. In this case, the Public Body exercised its discretion by choosing not to give written notification. As much as I would like to encourage public bodies to communicate with third parties, I cannot impose a duty upon the Public Body to give notification where the Act does not provide a statutory duty to do so.

[52.] Therefore, section 16(4)(a) does not apply. Even though I sympathize with the Applicant regarding the intended use of the personal information requested, I find that the Applicant has not met the burden of proof under section 67(2).

f) Conclusions under section 16

[53.] The Public Body correctly applied section 16(2)(c) and 16(2)(g) of the Act. I have already said that section 16(3)(f) is a relevant circumstance which weighs in favour of not disclosing personal information.

[54.] Therefore, I uphold the Public Body’s decision to refuse access to the personal information requested.

2. Has the Public Body breached its duty to assist the Applicant under section 9(1) of the Act?

[55.] Section 9(1) of the Act provides that the Public Body has a general duty to assist applicants in obtaining access to records. Section 9(1) reads:

9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[56.] At the commencement of the inquiry, the Applicant advised that it is not necessary for the names and addresses of the Third Parties (widows) be given out. The Applicant stated that the request would be satisfied if the Public Body simply wrote to the Third Parties advising them of the Disenfranchised Widows' litigation against the Public Body and giving the Third Parties the Applicant's address. With this information the Third Parties could, if they wished, contact the Applicant. In this way, the Public Body would not be disclosing the Third Parties' personal information and the response would meet the intent of the Applicant's request.

[57.] The Public Body submitted that to take such steps would be beyond "making every reasonable effort" as outlined in section 9(1) of the Act, and therefore, it did not breach its duty to assist the Applicant.

[58.] I encourage parties to work out solutions that are satisfactory to both parties and which meet the requirements of the Act. The Applicant's proposal is not specifically addressed in the Act, so the Public Body is not bound to follow it. While I am disappointed that the Public Body has not been able to respond, at least partially, to the Applicant's request, I do not believe that section 9(1) requires the Public Body to carry out what has been proposed by the Applicant, as an alternate solution.

[59.] Therefore, I find that the Public Body did not breach its duty to assist under section 9(1) of the Act.

3. Should the information be disclosed because it is clearly in the public interest as provided by section 31(1)(b) of the Act?

[60.] Section 31(1)(b) (information must be disclosed if in the public interest) reads:

31(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

...

(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.

[61.] Mr. Justice Cairns stated in Order 96-014 that the Applicant bears the burden of proof to show that the criteria in section 31(1)(b) has been met. Therefore, the Applicant must prove that the disclosure of the Third Parties' names and addresses would be "clearly in the public interest". Mr. Justice Cairns also considered what type of information that "may well be of interest to the public" and information that is "a matter of public interest". As I said in Order 96-011, the Legislature did not intend for section 31 to operate simply because a member of the public asserts "interest" in the information. The pre-condition that the information must be "clearly a matter of public interest" must refer to a matter of compelling public interest.

[62.] In this matter, I do not find that the pre-condition has been met. The Applicant has not proven a compelling public interest in the disclosure of the Third Parties' names and addresses to override the purpose of the exception outlined in section 16. Consequently, I find that section 31(1)(b) of the Act does not apply.

4. Would disclosure of the information requested be harmful to the economic interests of the Public Body under section 24 of the Act?

[63.] The Public Body also refused disclosure of the Third Parties' names and addresses on the basis of section 24 of the Act (no specific subsection was cited). Section 24 provides a discretionary exception for disclosure which is harmful to the economic interests of a public body.

[64.] The Public Body argued that providing a list of potential plaintiffs against the WCB to the Applicant could reasonably harm the WCB's economic interest together with the economic interests of all employers under the *Worker's Compensation Act* and all third parties who commit funds to the litigation. The Public Body stated: "Should any of the third parties identified choose to participate in a litigation against the WCB, the number of actions and the complexity of such actions will multiply, requiring the WCB to incur financial loss from the time, fees, and expenses associated with defending and potentially paying multiple claims."

[65.] In Order 96-016, I discussed how section 24 is to be applied. I said:

The wording of section 24(1) implies that it is the specific information itself that must be capable of causing the harm, if that information is disclosed. When I look at the kinds of information listed in section 24(1)(a)-(d), two things are clear to me: (i) the legislature had very specific kinds of information in mind when it was contemplating what information had the potential to cause harm if disclosed; and (ii) there must be a direct link between disclosure of that specific information and the harm resulting from

disclosure; in other words, there must be something in the information itself capable of causing the harm.

[66.] I am not persuaded by the Public Body's submissions nor did the Public Body provide evidence that the disclosure of information "could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy". Therefore, I find that the Public Body did not correctly apply section 24.

V. ORDER

[67.] Under section 68 of the Act, I make the following order:

1. The Public Body correctly applied section 16 of the Act (personal information). Therefore I uphold the head's decision to refuse access to the personal information requested.
2. The Public Body did not breach section 9(1) of the Act (duty to assist) by refusing to notify the Third Parties about the litigation involving the Disenfranchised Widows Action Group.
3. Section 31 (disclosure of information in the public interest) does not apply to bring about the disclosure of the personal information requested.
4. The Public Body did not correctly apply section 24 to the personal information requested. However, because I have found that the Public Body correctly applied section 16 to the same information, my decision under section 24 does not affect my decision to refuse access to the personal information requested.

Robert C. Clark
Information and Privacy Commissioner

Post Script:

I will be suggesting to the legislative committee reviewing the Act this year that section 29(2) of the Act be amended. In my view, granting complete discretion to a public body regarding the notification of third parties may not be appropriate. There may be circumstances when notifying the third parties, even when the public body is not considering giving access to the personal information, is reasonable and desirable.