ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-14

April 22, 2013

ENERGY RESOURCES CONSERVATION BOARD

Case File Numbers F5706, F5707, F5708

Office URL: www.oipc.ab.ca

Summary: Three Complainants made complaints that their personal information had been used and disclosed in violation of the *Freedom of Information and Protection of Privacy Act*. They complained that when the Energy Resources Conservation Board issued a decision in relation to well licence review proceedings initiated by them (from which they had withdrawn), it referred to them by name, described their medical conditions, and recounted facts about various positions taken by them throughout the proceedings. The Complainants also complained that a 'Notice of Constitutional Question' the Complainants had provided for the hearing, which contained their personal medical information, had been made available to persons who were present in the hearing room.

The Complainants also complained that the ERCB had taken into account incomplete or inaccurate personal information about them in its decision, and that it had failed to properly secure their personal information.

The Adjudicator found that the ERCB's use and disclosure of the Complainants' personal information had been in compliance with the FOIP Act, with the exception of its disclosure of the Complainants' personal medical information contained in their Notice of Constitutional Question to persons present in the hearing room. As to the latter, she found that the ERCB had failed to establish that it had met the requirements of section 40(4) of the Act in disclosing this information.

The Adjudicator decided that section 35 of the Act (ensuring accuracy of information) generally had no application to quasi-judicial proceedings, and had none in this case. As well she found that the ERCB had not established that it has reasonable security arrangements in place for determining the extent to which sensitive information such as that which was contained in the Notice of Constitutional Question should be shared with the public, and ordered the ERCB to put in place a mechanism or process that would ensure that such information would be treated appropriately.

Statutes Cited: AB: *Energy Resources Conservation* Act, R.S.A. 2000, c.E-10, section 16; *Energy Resources Conservation Board Rules of Practice*, AR 98/2011, sections 13, 25**;** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, sections 1(n), 3(c), 17, 33(a), 35, 35(a), 38, 39, 39(1)(a), 39(1)(b), 39(1)(c), 39(4), 40, 40(1), 40(1)(b), 40(1)(c), 40(1)(d), 40(1)(f), 40(4), 72.

Authorities Cited: AB: Order F2006-019

Publications Cited: British Columbia Office of the Information and Privacy Commissioner Bulletin "*Balancing Privacy and Openness: Guidelines on the Electronic Publication of Decisions of Administrative Tribunals, July 2011".*

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Issue D: Did the Public Body meet its obligations as required by section 38 of the FOIP Act (protection of personal information?)

IV. ORDER

I. BACKGROUND

[para 1] Three Complainants made applications to the Energy Resources Conservation Board ("ERCB" or "the Board") for reviews of oil and gas facility licences that had been issued to a number of companies, at various distances from their residence or lands they own or lease, on the basis of their concerns that emissions from the wells and pipelines were affecting or would affect their health.

[para 2] The Complainants provided evidence to the ERCB for the purposes of the ERCB's determination as to whether to hold hearings reviewing the licences. With regard to the terms on which particular medical evidence of the Complainants was provided and received, efforts were made by both the Board and the Complainants to bring into play

provisions in the ERCB legislation to make particular medical evidence subject to confidentiality conditions (under section 13 of the ERCB *Rules of Practice*). However, no agreement was reached between the ERCB and the Complainants in this regard, in part because the Complainants refused to permit the respondents to further disclose the information to experts or others who could assess it, and in part because no consensus was reached as to which evidence should be covered. In the result, the Complainants filed their medical information without subjecting it to these restrictions. Despite this, in a letter from ERCB General Counsel dated January 2, 2009, the ERCB undertook to treat this information in part in a confidential manner, in that it undertook to post it only on its internal Integrated Application Registry (IAR) System in contrast to its public files, to provide it to the other parties with restrictions that it be used only for the purposes of the proceedings, and not to post it on the Internet. The letter also indicated the medical information placed on the IAR would not be accessible by the public. (No discussion appears to have been undertaken with respect to whether any other evidence, including medical evidence, filed by the Complainants would or would not be available to those present at the hearing).

[para 3] The ERCB decided to hold an omnibus hearing dealing with nine applications. When the hearing commenced the Complainants raised concerns as to whether the evidence they had filed earlier would be used for the purposes of ERCB policy development, and disclosed publicly and for use by the industry, rather than used only to decide whether or not to allow their applications in connection with the facility licences.

[para 4] When these and related concerns of the Complainants, including the venue for the hearing, could not be resolved with the ERCB, the Complainants decided to withdraw their evidence, though they said they were not rescinding their objections, which were to stay on the record. The Complainants also stated they were prepared to withdraw their applications for review on the same grounds. The Complainants stated their position as a

> " … proviso that no reference in any manner to us, our property, our business, our health, our lifestyle, any other personal or business identification or discussion is not (sic) to be made."

After some intervening discussion, including submissions from counsel for respondents that the hearing could continue despite the Complainants' withdrawal, and an adjournment, the Board stated it would "allow the withdrawal" but would continue with the review respecting the licences. It said that there would need to be a revised list of exhibits, which would not include materials filed by the Complainants. The Board summarized as follows:

> "In summary, the hearing will proceed without the participation of the [Complainants] and without reference to or consideration of any of the material filed by them."

[para 5] A Notice of Constitutional Question the Complainants had provided for the hearing, which contained their personal medical information, had been included in the

public record of the hearing, and was made available in the hearing room to persons who were present, by placing copies on a table.

[para 6] The ERCB issued a decision that referred to the Complainants by name, and used particular phrases to describe their medical conditions. In its decision, most notably in an appendix (Appendix 2), the Board also recounted facts about the proceedings and about various positions taken by the Complainants throughout the proceedings. This decision was posted on the ERCB's website.

[para 7] The Complainants made complaints to the Commissioner that the personal information of each of them had been used and disclosed in violation of the *Freedom of Information and Protection of Privacy Act* ("the FOIP Act" or "the Act"). They also complained that the ERCB took into account incomplete or inaccurate personal information about them in its decision, and that it had failed to properly secure their personal information.

[para 8] The Commissioner authorized mediation to resolve the complaint. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. ISSUES

Issue A: Did the Public Body use and disclose "personal information" of the Complainants as that term is defined in section 1(n) of the FOIP Act?

Issue B: If yes, was the use and disclosure in compliance or in contravention of Part 2 of the FOIP Act?

Issue C: Does section 35(a) of the FOIP Act (which sets out the duty of public bodies, in making decisions, to make every reasonable effort to ensure the Complainant's personal information was accurate and complete), apply to the Public Body's decision making process in this case, and if so, was the duty met?

Issue D: Did the Public Body meet its obligations as required by section 38 of the FOIP Act (protection of personal information?)

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body use and disclose "personal information" of the Complainants as that term is defined in section 1(n) of the FOIP Act?

[para 9] Section 1(n) defines "personal information" inclusively, and states, in part:

> *1. In this Act,*
>
> *...*

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

…

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

…

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 10] ERCB Decision 2011 ABERCB 008 contains personal information about the Complainants. The Complainants provided a chart of all the references to their personal information in the ERCB's decision, which shows that the decision contains their names, reference to their land description, phrases that describe their health issues, particular health-related concerns, opinions about them, and their opinions. Appendix 2, which is appended to the main body of the decision, contains detailed information about steps and positions the Complainants took in the course of their participation in the hearing.

[para 11] The notice of constitutional challenge provided for the hearing by the Complainants, which contained their opinions and their personal medical information, was made available by the ERCB at the hearing, by placing copies of this document on a table in the hearing room. The Complainants say this was brought to their attention by a member of the public who was present at the hearing, and thus that it was available not only to parties but to others present, until it was removed when the Complainants withdrew. The Board acknowledged the copies were so placed, and did not contradict the evidence that people other than the parties reviewed them.

[para 12] I find that the ERCB used the personal information of the Complainants to make its decisions and disclosed the personal information of the Complainants when it issued the decision, and when it made the Complainants' Notice of Constitutional Question available to persons present in the hearing room.

Issue B: If yes, was the use and disclosure in compliance or in contravention of Part 2 of the FOIP Act?

*1. The ERCB's **use** of the Complainants' personal information*

[para 13] A public body, such as the ERCB, is permitted by the FOIP Act to use personal information in three circumstances, enumerated in section 39. Moreover, a public body may only use personal information to the extent necessary to enable it to carry out its purpose reasonably. Section 39 states, in part:

39(1) A public body may use personal information only

(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or

...

(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

a) *Was the ERCB authorized to use the Complainant's personal information by virtue of their consent within the terms of section 39(1)(b)?*

[para 14] Typically parties who initiate proceedings may be taken to consent to the use of information they submit in the proceeding. However, in this case the Complainants repeatedly make the point that when they first filed their personal medical information, they were coerced into doing so because the Board would not agree with the confidentiality restrictions they wished to have imposed under section 13 of the Board's *Rules of Practice*. Possibly one of their points is that the Board should not have used their information because they did not give genuine consent for it to be collected for the purpose of the proceeding to begin with. (However, this point would not apply to personal information of the Complainants that became a part of the proceeding but was not the subject of these confidentiality discussions. As the ERCB notes, the Complainants had instructed it in writing to file their review applications on the public record.)

[para 15] As noted above, no agreement was reached between the ERCB and the Complainants as to what confidentiality restrictions should be imposed and over what medical material, and the Complainants ultimately filed the medical information that had been the subject of those discussions without subjecting it to these restrictions, permitting it to become part of the "public record" of the proceedings. Despite this, the ERCB undertook in writing to treat this information to some degree in a confidential manner, as described at para 2 above. (The Board's terminology in this regard seems somewhat inconsistent, but given the Board's assurances, it appears that it interprets this provision such that evidence can be part of the "public record" or "public file" while still subject to the ERCB's commitments for restricting its disclosure, as described above.) No discussion was apparently undertaken with respect to whether any other evidence, including medical evidence, filed by the Complainants would or would not be similarly subject to restrictions (a point which is relevant to the discussion of the "Notice of a Constitutional Question", discussed below).

[para 16] Based on the foregoing, and the fact the Complainants rely throughout their submissions on the aforesaid commitments by the ERCB, it may be concluded that they initially consented to use of their personal medical information for the purposes of the proceedings as they initially understood these purposes, and consented to its becoming part of the public record of the proceedings, with the understanding (based on

correspondence from the Board) that the Board's commitments to restricted use of their medical information would nonetheless be met.

[para 17] However, the Complainants also say that the ERCB should not have continued to use their personal information after they withdrew their evidence and their participation. Possibly they are suggesting that any consent they did give for use of their information was withdrawn, and that by virtue of undertakings made by the Board, they had a reasonable expectation their information would not be used for the decision. They state:

> A decision is the culminating point of a proceeding. When the chair of the hearing ordered that no reference to us would be made in the proceeding, it should not have been put in the decision.
>
> When a decision is written, transcripts are to be read and referred to by the writer. It would have been impossible for the decision author to not have a very clear message that our personal information should not be referred to, because of the clarity of the discussion within the transcripts.

[para 18] The Complainants can be taken as saying, in essence, that when they decided to withdraw from the proceedings they revoked their consent to the use and disclosure of their medical information as well as any other personal information of theirs that had become part of the proceeding.

[para 19] In this regard, there appears to be a significant misunderstanding between the Complainants and the Board as to what was agreed among them with respect to the personal information respecting the Complainants that had become part of the proceeding. The Complainants stated that they wanted no reference to be made to themselves, their land, or anything about them (presumably they meant in the balance of the hearing and in the resulting decision). The Board said it would agree that the list of exhibits would be altered and that there would be no reference to the *filed medical evidence* in the remainder of the proceedings.

[para 20] There is an important distinction between 'no reference to the Complainants' (which the Complainants had asked for) and 'no reference to the materials filed by them' (to which the Board agreed).

[para 21] In saying this I acknowledge that after the Complainants decided to withdraw, the Board Chair made comments that it might be possible for the properties to be referenced in the hearing thereafter as Property A and Property B, and for the proceedings to involve no further reference to the Complainants by name (Transcript p. 285). As well, in the course of discussing how the proceedings would continue in the absence of the Complainants' evidence, the Board Chair commented that it was not just medical evidence that the Complainants had withdrawn, it was all their evidence. (Transcript p. 265) However, these comments relate to how the Complainants' evidence, or its absence, is to be treated *in the rest of the proceedings*. They do not relate to whether

the Board's final decision can refer to what had transpired before the Complainants decided to withdraw.

[para 22] In my view, given the context in which the Board's reference to "filed medical evidence" was made, this reference was to the filed documentary evidence which it would be possible to remove from the record of the proceeding, in contrast to information that had been presented by the Complainants in some other form prior to their withdrawal, for example orally, or in their initial applications to the Board. In other words, these words did not cover what was in the knowledge of the Board as to the reasons the proceeding had commenced, in terms of the general nature of the Complainants' concerns, or the location of their properties in relation to the licenced oil and gas facilities.

[para 23] The discussions in the transcripts that were appended by the Complainants in their initial submission make it clear that the balance of the proceedings would include an examination of the effect of the wells relative to the particular types of health concerns that had been raised by the Complainants specifically (even though the details and supporting materials about their concerns would not be taken into account because they had been withdrawn). As well, the discussion would be about wells that were located surrounding the Complainants' properties, because it was the emissions from these particular types of facilities that had given rise to the Complainants' concerns and that had caused the hearings to be undertaken. Counsel for the respondents in the proceeding pointed out that it was precisely these health concerns (which had been provided to the respondents), as related to the facilities in the particular locations, that the experts for the respondents had prepared to address. The basis for the Board's decision to proceed was its conclusion that *these matters* could still be examined despite withdrawal of the Complainant's filed evidence.

[para 24] As the Complainants were present for these discussions, they must have understood that the hearing would proceed relative to the types of health concerns they had raised, and relative to the particular wells and pipelines. Given that they knew these things, I do not agree with the Complainants that they had a reasonable expectation that the 'withdrawal of their consent' would result in compliance with their 'proviso' that no further reference at all would be made to them or to their medical concerns or conditions, or to the facilities surrounding their particular properties. In other words, at that point, given the matter was going to proceed, the Complainants were not in a position to withdraw their consent to use of that part of their information which could not effectively be withdrawn, and cannot be taken to have done so. They do not argue that they objected to the continuation of the proceedings. In my view, by initiating and participating in the proceeding to some degree, they can be taken to have consented to the use of that part of their personal information which they could not effectively withdraw.

a) Was the ERCB authorized to use the Complainant's personal information as a use for the same or a consistent purpose as the purpose of collection (section 39(1)(a))?

[para 25] Furthermore, the consent of an individual is only one provision permitting a public body to use personal information. If a public body uses personal information in accordance with section 39(1)(a) (or 39(1)(c)), the consent of the individual who is the subject of the information is not required, and conversely, their objection is not relevant.

[para 26] The ERCB argues that it used the Complainants' personal information for the purpose for which it was collected within the terms of section 39(1)(a): it collected the personal information to make decisions regarding the Complainants' application for a review, and to conduct the review. It says:

> The ERCB used the Complainants' personal information to make decisions about granting review hearings to the Complainants. In December, 2009, the Board decided to grant a number of the review applications filed by the Complainants, and directed that nine of the applications be heard together in an omnibus review hearing.
>
> In an organizational meeting that preceded the review hearing, the Complainants and their legal counsel asked the ERCB to file all the information the Complainants submitted with their original review applications, including the medical information they submitted, on the public record of the review hearing.
>
> The ERCB used the Complainants' personal information for the same purpose for which it was collected, namely to make decisions about granting the Complainants' review applications, and subsequently to conduct the review hearing that was granted (at least to the point that the Complainants withdrew from the hearing). The uses were authorized by subsection 39(1)(a) of the FOIP Act and were done in compliance with subsection 39(4) of the FOIP Act.

[para 27] Having reviewed Decision 2011 ABERCB 008, I am satisfied that the personal information of the Complainants contained in this decision was used for the purposes of making both the initial decision for granting review hearings, and for the Board's final determination. With respect to the final determination, despite the Complainants withdrawal of their participation and their evidence in the early stages of the hearing itself, their personal information (though not the filed documentary medical evidence that was withdrawn) was used to some degree to make decisions with respect to the gas and oil facilities surrounding the Complainants' lands, and to make findings with respect to persons who might have medical issues like those of the Complainants. The presence of some of the Complainants' evidence was in a sense implicit rather than explicit.

[para 28] I acknowledge that after the initial decision to grant the hearing had been made, a dispute arose between the Complainants and the ERCB as to what the purpose of the hearing, and consequently the purpose for the use of their personal information in the hearing, was to be. As noted earlier, the Complainants wanted the hearing and the evidence to deal only with their particular concerns and nothing else, and for their

personal information not to be used for or shared with industry or the public. The Board took the position that the particular hearing and consequent decision, as with all hearings and decisions of the ERCB, would constitute policy in the sense that it would become a precedent and constitute persuasive authority for similar situations. The failure of the Complainants and the Board to reach a consensus about these ideas may in part have caused the Complainants to withdraw.

[para 29] I do not regard this difference of opinion as detracting from my conclusion that the Board's use of the Complainants' personal information was for the same purpose as the purpose of the ERCB in collecting the information, which was to decide the issues the Complainants had raised (using the information to different degrees at different stages of the proceeding, and not using their filed medical information at all). I do not agree with the Complainants that it was not necessary for the Board to use their information to make its final determination after they withdrew. As explained above, the nature of their concerns and the location of the oil and gas facilities necessarily remained issues (though *not expressly* with reference to them) in the remainder of the proceedings. Thus I find that the ERCB's use of the Complainants' personal information was necessary to make its decisions and was permitted by section 39(1)(a) of the FOIP Act.

[para 30] As well, the ERCB used the Complainants' personal information when it wrote its decision. As a public body, the Board generally has an obligation to record and present to the public a coherent and understandable account of its proceedings. The nature of the Complainants' involvement, including their initiation of the proceedings, the basis on which they did this, and why the final decision did not directly address them, were all necessary to make that account coherent. As well, to a lesser degree, the Board made some reference to what it knew about the Complainants' medical concerns, and the location of their lands, to explain its final determinations in the hearing. Again, I find this use was for the same purpose for which the information was collected, and was permitted by section 39(1)(a).

b) Did the ERCB meet the terms of section 39(4) – use only to the extent necessary?

[para 31] The next question I must consider is whether the ERCB used only such personal information as was necessary to carry out its purpose in a reasonable manner.

[para 32] I have already explained why I thought the Board needed to use the Complainants' personal information, to varying degrees, to make its determinations in the hearing, including its determinations as to their participation and withdrawal, and indirectly as to some of the substantive issues in the proceedings thereafter. I do not regard any of the personal information that it used for making its decisions as superfluous to that purpose.

[para 33] As to use of the information *in writing the decision*, the Complainants also argue that more of their personal information was used to write Decision 2011 ABERCB 008 than was necessary. They suggest that Board should have restricted references to their personal information. For example, they say:

> Furthermore, if the board wished to make the same conclusion they could have stated simply, "According to the evidence before them there are no special needs." Once they identified us and stated we, as applicants had stated our concern was special needs the disclosure was inappropriately used.

[para 34] Had the Board written the decision in the way the Complainants suggest, or without making any reference to them, the decision might have been vulnerable to judicial review on the ground that the Board's reasons were vague and contained insufficient justification for the decision. Moreover, it would have been unclear as to why or how certain events had transpired, and what issues had been decided and why. As noted before, this would detract from the coherence and defensibility of the decision, as well as its value as a precedent for both procedural and substantive issues.

[para 35] For the reasons above, I find that the ERCB's use of the Complainants' personal information in making decisions and issuing reasons was in compliance with section 39(4) of the FOIP Act.

c) Comment on the intersection between the FOIP Act and the information-handling responsibilities of quasi-judicial bodies

[para 36] Before leaving the present section, I will take the opportunity raised by the facts of this case to comment on the scope of the jurisdiction of the Information and Privacy Commissioner (and of the scope of my jurisdiction as her delegate), in relation to dealings with personal information by quasi-judicial bodies. Quasi-judicial decision makers very often deal with personal information in their quasi-judicial roles: pursuant to their statutory and common law powers, they gather evidence, share it with parties, use it to make decisions, and disclose it to other parties and to the public when they issue written reasons. What is the role of the Commissioner in this context?

[para 37] The FOIP Act does not exclude quasi-judicial decision makers from its scope. However, it does permit them to collect use and disclose personal information where such dealings with information are authorized or required by statute (sections 33(a), 39(1)(a) and 40(1)(f)). Sometimes a tribunal's statutory powers in relation to information will be well-defined – it will be clearly required by its statute to deal with personal information in various ways, and may both follow its own provisions and still comply with FOIP by reference to the FOIP provisions just cited. However, in other cases tribunal powers over information are merely permissive rather than mandatory, or are grounded in the common law, and the intersection between their powers and FOIP's restrictions are less clear. For example, there may be no statutory provision clearly directing a tribunal to gather relevant evidence, or to disclose evidence in the course of issuing or publishing written decisions. Generally, tribunals may still do these things as a function of their common law ability to do what is necessary and incidental for performing their decision-making duties, but in the absence of clear statutory

requirements for particular dealings with information, FOIP's restrictions come more into play.[1]

[para 38] If that is so, it is important to ensure that the restrictions on dealings with personal information under the FOIP Act are not applied so as to interfere inappropriately with the statutory functions of the tribunal, in relation to what evidence it may gather, what evidence it treats as relevant, what evidence it uses in developing and issuing its decision, and to whom and to what degree (in terms of personally identifying information) the personal information it has relied on needs to be disseminated (though the last of these is arguably more than the others also within the province of the Commissioner).

[para 39] Section 16 of the *Energy Resources Conservation Act* (ERCA) grants the ERCB the powers to do things that are necessary or incidental to performing its statutory functions. It states:

> *16 The Board, in the performance of the duties and functions imposed on it by this Act and by any other Act, may do all things that are necessary for or incidental to the performance of any of those duties or functions.*

[para 40] This would include the authority to gather personal information as evidence, use it to make decisions, and disclose it in issuing reasons. It does not appear, however, that these provisions obviate the duty to comply with the restrictions on dealings with personal information under the FOIP Act.

[para 41] As well, as already discussed, ERCB *Rules of Practice* section 13 contains provision for parties to apply to have their evidence dealt with confidentially, which the Board may grant on any terms it regards appropriate. However, that provision concludes with the clause:

> *13(6) Nothing in this section limits the operation of any statutory provision that protects the confidentiality of information or documents*

This clause presumably includes the provisions in FOIP that deal with confidentiality of personal information in the hands of public bodies.

[para 42] Based on the foregoing, in my view, the FOIP Act does have some application to the ERCB in its dealing with personal information, even as a quasi-judicial maker. However, as noted above, in applying FOIP's restrictions to such dealings, it is very important to avoid encroaching on the Board's exercise of its quasi-judicial responsibilities. It is only when a quasi-judicial body can be said to be handling personal information in a manner clearly outside the scope of what is reasonable, for example by gathering or requiring, or disclosing, personal information that is entirely extraneous to its proceedings – where, in other words, it ranges outside its own territory and brings

[1] The FOIP Act also provides, in section 3(c), that it is not to be taken to "limit the information otherwise available by law to a party to a legal proceeding".

itself into the territory covered by the FOIP Act, that a response from the Commissioner is required. To put this another way, any application of the standard of reasonableness for dealings with personal information imposed the FOIP Act to a quasi-judicial body's dealings with personal information in the course of exercising it quasi-judicial functions should be done only in situations in which the possibility of impropriety in those dealings has clearly been raised. Even then it should be done with great care and deference to the expertise of the quasi-judicial body.

[para 43] Thus, the foregoing review of the manner in which the ERCB collected and used the personal information of the Complainants in this case was undertaken not to see whether I was in precise agreement with the manner in which it had dealt with personal information in reaching its decision, or if I agreed with the procedural and substantive decisions which it based on this personal information. Doing so could involve limiting the issues the ERCB may decide, or interfering with its decision making, despite the authority conferred upon it by the legislature to do these things. Rather, it was to see whether the ERCB had somehow strayed in its use of personal information in the manner described above. In my view, it is clear it had not.

d) *Conclusion re **use***

[para 44] I am satisfied that the ERCB had authority under section 39 of the FOIP Act to use the personal information of the Complainants in making its decisions and issuing reasons for decision, and that it did so only to the extent necessary for meeting its purposes in a reasonable manner.

*2. The ERCB's **disclosure** of the Complainants' personal information*

[para 45] A public body may disclose personal information only in compliance with a provision of section 40 of the FOIP Act. In this case, the provisions of section 40 that are possibly relevant are the following:

> *40(1) A public body may disclose personal information only*
>
> > *(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,*
> >
> > *(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
> >
> > *(d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure,*
> >
> > *(f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,*
> >
> > *(bb) when the information is available to the public…*

(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 46] As with section 39 with respect to use, a public body needs to meet only one of the provisions in section 40(1) in order to be authorized to disclose information.

[para 47] The Complainants argue the following:

> The use and disclosure then, was not in adherence to Section 39(1)(a)(b) and 39(4), 40(b),(c),(d),and 40(f).
>
> FOIP Guidelines and Practices (2009) page 268 states that individuals have the right to request that information outlined in that section not be disclosed. If an individual has requested that the information not be disclosed it cannot be disclosed under section 40 unless another provision in that section permits the disclosure.

[para 48] The ERCB argues:

> The ERCB's disclosure of the Complainant's personal information was authorized by subsections 40(1)(c), (d) and (f) of the FOIP Act. In addition, much of the Complainant's personal information that was disclosed by the ERCB is available to the public within the meaning of subsection 40(1)(bb) of the FOIP Act. The ERCB does not, however, rely on subsection 40(1)(bb) as authority to release the Complainant's personal information, but rather refers to the public availability of the Complainant's personal information as indicating that disclosure would not be an unreasonable invasion of the Complainants' privacy.
>
> The public availability of the Board's decision report relating to the review hearing, which contains some of the Complainants' personal information, is necessary in order to fulfill the Board's function of advising oil and gas operators of individuals (namely the Complainants) who have concerns about industry facilities and operations. The Complainants have told the ERCB that it has a legal duty to inform the oil and gas industry about their concerns over facilities and operations in the area of their lands, to ensure that industry provides them with notification of any intended development.

a) Disclosure of the personal information via Decision 2011 ABERCB 008

i. Was the disclosure for the purpose for which the information was collected or compiled or for a use consistent with that purpose (section 40(1)(c))?

[para 49] The personal information contained in Decision 2011 ABERCB 008 was gathered by the ERCB for the purpose of deciding and disposing of the issues raised by the Complainants. Tribunals are required to give reasons for a decision as a matter of fairness, and disposing of the issues included this obligation to give reasons for the decision. I therefore find that the personal information of the Complainants that was disclosed through release of the decision was disclosed for the purposes for which the

information was collected within the terms of section 40(1)(c), that is, to decide and dispose of the issues initially raised by the Complainants.

ii. Did the Complainants consent to the disclosure of their personal information in the prescribed manner (section 40(1)(d))?

[para 50] As discussed earlier, the Complainants withdrew their filed medical evidence, and their participation, from the hearing. As also discussed earlier, they were not in my view in a position to withdraw their written consent to the Board's use of all of their personal information that had become part of the proceeding, nor, in my view, did the Board agree that they could do so. The withdrawal of their consent for use of their personal information could extend only to information that could effectively be removed at the time of their withdrawal, and to which the Board agreed.

iii. Was the disclosure for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure Section 40(1)(f))?

[para 51] The ERCB was also authorized by section 40(1)(f) to disclose the Complainants' personal information. Section 16 of the *Energy Resources Conservation Act* (ERCA) grants the ERCB the authority to do things that are necessary or incidental to performing its statutory functions. It states:

> *16 The Board, in the performance of the duties and functions imposed on it by this Act and by any other Act, may do all things that are necessary for or incidental to the performance of any of those duties or functions.*

[para 52] Communicating an order or decision to affected parties, and the reasons for it, is a power clearly both necessary and incidental for the ERCB to exercise its order making function under the ERCA. As well, part of the Board's role as a regulator also requires it to provide important decisions to a broader public. This was such a decision. Thus section 40(1)(f) was engaged in this case, and authorized the Board to write and publish its decision.

iv. Was the disclosure not an unreasonable invasion of a third party's personal privacy under section 17 (section 40(1)(b))?

[para 53] As I find that sections 40(1)(c), (d) and (f) authorize the disclosures made by the ERCB, I need not consider whether section 40(1)(b) also authorizes the disclosure.

b) Disclosure of personal information contained in the Notice of Constitutional Question

i. Was the disclosure for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure Section 40(1)(f))?

para 54] Section 25 of the *Rules of Practice* requires parties to file notices of constitutional questions. Section 13 of the *Rules of Practice* requires that all filed documents be placed on the public record. While section 13 of the *Rules of Practice* outlines a process for filing documents confidentially, the evidence of the parties establishes that the Complainants did not engage that process with respect to this document.

[para 55] Therefore, leaving aside whether it was a reasonably necessary for the Board to do this to fulfill its purposes (within the terms of section 40(4)), placing the Notice of Constitutional Question on the public record was authorized by the *Rules of Practice*, and consequently by section 40(1)(f).

[para 56] It might be argued that once it was on the public record without restrictions, it was reasonable for the Board to place the document in a place where members of the public who attended the hearing could review it and come to know of its contents, in the same manner that they would come to know of other evidence entered into what is necessarily, by virtue of the ERCA, a public proceeding.

[para 57] However, I have some reservations about the manner in which the Board treated this document. It was noted earlier that despite the Complainants' having decided to place the medical information that was the subject of section 13 discussions on the public record, the Board offered assurances that it would post that information only on its internal Integrated Application Registry (IAR) System in contrast to its public files, that it would provide it to the other parties with restrictions that it be used only for the purposes of the proceedings, and that it would not post it on the Internet. The letter also indicated the medical information placed on the IAR would not be accessible by the public. In other words, the ERCB seems to interpret its own rules such that the mere fact a document is on the public record does not mean it is not to be accorded some degree of confidentiality.

[para 58] A considerable amount of the Complainants' information contained in their Notice of Constitutional Question was similar in kind and level of detail to that the ERCB undertook to treat in the manner just described. It is therefore not clear to me why the Board would treat the medical information in this record differently than it treated the other medical information (to which it accorded a substantial degree of confidentiality despite the absence of any confidentiality agreement). Possibly, though there is no evidence in this regard, the Complainants submitted the Notice with the same expectations as they had reasonably held, given the Board's assurances, with respect to their other medical information.

[para 59] I will therefore address this medical information further under the heading of section 40(4) below – whether the disclosure of this information in the particular manner it was disclosed (in the hearing room) was a disclosure only to the extent necessary for the Board to meet its purposes in a reasonable manner.

[para 60] As well, because the Board did not make submissions about this issue beyond acknowledging the availability of the information in the hearing room and that no claim was made for confidentiality with respect to it, it is possible it simply failed to take the sensitivity of the information into account in making it available in this way. I do not know if it did or did not in fact consider that the information was sensitive in choosing how to treat it, or even whether it knew about it. I believe that in hearings involving sensitive personal information, the Board ought to ensure that it at least considers what level of public dissemination is appropriate with respect to sensitive personal information that may be contained in documents provided in parties' submissions. I will therefore also consider this issue further under section 38 (reasonable security arrangements), below.

c) Did the ERCB meet the terms of section 40(4) – disclosure only to the extent necessary?

[para 61] I must now consider whether the Public Body disclosed the Complainants personal information only to the extent necessary for meeting its purpose for doing so in a reasonable manner, as required by section 40(4) of the FOIP Act.

i. Decision 2011 ABERCB 008

[para 62] The Complainants object to the fact that the ERCB made the decision disposing of their issues, which referred to them by name, available on its website. The Complainants also take the position that it was unnecessary to name them or to include personal identifiers in the decision. They state:

> None of the reasons the ERCB used in their submission for using or disclosing our information in the decision or disclosing it on the internet were valid. The decision was only required to be provided to the participants, not posted on the internet. Letters from ERCB counsel dated November 23, 2008, January 2, 2009, January 12, 2009 described a method that could be used to get "the message" the board wanted to convey without using and disclosing identifying information about us. Furthermore, if the board wished to make the same conclusion they could have stated simply, "According to the evidence before them there are no special needs". Once they identified us and state we, as applicants had stated our concern was special needs the disclosure was inappropriately used

[para 63] The ERCB states:

> In summary, if the ERCB was denied the ability to publicly identify the Complainants and the location of their lands in the Decision Report, then the report itself would do nothing more than [dispose of] the nine review application that were considered in the review hearing. It would not provide direction to the industry or the Complainants on

> the Board's interpretation of section 2.2.1(4) of Directive 56, as that requirement relates to the Complainants and other landowners in the Vulcan area. This is not a trivial matter as the Complainants have filed dozens of review applications and objections to the development, and they continued to file those after the issuance of the Decision Report.
>
> In the Board's view the need to communicate this interpretation to operators and other stakeholders in the Vulcan area is a legitimate ERCB business objective that can only be accomplished by identifying the Complainants and their lands in the Decision Report. In this case, which is unique in every respect, the Board's need to do this is absolutely critical and is not just a convenient or desirable by-product of the review hearing. In any other circumstances the Board may have considered omitting from the Decision Report any reference to the Complainants (although that was not the Board's understanding of the Complainant's request – the Board understood the Complainants to withdraw their evidence and arguments), but not in this case. Given the amount and kind of the personal information of the Complainants that already existed in the public realm, most of which the Complainants themselves disclosed or permitted to disclose, the ERCB believes that allowing broad public access to the Decision Report serves an important purpose and does not result in an unreasonable invasion of the Complainants' privacy.

[para 64] I accept that there are circumstances when the ERCB must include personally identifying information its written decisions, and to make them public, in order for the decisions to clearly resolve issues and to effectively serve as a precedent in related matters. As I have already stated, despite the Complainants' withdrawal of both their participation and their medical evidence, the decision needed to refer to their role as the initial applicants for review in order to present a coherent statement of how the matter had arisen and what it consisted of, and in order to clearly identify the full range of issues which the Board was proceeding to hear, so as to dispose of them as fully as possible.

[para 65] The Board also adverted to the fair degree of public attention the Complainants had themselves already attracted relative to their issues (citing an article published on the Internet entitled "Citizen Encana", which contains an interview with the Complainants, names them, and contains references to the location of their farm, their family history, and the health problems they attribute to the activities of natural gas companies in their area). It was reasonable for the Board to expect that members of the public and of industry who had heard of these matters might be expecting a resolution that named the Complainants, and might be watching for the resolution referable specifically to them. In other words, naming the participants in the decision posted on its website would be the most effective way for the Board to communicate the resolution of the issues they had raised with such people and organizations. Moreover, the fact the decision did not disclose any information that was not already public to some degree was a factor making it reasonable to include such information in the decision.

[para 66] I therefore find that in including some personal information of the Complainants in the decision, and posting it on its website, the Board had met the requirements of section 40(4).

ii. The Notice of Constitutional Question (medical information)

[para 67] As already noted, I have no knowledge about the purpose of the disclosure to those present at the hearing of the medical information that had been included in the Notice of Constitutional Question. The Board has given no rationale for this disclosure, other than that it was permitted by its statute and no confidentiality application was made. I must also have regard to the Board's contrasting treatment of other medical information that was on the public record (which it did not regard as necessary to disclose to the public). In view of these factors, I cannot find that this latter disclosure was only to the extent reasonable for meeting the Board's purposes.

d) Conclusion re ***disclosure***

[para 68] I am satisfied that the ERCB had authority under section 40 of the FOIP Act to disclose the personal information of the Complainants in its decision that it posted on its website.

[para 69] Although I agree with the Board's decision to post Decision 2011 ABERCB 008 on its website, consideration might be given, going forward, to technologies ("robot exclusion protocols") that restrict the ability to search websites by name with the use of search engines.[2] It is possible that the Board's need to communicate with the public and industry, for cases such as the present one, could be met even if such privacy-enhancing technological restrictions were put in place for this category of publication.

[para 70] As to the medical information that was contained in the Notice of Constitutional Question, I find the Board would be authorized by its own legislation to disclose such information to the public if done in a reasonable manner. However, I find the Board has failed to establish that the latter disclosure (to persons present in the hearing room) was necessary for the Board to carry out its purpose in a reasonable manner within the terms of section 40(4).

Issue C: Does section 35(a) of the FOIP Act (which sets out the duty of public bodies, in making decisions, to make every reasonable effort to ensure the Complainant's personal information was accurate and complete), apply to the Public Body's decision making in this case, and if so, was the duty met?

[para 71] Section 35 of the FOIP Act imposes a duty on public bodies to ensure that the personal information with which they make decisions is accurate and complete. It states, in part:

> *35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must*

[2] These are mentioned in the British Columbia Office of the Information and Privacy Commissioner Bulletin "*Balancing Privacy and Openness: Guidelines on the Electronic Publication of Decisions of Administrative Tribunals, July 2011".*

> *(a) make every reasonable effort to ensure that the information is accurate and complete…*

[para 72] The Complainants argue that the ERCB did not meet the requirements of section 35(a) when it referred to their personal information in Decision 2011 ABERCB 008. They state:

> Throughout this Inquiry submission we have shown our medical information was not to be used in Decision 2011-008. Due to our review applications being withdrawn the purpose for our medical information did not exist. Due to our personal information being withdrawn it was not before the board to consider in a decision. The issue of the inaccuracy of information disclosed in the decision stems from its use when we could not, due to becoming ill, defend and explain it or contradict the inaccurate referral by the opponents at the hearing. Whether the board had a proper understanding or not, only became an issue when they used the information. The harm that has been caused form the misconception or inaccurate information was caused because the inaccurate information was disclosed in Decision 2011 ABERCB 008. The harm continues due to the ERCB continuing to use the inaccurate information in subsequent administrative decisions while refusing to correct the inaccuracy when using the medical information.

[para 73] In these statements the Complainants argue that because they withdrew their evidence, and withdrew from the hearing, the evidence before the ERCB about them or affecting them was inaccurate or incomplete. They believe that the conclusions about their conditions drawn by the ERCB on the basis of this partial evidence and the evidence of the respondents, and without their own additional evidence and submissions (as these conclusions were stated in Decision 2011 ABERCB 008) are also inaccurate. The Complainants disagree particularly as to whether they should be regarded and treated as "special needs" individuals within the terms of the ERCB Practice Directives, and as to whether they are properly described as hyper-sensitive rather than hyper-susceptible. They are also concerned that these allegedly inaccurate conclusions are being used to make subsequent (similarly erroneous in their view), administrative decisions.

[para 74] The ERCB argues:

> In principle, the ERCB expect that section 35 of the Act does apply to the ERCB's decision making process. In this case, however, it only applies to the Board's December, 2009 decision to grant the Complainants a review hearing on nine of their review applications. That is the only decision the Board made that directly affects the Complainant's rights and that decision was made in the Complainants' favour. Section 35 does not apply, or more correctly cannot apply, to the Board's decisions contained in the Decision Report because those decisions do not directly affect the Complainants. When the Complainants withdrew from the review hearing the Board directed that the evidence provided by the Complainants was to be disregarded for the purposes of completing the review hearing. The Decision Report is focused on a technical analysis of the behavior of emissions from the oil and gas facilities that were examined during the review hearing. While the conclusions drawn by the Board in that hearing are related to potential impacts on human health, they are general in nature and not specific to the Complainants. There is nothing in the Decision Report that constitutes a decision made by the Board that both directly affects the Complainants and was arrived at in

> reliance on the Complainant's personal information. None of the Complainants' personal information was relied on by the Board.
>
> In addition, the ERCB submits that it met its duty under section 35 FOIP Act. It did so by following the principle of direct collection. The Complainants' personal information that was collected, used and disclosed by the ERCB in relation to the review application was collected directly from the Complainants. Any inaccuracies in the information provided by the Complainants could, at any time, have been corrected by the Complainants themselves. To be clear, however, while the Complainants may disagree with the conclusions drawn and decisions made by the Board in the Decision Report, that is not the Complainants' personal information. It is, rather, findings made by the Board following a quasi-judicial process that the Complainants were entitled to participate in but did not.

[para 75] As may be apparent from the views I have expressed in the earlier parts of this order, I do not accept the Board's view that Decision 2011 ABERCB 008 does not directly affect the Complainants within the terms of section 35(a) of the FOIP Act, that the decision did not rely on the Complainant's personal information, or that the conclusions in the decision are not the Complainants' personal information.

[para 76] Paragraph 18 of Decision 2011 ABERCB 008 establishes that the ERCB considered production operations, emissions and health effects to be relevant to its review of licences. The Complainants had applied to the ERCB to review the licences on the basis of their view that emissions from the licenced facilities were affecting their health. Clearly these interests of the Complainants were relevant to the decision to be made by the ERCB. In addition, the ERCB noted at paragraph 2 of its decision that the Complainants had "an enhanced susceptibility to emissions". Elsewhere in the paragraph, the ERCB referred to the Complainants as having submitted in an earlier application that they have "special needs due to enhanced sensitivities to emissions". The ERCB concluded in the decision that there "would not be special needs individuals" as defined by its directive in relation to any of the facilities that were the subject of the licences, and that the appropriate range for requisite notifications and consultations under its directives could be reduced. As well, the ERCB confirmed the licences without amending them.

[para 77] In my view, the ERCB did use the Complainants' personal information in making Decision 2011 ABERCB 008 (although it did not use their filed medical evidence that the Complainants had withdrawn). As well, the issues raised by the Complainants were the very issues to which the respondents in the proceeding were responding, and the ERCB in its decision was in part deciding (though without explicit reference to them). Similarly, the ERCB decision to confirm the terms of the licences without amendment, and to change the requirements respecting appropriate radial distances for notification and consultation, were decisions directly affecting the Complainants.

[para 78] Despite these observations, however, I find that section 35(a) is not engaged in this case. Indeed, I find that trying to engage it raises precisely the concern I outlined in paras 38 and 42 above – that the FOIP Act must not be used to interfere with or encroach upon tribunals in the exercise of their quasi-judicial responsibilities. In my view, trying to inject section 35 considerations into the middle, or at the end, of the

exercise of a quasi-judicial function is a clear and inappropriate interference with that function. It is up to the quasi-judicial decision maker to decide what evidence to accept or require, and what findings of fact to make. If it were appropriate for parties in disagreement with these decisions to try to engage section 35(a) and the related authority of the Commissioner, as the Complainants have tried to do in this case, the Commissioner would be in a position to – indeed would have the responsibility to – inquire into every allegation by a Complainant that a tribunal had taken into account inadequate or unreliable evidence or made incorrect findings of facts. Clearly, a party to a proceeding that has such concerns is to take them to the courts on judicial review rather than to the Commissioner.

[para 79] Given these considerations, in my view, despite its broad wording, section 35(a) is to be engaged primarily in relation to information that does not depend, for the determination of its accuracy, on a quasi-judicial process. Rather, resort may be had to it where a public body is to make a decision on the basis of information the accuracy of which is readily ascertainable by reference to concrete data. As the Adjudicator noted in Order F2006-019, section 35 is intended to promote fair information practices and data quality in relation to personal information.

[para 80] Further, even if I am wrong in my view that section 35(a) is not engaged in this case, I note that this provision does not require a public body to absolutely ensure information is accurate, but only to *make reasonable efforts* to ensure it is so. The evidence and submissions of the parties document the efforts the ERCB made to obtain evidence from the Complainants. I am satisfied the ERCB made adequate efforts to ensure that the personal information necessary for it to make its decision was before it. The ERCB provided the Complainants with notice of the hearing, shared the evidence and submissions of other parties with them, and gave them a reasonable opportunity to submit their own evidence and submissions, including the imposition of confidentiality restrictions on some of the evidence, and the opportunity to explore options for accommodation other than a venue change (such as written submissions and teleconferencing). The decision of the Complainants to withdraw their evidence and not to participate is the only basis for their position that the information before the ERCB was inaccurate or incomplete when it made its decision. This decision on the Complainants' part to withdraw does not change the fact the ERCB took reasonable steps to obtain accurate and complete personal information from them.

[para 81] I find that if section 35(a) is engaged in this case, the ERCB complied with its terms.

Issue D: Did the Public Body meet its obligations as required by section 38 of the FOIP Act (protection of personal information?)

[para 82] Section 38 of the FOIP Act imposes a duty on public bodies to ensure that personal information is secure. This provision states:

> *38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.*

[para 83] The Complainants argue that the ERCB did not meet its duty under section 38. They state:

> Section 38 of the Act refers to the head of a public body must protect personal information [sic]. The ERCB is one of the public bodies which is to adhere to the *Administrative Procedures Act* which at Section 7 states only each party of the proceeding need be furnished with a decision. Thus the disclosure of our personal information did not adhere to the Administrative Procedures Act nor the Administrative Procedures and Jurisdiction Act. Therefore the safeguards provided in the various Acts and statutory provisions that we spoke of in Issue #2 did not prevent the ERCB from disclosing our personal information on the internet.
>
> Neither was there any security arrangements in place against such risks as unauthorized access, collection, use, disclosure or destruction when the ERCB disclosed our personal medical information contained in the Notice of Question of Constitutional Law by putting a stack of that document on a table to be accessed by handouts by anyone who picked it up. It was member of the public who became alarmed by the disclosure and notified me of the disclosure.
>
> The fact that a dispute on privacy matters between the ERCB and us was on going for over 8 years would indicate that anyone involved in this hearing would have or should have known to be extremely careful to not use our personal information in a decision especially when it was not required. A decision is the culminating part of a proceeding. When the chair of the hearing ordered that no reference to us would be made in the proceeding it should not have been put in the decision.

[para 84] With regard to the Complainants' argument that the ERCB failed to safeguard their information, the ERCB states:

> In the case of the review applications and hearing that gives rise to this Inquiry, the Complainants' medical information was not filed on the public record of their review applications (thereby used by the ERCB) until the conclusion of a long process that ended with the Complainants refusing the terms of a confidentiality order that was granted by the ERCB. After the date on which the Complainants instructed the ERCB to file their medical information on the public record of their review applications, the material was available from the ERCB's Information Services facility in the ERCB's Main Office in Calgary. In accordance with the ERCB's normal practice, their medical information has never been made available on the Internet by the ERCB in connection with their review applications. In fact, following the recommendations of the OIPC in Investigation Report F2007-IR-002, the ERCB has not made landowners' submissions filed in review applications, or intervener submissions filed in regular applications, available on the Internet. Accordingly, the ERCB has not made any of the Complainants' filings in the review applications or review hearing available on the Internet. Public access to the Complainants' personal information contained in the submissions they filed in the public record of the review proceedings was only available by contacting the ERCB directly. In addition, on December 2, 2010, being the

> date the Complainants withdrew from the review hearing, the ERCB removed the Complainants' submissions filed in the review applications and review hearing from the public record of those proceedings. Accordingly, their personal information (apart from what may be revealed in the Decision Report, which is publicly available on the Internet) is not publicly available, and is only available to ERCB personnel except where a "need to know" is demonstrated (for example to respond to the Notice of Inquiry herein).

[para 85] I have found that the ERCB had authority to include the Complainants' personal information that it included in its decision and to post it on its website, and that it did so only to the degree necessary to achieve its purposes. As a result, these disclosures were not "unauthorized" within the terms of section 38, and the provision is not engaged.

[para 86] As to the Complainants' Notice of Constitutional Question, I have already found the ERCB was authorized to treat this document as a public record by virtue of its *Rules of Practice.* However, it is not clear that this requires public disclosure. In my view, in order to meet the requirements of section 40(4), the Board ought to have considered whether disclosure of the sensitive medical information in that document to the persons present at the hearing was necessary to meet its purposes in a reasonable manner, and it ought to have disclosed this information only if it regarded this disclosure as necessary for such a purpose. Possibly this was done, but the ERCB's evidence does not establish that it was. Possibly as well, the explanation is that the Board did not know the information was contained in the document. However, to the extent it is the Board's practice to put information in a place where it is accessible by the public, it should have a mechanism for making a reasonable effort to learn of the possible sensitivity of such information beforehand.

[para 87] The ERCB did not provide any evidence about this document, other than to acknowledge it was available in the room and to say that no confidentiality application had been made. Therefore, I cannot say whether it has any process in place to ensure it considers whether, to what degree and in what manner there should be dissemination to the public of sensitive information submitted to it in hearings, or to try to ensure that it knows about the presence of such information. In my view, section 38 requires this for circumstances such as the present. I will order the ERCB, in the event it has no such mechanism or process, to put one in place.

[para 88] I acknowledge in saying this that the ERCB may point to section 13 as already achieving this objective, so that any additional process would be superfluous. It may also point to the fact the Complainants had the option to make an application under that provision for this particular information but did not. However, as I have noted, it appears that the Board may impose confidentiality to some degree relative to the public even though section 13 has not been engaged and submissions are placed on the "public record", which suggests the Board itself believes this may be appropriate regardless.

[para 89] I also note that the process I suggest could involve placing an onus on parties to bring to the attention of the Board at the time of making their submissions that

sensitive information is being included, as it may be overly onerous to expect the Board to review all submissions at an early stage with the consideration of how to treat them, in terms of confidentiality relative to the public, in mind. For example, it seems quite likely the Board would not have anticipated that a 'Notice of Constitutional Question' would contain sensitive medical information, nor would it necessarily be reasonable to expect such a thing. Thus the process I suggest would be satisfied if the parties themselves were in effect required to initiate at an appropriate stage the consideration of what degree of confidentiality vis-à-vis the public would be appropriate.[3]

IV. ORDER

[para 90] I make this Order under section 72 of the Act.

[para 91] I confirm that the ERCB met its obligations under the FOIP Act with respect to the Complainants' personal information, with the exception of its disclosure of the Complainants' personal medical information contained in their Notice of Constitutional Question to persons present in the hearing.

[para 92] I find with respect to the latter information that the ERCB failed to establish that it met the requirements of section 40(4) of the Act in disclosing this information.

[para 93] I further find that the ERCB did not establish that it has reasonable security arrangements in place, within the terms of section 38, to ensure that when sensitive personal information such as that in the Notice of Constitutional Question is submitted to it in hearings, it considers whether disclosure of the information is necessary for it to carry out its purposes in a reasonable manner. In the event the ERCB has no such process, I order it to put one in place by which it may make reasonable efforts to learn of the presence of such information, and that ensures consideration of the need for and manner of disseminating it to the public.

[para 94] I order the ERCB to notify me within 50 days of receiving this Order that it has complied with its terms.

_____

Christina Gauk, Ph.D.
Director of Adjudication

[3] Further, in my view, were parties to fail to meet a clear obligation to alert the Board to sensitive information, a disclosure by the Board of such information that had not been brought to its attention could also meet the terms of section 40(4). In such circumstances the Board might be said to have carried out its purposes in a reasonable manner despite the disclosure of sensitive information that should have been, but was not, brought to its attention.