

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-49

November 21, 2014

WORKERS' COMPENSATION BOARD

Case File Number F7089

Office URL: www.oipc.ab.ca

Summary: An Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Workers' Compensation Board (Public Body) for a list of organizations that pay a surcharge (a premium higher than the relevant industry standard), and a list of organizations that pay a Poor Performance Surcharge. The Public Body located responsive records but withheld all information in the records under sections 16 and 17.

The Applicant requested a review of the Public Body's response. In the course of the inquiry, the Public Body decided to no longer apply section 17 to information in the records; it also decided to apply sections 21, 24 and 25.

The Adjudicator determined that none of the exceptions cited by the Public Body apply to the information in the records. She ordered the Public Body to disclose the responsive records to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 21, 24, 25, 30, 67, 72, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, *Workers' Compensation Act*, R.S.A. 2000, c. W-15, ss. 33, 103, 147; **CA:** *Access to Information Act* RSC 1985, c. A-1, s. 23; **NS:** *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c.5; **Ont:** *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. F.31.

Orders Cited: **AB:** 96-006, 96-010, 96-012, 96-018, 97-007, 98-013, 98-015, 99-008, F2004-013, F2004-026, F2008-032, F2009-028, F2011-018, F2012-06, F2012-10, F2012-12, F2012-17, F2013-13, Decision F2012-D-01; **Ont:** Orders P-373, PO-3268-F.

Cases Cited: *Halifax Herald Ltd. v. Nova Scotia (Workers' Compensation Board)*, 2008 NSSC 369, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, 1998 CanLII 7154 (ON CA).

I. BACKGROUND

[para 1] By fax dated November 23, 2012, an Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Workers' Compensation Board (Public Body) for "a copy of the list of employers, including names, addresses, and emails, which are currently in a surcharge position." In a telephone conversation on December 11, 2012, the request was clarified to include a list of organizations that pay a surcharge (a premium higher than the relevant industry standard), and a list of organizations that pay a Poor Performance Surcharge (PPS).

[para 2] The Public Body responded to the Applicant on February 25, 2013, withholding all responsive information under sections 16 and 17.

[para 3] The Applicant requested a review of the Public Body's response by this office. The Commissioner authorized a portfolio officer to investigate and attempt to resolve the issues between the parties but this was unsuccessful and an inquiry was requested.

II. RECORDS AT ISSUE

[para 4] The records consist of two lists of organizations that pay surcharges to the Public Body. One list contains information relating to 4578 organizations and one list contains information relating to 575 organizations.

III. ISSUES

[para 5] The Notice of Inquiry dated May 12, 2014, listed the issues for this inquiry as follows:

1. Does section 16 (disclosure harmful to business interests of a third party) apply to the information in the records?
2. Does section 17 (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?
3. Should the Public Body be permitted to apply section 25(1) (disclosure harmful to economic and or other interests of a public body) to the information in the records given

that it raised this possibility after the Applicant requested a review of the Public Body's decision to apply sections 16 and 17 and given that it is unclear whether the Applicant has been notified of the application of this exception to disclosure?

4. If the answer to Question #3 above is "yes", does section 25(1) of the Act apply to the information in the records?

[para 6] By letter dated September 11, 2014, I added the following issues to the inquiry:

5. Should the Public Body be permitted to apply sections 21(1) (disclosure harmful to intergovernmental relations) and 24(1) (advice to officials) to the information in the records given that it raised this possibility after the Applicant requested a review of the Public Body's decision to apply sections 16 and 17 and given that it is unclear whether the Applicant has been notified of the application of this exception to disclosure?
6. If the answer to the above is "yes", do sections 21(1) and 24(1) of the Act apply to the information in the records?

[para 7] In its initial submission the Public Body stated that it is no longer applying section 17 to the information in the records at issue; therefore, I will not consider that provision.

[para 8] Regarding issues 3 and 5, I will first consider whether the Public Body should be permitted to apply sections 21, 24 and 25. If I determine that the answer is "yes", I will consider the application of each exception.

IV. DISCUSSION OF ISSUES

Preliminary issue – relevance of the *Personal Information Protection Act*

[para 9] The Public Body has argued that most of the organizations listed in the records at issue "are governed by the Personal Information Protection Act and this information would not be subject to disclosure under that Act, accordingly this applicant should not be permitted to obtain that same information indirectly from the WCB. Lesser protection should not be afforded the information merely because it is held by a public body." (Initial submission, page 2)

[para 10] The Applicant has requested lists created by the WCB; presumably, the organizations on the list would not have the lists such that the Applicant could request them from one of the organizations under the *Personal Information Protection Act* (PIPA).

[para 11] Further, in Order F2012-12 I addressed the argument that information about organizations should not be accessible under the FOIP Act because it would not be accessible under PIPA. I said (at paras. 49-50):

PIPA addresses only an individual's access to his or her own personal information in the custody or control of an organization. That right of access is subject to the exceptions in the Act, and an overarching principle of reasonableness. In comparison, FOIP provides a

right of access to *all* information in the custody or control of a public body, subject only to the exclusions and exceptions in the Act.

Further, both section 6(1) and section 16 of the FOIP Act clearly contemplate the ability to request access to an organization's business information in the custody or control of a public body (if, for example, the organization was a contractor of the public body), yet PIPA does not allow an individual to request access to that same information directly from that organization. In other words, it is entirely reasonable that an individual may be able to request access to information under the FOIP Act that he or she could not request under PIPA.

[para 12] Therefore, the application of PIPA to the organizations on the lists is not relevant to the issues in this inquiry.

Preliminary issue – Affected parties

[para 13] The Public Body has applied section 16 (as well as other exceptions to access) to the records at issue, in their entirety. The Public Body argued that the information in the records is business information of the organizations whose names appear on the list. Section 30 of the FOIP Act requires public bodies to give notice to a third party if the public body is considering providing access to a record that affects that third party. Section 30 of the FOIP Act states in part:

30(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 16,

...

the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).

...

(3) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 16 or 17, the head may give written notice to the third party in accordance with subsection (4).

[para 14] The Public Body has not, to the best of my knowledge, notified any of the organizations on the list of the Applicant's request.

[para 15] In decision F2012-D-01, the adjudicator considered the application of section 30 in very similar circumstances to those here. In that case, an applicant had requested information from the Public Body including (but not limited to) a list of all employers in the Poor Performance Surcharge Program. The inquiry resulting from that request was to be conducted in two parts. The first party considered:

1. Whether the Public Body ought to notify third parties under section 30 of the Act;
2. Whether the Commissioner should notify third parties under section 67 of the Act; and
3. If notice to third parties is required, what is the appropriate form and manner of notice?

[para 16] The Public Body estimated the number of employers whose information would appear in the requested records to be 250,000. The adjudicator concluded that because section 30 requires public bodies to notify only “where practicable”, the duty was not triggered in that particular case. The adjudicator’s decision was based on the prohibitive cost of direct notification of each employer, the anticipated ineffectiveness of cheaper (indirect) forms of notification, and the staff resources required to effect the notice.

[para 17] Regarding notifying affected parties under section 67, the adjudicator concluded that it was appropriate to obtain submissions from the public body and the applicant, in order to make a determination as to whether the requested information was clearly exempt from disclosure (under section 16), clearly subject to disclosure, or whether the application of section 16 was uncertain. The adjudicator concluded that affected parties need not be notified in the first two circumstances.

[para 18] The test used by the adjudicator was set out in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (*Merck Frosst*), in which the Supreme Court of Canada considered notice provisions similar to those in section 30, in the federal *Access to Information Act (ATIA)*. The Court stated (at paras. 60, 77-78 and 84):

As noted earlier, s. 27(1) of the Act specifies when the head of the government institution must make reasonable efforts to give notice to a third party. (I will simply refer to this as the notice requirement.) For convenience, the text of the provision as it read at the time of the applications is as follows:

27. (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

(a) trade secrets of a third party,

(b) information described in paragraph 20(1)(b) that was supplied by a third party [financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party], or

(c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of a third party [information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party],

the head of the institution shall, subject to subsection (2) [waiver of the requirement by the third party], if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

[...]

As discussed earlier, in order to disclose third party information without giving notice, the head must have no reason to believe that the information might fall within the

exemptions under s. 20(1). Conversely, in order to refuse disclosure without notice, the head must have no reason to believe that the record could be subject to disclosure. If the information does not fall within one of these clear categories, notice must be given. I would therefore interpret the phrase “intends to disclose” as referring to situations which fall between those in which the head concludes that neither disclosure nor refusal of disclosure without notice is required. In other words, the head “intends to disclose” a record “that the head ... has reason to believe might contain” exempted information unless the head concludes either (a) that there is no reason to believe that it might contain exempted information (in which case disclosure without notice is required) or (b) that he or she has no reason to believe that disclosure could be required by the Act (in which case refusal of disclosure without notice is required). To the extent that the reasons of the Court of Appeal, at para. 34, suggest the head must have actually formed an opinion on the matter as opposed to simply having no “reason to believe”, I respectfully disagree.

The approach I propose sets quite a low threshold for the requirement of giving notice. This is not only consistent with the text of the Act, but properly reflects the balance the Act strikes between disclosure and protection of third parties.

[...]

To sum up my conclusions on s. 27(1):

- (i) With respect to third party information, the institutional head has equally important duties to disclose and not to disclose and must take both duties equally seriously.
- (ii) The institutional head:
 - should *disclose* third party information *without notice* only where the information is clearly subject to disclosure, that is, there is *no reason to believe that it is exempt*;
 - should *refuse to disclose* third party information *without notice* where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure.
- (iii) The institutional head must give notice if he or she:
 - is in doubt about whether the information is exempt, in other words if the case does not fall under the situations set out in point (ii);
 - intends to disclose exempted material to serve the public interest pursuant to s. 20(6); or
 - intends to disclose severed material pursuant to s. 25.

[para 19] I agree with the adjudicator in Decision F2012-D-01, that the test set out in *Merck Frosst* is relevant to a determination regarding whether a party is affected, such that it ought to be invited to participate in an inquiry pursuant to section 67.

[para 20] In my view, third parties need not be invited to participate in the inquiry in the following circumstances: where the exception to access clearly applies to information in the records at issue, such that the information will not be disclosed to the applicant under the FOIP Act, or where it is clear that the exception to access does not apply to the information in the records at issue such that it must be disclosed. Where it is unclear whether section 16 applies and

where evidence from the third party could provide insight into the application of the exception, the third party ought to be invited to participate.

[para 21] In this case, the Public Body and the Applicant have provided submissions regarding the application of section 16. Having reviewed the submissions, as well as the records at issue, I am satisfied that section 16 cannot apply to the information in the records (I will discuss the reasons for this finding under the relevant heading later in this Order).

[para 22] My determination is based on the fact that the information is not information that could have been supplied by the organizations within the terms of section 16(1)(b). There is no evidence or arguments that could be provided by the organizations that could affect the analysis of this factor, or the outcome.

[para 23] Had it been possible that evidence or arguments from the third parties could have changed my decision on these points, I would have invited the organizations (or a representative number, or umbrella organizations) to participate in the inquiry. In other words, had my determination been based on the strength of the Public Body's arguments regarding the application of section 16(1)(c), rather than the nature of the information in the records, it would have been appropriate to give the organizations an opportunity to provide additional arguments and evidence. That would be so particularly with respect to section 16(1)(c), which requires evidence of a reasonable expectation of harm resulting from disclosure of the information in the records; the organizations would be in a better position to provide such evidence than the Public Body.

[para 24] In Order PO-3268-F from the Ontario Information and Privacy Commissioner's office, the adjudicator also considered when third parties ought to be invited to participate in an inquiry regarding the application of a provision equivalent to section 16. In that case, the applicant made a request to a municipal power authority for records relating to a proposed power plant project. Some records contained information of organizations that submitted a bid in response to an RFP for the proposed project; the adjudicator considered whether those organizations ought to be invited to participate in the inquiry. She considered the Supreme Court of Canada's guidance in *Merck Frosst*, noting that it is similar to past orders of the Ontario office. She said (at paras. 16-18):

...In Order PO-1694-I, former Assistant Commissioner Tom Mitchinson reviewed the wording of section 28(1)(a) of the *Act* [equivalent to section 30 of Alberta's Act] and concluded:

If a head concludes that a record **might** contain section 17(1)-type information, and that this information **might** have been supplied in confidence, in my view, it is not appropriate for an institution to decide that notice is unnecessary based on an assessment that the potential for harm from disclosure does not meet the threshold established by section 28(1)(a).

I have been mindful of these principles in dealing with third party notice in the current appeal. In Interim Order PO-3146-I, I decided to notify certain fourth parties and to provide them with an opportunity to participate in the inquiry because the records clearly pertained to them and their disclosure might have affected the fourth parties' interests.

However, the only information at issue about the four proponents in records 17, 17a, 18 and 23 is the scores assigned to the various criteria for each proponent by the OPA in its

evaluation document. Previous orders of this office have clearly found that this type of information is not supplied in confidence, nor would its disclosure reveal information supplied by the third party, in confidence, and have found that the scores do not qualify for exemption under section 17(1).

[para 25] The adjudicator concluded that since there was clear precedent for the finding that the information at issue was not supplied to the public body by the organizations (and therefore the test for section 17 of the Ontario *Freedom of Information and Protection of Privacy Act* – equivalent to section 16 of Alberta’s Act – was not met), there was no procedural unfairness in not notifying the third parties in the circumstances of that case.

[para 26] Further, notifying the organization would require significant time and resources of this office. The participation of the organizations would also require time and resources on their part, and would result in a lengthy inquiry, with a delayed outcome. In a situation in which the participation of the organizations will not affect the outcome of the inquiry, such time, resources and delay is entirely unnecessary, and possibly unfair to the Applicant, who requested access to the records at issue almost 2 years ago. I note as well that the Public Body has made lengthy submissions with regard to its position that section 16 does apply so as to permit withholding of the records at issue, so that I have had an opportunity to consider arguments in support of this view.

[para 27] I agree with the conclusion in Ontario Order PO-3268-F, especially in light of the guidance provided by the Supreme Court of Canada in *Merck Frosst*. As the information at issue clearly does not meet the requirements of the mandatory exception for disclosure under section 16, I am not obliged to invite the organizations named in the records as affected parties in this inquiry.

Should the Public Body be permitted to apply sections 21(1), 24(1), and 25(1) (disclosure harmful to economic and/or other interests of a public body) to the information in the records given that it raised this possibility after the Applicant requested a review of the Public Body’s decision to apply sections 16 and 17 and given that it is unclear whether the Applicant has been notified of the application of this exception to disclosure?

[para 28] Previous orders of this office have held that the late raising of a discretionary exception by a public body would not be permitted if it resulted in delays or worked to the prejudice of a party (see Order 96-010).

[para 29] In this case, the Applicant did not address whether the Public Body ought to be permitted to raise the application of sections 21, 24 or 25 (although it has an opportunity to do so in its initial or rebuttal submissions, and in response to my September 11, 2014 letter). However, the Applicant did provide arguments regarding whether those exceptions apply to the information in the records.

[para 30] In my view, the Applicant has had an opportunity to respond to the Public Body’s application of each exception, and is not prejudiced by the late raising of sections 21, 24, or 25. I will therefore consider whether those exceptions apply to the information in the records at issue.

Does section 16 (disclosure harmful to business interests of a third party) apply to the information in the records?

[para 31] Section 16 of the Act is a mandatory exception to disclosure. It states:

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Section 16(1)(a) – Information of a third party

[para 32] For section 16(1)(a) to apply, three criteria must be fulfilled:

1. the records must contain trade secrets, or commercial, financial, labour relations, scientific or technical information;
2. the fact the disclosure must *reveal* this type of information means that the severed information must not already be in the public domain; and
3. the records must contain information that is “of a Third Party” (Order F2004-013, at para. 11, quoting Order 99-008)

[para 33] The Public Body has argued that the information is commercial, financial, and labour relations information of the third parties.

[para 34] The Adjudicator in Order F2009-028, after reviewing orders from both this office and the Office of the Information and Privacy Commissioner of Ontario, stated:

In Order 96-018, the former Commissioner adopted the following definition of “financial information” and determined that information is not the financial information of a third party for the purposes of section 16(1)(a) if the information does not allow an applicant to draw an accurate inference about a third party’s assets or liabilities, past or present:

In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word “financial”. I also reiterate that careful consideration must be given to the content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party

and is not limited to information relating to financial transactions in which the third party is involved.

As such, the information in the record is not of a “financial” nature because it reveals nothing of the third party’s financial capabilities beyond its commitment to raise the dollar amount specified. Similarly, I find that the record reveals nothing of the third party’s assets or liabilities, either past or present.

In Order MO-2496, an order of the Office of the Information and Privacy of Commissioner of Ontario, the Adjudicator considered the meaning of “commercial” and “financial” information as they appear in Ontario’s equivalent of the FOIP Act’s section 16. The Adjudicator stated:

These terms have been defined in previous orders of this office as follows:

...

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

In my view, Orders 96-013 and 96-018 of this office, and Order MO-2496 of the Office of the Information and Privacy Commissioner of Ontario, are essentially stating the same thing. “Commercial information” is information belonging to a third party about its buying, selling or exchange of merchandise or services. “Financial information” is information belonging to a third party about its monetary resources and use and distribution of its monetary resources.

[para 35] In Order F2011-018, the adjudicator reviewed previous orders of this office regarding the scope of “commercial” and “labour relations” information. He said:

Definitions for "commercial information" and "labour relations information" were noted in Order F2010-013 (at paras. 19 and 24), being the Order that dealt with the Applicant's right of access to the AHW Notices. I refer to those same definitions for the purpose of reviewing the content of the Objection Letter. I find that the Objection Letter does not contain or reveal information about the "buying, selling or exchange of merchandise or services" (commercial information), and that it does not contain or reveal information about "employer/employee relations including especially matters connected with collective bargaining and associated activities" or "relationships within and between workers, working groups and their organizations and managers, employers and their organization" (labour relations information).

[para 36] This approach was followed in subsequent Orders (see Order F2012-17, at para. 16).

[para 37] To fall within the terms of section 16(1)(a), information must be “of a third party” in the sense that the information must belong to a third party and be about the third party’s

monetary resources and its use and distribution of them, its exchange of merchandise or services, etc.

Section 16(1)(a) – Public Body’s arguments

[para 38] The Public Body argues that the information is commercial and financial information of third parties insofar as it deals with how much they pay to the WCB, and is labour relations information insofar as it deals with “accidents involving staff or occurring at work.” (Initial submission, page 11)

[para 39] The information in one of the lists consists of the account number, industry code, legal name, trade name, address, as well as the name, phone number, fax number and email address of a contact person for each organization appearing in the list. The information in one of the lists consists of the account number, industry code, legal name, and address, as well as the name, phone number, and email address of a contact person for each organization appearing in the list.

[para 40] The Public Body doesn’t appear to be arguing that the information on the lists (name of the organization, address and contact information of an employee) is commercial, financial, or labour relations information; rather it appears to be arguing that disclosing the list would *reveal* information that is commercial, financial and/or labour relations information of the organizations appearing on the lists, insofar as it is a list of the organizations (employers) who pay surcharges.

[para 41] For example, the Public Body argues that the surcharge and PPS is financial and commercial information of an organization; disclosing the list would

reveal a reasonable approximation of the additional premium that each employer paid, hence a piece of commercial and financial information that is relevant only to the employer themselves. It would be akin to having the employer publish what they pay for commercial or auto insurance, what their advertising costs are or other elements of their cost structures. Having your competitors know your operational costs would give them an unfair advantage in obtaining contracts and perspective [sic] employees. (Initial submission, page 10)

[para 42] Further, the Public Body argues with respect to section 16(1)(b), that the information on the lists was not supplied by the organizations in confidence, but that disclosing the lists would reveal information that was supplied in confidence by the organizations (specifically the information in the above excerpt). The Public Body’s arguments indicate that it also believes disclosing the lists would reveal information such as insurable earnings that are used by the Public Body to calculate the premiums, and information about injury claims provided by the organization.

[para 43] The Public Body’s submissions state that organizations “are required by law to report claims to the WCB as they occur and they are also required to periodically submit insurable earnings to WCB. The WCB uses this information to calculate their appropriate premiums – be it discount, industry rate or surcharge” (Initial submission, page 11, my emphasis). I note that the *Workers’ Compensation Act (WCA)* requires employers to provide

information about accidents when the employer becomes aware of them (section 33); it also requires employers to provide information about payroll (section 103). I cannot find any indication that employers are required to provide any other type of information to the Public Body, other than regarding specific accidents (or injury claims, including information that may be requested by the Public Body regarding the accidents) and payroll.

[para 44] According to the Public Body, an organization's premium rate is the "amount an employer pays per \$100 of insurable earnings" and is based on average industry losses as well as the organization's own accident experience. Premiums are adjusted by modifiers such as the Poor Performance Surcharge, or the Partnerships in Injury Reduction. (Initial submission, pages 5-6)

[para 45] The information contained in the lists – the name of each organization, address, and contact information of an employee – is not information that is about buying, selling or exchange of merchandise or services (commercial information); about an organization's monetary resources and use and distribution of its monetary resources (financial information); or information about employer/employee relations including especially matters connected with collective bargaining and associated activities (labour relations). I also agree with the Public Body that it is not the type of information that could have been supplied in confidence. Therefore, the discussion of section 16 relates not to the information in the lists *per se*, but rather the information that would be revealed by disclosing the lists.

[para 46] The Public Body has argued that disclosing the lists could reveal the premium amounts (actual or approximate) of each organization on the list, as well as other information provided to the Public Body by the organizations, such as payroll information (insurable earnings) and information relating to injury claims.

[para 47] The Public Body may also be arguing that disclosing the lists would reveal the fact that each organization pays a surcharge (and/or PPS), and/or that the organizations on the lists have more accidents than their industry average. I would agree that both of these facts appear to be deducible from the lists themselves. I will consider whether either of these facts meet the test for section 16(1)(a) or (b).

Section 16(1)(a) – Applicant's arguments

[para 48] The Applicant has provided limited arguments regarding the Public Body's application of section 16. The Applicant has provided me with Ontario Order P-373, in support of its position that section 16 does not apply, which I will discuss.

Analysis of section 16(1)(a)

[para 49] In Ontario Order P-373, cited by the Applicant, the former Assistant Commissioner considered the application of the provision in the Ontario *Freedom of Information and Protection of Privacy Act* that is equivalent to section 16 in Alberta's FOIP Act to a request made to the Ontario WCB for the names and addresses of the 50 organizations with the highest penalty rating for a particular year.

[para 50] The former Assistant Commissioner determined that the information in the list, did not reveal information about the amount of surcharge, nature of claims made, or payroll information of the organizations in the list, nor would disclosure permit an accurate inference about such information (at page 7 of P-373). Based on this, he concluded the information on the list did not reveal commercial or financial information.

[para 51] That Order was overturned by the Ontario Divisional Court, but subsequently upheld by the Ontario Court of Appeal in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, 1998 CanLII 7154 (ON CA), (*Ontario WCB*).

[para 52] In this case, the Public Body has not provided me with any evidence to support its contention that the organizations' premium amounts (actual or approximate), or information provided regarding injury claims, could be derived from the lists alone. The Public Body has stated that a premium rate depends on several factors, including an organization's insurable earnings and accident experience, average industry losses, and whether the organization is subject to modifiers such as the Partnerships in Injury Reduction. Based on the Public Body's submissions, it is not at all clear to me how knowing that an organization pays a surcharge reveals any of these other factors such that the premium amount (actual or approximate) could be derived. Further, the fact that an organization pays a surcharge does not reveal any information about individual claims provided by the organization.

[para 53] That said, the term "financial information" is arguably sufficiently broad to include the fact that an organization pays a poor performance surcharge (without knowing the surcharge amount), since the fact that a surcharge is owed says something about the organization's financial liabilities.

[para 54] Regarding the fact that the organizations on the lists have more accidents than their industry average, which presumably would be revealed if the lists are disclosed, that is not information about the organizations' buying, selling or exchange of merchandise or services (commercial information), nor is it financial information (other than what it says about the organizations' financial liabilities, already discussed).

[para 55] Further with regard to the Public Body's contention that the information provided by the organizations to the Public Body (payroll and claims information) is revealed by the information at issue (the lists), I note that the information as to injury claims – individual claims or cumulative information regarding the total number of claims of an organization – is not the organizations' proprietary information in the sense that it is information "belonging to it" within the terms of section 16(1)(a). While information as to injury claims (specific claims or cumulative information) may be *associated with* particular employers, the fact that accidents happen at their sites is not an "informational asset" such that it would be appropriate for an organization to regard and treat it as their own confidential information. Indeed, it is information that the Public Body receives independently from employees who make a claim for benefits, and thus has available to it regardless. In my view, the fact that organizations have an obligation to report accident claims themselves, to the Public Body, does not transform the information about

the claims, individually or cumulatively, into proprietary information “of” the organizations, within the terms of section 16(1)(a).

[para 56] As to whether the information is “labour relations information, I note that a case involving somewhat similar facts was considered by the Nova Scotia Superior Court in *Halifax Herald Ltd. v. Nova Scotia (Workers’ Compensation Board)*, 2008 NSSC 369. In that case, the Court considered a request under the Nova Scotia *Freedom of Information and Protection of Privacy Act* made to the Nova Scotia WCB for the names of 25 organizations with the most workplace injuries over three years. The Court accepted that the records revealed “labour relations” information, because “the subject matter of the [applicant]’s request deals directly with the employer-worker relationship and, in particular, workplace safety” (at para. 56).

[para 57] Past orders of this office, cited above, have defined “labour relations” as follows: employer/employee relations including especially matters connected with collective bargaining and associated activities, or relationships within and between workers, working groups and their organizations and managers, employers and their organization. I agree the subject-matter of the Applicant’s request is connected to workplace safety. However, in accordance with the definition just cited, the terms refer to relations between workers and employers. Workplace safety may well be a topic that is dealt with in a labour relations context, but the simple fact WCB claims are being made, or even the numbers that are made, does not refer to or describe relations between workers and employers in the sense the term is used in the definition. Therefore, I do not agree that the information on the list reveals “labour relations” information.

[para 58] The Public Body also states:

Asking the WCB to disclose the information herein would be no different than asking any insurance company to disclose its client’s entire accident history. (Emphasis in original, initial submission, page 5)

[para 59] Other insurance companies are not subject to the FOIP Act, unlike the Public Body. Further, while the existence of an organization’s name on the lists indicates something about that organization’s accident history, it does not reveal details of that history.

[para 60] I conclude that the information in the lists is not commercial or labour relations information of the listed organizations, as claimed by the Public Body; possibly, it reveals financial information. In case I am wrong about the first two conclusions, as well as because the records at issue possibly reveal some (albeit unspecific) financial information, I will deal below with whether the records meet the test under section 16(1)(b).

Section 16(1)(b) – Information supplied in confidence

[para 61] In order for section 16(1)(b) to apply, the information must be supplied by the third party to the public body, explicitly or implicitly in confidence or would reveal information that was supplied in confidence.

Section 16(1)(b) – Public Body’s arguments

[para 62] The Public Body acknowledges that the names of the organizations were supplied to the Public Body when creating their accounts with the Public Body, and were not supplied in confidence to the Public Body. However, it argues that “disclosure of the names of those same employers in relation to their existence on the surcharge or PPS list would permit the applicant to make an accurate inference of the sensitive, commercial and financial business information noted in the previous section 16(1)(a) discussion.” (Initial submission, page 11)

[para 63] Some of the information the Public Body claims can be derived from the information at issue was described earlier (paras 41-42). The Public Body also states:

The decision to apply a penalty results from reporting provided by employers – their insurable earnings, claim information and/or other details. Employers try to comply with the normal reporting, which they believe is being supplied in confidence pursuant to section 147(2) of the WC Act. Although penalties are calculated and provided to the employer by the WCB, the employer reporting used to calculate the penalties is submitted in confidence and is inextricably linked with the resultant premium rate; therefore, the confidentiality provision applies. (Initial submission, page 11)

[para 64] Section 147(2) of the WCA states:

147(2) No member or officer or employee of the Board shall divulge information respecting a worker or the business of an employer that is obtained by that person in that person's capacity as a member, officer or employee unless it is divulged under the authority of the Board to the persons directly concerned or to agencies or departments of the Government of Canada, the Government of Alberta or another province or territory.

Analysis of section 16(1)(b)

[para 65] The Public Body has acknowledged that the names of the organizations were not supplied by the organizations in confidence; it has not argued that the address or contact information was supplied in confidence, and presumably this information was also provided to the Public Body by organizations when creating their accounts. Therefore, as already noted, the Public Body's argument is that the lists *reveal* information that was supplied in confidence.

[para 66] One type of information which the Public Body seems to suggest may be derived from the record is injury claims information. Presumably it is suggesting that the injury claims that are made by employees on a case-by-case basis, and are also reported on a case-by-case basis to the Public Body by organizations (employers), are revealed by an organization's presence on the list of employers who pay surcharges.

[para 67] Accepting for the sake of this discussion that that injury claims are reported by organizations to the Public Body on a confidential basis (which is not made entirely clear by the reference to section 147(2) of the Act since that permits disclosures in some circumstances), it does not follow that the fact organizations pay a surcharge reveals anything about injury claims, indeed, that is patently not the case. The fact the two types of information are “inextricably linked” does not mean that accurate information about the latter can be derived from the former.

[para 68] For the same reason, I reject the following submission of the Public Body:

The WCB could not have calculated premiums without the background information initially being provided to it. If the underlying information is confidential, so too must be the information extrapolated therefrom.” (Initial submission, page 14).

The premiums may be calculated on the basis of the claims, but nothing specific can be derived about the claims from the premiums.

[para 69] The same applies to the idea that information about “insurable earnings (the other item on the list of potentially “revealed” information) can be derived from the fact of an organization being on the list. Given the variables at play (as explained by the Public Body), it does not seem possible that this fact alone could lead to any accurate conclusions about an employer’s insurable earnings, and if it could, the Public Body has not told me how it could.

[para 70] I have noted the possibility that the Public Body means to suggest that the fact can be inferred, about the organizations on the lists, that they have more claims than their industry average, or some similar conclusion. In other words, the Public Body’s argument may be that as an organization reports claims on a case-by-case basis, ultimately it provides an aggregate of information, and that is provided in confidence. If that is the Public Body’s argument, I have rejected that this information falls within the types of information contemplated in section 16(1)(a), and I similarly reject the notion that it could be information supplied by the organizations.

[para 71] The Public Body has stated that “[t]he information sought [the lists] is an extrapolation, calculated from the business information of an employer by WCB employees” (Initial submission, page 16). I agree with this characterization; the fact that an organization has more than average claims such that a surcharge (and/or PPS) ought to apply is a determination made by the Public Body. The fact that the Public Body has made that determination about an organization is revealed by the lists, however, it cannot be said to have been “supplied”, in confidence or otherwise.

[para 72] The Public Body has cited Order 98-015 in its submissions, in which former Commissioner Clark found that the information there at issue was not supplied by the third party but the disclosure of that information allowed an accurate inference to be made regarding information that *was* supplied by the third party in confidence. In that Order, the former Commissioner was deciding the application of section 16 to records created by a public body based on information provided by a third party, and which contained (i.e. revealed) commercial and financial information of the third party that had been supplied to the public body in confidence. Possibly, the Public Body is here indeed arguing that the inclusion of an organization on the surcharge list allows an accurate inference to be drawn about the volume of WCB claims made by employees of an employer, or similar information.

[para 73] I agree with the conclusion in Order 98-015. However, for the reasons discussed in the preceding paragraph, I do not agree it applies in this case. With respect to WCB claims, the information that was supplied (possibly in confidence) was with respect to individual claims, and

nothing can be inferred about these from the information at issue. As discussed above, no *aggregate* information was *supplied*, in confidence or otherwise.

[para 74] I find strong support for my conclusion in Ontario Order P-373, in which the former Assistant Commissioner found that the surcharge amounts were not supplied to the public body by the organizations, and that it was not possible to ascertain the information supplied by the organizations from the surcharge amounts. The Public Body argues that finding is contrary to the finding in Order 98-015 of this office, but for the reasons just given, I do not agree there is any conflict. There are no accurate inferences about information that was supplied in confidence to the Public Body that can be made from the presence of an employer on the surcharge list. Moreover, even any conclusions about the information as an aggregate would be highly general and unspecific.

[para 75] Although the Public Body has not argued that the information in the lists was supplied by the listed organizations, it is worth noting that such an argument was made and rejected in Ontario Order P-373, which was upheld by the Ontario Court of Appeal on that point. The former Assistant Commissioner in Order P-373 said:

In my view, the surcharge amounts were not “supplied” to the Board by the affected persons; rather, they were calculated by the Board. While it is true that information supplied by the affected parties on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected persons from the surcharge amounts themselves.

[para 76] The Ontario Court of Appeal stated:

... the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers.

[para 77] Similarly, in the aforementioned Nova Scotia Superior Court decision, the Court stated:

The disclosure sought in this application is the name of the 25 employers with the highest number of workplace accidents. This information is tabulated by WCB and is not supplied by the employers. (At para. 73)

[para 78] I conclude that the information in the records at issue is not information that was supplied by the listed organizations to the Public Body in confidence, nor would it reveal or allow the drawing of accurate inferences about information that was so supplied. Therefore, I conclude section 16(1)(b) is not met.

Section 16(1)(c) – disclosure could reasonably result in listed harm

[para 79] I stated above, in the discussion regarding sections 30 and 67 of the FOIP Act, that had I found that the tests for sections 16(1)(a) and (b) been met, I would have invited submissions from the organizations (or a representative number of the organizations) appearing on the lists. I have found that neither section applies to the information in the lists; therefore I do not need to consider whether section 16(1)(c) applies. Nevertheless, I will address some of the concerns raised by the Public Body in its submissions.

[para 80] In Order 98-013, the former Commissioner emphasized that the harm under section 16(1)(c)(i) must be significant, and that the Public Body must show evidence of the following:

- i. the connection between disclosure of the specific information and the harm which is alleged;
- ii. how the harm constitutes “damage” or “detriment” to the matter; and
- iii. whether there is a reasonable expectation that the harm will occur.

[para 81] The former Commissioner also emphasized that under section 16(1)(c)(iii), a financial loss or gain must be “undue” (at para. 22).

Section 16(1)(c) – Public Body’s arguments

[para 82] The Public Body has argued that the evidentiary test for section 16(1)(c) ought to be low, due to the nature of the harms it alleges may occur from disclosure.

[para 83] With regard to section 16(1)(c)(i), the Public Body states that the disclosure of the lists would reveal portions of each listed organization’s cost structure. It states that

[a]s a result, [the organizations] will lose opportunity in negotiations, especially compared to other employers who are not on the list. As well they may lose jobs, or be denied the opportunity for work by being on the list. Many industries, like construction and oil and gas, look at the PPS as a safety indicator, which it is not. They may deny an employer a job as a result of being on the list.

[para 84] The Public Body also argued extensively that the fact that an organization appears on the list does not provide an accurate reflection of its safety record, nor does it create an accurate comparator for organizations. It states that it would be misleading to use the information in the lists for such purposes.

[para 85] With respect to section 16(1)(c)(ii), the Public Body argues:

Employers who know they may appear on the list may be hesitant to report claims, although they are legally required to do so. It is not unreasonable to expect that they may make deals with workers to pay for their losses outside of the workers’ compensation system. While that is a practice contrary to the WC Act, the survival of the business and employment may depend up on it... (Initial submission, page 13)

[para 86] Regarding section 16(1)(c)(iii), the Public Body repeated its argument that the disclosure of the lists may result in the listed organizations losing out on jobs, or being unable to recruit employees. It states:

... employers may reasonably lose contracts and the opportunity to bid on contracts by being identified on one of these lists. In some cases there are employers with worse performance who are not on the list who could get those contracts, which is hardly a just result. (Initial submission, page 13)

Analysis of section 16(1)(c)

[para 87] Regarding the Public Body's argument that the evidentiary burden ought to be low because of the nature of the alleged harms, the Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 16(1)(c)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:

I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]

This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 88] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation, regardless of the seriousness of the harm alleged. The Public Body must satisfy me that there is a reasonable expectation of probable harm that would result from the disclosure of the lists.

[para 89] Regarding the arguments made under sections 16(1)(c)(i) and (iii) (which both alleged a loss of negotiating position and the potential loss of jobs or recruitment opportunities for the listed organizations), similar arguments were made and rejected in the Ontario and Nova Scotia cases. In Ontario Order P-373, the former Assistant Commissioner stated:

I find the evidence regarding harm that could result from a negative interpretation of the information contained in the records is not sufficient to establish the third part of the section 17(1) [equivalent to section 16(1) of Alberta's Act] exemption test. In my view, the evidence consists of generalized assertions of fact in support of what amounts to, at most, speculation of possible harm.

[para 90] This finding was upheld by the Ontario Court of Appeal. In this case, the Public Body has likewise not offered any evidence to support its assertions that the disclosure of the lists would have the result posited by the Public Body.

[para 91] Regarding the harms alleged under section 16(1)(c)(ii), the Public Body has stated that organizations that participate in the compensation scheme under the *Workers' Compensation Act* are required under that Act to report certain information about injury claims etc. The Public Body argues that it is not unreasonable to expect that organizations would contravene these legal requirements in order to avoid being placed on these lists, if these lists are disclosed. I disagree – in my view it is unreasonable to *expect* organizations to contravene the law to avoid an undesirable outcome. Further, as the Nova Scotia Superior Court noted:

I fail to understand how disclosure could have an adverse effect on participation by employers... that the imposition of surcharges (a direct attack on the employer's pocketbook) has not, or would not, have. (At para. 115)

[para 92] Even if the information in the lists met the tests under sections 16(1)(a) and (b) (which it does not), the Public Body has provided only assertions of speculative harm that could result from disclosure. Merely alleging that organizations would fail to fulfill their legal obligations under the *WCA* in order to avoid being placed on a list that would be disclosed – without offering any evidence to back up this claim – does not meet the evidentiary burden of reasonable expectation of probable harm, as set out by the Supreme Court of Canada. Neither does the assertion that the information could be misleading to a reader, or that it could lead to the loss of jobs or recruitment opportunities.

[para 93] In Order F2012-17, the adjudicator addressed the argument that the possibility that information may be misinterpreted meets the harms test under section 16. Referring to the Supreme Court of Canada in *Merck Frosst*, she said:

In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), 2012 SCC 3 (*Merck Frosst*), the Supreme Court of Canada rejected the potential for misinterpretation of information as a legitimate reason for refusing access under section 20 of the federal *Access to Information Act*, which is a provision equivalent to section 16 of Alberta's FOIP Act. Cromwell J., speaking for the majority, stated:

That leaves for consideration Merck's submission that release of some of the pages could give an inaccurate perception of the product's safety. Merck says that refusal to disclose this sort of information under s. 20(1)(c) is not problematic because proper information in proper context is provided in the Product Monograph. Moreover, there are reporting requirements relating to information where public safety is concerned and, in an appropriate case, the public interest override could be invoked to release such information even if it is found to be exempt under s. 20(1)(c), providing disclosure is in the public interest.

I do not accept the principles inherent in these submissions. The courts have often — and rightly — been sceptical about claims that the public misunderstanding of disclosed information will inflict harm on the third party: see, e.g., *Air Atonabee*, at pp. 280-81; *Canada Packers*, at pp. 64-65; *Coopérative fédérée du Québec v. Canada (Ministre de l'Agriculture et de l'Agroalimentaire)* (2000), 2000 CanLII 14811 (FC), 180 F.T.R. 205, at paras. 9-15. If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption could succeed.

In my view, the Supreme Court of Canada's decision in *Merck Frosst* applies equally to section 16 of Alberta's FOIP Act, given that section 20 of the *Access to Information Act* contains similar wording and is intended to protect similar interests. As a result, I conclude that arguments regarding the potential for misinterpretation of information do not serve to bring information within the scope of section 16(1)(c). Moreover, the plan administrator has not pointed to information it considers would lead people to draw erroneous conclusions, such that I could evaluate the likelihood that people would misinterpret the information or draw such conclusions.

[para 94] I agree that the possibility that information may be misleading or misunderstood if disclosed is not a legitimate reason for withholding the information under section 16(1)(c).

Conclusions regarding section 16(1)

[para 95] The information in the lists – names, addresses and contact information for organizations that pay a surcharge (and/or PPS) to the Public Body – is not information that falls within one of the categories in section 16(1)(a), nor was it supplied in confidence. The fact that an organization appears on one of these lists could possibly affect its reputation; however, even if this harm were more than merely speculative, section 16(1) cannot be applied to information if section 16(1)(a) and/or (b) are not met.

[para 96] Had the lists revealed payroll information and/or information about individual claims made by the organizations, section 16(1)(a) and (b) may have applied to some of that information. However, the information on the lists cannot be said to reveal any of this information. Nor does it reveal the actual amounts of premiums paid by each organization (although it is unlikely that information could be withheld under section 16 as it is calculated by the Public Body, and not supplied by the organization).

[para 97] The fact that an organization on one of (or both of) the lists seems to have more claims than the average for its industry may be revealed by the lists, but it is not information that falls within section 16(1)(a), nor is it information that was supplied by the organization.

[para 98] The fact that an organization pays a surcharge (or PPS) may reveal that organization's financial information, such that section 16(1)(a) may be met. However, this information is not supplied by the organization to the Public Body, in confidence or otherwise, such that section 16(1)(b) could be met.

[para 99] I find that section 16 does not apply to any of the information in the records.

Does section 21(1) of the Act (disclosure harmful to intergovernmental relations) apply to the information in the records?

[para 100] The Public Body has applied section 21(1)(b) to the information in the records. Section 21 states:

21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:

- (i) the Government of Canada or a province or territory of Canada,*
- (ii) a local government body,*
- (iii) an aboriginal organization that exercises government functions, including*
 - (A) the council of a band as defined in the Indian Act (Canada), and*
 - (B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,*
- (iv) the government of a foreign state, or*
- (v) an international organization of states,*

or

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

(2) The head of a public body may disclose information referred to in subsection (1)(a) only with the consent of the Minister in consultation with the Executive Council.

(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

(4) This section does not apply to information that has been in existence in a record for 15 years or more.

[para 101] The Public Body's arguments regarding the application of section 21(1)(b) indicate that it is applying this exception in conjunction with section 16(1)(b). Its arguments relate solely to whether the information in the records was supplied in confidence to the Public Body by the organization, or whether it reveals information that was supplied in confidence. These arguments are relevant to the application of section 16(1)(b) alone; they are not at all relevant to an application of section 21(1)(b).

[para 102] Section 21(1)(b) applies to information that was supplied to a public body by a government, local government body, or organization listed in section 21(1)(a), or one of its agencies. The Public Body has not explained how any of the organizations providing information to the WCB could be one of the bodies listed in section 21(1)(a), or an agency of one of those bodies. As such, I find that section 21(1)(b) does not apply to any of the information in the records.

Does section 24 (advice from officials) apply to the information in the records?

[para 103] The Public Body argues that sections 24(1)(a) and (b)(i) applies to the information in the records. These provisions state:

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

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
- (b) consultations or deliberations involving*
 - (i) officers or employees of a public body*

[para 104] In previous orders, the Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)

[para 105] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at para. 123).

[para 106] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (section 24(1)(a)), or consultations or deliberations between specified individuals (section 24(1)(b)). Neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 107] In Order 97-007, former Commissioner Clark stated that

While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an analyses. Gathering pertinent factual information is only the first step that forms the basis of an analyses. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

[para 108] This was cited in F2008-032, in which the adjudicator concluded that

‘Advice’ then, is the course of action put forward, while ‘analyses’ refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.

[para 109] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark’s interpretation of “consultations and deliberations”, that

It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making.

[para 110] In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 111] Further, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the individuals involved in the advice or consultations, dates, and information that reveals only the fact that advice is being sought or consultations held (and not the substance of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 89).

[para 112] The Public Body states (at pages 15-16 of its initial submission):

In Order F2008-032 the Adjudicator acknowledged that in some circumstances the content of a record may be sufficient evidence to demonstrate that section 24 applies to the record. In that Order the Adjudicator noted the following:

In Order F2008-028, the Adjudicator noted that the contents of the records at issue are sometimes sufficient evidence that section 24 applies to them. He said:

As with information falling under other sections of the Act, such as section 22 (Cabinet confidences) and 27 (privileged information), I was often able to ascertain from the records themselves – in conjunction with the Public Body’s broad submissions – that information fell under section 24(1). For example, I can infer that certain information was sought or expected from officers and employees of the Public Body acting in their various roles, that it was directed toward formulating and drafting Bill 27 and its regulations, and that it was provided to the Minister of the Public Body, who can act on the information by taking proposals to Cabinet and ultimately introducing, enacting and implementing legislation on behalf of government. In other instances, however, I required more specific submissions from the Public Body as to the nature of the action that was to be taken or the decision that was to be made.

In that case, the Adjudicator was able to find that some information was a proposal developed by or for a public body, in the absence of submissions, because the record clearly established the information to be such. Similarly, in *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054), *supra*, Rothstein J. noted that records can sometimes “speak for themselves” and require little explanation.

[para 113] The Public Body argues:

... it is evident based on the content of the information at issue and the WCB’s published Policy relating to the calculation of premiums and surcharges, that it is required to compile and analyze (through its’ staff) the information and based on this analysis determine which employers are subject to a surcharge and/or a poor performance surcharge. In this case, the analysis resulted in the list of employers in a surcharge or PPS position for the year 2012. The WCB submits that section 24 applies to the information and that the view taken by the Adjudicator in Order F2008-032 is a relevant consideration in this circumstance. (Initial submission, page 16)

[para 114] In order for section 24(1)(a) or (b) to apply, the information must *reveal* advice, proposals, recommendations, analyses, policy options, consultations or deliberations. Neither exception applies to a decision that has been made as a result of the advice etc.

[para 115] The information in the records consists of the names of organizations, along with contact information, that paid a surcharge in 2012. It is not clear what advice, proposals, recommendations, analyses, policy options, consultations or deliberations occurred when this list was being compiled, or how the disclosure of the list could reveal such advice etc.

[para 116] Perhaps the Public Body is meaning to argue that calculations involved in determining what organizations owe a surcharge (or how much of a surcharge) is revealed in this list, and that those calculations are analyses within the terms of section 24(1)(a). As explained in Order F2008-032 (cited above), “‘analyses’ refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.”

[para 117] Even if surcharge calculations could fall within the scope of ‘analyses’, the information in the records do not reveal those calculations – the information does not reveal the amount of surcharge paid by each organization, only that it pays a surcharge (or that it did in 2012). Further, the appearance of the organization names on the list indicate that the Public Body has made a decision regarding the calculations (namely that the organizations owe a surcharge).

[para 118] I find that section 24(1) does not apply to the information.

Does section 25 (disclosure harmful to economic and other interests of a public body) apply to the information in the records?

[para 119] The Public Body argues that section 25(1)(c) applies to information in the records.

[para 120] Section 25(1)(c) states:

25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure 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, including the following information:

...

- (c) *information the disclosure of which could reasonably be expected to*
 - (i) *result in financial loss to,*
 - (ii) *prejudice the competitive position of, or*
 - (iii) *interfere with contractual or other negotiations of, the Government of Alberta or a public body*

[para 121] The Public Body's submissions indicate that the Public Body has applied section 25(1)(c) in conjunction with section 16(1)(c). Its arguments relate solely to the harm that may come to an organization if its information, contained in the records, is disclosed. The Public Body does not explain how the disclosure of the information could reasonably be expected to result in harm to it, or to the Government of Alberta. As such, I cannot conclude that section 25(1) applies to the information in the records.

V. ORDER

[para 122] I make this Order under section 72 of the Act.

[para 123] I find that the Public Body did not properly apply section 16 to the information in the records at issue.

[para 124] I find that the Public Body did not properly apply section 21 to the information in the records at issue.

[para 125] I find that the Public Body did not properly apply section 24 to the information in the records at issue.

[para 126] I find that the Public Body did not properly apply section 25 to the information in the records at issue.

[para 127] I order the Public Body to disclose the records to the Applicant.

[para 128] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator