ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2012-D-01

April 13, 2012

WORKERS' COMPENSATION BOARD

Case File Number F5624

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked the Workers' Compensation Board (the "Public Body") for information regarding the premiums paid by employers in Alberta, which depends in part on their accident experience. The Public Body estimated that it had responsive information relating to 250,000 employers.

A preliminary issue was whether the Public Body should be required to notify the employers, as third parties, under section 30 of the Act. The Adjudicator first noted that, generally-speaking, a public body should notify third parties unless the requested information relating to them is clearly exempt from disclosure, or alternatively, the information is clearly subject to disclosure. At the same time, a public body is required to give notice to third parties under section 30 "where practicable". In the circumstances of the case before him, the Adjudicator decided that it was not practicable for the Public Body to notify third parties, given the number of them involved, and the time, financial cost and human resources that would be required in order to give notice.

Instead, the Adjudicator decided that he would review the submissions of the Public Body and Applicant on whether the requested information should or should not be disclosed, and then consider whether any affected parties should be given notice, by the Office of the Information and Privacy Commissioner, under section 67 of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n)(i), 2(a), 16, 17, 21, 25, 30, 30(1), 30(1)(a), 30(1)(b), 30(3) and 67. **CAN:** *Access to Information Act*, R.S.A. 1985, c. A-1, ss. 27 and 27(1).

Authorities Cited: AB: Orders 97-018, 99-023, 99-007 and 2000-019; Decision F2008-D-001; *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344; *Edmonton Police Commission v. Alberta (Information and Privacy Commissioner)*, 2011 ABQB 291. **CAN:** *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

Other Source Cited: *Merriam-Webster online dictionary*, retrieved April 10, 2012 from http://www.merriam-webster.com/dictionary.

I. BACKGROUND

[para 1] The Workers' Compensation Board (the "Public Body" or "WCB") sets the premiums that each employer in Alberta is required to pay for workers' compensation coverage. It does so according to the particular employer's industry and claim history, as modified by accident experience. The method of adjusting premium rates based on the particular employer's accident experience is referred to as "experience rating". The Public Body sets base premium rates annually for each industry, and following its assessment and calculations for a particular employer, the employer's premium is characterized as "discount", "industry" or "surcharge". If a particular employer's rate is any higher than the industry base rate, even by $0.01, the employer is considered to be in a surcharge position. If a particular employer's rate is less than the industry base rate, the rate is considered to be discount and the employer may be entitled to a refund. The Public Body explains that employers that have similar operations and share similar risks are grouped together for the purpose of setting premium rates. Employers performing well, such as those involved in the Partners in Injury Reduction ("PIR") program, pay less. Employers with poor performance, such as those in the Poor Performance Surcharge ("PPS") program, pay more.

[para 2] In a letter dated June 17, 2010, Shepell.fgi (the "Applicant") made an access request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Applicant's request was as follows:

> *We, at Shepell.fgi provide Workers' Compensation Services to many clients across Canada. We provide industry comparisons outlining the benefits of Modified Return to Work Programs and how these programs affect individual employer's bottom line. We also demonstrate the cost of injuries to industries as a whole.*
>
> *We would be grateful if I we [sic] could be provided with a document published by WCB Alberta which shows the employers in Alberta which are in a surcharge/rebate position for 2010.*

[para 3] In the course of telephone discussions with the Public Body, the Applicant clarified and modified its access request. The Public Body then summarized the access request, as follows, in a letter to the Applicant dated July 29, 2010:

> *We are writing in regard to your request for access to the records held by the Workers' Compensation Board (WCB), that pertain to information you have categorized in the following ways:*
>
> *For the years 2008 to 2010:*
>
> - *What the experience rating position is for all employers in Alberta*
>
> - *A list of all employers, including contact details (address and telephone number) that are in the Poor Performance Surcharge (PPS) Program, and what each of these employer's surcharge and percentage amounts are.*
>
> - *A list of all employers in the Partners in Injury Reduction (PIR) program, including contact details (address and telephone number), and what each of these employer's rebates are.*
>
> *Please consider, that we have not calculated or issued any 2010 PIR refunds at this time, and so with the years of 2008-2010 that you are requesting, this would capture calculations and refunds issued for the entitled employers for the years 2007 to 2009.*

[para 4] In its letter of July 29, 2010, the Public Body provided a fee estimate of $534.44 in order to process the access request, and the Applicant then paid a deposit of $267.22. After processing the access request, the Public Body informed the Applicant, by letter dated October 28, 2010, that the actual fees were $384.44, meaning that the balance due was $117.22, which the Applicant then paid.

[para 5] By letter dated November 10, 2010, the Public Body gave the Applicant access to a limited amount of the requested information, withholding the remainder under various sections of the Act, being section 16 (disclosure harmful to business interests of a third party), section 17 (disclosure harmful to personal privacy of a third party) and section 21 (disclosure harmful to intergovernmental relations).

[para 6] In forms dated December 29, 2010 and a letter dated December 30, 2010, the Applicant requested a review by this Office of the fees charged by the Public Body, given that the Applicant had received very little information. The Applicant asked that either all costs be reimbursed or else the information be released. Mediation by a portfolio officer was authorized but was not successful. During mediation, the Public Body apparently added section 25 of the Act as a basis for withholding the requested information.

[para 7] In a form dated September 2, 2011, the Applicant requested an inquiry into the Public Body's refusal to release the requested information and its decision to charge fees.

[para 8] In separate letters dated November 21, 2011, the former Commissioner advised the parties that the inquiry would be held in two parts. The first part would involve a review of the Public Body's obligations under section 30 of the Act with respect to notifying third parties, and the second part would involve a review of the Public Body's decision to withhold the requested information and a review of the fees charged.

[para 9] This Decision addresses Part 1 of the inquiry.

II. RECORDS AT ISSUE

[para 10] As contained in spreadsheets prepared and submitted by the Public Body, the information at issue consists of the following:

- the "experience rated rate" of employers for the years 2008 to 2010 (the Public Body gave the Applicant access to the names of the employers);
- the names and addresses of employers in the PPS program for the years 2008 to 2010, the telephone numbers of the contact persons for employers, and the employers' "LB PPS percentage" and "LB rate adjustment percentage"; and
- the telephone numbers of contact persons for employers to which the Public Body issued a refund in the context of the PIR program for the years 2007 to 2009, and the refund amount (the Public Body gave the Applicant access to the names and addresses of the employers).

[para 11] In addition to addresses and telephone numbers, the Public Body withheld the names of contact persons for the employers under section 17 of the Act. However, I find that these names are not responsive to the Applicant's access request. As summarized in the Public Body's letter of July 29, 2010, the Applicant requested, in terms of contact details, addresses and telephone numbers only. Having said this, the telephone numbers of the contact persons may remain their personal information under section 1(n)(i) of the Act, even though their names were not requested.

III. ISSUES

[para 12] The Notice of Inquiry, dated January 13, 2012, set out the following issues for Part 1 of the inquiry:

> Bearing in mind whether it is practicable to do so, should the Public Body notify third parties under section 30 of the Act? If so, which parties?
>
> In the alternative, bearing in mind whether it is practicable to do so, should the Commissioner notify affected parties under section 67 of the Act? If so, which parties?
>
> Assuming that notice is required under section 30 and/or section 67 of the Act, what is the appropriate form and manner of notice?

[para 13] The Public Body provided a submission in response to the above issues, but the Applicant did not.

IV. DISCUSSION OF ISSUES

A. Bearing in mind whether it is practicable to do so, should the Public Body notify third parties under section 30 of the Act? If so, which parties?

[para 14] Section 30 of the Act reads, in part, as follows:

> *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, or*
> >
> > *(b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,*
>
> *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).*
>
> *(4) A notice under this section must*
>
> > *(a) state that a request has been made for access to a record that may contain information the disclosure of which would affect the interests or invade the personal privacy of the third party,*
> >
> > *(b) include a copy of the record or part of it containing the information in question or describe the contents of the record, and*
> >
> > *(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the public body explaining why the information should not be disclosed.*
>
> *(5) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that*
>
> > *(a) the record requested by the applicant may contain information the disclosure of which would affect the interests or invade the personal privacy of a third party,*

(b) the third party is being given an opportunity to make representations concerning disclosure, and

(c) a decision will be made within 30 days after the day notice is given under subsection (1).

[para 15] Based on its review of the lines of data in each of the spreadsheets containing the information requested by the Applicant, the Public Body believes that there are 320,747 employers involved in the request for the experience rating positions, 3,080 employers (a subset of the foregoing set of employers) involved in the request for the information in relation to the PPS program, and 24,695 employers (another subset) involved in the request for the information in relation to the PIR program. However, because some employers have multiple accounts with the Public Body, the Public Body indicates that the number of employers involved in the Applicant's access request, overall, is closer to approximately 250,000 employers.

[para 16] In its submissions, the Public Body primarily refers to the fact that it withheld information under section 16 of the Act, as this is the section that protects the business interests of the employers. However, the Public Body also withheld the telephone numbers of contact persons for employers under section 17, on the basis that disclosure may be an unreasonable invasion of their personal privacy. In any event, this does not significantly change the possible number of notices that might be required under section 30 (or section 67). Any contact person whose telephone number appears in the requested records could be given notice by way of the same notice to the employer/business. In other words, the notice could indicate that it is being given to both the employer/business and the contact person listed in the Public Body's records. There may be instances where the contact person no longer owns the particular business, or is no longer employed by it, but the notice could advise the employer/business to respond to that effect, in which case efforts could then be made to give separate notice to the particular individual (assuming that the telephone number remains associated with the individual despite his or her departure from the employer/business). Again, though, there would be relatively few such instances, as the Public Body's records presumably contain up-to-date contact information and, among the 250,000 employers, it is not likely that a significant percentage have had a change in ownership or a change in the employee who serves as the contact person.

[para 17] The Public Body submits that, in the circumstances of this particular case, section 30 of the Act does not require it to notify any third parties. It argues that at no point was it "considering giving access", as contemplated by section 30(1), to any information that affects the interests of a third party under section 16 or the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17. On the contrary, it determined that such information should not be released to the Applicant. On the basis that it therefore did not "intend to give access", as contemplated by section 30(3), the Public Body submits that it had the discretion, not the obligation, to give notice to the third parties in question. It cites orders of this Office that interpret notice under section 30(3) to be discretionary, not mandatory (Order 97-018 at

paras. 49-51; Order 99-007 at para. 29; Order 99-023 at para. 21; Order 2000-019 at para. 118).

[para 18] The Public Body further notes the following comments made by the Court of Queen's Bench in *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344 (at para. 34):

> Neither the s. 30 nor s. 67 obligations to notify are unconditional. The legislation does not provide an absolute right to a third party or affected person to immediately receive, in full, all relevant materials and submissions. The s. 30(1) obligation on the public body is to notify "where practicable and as soon as practicable", while the s. 30(3) obligation is permissive; if a public body refuses disclosure on the basis of ss. 16-17 then the public body appears to have discretion to notify or not notify any third party.
>
> [Underline added.]

[para 19] The above-noted orders and court decision are not consistent with another decision of the Court of Queen's Bench rendered in *Edmonton Police Commission v. Alberta (Information and Privacy Commissioner)*, 2011 ABQB 291. In the circumstances of that case, the Court effectively concluded that section 30(3) sets out a mandatory obligation to notify third parties. The Court wrote the following about a public body's duty to give notice to third parties (at paras. 12 to 15):

> … If the body is considering giving access to a record that may unreasonably invade the privacy of a third party, the body has to give that person a chance to object. That is enough to resolve this question. The EPC disclosed the record, although completely redacted, without complying with the Act, specifically s. 30. Section 30 provides:
>
> > [parts of section 30 excerpted]
>
> It is plain that s. 30 uses the word "access" as opposed to the word "disclosure," found in s. 17 and 20. It seems to me that one cannot have access without disclosure. In any event, in my view, the purpose of s. 30 is to allow a potentially affected third party a say in what personal information gets published. That is a fundamental tenet of the Act. Therefore, whenever the personal information of a third party may be disclosed, even if that is not the public body's intent, the procedure in s. 30(4) must be followed. It may be that the public body does not intend to disclose, either because the information is beyond the scope of the request or the provisions of s. [1]7 or s. 20 preclude disclosure. If it is the latter, the input of the potentially affected party is necessary as the OIPC may disagree with the public body's decision. If that happens, requiring the OIPC to direct the public body to then notify the potentially affected third party becomes cumbersome and unnecessarily delays the process. Therefore, in my view, despite the permissive language in Section 30(3), the public body ought to conduct itself in accordance with s. 30(4), when deciding whether to disclose in scope information.

> Where the public body is deciding on the scope of the request, that is a question which more closely relates to the public body's usual activities and therefore where the public body does not intend to disclose information as being out of scope, it makes little sense to nonetheless advise a potentially affected third party. Thus the permissive language of s. 30(3) is more appropriate. In the event the OIPC disagrees with the EPC's decision as to scope, it makes better sense to then have the EPC act in accordance with s. 30 before determining what portions of the in-scope material it will release.
>
> Given my interpretation of s. 30 of the Act, had the matter been properly brought to the Commissioner's attention, the only rational conclusion that the Commissioner could have come to is that the EPC violated the Act and must be directed to proceed in accordance with the Act, specifically s. 30.
>
> [Underline added.]

[para 20] The Notice of Inquiry specifically asked the parties to comment on the application of the above court decision to the present matter. The Public Body submits that the decision contradicts the wording of section 30(3), which uses the word "may", not "must". It again says that section 30(3) affords a public body the discretion to give, or not give, notice to third parties when it does not intend to give access to their information, provided that the discretion is exercised properly. The Public Body argues that a public body's discretion under section 30(3) should be based on the facts present when it is processing an access request, not – as suggested in the above excerpt – based on the possibility that the input of third parties may later become necessary if the matter proceeds to a review by this Office or this Office disagrees with the public body's decision to refuse access. The Public Body submits that if discretion were only available under section 30(3) where a public body is determining the scope of an access request – as suggested in the above excerpt – then the provision would have presumably said so. Instead, section 30(3) uses the phrase "[i]f the head of a public body does not intend to give access", meaning that this is the only requirement in order to trigger a public body's discretion to give notice to third parties.

[para 21] The Public Body alternatively submits that, if the decision in *Edmonton Police Commission v. Alberta (Information and Privacy Commissioner)* remains good law, the facts in that matter may be distinguished from the facts of the present inquiry. First, the court case involved only two third parties, whereas the present inquiry involves approximately 250,000 third parties, meaning that the question of whether notice would be practicable did not have to be considered in the court case. I agree that this would be a distinguishing factor, which I will discuss in more detail later in this Decision.

[para 22] Second, the Public Body notes that *Edmonton Police Commission v. Alberta (Information and Privacy Commissioner)* involved the personal information of individuals in reference to section 17, as opposed to business information in reference to section 16. I disagree that this is a distinguishing factor. While one might argue that personal privacy is more important than the privacy afforded to businesses, the Act makes no distinction in this regard. Both sections 16 and 17 set out mandatory exceptions to disclosure, and section 30(1) equally contemplates notice to a third party

where a requested record may contain information that affects the interests of that third party under section 16. Further, section 2(a), which states the Act's purpose of allowing any person a right of access to records subject to limited and specific exceptions, does not assign greater importance to any particular exception to disclosure set out in the Act. Therefore, if a public body must give notice "whenever the personal information of a third party may be disclosed, even if that is not the public body's intent" – as stated by the Court in *Edmonton Police Commission v. Alberta (Information and Privacy Commissioner)* – I presume that the same principle would apply in respect of business information of a third party.

[para 23] Setting aside the question of practicability for the moment, a public body's obligation, as opposed to discretion, to give notice to third parties depends on what is meant by "considering giving access" under section 30(1), as opposed to what is meant by "not intend[ing] to give access" under section 30(3). Notice provisions comparable to those in section 30 of the Act were recently considered by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3. Referring to section 27 of the federal *Access to Information Act*, the justice speaking for a majority of the Court made the following comments regarding notice to third parties (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.

[Underline added.]

[para 24] In the present inquiry, the Public Body argues that it was not required to notify any third parties because it did not "intend to give access", under section 30(3) of Alberta's Act, to the information that it withheld from the Applicant. With respect to the obligation to notify third parties, section 27(1) of the federal *Access to Information Act* uses the comparable phrase "intends to disclose". I therefore consider the comments of the Supreme Court applicable to access requests under Alberta's Act. As a result, a public body should give notice to an interested third party unless the requested information is "clearly" exempt from disclosure or there "is no reason to believe" that the information could be subject to disclosure. In opposite cases, a public body is not required to give notice if the requested information is clearly subject to disclosure or there is no reason to believe that it is exempt from disclosure. In these opposite cases, section 30 is not engaged at all, as there is no arguable possibility that the requested record contains information captured by section 16 or 17, being the information contemplated in sections 30(1)(a) and 30(1)(b).

[para 25] Following the line of analysis articulated by the Supreme Court, a public body "does not intend to give access to a record that contains information excepted from disclosure under section 16 or 17", within the terms of section 30(3) of Alberta's Act, where there is no arguable possibility that the requested information might be subject to disclosure. If there is any reason to believe otherwise, the public body should seek the input of the interested third parties in order to determine whether the information should be released to the applicant or not. In such instances, the public body is properly characterized as being at the stage of "considering giving access", within the terms of section 30(1), and the notice obligation is triggered.

[para 26] In my opinion, the foregoing interpretation of section 30 has the additional advantage of discouraging public bodies from simply deciding not to give access to information because it means that they can avoid giving notice to any third parties. As explained by the Supreme Court in *Merck Frosst Canada Ltd. v. Canada (Health)* (at para. 73) the head of an institution, or public body, has a duty not only to refuse to disclose exempted material, but also a duty to disclose non-exempt material, and he or she must give due consideration to both of these possibilities.

[para 27] While I have set out the circumstances in which a public body is generally required to give notice to third parties, there is an additional consideration in section 30(1) of the Act, which is that a public body must give notice "where practicable and as soon as practicable". The necessary implication is that, if notice to the third parties in question is not practicable, it is not required. In this inquiry, the Public Body argues that giving notice to approximately 250,000 employers is not practicable. A comparable

consideration did not arise in *Merck Frosst Canada Ltd. v. Canada (Health)*. The comments of the Supreme Court, excerpted above, therefore do not provide a complete answer to the question of whether the Public Body, in this inquiry, should give notice to third parties.

[para 28] The Public Body estimates that giving notice, by mail, to approximately 250,000 employers would cost $326,540 in terms of form preparation, printing, envelopes and postage. It estimates that giving notice, alternatively, by way of a public notice for five days in Alberta's local and rural newspapers would cost between $25,000 and $35,000. While this is cheaper than a mail-out, the Public Body questions whether public notice is practicable, given that it would not likely be seen by all of the employers in question, and the response rate would therefore be much lower than if there were a mail-out. The Public Body submits that, in determining what is practicable, the utility of the process must also be considered. On this point, the Public Body adds that a relatively inexpensive notice on its own website would not likely prove effective, as employers do not necessarily routinely visit its website. Further, the Public Body submits that, because some employers have their head offices outside Alberta or the staff member responsible for dealing with access to information works in an office outside Alberta, a public notice in national newspapers may also be necessary in order to reach the target audience. On its preliminary review, it notes that there are 25,738 employers with out-of-province addresses. The Public Body estimates that running a public notice in national newspapers for five days would cost approximately $170,000.

[para 29] Based on its experience notifying 1,380 employers by mail-out in a different inquiry, in which it received representations from roughly one-third of them and responded to many telephone inquiries, the Public Body estimates that, if it were to notify 250,000 employers, it would require eight to ten staff members, for a period of two to three months, to deal with the incoming calls and mail. It estimates the staffing costs to be between $77,000 and $144,000. While a notice published in newspapers would not necessarily reach all of the same target audience, the Public Body would still require staff to respond to queries and review the incoming representations. Even if there were a lower rate of response and therefore fewer staff required, the Public Body will have already spent a considerable amount in publishing the notice in the first place.

[para 30] I note that a dictionary defines "practicable" as "capable of being put into practice or of being done or accomplished; feasible" (*Merriam-Webster online dictionary*). In my view, in order to determine whether notice would be practicable within the terms of section 30(1) of the Act, it is appropriate to consider the number of third parties involved, and the time, financial cost and human resources that would be required. In theory, virtually everything is "capable of being… done" or "feasible", if there are unlimited time and resources, or all available time and resources are dedicated to the particular task. Surely, though, something is practicable only insofar as it is reasonable to dedicate the necessary time and resources to the particular task.

[para 31] Therefore, based on the Public Body's estimates of the financial costs and human resources implications if it were to give notice to approximately 250,000

employers, whether by way of a mail-out or public notice, I agree that notice under section 30(1) is not practicable. The Public Body is therefore not required to give notice, regardless of whether there is any reason to believe that the information requested by the Applicant could be subject to disclosure.

B. In the alternative, bearing in mind whether it is practicable to do so, should the Commissioner notify affected parties under section 67 of the Act? If so, which parties?

[para 32] Section 67 of the Act reads as follows:

> *67(1) On receiving a request for a review, the Commissioner must as soon as practicable*
>
> *(a) give a copy of the request*
>
> *(i) to the head of the public body concerned, and*
>
> *(ii) to any other person who in the opinion of the Commissioner is affected by the request,*
>
> *and*
>
> *(b) provide a summary of the review procedures and an anticipated date for a decision on the review*
>
> *(i) to the person who asked for the review,*
>
> *(ii) to the head of the public body concerned, and*
>
> *(iii) to any other person who in the opinion of the Commissioner is affected by the request.*
>
> *(2) Despite subsection (1)(a), the Commissioner may sever any information in the request that the Commissioner considers appropriate before giving a copy of the request to the head of the public body or any other person affected by the request.*

[para 33] The Public Body's submissions on the above issue read, in part, as follows:

> The WCB submits that, in this case, "as soon as practicable" may be if and when the OIPC determines that the disclosure [of the information withheld from the Applicant] may be proper given the circumstances. In that event, the impacted employers become interested and in only that event is notice arguably required. The hearing at the OIPC level could have two stages. Based on the initial submissions of the WCB and Applicant herein, the OIPC could determine if disclosure is appropriate. If the OIPC was inclined to direct a disclosure, it could then issue notices to interested employers. That process… would alleviate a

> potentially unnecessary and administratively time consuming and expensive step of giving notice where no impact is foreseen…

[para 34] In Decision F2008-D-001 (at paras. 30-32), a matter in which I determined that affected parties should be notified, I made similar comments, as follows, regarding the meaning of the phrase "as soon as practicable" in section 67:

> Section 67(1)(a)(ii) of the Act requires a copy of the request for review to be given to any person affected by it "as soon as practicable". It has been stated that notice can be given to an affected party at any stage of the process (Order 2001-002 at para. 6).
>
> In my view, the reason that notice might be given to an affected party at various points in time is that the Commissioner or his delegate must have the requisite knowledge in order to determine whether a person is indeed affected by a request for review under section 67(1)(a)(ii). Sometimes, there might not be sufficient information until the decision-maker obtains and reviews the records at issue. Even that may not suffice. For instance, to determine whether the mandatory exception to disclosure under section 16 or 17 of the Act arguably applies, or to understand that there may be consequences to third parties if information about them were disclosed, one might first need to obtain and review the initial and rebuttal submissions of the applicant and public body.
>
> Given the foregoing, the point in this Office's processes when it becomes as soon as practicable to notify affected parties will vary among reviews and inquiries. While notifying them at the same time that an applicant and public body are asked to make their representations is the best way to resolve a matter quickly, this is not always practicable. It is appropriate, in my view, to avoid the unnecessary involvement of parties who, in the end, did not have to become involved. Automatically notifying persons at the outset, simply for the sake of expedience, may unnecessarily complicate certain reviews and inquiries. This may be particularly so where it is quite clear, on preliminary review of the records at issue, that the personal or business information of third parties is subject to a mandatory exception to disclosure and therefore will not be ordered to be disclosed.

[para 35] While the Court of Queen's Bench quashed Decision F2008-D-001 in *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, it did so because it found that notice to affected parties was premature, for certain other procedural reasons. The Court did not review my comments above about when notice would be as soon as practicable, so I do not believe that they have been rendered inapplicable. Indeed, I consider my comments to be consistent with the Court's decision in that both effectively suggest that notice to affected parties should not automatically occur immediately, but rather after there has first been a somewhat fuller analysis of whether an exception to disclosure in the Act applies. Both the Court and I suggest that, if it becomes apparent that the requested information is not possibly subject to disclosure, for whatever reason, then it may never be necessary to notify any affected parties.

[para 36] In this particular inquiry, I already have a copy of the information at issue, but I do not have the benefit of any representations from the Public Body or Applicant, regarding whether or how the information falls within or outside the scope of section 16 or 17 of the Act. To the extent that the Supreme Court of Canada's comments, excerpted earlier in this Decision, may be applied to this Office's obligation to notify affected parties under section 67, I have insufficient information, at this time, to determine whether the requested information is clearly exempt from disclosure, or alternatively, whether it is clearly subject to disclosure. Simply reviewing the information at issue in the spreadsheets prepared by the Public Body does not enable me to make this determination, so I find it necessary and appropriate to first request submissions from the Public Body and Applicant on the main issues in the inquiry. On my review of the Public Body's views on why the information should be withheld, and the Applicant's views on why the information should be released, I will be in a position to decide whether there is an arguable possibility that the information should be released, in which case notice to affected parties might be warranted.

[para 37] Finally, I note that, when the Applicant initially wrote to this Office by letter dated December 30, 2010, it was primarily concerned that it had been charged fees but had received a limited amount of information in return. The Applicant summarized its position as follows:

> We find the charges by the WCB for providing incidental information unreasonable and unwarranted. The process the WCB followed was misleading and resulted in our firm paying monies to the WCB unnecessarily.
>
> We ask that all costs be reimbursed to our firm or the information be released.

[para 38] The above indicates that the Applicant was, at least at one point, ready to accept a refund of the fees charged rather than access to the remaining information that it had requested. Should the Applicant remain willing to effectively withdraw its access request if the Public Body refunds the fees, and the Public Body agrees to do so, then notice to any affected parties would be unnecessary. Of course, the foregoing possibility would be in the nature of a settlement between the parties, so it should not be discussed before me. If the parties happen to settle at any point in time, they should advise the Registrar of Inquiries and this inquiry will be discontinued. In the meantime, this inquiry will proceed as it would in the normal course, meaning that the Notice of Inquiry for Part 2 will be issued shortly.

C. Assuming that notice is required under section 30 and/or section 67 of the Act, what is the appropriate form and manner of notice?

[para 39] In setting out the above issue, the Notice of Inquiry asked the parties to make submissions on whether notice may be appropriately carried out by way of a general public notice and, if so, in what specific online websites or forums, and what specific physical (i.e., hard copy or print) publications. The Notice of Inquiry also asked the parties to indicate whether, in their view, there are any umbrella organizations that could

adequately make representations on behalf of the employers whose interests may be at stake.

[para 40] Earlier in this Decision, I reviewed the Public Body's submissions regarding the practicability of giving notice to the employers by way of a mail-out, as well as by way of a public notice. While I found that neither was practicable from the standpoint of requiring the Public Body to give notice within the terms of section 30(1) of the Act, this does not necessarily mean that it would not be practicable for this Office to give notice, under section 67, by way of a public notice or mail-out. For instance, it might be possible for this Office to give sufficient and appropriate notice under section 67 by inviting submissions from a subset of employers, following some form of public notice or a more limited mail-out. It might also be sufficient to invite one or more umbrella organizations to participate on the employers' behalf, as interveners. While sections 30 and 67 are in some ways comparable, they do not consist of the same content or considerations. The form and manner of notice, and the parties to whom it is given, may accordingly differ, depending on which section is engaged. Further, while both sections use the term "practicable", there may be different operational and other factors to consider in deciding what is practicable for this Office to do, as opposed to the Public Body.

[para 41] In any event, I do not need to decide any of the foregoing questions, or the above issue, at this time. First, I have decided that the Public Body is not required to give notice to any third parties under section 30. Second, I have not yet decided whether this Office is required to give notice to any affected parties under section 67.

[para 42] On a final note, while I have decided that the Public Body is not itself required to give notice to the employers under section 30 of the Act, I may later request its further input or assistance, should I decide that this Office should notify affected parties under section 67.

V. DECISION

[para 43] The Public Body is not required to notify any third parties under section 30 of the Act, as it is not practicable to do so.

[para 44] Instead, I will consider, at a later stage in the process, whether this Office should notify any affected parties under section 67 of the Act. If, in my opinion, there are affected parties following my review of the submissions of the Public Body and Applicant on whether the requested information should or should not be disclosed, I will arrange for such affected parties to be notified as soon as practicable, and in an appropriate form and manner.

Wade Riordan Raaflaub
Adjudicator