Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4149

Appeal PA19-00262

Workplace Safety and Insurance Board

May 28, 2021

Summary: This is a third party appeal regarding the Workplace Safety and Insurance Board's (WSIB) decision to partially disclose records relating to a particular food delivery company. On appeal to the IPC, the appellant submitted that the records should not be disclosed to the requester based on the following sections of the *Act*: the employment or labour relations exclusion in section 65(6)1; the WSIB's custody or control of records under section 10(1); the third party information exemption in section 17(1); and the law enforcement report exemption in section 14(2)(a). Neither the appellant nor the requester appealed the WSIB's decision to deny access to certain portions of the records based on the third party information and personal privacy exemptions in sections 17(1) and 21(1), respectively. However, the requester, a journalist, raised the application of the public interest override in section 23 with respect to the information that the appellant argued should be withheld under section 17(1).

In this order, the adjudicator finds that the records at issue are not excluded from the application of the Act under section 65(6)1 and are within the WSIB's custody or control. She also finds that the section 17(1) exemption does not apply to the information at issue, and that the appellant is not entitled to claim the application of the discretionary law enforcement exemption in section 14(2)(a). Therefore, she upholds the WSIB's decision to disclose the information and dismisses the appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c.F.31 , as amended, sections 10(1), 17(1), and 65(6)1; *Workplace Safety and Insurance Act, 1997,* SO 1997, c 16, Sched A; and *Public Inquiries Act, 2009*, SO 2009, c 33, Sched 6.

Orders and Investigation Reports Considered: Orders P-16, P-257, P-345, P-952, and P-1137.

OVERVIEW:

[1] A journalist submitted a request to the Workplace Safety and Insurance Board (the WSIB) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to three named food delivery companies who are registered as employers with the WSIB. The request read, in part:

> Any and all documents (including emails, memos, notes, questionnaires, forms, and other records) in the employer accounts…
>
> Any and all records (including emails, memos, notes, questionnaires, forms, and other documents) related to WSIB's decisions on original classification/registration status…
>
> Any and all records (including emails, memos, notes, questionnaires, forms, and other documents) on subsequent decisions to reclassify (and/or re-register)…

[2] The requester also sought access to:

> Any and all records (including emails, memos, notes, questionnaires, forms, documents) that relate to WSIB's internal response to the CBC News: Marketplace documentary, "Battle of the Food Delivery Apps" which aired on November 16, 2018.

[3] The request further stated:

> Please include any and all forms, regardless of date.

[4] The WSIB identified records relating to the request and notified the three named companies under section 28(1) of the *Act* to obtain their views regarding disclosure of the records. At least one of the companies provided written representations expressing their views on disclosure, and the WSIB issued a decision granting partial access to the records. Access to the withheld information was denied pursuant to sections 17(1) (third party information exemption) and 21(1) (personal privacy exemption) of the *Act*. The WSIB also withheld information in the records that it identified as non-responsive to the request.

[5] One of the companies appealed the WSIB's decision to the Information and Privacy Commissioner of Ontario (the IPC), thereby becoming the third party appellant in this appeal.

[6] During the mediation stage of the appeal process, the appellant opposed the disclosure of the records relating to it and relied on the employment or labour relations exclusion in section 65(6), the third party information exemption in section 17(1), the personal privacy exemption in section 21(1), and the law enforcement report exemption in section 14(2)(a). The appellant also challenged the WSIB's custody or control of

records under section 10(1) and the WSIB's assessment of the scope of the request under section 24.

[7] The requester confirmed that they would not appeal the WSIB's decision. Accordingly, the information withheld by the WSIB under sections 17(1) and 21(1), and as non-responsive, is not at issue in this appeal. The requester did, however, raise the application of the public interest override in section 23 of the *Act*, in response to the appellant's claims that the remaining portions of the records should not be disclosed.

[8] A mediated resolution was not achieved. The file was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry under the *Act*. I decided to conduct an inquiry, which I began by inviting the appellant to provide written representations responding to the issues raised by its appeal. In its representations, the appellant advised that it no longer takes issue with the scope of the request, or relies on section 21(1). Therefore, those issues were removed from the scope of the appeal.

[9] I then invited the WSIB and the requester to provide written representations addressing the issues and responding to the appellant's position. Following receipt of those parties' representations, I invited the parties to provide reply and sur-reply representations. Throughout my inquiry, the parties' representations were shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*. Although I have considered the parties' representations in their entirety, I will only summarize the non-confidential portions of them in this order.

[10] For the reasons that follow, I find that the records are not excluded from the application of the *Act*, pursuant to section 65(6), and are within the WSIB's custody or control under section 10(1). I find that the section 17(1) exemption does not apply to the information at issue, and that the appellant is not entitled to claim the application of the discretionary law enforcement exemption in section 14(2)(a). Accordingly, I uphold the WSIB's decision to disclose the records and dismiss the appeal.

[11] In addition, as noted above, the WSIB withheld portions of the records based on the personal privacy exemption in section 21(1). The requester did not appeal that decision, nor does the appellant take issue with it in this appeal. I note that an individual's name and birth date appear in two places on page one of record 81; however, the WSIB only indicated that it would sever that information under section 21(1) in one of the two locations. Staff of this office have confirmed that the requester is not interested in obtaining access to the individual's name or birth date. **The WSIB should sever those portions of record 81 prior to disclosure.**

RECORDS:

[12] There were originally 13 records at issue in this appeal, which were identified as Tabs (records) 53, 54, 55, 56, 62, 64, 75, 76, 77, 79, 80, 81, and 85 in an Index of Records provided by WSIB to the parties.

[13] In the appellant's representations, it advised that it no longer objects to the disclosure of records 53, 54, 55, 56, 77, 79, 80, and 85 with the WSIB's redactions, if the appellant's WSIB account number is redacted from records 53, 54, 55, and 56 prior to disclosure. In response, the requester maintained that the account numbers in records 53, 54, 55, and 56 should be disclosed. Therefore, the following information remains at issue in this appeal:

- The appellant's WSIB account number in records 53, 54, 55, and 56, and
- The entirety of records 62, 64, 75, 76, and 81.

[14] These records primarily consist of correspondence that was sent from the WSIB to the appellant, including correspondence about a classification review (record 62) and information about the appellant's premium rate group and premium rate (records 64, 75, and 76). One record (record 81), contains the WSIB's notes regarding the appellant's account.

[15] The WSIB's decision with respect to records 77, 79, 80, and 85 is no longer at issue, and will not be considered further in this order.

PRELIMINARY ISSUE:

WSIB's claim that the appellant's WSIB account number does not relate to the request

[16] As mentioned above, the appellant has agreed to the disclosure of records 53, 54, 55, and 56 to the appellant with the severances set out in the WSIB's decision, as long as its WSIB account number is also severed from the records.

[17] In response, the WSIB submitted that the account number does not qualify for the section 17(1) exemption (an issue that will be considered in detail below). In the alternative, however, the WSIB said that the account number could be withheld on the basis that it is non-responsive (not related) to the request, because it "is not specific to the original request and is not a vital part of the records and content." In its reply representations, the appellant agreed that the information could be withheld on the basis that it is not responsive to the request.

[18] The IPC has previously held that institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. To be considered "responsive" to the request, information must "reasonably relate" to the request.[1]

[19] The responsiveness of the appellant's WSIB account number was not identified in

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[1] Orders P-880 and PO-2661.

the Mediator's Report as an issue for adjudication.[2] The WSIB first raised the issue of whether this information is responsive in its representations during my inquiry. Its initial decision was to disclose the appellant's account number to the requester, as it did with the other two companies' account numbers. In that same decision, the WSIB withheld other information in the records on the basis that it was non-responsive to the request. I infer from this that the WSIB did initially consider the issue of responsiveness, and viewed the appellant's account number as responsive to the request. The WSIB has not issued a revised decision changing its position with respect to the appellant's account number.

[20] In my view, these circumstances, including the parties' failure to raise the issue of the responsiveness of this information in a timely way, provide a basis for my declining to consider their arguments on this point. In any event, however, I am satisfied that the appellant's WSIB account number is "reasonably related" to the request for various information relating to the appellant's employer account.

[21] I will consider under Issue C, below, whether the appellant's WSIB account number should be withheld from the records based on section 17(1), which the appellant claims should apply to exempt the information from disclosure.

ISSUES:

A. Does the labour relations or employment records exclusion at section 65(6)1 exclude the records from the *Act*?

B. Are records 62 and 81 in the custody or under the control of the WSIB under section 10(1)?

C. Does the mandatory third party information exemption at section 17(1) apply to records 53, 54, 55, 56, 62, 64, 75, 76, and/or 81?

D. Should the third party appellant be allowed to raise the application of the discretionary exemption in section 14(2)(a) of the *Act*? If so, does the discretionary law enforcement exemption in section 14(2)(a) apply to records 62 and 81?

[2] While "scope of the request" (section 24) was listed as an issue in the Mediator's Report, it was only raised with respect to record 81. As set out above, that issue was dropped by the appellant in its initial representations.

DISCUSSION:

Issue A: Does the labour relations or employment records exclusion at section 65(6)1 exclude the records from the *Act*?

[22] On appeal to the IPC, the appellant raised the application of the exclusion in section 65(6)1 with respect to the records at issue. The burden is on the appellant to establish that the exclusion applies.

[23] Section 65(6)1 states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

[24] If one of the exclusions in section 65(6) applies to the records, and none of the exceptions found in section 65(7) applies,[3] then the records are excluded from the scope of the *Act*.

[25] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1 of section 65(6), it must be reasonable to conclude that there is "some connection" between them.[4]

[26] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[5]

[27] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[6]

[28] If section 65(6) applied at the time the record was collected, prepared,

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[3] Section 65(7) (relating to agreements and expense accounts) is of no relevance in this appeal.
[4] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[5] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner), [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.*
[6] Order PO-2157.

maintained or used, it does not cease to apply at a later date.[7]

[29] The type of records excluded from the *Act* by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[8]

Section 65(6)1: court or tribunal proceedings

[30] For section 65(6)1 to apply, the appellant must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

Representations

The appellant's representations

[31] The appellant maintains that the *Act* does not apply to the records at issue because they are excluded by virtue of section 65(6)1.

[32] In support of this position, the appellant refers to the decision in *Ontario (Minister of Health and Long-Term Care)*[9] in which the Ontario Court of Appeal held that the term "labour relations" extends beyond collective bargaining to include independent contractor relationships. The appellant submits that the records at issue were collected, prepared, maintained and/or used by the WSIB in relation to anticipated proceedings before the WSIB, the WSIB's appeals branch, and the Workplace Safety and Insurance Appeals Tribunal (WSIAT), relating to labour relations between the appellant and its "riders" (defined by the appellant as independent third party drivers or cyclists).

[33] The appellant acknowledges that the IPC has historically applied section 65(6)1 to employment matters or labour relations in which the institution is the employer;

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[7] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

[8] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[9] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [200 3] O.J. No. 4123 (C.A.).

however, the appellant argues that this is an "unduly narrow" application of the exclusion. The appellant maintains that there is "little logic to say that information regarding employment and labour relations is inherently sensitive if the government is the employer, but not if the private sector is the employer."

[34] The appellant also submits that "section 65(6)1 must inform the interpretations of the exemptions in sections 14 and 17 because, like any other statute, the *FIPPA* must be interpreted in accordance with Driedger's modern principle," which states:

> Today there is only one principle or approach, namely, the words of an Act are to be read *in their entire context* and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[10] (emphasis added by appellant)

[35] According to the appellant, the wording of section 65(6)1 "invariably leads to the conclusion that labour and employment relations are usually commercially sensitive matters," such that public disclosure of those matters would result in harm.

The WSIB and requester's representations

[36] The requester maintains that if the information at issue, and similar information held by the WSIB, was considered to have some connection to employment matters and labour relations for the purpose of section 65(6)1, "it would block many WSIB records from ever being disclosed." According to the requester, the exclusion is "about labour relations in the context of government, which is not relevant" in the circumstances.

[37] The WSIB's representations did not address this issue.

The appellant's reply

[38] In reply, the appellant maintains that the language of the *Act* must not be "artificially circumscribed." The appellant claims that pursuant to section 64 of the *Legislation Act*,[11] section 65(6)1 must be given a "fair, large, and liberal construction and interpretation." Similarly, the words "relating to" in section 65(6)1 must also be interpreted broadly.

[39] The appellant's sur-reply representations did not address this issue, and the WSIB did not provide sur-reply representations for my consideration.

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[10] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.
[11] *Legislation Act, 2006*, SO 2006, C 21, Sch F.

Analysis and Findings

[40] Based on my review of the records and the parties' submissions, I accept the appellant's assertion, and I find, that the records were prepared, maintained, and/or used by the WSIB as required for part one of the section 65(6)1 test. However, even if I were satisfied that the preparation or maintenance of the records had been related to proceedings or anticipated proceedings for the purpose of part two of the test, my finding that follows - that part three of the test is not met - means that the 65(6)1 does not apply to exclude the records from the *Act*.

[41] Pursuant to the statutory language of the exclusion itself, part three of the section 65(6)1 test requires that the "proceedings or anticipated proceedings" referred to in part two of the test relate to labour relations or to the employment of a person *by the institution*. In this case, the records relate to labour relations or the employment of a person by the appellant, not the WSIB.

[42] I am not persuaded by the appellant's suggestion that limiting the application of the exclusion to employment matters or labour relations in which the institution is the employer is an "unduly narrow" interpretation of the *Act*, considering that this interpretation and application is based on the very wording of the exclusion itself:

> […] this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 1. Proceedings or anticipated proceedings before a court, tribunal or other entity *relating to labour relations or to the employment of a person by the institution*. (emphasis added)

[43] In my view, extending the application of the exclusion to include labour relations or employment matters in which an entity other than an institution is the employer would be reading in an application that was not intended by the Legislature, nor is it supported by the case law.[12] Accordingly, I find that the final requirement of the section 65(6)1 exclusion is not satisfied, and that the records at issue are not excluded from the application of the *Act*.

Issue B: Are the records 62 and 81 in the custody or under the control of the WSIB under section 10(1)?

[44] The appellant raised the issue of custody or control with respect to records 62 and 81. These records consist of a letter from the WSIB to the appellant about a classification review that was conducted by the WSIB, and the WSIB's notes about the appellant's WSIB account, respectively.

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[12] *Ontario (Ministry of Correctional Services) v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.).

[45] Section 10(1) provides for a general right of access to records that are in the custody or under the control of an institution governed by the *Act*. It reads, in part:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .

[46] Under section 10(1), the right of access applies to a record that is in the custody or under the control of an institution; the record need not be both.[13]

[47] There are exceptions to the general right of access set out in section 10(1).[14] The record may be excluded from the application of the *Act* by section 65, or may be subject to an exemption from the general right of access.[15]

[48] The courts and the IPC have applied a broad and liberal approach to the custody or control question.[16] In deciding whether a record is in the custody or control of an institution, the factors outlined below are considered in context and in light of the purposes of the *Act*.[17]

Factors relevant to determining "custody or control" when an institution holds the record

[49] The IPC considers the following non-exhaustive list of factors when deciding if a record is in the custody or control of an institution.[18]

- Was the record created by an officer or employee of the institution?[19]
- What use did the creator intend to make of the record?[20]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?[21]

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[13] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).
[14] Order PO-2836.
[15] Found at sections 12 through 22 and section 49 of the *Act.*
[16] *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072; *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.) and Order MO-1251.
[17] *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.).
[18] Orders 120, MO-1251, PO-2306 and PO-2683.
[19] Order 120.
[20] Orders 120 and P-239.
[21] Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

- Is the activity in question a "core," "central" or "basic" function of the institution?[22]

- Does the content of the record relate to the institution's mandate and functions?[23]

- Does the institution have physical possession of the record, either because it was voluntarily provided by the creator or provided pursuant to a statutory or employment requirement?[24]

- If the institution does have possession of the record, is it more than "bare possession"? In other words, does the institution have the right to deal with the record in some way and does it have some responsibility for its care and protection?[25]

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of their duties as an officer or employee?[26]

- Does the institution have a right to possession of the record?[27]

- Does the institution have the authority to regulate the record's content, use and disposal?[28]

- Are there any limits on the ways in which the institution may use the record? If so, what are those limits, and why do they apply to the record?[29]

- To what extent has the institution relied upon the record?[30]

- How closely is the record integrated with other records held by the institution?[31]

- What is the usual practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature?[32]

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[22] Order P-912.
[23] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, cited above, and Orders 120 and P-239.
[24] Orders 120 and P-239.
[25] Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[26] Orders 120 and P-239.
[27] Orders 120 and P-239.
[28] Orders 120 and P-239.
[29] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.
[30] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.
[31] Orders 120 and P-239.

[50] This list is not exhaustive. Some of these factors may not apply in a specific case, while other factors that are not listed above may apply.

Factors relevant to determining "custody or control" when another individual or organization holds the record

[51] The Supreme Court of Canada adopted the following two-part test on the question of whether an institution has control of records that are not in its physical possession:

1. Do the contents of the document relate to a departmental matter?
2. Could the government institution reasonably expect to obtain a copy of the document upon request?[33]

[52] In addition, the following factors may be relevant considerations where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?[34]
- Is the individual, agency or group who or that has physical possession of the record an "institution" for the purposes of the *Act*?
- Who owns the record?[35]
- Who paid for the creation of the record?[36]
- What are the circumstances surrounding the creation, use and retention of the record?[37]
- Are there any contractual provisions between the institution and the individual who created the record that give the institution an express or implied the right to possess or otherwise control the record[38]
- Was there an understanding or agreement between the institution, the individual who created the record, or any other party that the record was not to be

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[32] Order MO-1251.
[33] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.
[34] PO-2683.
[35] Order M-315.
[36] Order M-506.
[37] PO-2386.
[38] *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

disclosed to the institution? If so, what was the precise undertaking of confidentiality given by the individual who created the record, to whom was it given, when, why, and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? Did the agent have the authority to bind the institution? If so, please explain the scope of that agency, and whether it gave the institution the right to possess or otherwise control the record.

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances?[39]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue?[40]

Representations

The appellant's representations

[53] The appellant explains that the WSIB conducted an "inspection/investigation of the appellant"[41] pursuant to section 135 of the *Workplace Safety and Insurance Act, 1997* (*WSIA*),[42] during which it made inquiries and examined documents that the appellant was compelled to provide.[43] The appellant maintains that section 136 of the *WSIA* makes all inspections, investigations, and examinations subject to section 33 of the *Public Inquiries Act, 2009*,[44] and that section 33(14) of the *Public Inquiries Act, 2009*, requires the WSIB to return documents, records, and information provided by the person who produced them. In particular, this section states:

> 33 (14) Documents and things produced in evidence at an inquiry shall, upon request of the person who produced them or the person entitled thereto, be released to the person by the person or body conducting the inquiry within a reasonable time.

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[39] Order MO-1251.
[40] Order MO-1251.
[41] Although the appellant does not specify, it appears that the "inspection/investigation" it is referring to the WSIB's classification review of food delivery companies, including the appellant.
[42] *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sched. A [*WSIA*].
[43] *WSIA*, section 153(1).
[44] *Public Inquiries Act, 2009*, SO 2009, c 33, Sched 6.

[54] According to the appellant, on April 9, 2019, it requested that the WSIB return all of the documents and things produced by the appellant during the WSIB's inspection/investigation, and the WSIB complied with that request on May 6, 2019. On this basis, the appellant maintains that the records are no longer in the WSIB's custody or control.

[55] The appellant submits that records 62 and 81 "contain repetition of information and/or documents that the appellant provided to the WSIB." In the appellant's view, the subject matter of the documents it provided to the WSIB "is so intertwined" with the subject matter from other sources, that it cannot be segregated. The appellant submits that it would make section 33(14) of the *Public Inquiries Act, 2009* "meaningless" if an institution could "wholly circumvent the provision by simply copying or re-typing such documents and things."

The WSIB and requester's representations

[56] The requester submits that the records are "most certainly" under the WSIB's custody and control. She notes that the WSIB included them in response to her request, which "must mean that [the records] were responsive to the WSIB's search of the records."

[57] The WSIB's representations did not address this issue.

The appellant's reply

[58] In reply, the appellant maintains that the fact that an institution lists a record as responsive to a request is not determinative of whether the record actually is within the institution's custody or control.

[59] The requester's sur-reply did not address the issue of custody or control.

Analysis and Findings

[60] Based on the content of the records and the representations before me, I find, for the following reasons, that the WSIB has custody or control of records 62 and 81 as contemplated by section 10(1) of the *Act*.

[61] While I do not have the benefit of the WSIB's submissions on this issue, my review of the records indicates that record 62 is a letter from the WSIB to the appellant regarding the WSIB's classification review, and record 81 consists of the WSIB's internal working notes about the appellant's account. I am satisfied, and I find, that the nature of records 62 and 81 reveals that they were created by WSIB employees,[45] and are not themselves documents that were provided to the WSIB by the appellant. I also find that

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[45] Order 120.

the records relate to the WSIB's "core," central" or "basic" functions,[46] including its statutory powers or duties as set out in the WSIA.[47]

[62] The evidence before me indicates that WSIB had physical possession of records 62 and 81 at the time that the request was received by the WSIB (December 21, 2018), and at the time that the WSIB issued its access decision (April 25, 2019). I find that the WSIB physically possessed[48] records 62 and 81 at the relevant times as a result of its ordinary business and record keeping practices.

[63] Although the appellant maintains that records 62 and 81 "contain repetition of information and/or documents that the appellant provided to the WSIB," it has not established that *the records themselves* were provided by and then returned to the appellant, or are otherwise beyond the WSIB's custody or control. Whether the records contain information that the appellant supplied to the WSIB in confidence is a matter for consideration with regard to section 17(1) (see Issue C), and is not determinative to the custody or control issue.

[64] For these reasons, I am not persuaded by the appellant's position on this issue, and I find that records 62 and 81 are in the custody or under the control of the WSIB for the purpose of the general right of access set out in section 10(1).

Issue C: Does the mandatory third party information exemption at section 17(1) apply to records 53, 54, 55, 56, 62, 64, 75, 76, and/or 81?

[65] The WSIB's access decision was that portions of records 77, 79, 80, and 85 were exempt under section 17(1). These severances are not at issue in this appeal.

[66] On appeal, the appellant submits that the third party information exemption in section 17(1) also applies to records 62, 64, 75, 76, and 81[49] in their entirety, and to its WSIB account number in records 53, 54, 55, and 56.

[67] The section 17(1) exemption states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

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[46] Order P-912.

[47] *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, cited above, and Orders 120 and P-239.

[48] Orders 120 and P-239.

[49] The WSIB withheld portions of record 81 under the personal privacy exemption at section 21, and on the basis that the information is not responsive to the request. These severances are not at issue in this appeal.

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[68] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[50] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[51]

[69] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Representations

[70] Recall that, with the exception of record 81, the records at issue consist of correspondence that was sent from the WSIB to the appellant. Record 62 pertains to a classification review that was carried out by the WSIB, and records 64, 75, and 76 relate to the appellant's WSIB premium rate. Record 81 contains the WSIB's notes about the appellant's account.

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[50] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[51] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

The appellant's representations

[71] The appellant submits that section 17(1) is designed to protect the informational assets of organizations that provide information to institutions by limiting disclosure of confidential information that could impair a third party's ability to compete in the marketplace. In the context of this appeal, the appellant maintains that section 17(1) prohibits disclosure of its WSIB account number in records 53, 54, 55, and 56, and records 62, 64, 75, 76 and 81 in their entirety.

[72] With regard to the first part of the section 17(1) test, the appellant submits that the records contain the appellant's confidential proprietary commercial, financial and/or labour relations information. In support of its position, the appellant maintains that records 62, 64, 75, 76, and 81 contain detailed commercial information about its "selling of services to riders and restaurants," including, for example, how its "platform works and the relationships between the various parties in a given meal delivery transaction."

[73] The appellant also submits that the records contain financial information in the form of a confidential WSIB "Firm Number" and "Account Number," information about the appellant's premium rates, expressed as a dollar figure, and the appellant's CRA number (in record 64, specifically), as well as labour relations information pertaining to the appellant's "contractor relationship" with riders.

[74] With regard to the "supplied" requirement in part two of the section 17(1) test, the appellant maintains that records 62, 64, 75, 76, and 81 all contain information that was supplied to the WSIB by the appellant. According to the appellant, records 62, 64, 75, and 76 consist of WSIB forms and decisions, which "repeat the information supplied by the appellant in response to the WSIB's queries." With respect to record 81, the appellant maintains that it "[recites] information that the appellant provided to the WSIB" and includes information that was "directly derived from that information and could be used to easily determine the information that [was] provided to the WSIB."

[75] Regarding the requirement that the information be supplied to the institution "in confidence," the appellant submits that the WSIB "assured the appellant during a conference call on November 6, 2018 that everything the appellant told the WSIB about its business would be confidential." The appellant further submits that its expectations of confidentiality were reasonable, because they were "bolstered by the secrecy provision in the WSIB's enabling statute," the *WSIA*, which states:

> 181 (1) No member of the board of directors or employee of the Board and no person authorized to make an inquiry under this Act shall disclose information that has come to his or her knowledge in the course of an examination, investigation, inquiry or inspection under this Act nor shall he or she allow it to be disclosed.

[76] As further support for its claim that it had a reasonable expectation of confidentiality, the appellant notes that record 76 expressly states, "all information is

strictly confidential," and that the WSIB inserted language into the emails that comprise records 77, 79, 80, and 85 (which are not at issue),[52] stating that:

> The information in this e-mail is intended solely for the addressee(s) named, and is confidential. Any other distribution, disclosure or copying is strictly prohibited. If you have received this communication in error, please reply by e-mail to the sender and delete or destroy all copies of this message.

[77] According to the appellant, "the reasonable inference from this language is that the appellant's communications with the WSIB took place in an environment of confidentiality, and information provided by the appellant was done so in confidence."

[78] Finally, regarding the third part of the section 17(1) test, the appellant maintains that the harms described in paragraphs 17(1)(a) and (c) can reasonably be expected to result from disclosure of the information at issue. The appellant submits that section 17(1) "ought to be informed by" the exclusion in section 65(6)1, which "acknowledges that labour and employment information is inherently sensitive information."

[79] The appellant refers to the following excerpt from the Supreme Court of Canada's *Merck Frosst* decision, where the Court recognized the harm that can befall third parties when information that was provided for regulatory purposes is disclosed:

> Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage.[53]

[80] The appellant notes that in the same decision, the Court recognized that a reasonable expectation of harm or prejudice to a third party's competitive position may result from, "disclosure of information that is not already in the public domain and that could give competitors a head start… or which they could use to their competitive advantage[.]"[54]

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[52] Note: The WSIB's decision was to disclose records 77, 79, 80, and 85, in part, with severances pursuant to section 17(1).
[53] *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 2.
[54] *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 220.

[81] The appellant also refers to Order PO-1763,[55] in which the adjudicator affirmed that,

> there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.

[82] Regarding records 62, 64, 75, 76, and 81, the appellant maintains that there is a reasonable expectation of harm arising if the WSIB's "decisions and justifications" in those records are disclosed, because "they contain and are infused with fundamentally incorrect information." The confidential portions of the appellant's representations explain what those inaccuracies are and how, in the appellant's view, their disclosure could result in the harms described in paragraphs (a) and (c) of section 17(1). In sum, the appellant submits that disclosure of the records could reasonably be expected to cast the appellant "in a false light," thereby leading to confusion and complications that the appellant would need to expend resources on to clear up, and potentially impacting the appellant's ability to retain riders. The appellant also submits that disclosure would provide its competitors with information about the appellant's confidential legal and business arrangements, which they could use to the appellant's detriment.

The WSIB's representations

[83] The WSIB explains that it issues employer account numbers to "identify employers and link employers with multiple accounts." According to the WSIB, these numbers are not "supplied" to the WSIB as required by part two of the section 17(1) test, and therefore cannot be withheld based on the section 17(1) exemption.

The requester's representations

[84] The requester notes that the appellant bears the burden of proof with respect to the application of section 17(1), and maintains that without knowledge of the documents, she cannot present a fulsome argument on the issue.

[85] The requester refers to Order PO-3826-I, in which the adjudicator found that in order to satisfy the harm requirements in section 17(1)(a), the party resisting disclosure must show that disclosure could reasonably be expected to prejudice "significantly" the third party's competitive position.

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[55] Upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] OJ No 2552 (Div Ct).

Analysis and findings

[86] As noted above, in order to fall within the section 17(1) exemption, the records at issue must meet a three-part test. Failure to satisfy the requirements of any part of this test will lead to a finding that the section 17(1) exemption does not apply. For the reasons that follow, I find that section 17(1) does not apply because the second part of the three-part test is not established in the circumstances of this appeal. I begin my analysis by considering that part of the test.

Part 2 – supplied in confidence

[87] Part two of the section 17(1) test requires that the records contain information that was "supplied" to the WSIB by the appellant. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[56]

[88] First, I will consider the appellant's account number, which appears in all of the records at issue, and is the only information at issue in records 53, 54, 55, and 56.

[89] Based on the submissions before me, I am satisfied that the appellant's account number is an identifying number that was assigned to the appellant's WSIB employer account by the WSIB. In other words, the appellant did not supply the account number to the WSIB in the sense contemplated by part two of the test under section 17(1). Nor am I persuaded that disclosure of the appellant's WSIB account number would reveal or permit the drawing of accurate inferences with respect to information that was supplied by the appellant to the WSIB.[57] Accordingly, I find that this information does not meet the "supplied" requirement in part two of the section 17(1) test. As all three parts of the section 17(1) test must be satisfied for the exemption to apply, I find that the appellant's WSIB account number cannot be withheld on the basis of this exemption. Therefore, I uphold the WSIB's decision to disclose this information where it appears in the records at issue.

[90] Next, I will consider whether the remaining portions of records 62, 64, 75, 76, and record 81 should be withheld based on section 17(1). The appellant maintains that these records "repeat" and "recite" information that it supplied to the WSIB. It also submits that the content of record 81 in particular "could easily be used to determine the information that [was] provided to the WSIB."

[91] In my view, the following aspect of the appellant's representations on the custody or control issue, summarized above, is also relevant: The WSIB conducted an "inspection/investigation of the appellant" pursuant to section 135 of the *WSIA*, during

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[56] Orders PO-2020 and PO-2043.
[57] Orders PO-2020 and PO-2043.

which the WSIB made inquiries and examined documents that the appellant was compelled to provide.

[92] In Order P-16, former Commissioner Sidney Linden considered the meaning of "supplied" in dealing with a request for annual audit inspection reports prepared by inspectors under the *Meat Inspection Act*.[58] In that case, he found that an inspector's assessment of a meat packer's operation was not "supplied" by the affected persons, but rather that the institution obtained the information itself through inspections required by statute. The Commissioner quoted from the then-recent decision in *Canada Packers Inc. v. Canada (Minister of Agriculture),*[59] where the requesters made an access request for audit reports related to inspections done on certain meat packing plants. The third party, Canada Packers Inc, resisted disclosure of the reports. The court discussed the meaning of the phrase "supplied to a government institution" in section 20(1)(b) of the *Access to Information Act*[60] and MacGuigan J. (as he then was) made clear that the portions of the audit reports in issue that consisted of the inspectors' judgments were not "supplied," stating that:[61]

> Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar.

[93] Commissioner Linden found that if information was obtained by an institution's own officials, through a process akin to an inspection, then the record would not fit within the section 17(1) exemption on the basis that the information was not "supplied" to the institution. In contrast, in Order P-345 former Commissioner Tom Wright found that information provided to an institution under a mandatory legislative reporting requirement[62] would be considered "supplied" for the purposes of section 17(1).

[94] The "supplied" requirement was further clarified in Order P-952, in which former Inquiry Officer Anita Fineberg held that information received by an institution pursuant to a search warrant makes it analogous to information obtained by an institution itself, through investigations or inspections, as opposed to information provided to the institution pursuant to a mandatory reporting requirement. She also found that records

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[58] R.S.O. 1980, c.260 and Regulation 607, R.R.O. 1980.
[59] [1989] 1 F.C. 47. See also Order 16.
[60] S.C. 1980, c.111.
[61] At para. 12 (F.C.J.).
[62] In Order P-345, the former Commissioner considered whether information that was provided to the Ministry of the Environment on a monthly basis, as required by section 8(1) of O. Reg. 623/85, was exempt under section 17(1).

obtained by an institution pursuant to inspections that are required by statute are not "supplied" for the purpose of section 17(1).

[95] While information obtained through inspections or investigations is commonly not "supplied" for the purpose of section 17(1), it is the content, rather than the form, of the information is the important factor.[63]

[96] The appellant submits that the records reflect or contain information that it supplied to the WSIB during the course of the WSIB's investigation or inspection, such that the records were, in their entirety, "supplied" for the purpose of section 17(1). I do not accept this position, for several reasons.

[97] First, the appellant has not provided the requisite evidence of the link between the information it supplied to the WSIB and the records at issue to establish that the records reproduce, contain, or reveal the content of the information it provided to the WSIB. It is evident from the nature and content of the records that they were drafted by the WSIB, not prepared and then provided to the WSIB by the appellant. It is also clear that in creating the records, the WSIB drew heavily on its own policies, standards, and practices. Therefore, without evidence of the connection between information the appellant may have provided and the content of the WSIB's correspondence and notes in records 62, 64, 75, 76, and 81, I am not persuaded that the records are, as the appellant suggests, indistinguishable from the information it provided to the WSIB, or that they would reveal that information.

[98] Second, the records predominantly convey, or reflect, the WSIB's assessment of the appellant's business classification, following a classification review that was conducted by the WSIB. In my view, the records reflect the WSIB's own fact gathering, analysis, and judgment regarding the appellant's classification. The WSIB's conclusions, and its explanation of how those conclusions impact the appellant, could not have been included in the information the appellant provided. Moreover, as mentioned above, while the WSIB's analysis and conclusions may have been informed by the information provided by the appellant, I do not have evidence before me linking the content of that information with the content of the records at issue.

[99] Third, it appears, based on the appellant's submissions, that the records were generated by the WSIB as result of its inspection or investigation of the appellant[64] under section 135 of the *WSIA*. In my view, to the extent that the records reflect information that was provided by the appellant to the WSIB, that information was obtained by the WSIB pursuant to its powers of examination and inspection under the *WSIA*, and not based on a mandatory reporting requirement. Accordingly, I find that the circumstances of this appeal are analogous to those considered in Orders P-16 and

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[63] *Merck Frosst Canada v. Canada (Health),* 2012 SCC 3 (CanLII), at para 157.
[64] The classification review.

P-952, discussed above, and are distinguishable from those in Order P-345. As in Orders P-16 and P-952, the information was obtained or received by the institution pursuant to its statutory powers of inspection, and was therefore not "supplied" for the purpose of section 17(1).

[100] Accordingly, I do not accept the appellant's submission that records 62, 64, 75, 76, and 81 contain information that it "supplied" to the WSIB, and I find that the "supplied" requirement in the second part of the section 17(1) test is not met.

[101] As stated earlier, failure to meet any one of the three parts of the test will result in a finding that the section 17(1) exemption does not apply. Since I have found that the second part of the test under section 17(1) has not been met, there is no need to consider the first or third parts. I find that records 62, 64, 75, 76, and 81 are not exempt under section 17(1).

[102] Given my finding that section 17(1) does not apply to any of the information or records that the appellant claimed it did, I do not need to consider whether there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption.

Issue D: Should the third party appellant be allowed to raise the application of the discretionary exemption in section 14(2)(a) of the *Act*? If so, does the discretionary law enforcement exemption in section 14(2)(a) apply to records 62 and 81?

[103] Some exemptions in the *Act* are mandatory; if a record qualifies for exemption under a mandatory exemption, the head of an institution "shall" refuse to disclose it. However, a discretionary exemption uses the word "may" and in choosing that language, the Legislature expressly contemplated that the head of the institution retains the discretion to claim, or not claim, such an exemption to support its decision to deny access to a record.[65]

[104] In this appeal, the appellant raised the application of the discretionary exemption for a law enforcement report in section 14(2)(a) of the *Act* in relation to records 62 and 81. The WSIB did not rely on this exemption. Therefore, before considering whether section 14(2)(a) might apply to records 62 and 81, I must first address the issue of whether the appellant can claim the discretionary exemption with respect to records for which the WSIB did not.

[105] A number of past orders have considered the issue of whether a party other than the institution can claim a discretionary exemption.[66] In those orders, the IPC has determined that a party can only do so in rare circumstances, where there is found to

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[65] Orders PO-3986 and MO-2635.
[66] See for example, Orders P-1137, P-777, PO-3512, and PO-3032.

be a "rare exception to the general presumption that affected [or third] parties are not entitled to raise the possible application of… discretionary exemptions."[67]

Representations

The appellant's representations

[106] The appellant maintains that it is entitled to raise the application of the law enforcement exemption in section 14(2)(a) because nothing in the *Act* states that an affected party is limited in terms of the exemptions it can advance.

[107] The appellant submits that when an institution notifies an affected party of an access request under section 28 of the *Act*, it means that the party has an interest in whether the requested records are disclosed, and is entitled to make submissions regarding the request. In the appellant's view, it undermines the rule of law to suggest that a party with a "real interest in the outcome does not have standing to raise relevant points of law." On this basis, the appellant submits that past IPC decisions "blocking" affected parties from raising discretionary exemptions are "wrong in law."

[108] In addition, the appellant maintains that "it does not matter that the section 14(2)(a) exemption is discretionary [because] it is trite law that there is no such thing as absolute and untrammelled discretion." In the circumstances of this appeal, the appellant says that the WSIB's decision "does not contain anything suggesting that the decision-maker turned his mind to subsection 14(2)(a)," despite the exemption being raised by the appellant "in the first instance." The appellant argues that denying it standing to raise a discretionary exemption on appeal is "inconsistent with the liberal approach to standing that tribunals are obligated to use."

The WSIB's representations

[109] The WSIB refers to Order MO-3295, which it says, "speaks to the appellant's ability to compel an institution to apply a discretionary exemption." It claims that with respect to any other issues raised by this complaint, it is *functus officio* and its decision letter speaks for itself.

[110] The requester's representations, and the parties' reply and sur-reply representations did not address this issue any further.

Analysis and findings

[111] As mentioned above, the IPC has a well-developed body of jurisprudence regarding the circumstances under which an affected, or third, party will be permitted to raise a discretionary exemption. For example, in Order P-257, former Assistant

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[67] Order PO-3512.

Commissioner Tom Mitchinson stated:

> As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record. ...
>
> In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be **rare occasions** when the Commissioner decides it is necessary to consider the application of a particular section of the Act not raised by an institution during the course of the appeal. This could occur in a **situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act***. It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, **it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption**, and the Commissioner has no obligation to consider it. (emphasis added)

[112] Additionally, in Order P-1137, former Inquiry Officer Anita Fineberg made the following comments:

> The Act includes a number of discretionary exemptions within sections 13 to 22 of the Act, which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. **These exemptions are designed to protect various interests of the institution in question**. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. […]
>
> **Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution**. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the Act. (emphasis added)

[113] I agree with and adopt the reasoning in the IPC's past orders.

[114] While the appellant submits that it would undermine the rule of law to prevent

parties from raising relevant points of law, the rationale for generally not allowing third parties to claim discretionary exemptions has been clearly explained in past orders: The Legislature expressly intended for the head of the institution to be given the discretion to claim, or not claim, these exemptions.[68] The issue, therefore, is whether the circumstances of this appeal present one of those "rare occasions" where a third party should be permitted to raise a discretionary exemption that was not claimed by the institution.

[115] In my view, the appellant's submission that the WSIB's access decision does not suggest that the WSIB considered section 14(2)(a), despite the exemption being raised by the appellant in the first instance, does not establish this as a "rare occasion" when a third party ought to be allowed to raise a discretionary exemption. Institutions are not required to refer to every discretionary exemption that they might have considered and decided not to apply when issuing an access decision. Moreover, the fact that the appellant raised section 14(2)(a) in its response to being notified of the request by the WSIB indicates that the possible application of this exemption was, in fact, put before the WSIB for consideration before it issued its access decision.

[116] Accordingly, I am not satisfied, based on the appellant's representations or the records themselves that this case qualifies as a "rare exception" to the general presumption that affected parties are not entitled to raise the application of discretionary exemptions that the institution itself did not rely on. Therefore, I find that the appellant is not entitled to raise section 14(2)(a).

[117] As a result of this finding, it is not necessary for me to determine whether the section 14(2)(a) exemption applies to records 62 and 81.

ORDER:

1. I uphold the WSIB's access decision and I dismiss the appeal.

2. I order the WSIB to disclose the records to the requester in accordance with its decision letter, by **July 2, 2021** but not before **June 25, 2021**.

Original signed by ______________ May 28, 2021

Jaime Cardy
Adjudicator

[68] Order MO-2635