

## 5. THIRD PARTY NOTICE

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### Overview

This chapter covers

- who is a third party;
- when third party notice is required;
- the notice process for third parties and applicants;
- the response from a third party;
- the decision by a public body, and
- time limits.

See FOIP Bulletin No. 10: *Third Party Notice*, published by Access and Privacy, Service Alberta, for more detailed information on this topic.

Many public bodies hold large quantities of information about individuals, companies, non-profit groups and other third parties. The *FOIP Act* includes a consultation process for situations where disclosure of this information might result in harm to a third party or be an unreasonable invasion of a third party's personal privacy (see sections 4.2 and 4.3 in Chapter 4). The Act provides for notification of third parties when access to records containing such third party information is requested.

*Third party* is defined in **section 1(r)** as a person, a group of persons, or an organization other than an applicant or a public body. Third parties include individuals, sole proprietorships, partnerships, corporations, unincorporated associations and organizations, non-profit groups, trade unions, syndicates and trusts (see *IPC Order 98-008* for examples of third parties that required notification). An employee of a public body can also be a third party (*IPC Order 96-019*).

A person authorized to exercise the rights of an individual under **section 84** of the *FOIP Act* is *not* a third party.

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### 5.1 When to Give Third Party Notice

#### Notice *must* be given under section 30

A public body *must* give notice to a third party under **section 30(1)(a)** if

- the public body is considering giving access to records, and
- the exception for third party business information (**section 16**) may apply to information in the records.

Similarly, a public body *must* give notice to a third party under **section 30(1)(b)** if

- the public body is considering giving access to records, and
- the exception for personal privacy (**section 17**) may apply to information in the records.

For example,

- a public body that is considering giving access to third party commercial information that was supplied in confidence must give notice to the third party if there is any question as to whether the disclosure could reasonably be expected to cause significant harm to the third party's competitive position or any of the other outcomes listed in **section 16(1)(c)**;
- a public body that is considering giving access to third party personal information must give notice to the third party if there is any question as to whether the disclosure may be an unreasonable invasion of the third party's personal privacy under **section 17**.

If a public body is responding to a continuing request (**section 9**), notice under **section 30(1)** must be given each time the public body is considering giving access to records that may be subject to the exception for business information in **section 16** or the exception for personal privacy in **section 17**. A one-time third party consent would not be sufficient for the purposes of **section 30** because a third party cannot consent to the disclosure of records that have not yet been created.

If a public body has made a decision regarding disclosure of third party information in response to a request, and there is a new request for the same information, the public body may be required to give notice again – and may arrive at a different decision after taking into consideration a change in circumstances (see *IPC Order F2004-013*).



There is no obligation to give third party notice when a public body is *not* intending to give access to third party information (*IPC Order 99-007*).

### **Notice may be given under section 30**

The Act expressly states that a public body *may* (but is not required to) give notice to a third party if

- the public body has determined that **section 16** or **section 17** applies to the third party's information in a record, and
- the public body does not intend to give access to the information.

A public body may decide to give notice when it is not required to do so to allow a third party to provide reasons for not disclosing the information. For example, if a public body has decided that disclosure of third party business information could reasonably be expected to cause significant harm to the third party's competitive position, the third party may be able to provide information to support the public body's non-disclosure decision.

A public body may also decide to give notice when it is not required to do so to allow a third party to consent to the disclosure. For example, a media applicant may have made a request to a post-secondary educational body for personal information relating to the educational history of a public figure. Disclosure of this type of information is presumed to be an unreasonable invasion of a third party's personal

privacy (under **section 17(4)(d)**). However, the public body may choose to provide an opportunity for the public figure to consent to disclosure of the information.

The Information and Privacy Commissioner has said that he cannot impose a duty upon a public body to give notice where the Act does not establish a duty to do so (*IPC Order 97-018*). This is the case even if there is some likelihood that the third party would give consent if notified.

However, if the applicant requests a review, the Commissioner may, under **section 67(1)(a)(ii)** of the Act, give a copy of the request for review to any person, including a third party who, in the Commissioner's opinion, is affected by the request for review.

If notice is given under **section 30** and the third party consents to disclosure of the third party information, the record cannot be withheld under **section 16** or **section 17**, as the case may be. The public body cannot refuse to disclose the information unless another exception applies to it.

### Notice requirement in section 30 does not apply

The Act specifically states that there are two instances where the notice requirement in **section 30(1)** does not apply.

The first is where the head of the public body has decided to withhold information under the exception for information that is or will be available to the public (**section 29**). For example, if a public body has decided to issue a news release containing third party business or personal information on a date in the near future, the Act allows the public body to refuse to disclose the information in response to an access request. **Section 30(1)** does not apply in these circumstances; and the public body does not need to notify the third party.

The second instance where the notice requirement in **section 30(1)** does not apply is where a public body has decided to disclose a record containing information described in **section 17(2)(j)** (enrolment in an educational program, attendance at a public event related to a public body, receipt of an honour or award granted by a public body). Disclosure of this information is not an unreasonable invasion of personal privacy unless the third party has requested that the information not be disclosed under **section 17(3)**. **Section 30(2)** states that the requirement to give notice established in **section 30(1)** does not apply to a record containing information to which **section 17(2)(j)** applies.



Public bodies should take steps to give individuals an opportunity to request non-disclosure under **section 17(3)** when personal information subject to **section 17(2)(j)** is collected, because third party notice will not be given in these cases.

In addition, the notice requirement in **section 30(1)** does not apply if the public body has decided to give access to third party information on the basis that the information is clearly not subject to **section 16** or **section 17**. The clearest example of this would be where the third party has already given unqualified consent to disclosure of

requested business information and has advised the public body that it does not wish to receive notice of future requests for the same information.

### **Section 30 not relevant**

There are a number of cases where a third party's interests may be affected, but a public body does not need to consider **section 30**.

The notice requirement is not relevant to a request for records that may be subject to an exception in the Act other than **section 16** or **section 17**. This is the case even if another mandatory exception (e.g. the exception for legal privilege of a third party in **section 27(2)**) applies to information in the records.

The same is true for records that may be subject to discretionary exceptions. **Section 30** is not relevant to a request for records that are subject to the exception for advice from officials (**section 24**), for example.

**Section 30** is also not relevant to the disclosure of personal information under **Part 2** of the Act. A public body may disclose personal information under **section 40(1)(b)** – the provision for disclosure that is not an unreasonable invasion of privacy under **section 17** – after the public body has done a complete analysis under **section 17** and determined that the disclosure would not be an unreasonable invasion of a third party's privacy. (If the public body believes that it would be appropriate to give notice to a third party, it may be advisable to ask the person who requested the information to submit an access request under the *FOIP Act*. The third party would then be given notice of the request.)

Notice is not given under **section 30** to a public body, since a public body is not a third party as defined in the *FOIP Act* (**section 1(r)**). Nor is notice given under **section 30** for the purpose of consulting with a government body in another jurisdiction.

Any notice that is given to a third party or other person in circumstances where **section 30** has no application has no standing under the Act. The third party or other person would have no right to request a review by the Commissioner of the public body's decision on disclosure of the information in question.



A public body that gives notice to a third party, formally or informally, must not disclose the identity of an individual applicant.

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## **5.2 Initiating the Third Party Notice Process**

### **Notice where practicable and as soon as practicable**

**Section 30(1)** requires that any third party notice be given “where practicable and as soon as practicable.”

Giving notice “where practicable” means giving notice (when it has been decided that notice must or may be given) unless it has not been possible to locate and notify the third party after making reasonable attempts to do so. Public bodies are expected to

use only their own records and publicly available resources to locate an address for a third party.

Conducting a search through a corporate registry may provide information on the status of a company, organizational and name changes, and the most current contact information.

A public body should not rely on particulars about a third party, such as name, address or phone number, that are contained in historical records, since the information may no longer be accurate.

If there is any doubt as to the third party's contact information, the public body may need to adapt its notification process to ensure there is no breach of privacy or confidentiality in the course of the notification process. In *IPC Order 2000-019*, it was decided that the impracticability of giving notice to a third party was a relevant circumstance that weighed in favour of not disclosing the third party personal information.

Giving notice "as soon as practicable" means giving notice as soon as reasonably possible after determining that a third party needs to be consulted. This enables the public body to respond to the request in a timely manner.

**Section 30(5)** of the *FOIP Act* says that when notice is provided to the third party, notice must also be provided to the applicant. Where possible, these notices should be given at the same time.

Separate notice must be given to each third party whose interests may be affected by disclosure of the information. Where a public body is notifying multiple third parties, and especially where the public body is notifying multiple third parties about the same or related records, the public body should issue the third party notices on the same day.

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### 5.3

#### Time Limits

#### Time limits under sections 30 and 31

Time limits for responding to access requests are set out in **section 11(1)** and **section 14** of the Act. When a public body is processing a request involving third party notice, the Act requires the public body to delay responding to the request so as to allow the third party time to exercise their rights under the Act, including their right to request a review by the Information and Privacy Commissioner. The time limits for the parties to exercise their rights are set out in **sections 30** and **31**.

*Prior to giving notice* to a third party, a public body may extend a time limit under **section 14(1)(a), (b) or (c)** or **section 14(2)**. The permission of the Commissioner may be required in certain circumstances. Extensions under **section 14(1)** and **(2)** are discussed in Chapter 3, section 3.3.

*After giving notice* under **section 30**, a public body must observe the time limits set out in **section 31**. Extension of the time limit for responding to the request in order to comply with **section 31** is permitted under **section 14(3)**. The permission of the Commissioner is not required.

The applicable time limits are as follows:

- a third party has 20 days to respond to the notice (**section 30(4)(c)**);
- no decision can be made until the third party's response is received, or 21 days after notice is given, whichever comes first (**section 31(1)**);
- the public body must make a decision whether to grant access or not and notify the third party and applicant of this decision within 30 days after third party notice is given (i.e. the public body has at least 10 days to consider the response from a third party and make the decision) (**section 31(1)**);
- after the public body's notice of a decision is given, a third party has 20 days to ask for a review (**section 31(3)**); and
- after the public body's notice of a decision is given, the applicant has 60 days to ask for a review (**sections 31(4) and 66(2)**).

The Act does not allow a public body to extend any of the time limits in **section 31** for any reason.

### **Effect of time limits**

The 20-day time period allowed for a third party to respond to a notice begins on the day after the third party notice is given (i.e. the day after the public body sends the notice), not the date the third party receives it. The date on which the notice is sent is the date marked on it indicating posting or electronic transmission (e.g. the postmark for regular mail, and the transmission date for e-mail or facsimile). For example, if a public body sends a third party notice by regular mail and the envelope is postmarked March 1, the third party has until the close of business on March 21 to respond. For this reason, public bodies should choose a delivery method that ensures that notice is given promptly.

Contacting a third party prior to giving written notice is a good practice. It enables the public body to explain the process, the importance of responding, the consequences of not responding and the time lines. See FOIP Bulletin No. 10: *Third Party Notice*, published by Access and Privacy, Service Alberta, for other practical considerations.

### **Time limit extensions for complex requests**

If a public body is processing a request that requires an extension for several reasons – for example, the request involves a large number of records, will necessitate consultation with another public body, and will also require third party notice – the public body should extend the time limit for responding under **section 14(1)** first. Once notice has been given under **section 30**, the public body can rely only on **section 14(3)**. **Section 14(3)** allows a public body to extend the time limit for responding to a request to enable the public body to comply with the requirements of **section 31**.

If the request involves multiple third parties, the most practical method of working with the time limits is to ensure that all third parties have been identified before beginning the notification process, then to send out all the notices at the same time.

From time to time, a public body identifies an additional third party late in the processing of the request. This may happen because additional records are identified after the initial search or because a third party notice results in information that suggests further that the public body should provide notice to another third party. In these cases, it is recommended that the public body make its decision concerning access to the records on which it has given notice and provide a response to the request with respect to those records. The public body should delay its response only with respect to the records for which the notification process is not complete. Although the Act does not specifically provide for responding to a request in part, this approach to timely release of records is consistent with the spirit of the Act.

Under these circumstances, if the applicant were to request a review, the time limit for requesting the review would be 60 days from the day on which the *final* response to the request was given.

The applicant has the right to make a complaint to the Information and Privacy Commissioner about any time limit extension.

### **Manner of giving notice**

**Section 83** **Section 83** requires that any notice or other document to be given to a person under the Act be given

- by sending it to that person by prepaid mail to the last known address of that person;
- by personal service;
- by substitutional service if so authorized by the Commissioner;
- by facsimile telecommunication; or
- in electronic form other than facsimile telecommunication if the person to whom the notice or document is to be given has consented to accept the notice or document in that form.

Public bodies should choose a delivery method that is expeditious and convenient for the third party, but which is also efficient and cost-effective for the public body. Regular mail is not recommended. If there is a small volume of records, the records can be faxed to the third party. For larger volumes, records should be sent by courier or priority post. Prompt delivery will allow the third party as much time as possible to respond.

If sending the notice by fax or other electronic means, care should be taken to prevent unauthorized disclosure of third party information. It may be necessary to telephone the third party before sending the notice to identify the individual best qualified to deal with it or to advise of the electronic transmission. For some measures recommended by the Commissioner, see *Guidelines on Facsimile Transmission* (revised 2002). Public bodies that are government departments or agencies should also refer to the requirements for transmission of personal information in the Government of Alberta *Policy for the Transmission of Personal Information via Electronic Mail and Facsimile* (revised July 2002), developed by the Office of the Corporate Chief Information Officer.

See Chapter 2, section 2.6 for further discussion on the manner of giving notice.

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**5.4**  
**Notice to a**  
**Third Party**

**Content of third party notice**

**Section 30(4)** states that a third party notice must

- 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 privacy of the third party;
- either include a copy of the record, or the part of it containing the information in question, or include a full description of the contents of the record involved; and
- state that, within 20 days after the notice is given, the third party may, in writing, either consent to the disclosure or make representations to the public body explaining why the information, in whole or in part, should not be disclosed.

If a record that is the subject of a third party notice contains personal information about other third parties, it may be best simply to describe the record in the notice. If a public body sends a third party a record that contains personal information of other third parties, the public body risks the unintentional disclosure of that personal information (see *IPC Order 99-030*).

**Model Letter L** in Appendix 3 sets out the various options for third party notice. The notice provides a summary of the particular exception involved (either **section 16** or **section 17**). It also provides an explanation of the points that a third party should address in any representations as to why information should not be disclosed. The version of this letter relating to **section 16** notes, in particular, the importance of providing clear and specific information relating to any harm that may be expected to result from disclosure of records to which **section 16** may apply.

Although the Commissioner stated in *IPC Order 99-023* that he did not have jurisdiction to review the content of a third party notice, efforts should be made to ensure that the third party understands the significance of the notice.

A public body must decide whether to withhold or grant access to third party information on the basis of factors relevant to the applicability of **section 16** or **section 17**. However, the public body can consider comments or statements from a third party that may be relevant to other exceptions, such as **sections 18, 20, 21, 24, 25** and **27**, when it is considering whether any other exceptions apply to the record. Also, if there is a question as to whether **section 27(2)** may apply, the third party that has privileged information should be consulted. Consultation on exceptions other than **sections 16** and **17** is not notice for the purposes of **section 30** and has no standing under the *FOIP Act*.



**Third party notice must be in writing. A verbal notice is not satisfactory for the purposes of section 30. The identity of an applicant must not be included in the notice sent to the third party, unless the applicant has consented to this disclosure (see *IPC Investigation Report 98-IR-009*). The notice must include the name, job title and telephone number of the person within the public body that the third party may contact for more information.**

Good communication with the third party ensures a smooth notification process and promotes better understanding of the third party's representations when determining the applicability of the exception.

The identity of a third party business should be confirmed before sending a third party notice. However, if the identity of the most appropriate person to receive the notice is unclear, the public body may wish to add a comment to the notice stating that the public body should be notified if the recipient is not the appropriate person to receive the notice, or if the recipient is aware of another third party that may also have an interest in the information.

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#### 5.5 Notice to Applicant

**Section 30(5)** provides that, when notice is given to a third party, the public body must also provide a notice to the applicant.

The notice must state that

- the requested record(s) may contain information the disclosure of which would affect the business interests or invade the personal privacy of a third party;
- the third party is being given an opportunity to make representations respecting disclosure; and
- a decision whether or not to give access to the requested record(s) will be made within 30 days after the date of notice to the third party.

A model notice to an applicant is included as **Model Letter M** in Appendix 3.

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#### 5.6 Response from Third Party

In deciding whether or not to give access to all or a portion of the requested record(s), the public body must consider any third party responses received in reply to notices given under **section 30** which are pertinent to **section 16** or **17**, as applicable. The response from the third party must be in writing.

**Section 31(1)** provides that a public body must decide whether or not to give access within 30 days of giving notice. A decision cannot be made until the third party responds, or on the 21st day after notice is sent, whichever comes first.

### **Consent**

If the third party consents in writing to disclosure of the information, the public body must release the information unless another exception in the Act applies to it.

Where the third party is an organization, the public body should be reasonably satisfied that the person giving consent to disclose the information on behalf of an organization is an officer, employee or corporate officer authorized to provide such consent.

### **Representations opposing disclosure**

If a third party makes representations as to why the information should not be disclosed, the public body must consider the representations in reaching a decision on access.

If there is any doubt that the third party has understood the significance of the notice or the criteria that apply in decisions regarding access, the public body should contact the third party by telephone to discuss the matter.

### **Non-response**

If a third party does not respond to the notice by the 21st day after the notice was given, the public body must make a decision based on the information available.



Failure to respond to a notice does not imply that the third party has consented to the disclosure of the information.

A public body should contact the third party by telephone, fax or e-mail to discuss why a response has not been made and advise the third party of the consequences of not responding. The opportunity for contact extends up to the point of disclosure of the information. It may be helpful, in the event of a review by the Information and Privacy Commissioner, for the public body to be able to provide documentation of its efforts to contact a third party.



If the third party requests a few extra days to respond and the public body agrees, these days would be subtracted from the 10 days in which the public body must make a decision. The Act does not allow the public body to extend its time to make a decision in order to give a third party more than 20 days to respond. After notification of the public body's decision, the third party still has 20 days to request a review by the Commissioner of the public body's decision to disclose the third party's information.

## 5.7

**Decision by Public Body and Notice of Decision**

The public body is required to decide whether or not to give access to all or part of the record within 30 days after third party notice is given.

**Section 31(1)** states that the public body must not make this decision until after the third party has had an opportunity to respond to the notice. Since the third party has up to 20 days to respond, the public body cannot make a decision on access until the earlier of

- 21 days after the notice was given; and
- the day a response is received from the third party.

**Section 31(2)** provides that once a public body makes a decision on access, it must give written notice of this decision, including reasons for the decision, to both the applicant and the third party. The content of the notice will vary according to circumstances.

**When a public body decides to grant access to the record*****Notice to applicant***

The public body must inform the applicant of the decision and the reasons for it. The public body must also provide notice that access will be provided 21 days after the date the notice of the decision is given if the third party does not ask for a review by the Information and Privacy Commissioner.

***Notice to third party***

Whether or not the third party responded to the notice, the public body must inform the third party of the decision and the reasons for it, and provide notice that the third party can request a review by the Commissioner of the public body's decision within 20 days. This 20-day period is calculated from the day after the public body gives the notice, not from the date the third party receives it. The relatively short period for the third party to request a review is based on two considerations. First, the public body must exercise its decision-making authority properly, regardless of whether the third party responds to the notice or not. Second, the third party will already have had at least 20 days after notice was given to make representations as to why disclosure should not be given. Therefore, the third party should not require much additional time to decide whether or not to request a review.

The public body should set out its reasons for the decision in a comprehensive way. There are two benefits of this: first, the reasons will assist the third party in understanding how the Act applies to the information; second, the public body's decision may be the subject of a request for review by the Commissioner (*IPC Order 98-006*).

If the third party does not request a review within the 20-day period, the applicant is given access to the records that were the subject of third party representations on the 21st day. A public body must contact the Office of the Information and Privacy Commissioner to determine whether a request for review has been submitted. The applicant is not given access to any record or part of a record that is the subject of the review until the review is completed.

If the review affects only some of the records proposed for disclosure, the public body must release the remainder of the records to the applicant unless they are subject to other exceptions. The outcome of the review determines whether or not access is given to any record that is the subject of the review.



The public body cannot disclose the information until after the 20 days allowed for the third party to request a review have passed (see *IPC Order 98-006*).

Even if the third party consents to the disclosure of the records, the public body should not disclose the records before the expiry of the time allowed to request a review. This is because misunderstandings may arise regarding the authority of the employee or officer who consented or what the third party believed it was consenting to disclose.

### **When a public body decides to deny access to the record**

#### ***Notice to applicant***

The public body must inform the applicant of its decision and the reasons for it, and provide notice that the applicant may, within 60 days, request a review of the decision by the Commissioner in accordance with **section 65(1)**.

#### ***Notice to third party***

The public body must inform the third party of its decision and the reasons for it, and that the applicant may, within 60 days, request a review of the decision by the Commissioner.

**Model Letters N and O** in Appendix 3 outline the options for these types of notices.

In *IPC Order 2000-014*, the Commissioner outlined his expectations as to how public bodies should notify applicants and third parties of their decisions. When giving notice of a decision under **section 31**, the public body should avoid using the words “partial access.” The response should specify which records are going to be disclosed and which records cannot be disclosed. The Commissioner’s expectations are discussed in more detail in FOIP Bulletin No. 10: *Third Party Notice*, published by Access and Privacy, Service Alberta.

### **Application of third party notice**

Figure 12 contains a flowchart setting out the process for giving third party notice.



