ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

INTERIM ORDER 97-015

October 15, 1997

LEGISLATIVE ASSEMBLY OFFICE

Review Number 1286

Background:

[1.] The Applicant made an access request to the Legislative Assembly Office (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act") for a series of expense records pertaining to a certain member of the Legislative Assembly. The Public Body refused to provide access on the grounds that that the records at issue were excluded from the application of the Act according to section 4(1)(k).

[2.] The Applicant made a request for review and the matter was set for inquiry on September 9, 1997. In the Applicant's written submission and at the inquiry, it raised the following issue:

> *The public body has not cooperated in providing either the Applicant or the Commissioner with a thorough listing of the relevant records or a detailed explanation of who each record was created by or for. Until this is done, the applicant submits it will be difficult to decide the issue at hand.*

[3.] This Order is a preliminary order because it deals exclusively with the issue of the Applicant's ability to make effective representations during the Inquiry for Order 97-015.

[4.] My understanding of the Applicant's position is whether the Applicant's right to a fair hearing is affected because the Public Body has not released sample documents and/or a file index to the Applicant. The Applicant

stated that it felt compromised in its ability to make argument and present evidence because it did not know what records were relevant and second, to determine whether those records were created by or for the member of the Legislative Assembly.

[5.] Since the Applicant alleged that this preliminary matter affected its ability to make effective representations, in the interest of procedural fairness, I must deal with the matter before the central issue of the application of section is 4(1)(k) is dealt with. For that reason, the inquiry was adjourned so both parties could submit arguments on this issue.

[6.] I requested that both parties present submissions on two points:

1. Is the Applicant's right to a fair hearing and ability to make effective representation at the inquiry prejudiced if the Public Body does not provide the Applicant with:
   -samples or forms of the types of records at issue in the inquiry;
   -an index of the records as the one described in Practice Note #5?
2. How is providing the above information related to the Public Body's "duty to assist" obligation under section 9(1) of the *Freedom of Information and Protection of Privacy Act?*

Discussion:

Point #1-Right to a Fair Hearing

[7.] The Public Body does not agree that the Applicant's right to a fair hearing or ability to make representations would be prejudiced by the Applicant not having sample of blank documents or that the provision of these samples or blank documents is a component of the duty to assist. However, the Public Body did provide a series of sample forms for the Applicant.

[8.] Procedural fairness in an inquiry requires some degree of disclosure of the issues to be met at the inquiry. Given the mandate of the Commissioner and the purpose of the Act, disclosure must not disclose the contents of the records at issue. There must be a balance between the twin goals of non-disclosure of records and fairness to the applicant enabling it to make representations.

[9.] Inquiry Officer Fineberg in the Ontario Order P-880 succinctly described the unique challenges which face this type of inquiry process. She stated:

In most proceedings, the rules of natural justice or procedural fairness dictate that, among other things, (1) the proceedings are open, (2) the parties are entitled to know the case of the other side, and (3) the parties have the right to comment on or respond to the submissions made by the other parties.

In appeals before the Commissioner, the issue to be determined is whether a record should be disclosed to a requester. Premature disclosure of a record, or any document referring to the content of a record, would render the entire process moot. Therefore, the nature of the matter to be decided in appeals before the Commissioner dictates that a non-traditional approach be taken to the adjudication of appeals, an approach which ensures that the confidentiality of the records is maintained...the Commissioner's office has recognized that the need for confidentiality must be balanced with the need to provide a requester with the right to generally know the case which he or she must meet in order to make effective representations.

[10.] The right to a fair hearing arises from the rule of "natural justice" that a party to a proceeding must be given an adequate opportunity to be heard. The Act retains some of the rules of "natural justice". In particular, section 66(3) provides an opportunity to make representations to the Commissioner during the inquiry. Section 66(3) reads:

(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.

[11.] However, the Act also abolishes certain other "natural justice" rights. Under section 66(3) there is no right to have access to another person's representations made to the Commissioner nor a right to comment on another person's representations made to the Commissioner.

[12.] The Act allows the Commissioner considerable latitude with respect to procedure in inquiries. The Commissioner has the right to control his own process. Given the mandate of this Commissioner, I am mindful that the need for confidentiality must be balanced with the need to provide an applicant with the right to make meaningful representations on the issues I must decide.

[13.] The Act also provides that part of my role as Commissioner is to be an independent reviewer of the records. Accordingly, the interests of the Applicant are preserved by the ability of the Commissioner to ask questions regarding the specific content of the records and how the records meet the criteria of the Act.

[14.] What information needs to be disclosed ultimately depends on the circumstances. In my view, the information provided to the applicant must be sufficient to disclose the relevant issues in the inquiry.

[15.] Since the Public Body has agreed to provide samples of the types of records at issue in this inquiry, it is not necessary that I make a determination on whether the Public Body should in the interests of fairness, provide samples or forms to the Applicant. The samples first, consist of four pages which describe the nine type of samples provided and, second, of the samples themselves. In total there are 30 pages of samples provided.

[16.] The Applicant stated that such information would assist the Applicant in the following way:

> *One of the key issues to be decided at this inquiry in "by whom and for whom" were the records in question created. The form and general content of the records in question may be crucial in deciding that issue. The records may contain explicit indications by whom or for whom they were created, but the applicant is now ignorant of that. For example, there may be standard forms created by the staff of LAO for their administration of MLA expenses. They may ask for certain information and supporting documentation. Their existence, specifics and details of how they are used may be crucial evidence for this inquiry. Without this information, the Applicant would be compromised in his ability to examine the Public Body on its use of the records in question and in making submissions to the Commissioner on the key issue.*

[17.] I find that the provision of the samples to the Applicant is sufficient to enable the Applicant to make effective representations on the relevant issues in this inquiry. For this reason, I find that it is not necessary for the Public Body to also provide to the Applicant an index describing the records at issue. Nevertheless, I would like to discuss several of the Public Body's arguments.

[18.] My office has recently issue Practice Note #5. Practice Note #5 deals with preparing records and submissions for inquiries. The purpose of practice notes is to assist parties with the procedure of the inquiry process. Both Ontario and British Columbia have also issued similar policy

guidelines. A practice guide always remains a guide and I do not consider it binding upon my ability to determine the procedure during an inquiry. Under certain circumstances, different fact situations may require different ways of proceeding.

[19.] The Public Body alleges that, should it prepare an index, the confidentiality of its records would be lost. I disagree. The index is to provide a general description of the records along with the exemptions or exclusions claimed and the reasons why. An properly prepared index does not give away the content of the records. Experience has shown that the baby is not thrown out with the bath water simply because a public body has prepared an index.

[20.] The Public Body has also argued that the provision of an index as contemplated by Practice Note #5 is not applicable to records which fall into section 4 exclusions from the Act but only to records which are exempted from disclosure by the Act. I am not prepared to agree with such a statement. I do not see why an Applicant's right to a fair hearing should be different just because the Public Body is claiming that the records at issue are not subject to the Act. Again, in any event, an index would not disclose information which is not subject to the Act because an index should not disclose the content of the records.

[21.] In this case, I find that the Applicant has received sufficient information to make effective representations with the provision of a series of sample documents. Therefore the provision of an index is not necessary. However, there may be situations where an index may be necessary for records where section 4 exclusions are claimed.

Point #2- Duty to Assist Section 9(1)

[22.] Although both the Public Body and the Applicant have, in their submissions, discussed the manner in which the Public Body has assisted the Applicant throughout the request, this interim order will only deal with whether the Public Body's provision of an index or samples of records relate to the obligation of "duty to assist" under section 9(1). Other aspects of the how the Public Body assisted the Applicant will be dealt with during the inquiry.

[23.] Recognizing the inherent inequalities which exist between a public body and an applicant regarding the information available about the records at issue, the Act has included a "duty to assist" provision under section 9(1). Section 9(1) reads:

> *The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately, and completely.*

[24.] The "duty to assist" obligation is a common thread in all requests for information. Regardless whether the information identified is outside the application of the Act or falls within an exception, the Public Body must, in all requests, assist the Applicant. If a public body determines that the records requested fall under section 4, the "duty to assist" is not suspended because it is the Commissioner who reviews that decision. Making that conclusion would be putting the cart before the horse because whether or not records are excluded or excepted from the Act may be the issue in an inquiry. Therefore an applicant must be apprised as much as possible about the record to make effective argument on the jurisdictional issues.

[25.] Moreover, there is nothing in Act which states that the "duty to assist", or the manner in which a public body responds to an applicant is different for records which may fall in section 4. For this reason, the entire process including the "duty to assist" should be consistent for all requests.

[26.] Nevertheless, even though the "duty to assist" is obligatory in all requests, how a public body fulfills its duty to assist varies according to the fact situation of each request. For example, in *Re: Bosch and the Department of Federal and Intergovernmental Affairs*-Order 96-014, it was held that the "duty to assist" is less onerous when dealing with a sophisticated user of the Act.

[27.] The Public Body submitted that it cannot be expected to provide documents such as forms or samples as part of its "duty to assist" the Applicant which are not identified in the Applicant's request and which the Public Body determined would not be responsive to the request. It submitted that the Applicant is attempting to expand the scope of the initial request by now requesting samples or forms.

[28.] It is true that the Applicant never requested samples in its original request. The Applicant subsequently requested samples because thePublic Body had not provided information about the records. If this had been done in the first place, samples may not have be needed. For this reason, I do not view the request for samples as a new request but rather an extension of the Public Body's duty to assist.

[29.] In this situation, as the request process evolved, and the Public Body claimed section 4(1)(k) and was not willing to provide a description of the types of records at issue to the Applicant, the Applicant felt prejudiced in its ability to make effective representations. Part of the "duty to assist" is

responding to issues as they arise. Samples or forms with fictitious names is an effective way of responding to the Applicant openly, accurately and completely about the nature of the records which were identified without disclosing the contents of the records. The provision of samples is also an effective way of striking a balance between maintaining confidentiality and fairness so that the Applicant may make effective representations.

[30.] The Public Body also argued that its duty to assist cannot be deemed to include the duty to provide an index if the information used to produce the index is based on records which are outside the scope of the Act. This argument again presupposes that an index would disclose information which falls under section 4(1)(k). This is not true. There have been numerous inquiries held where indexes have been provided to applicants to assist the applicant in following the argument and the general steps of the inquiry without disclosing any confidential information.

[31.] As stated above, I do not believe that because a public body is claiming an exclusion for the records at issue, that the public body's "duty to assist" automatically excludes the provision of an index. There may be cases where an index would be helpful and necessary in responding to the applicant openly, accurately and completely. However, I find that in this case the Public Body's provision of samples to the Applicant satisfies the Public Body's "duty to assist" in this case, and an index is therefore not required.

[32.] In conclusion, I do not believe that confidentiality of records and the Applicant's ability to make effective representation are in direct conflict. A balance must be struck in every case. Since every case is different, there may be subtle factors which influence how that balance is maintained.

[33.] All public bodies should be mindful that openness and cooperation with applicants will instill a sense of confidence in the integrity of the access process for applicants.

Order:

1. Since the Public Body has provided the Applicant with a series of samples of the types of records at issue in the inquiry, this will enable the Applicant to make effective representations. Therefore, the Applicant will not be prejudiced if the Public Body does not provide the Applicant with an index of the records as the samples provided. This serves the same purpose as an index.

2. I find that providing the above information to the Applicant arises from the Public Body's "duty to assist" obligation under section 9(1).

3. The inquiry will resume on Monday, October 20, 1997 at 9:30 a.m.

Robert C. Clark
Information and Privacy Commissioner