ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-019

April 6, 1998

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1324

I. BACKGROUND

A. Overlapping matters relevant to this inquiry

[1.] There are three overlapping matters relevant to this inquiry:

1. Applicants' first request for access (96-A-00017)

2. Second request for access (97-A-00004) submitted by one of the Applicants

3. Fees charged for the records relating to the Applicants' first request for access (96-A-00017)

[2.] Each of these three matters has its own timeline, which is set out as background in this Order.

1. Applicants' first request for access (96-A-00017)

[3.] On February 16, 1996, the Applicants applied to Alberta Environmental Protection (the "Public Body") for access under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Public Body received the Applicants' request on February 23, 1996. The Applicants asked for the following:

> *I request from Environmental Protection copies of files, memos, memorandoms* [sic]*, interdepartmental memos, notes, recommondations* [sic] *and/or any information regarding or pertaining to our* [two miscellaneous lease applications and one licence of occupation application].
>
> *Also files, memos, notes, memorandoms* [sic]*, interdepartmental memos, recommondations* [sic] *and/or any information to/or* from [a named company] *regarding or pertaining to* [the two miscellaneous lease applications and one licence of occupation application].
>
> *Also files, memos, notes, interdepartmental memos, memorandoms* [sic]*, recommondations* [sic] *and/or information pertaining or regarding* [the "X" Ranger Station] *from September 1, 1993 to present date.*
>
> *Also copies of files, memos, interdepartmental memos, memorandoms* [sic]*, recommondations* [sic]*, notes from The Implementation Task Force of the C.T.R.L.* [Commercial Tourism and Recreational Leasing process]*, the task force has representations from the Resource Planning Branch (Chairman and Sect.)* [sic]*, Land Administration Branch, Land Management Branch, Habitat Management Branch, Forest Land Use Branch and Forest Industry Development Division of Alberta Forestry, Lands and Wildlife and the Destination Planning Branch of Alberta Tourism. Also endorsing Committees (RMDC) Resource* [sic] *Management Directors Committee, (RMDHC) Resource* [sic] *Management Division Heads Committee. Both these committees are Energy, Forestry, Lands and Wildlife committees.*

[4.] The Applicants' two miscellaneous lease applications and the one licence of occupation application concerned the lease of public land for commercial recreational use. The X Ranger Station concerned the Applicants' proposal to use that ranger station as a non-profit public facility (the "Applicants' proposal").

[5.] The Applicants asked that their request for access be a continuing request. The Public Body numbered this as Request for Access 96-A-00017.

[6.] On April 9, 1996, the Public Body provided the Applicants with the initial delivery of records related to the Applicants' continuing request. After the Applicants received that delivery of records, they complained to the Public Body that the records were not complete because a number of records had not been disclosed, as follows:

(i) the Applicants' proposal for the X Ranger Station (14 pages), delivered to a named employee of the Public Body at the Public Body's Rocky Mountain House office on July 5, 1995, and sent by mail to the Assistant Deputy Minister of the Public Body,

(ii) notes of a meeting that the Applicants had with three named employees of the Public Body, held on February 22, 1995, and notes written by a named employee at that meeting, and

(iii) notes or related documents from the Resource Management Directors Committee or related governing committees, relating to all the Applicants' applications, in existence since February 1994.

[7.] The Applicants wanted to know why the foregoing records were missing from the records sent to the Applicants. In an April 22, 1996 letter and a May 13, 1996 letter, the Public Body responded to the Applicants' concerns about the missing records. The Public Body said that (i) it was unable to locate the Applicants' original proposal or its copy of the proposal, but it did locate a copy of the proposal at Economic Development and Tourism; (ii) there were no formal or informal notes of the February 22, 1995 meeting; and (iii) the Regional Management Directors Committee (RMDC) and the Regional Management Division Head Committee (RMDHC) were disbanded in 1991, and the former Regional Resources Management Committee (RRMC) and the present Environmental Resources Committee (ERC) make no reference to the Applicants' applications or proposal.

[8.] The Applicants were not satisfied with the Public Body's explanations regarding the missing records. Consequently, on May 23, 1996, the Applicants requested that my Office review the completeness of the Public Body's response as it related to those missing records.

[9.] In that May 23, 1996 letter, the Applicants also asked me to examine whether the Public Body's refusal to have some sort of protection placed for their pending licence of occupation application was consistent or inconsistent with due process across the province of Alberta. As this question is outside of my jurisdiction under the Act, I am not able to consider it.

[10.] On June 11, 1996, I informed all the parties that I would review the Public Body's response to the Applicants' first request for access (96-A-00017). I authorized mediation and an investigation to try to settle the matter. I also said that I would conduct an inquiry if matters with the Public Body could not be mediated.

[11.] My Office conducted an investigation, and reported the results of the investigation to the Applicants on November 1, 1996. That letter summarized

the results of the investigation and the Public Body's explanations regarding the missing records. The letter concluded that there was no matter that could reasonably be referred to the Commissioner for inquiry, and the file was being closed because there was nothing left for the Commissioner to review.

[12.] The Applicants were not satisfied with the results of my Office's investigation of the missing records on their first request for access (96-A-00017), or my Office's procedure relating to that investigation. The Applicants complained that, instead of closing the file, my Office should have proceeded under section 10(2) of the Act because the Public Body failed to find the missing records. Section 10(2) says that the failure of the head to respond to a request within the 30-day time period is to be treated as a decision to refuse access to the record.

[13.] Therefore, on February 11, 1997, the Applicants requested that I conduct an inquiry into all issues because there were unsettled matters after mediation.

[14.] After more correspondence with the Applicants, on July 25, 1997, I asked the Applicants to specifically identify all the issues for an inquiry. The Applicants set out those issues in a letter dated September 5, 1997. Those issues encompassed the Applicants' first request for access (96-A-00017) and the Applicants' second request for access (97-A-00004, set out below). Those issues also included a request to review the Public Body's application of section 4, section 16 and section 23 of the Act to some of the records relating to the Applicants' first request for access (96-A-00017).

2. Second request for access (97-A-00004) submitted by one of the Applicants

[15.] On January 8, 1997, one of the Applicants applied to the Public Body for access to the following:

> [A]*ny information pertaining to the process and information used to change the C.T.R.L. (Commercial Tourism and Recreational Leasing Process) to the A.T.R.L. (Alberta Tourism and Recreational Leasing Process) as stated in the news release NO: 95-127 dated Thursday Oct. 19, 1995. Also I would like to request a copy of* [a named company's] *A.O.P. (Annual Operating Plan) and a copy of the approved Detailed Forest Management Plan for the Clearwater Tay River Area FMA #9200030.*

[16.] The Public Body numbered the request as Request for Access 97-A-00004. On that request, a dispute arose between one of the Applicants and the Public Body over two issues: copyright relating to the named company's Annual Operating Plan; and the Public Body's requirement that the Applicant provide

information relating to the Applicant's photocopying equipment (the Applicant had asked to copy the records to reduce the fees). The Applicant subsequently refused to pay the fees, and the Public Body did not release the records to the Applicant.

3. Fees charged for the records relating to the Applicants' first request for access (96-A-00017)

[17.] Because this was to be a continuing request over two years, the Public Body provided the Applicants with a schedule of dates on which the Applicants' request would be deemed to have been received, as required by section 8(2) of the Act. Those dates were as follows: May 23, 1996; September 23, 1996; January 23, 1997; May 23, 1997; September 23, 1997; and January 23, 1998.

[18.] However, the Public Body did not provide an estimate of the total fee payable over the course of the continuing request, as provided by section 12(3) of the Regulations to the Act (Alta. Reg. 200/95, the "Regulations").

[19.] On April 9, 1996, the Public Body notified the Applicants that the initial delivery of records was estimated at $195.18. The Applicants paid that amount. The records related to the May 23, 1996 and September 23, 1996 scheduled dates were provided to the Applicants without any further mention of fees.

[20.] On February 7, 1997, the Public Body notified the Applicants that the records related to the January 23, 1997 scheduled date, consisting of 20 pages, would cost $170.21, and would not be sent to the Applicants until that amount was paid. Although that amount was for the cost of the September 23, 1996 and January 23, 1997 scheduled dates combined, the February 7, 1997 letter to the Applicants did not say so.

[21.] In a subsequent letter to the Applicants dated March 26, 1997, the Public Body said it was willing to recognize its error for not charging for the records related to the May 23, 1996 scheduled date, and would not now charge the Applicants for it. However, the Public Body said it would not waive the $170.21 fee for the records related to the September 23, 1996 and January 23, 1997 scheduled dates.

[22.] The Applicants refused to pay the $170.21, and the Public Body did not deliver the records related to the January 23, 1997 scheduled date.

[23.] Because there was a great deal of confusion about the fees payable by the Applicants for their continuing request, during the inquiry, I asked the Applicants and the Public Body to see if they could come to some agreement

regarding the fees. By agreement, I adjourned the inquiry briefly, went out of the room, and asked the parties to inform me when they were ready to proceed.

[24.] When the inquiry resumed 15 minutes later, I was informed that the Public Body had presented the Applicants with two options for payment of the fees. The Applicants said they would make that decision within two weeks.

[25.] After the inquiry, instead of selecting one of the two fee payment options, the Applicants decided to ask the Public Body for a fee waiver. On March 12, 1998, the Public Body notified me that it had granted the fee waiver.

[26.] The unresolved issue as to fees was related to the deliveries of records for the September 23, 1996 and January 23, 1997 scheduled dates. Therefore, I determined prior to the inquiry that the fee issue did not affect my jurisdiction to proceed with any of the issues related to the initial delivery of records to the Applicants or the delivery of records related to the May 23, 1996 scheduled date. As it will become clear from the discussion under Issue C in this Order, I am not, in fact, prevented from proceeding on any of the issues related to the Applicants' first request for access (96-A-00017).

B. Scheduling the inquiry

[27.] An oral inquiry was scheduled for November 27, 1997. Neither the Applicants nor the Public Body was required to submit a written submission.

[28.] At the conclusion of the inquiry, I found it necessary to ask both the Public Body and the Applicants to get back to me with additional information related to some of the issues set out for the inquiry. I received the last of that information on February 5, 1998.

II. RECORDS AT ISSUE

[29.] The particular records at issue are those records severed under section 16 of the Act (personal information).

[30.] As those records were not numbered, I will refer to them individually by description, and collectively as the "Records".

[31.] Other records that the Public Body said it could not find are not directly at issue, but relate to the other issues in this inquiry. Consequently, I will refer to those records only by description or generically as the "records".

III. ISSUES

[32.] I have summarized the issues set out in the Applicants' September 5, 1997 letter to me, as follows:

> A. Did the Public Body correctly apply section 16 of the Act (personal information)? (Applicants' Issue Number 1 and part of Issue Number 3)
>
> B. Did the Public Body meet its duty to assist the Applicants under section 9(1) of the Act? (Applicants' Issue Number 2 and part of Issue Number 3)
>
> C. Did the Public Body fail to provide the Applicants with an estimate of the total fees payable over the course of the Applicants' continuing request, and fail to respond to the Applicants' request? (Applicants' Issue Number 4)
>
> D. Did the Commissioner's Office follow proper procedure? (Applicants' Issue Number 5)

[33.] Under the section 9(1) and section 16 issues set out above, the Applicants listed a number of sub-issues for me to decide. I have not listed the sub-issues here, but will deal with them in the course of this Order.

IV. PRELIMINARY MATTERS

A. Application of section 4 and section 23 of the Act

[34.] With regard to the delivery of records related to the May 23, 1996 scheduled date, the Public Body refused to disclose some records because it said that those records were excluded from the application of the Act by section 4. The Public Body also severed one record under section 23 (advice).

[35.] During the inquiry, I found it necessary to determine whether section 4 and section 23 were still at issue for records relating to the Applicants' first request for access (96-A-00017).

[36.] The Public Body informed me that by letter dated October 24, 1997, it released those records to the Applicants. The Public Body said it decided to release the section 4 records outside of the Act, even though the Act did not apply to those records. I asked the Applicants to confirm that they had received those records, which they did.

[37.] The Public Body also informed me that the one record to which it had applied section 23 was one of the same records to which it also said that section 4 of the Act applied. Since the Public Body had released that one record, in its entirety, outside of the Act, section 23 is also no longer at issue in this inquiry.

[38.] As a result, there are no further issues relating to section 4 or section 23 in this inquiry. Consequently, I do not find it necessary to consider the Applicants' Sub-issue Number 3f, set out in the Applicants' September 5, 1997 letter.

B. My jurisdiction to consider issues related to the second request for access (97-A-00004) submitted by one of the Applicants

[39.] At the beginning of the inquiry, I noted that three of the Applicants' sub-issues for the inquiry concerned the second request for access (97-A-00004) submitted by one of the Applicants. Those sub-issues were set out in the Applicants' September 5, 1997 letter as Sub-issue Numbers 2c, 2d and 3a. Therefore, I asked the parties to give evidence about the status of the second access request. That evidence was necessary in order to determine whether I had jurisdiction to deal with any issues relating to that request.

[40.] To decide whether I had jurisdiction, I also reviewed the Applicants' correspondence with the Public Body on the matter of fees. That review revealed that the second request for access submitted by one of the Applicants was stalled when the Applicant did not pay the fees that appeared to be agreed upon by the parties. The Applicant said the fees were not paid because the Applicant objected to having to provide the Public Body with information concerning that Applicant's photocopier, which the Applicant wanted to use to reduce the costs associated with photocopying the records.

[41.] I explained to the Applicants that section 13(1) of the Regulations to the Act applies to the second request for access. Section 13(1) reads:

> *13(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on*
>
> *(a) the receipt of an agreement to pay the fee, and*
>
> *(b) the receipt of at least 50% of any estimated fee that exceeds $150.*

[42.] Under section 13(1) of the Regulations, there is no requirement that a public body continue to process a request until there is an agreement to pay fees and payment of 50 per cent of any estimated fee exceeding $150. In this case, there appears to be an agreement as to the amount of fees, which exceeds $150, but there is no payment of 50 per cent of that amount. Consequently, the Public Body ceased processing the request, as allowed by section 13(1).

[43.] Section 62(1) of the Act sets out my jurisdiction for conducting reviews. Section 62(1) requires that there be a decision, act or failure to act of the head of a Public Body that relates to an applicant's request. If there is no decision, act or failure to act relating to an applicant's request, I have no jurisdiction under section 62(1).

[44.] In this case, because the Public Body has ceased to process the request, the only reviewable decision of the Public Body concerns the fees. In the Applicants' issues set out for this inquiry, the Applicants have not asked that I review the fees related to the second request for access. Furthermore, the Applicants have not requested a fee waiver. Consequently, there is no decision, act or failure to act on the part of the Public Body that I can review under section 62(1).

[45.] I therefore decided that I did not have jurisdiction to hear and decide those issues related to the second request for access submitted by one of the Applicants (Applicants' sub-issues 2c, 2d, and 3a, set out in the Applicants' September 5, 1997 letter). I informed the Applicants accordingly.

[46.] I also informed the Applicants that they must revisit the fee issue so that the Public Body can recommence processing the second request for access submitted by one of the Applicants.

V. DISCUSSION OF THE ISSUES

Issue A: Did the Public Body correctly apply section 16 of the Act (personal information)?

1. General

[47.] The Public Body said that section 16 applies to several pages of the records relating to the May 23, 1996 scheduled date under section 8(2) of the Act. As those pages were unnumbered, I have divided them into two categories, namely, records originating from the third parties, and records originating from the Public Body, as follows:

Table I: Records originating from the third parties

Record	Date	Addressee	Location of personal information severed on page	Copied (cc'd) to Applicants
Letter (1 p.)	Mar. 25/96	Land Administration Division (LAD)	Top and bottom of page	No
Letter (1 p.)	Mar. 25/96	LAD	Bottom of page	No
Letter (2 pp.)	Mar. 27/96	LAD	Second page, bottom of page	No
Letter (1 p.)	Mar. 29/96	Member of Legislative Assembly (MLA)	Bottom of page	No
Letter (1 p.)	Mar. 29/96	MLA	Bottom of page	No
Letter (1 p.)	Apr. 1/96	To whom it may concern	Top and bottom of page	No
Letter (1 p.)	Apr. 1/96	Applicants	Top of page	N/A
Letter (1 p.)	No date (faxed Apr. 1/96)	No addressee	Top and bottom of page	No
Letter (1 p.)	No date (faxed Apr. 1/96)	LAD	Bottom of page	No

Table II: Records originating from the Public Body

Record	**Date**	**Addressee**	**Location of personal information severed on page**	**Copied (cc'd to Applicants)**
Action request (2 pp.)	Mar. 29./96	Employee of Public Body	Second column, second line of first page	No
Action request (1 p.)	Apr. 9/96	Employee of Public Body	Second column, second line	No
Action request (1 p.)	Apr. 9/96	Employee of Public Body	Second column, second line	No
Action request (1 p.)	Apr. 9/96	Employee of Public Body	Second column, second line	No
Letter (1 p.)	Apr. 24/96	Third party(ies)	Address block and salutation	No
Letter (1 p.)	Apr. 24/96	Third party(ies)	Address block and salutation	No
Letter (1 p.)	Apr. 24/96	Third party(ies)	Address block and salutation	No
List of responses to Applicants' advertisement (2 pp.)	No date	No addressee	First page, second column: 2nd to 10th items Second page, second column: 1st to 6th items	No

[48.] During the inquiry, I asked the Public Body several questions, *in camera*, related to its severing of the personal information in the records. The Public Body said it would have to review its severing and get back to me.

[49.] In a December 23, 1997 letter to me, the Public Body provided answers to my questions. As a result of that letter, the Public Body revised its list of records for which it had said that personal information could not be disclosed, and provided one further record, unsevered, to the Applicants. The Public Body also provided another record, partly severed, to the Applicants.

[50.] Based on the Public Body's December 23, 1997 response, I have revised Table I and Table II above to reflect only the personal information that is still at issue in this inquiry, as follows:

Revised Table I: Records originating from the third parties

Record	Date	Location of personal information severed on the page
Letter (1 p.)	Mar. 25/96	Top and bottom of page
Letter (1 p.)	Mar. 25/96	Bottom of page
Letter (2 pp.)	Mar. 27/96	Second page, bottom of page
Letter (1 p.)	Mar. 29/96	Bottom of page
Letter (1 p.)	Mar. 29/96	Bottom of page
Letter (1 p.)	Apr. 1/96	Top and bottom of page
Letter (1 p.)	No date (faxed Apr. 1/96)	Top and bottom of page
Letter (1 p.)	No date (faxed Apr. 1/96)	Bottom of page

[51.] Revised Table I removes an April 1, 1996 letter (1 page) addressed to the Applicants. The Public Body has since disclosed that letter, unsevered, to the Applicants.

Revised Table II: Records originating from the Public Body

Record	Date	Location of personal information severed on the page
Action request (2 pp.)	Mar. 29/96	Second column, second line of first page
Action request (1 p.)	Apr. 9/96	Second column, second line
Action request (1 p.)	Apr. 9/96	Second column, second line
Action request (1 p.)	Apr. 9/96	Second column, second line
Letter (1 p.)	Apr. 24/96	Address block and salutation
Letter (1 p.)	Apr. 24/96	Address block and salutation
Letter (1 p.)	Apr. 24/96	Address block and salutation
List of responses to Applicants' advertisement (2 pp.)	No date	First page, second column: 4th, 5th, 7th, 8th and 10th items Second page, second column: 6th item

[52.] Revised Table II changes the amount of personal information severed in the last record set out in the table. The Public Body has since disclosed that record, partly severed, to the Applicants.

2. Do the Records contain "personal information"?

[53.] The Public Body says that the Records set out in the preceding Revised Table I and Revised Table II contain "personal information" for the purposes of section 16(1) of the Act. Therefore, the Public Body severed the personal information, as indicated in those two revised tables.

[54.] "Personal information" is defined in section 1(1)(n) of the Act. The relevant portions of section 1(1)(n) read:

> *1(1)(n) 'personal information' means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number,*
> > *...*
> > *(iii) the individual's age, sex, marital status or family status.*

[55.] I have reviewed the foregoing pages of the Records, and find that all those pages contain personal information as defined in section 1(1)(n)(i) or section 1(1)(n)(iii).

3. Would disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided by section 16(1) of the Act?

[56.] Section 16(1) of the Act reads:

> *16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[57.] Section 16(1) is a mandatory ("must") provision. If section 16(1) applies, a public body must refuse to disclose the personal information.

[58.] Section 16(2) of the Act sets out a list of personal information, the disclosure of which is presumed to be an unreasonable invasion of a third party's personal privacy.

[59.] The Public Body says that section 16(1) and section 16(2)(g) apply to the personal information set out in the Records in Revised Table I and Revised Table II.

[60.] Section 16(2)(g) reads:

> *16(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party.

[61.] I have reviewed the foregoing pages of the Records and find that the presumption in section 16(2)(g) applies to the personal information contained in those pages of the Records. Consequently, disclosure of that personal information is presumed to be an unreasonable invasion of those third parties' personal privacy for the purpose of section 16(1).

4. What relevant circumstances did the Public Body consider under section 16(3)?

[62.] The initial part of section 16(3) of the Act reads:

16(3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances...

[63.] Under section 16(3) of the Act, a public body must consider all the relevant circumstances when determining under section 16(1) or section 16(2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy. Section 16(3) then goes on to list some relevant circumstances. The list is not exhaustive. In this case, the Public Body said it considered a relevant circumstance that was not in the list under section 16(3).

[64.] The Public Body says that under the Alberta Tourism Recreational Leasing (ATRL) process, the Applicants were required to advertise for public input on one of their miscellaneous lease applications. The Applicants' advertisement stated that written comments should be sent to the applicant (a company name proposed by the Applicants) and to the Public Body. The Public Body says it received letters sent by third parties, and those letters commented on the Applicants' miscellaneous lease application.

[65.] The Public Body says that if a letter contained a clear indication that the letter was copied or "cc'd" to the Applicants, the Public Body disclosed that

letter, unsevered, to the Applicants. However, if a letter did not contain a clear indication that it was cc'd to the Applicants, the Public Body severed the personal information (names and addresses) before disclosing that letter to the Applicants.

[66.] Furthermore, the Public Body says that if the third parties' letters were cc'd to the Applicants, the Public Body also released the third parties' personal information in the Public Body's letters responding to those third parties' letters, and in its other internal documents relating to its letters of response to those third parties. The Public Body says it did not contact the third parties to ask for consent to disclose those third parties' personal information.

[67.] The Public Body appears to be suggesting that if a third party's letter is not cc'd to an applicant, that is evidence that the disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy under section 16(1). Conversely, if a third party's letter is cc'd to an applicant, that is evidence that the disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy.

[68.] I do not agree that a third party's letter cc'd to an applicant is evidence one way or the other as to whether the disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy. If the Public Body has presumed that an absence of a "cc" on a letter is a request for confidentiality, that is not evidence of confidentiality. A "cc" on a letter is also not evidence that a third party consents to the disclosure of the personal information. Consequently, I find that whether a third party cc'd a letter to the Applicants is not a relevant circumstance to consider when determining whether the disclosure of the personal information would be an unreasonable invasion of the third party's personal privacy under section 16(1).

[69.] The Applicants argue that all the letters commenting on the Applicants' miscellaneous lease application should be released, unsevered, to the Applicants, for three reasons.

[70.] First, the Applicants say that under the ATRL process, the Applicants were required to advertise for public input on their miscellaneous lease application. Furthermore, the advertisement states that written comments should be sent both to the applicant (a company name proposed by the Applicants) and the Public Body, at the addresses indicated. Therefore, the Applicants conclude that they should be given copies of all the letters. I would conclude that a requirement to advertise for public input indicates that the process was to be open.

[71.] I have reviewed the advertisement in relation to the Act. There is nothing in the Act that would allow the personal information of a third party to be given

to an applicant merely because an applicant must, under other legislation, give public notice of its proposed activities. I conclude that the letters provided by third parties to the Public Body are nevertheless subject to the Act.

[72.] Second, the Applicants argue that without the third parties' names and addresses, they are prevented from responding to the individuals who may have had concerns. The Applicants want to be able to respond to anything negative in the letters and to clarify their miscellaneous lease application.

[73.] However well intentioned, the Applicants' desire to respond to third parties is not a relevant circumstance under section 16(3).

[74.] Third, the Applicants argue that they were told by the Public Body that all the letters would be used in the decision-making process. Because of that, the Applicants believe that it is only fair to release the personal information.

[75.] In effect, the Applicants are arguing that section 16(3)(c) should apply to permit the release of the third parties' personal information. Section 16(3)(c) reads:

> *16(3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(c) the personal information is relevant to a fair determination of the applicant's rights.*

[76.] If considered to be a relevant circumstance, section 16(3)(c) weighs in favour of disclosing personal information.

[77.] The Public Body said that the letters were not the only criteria used in the Public Body's decision-making process. Furthermore, the Public Body has already made a decision to deny the Applicants' miscellaneous lease application, and the Applicants have appealed that decision. The decision on the appeal is expected to be released soon.

[78.] Assuming, without deciding, that the Applicants had "rights" that were to be determined by the ATRL process, which involved soliciting the letters from third parties, the Public Body has already determined those "rights" by making the decision to deny the Applicants' miscellaneous lease application. Therefore, section 16(3)(c) is no longer applicable, and the disclosure of the letters in their entirety will not assist in a fair determination of the Applicants' "rights".

[79.] Furthermore, the Applicants have been given all the information in those letters and in the Public Body's documents, except for the third parties' names and addresses. Even if the Applicants' "rights" were yet to be determined, the Applicants, who have the contents of the letters and documents (except the names and addresses), would know what they are up against in terms of what the decision makers have before them. Moreover, the Applicants did not provide any evidence as to how the third parties' names and addresses would assist in a fair determination of their "rights". Therefore, I find that the names and addresses are not relevant to a fair determination of the Applicants' "rights".

[80.] Having made this decision, it follows that section 16(3)(c) is not a relevant circumstance to consider when determining whether the disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy under section 16(1).

[81.] I have reviewed the process that the Public Body used under section 16(3) in coming to its decision about whether the disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy under section 16(1). Because the Public Body considered a matter that I have found is not a relevant circumstance under section 16(3), I find that the Public Body did not use the right process under section 16(3).

[82.] Nevertheless, the presumption under section 16(2)(g) applies to the personal information that the public body refused to disclose to the Applicants. Consequently, the disclosure of the personal information is presumed to be an unreasonable invasion of a third party's personal privacy under section 16(1), unless the Applicants can rebut that presumption.

[83.] As a result of my findings under section 16(3), it would appear that the Public Body has disclosed some personal information of third parties, contrary to section 16(1). However, as that issue was not before me in this inquiry, I will not make an Order in that regard. As to future decisions to disclose personal information, the Public Body should be proceeding under section 29(1) of the Act (third party notice).

5. Did the Applicants meet the burden of proof under section 67(2)?

[84.] Because the disclosure of the personal information is presumed to be an unreasonable invasion of a third party's personal privacy, the burden of proof is on the Applicants to prove that the disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy, as provided by section 67(2) of the Act.

[85.] Having reviewed the Applicants' arguments, discussed under section 16(3) above, I find that the Applicants have not met the burden of proving that disclosure of the third parties' personal information would not be an unreasonable invasion of the third parties' personal privacy.

6. Conclusion under section 16

[86.] The Public Body correctly applied section 16(1) and section 16(2)(g) to the personal information, as set out in Revised Table I and Revised Table II.

[87.] Therefore, I uphold the Public Body's decision to refuse to disclose that personal information to the Applicants.

Issue B: Did the Public Body meet its duty to assist the Applicants under section 9(1) of the Act?

1. General

[88.] Section 9(1) of the Act reads:

> *9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[89.] In their September 5, 1997 letter to me, the Applicants set out the following six sub-issues for me to consider under section 9(1) of the Act: Sub-issue Numbers 2a, 2b, and 3b to 3e. I intend to consider these sub-issues individually, except for Sub-issue Numbers 2a and 3d, which I have combined because they are interrelated.

2. Applicants' Sub-issue Numbers 2a and 3d

[90.] I have summarized the Applicants' Sub-issue Numbers 2a and 3d as follows:

> 2a The Applicants believe that when my Office was investigating why the Public Body could not find the Applicants' original proposal or the copy of the proposal sent to the Public Body's Assistant Deputy Minister, the Public Body provided inaccurate information about who was responsible for making the decision on the Applicants' proposal.
>
> 3d The Public Body failed to disclose the copy of the Applicants' proposal submitted July 5, 1995.

[91.] Sub-issue Number 2a concerns the following sequence of events: the Applicants' February 16, 1996 request for access; the Public Body's inability to find not only the Applicants' original proposal, but also the Public Body's copy of the Applicants' proposal on that request for access; the Applicants' May 23, 1996 request that my Office review that and other matters; and my Office's subsequent investigation. During the Public Body's initial search for records, the only place the Public Body had been able to locate a copy of the Applicants' proposal was at the offices of another public body, namely, Economic Development and Tourism.

[92.] The Public Body obtained a copy of the Applicants' proposal from Economic Development and Tourism on March 15, 1996. The Public Body did not find its own copy of the Applicants' proposal until after the inquiry. The Public Body has not been able to locate the Applicants' original proposal, which the Applicants say they submitted to a named employee of the Public Body at the Public Body's Rocky Mountain House Office on July 5, 1995.

[93.] During the investigation, my Office met with certain employees in the office of the Assistant Deputy Minister of the Public Body on October 28, 1996. In that meeting, those employees told my Office that they could not remember seeing the Applicants' proposal, they could not remember what happened to that proposal and, had they known that a copy was being held by Economic Development and Tourism, they probably would have destroyed their copy, knowing that there was no obligation to keep a transitory record or a duplicate.

[94.] After that meeting, my Office was of the opinion (incorrectly, as it turns out) that the Public Body did not have firsthand decision-making authority or responsibility on the Applicants' proposal. My Office informed the Applicants of that opinion in a November 1, 1996 letter. The Applicants therefore believed that the Public Body incorrectly advised that the decision on the proposal was made by Economic Development and Tourism.

[95.] Because of the confusion surrounding the decision-making authority on the Applicants' proposal, during the inquiry, I asked the Public Body to find out who had that decision-making authority, and report back to me. In a December 23, 1997 letter, the Public Body responded as follows:

> *The decision-maker for the land use decisions on public land rests with the Minister of Environmental Protection. This had been delegated to the Regional Director of Land and Forest Service. Under the CTRL process, the Department initially designated to receive proposals was Economic Development and Tourism, who facilitated ensuring the proposals were appropriately handled through the process. The actual decision-making on the proposal was the responsibility of Environmental Protection who communicated the decisions to the applicants. When the process was*

changed to the ATRL process, the applications then were submitted to Environmental Protection.

The Regional Director for Land and Forest Service at the time, [named individual]*, made the decision on the land use and had the proposal from* [the Applicants] *in hand when the decision was made to not accept their proposal. A decision was made quickly following receipt of their proposal in* [the Regional Director's] *letter of September 15, 1995.*

[96.] I also reviewed a number of records to which the parties referred, including records that relate to the decision-making authority.

[97.] A September 15, 1995 letter is the clearest documentary evidence of the decision-making authority, and supports the Public Body's statement in that regard. In that letter, the Regional Director for Land and Forest Services notified the Applicants of the decision on their proposal.

[98.] I note that a draft of the September 15, 1995 letter is dated September 21, 1995. The draft has slightly different wording than the original letter, and there is no signature block on the draft. However, I also note that a fax cover sheet transmitting a copy of the September 15, 1995 letter is dated September 20, 1995. Consequently, I do not attach any significance to the differences in the dates on the two letters, particularly since this matter does not affect the issue as to who had the decision-making authority on the Applicants' proposal.

[99.] I have also reviewed the records to determine the extent to which Economic Development and Tourism was involved in the Applicants' proposal.

[100.] On the copy of the Applicants' proposal obtained from Economic Development and Tourism, I note that the Applicants copied or "cc'd" their proposal to Economic Development and Tourism. I also note that the Public Body has cc'd Economic Development and Tourism on numerous letters referencing other applications made by the Applicants (miscellaneous lease and licence of occupation applications). Furthermore, many of the Public Body's letters to the Applicants were cc'd to Economic Development and Tourism.

[101.] In a news release dated October 19, 1995, the Public Body announced a change from the CTRL process to the ATRL process. The Applicants provided me with a copy of that news release. The news release indicates that Economic Development and Tourism will continue to assist applicants with the preparation of their application packages.

[102.] Based on the foregoing evidence, I conclude that Economic Development and Tourism was responsible for receiving applications such as the Applicants'

proposal, and that the Regional Director for Land and Forest Services had the responsibility for making, and made, the decision on the Applicants' proposal.

[103.] Consequently, I conclude that my Office was initially in error in its understanding of the Public Body's decision-making power regarding the Applicants' proposal, and in my Office's November 1, 1996 response to the Applicants in that regard.

[104.] That matter resolved, I turn now to the matter of the Public Body's employees' statements that they could not remember the Applicants' proposal.

[105.] I reviewed the Public Body's copy of the Applicants' proposal, which the Public Body found after the inquiry. It is clear that the Assistant Deputy Minister's office received the Applicants' proposal on September 5, 1995. This is the date stamp on the proposal that arrived in the Assistant Deputy Minister's office.

[106.] However, it is also obvious that the proposal was then sent to the Director of the Public Body's Forest Management Division. This is evident from the handwritten note of instruction on the proposal, which is addressed to that Director, and asks the Director to work with two named employees of the Public Body on the proposal. I have identified one of those named employees as the Regional Director for Land and Forest Services, who was the decision-maker on the proposal. The handwritten note of instruction is initialed, but the initials are not those of the Assistant Deputy Minister. The proposal is further stamped as received in the Forest Management Division on September 7, 1995.

[107.] As evidenced by the date stamps on the proposal, the proposal was physically in the Assistant Deputy Minister's office for less than two days. During my Office's investigation, the Assistant Deputy Minister's staff were being asked, more than a year later, to remember a document that briefly passed through the Assistant Deputy Minister's office (probably along with many other documents) and, further, was not a matter over which the Assistant Deputy Minister had the decision-making authority. Consequently, I do not find it unusual that no one in the Assistant Deputy Minister's office remembered seeing the Applicants' proposal.

[108.] Sub-issue Number 2a having been resolved, I turn to Sub-issue Number 3d. A determination as to Sub-issue Number 3d is not difficult as it concerns the Public Body's copy of the Applicants' proposal, which was found after the inquiry.

[109.] Before and during the inquiry, it was the Public Body's belief that it had misfiled its copy of the Applicants' proposal. That belief was verified when, on

December 23, 1997, the Public Body informed my Office that it had located its copy of the Applicants' proposal. The Public Body said that its copy of the Applicants' proposal had been found on the wrong file when searching that file for another document.

[110.] I do not find anything unusual or sinister about the Public Body's copy of the Applicants' proposal having been misfiled. Human error occurs when filing documents in any office. Furthermore, it appears that the proposal was misfiled after the Applicants had been notified of the Public Body's decision regarding the proposal, as evidenced by the date of the letter of decision sent to the Applicants, the date stamps on the Public Body's copy of the proposal, and the "bring forward" date written on that copy.

[111.] I have noticed two unusual things about the Public Body's copy of the Applicants' proposal.

[112.] First, the Public Body's copy is stamped as received on September 5, 1995, two months after the Applicants submitted their original proposal to the Public Body's Rocky Mountain House office. However, I am not prepared to find any significance in those different dates because there is no evidence before me that all the copies of the proposal were sent at the same time. It is not clear from the Applicants' May 23, 1996 letter to me, from the Applicants' evidence at the inquiry, or from the "cc'd" copies listed on the last page of the Applicants' proposal, as to when the various copies of the proposal were sent.

[113.] Second, the point size of the typeface on the Public Body's copy of the Applicants' proposal is slightly larger than on the copy obtained from Economic Development and Tourism, but the two copies are otherwise exactly the same, right down to the typographical errors. I am unable to draw any conclusion from that, other than it is likely each version was produced at a different time.

[114.] Consequently, I accept the Public Body's explanation for its inability to find its copy of the Applicants' proposal.

[115.] A determination as to Sub-issue Number 3d, as it concerns the fate of the Applicants' original proposal, is more problematic.

[116.] The Public Body gave evidence of its search procedure that it conducts on a request for access. The Public Body followed its normal search procedure in this case. The Public Body cannot find the Applicants' original proposal. It too may be misfiled.

[117.] I have reviewed the evidence of the Public Body's search procedure, and conclude that the Public Body conducted a thorough search. Given the

evidence of a thorough search, I accept the Public Body's word that it cannot find the Applicants' original proposal.

3. Applicants' Sub-issue Number 2b

[118.] I have summarized the Applicants' Sub-issue Number 2b as follows:

> 2b The minutes from meetings of the Environmental Resources Committee, dated April 4, 1996 and June 6, 1996, appear to have been altered after my Office's investigation and before receipt of documents under the Applicants' request for access (96-A-00017).

[119.] In Sub-issue Number 2b, the alteration to which the Applicants refer is text that was not bolded in the original version of the minutes, but was bolded in the version given to the Applicants.

[120.] The Applicants were also concerned about whether the minutes referred to their proposal for the X Ranger Station, but I note that the minutes refer only to a lease application of the Applicants.

[121.] The Applicants were initially provided with excerpts from those minutes, rather than the entirety of the minutes. Furthermore, the excerpt said to be from the June 6, 1996 minutes was, in fact, from the May 2, 1996 minutes.

[122.] The Public Body offered the following explanation of what happened. The copies of the minutes the Applicants received were excerpts from an electronic version, and the bolding on the Applicants' copy was done only to show the places where the Applicants were mentioned in the minutes. In later reviewing the minutes, the Public Body found the error made in the excerpt of the June 6, 1996 minutes. In those minutes, there was no mention of the Applicants. The reference was actually made in the May 2, 1996 minutes. The error occurred when the electronic version of the minutes was found and sent from the Regional Coordinator's office in Calgary.

[123.] This explanation points to a number of problems that may occur when electronic records are the subject of an access request. First, it would seem to me that a public body should print the record as is exists in the electronic version. A public body should not attempt to excerpt the record electronically, or highlight any part of the text, before it prints the record. The printed version of the record can then be severed, or highlighted in a way that assists an applicant if a public body wishes. Had those procedures been followed in the present case, this misunderstanding might not have occurred.

[124.] Although I accept the Public Body's explanation of what happened in this case, I caution the Public Body and other public bodies about deviating from the procedure I have set out above.

[125.] I note that the minutes were provided to the Applicants in the delivery of records related to the September 23, 1996 scheduled date. The Public Body's notation on the records is that those records were released to the Applicants on October 24, 1996.

4. Applicants' Sub-issue Number 3b

[126.] I have summarized the Applicants' Sub-issue Number 3b as follows:

> 3b The Public Body failed to disclose four specific letters to and from the Public Body's Assistant Deputy Minister.

[127.] The Applicants said that these letters were dated October 4, 1995, October 23, 1995, August 6, 1996, and October 4, 1996.

[128.] During the inquiry, I asked the Applicants to provide me with copies of these letters, to assist the Public Body in locating its copies.

[129.] I subsequently clarified with the Applicants that there was no October 4, 1996 letter. Instead, that date should have read October 30, 1995.

[130.] On February 5, 1998, the Public Body notified me that it located these four records. However, the records did not relate to the subject of the Applicants' request, which was the X Ranger Station. Instead, the records related to the "Y" Ranger Station.

[131.] I have confirmed that the records in fact relate to the Y Ranger Station. I therefore accept the Public Body's reason as to why it did not find the records when it did its original search.

[132.] I also note that on the date the Public Body received the Applicants' request (February 23, 1996), the August 6, 1996 letter would not yet have been created. The Applicants would not have been aware that record was missing until they received the records relating to the September 23, 1996 scheduled date. The Public Body released those records to the Applicants on October 24, 1996.

5. Applicants' Sub-issue Number 3c

[133.] I have summarized the Applicants' Sub-issue Number 3c as follows:

3c The Public Body failed to disclose notes from a February 22, 1995 meeting the Applicants had with three named employees of the Public Body.

[134.] In its May 13, 1996 letter to the Applicants, the Public Body told the Applicants that two of its employees who attended the February 22, 1995 meeting said that no formal minutes or informal notes were taken at that time.

[135.] During the inquiry, the Public Body notified me that the named employee whom the Applicants thought had taken notes at the February 22, 1995 meeting was away from the office, but that the Public Body would get a statement from that employee shortly. The Public Body said it had a telephone conversation with the employee, in which the employee stated that the employee could not recall the meeting.

[136.] After the inquiry, the Public Body provided me with that employee's memo written to the Public Body. The memo said that the employee did not have any notes of the February 22, 1995 meeting. The memo also said that although the employee often takes notes at meetings, those notes are destroyed once any action items related to the meeting are attended to.

[137.] As the memo was not an affidavit (nor did I ask for one), I have also looked at other evidence to decide the likelihood of whether notes were kept. I have located a March 8, 1995 letter sent to the Applicants by the Public Body's employee in question, outlining what was discussed in the February 22, 1995 meeting (that letter was in the initial records sent to the Applicants). In that letter, the employee recorded the content of the meeting.

[138.] Therefore, I find that even if the employee had taken notes of the meeting, it is unlikely that the employee would have kept those notes. I believe that the employee would have treated the notes as a transitory record and destroyed them after writing the March 8, 1995 letter. Consequently, I accept the employee's statement that the employee does not have any notes of the February 22, 1995 meeting.

6. Applicants' Sub-issue Number 3e

[139.] I have summarized the Applicants' Sub-issue Number 3e as follows:

3e The Public Body failed to disclose ten specific letters to and from the Member of the Legislative Assembly who is the Chair of the Standing Policy Committee on Natural Resources and Sustainable Development.

[140.] These letters were dated as follows: April 22, 1996 (two letters); April 25, 1996 (two letters); April 29, 1996 (two letters); May 2, 1996; May 16, 1996; May 22, 1996; and June 4, 1996.

[141.] During the inquiry, I asked the Applicants to provide me with copies of these letters, to assist the Public Body in locating any copies it may have. I also indicated to the Applicants that I had located an April 25, 1996 letter in the records related to the May 23, 1996 scheduled date, and the June 4, 1996 letter in the records relating to the September 23, 1996 scheduled date.

[142.] The Applicants provided me with the following eight letters relating to this matter: April 22, 1996 (one letter); April 25, 1996 (one letter); April 29, 1996 (one letter); May 2, 1996 (copy sent July 5, 1996); May 16, 1996; May 22, 1996; June 4, 1996; June 12, 1996; July 2, 1996; and August 9, 1996.

[143.] The second April 22, 1996 letter the Applicants provided to me had nothing to do with the Standing Policy Committee on Natural Resources and Sustainable Development (the "Standing Policy Committee"), and I have removed that letter from the Applicants' list above. There was only one letter dated April 25, 1996 and one letter dated April 29, 1996.

[144.] The June 12, 1996 letter, which was not on the Applicants' list, was addressed to the Coordinator of the Standing Policy Committee. I have added that letter to the Applicants' list. The July 2, 1996 letter was addressed to the Executive Council, and the August 9, 1996 response from Executive Council was also copied or cc'd to the Chair of the Standing Policy Committee. I have added those letters to the Applicants' list.

[145.] I provided all the letters to the Public Body. In its February 5, 1998 response to me, the Public Body said that the records sent or received from the office of the MLA, as chair of the Standing Policy Committee, were not found in the Public Body's files.

[146.] I do not find it unusual that the Public Body did not find in its files the letters sent to or from the Standing Policy Committee, or to or from the Executive Council. Under section 1(1)(p)(iii) of the Act, the Executive Council Office is a separate public body for the purpose of accessing records under the Act. Standing Policy Committees report to the Executive Council. Therefore, the records of the Executive Council and the records of the Standing Policy Committee would be under the custody or control of the Executive Council Office as a separate public body.

[147.] The Applicants' July 2, 1996 letter to the Executive Council and the August 9, 1996 response are evidence that the Applicants made a separate application for access to records held by the Executive Council. However, in

this Order, I do not have to decide why the Executive Council Office responded that it did not have the records of the Standing Policy Committee.

[148.] The only issue I need to decide is whether it is likely that the Public Body would have in its custody or control the records relating to the Standing Policy Committee. Based on the foregoing, I find that the Public Body likely would not have those records.

[149.] Consequently, I accept the Public Body's statement that it did not find the records relating to the Standing Policy Committee.

[150.] However, I note that the Public Body earlier had provided the April 25, 1996 and June 4, 1996 letters to the Applicants as part of the Applicants' continuing request. The April 25, 1996 letter is a copy that was faxed to the Public Body, but the fax markings are unclear. The June 4, 1996 letter is a clear fax copy sent from Executive Council to the Public Body. I believe that the Public Body's inability to find those records on its further search after the inquiry speaks primarily to the adequacy of its manual record-keeping system, rather than to the Public Body's duty to assist.

7. Conclusion under section 9(1) of the Act

[151.] I have accepted the Public Body's explanation for its inability to find its copy of the Applicants' proposal for the X Ranger Station, and I am satisfied with the Public Body's reason as to why, at first, it did not locate the missing records for the Y Ranger Station. Furthermore, I have accepted the Public Body's explanation of what happened regarding the minutes of the Environmental Resources Committee, and the Public Body's employee's statement that that the employee does not have any notes of a February 22, 1995 meeting with the Applicants. I am also satisfied that the Public Body would not have in its custody or control the records relating to the Standing Policy Committee (except the two records mentioned).

[152.] Given the evidence of a thorough search, I accept that the Public Body's word that it cannot find the Applicants' original proposal.

[153.] Furthermore, I find that the Public Body made further efforts to find the records when the Applicants said that records were missing. In a May 13, 1996 letter, the Public Body asked the Applicants to provide a copy of the proposal for the X Ranger Station when the Public Body could not find that proposal. The Public Body contacted another public body to get a copy of that proposal. In an April 22, 1996 letter, the Public Body also provided an explanation as to what steps it took to determine that other records or information did not exist.

[154.] Consequently, I find that the Public Body met its duty to assist the Applicants under section 9(1) of the Act.

Issue C: Did the Public Body fail to provide the Applicants with an estimate of the total fees payable over the course of the Applicants' continuing request, and fail to respond to the Applicants' request?

1. Applicants' issue clarified

[155.] The Applicants worded the issue this way: "Failing to respond to Applicants' request/Failing to provide notification of fees contrary to section 11 and section 13". The Applicants then went on to describe the issue as follows:

> *Failing to notify Applicant* [sic] *with respect to fees associated with FOIPP Application dated February 16, 1996. In response to the continuing FOIPP request the Applicants were advised that an additional 20 pages would cost $170.21.*

[156.] Simply put, the Applicants' complaint is that the Public Body did not provide the Applicants' with an estimate of the total fees payable over the course of the Applicants' continuing request. I understand the Applicants to be saying that the Public Body's failure to provide the fee estimate is a breach of section 11 and section 13 of the Act. The Applicants also say that the Public Body failed to respond to the Applicants' request. A failure to respond to an applicant's request would be a breach of section 10(1) of the Act.

[157.] The Applicants informed me that they were not asking for a review of the fee, but a review of the procedure for providing a fee estimate on a continuing request.

[158.] It should be kept in mind that this Order deals only with the provisions of the Act concerning a fee estimate on a general access request, not on a request for personal information.

2. What matters do I need to decide under Issue C?

[159.] Issue C requires that I decide two matters:

a. What do the Act and the Regulations require by way of a fee estimate on a continuing request?

b. Does a public body's failure to provide a fee estimate result in a breach of section 11 and section 13 of the Act, and result in a breach

of a public body's duty to respond to an applicant under section 10(1) of the Act?

[160.] To decide these two matters, I intend to use the following approach:

a. Review all the relevant provisions of the Act and the Regulations concerning continuing requests, fee estimates and payment of fees, and decide what the Act requires by way of estimating fees, determining the "$150 threshold" for fees, and paying fees on a continuing request.

b. Review all the relevant provisions of the Act concerning responding to an applicant, and decide how the requirement to provide a fee estimate impacts on responding to an applicant.

a. What do the Act and the Regulations require by way of a fee estimate on a continuing request?

i. Provisions of the Act relevant to a continuing request

[161.] Section 8 of the Act is relevant to this case. Section 8 reads:

> *8(1) The applicant may indicate in a request that the request, if granted, continues to have effect for a specified period of up to 2 years.*
>
> *(2) The head of a public body granting a request that continues to have effect for a specified period must provide to the applicant*
>
> > *(a) a schedule showing dates in the specified period on which the request will be deemed to have been received and explaining why those dates were chosen, and*
> >
> > *(b) a statement that the applicant may ask the Commissioner to review the schedule.*
>
> *(3) This Act applies to a request that continues to have effect for a specified period as if a new request were made on each of the dates shown in the schedule.*

[162.] Section 8(1) of the Act provides that a request for access may continue for up to two years. In this Order, I refer to a request under section 8(1) as a "continuing request", as that wording is used in the Regulations.

[163.] I do not find it necessary to consider whether this was a situation in which it was appropriate to grant a continuing request, as the Public Body chose to grant the continuing request and proceeded on that basis.

[164.] The Applicants say that their February 16, 1996 request for access, received by the Public body on February 23, 1996, was a continuing request under section 8(1) of the Act. In this case, the Applicants' request continued to have effect for two years.

[165.] Section 8(2) of the Act requires that for the specified period of up to two years, the Public Body must provide a schedule of dates on which the request is deemed to have been received. The Public Body must also explain why the dates were chosen. It seems clear that the purpose of section 8(2) is to reactivate the request automatically on the specified dates, so that an applicant does not have to submit a new request each time.

[166.] I do not have any evidence before me regarding the original schedule the Public Body gave the Applicants to comply with section 8(2) of the Act. However, it appears that the Public Body complied with section 8(2), as evident from a copy of an April 22, 1996 letter to the Applicants, changing the original schedule at the request of one of the Applicants. The changed schedule sets out the following dates on which the Applicants' request would be deemed to have been received under section 8(2): May 23, 1996; September 23, 1996; January 23, 1997; May 23, 1997; September 23, 1997; and January 23, 1998.

[167.] Finally, section 8(3) says that the Act applies to each scheduled date as if a new request were made on that date. I will discuss section 8(3) in detail later in this Order.

ii. Provisions of the Act and the Regulations relevant to a fee estimate

[168.] Section 87(1) and section 87(3) of the Act are relevant to a fee estimate. Those sections read:

> *87(1) The head of a public body may require an applicant to pay to the public body fees for services as provided for in the regulations.*
>
> *87(3) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.*

[169.] Section 10(4), section 10(5), section 12(1), section 12(3), and section 12(4) of the Regulations are also relevant. Those sections read:

> *10(4) In addition to the initial fee, fees in accordance with Schedule 2 may be charged if the amount of the fees, as estimated by the public body to which the request has been made, exceeds $150.*
>
> *10(5) Where the amount estimated exceeds $150, the total amount is to be charged.*
>
> *12(1) An estimate provided under section 87(3) of the Act must set out*
>
> > *(a) the time and cost required*
> >
> > > *(i) to search, locate and retrieve the record;*
> > >
> > > *(ii) to prepare the record for disclosure;*
> >
> > *(a.1) the cost of copying the record;*
> >
> > *(b) the cost of computer time involved in locating and copying a record or, if necessary, re-programming to create a new record;*
> >
> > *(c) the cost of supervising an applicant who wishes to examine the original record, when applicable;*
> >
> > *(d) the cost of shipping the record or a copy of the record.*
>
> *12(3) In the case of a continuing request, the estimate is to include the total fees payable over the course of the continuing request.*
>
> *12(4) An applicant has up to 20 days to indicate if the fee estimate is accepted or to modify the request to change the amount of fees assessed.*

[170.] By way of introduction, section 87(1) of the Act and section 10(4) of the Regulations make it clear that charging a fee for services is a discretionary ("may") decision under the Act. However, if a public body decides to charge

fees estimated to exceed $150 (the "$150 threshold"), it must charge the total amount, as provided by section 10(5) of the Regulations.

[171.] Section 87(3) says that if fees for services are to be charged, a public body must give an estimate of the total fee before providing the services. If no fees for services are to be charged, it follows that no fee estimate is required. Section 12(1) sets out the contents of a fee estimate.

[172.] Under section 12(3) of the Regulations, a public body must provide an applicant with a fee estimate of the total fees payable over the course of the continuing request. Section 12(4) of the Regulations gives an applicant up to 20 days to indicate acceptance of a fee estimate, or to modify the request for access.

[173.] On March 13, 1996, the Public Body sent a notice of a fee estimate to the Applicants. The amount of the fee estimate was $195.18, which the Applicants paid in full. The Applicants subsequently received an initial delivery of records and a receipt from the Public Body. The Public Body provided me with a copy of those records. The Applicants provided me with a copy of their receipt. The "Payment for" line on the receipt reads "Final Fees - Access Request 96-A-00017". The Applicants say that, consequently, they thought the $195.18 was the full amount they would be charged for their continuing request.

[174.] Although the Public Body provided a fee estimate for the records initially delivered to the Applicants, the Public Body did not provide a fee estimate of the total fees payable over the course of the continuing request, as provided by section 87(3) of the Act and section 12(3) of the Regulations.

iii. Provisions of the Regulations relevant to payment of fees

[175.] Section 13(1) and section 13(4) of the Regulations are relevant to payment of fees. Those sections read:

> *13(1) Processing of a request ceases once a notice of estimate has been forwarded to an applicant and recommences immediately on*
>
> *(a) the receipt of an agreement to pay the fee, and*
>
> *(b) the receipt of at least 50% of any estimated fee that exceeds $150.*
>
> *13(4) In the case of a continuing request, the portion of the estimate applicable to each delivery of the request*

(a) must be paid at the time of delivery, and

(b) is to be used to calculate any required payment under subsection (1).

[176.] Section 13(1) and section 13(4) of the Regulations set out a payment formula that uses the estimated fee and the $150 threshold established under the Regulations.

[177.] The Public Body says that these Regulations are to be interpreted as setting a $150 threshold for the entire continuing request. In other words, if a public body estimates that the continuing request will be more than $150, a public body must charge the full amount for each delivery of records in the continuing request, even if each delivery is less than $150. Although the Public Body did not provide an estimate of the total fees payable over the course of the continuing request, the Public Body reasons that since the initial delivery of records was over the $150 threshold, the Public Body was required to charge the Applicants the full amount for each of the subsequent deliveries of records over the course of the continuing request.

[178.] The Applicants say that they received two further deliveries of records, which corresponded with the May 23, 1996 and September 23, 1996 dates set out in the schedule provided under section 8(2) of the Act. No invoice accompanied those two deliveries.

[179.] January 23, 1997 was the next scheduled date set out in the schedule provided under section 8(2) of the Act. On February 7, 1997, the Public Body notified the Applicants that the cost of providing those records would be $170.21. The records consisted of 20 pages. The Public Body sent a further letter to the Applicants, dated February 27, 1997. That letter explained the $150 threshold.

[180.] On March 17, 1997, the Applicants wrote back to the Public Body, saying they were not told there would be additional costs, and asking for a detailed itemized account of the $170.21 charge. The Public Body responded to the Applicants on March 26, 1997, indicating that the $170.21 amount was the combined charge for the records relating to both the September 23, 1996 and January 23, 1997 scheduled dates set out in the schedule provided under section 8(2) of the Act. In that letter, the Public Body also said that it was willing to recognize its error in not charging for the records related to the May 23, 1996 scheduled date, and that it would not now charge for those records. However, the Public Body maintained that it was still entitled to charge for the records related to the September 23, 1996 and January 23, 1997 scheduled dates.

[181.] The result was the Applicants refused to pay the $170.21, and the Public Body did not provide the Applicants with the records related to the January 23, 1997 scheduled date.

[182.] There is no issue before me concerning deliveries of records after the January 23, 1997 scheduled date.

iv. Reconciling the continuing request, fee estimate and fee payment provisions of the Act and the Regulations

[183.] There are three matters that I must now decide:

(1) How is a public body to prepare a fee estimate for a continuing request?

(2) Does the $150 threshold apply to the estimate of the total fees on a continuing request?

(3) Does an applicant pay fees intermittently on a continuing request?

(1) How is a public body to prepare a fee estimate for a continuing request?

[184.] To decide this issue, the starting point is section 8(2) of the Act. Section 8(2) requires that, on a continuing request, a public body must provide an applicant with a schedule of dates on which the request will be deemed to have been received.

[185.] The next consideration is section 87(3) of the Act and section 12(3) of the Regulations. Section 87(3) of the Act requires that a public body provide an applicant with an estimate of the total fee before providing the services. Section 12(3) of the Regulations requires that a public body provide an estimate of the total fees payable over the course of the continuing request.

[186.] Section 13(4) of the Regulations must also be considered, even though that section mainly concerns payment of the fee estimate. I believe that the phrase "portion of the estimate applicable to each delivery of the request", set out in the initial part of section 13(4), assumes that a public body also decides what portion of that estimate will be applicable to each delivery of records in the continuing request. To decide this, it would seem to me that a public body would take the estimate of the total fees payable over the course of the continuing request and, using its best guess, decide how much of that estimate is likely to be applicable to each delivery. It follows that a public body would also provide that information to an applicant.

[187.] This interpretation of section 13(4) is consistent with section 12(3) of the Regulations, which says that an "estimate is to *include* [my emphasis] the total fees payable over the course of the continuing request". Section 12(3) does not mean that the estimate of total fees is the only thing provided to an applicant.

[188.] To illustrate how section 8(2) of the Act, and section 12(3) and section 13(4) of the Regulations work, I am going to assume that a public body gave an applicant an estimate of total fees of $2000, payable over the course of a continuing request. For argument's sake, I will use the six scheduled dates set out for the Applicants over the period of their two-year request. The following table sets out what a public body might decide will be the portion of the estimate applicable to each delivery of the request.

Scheduled date on which request deemed to have been received (section 8(2) of Act)	**Portion of the estimate (in dollars) applicable to each delivery of the request (section 13(4) of Regulations)**
May 23, 1996	500
September 23, 1996	100
January 23, 1997	300
May 23, 1997	450
September 23, 1997	50
January 23, 1998	600
	2000 (estimate of total fees)

[189.] In deciding how a public body should provide a fee estimate on a continuing request, I have rejected an interpretation of the Act and the Regulations that would have a public body provide a new fee estimate on each of the scheduled dates under section 8(2) of the Act, for the following reasons.

[190.] First, section 8(3) makes it clear that the *Freedom of Information and Protection of Privacy Act* [my emphasis] applies to a continuing request as if a new request were made on each of the scheduled dates.

[191.] Under section 25(1)(a) of the *Interpretation Act*, R.S.A. 1980, c. I-7, *Act* means *Act* only, and does not mean a regulation made under an *Act*. Consequently, under section 8(3) of the Act, only the provisions of the *Freedom of Information and Protection of Privacy Act* apply for the purposes of treating a continuing request as if a new request were made on each of the scheduled dates. As the Regulations do not apply as if a new request were made on each of the scheduled dates, section 8(3) cannot be interpreted so as to require a new fee estimate to be given on each of the scheduled dates.

[192.] Second, I believe that the Legislature specifically intended that the Act set out the scheduled dates on which a new request is deemed to have been made, and that the Regulations allow the estimate of total fees to be apportioned according to the number of deliveries of records. If the Legislature had intended that a new fee estimate be provided on each of the scheduled dates, it would have said so. Furthermore, the above two provisions are not in conflict.

[193.] Finally, if the Act required a new fee estimate on each of the scheduled dates, providing an estimate of the total fees payable over the course of the continuing request would serve no useful purpose, given the uncertainty about the fee applicable on each of the scheduled dates. It is conceivable that an applicant could be in for an unpleasant surprise on any scheduled date. The present case is an example on point.

[194.] The purpose of providing an estimate of the total fees payable over the course of a continuing request under section 12(3) of the Regulations is to give an applicant some idea of the total cost associated with making a continuing request. The purpose of section 12(4) of the Regulations is to then allow an applicant to decide if he or she accepts the fee estimate or wishes to modify the request to change the amount of fees. Given a fee estimate, it is not unusual for an applicant to become more specific about the records for which access is sought, and for the fee estimate to change as a result.

[195.] However, because only one estimate of total fees is given under section 12(3) of the Regulations, I believe that section 12(4) of the Regulations permits an applicant to modify fees only once on a continuing request. If there is an estimate of the total fee and that estimate is apportioned according to each delivery of records, it follows that an applicant who modifies the estimate of the total fees will necessarily modify the portion of the estimate applicable to each delivery.

(2) Does the $150 threshold apply to the estimate of the total fees on a continuing request?

[196.] Section 10(4), section 10(5), section 12(3), and section 13(4) of the Regulations are relevant in deciding this issue.

[197.] Section 10(4) and section 10(5) of the Regulations establish the $150 threshold for payment of fees. It is only when that $150 threshold has been met that a public body must give an applicant an estimate of the total fees payable.

[198.] Section 12(3) of the Regulations provides that an estimate is to include the total fees payable over the course of the continuing request.

[199.] Section 13(4) of the Regulations specifically refers to "portion" of the estimate. As previously discussed, a public body does not give a new fee estimate on each scheduled date under section 8(2) of the Act. Instead, a public body takes the estimate of the total fees and apportions that estimate according to the number of deliveries of records (which will correspond with the scheduled dates under section 8(2)). Consequently, it cannot be said that an apportionment of the estimate of total fees is a new estimate. Clearly, on the words of section 13(4), there is an apportionment of the estimate for each delivery, not a new or separate estimate for that delivery.

[200.] Therefore, an estimate of the total fees on a continuing request is a one-time estimate under section 12(3) of the Regulations. Since there is one estimate for the continuing request, there can only be one $150 threshold that applies to that estimate. There cannot be a separate $150 threshold for each portion of the estimate.

[201.] It follows that if an estimate of total fees on a continuing request exceeds $150, an Applicant pays the entire estimated fee. It makes no difference if a portion of the estimate for a delivery is less than $150.

[202.] I believe that the Lieutenant Governor in Council intended that the $150 threshold apply to the estimate of the total fees on a continuing request because of the additional work those requests entail and because of the principle of "user pay" under section 6(3) of the Act.

[203.] However, payment of estimated fees is nevertheless subject to the provisions limiting fees to a public body's actual costs (section 87(5) of the Act) and allowing for a refund if fees paid are higher than actual fees (section 13(3) of the Regulations).

(3) Does an applicant pay fees intermittently on a continuing request?

[204.] Section 13(1) and section 13(4) of the Regulations are relevant in deciding this issue.

[205.] Section 13(1) is the general provision relating to payment of fees. There are two requirements under section 13(1): an agreement to pay, and payment of 50 per cent of any estimated fee that exceeds $150.

[206.] It seems to me that the requirement to pay, upfront, at least 50 per cent of any amount over the $150 threshold reflects the fact that the request

probably involves a reasonable amount of work. I think that the purpose of section 13(1) must be to secure payment of part of the estimated fee exceeding $150 to ensure that a public body does not go to any more work than is necessary in processing a request, only to find that an applicant does not want to pay for it.

[207.] Section 13(4) is the specific provision relating to payment of fees on continuing requests. Consequently, I believe that section 13(4) prevails over section 13(1), to the extent that it modifies section 13(1). Section 13(4) modifies both the frequency of payments and when payments must be made.

[208.] Section 13(4)(b) says that "the portion of the estimate applicable to each delivery of the request" is to be used to calculate any *required payment* [my emphasis] under section 13(1). The required payment under section 13(1) of the Act is payment of at least 50 per cent of any estimated fee that exceeds $150. That amount is to be paid before the public body recommences processing the request.

[209.] I believe that section 13(4) of the Regulations modifies section 13(1) to the extent that the Applicant does not pay, upfront, 50 per cent of the estimate of the total fees on a continuing request ($1000 in the above example).

[210.] I interpret section 13(4)(b) to mean that if the portion of the estimate applicable to a delivery is more than $150, then an applicant must pay at least 50 per cent of that amount to the public body before the public body continues processing that particular part of the deemed request under section 8(2) of the Act. The purpose of section 13(4)(b) is also to ensure that an applicant pays, upfront, at least 50 per cent of the apportioned estimate for that delivery, for the same reasons as previously discussed.

[211.] Section 13(4)(a) says that "the portion of the estimate applicable to each delivery of the request" must be paid at the time of delivery. I have already said that section 13(4)(b) is to be interpreted as referring to the portion of the estimate that exceeds $150, so it must be that section 13(4)(a) is to be interpreted as referring to either the portion of the estimate exceeding $150 that has not yet been paid or the portion of the estimate that is otherwise under $150. Consequently, at the time of delivery, an applicant must pay either the portion of the estimate exceeding $150 that has not yet been paid, or the portion of the estimate under $150 that is applicable to that delivery.

[212.] Under section 13(4)(a), if the portion of the estimate applicable to a delivery is under $150, an applicant would not be required to pay 50 per cent of that estimated amount in advance of delivery.

[213.] Using the information contained in the foregoing table, I envision a public body applying section 13(4), as follows.

Scheduled date on which request deemed to have been received (section 8(2) of Act)	**Portion of the estimate (in dollars) applicable to each delivery of the request (section 13(4) of Regulations)**	**Portion of the estimate (in dollars) applicable to each delivery, to be paid before delivery (section 13(4)(b) of the Regulations)**	**Portion of the estimate (in dollars) applicable to each delivery, to be paid at the time of delivery (section 13(4)(a) of the Regulations)**
May 23, 1996	500	250	250
September 23, 1996	100	None	100
January 23, 1996	300	150	150
May 23, 1997	450	225	225
September 23, 1997	50	None	50
January 23, 1998	600	300	300

[214.] Practically speaking, to be paid, whether before or after delivery of records, a public body will likely have to send a reminder letter or an invoice to an applicant. I intend to leave this matter to the public bodies.

[215.] One final matter needs to be considered. I believe that section 13(3) of the Regulations applies to a continuing request, even though section 13(4) is concerned with "the portion of the estimate applicable to each delivery". In other words, if a public body determines that an amount paid under section 13(4) is higher than actual fees, the public body must refund that amount. I believe that section 13(3) anticipates that a public body keeps a running total of the actual costs of the continuing request to be able to comply with section 13(3). Section 87(5) of the Act, which provides that fees must not exceed the actual costs of the services, also supports this view.

v. Conclusion as to whether the Public Body complied with the fee estimate provisions of the Act and the Regulations

[216.] Although the Public Body provided a fee estimate prior to the initial delivery of records on the continuing request, that fee estimate did not meet the requirements of section 87(3) of the Act and section 12(3) of the Regulations, which require that the Public Body provide an estimate of the total fees

payable, and an estimate of the total fees payable over the course of the continuing request, respectively. Consequently, the Public Body failed to comply with section 87(3) of the Act and section 12(3) of the Regulations.

[217.] Even though the Public Body later notified the Applicants of the costs associated with two of the subsequent deliveries, that notification does not amount to an estimate of the total fees under section 87(3) of the Act or section 12(3) of the Regulations.

[218.] Under section 68(3)(a) of the Act, I have the power to require that a duty imposed by the Act or the Regulations be performed. Consequently, I can order that the Public Body provide an estimate of the total fees over the course of the continuing request.

[219.] However, on March 12, 1998, the Public Body notified me that it provided a fee waiver for all but the initial delivery of records provided to the Applicants on the continuing request. Consequently, ordering that the Public Body provide an estimate of the total fees would have no practical effect, in that it would not now remedy the Public Body's breach of section 87(3) of the Act or section 12(3) of the Regulations. Therefore, I will not make such an order in this case.

[220.] I acknowledge that section 12(3) of the Regulations is onerous for public bodies who, on a continuing request, must provide a fee estimate for records that do not yet exist. Nevertheless, unless changed, public bodies must comply with the legislation as written.

b. Does a failure to provide a fee estimate result in a breach of section 11 and section 13 of the Act, and result in a breach of a public body's duty to respond to an applicant under section 10(1) of the Act?

i. Provisions of the Act relevant to a public body's responding to a request for access

[221.] Section 10, section 11 and section 13 of the Act are relevant to this discussion. The relevant parts of section 10, section 11 and section 13 read:

> *10(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
>
> *(a) that time limit is extended under section 13, or*

(b) the request has been transferred under section 14 to another public body.

11(1) In a response under section 10, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

13(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if

(a) the applicant does not give enough detail to enable the public body to identify a requested record,

(b) a large number of records is requested or must be searched and responding within the period set out in section 10 would unreasonably interfere with the operations of the public body,

(c) more time is needed to consult with a third party or another public body before deciding whether or not to grant access to a record, or

(d) a third party asks for a review under section 62(2) or 73(3).

[222.] Section 10(1) of the Act focuses on the time limit for responding to an applicant's request for access under the Act. Section 13 of the Act permits an extension of the time limit for responding, in limited circumstances. The Public Body has not extended the time under section 13 in this case.

[223.] Section 11(1) of the Act sets out the contents of the response that must be given under section 10(1). As such, section 10(1) and section 11(1) are inextricably linked, so that a breach of section 11(1) will also be a breach of section 10(1). Section 11(1) presumes that a public body has looked closely at the records and decided what exceptions apply under the Act, what information must be severed, and what information can be given to an applicant.

[224.] Although I have not set out section 12 of the Act above, section 12 is somewhat relevant because it is linked to section 11(1). Briefly, if an applicant is told under section 11(1) that access will be granted, the public body must provide a copy of the record or part of it with the response, if the applicant asked for a copy and the record can reasonably be reproduced. Otherwise, the applicant must be given reasons for any delay in providing the copy and told where, when and how the copy will be provided.

[225.] Section 10(1), section 11(1) and section 13 do not contain a requirement to provide a fee estimate. The requirement to provide a fee estimate is contained in other provisions of the Act and Regulations. I have already discussed the requirements for a fee estimate contained in section 87(3) of the Act and section 12(3) of the Regulations. The requirement to provide a fee estimate is premised on a public body's determination that the fees will exceed $150.

[226.] Since the Legislature has not linked the requirement to provide a fee estimate with the requirement to respond to an applicant under section 10(1), section 11(1) or section 13 of the Act, I conclude that the fee estimate requirement is intended to be separate from the response requirements, for the following reasons: (i) there could be a situation in which a fee estimate has not been provided, as required, but a public body has nevertheless complied with section 10(1), section 11(1) and section 13 of the Act; and (ii) conversely, there could be a situation in which a fee estimate has been provided, but a public body has not complied with section 10(1), section 11(1) or section 13 of the Act.

[227.] It follows that a breach of section 87(3) of the Act or 12(3) of the Regulations does not, of itself, result in a breach of section 10(1), section 11(1) or section 13 of the Act.

ii. Reconciling the continuing request and fee estimate provisions of the Act and the Regulations, and the response provisions of the Act

[228.] The question to be answered in this case is this: In what circumstances does a breach of either section 87(3) of the Act or section 12(3) of the Regulations, or both, result in a breach of section 10(1), section 11(1) and section 13 of the Act? To answer this question, I must first determine where a fee estimate fits in the process of responding to an applicant.

[229.] In deciding this issue, I have canvassed the decisions of the Ontario Information and Privacy Commissioner, who has dealt with the thorny issue of when fee estimates are to be issued in the process of responding to an applicant. I have found that the Alberta legislation and the Ontario legislation differ in a number of ways, including the provision for continuing requests. Consequently, I will not follow the Ontario Orders (such as Ontario Order 81 and Ontario Order P-502) requiring that a fee estimate and the equivalent of our section 11 notice be issued simultaneously, or a fee estimate and an "interim notice" be issued simultaneously in certain circumstances.

[230.] Section 87(3) of the Act contemplates that a fee estimate is a preliminary step in the process of providing access. That estimate is to include the total fees payable over the course of a continuing request, as provided by section 12(3) of the Regulations.

[231.] Under section 8(3) of the Act, the Act applies to a continuing request as if a new request were made on each scheduled date set out under section 8(2). It follows that section 10(1), section 11(1) and section 13 of the Act would apply on each of those scheduled dates. In other words, the 30-day time limit for responding to an Applicant begins anew on each scheduled date under section 8(2).

[232.] Section 13(1) of the Regulations provides that processing of a request ceases once a notice of estimate has been forwarded to an applicant, and does not recommence until the public body receives an agreement to pay the fee and at least 50 per cent of any estimated fee exceeding $150. Consequently, section 13(1) of the Regulations has the effect of suspending the time for responding under section 10(1) of the Act. In other words, the clock stops running under section 10(1). If the clock stops running under section 10(1), section 11(1) and section 13 of the Act can have no application, as they are linked with section 10(1). The clock under section 10(1) of the Act begins running again only when the requirements of section 13(1) of the Regulations have been met.

[233.] Since providing a fee estimate suspends the time for responding under section 10(1) of the Act, it seems logical that a Public Body would give a fee estimate before providing all the services, that is, before it gives a response under section 10(1) of the Act.

[234.] Under section 13(1) of the Regulations, it is clear that processing of a one-time access request ceases when the notice of estimate has been forwarded to an applicant. The time under section 10(1) of the Act stops until an applicant complies with section 13(1) of the Regulations.

[235.] Does processing of a continuing request also cease when the notice of estimate has been forwarded to an applicant? In other words, since there is only one estimate of the total fees that an applicant receives on a continuing request, is that the only time on a continuing request that processing of the request may cease? The answer to that question determines when the time stops under section 10(1) on a continuing request.

[236.] I have said before that section 13(1) of the Regulations is a general provision relating to payment of fees, that section 13(4) of the Regulations is the specific provision relating to payment of fees on continuing requests, and that section 13(4) prevails over section 13(1), to the extent that it modifies section 13(1).

[237.] I have also said that for a continuing request, section 13(4) modifies only the frequency of payments and when payments must be made. In my view, section 13(4) does not modify the following requirements under section 13(1): the agreement to pay, the $150 threshold for payment, and the requirement to pay at least 50 per cent of any estimated fee exceeding $150.

[238.] Therefore, I believe that the section 13(1) of the Regulations should be interpreted so that processing of a delivery on a continuing request ceases if the portion of the estimate applicable to that delivery of the request exceeds $150 and an applicant has not paid at least 50 per cent of any estimated fee exceeding $150, as required by section 13(4)(b). Consequently, the time under section 10(1) of the Act stops until an applicant pays that amount. Processing recommences when that amount is paid, at which point the time begins to run again under section 10(1).

[239.] However, processing of a delivery on a continuing request does not cease when the portion of the estimate applicable to that delivery is less than $150. I have already said that in such an instance, a public body would first provide the records to an applicant. Section 13(4)(a) of the Regulations requires an applicant to pay the portion of the estimate applicable to that delivery at the time of delivery. Consequently, because a public body would first deliver the

records, processing of the request does not cease under section 13(1) of the Regulations, and the time under section 10(1) of the Act does not stop.

[240.] A public body that does not respond within the 30-day time limit under section 10(1) of the Act is in breach of section 10(1). If, on a continuing request, a public body is awaiting payment of at least half of the portion of the estimate exceeding $150 before delivering the records, processing ceases under section 13(1) of the Regulations, and the time under section 10(1) of the Act stops. A public body is not in breach of section 10(1) during that waiting period. If that were not the case, then the time could easily run out during the waiting period, and a public body would be in breach of section 10(1) as a consequence. That would be an absurd result.

[241.] However, if, on a continuing request, the portion of the estimate applicable to a delivery is less than $150, processing under section 13(1) of the Regulations does not cease and the time under section 10(1) of the Act does not stop. A public body is in breach of section 10(1) of the Act if a public body does not respond during the 30-day period. A public body's response must also comply with section 11(1) of the Act. A public body may extend the 30-day time limit under section 13 of the Act.

iii. Conclusion as to whether the Public Body's failure to provide a fee estimate resulted in a breach of section 11(1) and section 13 of the Act, and resulted in a breach of the Public Body's duty to respond to the Applicants under section 10(1) of the Act

[242.] In this case, the Public Body received the Applicants' continuing request for access on February 23, 1996 and, on March 13, 1996, provided a fee estimate. On the Public Body's evidence, that fee estimate was, in fact, the portion of the estimate applicable to initial delivery of the continuing request.

[243.] That portion of the estimate was more than $150. Under section 13(1) and section 13(4) of the Regulations, processing ceased. The time then stopped under section 10(1) of the Act.

[244.] On April 9, 1996, the Applicants paid the full fee, thus meeting the requirements of section 13(1) and section 13(4) of the Regulations. Processing recommenced, the time under section 10(1) of the Act began running again, and the Public Body responded under section 10(1) by making the initial delivery of records (unsevered) to the Applicants. Consequently, the Public Body complied with section 10(1) of the Act on the initial delivery of records.

[245.] The problem arose on the delivery of records associated with the January 23, 1997 scheduled date. The Public Body had not provided an estimate of the

total fees on the continuing request, had not determined the portion of the estimate applicable to each of the delivery, and had not charged for the deliveries of records associated with the May 23, 1996 and September 23, 1996 scheduled dates.

[246.] Consequently, the Public Body sent the Applicants a notice that delivery of the records related to the January 23, 1997 scheduled date would cost $170.21. However, the $170.21 was comprised of $142.68 for the delivery of records related to the September 23, 1996 scheduled date, and only $27.53 for the delivery of records related to the January 23, 1997 scheduled date. The Public Body agreed to waive the cost of the delivery of records related to the May 23, 1996 scheduled date. Ideally, the Public Body should have sent an invoice with each delivery of the records.

[247.] I understand that the two amounts ($142.68 and $27.53) may have been actual, as opposed to estimated, costs. However, even if each amount had been a portion of the estimate applicable to a delivery, both portions of the estimate were under $150, which did not entitle the Public Body to collect at least half of the amount upfront, as provided by section 13(4)(b) of the Regulations.

[248.] As the portion of the estimate or actual cost for the record related to the January 23, 1997 scheduled date was $27.53, processing of the request did not cease under section 13(1) of the Regulations, and the time did not stop under section 10(1) of the Act. Therefore, the Public Body was required to respond, as provided by section 10(1) and section 11(1) of the Act. Then the Public Body should have delivered the records (assuming that the Public Body decided that access would be given), and the Applicants were then required to pay for the records when delivered, as provided by section 13(4)(a) of the Regulations

[249.] The Public Body wrote to the Applicants on February 7, 1997, indicating that $170.21 was owing and must be paid before the Public Body would provide the records. However, that letter did not meet the requirements of section 11(1) of the Act because it did not say whether access to the record or part of it was to be granted or refused (section 11(1)(a)).

[250.] Consequently, the Public Body breached section 11(1) of the Act. The Public Body also breached section 10(1) of the Act with regard to the January 23, 1997 scheduled date when it did not comply with the requirements of section 10(1): a response according to section 11(1), within the 30-day time limit.

[251.] Two further letters from the Public Body, dated February 27, 1997 and March 26, 1997 also did not comply with section 11(1) of the Act. In any event,

those responses were beyond the 30-day time limit and in breach of section 10(1) of the Act.

[252.] Section 13 of the Act is not applicable in this case as the Public Body did not extend the time under section 13(1), nor did the Public Body ask me to extend the time. Section 13(1) is not breached if, as here, a public body does not extend the time, although not extending the time may result in a breach of section 10(1) of the Act.

[253.] The Public Body's failure to respond with regard to the January 23, 1997 scheduled date was to be treated as a decision to refuse access to that record, as provided by section 10(2) of the Act. However, that failure was not to be treated as a decision to refuse access to the records associated with any of the previous scheduled dates. The subsequent scheduled dates are not at issue.

[254.] As the Public Body's failure to comply with section 10(1) of the Act is to be treated as a "deemed refusal" under section 10(2), I may make an order under section 68(2) of the Act. The Public Body's failure to provide a response, as required by section 11(1) of the Act, also permits me to make an order under section 68(3)(a) of the Act.

[255.] On March 12, 1998, the Public Body provided me with a copy of a letter sent to the Applicants, notifying the Applicants that the Public Body would be providing the records related to the January 23, 1997 scheduled date. On March 27, 1998, the Public Body notified me that it was releasing the records related to the January 23, 1997 scheduled date.

[256.] Consequently, I do not now find it necessary to make an order under section 68(2) in relation to the deemed refusal under section 10(2). I also do not find it necessary to make an order under section 68(3)(a) to require that the Public Body respond as required by section 11(1) of the Act.

[257.] I do not think that my interpretation of the above provisions of the Act and the Regulations puts public bodies in an untenable position as to payment for records for which payment is to follow delivery under section 13(4)(a) of the Regulations. In my view, a public body that is entitled to collect for records provided to an applicant on a continuing request is able to comply with section 10(1) and section 11(1) of the Act, and still collect payment, through the mechanism of section 12(2.1) of the Act. Section 12(2.1) reads:

> *12(2.1) If there will be a delay in providing the copy under subsection (2), the applicant must be told where, when and how the copy will be provided.*

[258.] It seems to me that if an applicant has not paid for a previous delivery on a continuing request, or has not paid the 50 per cent balance on a delivery exceeding $150, a public body may wish to use the following procedure prior to a subsequent delivery: (i) respond to an applicant under section 10(1) and section 11(1) of the Act, thus meeting those requirements; and (ii) in that response, also indicate under section 12(2.1) of the Act that the public body will mail (for example) the records related to that delivery, to the applicant within two days (for example) of the applicant's paying the previous amount owing.

[259.] My interpretation of section 12(2.1) is supportable under section 6(3) of the Act, which reads:

> *6(3) The right of access to a record is subject to the payment of any fee required by the regulations.*

[260.] Although the Public Body attempted to make use of section 12(2.1) in its February 7, 1997 letter to the Applicants, that response did not comply with section 11(1) of the Act and, consequently, with section 10(1) of the Act.

[261.] A public body also has the normal creditor remedies for nonpayment of a debt. I make no comment as to the adequacy of such remedies.

Issue D: Did the Commissioner's Office follow proper procedure?

[262.] The circumstances surrounding the Applicants' complaint that my Office did not follow proper procedure are as follows.

[263.] The Applicants had made their first request for access to the Public Body on February 16, 1996. When, after April 9, 1996, the Applicants received the initial delivery of records, the Applicants said certain records were not contained in the records disclosed to the Applicants.

[264.] In their May 23, 1996 letter, the Applicants requested that I review the matter of the missing records: the Applicants' proposal; the notes of a meeting that the Applicants had with three named employees of the Public Body on February 22, 1995; and the notes or related documents from the Regional Management Directors Committee or related governing committees, relating to the Applicants' two miscellaneous lease applications and one licence of occupation application.

[265.] It was not until I received the Applicants' September 5, 1997 letter that the Applicants also claimed that other records (letters) were not disclosed to the Applicants. Consequently, the only matters I intend to consider under Issue D

are those matters set out in the Applicants' May 23, 1996 letter, as those were the only matters that my Office investigated. That investigation concerned only the records initially released to the Applicants, and later included the records related to the May 23, 1996 scheduled date. It did not include the records related to the September 23, 1996 scheduled date, which were not released to the Applicants until October 24, 1996, at the time the investigation was being concluded. Obviously, it did not include the records related to the January 23, 1997 scheduled date.

[266.] When my Office completed its investigation, it reported to the Applicants on November 1, 1996, and closed the file.

[267.] The Applicants were not satisfied with the results of the investigation, and complained that my Office should not have closed the file.

[268.] In a January 23, 1997 letter to me, the Applicants contended that the Public Body's inability to find the missing records should be viewed as a failure of the Public Body to respond to the Applicants under section 10(1) of the Act. The Applicants maintained that such a failure to respond is to be treated as a decision to refuse access to the record under section 10(2) of the Act. The Applicants concluded that my Office should have proceeded under section 10(2) on this matter and, therefore, did not follow proper procedure when it closed the file.

[269.] I must now consider whether section 10(2) in particular, and section 10 in general, is intended to encompass a public body's inability to find records.

[270.] I reproduce section 10 of the Act here for convenience:

> *10(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
>
> > *(a) that time limit is extended under section 13, or*
> >
> > *(b) the request has been transferred under section 14 to another public body.*
>
> *(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

[271.] I have already found that the Public Body met the requirements of section 10(1) of the Act for the initial delivery of records. There is also evidence to suggest that the Public Body met the requirements of section 10(1) for the

delivery of records related to the May 23, 1996 scheduled date. Therefore, section 10(2) of the Act is not applicable to the Public Body with regard to those two responses.

[272.] Furthermore, section 10(2) does not apply to my Office when it undertakes, as in the Applicants' case, to investigate the circumstances surrounding a public body's response to an applicant.

[273.] I note that if an applicant's request is general in nature, a public body would have no way of knowing that records are missing when it responds to the applicant within the 30-day time period. In these cases, it is usually not until after the 30-day time period, when the applicant pays the fee and gets the records, that an applicant can say what is missing. However, in these cases, the public body will nevertheless have met its duty to respond within the 30-day time period under section 10(1). Consequently, section 10(2) will have no application.

[274.] In this case, the Applicants' request was general in nature, namely, "memoranda, notes, recommendations or any other information". It was not until the Applicants received the initial delivery of records and reviewed those records, that the Applicants discovered that certain records were missing, and complained to the Public Body.

[275.] Having found that section 10(2) does not apply to the Public Body or to my Office, I therefore find that my Office followed proper procedure when it did not treat the Public Body's inability to find the missing records as a decision to refuse access to the record under section 10(2) of the Act.

[276.] The issue remains as to whether my Office should have closed the file. The Applicants' original request to my Office was a request for review. The file was closed on the basis that after examining the results of the investigation, there were no matters left for review by the Commissioner under the Act. However, section 66(1) of the Act makes it clear that if, on a request for review, matters are not settled by mediation, then the Commissioner *must* [my emphasis] conduct an inquiry. Even if, as in this case, the investigation determines that there is no matter that can reasonably be referred to the Commissioner for an inquiry, I do not have any choice but to conduct an inquiry if mediation has not settled matters.

[277.] In this case, the Applicants were not satisfied that all matters were settled by mediation. Therefore, the correct procedure was to conduct an inquiry. Consequently, the Applicants' file should not have been closed. The matter was remedied by opening a new file to conduct this inquiry.

VI. ORDER

[278.] I make the following Order under section 68 of the Act.

Issue A:

[279.] The Public Body correctly applied section 16(1) and section 16(2)(g) of the Act to the personal information, as set out in Revised Table I and Revised Table II below.

Revised Table I: Records originating from the third parties

Record	**Date**	**Location of personal information severed on the page**
Letter (1 p.)	Mar. 25/96	Top and bottom of page
Letter (1 p.)	Mar. 25/96	Bottom of page
Letter (2 pp.)	Mar. 27/96	Second page, bottom of page
Letter (1 p.)	Mar. 29/96	Bottom of page
Letter (1 p.)	Mar. 29/96	Bottom of page
Letter (1 p.)	Apr. 1/96	Top and bottom of page
Letter (1 p.)	No date (faxed Apr. 1/96)	Top and bottom of page
Letter (1 p.)	No date (faxed Apr. 1/96)	Bottom of page

Revised Table II: Records originating from the Public Body

Record	**Date**	**Location of personal information severed on the page**
Action request (2 pp.)	Mar. 29/96	Second column, second line of first page
Action request (1 p.)	Apr. 9/96	Second column, second line
Action request (1 p.)	Apr. 9/96	Second column, second line
Action request (1 p.)	Apr. 9/96	Second column, second line
Letter (1 p.)	Apr. 24/96	Address block and salutation
Letter (1 p.)	Apr. 24/96	Address block and salutation
Letter (1 p.)	Apr. 24/96	Address block and salutation
List of responses to Applicants' advertisement (2 pp.)	No date	First page, second column: 4th, 5th, 7th, 8th and 10th items Second page, second column: 6th item

[280.] Therefore, I uphold the Public Body's decision to refuse to disclose that personal information to the Applicants.

Issue B:

[281.] The Public Body met its duty to assist the Applicants under section 9(1) of the Act.

Issue C:

[282.] The Public Body failed to provide the Applicants with an estimate of the total fees payable over the course of the continuing request, contrary to section 87(3) of the Act and section 12(3) of the Regulations.

[283.] The Public Body also failed to respond to the Applicants, contrary to section 10(1) and section 11(1) of the Act, with regard to the delivery of records related to the January 23, 1997 scheduled date.

[284.] Section 13 of the Act is not applicable in this case.

[285.] The failure to respond to the Applicants with regard to the delivery of records related to the January 23, 1997 scheduled date was to be treated as a decision to refuse access to those records under section 10(2) of the Act.

[286.] However, the Public Body has since waived the fees, and has since responded to the Applicants by indicating that the Public Body will provide the Applicants with the records related to the January 23, 1997 scheduled date. Consequently, I will not now make an order under section 68(3)(a) of the Act that the Public Body perform its duty to provide a fee estimate, or that the Public Body respond to the Applicants, as required by section 11(1) of the Act. I will also not make an order under section 68(2) of the Act in relation to the "deemed refusal" under section 10(2) of the Act, concerning the records related to the January 23, 1997 scheduled date.

Issue D:

[287.] My Office followed proper procedure when it did not treat the Public Body's inability to find missing records related to the initial delivery of records and the records related to the May 23, 1996 scheduled date as a decision to refuse access to the record under section 10(2) of the Act.

[288.] However, my Office should not have closed the Applicant's file. Because of the wording of section 66(1) of the Act, the correct procedure is to conduct an inquiry when matters on a request for review are not settled by mediation, as in this case. The matter was remedied by opening a new file and conducting this inquiry.

Robert C. Clark
Information and Privacy Commissioner