ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-020

May 5, 1998

ALBERTA HUMAN RIGHTS AND CITIZENSHIP COMMISSION

Review Number 1323

I. BACKGROUND

[1.] The Applicant was dismissed from the Applicant's employment, allegedly because of religious belief discrimination. The Applicant lodged a discrimination complaint with the Alberta Human Rights and Citizenship Commission (the "Public Body"). The Public Body conducted an investigation, but ultimately dismissed the Applicant's complaint.

[2.] On April 24, 1997, the Applicant applied to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the "Act"), as follows:

> *I am requesting all non-statisticle* [sic] *information within the regional and head office files regarding myself as well as* [a named individual who is the Applicant's agent]. *ie,* [sic] *investigation notes, telephone minutes, as well as meeting minutes.*

[3.] Although the Applicant's request for access was on the form entitled "Request for correction of personal information", I am satisfied that the April 24, 1997 request was a request for access.

[4.] The Public Body interpreted this request as a general request for access, which required that the Applicant pay a $25 application fee under the Regulations to the Act (Alta. Reg. 200/95). The Applicant did not pay the application fee.

[5.] After discussing the Applicant's request, the Public Body and the Applicant, by mutual agreement, narrowed the request to the Applicant's own personal information and the personal information of the Applicant's agent (the "agent"). As the $25 application fee does not have to be paid for a request for an applicant's own personal information, the Applicant did not have to pay the fee for the narrowed request.

[6.] The Public Body provided records to the Applicant, but removed information from those records on the ground that the information was not responsive to the Applicant's request for the Applicant's and the agent's personal information. The Public Body did not apply any exceptions under the Act when it removed the information.

[7.] On June 11, 1997, the Applicant asked my Office to review the Public Body's response to the Applicant's request for access. The Applicant complained that the Public Body should have indicated the sections of the Act under which the Public Body removed the information, instead of merely removing the information on the ground that it was not responsive to the Applicant's request.

[8.] While the review was in progress, on July 7, 1997, the Applicant applied to the Public Body to correct the Applicant's personal information under section 35 of the Act. Instead of correcting the Applicant's personal information, the Public Body decided to link the requested correction to the Public Body's northern regional office file concerning the Applicant.

[9.] The Applicant was dissatisfied with the Public Body's decision to link, rather than to correct or annotate under section 35 of the Act. Consequently, the Applicant asked my Office for a second review. The parties agreed to combine the second review with the review in progress.

[10.] I authorized mediation of both matters. Mediation was not successful. The matters were set down for an oral inquiry on December 11, 1997. I received the Public Body's and the Applicant's written submissions on December 5, 1997.

II. RECORDS AT ISSUE

[11.] The Public Body provided the Applicant with 142 pages from the Applicant's files held by the Public Body. The Public Body divided those pages into two groups:

(1) Group 1 (pages 1 to 83) contain information that the Public Body said was already shared with or written by the Applicant. The Public Body disclosed that information in its entirety to the Applicant.

(2) Group 2 (pages 84 to 142) contain information that the Public Body said was not copied to, received by or sent to the Applicant. The Public Body said that it removed all information not considered in keeping with the Applicant's request, i.e., the "non-responsive" information, consisting of "non-personal information and personal information not belonging to the Applicant".

[12.] In this Order, only the pages in Group 2 above are at issue (pages 84-142).

[13.] Where one page is a complete document in and of itself, I have treated that page as a "Record". Each of the following pages is a Record for the purposes of this Order:

84, 86, 87, 88, 89, 90, 91, 92, 99, 100, 135 (eleven one-page Records)

[14.] Where a document is comprised of two or more pages, I have treated those pages as a "Record". Each of the following groups of pages is a Record for the purposes of this Order:

93-94, 95-98, 101-102, 103-107, 108-114, 115-120, 121-125, 126-129, 130-134, 136-137, 139-141 (eleven multiple-page Records)

[15.] I will refer to any one-page Record or multiple-page Record in the singular as "Record" and in the plural as "Records".

[16.] The Applicant's written submission indicated that information was also removed from pages 8, 37 and 47. I have reviewed those pages and determined that no information was removed.

[17.] I have also found that no information has been removed from pages 85 and 138. I have removed those pages from consideration in this inquiry.

III. ISSUES

[18.] There are three issues in this inquiry:

A. Open, accurate and complete response (section 9(1) of the Act)

B. Scope of the records (section 9(1) of the Act)

C. Correction of personal information (section 35 of the Act)

[19.] The Notice of Inquiry set out specific questions for the parties to answer under each of these three issues. I have set out those questions at the beginning of the discussion of each issue.

IV. PRELIMINARY MATTERS

1. Out-of-province Applicant and agent

[20.] The Applicant and the Applicant's agent now reside in Moose Jaw, Saskatchewan. Because I had decided to conduct an oral inquiry, and because the Applicant was not able to attend before me, my Office arranged for the inquiry to be held by teleconference call. I conducted the teleconference from Edmonton. The Public Body attended before me in Edmonton, and the Applicant and the Applicant's agent attended at the Office of the Clerk of the Court of Queen's Bench in Moose Jaw, Saskatchewan.

[21.] The Clerk of the Court of Queen's Bench in Moose Jaw administered the oath or affirmation to the Applicant and the Applicant's agent, following Rule 270 of the Alberta Rules of Court.

2. My jurisdiction to consider certain matters raised in the Applicant's written submission

[22.] During the inquiry and in the written submission, the Applicant asked for the following:

> (i) that one telephone record, prepared by the Applicant's agent after a call with an employee of the Public Body, be "annotated" to the Public Body's "Official File"; and
>
> (ii) that a particular reference contained in one of the Records be corrected.

[23.] As these two requests did not appear to be contained in the Applicant's July 7, 1997 letter of request to the Public Body under section 35 of the Act, I asked the Applicant to confirm whether the two requests had yet been made to the Public Body. The Applicant confirmed they had not.

[24.] I decided that I did not have the jurisdiction to hear the two requests, and informed the Applicant accordingly. The Applicant then withdrew the two requests.

V. DISCUSSION OF THE ISSUES

Issue A: Open, accurate and complete response (section 9(1) of the Act)

1. General

[25.] Section 9(1) of the Act is relevant to a determination of the issue of open, accurate and complete response. That section 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.*

[26.] The Notice of Inquiry set out three questions for the parties to answer concerning the issue of open, accurate and complete response:

> 1. Does the Public Body have a duty to provide Act-referenced severing notations to the Applicant to show what has prompted the Public Body to remove text from copies of the response records where the Public Body deemed the removed information to be not responsive to the personal information request?
>
> 2. Does the Applicant have a right to see severing notations for general information (non-personal information and personal information about other persons) when the Applicant has requested the Applicant's own personal information and has not paid the initial fee for a general information access request?
>
> 3. Under what authority does the Public Body remove other information from the record before giving the Applicant access to the record?

a. Applicant's position

[27.] The Applicant submits that the removal of information, without an indication of the section of the Act under which the information is removed, is not the standard of service to be expected on an access request. The Applicant bases this submission on section 11(1)(c)(i) of the Act, which provides that if access to the record or part of it is refused, an applicant must be told the reasons for the refusal and the provision of the Act on which the refusal is based. The Applicant also feels that "[W]ithout Act-referenced severing notations it is logically difficult to understand the records."

b. Public Body's position

[28.] The Public Body's position is that the removal of "non-responsive" information from records is not "severing", so severing notations are not required. The Public Body says that "non-responsive" information is information that an applicant does not request. The Public Body maintains that severing notations are not required when a public body removes information that an applicant does not request because there is no entitlement to that information.

[29.] The Public Body has removed some information from the Records on the basis that that information is not responsive to the Applicant's request. The Public Body says that not only does the Act permit the removal of non-responsive information, but there are also practical considerations justifying the removal of non-responsive information. The Public Body further says that the Act does not require severing notations for the removal of non-responsive information.

2. Approach to the issue

[30.] To decide the issue concerning open, accurate and complete response under section 9(1) of the Act, I must decide when a public body may remove "non-responsive" information from records, and provide just the "responsive" information to an applicant. Conversely, I must decide in what situations a public body may "sever" information and must then provide an applicant with the section numbers of the Act under which the information has been "severed".

[31.] Therefore, I intend to consider the following: (a) What does "responsiveness" mean? (b) On what basis (authority) does a public body remove non-responsive information from a record? (c) What is responsive: the information or the record? and (d) When does a public body remove non-responsive information and when does a public body "sever" information?

a. What does "responsiveness" mean?

[32.] In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about "responsiveness":

> *In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information*

legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

[33.] "Responsiveness" must mean anything that is reasonably related to an applicant's request for access. In determining "responsiveness", a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant's request for access will be "non-responsive" to the applicant's request.

b. On what basis (authority) does a public body remove non-responsive information from a record?

[34.] The Public Body maintains that the Applicant asked only for the Applicant's and the agent's personal information Therefore, the Public Body did not provide information that was not sought or requested, and removed that information as being non-responsive to the Applicant's request.

[35.] The Public Body says that the removal of non-responsive information is supportable on two grounds.

[36.] First, the Public Body maintains that although section 6 of the Act allows for access to a record, that section does not require that a public body give access to all the information within a record. The Public Body relies on Ontario Order P-880 to support its position.

[37.] Second, the Public Body says that it is crucial that a public body be able to simply remove information that is not responsive or relevant to an applicant's request because of the amount of work and time that would be required to sever everything and to provide the required third party notices under section 29 of the Act. The Public Body relies on Ontario Order P-913 to support its position.

i. Does the Act allow the removal of non-responsive information from a record?

[38.] The Public Body relies on Ontario Order P-880 to support its position that a public body may remove non-responsive information from a record. In that Order, the Office of the Information and Privacy Commissioner of Ontario reviewed the Ontario legislation, which refers to "a right of access to a record or *a part of a record* [my emphasis]". That wording was interpreted to mean two

things: (i) the legislation recognized that only portions of a record may be responsive to a request, and (ii) institutions must entertain requests for information that may be contained in part of a record, as opposed to the record itself.

[39.] Section 6(1) of the Act is relevant to this discussion. That section reads:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

[40.] Section 6(1) refers only to "a right of access to any record", and does not refer to "a right of access to…*a part of a record* [my emphasis]", which is the wording of the Ontario legislation.

[41.] However, section 11(1) of the Act reads:

> *11(1) In a response under section 10, the applicant must be told*
>
> > *(a) whether access to the record or <u>part of it</u>* [my emphasis] *is granted or refused,*
> >
> > *(b) if access to the record or <u>part of it</u>* [my emphasis] *is granted, where, when and how access will be given, and*
> >
> > *(c) if access to the record or to <u>part of it</u>* [my emphasis] *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.*

[42.] Section 11(1)(a) and section 11(1)(b) appear to contemplate that there may be situations in which a public body would provide an applicant with access to a part of a record, rather than the entire record.

[43.] Is there other evidence that the Act contemplates access to part of a record, as opposed to the entire record? Section 87(2) (fee waiver) refers to a request for the applicant's own personal information. Therefore, it must be that the Act contemplates that access will be given to a part of the record when a person makes a request for access to personal information or, indeed, to information generally, as opposed to a request for access to records.

[44.] How do I reconcile section 6(1) of the Act, which speaks only of access to a record, and section 11(1) of the Act, which speaks of access to a record or part of a record?

[45.] Section 6(1) and section 11(1) are both contained in that part of the Act dealing with the process of obtaining access. Those sections should be read in such a manner that they do not conflict. Consequently, I intend to read section 6(1) and section 11(1) together as supporting an interpretation that a public body may grant access to part of the record that contains the responsive information, and may remove the non-responsive information from that record.

ii. Are there other practical considerations that support the removal of non-responsive information from a record?

[46.] The Public Body relies on Ontario Order P-913 to support its position that there is a practical consideration for adopting an interpretation of the Act that permits the removal of parts of records on the basis of non-responsiveness. That practical consideration relates to the requirement to notify third parties under section 29 of the Act when personal or business information of third parties is to be disclosed. The Public Body maintains that if it cannot remove non-responsive information from a record, it will have to expend scarce resources to comply with the section 29 requirements in relation to information that has no bearing on the subject matter of a request.

[47.] I agree with the Public Body that this practical consideration is also a reason for supporting an interpretation of the Act that permits the removal of non-responsive information from a record.

[48.] The removal of non-responsive information from a record is also supported from the viewpoint of a record created to serve multiple purposes, as stated in Ontario Order P-913:

> *[T]he approach which flows from this interpretation is desirable from a practical perspective in relation to the access scheme in the Act, because*

it recognizes that government organizations create records for a variety of reasons, and some documents may be created to serve multiple purposes.

[49.] I agree with that statement. In those cases, a public body would locate the records containing the responsive information, and remove the non-responsive information before providing an applicant with the information requested.

c. What is responsive: the "information" or the "record"?

[50.] The Public Body relies on Ontario Order P-880, in which a request for information and a request for a record are distinguished. Consequently, the Public Body maintains that there is a distinction between a request for personal information and a request for all records that contain information about an applicant. The Public Body says that if, as here, an applicant asks for access to "information", but does not ask for access to a "record", then only the "information" is responsive to the applicant's request, and the "record" is not.

[51.] In the Public Body's view, the consequence of asking for "information" and not a "record" is that the Public Body gives an applicant only the responsive "information", removes the non-responsive information from the record, and does not provide severing notations for the non-responsive information. If an applicant asks for access to a "record", the "record" is responsive, and Public Body says it would provide severing notations for information severed from the record.

[52.] I understand the Public Body to be saying that to determine what is responsive to a request, a public body need only look at what an applicant has asked for: information or a record.

[53.] The Applicant argues that a difference between a record and information is merely semantics, that the Act does not distinguish between a record and information, and that the distinction comes in only when information is removed.

[54.] I take the Applicant's argument to be that the Applicant does not distinguish between a request for information, as opposed to a request for records. To put it another way, it appears that the Applicant believes that all the information in the Records is responsive to the Applicant's request; therefore, the Records are responsive to the Applicant's request.

[55.] “Record” is defined in section 1(1)(q) of the Act to mean a “record of information” in any form. The definition then goes on to list some forms of records, such as books, documents and letters.

[56.] Both “information” and “record” appear in a number of sections of the Act. Under other circumstances, because two different words are used, I would interpret “information” to mean something different from “record”. However, because of the manner in which “record” is defined (a “record of information”), it is clear that “information” is part of a record and is contained in a record, and that there would not be a record without information. Therefore, I believe that the only difference between the two words is that a particular kind of “information” may be something less than the entire record of information (regardless of the form of that record) if there are other kinds of information in that record.

[57.] I agree with Ontario Order P-880 that the request itself circumscribes the records that will ultimately be identified as being responsive to the request. Therefore, I accept that a public body will first look at an applicant’s request to decide what records a public body must search out, thereby determining what records are responsive to the request. That is the fundamental first step in complying with the request.

[58.] However, that is not the end of the matter. Even if an applicant asks for information, including personal information, a public body must nevertheless determine whether a record itself is responsive. This follows from the principle that anything reasonably related to an applicant’s request is to be considered as responsive to the request. I do not think that a request for information, including personal information, automatically precludes a finding that a record is responsive.

[59.] A record will be responsive to an applicant’s request when all the information contained in the record is reasonably related to an applicant’s request. A record will not be responsive to an applicant’s request when only some of the information contained in the record is reasonably related to an applicant’s request. However, that information will be responsive.

[60.] In my view, a record that is created to serve one purpose only is more likely to be responsive to an applicant’s request, and not just the information contained in the record. A record created to serve multiple purposes is less likely to be responsive to an applicant’s request.

[61.] To decide whether a record or information is responsive, it is necessary to examine an applicant’s request.

[62.] On the request form the Applicant filled out, the Applicant checked two boxes: the box related to the Applicant's own personal information and the box related to the personal information for another person (the agent). Then the Applicant asked for all information in the regional and head office files regarding the Applicant and the agent. After that, the Applicant listed some documents in which that information could be found: investigation notes, telephone minutes, and meeting minutes.

[63.] It is obvious that the Applicant's request for personal information is framed within the context of the Applicant's complaint under human rights legislation, and the Public Body's investigation of that complaint. The Applicant is attempting to get information about the Applicant and the Applicant's agent that relates to the complaint and investigation.

[64.] I have reviewed all the Records. The Records relate only to the Applicant's complaint and the Public Body's investigation of that complaint.

[65.] Under section 62(1) of the Act, I may review any decision of a public body that relates to an applicant's request for access. In my view, a determination of whether a record or information, and which record or information, is responsive to an applicant's request, is a decision like any other that the public body is entitled to make, and is reviewable by me.

[66.] This view is also shared by the Office of the Information and Privacy Commissioner in Ontario (see Ontario Order P-880) and by the Ontario Divisional Court in *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Ont. Div. Ct.), as follows:

> *[The Inquiry Officer] must have the jurisdiction to consider the information and the records at issue, in light of the wording of the request. Such jurisdiction necessarily entails a right to determine the scope of the request and the related relevance of the information at issue.*

[67.] Furthermore, I find that I have the jurisdiction to determine whether parts of the Records, which the Public Body has removed on the basis that those parts are non-responsive to the Applicant's request, are in fact non-responsive and, if they are, to find that they fall outside the scope of the request. On the other hand, I also have the jurisdiction to find that those parts of the Records are responsive to the Applicant's request and fall within the scope of the Applicant's request: see Ontario Order P-913.

[68.] I have carefully reviewed the portions of the Records which the Public Body says are not responsive, and compared their contents with the wording of the request, which is a request for the Applicant's and agent's personal

information contained in "investigation notes, telephone minutes and meeting minutes".

[69.] I find that the following Records are not reasonably related to the Applicant's request, although I agree with the Public Body's determination that some of the information in those Records is reasonably related to the Applicant's request:

86, 87, 88, 90, 99, 100

[70.] Even though the foregoing Records were created to serve one purpose, namely, the investigation of the Applicant's complaint, those Records refer to the Applicant only peripherally in the context of third parties' responses to the Public Body concerning legal and other issues, and the Public Body's response to third parties. Furthermore, those Records are not "investigation notes, telephone minutes and minutes of meetings".

[71.] Subject to my comments regarding Records 87, 88, and 90, I agree with Public Body's determination that the information it removed from the foregoing Records is non-responsive to the Applicant's request. That determination was a reasonable and proper assessment based upon a reasonable interpretation of the request.

[72.] Records 87, 88, and 89 contain personal information of the Applicant. On the face of it, that personal information is responsive to the Applicant's request, but the Public Body did not provide that responsive information to the Applicant.

[73.] Ontario Order P-880 held that if the responsive information would not be meaningful after the public body has removed the non-responsive information, then the public body should not be required to provide meaningless responsive information. The responsive information is meaningless if only fragmentary portions of the information are provided.

[74.] In Order 96-019, I dealt with the issue of the disclosure of meaningful information after severing under section 6(2). If, after severing, there would be meaningless information left to give to an applicant, I said that a public body did not have to provide that meaningless information.

[75.] The information that is to be provided must be meaningful, whether after the severing process or after the process of removing non-responsive information from a record.

[76.] I have reviewed Records 87, 88, and 90. I find that although there is some responsive personal information about the Applicant, which remains after

the non-responsive information has been removed, that responsive information consists mostly of a few words scattered here and there, or occasionally parts of sentences referring to the Applicant, in the context of the third parties' responses to the Public Body concerning legal or other issues and the Public Body's responses to third parties.

[77.] I find that the responsive personal information in Records 87, 88 and 90 exists in fragmentary portions and is not meaningful when taken out of context. Therefore, I find that the Public Body properly removed that information, along with the non-responsive information.

[78.] I find that all the information contained in the following Records and, consequently, those Records, are reasonably related to the Applicant's request:

> 84, 89, 91, 92, 93-94, 95-98, 101-102, 103-107, 108-114, 115-120, 121-125, 126-129, 130-134, 135, 136-137, 139-141

[79.] Subject to my comments regarding Records 89 and 92, the foregoing Records were created to serve one purpose, namely, the investigation of the Applicant's complaint. Furthermore, those Records are "investigation notes, telephone minutes and minutes of meetings".

[80.] Records 89 and 92 are not "investigation notes, telephone minutes and minutes of meetings", as such. However, those Records are internal memos that discuss what has transpired in the investigation. Both Records relate directly to the Applicant's complaint and also document telephone conversations concerning the investigation. Therefore, I find that Records 89 and 92 are also reasonably related to the Applicant's request.

[81.] Therefore, I find that the Public Body's determination that the information contained in the following Records was non-responsive was not a reasonable and proper assessment based upon a reasonable interpretation of the request:

> 84, 89, 91, 92, 93-94, 95-98, 101-102, 103-107, 108-114, 115-120, 121-125, 126-129, 130-134, 135, 136-137, 139-141

d. When does a public body remove non-responsive information and when does a public body "sever" information?

[82.] The Public Body's position is that removing non-responsive information from records and "severing" information are two distinct processes under the Act. The Public Body says that when information is removed as being non-responsive, the Act is not used to provide severing notations.

[83.] However, the Public Body also says that it would have provided severing notations if the request had been general, as opposed to a request for personal information, for which no fee is paid. The Applicant maintains that the fee should not be used as a reason for not providing severing notations.

[84.] Regardless of whether there is a general request for access or a request for an applicant's personal information, a public body must look at the request to determine what is responsive: the information or the record. The payment or non-payment of a fee has no bearing on this determination, nor on whether information is severed under the Act.

[85.] The notion of "severing" appears in section 6(2) of the Act. That section reads:

> *6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can be reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

[86.] The first step in responding to an applicant's request for access is to find the records that are responsive to the applicant's request. In this process, the public body eliminates non-responsive records. The public body then reviews the responsive records and removes any information that is non-responsive to the applicant's request. The remaining information or records are said to be responsive to the applicant's request.

[87.] The second step in responding to an applicant's request is to decide what, if any, exceptions under the Act apply to the responsive information and records, so that the public body can tell the applicant why it won't be disclosing that information or those records. This is "severing".

[88.] I emphasize that severing is the process that occurs after a public body has determined what records or information are responsive. The removal of non-responsive information or records is not severing.

[89.] Severing information from records constitutes a refusal to provide the information. The public body must then comply with the duty under section 11(1)(c)(i) of the Act to provide an applicant with the reasons for the refusal, and the provision of the Act on which the refusal is based.

e. My decision under section 9(1) on the issue of open, accurate and complete response

[90.] I have found that the following Records are not reasonably related to the Applicant's request, although I agree with the Public Body's determination that some of the information in those Records is reasonably related to the Applicant's request:

86, 87, 88, 90, 99, 100

[91.] I have agreed with Public Body's determination that the information it removed from the foregoing Records is non-responsive to the Applicant's request. That determination was a reasonable and proper assessment based upon a reasonable interpretation of the request.

[92.] I have also found that the responsive personal information in Records 87, 88 and 90 is only fragmentary portions and is not meaningful out of context. Therefore, I have found that the Public Body properly removed that information, along with the non-responsive information.

[93.] I have found that all the information contained in the following Records and, consequently, those Records, are reasonably related to the Applicant's request:

84, 89, 91, 92, 93-94, 95-98, 101-102, 103-107, 108-114, 115-120, 121-125, 126-129, 130-134, 135, 136-137, 139-141

[94.] The Public Body has removed information from the foregoing Records, on the basis that the information is non-responsive to the Applicant's request. However, as those Records are responsive, the next step in the process is to decide what, if any, exceptions, apply to those responsive Records.

[95.] Therefore, I intend to remit to the Public Body the matter of severing those Records in accordance with the Act. Under section 68(3)(a) of the Act, I also intend to order that the Public Body comply with the duty to respond to the Applicant under section 11(1)(c)(i) regarding any severing of those Records.

[96.] Consequently, under Issue A, I do not find it necessary to decide whether the Public Body met its duty to respond to the Applicant openly, accurately, and completely under section 9(1) of the Act.

Issue B: Scope of the records (section 9(1) of the Act)

[97.] Section 9(1) of the Act is also relevant to a determination of the issue concerning the scope of the records. I reproduce that section again for ease of reference:

> *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.*

[98.] The Notice of Inquiry set out one question for the parties to answer concerning the scope of the records:

> Did the Public Body produce to the Applicant the full set of records to which the Applicant has the right of access as set out in the Applicant's access request?

[99.] The Applicant's complaint is that there are missing or nonexistent records detailing telephone calls between the Applicant, or the agent, and employees of the Public Body. The Applicant cites, in particular, three telephone calls for which the Applicant believes there should be records. These three telephone calls appear to have occurred after the conclusion of the Public Body's investigation into the Applicant's complaint.

[100.] The Public Body said it searched its northern regional office and head office for files or records containing information about the Applicant. On that search, the Public Body said it found two files: one file in its head office, and one file in its northern regional office. When the Applicant complained about missing records, the Public Body says it did a second search. The Public Body did not find any further records.

[101.] The Public Body explained that its files are not circulated into other sections of the Public Body; therefore, there was no need to go to other areas. Furthermore, information is placed on the files in chronological order, the date ranges on the records were consistent, and from a review of the records, there were no letters referenced in other letters that were not provided. Consequently, the Public Body was satisfied that these were the records identified.

[102.] The Public Body explained that although the telephone calls had been made, the standard of recording was aimed at the investigation process, during which there was an expectation that matters would be recorded. The Public Body said it does not record post-investigation calls because those calls generally do not provide unique information or raise new issues. The one exception was a telephone call recorded by a particular employee who had not

previously been involved in the Applicant's file, so that person was ensuring that the content of the call was made known to whoever was handling the file.

[103.] I accept the Public Body's explanations about why there would not be records relating to the telephone calls to which the Applicant refers. Consequently, under Issue B, I find that the Public Body met its duty to respond to the Applicant openly, accurately and completely under section 9(1) of the Act.

Issue C: Correction of personal information (section 35 of the Act)

1. General

[104.] Section 35 of the Act is relevant to a determination of the issue concerning the correction of personal information. That section reads:

> *35(1) An applicant who believes there is an error or omission in the applicant's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.*
>
> *(2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate or link the information with the correction that was requested but not made.*
>
> *(3) On correcting, annotating or linking personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year before the correction was requested that a correction, annotation or linkage has been made.*
>
> *(4) On being notified under subsection (3) of a correction, annotation or linkage of personal information, a public body must make the correction, annotation or linkage on any record of that information in its custody or under its control.*
>
> *(5) Within 30 days after the request under subsection (1) is received, the head of the public body must give written notice to the individual that*

(a) the correction has been made, or

(b) an annotation or linkage has been made pursuant to subsection (2).

(6) Section 13 applies to the period set out in subsection (5).

[105.] The Notice of Inquiry set out one question for the parties to answer concerning the correction of personal information:

> Is linkage or some other measure the proper action to be taken by the Public Body in response to the Applicant's request to correct the personal information?

2. Which party has the burden of proof under section 35?

[106.] The Act is silent as to which party has the burden of proof under section 35. However, in Order 97-004, I stated that in such cases, I will consider the following criteria, among others, to determine who has the burden of proof:

> (i) who raised the issue, and
>
> (ii) who is in the best position to meet the burden of proof.

[107.] As to which party bears the burden of proof under the equivalent of section 35 in British Columbia and Ontario, I note that the decisions from those two jurisdictions differ.

[108.] Two requirements must be met for section 35(1) to apply: (i) there must be personal information about an applicant, and (ii) there must be an error or omission in the applicant's personal information. As an applicant is in the best position to meet these two requirements, I find that an applicant should have the burden of proof under section 35(1).

[109.] When an applicant makes a request to a public body under section 35(1), it is up to a public body to decide whether or not to correct the applicant's personal information. Under section 35(2), if a public body does not correct the applicant's personal information, it must either annotate or link the information with the correction that was requested but not made. As a public body is in the best position to speak to the reasons why it decided to correct or not to correct personal information under section 35(1), and to annotate or link instead under section 35(2), I find that a public body should have the burden of proof regarding a decision to correct or not to correct under section 35(1) and a decision to annotate or link under section 35(2).

3. Does a public body have a duty to correct personal information under section 35(1)?

[110.] Section 35(1) provides an applicant with a right to request a correction of personal information. There are no words in section 35(1) requiring that a public body make that correction. Section 35(2) contemplates what happens if a correction is not made.

[111.] Therefore, I believe that a public body has a choice or discretion to correct or not to correct personal information under section 35(1). It would be absurd if a public body had to correct personal information in every case.

4. What is my jurisdiction regarding the correction of personal information under section 35(1)?

a. General

[112.] Under section 62(1), I may review any decision of a public body in relation to an applicant's request to correct personal information. Therefore, I may review a public body's decision to correct or not to correct personal information under section 35(1).

[113.] Section 68(3)(d) is particularly relevant to the issue of my jurisdiction regarding the correction of personal information. That section reads:

> *68(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:*
>
> > *(d) confirm a decision not to correct personal information or specify how personal information is to be corrected.*

[114.] Section 68(3)(d) is unusual in that it contemplates that I may substitute my own decision for that of the public body when I find that the public body has exercised its discretion improperly in making its decision under section 35(1). In that regard, section 68(3)(d) may be contrasted with section 68(2)(b), under which I have held that I may not substitute my own decision for that of the public body if I find that the public body exercised its discretion improperly in making its decision on an access request. In that case, I may only ask the public body to reconsider its decision.

[115.] Because I may substitute my decision for that of the public body under section 35(1), I intend to give some guidance to public bodies on two matters:

the exercise of discretion to correct or not to correct personal information under section 35(1), and the factors to consider when making a correction. To that end, I have reviewed a number of Ontario and British Columbia Orders.

b. Exercise of discretion under section 35(1):

[116.] British Columbia Order 124-1996 sets out a number of general guidelines that I intend to follow when considering a public body's exercise of discretion under section 35(1). In general, a public body exercises its discretion properly under section 35(1) if it acts in good faith, without prejudicing the issue and without any bias against the applicant.

i. When does a public body exercise its discretion properly to correct an applicant's personal information?

[117.] In my view, a public body exercises its discretion properly if it corrects an applicant's personal information where a "fact" is incorrect, that is, if there is an error or omission of "fact" in the applicant's personal information.

[118.] In Order 97-002, I discussed the meaning of "fact". I said that a "fact" is a thing that is known to have occurred, to exist, or to be true, or an item of verified information. An example of a "fact" would be an applicant's employment position, date of employment, or reason for leaving employment. By definition, a "fact" may be determined objectively.

[119.] I will discuss the meaning of "error" or "omission" later in this Order.

[120.] I agree with the guideline set out in British Columbia Order 124-1996 that it must be within the reasonable administrative resources (including financial considerations and time factors) of the public body to make the decision that the information on record is indeed incorrect and that the applicant's version is the correct one. If the public body acts in good faith, it should not be required to expend an unreasonable amount of time, financial and other resources deciding where the truth lies.

[121.] To my way of thinking, exercising a discretion to correct a fact that is incorrect is another way of saying that a public body may correct an applicant's personal information where an applicant has met the burden of proving that there is an error or omission of fact. It should be remembered that the burden of proof remains on an applicant to show that there is an error or omission in the applicant's personal information.

ii. When does a public body exercise its discretion properly to not correct an applicant's personal information?

[122.] Decisions of Office of the Information and Privacy Commissioner in British Columbia and Ontario are helpful in answering this question. There are at least three situations in which a public body exercises its discretion properly to not correct an applicant's personal information:

> (a) When there is a dispute about whether there is an error or omission of fact concerning an applicant's personal information.
>
> (b) When there is a third party's recorded statement of fact regarding the applicant's personal information, even if the recorded fact is wrong.
>
> (c) When there is a third party's opinion about the applicant.

(a) Disputed error or omission of fact

[123.] A public body exercises its discretion properly if it does not correct a disputed fact, provided, as always, that a public body has acted in good faith.

[124.] It follows that if a public body and an applicant dispute a fact, the public body is justified in not correcting the applicant's personal information because the applicant has not met the burden of proving that there is an error or omission of fact. As I have said previously, the burden of proof is on an applicant to prove that there is an error or omission in the applicant's personal information.

[125.] If a public body is justified in not correcting an applicant's personal information because of a disputed fact, I may review that decision under section 68(3)(d). However, if there are facts upon which an applicant and a public body cannot agree, I accept that a public body should not be required to expend an unreasonable amount of time, financial and other resources to decide the correct version of those facts.

(b) Third party's recorded statement of fact

[126.] Ontario Order M-440 and British Columbia Order 189-1997 held that a public body was not able to correct a third party's statement of fact about an applicant's personal information, if accurately recorded, even if that statement of fact was in error. In such a situation, a public body would be justified in not correcting that personal information.

[127.] I have reviewed those two decisions. In those cases, it appears that even though an applicant was able to meet the burden of proving an error of fact, there was another reason for not correcting the applicant's personal information. That reason involves maintaining the integrity of the record in certain situations, such as investigations in which a third party's statements have been recorded. In investigations, there is a need to record statements accurately, in order later to make a decision relating to what was said, and to understand the basis on which a decision was made. Accordingly, a third party's statement of fact cannot be corrected, even if that statement of fact is in error. The statement does not appear for the truth of it; it appears for the fact that it is what was said, truthful or not.

[128.] It seems to me that the only way an applicant can meet the burden of proof in these situations is to show that the third party's statement of fact was not accurately recorded.

(c) Third party's opinion about an applicant

[129.] In Order 97-002, I discussed the meaning of "opinion". I said that "opinion" means "a belief or assessment based on grounds short of proof; a view held as probable". An "opinion" is subjective in nature, and may or may not be based on fact. An example of an "opinion" would be a belief that a person would be a suitable employee, whether or not the opinion is based on that person's employment history.

[130.] British Columbia Order 124-1996 and Ontario Order 186 held that a public body cannot "correct" a third party's opinion by changing the opinion in the record. In particular, Ontario Order 186 goes on to say that one of the purposes of the legislation is to promote better government record keeping, including the accuracy of records. Since an opinion is subjective, without the agreement of the opinion holder, it may not be appropriate or even possible to correct it. In any event, Ontario Order 186 maintains that a public body cannot correct an opinion if the record accurately sets out the opinion.

[131.] I have reviewed the above two Orders. Since an opinion is not a "fact" in the sense that I have discussed, an opinion cannot be an error or omission of fact that can be corrected. It follows that an applicant is not able to meet the burden of proving that an opinion is an error or omission of fact.

[132.] I also believe a public body is not able to correct an opinion because of the necessity of maintaining the integrity of the record in certain situations, such as investigations in which a third party's opinion has been recorded. In that regard, a recorded opinion is the same as a recorded statement of fact. It seems to me that the only way an applicant can meet the burden of proof in

that situation is to show that the third party's opinion was not accurately recorded.

[133.] British Columbia Order 20-1994 held that although a public body cannot correct an opinion, a public body can correct factual information on which an opinion is based. I would say that a public body cannot correct even the factual information on which an opinion is based if the fact and the opinion (that is, mixed fact and opinion) are part of a recorded statement, and have been accurately recorded.

[134.] I agree with the British Columbia Information and Privacy Commissioner when he said, in British Columbia Order 192-1997, that a public body "[C]annot correct the opinion and statements of persons which are reflected in the Report or the conclusions reached in the Report. Furthermore, the method of investigation and review and the way the Report is written are not matters which are capable of correction..."

[135.] In conclusion, a public body exercises its discretion properly under section 35(1) when it does not correct subjective information such as opinions, judgments and conclusions, as these cannot be corrected.

iii. Summary

[136.] I intend to apply the preceding when considering the public body's exercise of discretion under section 35(1). However, the exercise of that discretion cannot be separated from a consideration of how a correction is to be made.

c. Making a correction under section 35(1):

[137.] Ontario Order P-448 sets out three factors to consider when deciding how to correct an applicant's personal information:

(i) the nature of the record,

(ii) the method indicated by the applicant, if any, and

(iii) the most practical and reasonable method in the circumstances.

[138.] I accept that a public body must consider those factors.

[139.] I also adopt the two general standards for correction, set out in British Columbia Order 124-1996:

(i) a correction should be apparent in the file, and

(ii) any correction should be retrieved with the original file.

5. Is there "personal information" about the Applicant?

[140.] Under section 35(1), the Applicant must first show that there is personal information about the Applicant.

[141.] The Applicant says that the Applicant's personal information consists of two types: (i) the "psychological profile" of the Applicant that has been drawn by the questions of the Public Body's investigator and the recorded statements and opinions of third parties; and (ii) third parties' statements and opinions recorded by the Public Body's investigator concerning the Applicant's record of motor vehicle accidents while employed.

[142.] "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,*
> >
> > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> >
> > *(iii) the individual's age, sex, marital status or family status,*
> >
> > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> >
> > *(viii) anyone else's opinions about the individual, and*
> >
> > *(ix) the individual's personal views or opinions, except if they are about someone else.*

[143.] I have reviewed all the Records containing the information that the Applicant asked to be corrected. I find that this information is the Applicant's personal information because it is recorded information about the Applicant,

consisting of one or more of the kinds of personal information listed above, or it is recorded information about the Applicant as an identifiable individual, as set out in the initial part of section 1(1)(n), because of the context in which that information appears. Therefore, the Applicant has met the burden of proving that there is personal information about the Applicant.

4. Is there an "error" or "omission" in the Applicant's personal information?

[144.] Having shown that there is personal information about the Applicant, the Applicant must next show that there is an error or omission in the Applicant's personal information.

a. How is "error" or "omission" to be interpreted?

[145.] "Error" and "omission" are not defined in the Act.

[146.] The Concise Oxford Dictionary, Ninth Edition, defines "omission" to mean something missing, left out or overlooked. "Error" is defined to mean a mistake, or something wrong or incorrect.

[147.] The Concise Oxford Dictionary further defines "incorrect" to mean not in accordance with *fact* [my emphasis], or wrong. "Correct" means to set right, amend, or substitute the right thing for the wrong one.

[148.] Section 35(1) requires that there is some personal information that is able to be corrected.

[149.] A public body is able to correct an applicant's personal information if there is an error or omission of fact.

[150.] A public body is not able to correct an applicant's personal information:

(a) When there is a dispute about whether there is an error or omission of fact concerning an applicant's personal information.

(b) When there is a third party's recorded statement of fact regarding the applicant's personal information, even if the recorded fact is wrong.

(c) When there is a third party's opinion about the applicant.

b. Is there an error or omission in the Applicant's personal information?

i. General

[151.] The Applicant requested that the Public Body correct the Applicant's "psychological profile" information and motor vehicle accidents information.

[152.] The Public Body responded as follows:

> *Your request to change your personal information that was gathered from sources other than yourself is not appropriate. Section 33(1)(c) of FOIP makes it clear that the Commission has the option to collect personal information about you, including subjective information like someone's opinion or recall of an incident, from sources other than yourself when that information is collected for the purpose of law enforcement.*

[153.] The Public Body further said that the issue pervades many pieces of the file and that would have meant correcting the heart of the file. The Public Body was of the view that a report should reflect what was before the person at the time the decision was made, and that religious belief discrimination was the issue, not the Applicant's dismissal.

[154.] Therefore, instead of correcting the Applicant's personal information, the Public Body agreed to link the Applicant's request to the regional office file.

[155.] The Applicant was dissatisfied with the Public Body's decision to link rather than to correct or annotate.

ii. "Psychological profile" information

[156.] The Applicant says that the Public Body's investigator, when dealing with certain witnesses, arranged the questions so as to label the Applicant as "moody, short [sic], and non-responsive". A case against the Applicant was being drawn by the arrangement and subsequent presentation of the facts uncovered during the investigation.

[157.] As a result of the statements made and opinions given by third parties in response to the investigator's questions, the Applicant said that the Applicant was evaluated by the investigator as being emotionally deficient. The Applicant states: "The information is not accurate and therefore any decision that was rendered and any recorded information must have an annotation in this regard."

[158.] I believe the Applicant to be saying that third parties' statements of facts or opinions about the Applicant are in error. There is no issue regarding "omission". The Applicant has listed what the Applicant believes to be in error.

[159.] My understanding is that the Applicant wants to correct opinions that are not supported by fact. The gist of the Applicant's argument is that information was used to render a decision affecting the Applicant, so records that are inaccurate, unsupported or misleading, should be corrected. This is similar to an applicant's argument made in British Columbia Order 124-1996.

[160.] The Applicant believes that the Applicant's original discrimination complaint to the Public Body has been minimized by the inaccuracies contained in the personal information related to the "psychological profile".

[161.] I have carefully reviewed all the "psychological profile" information to which the Applicant refers. I find that all the information is third parties' recorded statements of fact or third parties' opinions about the Applicant. For the reasons previously discussed, I find that that personal information is not able to be corrected (although it may be annotated or linked).

iii. Motor vehicle accidents information

[162.] The Applicant made two submissions regarding the Applicant's motor vehicle accidents that were investigated by the Public Body's investigator.

[163.] The first submission was the Applicant's request for correction of personal information, which is contained in Appendix G of the Public Body's submission. The first submission relates to correspondence from an insurance company. The Applicant says that the investigator asked for a copy of any correspondence from the insurance company confirming that the Applicant was "at fault" in the one particular accident. The Applicant says that the Applicant received information from the insurance company that should have been obtained during investigation. Had the investigator verified the information, it would have been understood that it was not provided to show "fault".

[164.] The second submission was not contained in the Applicant's original request for correction of personal information, but did relate to the submission regarding the motor vehicle accidents and was contained on page 3 of the Applicant's submission (the Public Body received a copy of that submission). The second submission relates to specific information concerning inaccuracies regarding the record of the Applicant's accidents with the Applicant's employer's vehicle. The Applicant maintains that none of the incidents or the circumstances of these accidents can be verified by the records, except for the

last incident. The Applicant feels that the information/facts surrounding the last incident are grossly misrepresented in the investigation/report.

[165.] Based on the statements and opinions of witnesses, the Applicant believes the Applicant was evaluated by the investigator as being a dangerous driver. The Applicant also maintains that "The information is not accurate and therefore any decision that was rendered and any recorded information must have an annotation in this regard."

[166.] I believe the Applicant to be saying that third parties' statements of facts or opinions about the Applicant are in error. Although the Applicant mentions a lack of documents to prove the complaints against the Applicant, I do not believe the Applicant is saying that there is an "omission" in the Applicant's personal information. Instead, I believe the Applicant's statement about the lack of documents goes to the Applicant's contention that the recorded statements and opinions are unsupported.

[167.] The Applicant believes that the Applicant's original discrimination complaint to the Public Body has also been minimized by the inaccuracies contained in the personal information related to the motor vehicle accidents.

[168.] I have carefully reviewed all the motor vehicle accident information to which the Applicant refers. I find that all the information is third parties' recorded statements of fact or third parties' opinions about the Applicant. For the reasons previously discussed, I find that that personal information is not able to be corrected (although it may be annotated or linked).

iv. Conclusion under section 35(1): Is the Applicant's personal information able to be corrected?

[169.] I have found that the Applicant's personal information consists of third parties' recorded statements of fact and third parties' opinions about the Applicant. Therefore, the Applicant's personal information is not able to be corrected. The Applicant has not met the burden of proof under section 35(1).

[170.] Consequently, I find that the Public Body exercised its discretion properly under section 35(1) when it refused to correct the Applicant's "psychological profile" information and motor vehicle accidents information. The Public Body met the burden of proof in regard to exercising its discretion properly, but not for the reasons stated in the Public Body's response to the Applicant.

[171.] Generally, I believe that section 35(1) should not be used by an applicant to contest a finding of fact made by a public body or a decision based on that finding of fact. Similarly, the British Columbia Information and Privacy

Commissioner, in British Columbia Order 124-1996, has said that the equivalent of section 35(1) should not be used as a means of attempting to appeal decisions and opinions of a public body, with which an applicant does not agree. I agree.

[172.] Having decided that the Public Body exercised its discretion properly under section 35(1), I must now decide whether the Public Body has a duty under section 35(2) to "annotate" or "link" the information with the correction that was requested but not made.

7. If a public body does not correct an applicant's personal information, does a public body have a duty to "annotate" or "link" under section 35(2)?

a. How is "annotate" and "link" to be interpreted?

[173.] The Act does not define "annotate" or "link".

[174.] The Concise Oxford Dictionary, Ninth Edition, defines "annotate" to mean "add an explanatory note" to something. "Link" is defined to mean "connect or join two things or one thing to another", "attach to", or "combine".

[175.] As the Act uses two different words, I believe that those words should be given different interpretations. However, I believe the interpretation will also differ, depending on whether one is considering a paper file or an electronic file.

[176.] I adopt the above two definitions in regard to a paper file. In regard to an electronic file, "link" must refer to the mechanism by which a person viewing one file is alerted to a related file or information.

[177.] In this case, the files are all paper files, not electronic files. I will not consider electronic files in this Order.

[178.] Considering the above definitions and the wording of section 35(2), I find that to "annotate…the information with the correction that was requested" implies that the actual correction that was requested is written on the original record, close to the information under challenge by the applicant. Although there is no requirement to do so, I would think that the annotation should also be signed and dated.

[179.] On the other hand, to "link the information with the correction that was requested" implies that the correction that was requested is attached to, or joined or connected with, the original record containing the information under challenge by the applicant.

[180.] I do not think that "link" refers to what the public body does with the same record held by another public body. I am reinforced in this view by the wording of section 35(4). That section says that another public body, which has been notified of a correction, annotation or linkage, must make that correction, annotation *or linkage* [my emphasis] on any record of that information in its custody or under its control.

b. Does a public body have a duty to "annotate" or "link"?

[181.] Section 35(2) of the Act says that if a public body does not correct an applicant's personal information, it "must" annotate or link the information with the correction that was requested but not made. Therefore, a public body has a duty to annotate or link under section 35(2).

c. What is my jurisdiction regarding section 35(2)?

[182.] Under section 62(1), I may review any decision of a public body in relation to an applicant's request to correct personal information. Therefore, I may review a public body's decision to annotate or link under section 35(2).

[183.] Under section 68(3)(a), I may require that a duty imposed by the Act or the Regulations be performed. Therefore, if a public body does not properly perform its duty to annotate or link under section 35(2), I may order that it perform its duty properly.

[184.] Because I may review a public body's decision to annotate or link under section 35(2), I intend to give some guidance to public bodies on the manner of performing the duty under section 35(2). I agree with the British Columbia Information and Privacy Commissioner when, in Order 124-1996, he made the following points:

> (i) the equivalent of section 35(2) should be interpreted sensibly, so that a public body has some administrative leeway in deciding the manner in which annotation or linking will occur;
>
> (ii) no public body should try to bury or hide an applicant's request for correction;
>
> (iii) neither, however, should a public body be forced to comply with unreasonable demands of an applicant who insists that documents be edited in exactly the fashion that suits him, so that they will say exactly what he wants them to say; and
>
> (iv) fairness should be the test.

[185.] A fair way to annotate or link will depend on the following factors:

(i) the type of records involved,

(ii) the length of the correction requested,

(iii) the applicant's other avenues of redress within the public body (such as appeals), and

(iv) the administrative resources of the public body.

[186.] I accept that a public body must consider those factors.

[187.] I also adopt the three general standards for annotation, set out in British Columbia Order 124-1996, and I intend to apply those standards to both annotation and linking:

(i) an annotation or linkage should be apparent in the file, but a public body should have discretion to make administrative decisions about how it will annotate or link,

(ii) in general, an annotation or linkage should be as visible and accessible as the information under challenge by an applicant, and

(iii) any annotation or linkage should be retrieved with the original file.

8. In this case, did the Public Body properly perform its duty to "annotate" or "link" the information with the correction that was requested by the Applicant but not made?

a. How did the Public Body interpret "annotate" and "link" in section 35(2)?

[188.] The Public Body said that "annotation" must touch the text, such as changing the word "husband" to "brother". I do not agree that an annotation would change the text. In my view, the Public Body is confusing "annotation" with "correction".

[189.] It is my opinion that the Public Body may have decided to "link", rather than "annotate", because it was considering the potential use of the file in a judicial review of the Public Body's decision under its legislation. I agree with the Applicant that judicial review cannot be used as a reason for not annotating or linking, on the basis that annotating or linking will prejudice the judicial review.

[190.] However, given the Applicant's request for correction related to the psychological profile and motor vehicle accidents (contained in Appendix G of the Public Body's submission), and considering the factors for deciding on a fair way to annotate or link, I am of the view that the Public Body's decision to "link" was appropriate. The Public Body's method of linking is another matter.

[191.] The Public Body linked the Applicant's written request for correction to the regional office file by placing the Applicant's letter of request on the top of the file in chronological order of its receipt by the Public Body.

[192.] In this Order, I have said that to "link the information with the correction that was requested" in section 35(2) implies that the correction that was requested is attached to, joined or connected with, the original record containing the particular information under challenge by an applicant.

[193.] By placing the request for correction on the top of the file in chronological order, the Public Body has not "linked the information with the correction that was requested". Therefore, the Public Body has not met the requirements of section 35(2).

[194.] Furthermore, section 35(2) places the duty to annotate or link on a public body. Therefore, the Public Body has the duty to link under section 35(2), not the person reading the file, as the Public Body contends.

[195.] In my view, the Public Body has misinterpreted section 35(2) as to a fair way to "link". Consequently, the Public Body has not met the burden of proof under section 35(2).

[196.] Although I have come to this conclusion, I intend to consider the standards for linking (which also apply to annotating), so as to give public bodies generally, and the Public Body in particular, some guidance.

b. Did the Public Body meet the standards for linking?

[197.] In this Order, I have adopted three standards for linking, which I set out again for ease of reference:

> (i) a linkage should be apparent in the file, but a public body should have discretion to make administrative decisions about how it will link,
>
> (ii) in general, a linkage should be as visible and accessible as the information under challenge by an applicant, and

(iii) any linkage should be retrieved with the original file.

[198.] The Public Body met both the first and third standards, in that the linkage is apparent in the file. The Applicant's letter requesting the correction of personal information is in chronological order in the file, and the linkage will be retrieved with the original file because the Public Body said that the file was treated as a singular piece, regional office files and head office files were bound together and archived together, and file components were not separated.

[199.] However, the Public Body did not meet the second standard because the linkage is not as visible and accessible as the information under challenge by the Applicant. To my way of thinking, the "linkage" of the information under challenge with the correction that was requested is not visible if that correction is buried in the file. In this regard, I note that because the Public Body's files are ordered so that the most recent record is on the top of a file, the Applicant's request for correction is now under the Public Body's response letter to the Applicant's request for correction, and is no longer on the top of the file.

[200.] Moreover, although the linkage may be accessible to staff who would read the entire file, the linkage would not be evident to staff if one of the third parties asked for access to that third party's personal information, which was under challenge. The Public Body's staff, when looking for that third party's personal information, would not be aware that there was a link unless they read the entire file. The link is not as visible or accessible as the information under challenge because the link is separated in the file from the information under challenge.

[201.] In conclusion, I find that the Public Body did not meet the standard requiring that a linkage be as visible and accessible as the information under challenge by the Applicant.

c. Conclusion under section 35(2): Did the Public Body properly perform its duty to "annotate" or "link"?

[202.] I have decided that the Public Body's decision to link the information in the record with the Applicant's request for correction (contained in Appendix G of the Public Body's submission), was appropriate.

[203.] However, I have determined that the Public Body misinterpreted section 35(2) as to a fair way to "link", and did not comply with one of the standards for "linking". Therefore, the Public Body did not properly perform its duty to link, as provided by section 35(2).

[204.] Under section 68(3)(a), I may make an order requiring that a duty imposed by the Act be performed. In this case, I intend to order that the Public

Body properly perform its duty to link the information under challenge with the Applicant's request for correction (contained in Appendix G of the Public Body's submission). In linking, the Public Body must take into consideration the factors for deciding on a fair way to link, and the standards for linking, which I have set out in this Order.

[205.] The Applicant's submission (page 3) refers to specific personal information regarding the motor vehicle accidents. This detail is not contained in Appendix G. However, the Applicant has previously alerted the Public Body to the general information under challenge concerning the motor vehicle accidents, and I do not regard the detailed information relating to those accidents as a further request for correction of that same personal information.

[206.] Consequently, because I intend to order that the Public Body properly perform its duty to link the information under challenge with the general motor vehicle accident information contained in Appendix G of the Public Body's submission, I also intend to order that the Public Body properly perform its duty to annotate or link the information under challenge with the specific motor vehicle accident information contained in page 3 of the Applicant's submission. In deciding whether to annotate or link, and in annotating or linking, the Public Body must take into consideration the factors for deciding on a fair way to annotate or link, and the standards for annotating or linking, which I have set out in this Order.

VI. ORDER

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

Issue A:

[208.] I find that the following Records are not reasonably related to the Applicant's request, although I agree with the Public Body's determination that some of the information in those Records is reasonably related to the Applicant's request:

86, 87, 88, 90, 99, 100

[209.] I agree with Public Body's determination that the information it removed from the foregoing Records is non-responsive to the Applicant's request. That determination was a reasonable and proper assessment based upon a reasonable interpretation of the request.

[210.] I also find that the responsive personal information in Records 87, 88 and 90 is only fragmentary portions and is not meaningful out of context.

Therefore, I find that the Public Body properly removed that information, along with the non-responsive information.

[211.] I find that all the information contained in the following Records and, consequently, those Records, are reasonably related to the Applicant's request:

> 84, 89, 91, 92, 93-94, 95-98, 101-102, 103-107, 108-114, 115-120, 121-125, 126-129, 130-134, 135, 136-137, 139-141

[212.] Therefore, I find that the Public Body's determination that the information contained in those pages of the Records was non-responsive was not a reasonable and proper assessment based upon a reasonable interpretation of the request.

[213.] The Public Body has removed information from the foregoing Records, on the basis that the information is non-responsive to the Applicant's request. However, as those Records are responsive, the next step in the process is to decide what, if any, exceptions, apply to those responsive Records.

[214.] Therefore, I am remitting to the Public Body the matter of severing the following Records in accordance with the Act:

> 84, 89, 91, 92, 93-94, 95-98, 101-102, 103-107, 108-114, 115-120, 121-125, 126-129, 130-134, 135, 136-137, 139-141

[215.] Under section 68(3)(a) of the Act, I order that the Public Body comply with the duty to respond to the Applicant under section 11(1)(c)(i) regarding any severing of those Records, within 30 days of receiving a copy of this Order.

[216.] Having made the foregoing Order, under Issue A, I do not find it necessary to decide whether the Public Body met its duty to respond to the Applicant openly, accurately, and completely under section 9(1) of the Act.

Issue B:

[217.] I accept the Public Body's explanations about why there would not be records relating to the telephone calls to which the Applicant refers. Consequently, under Issue B, I find that the Public Body met its duty to respond to the Applicant openly, accurately and completely under section 9(1) of the Act.

Issue C:

[218.] I find that the Public Body exercised its discretion properly under section 35(1) when it decided not to correct the Applicant's personal information.

Under section 68(3)(d), I confirm the Public Body's decision not to correct the Applicant's personal information, as requested by the Applicant.

[219.] However, under section 35(2), I find that the Public Body did not properly perform its duty to link the information with the correction that was requested but not made.

[220.] Under section 68(3)(a), I order that the Public Body properly perform its duty to link the information under challenge with the Applicant's request for correction (contained in Appendix G of the Public Body's submission). In linking, the Public Body must take into consideration the factors for deciding on a fair way to link, and the standards for linking, which I have set out in this Order.

[221.] Under section 68(3)(a), I also order that the Public Body properly perform its duty to annotate or link the information under challenge with the specific motor vehicle accident information contained in page 3 of the Applicant's submission. In deciding whether to annotate or link, and in annotating or linking, the Public Body must take into consideration the factors for deciding on a fair way to annotate or link, and the standards for annotating or linking, which I have set out in this Order.

[222.] I further order that the Public Body provide a copy of that linked, or annotated and linked, information to me and to the Applicant, within 30 days of receiving a copy of this Order.

[223.] I order that the Public Body notify me in writing, within 30 days of receiving a copy of this Order, that the Public Body has complied with this Order. That written notification is to be received by my Office within the 30 days.

Robert C. Clark
Information and Privacy Commissioner