ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-005

May 10, 1999

ALBERTA GAMING AND LIQUOR COMMISSION

Review Number 1451

I. BACKGROUND

[para 1.] On June 10, 1998, the Applicant applied to the Alberta Gaming and Liquor Commission (the "Public Body"), under the *Freedom of Information and Protection of Privacy Act* (the "Act"), for access to records relating to the introduction of video lottery terminals in Alberta. The Applicant's request covered the period from January 1, 1990 to December 21, 1994. The Applicant listed the kinds of records sought. The Applicant also asked that "... any fees beyond the initial $25 be waived pursuant to Section 87(4) of the Act."

[para 2.] The Applicant subsequently disputed the date the Public Body said the Applicant's request commenced for the purposes of the 30-day time limit the Act imposes on public bodies for responding to an access request. On June 25, 1998, the Applicant asked my Office to investigate the Public Body's handling of the access request, specifically, the internal processes the Public Body follows when it receives an access request.

[para 3.] On June 25, 1998, in a letter to the Applicant to clarify the request, the Public Body said that it was denying the Applicant's request to waive the fee beyond the initial $25 fee. The Public Body had not provided the Applicant with a fee estimate when it sent that letter. On July 9, 1998, the Applicant asked that the fee waiver issue be included

in my review of the Public Body's response to the Applicant's access request.

[para 4.] The matter concerning the handling of the Applicant's access request was subsequently settled. The matter of the fee waiver was put in abeyance until the Public Body provided the Applicant with a fee estimate.

[para 5.] On July 23, 1998, the Public Body provided a fee estimate. On August 7, 1998, the Public Body provided a revised fee estimate, as a result of the Applicant's narrowing of the scope of the access request. On September 11, 1998, the Public Body provided the Applicant with the exact calculation of the fees. In response to the Public Body's request for information to decide whether it should waive the fees, the Applicant provided information on October 25, 1998, and requested that the fees be waived under section 87(4)(b) of the Act (the record relates to a matter of public interest). On October 28, 1998, the Public Body denied the fee waiver. On November 10, 1998, the Applicant asked that I review the following matters:

> (i) the fee waiver (the Applicant asked that I make a "fresh" decision under section 87(4)(b));
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> (ii) the fee estimate;
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> (iii) whether the Public Body met its duty to assist the Applicant; and
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> (iv) the Public Body's application of sections 4, 20 and 26 to the records.

[para 6.] On November 18, 1998, my Office issued a Notice of Inquiry, to be held orally on January 27, 1999.

[para 7.] Before the date scheduled for the inquiry, my Office determined that one of the records at issue was that of an affected party (the "Affected Party") for the purposes of the inquiry. Therefore, my Office issued a Notice of Inquiry to the Affected Party. On January 26, 1999, the Affected Party notified my Office that it would not be attending the inquiry. However, the Affected Party provided a written submission, which I accepted *in camera*.

[para 8.] At the inquiry, I notified the other parties that I had accepted an *in camera* submission from the Affected Party, whom I did not name. I gave the other parties an opportunity to object to my procedure in this regard, in a further written submission. Neither the Applicant nor the

Public Body provided a further written submission regarding that procedure.

[para 9.] On January 28, 1999, I received the following responses to my questions to the Affected Party:

(i) the Affected Party would not consent to being named;

(ii) the Affected Party would not consent to disclosure of the written submission provided to me (which contained a legal opinion), and

(iii) a search of the Affected Party's records could find no documented notation that the Affected Party had released the record in question to the general public.

[para 10.] On January 4, 1999, before the date scheduled for the inquiry, the Public Body notified the Applicant that it was waiving the fees under section 87(4)(a) of the Act, which allows for excusing payment of fees if for any other reason it is fair to excuse payment.

[para 11.] Before the date scheduled for the inquiry, the Applicant notified my Office that the matter of the fee estimate and the Public Body's duty to assist were no longer at issue.

[para 12.] My Office received the Applicant's and the Public Body's advance written submissions on January 14, 1999. My Office exchanged those submissions.

[para 13.] The Applicant's submission raised, for the first time, the issue of waiver of the initial $25 fee. When the Public Body received the Applicant's submission, it noted that the Applicant was now revising the request for a fee waiver to include the initial $25 fee. In response, on January 19, 1999, the Public Body notified the Applicant and my Office that it was refunding the initial $25 fee.

[para 14.] Consequently, as the Public Body had waived all the fees before the date scheduled for the inquiry, the issue of the fee waiver had become hypothetical or "moot". Even though the issue had become moot, the Applicant nevertheless asked that I decide whether the Public Body should have waived the fees under section 87(4)(b) of the Act (the record relates to a matter of public interest), instead of under section 87(4)(a) of the Act (for any other reason it is fair to excuse payment).

[para 15.] Therefore, at the conclusion of the inquiry, I asked the parties to provide me with a further written submission concerning my jurisdiction to hear a "moot" issue. I also asked the parties to provide

argument concerning the criteria I should consider in exercising my discretion to hear a moot issue, if I were to find I had the jurisdiction to hear the moot issue. Those criteria are set out in *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.).

[para 16.] I received the Applicant's and the Public Body's further written submissions on February 8, 1999.

II. RECORDS AT ISSUE

[para 17.] The records actually at issue concern five documents, consisting of 62 pages in total, which the Public Body withheld in their entirety. The Public Body identified each of the documents by document number.

[para 18.] The Public Body said that Document #9 and Document #10 were excluded under section 4(1)(l) of the Act (record created by or for a member of the Executive Council or a Member of the Legislative Assembly and sent to a member of the Executive Council or a Member of the Legislative Assembly).

[para 19.] The Public Body applied section 26(1)(a), (b), and (c) of the Act (privileged information) to Document #1 and Document #8.

[para 20.] Finally, the Public Body applied the following sections of the Act to Document #6, which the Public Body said was a report: section 20(1)(a)(i) (harm to intergovernmental relations) and section 20(1)(b) (information supplied explicitly or implicitly in confidence by a government, local government body or an organization listed in section 20(1)(a) or its agencies).

[para 21.] In this Order, I will refer to the records by document number, as identified by the Public Body.

III. ISSUES

[para 22.] There are four issues in this inquiry:

> A. If the issue about the fee waiver is "moot", do I have the jurisdiction under the Act to hear the moot issue? If I have the jurisdiction to hear the moot issue, what criteria should I consider in exercising my discretion to hear the moot issue? If I exercise my discretion to hear the moot issue, do the records relate to a matter of public interest, as provided by section 87(4)(b)?

B. Are certain records excluded from the application of the Act by section 4(1)(l) (record created by or for a member of the Executive Council or a Member of the Legislative Assembly and sent to a member of the Executive Council or a Member of the Legislative Assembly)?

C. Did the Public Body correctly apply section 20(1)(a)(i) of the Act (harm to intergovernmental relations) or section 20(1)(b) of the Act (information supplied explicitly or implicitly in confidence by a government, local government body or an organization listed in section 20(1)(a) or its agencies)?

D. Did the Public Body correctly apply section 26(1)(a), (b) or (c) of the Act (privileged information)?

IV. DISCUSSION OF THE ISSUES

ISSUE A: If the issue about the fee waiver is "moot", do I have the jurisdiction under the Act to hear the moot issue? If I have the jurisdiction to hear the moot issue, what criteria should I consider in exercising my discretion to hear the moot issue? If I exercise my discretion to hear the moot issue, do the records relate to a matter of public interest, as provided by section 87(4)(b)?

1. General

[para 23.] The Public Body decided to waive the Applicant's fees under section 87(4)(a) of the Act. The Applicant wanted the Public Body to waive the fees under section 87(4)(b).

[para 24.] Sections 87(4)(a) and (b) read:

> *87(4) The head of a public body, or the Commissioner at the request of an applicant, may excuse the applicant from paying all or part of the fee if, in the opinion of the head or the Commissioner, as the case may be,*
>
> > *(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or*

> *(b) the record relates to a matter of public interest, including the environment or public health.*

[para 25.] Section 87(4)(a) permits a public body to excuse payment if for any other reason it is fair to excuse payment, as in this case.

[para 26.] The Applicant wanted the Public Body to waive fees under section 87(4)(b) of the Act (the record relates to a matter of public interest). In the Applicant's view, the records relate to a matter of public interest because they concern the introduction of video lottery terminals in Alberta. The Applicant is asking that I make a "fresh" decision under section 87(4)(b), even though the Public Body has already waived all the fees under section 87(4)(a).

2. What does "moot" mean?

[para 27.] An issue is "moot" when it presents no actual controversy, or the issue has ceased to exist because the matter has already been resolved. According to Black's Law Dictionary, a matter is also said to be "moot" when a determination is sought on the matter which, when rendered, cannot have any practical effect on the existing controversy.

[para 28.] The Supreme Court of Canada discusses "mootness" in *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (S.C.C.). In that case, Justice Sopinka stated:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

[para 29.] In *Grimble v. Edmonton (City)* (February 26, 1996), Edmonton Appeal No. 9403-0661-AC (Alta. C.A.), the Alberta Court of Appeal said that a case is moot if some event occurs after proceedings were commenced, which eliminates the controversy between the parties. The Court of Appeal then followed the two-step analysis in *Borowski v. Canada (Attorney General)* in considering (i) whether the dispute had disappeared and the issues had become academic (moot), and (ii)

whether the court should nevertheless exercise its discretion to hear the case even if the issue had become moot.

[para 30.] As discussed in *Borowski v. Canada (Attorney General)*, I accept that an issue is "moot" when no present live controversy exists, which affects the rights of the parties.

3. Is the issue of the fee waiver "moot"?

[para 31.] The Applicant believes that, since the Public Body did not waive the Applicant's fees until after the matter had been set down for an inquiry, I can still "…rule on a matter of law that is very much alive" at the time the inquiry was scheduled.

[para 32.] The Applicant argues that there is a live controversy because the rights of the Applicant in future fee waiver requests will be influenced and affected by my decision on this issue. The Public Body disagrees, and maintains that each request for a fee waiver under section 87(4)(b) will relate specifically to the records at issue in the particular access request.

[para 33.] In my view, a fee waiver under section 87(4)(b) requires that the records requested in each particular access request be found to relate to a matter of public interest. As discussed later in this Order, a characterization of records as relating to a matter of public interest in one access request does not ensure the same characterization of records in any future access request.

[para 34.] Furthermore, as stated in *Borowski v. Canada (Attorney General)*, mootness may exist either when the action or proceeding is commenced, or when the court is called upon to reach a decision.

[para 35.] Because the Public Body has waived the fees, no present live controversy exists, which affects the rights of the Applicant and the Public Body with regard to the fees. Therefore, the issue of the fee waiver is moot.

4. If the issue about the fee waiver is "moot", do I have the jurisdiction under the Act to hear the moot issue?

[para 36.] During the inquiry, I asked the parties to provide submissions as to whether I had the jurisdiction to hear a moot issue. Specifically, I asked the parties to tell me (i) whether section 66(1) of the Act (decide all questions of fact or law) was sufficient authority, and (ii) whether the wording of my order-making power under section 68(3)(c) (confirm or reduce a fee or order a refund, in the appropriate

circumstances) prevented me from making an Order on the moot issue, and thereby prevented me from hearing the moot issue.

[para 37.] The parties referred to a number of sections of the Act in their arguments. I have set out those sections below, for ease of reference.

> *51(1) In addition to the Commissioner's powers and duties under Part 4 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may*
>
> *…*
>
> *(b) make an order described in section 68(3) whether or not a review is requested,*
>
> *…*
>
> *(g) comment on the implications for freedom of information or for protection of personal privacy of proposed legislative schemes or programs of public bodies.*
>
> *(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that*
>
> *…*
>
> *(c) a fee required under this Act is inappropriate.*
>
> *65 The Commissioner may authorize a mediator to investigate and try to settle any matter that is the subject of a request for a review.*
>
> *66(1) If a matter is not settled under section 65, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*
>
> *68(1) On completing an inquiry under section 66, the Commissioner must dispose of the issues by making an order under this section.*
>
> *…*
>
> *(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:*
>
> *…*

> *(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met.*

[para 38.] The Applicant argues that section 66(1) provides me with sufficient authority to hear and decide this question of law, especially when taken in the context of section 51, which gives me broad powers (i) to monitor how the Act is administered to ensure that its purposes are achieved, including making an order described in section 68(3), whether or not a review is requested; and (i) to comment on the implications for freedom of information of programs by public bodies. The Applicant's view is that I have general powers outside the context of a review to "pass judgment" on the conduct of a public body where I see that its decision could or is having an impact that is not in keeping with the purposes of the Act.

[para 39.] Furthermore, the Applicant believes that the words "appropriate circumstances" in section 68(3)(c) allow me to direct that a fee waiver be given in this "appropriate circumstance", and substitute a different reason for the fee waiver.

[para 40.] The Public Body says that a general rule of administrative law is that an administrative body is a creature of statute and therefore has no inherent jurisdiction. Any power my Office possesses must be found in an enactment.

[para 41.] The Public Body maintains that, as an administrative body, I do not have the jurisdiction to hear and decide a moot issue because I do not have any inherent powers, and there are no clear words in the Act that provide those powers to me. In the Public Body's view, the plain meaning of section 66(1) shows that it is not sufficient authority for me to hear this matter.

[para 42.] The Public Body argues that the plain meaning of section 87 establishes that there must be a requirement for an applicant to pay a fee before a fee waiver can arise. In an inquiry, section 66(1) establishes that only if a matter is not settled, must the Commissioner consider the matter. If a matter is settled in mediation under section 65, there is no requirement for the Commissioner to hear that matter. Furthermore, the plain meaning of section 68(3) and section 51(2) establishes that an applicant must be required to pay a fee before the Commissioner can confirm, reduce or order a refund of that fee, or determine if that fee is appropriate. In this case, the matter of the fee waiver is settled as the fees have been entirely refunded to the Applicant, and section 68(3) does not apply.

[para 43.] In addition, in the Public Body's view, section 68 only applies "on completing an inquiry". If a matter is settled, then (as indicated by section 66) that matter is not part of the inquiry and there cannot be an order in relation to that matter under section 68. The Commissioner may be asked to hear any and all moot issues which arise in the future, which is not consistent with the plain meaning of section 66 (only matters that are not settled are heard at inquiries). Finally, the plain meaning in the Act in regard to fees is that the Commissioner only hears and decides those cases where there is a dispute as to the amount of the fee. In this case, the entire fee has been refunded and no dispute exists.

[para 44.] The Public Body submits that I will exceed my jurisdiction if I hear and decide the moot issue.

[para 45.] As to whether I have the "jurisdiction", "power" or "authority" to hear a moot issue, I regard those terms as synonymous. In this discussion, I will use the term "jurisdiction".

[para 46.] First, I do not agree with the characterization of the facts on which the Public Body bases its interpretation of section 66(1). Section 66(1) requires that I conduct an inquiry if the matter is not settled by mediation. Settlement requires that the parties come to some agreement on the matter that is being mediated. That did not occur here. Instead, after the matter was set down for an inquiry, the Public Body made a unilateral decision to waive the fees. If the matter had been settled by mediation, there would have been no requirement that I conduct this inquiry, at least that part of the inquiry concerning the fee waiver.

[para 47.] The focus of section 66(1) is that I must conduct an inquiry if the matter is not settled by mediation. I must conduct an inquiry to decide all questions of fact or law arising in the course of the inquiry. Although the issue of the fee waiver became moot during the course of the inquiry, section 66(1) does not prohibit my hearing the moot issue.

[para 48.] Second, I believe that my jurisdiction to hear and decide a moot issue is part of my jurisdiction to hear and decide an issue under any provision of the Act that gives me such jurisdiction. As long as the criteria establishing my jurisdiction to hear an issue in the first instance are met, then I also have the jurisdiction to decide the issue if it becomes moot.

[para 49.] In this case, the Applicant asked that I make a "fresh" decision to waive fees under section 87(4)(b). Mediation was not successful, so the matter was set down for an inquiry. At the time the matter was set down for an inquiry, the Applicant was still required to pay the fees. During the course of the inquiry, the issue of the fee waiver

became moot. Since my jurisdiction to hear the issue in the first instance had been established at the time the matter was set down for inquiry, I have jurisdiction to hear the moot issue.

[para 50.] Third, having read *Borowski v. Canada (Attorney General)*, the issue of whether I can decide a moot issue appears not to be a matter of jurisdiction, but a matter of general policy or practice of the tribunal. As long as I have the jurisdiction in the first instance (in this case, to make a fresh decision under section 87(4)(b)), then it becomes a matter of my general policy or practice as to whether I will exercise my discretion to hear a moot issue.

[para 51.] Furthermore, I believe that my power under section 68(3)(c) to order, confirm, or reduce a fee or order a refund does not determine my jurisdiction to hear a moot issue. Instead, my order-making power goes to the issue of whether I should exercise my discretion to hear a moot issue when my decision will not have any practical effect on the rights of the parties (the Applicant in this case) because there is no remedy available (I discuss that issue later in this Order). For a similar decision, see *Fountain v. British Columbia (Minister of Forests)* (June 15, 1994), Vancouver No. CA015952 (B.C. C.A.).

[para 52.] Therefore, I find that I have the jurisdiction to hear the moot issue in this case. In the alternative, whether I can hear the moot issue is not a matter of jurisdiction, but a matter of general policy or practice, as discussed in *Borowski v. Canada (Attorney General)*.

5. If I have the jurisdiction to hear the moot issue, what criteria should I consider in exercising my discretion to hear the moot issue?

[para 53.] In *Borowski v. Canada (Attorney General)*, Mr. Justice Sopinka proposed some criteria or guidelines to consider when deciding whether to exercise discretion to hear a moot issue. Those criteria have been succinctly summarized by the Alberta Court of Appeal in *Grimble v. Edmonton (City)*, as follows:

> *(i) Adversarial context*. The issue must exist within an adversarial context. That requirement is satisfied if the adversarial relationships will prevail even though the issue is moot. Consider whether a party will suffer any collateral consequences if the merits are left unresolved, or whether a party will continue to be engaged in an adversarial relationship.

(ii) *Judicial economy*. The special circumstances of the case must make it worthwhile to apply scarce judicial resources to resolve it. The factors to consider include (i) whether the decision will have some practical effect on the rights of the parties, even if the decision will not have the effect of determining the controversy that gave rise to the action; (ii) whether the case involves a recurring issue of brief duration, such that the dispute is likely to occur again, and always disappear before it is ultimately resolved; and (iii) a consideration of the public interest, namely, whether there is a social cost of continued uncertainty in the law in leaving the matter undecided.

(iii) Role of the legislative branch. Consider whether exercising the discretion would be an intrusion into the role of the legislative branch, if a decision were to be made in the absence of a dispute affecting the rights of the parties.

a. Adversarial context, judicial economy and role of the legislative branch, as criteria to consider in exercising discretion

(1) Applicant's arguments

[para 54.] The following is a summary of the Applicant's arguments:

(i) The controversy about whether a fee waiver under section 87(4)(b) is appropriate is very much alive. The Commissioner's decision on this issue will have influence and provide direction to public bodies and applicants about the definition of "public interest". A ruling on a matter of law will give direction to public bodies about the appropriate use of section 87(4)(b) in the future.

(ii) The practical effect of a decision would be direction to applicants and public bodies on how to conduct themselves in similar situations. In terms of timely access, it is important to make the right decision about a fee waiver the first time, instead of waiting until an inquiry is directed. Allowing public bodies to use section 87(4)(a) at the eleventh hour and thus avoid inquiries is to encourage the use of fee waiver denials as a means of delaying, if not denying, access.

(iii) Cases of this type may well be recurring, based on statistics of fee waiver cases in the Commissioner's Office. In at least one other case, the public body waived the fee after the matter had been set down for inquiry. If the Commissioner does not exercise his discretion, that could result in a situation where public bodies waive the fee after the matter has been set down for inquiry, thus

preventing any public interest fee waiver cases by applicants from ever reaching inquiry.

(iv) Fees can be an obstacle to access. There is uncertainty about the definition of "public interest" under section 87(4)(b). In the future, applicants without financial resources to post a bond pending an inquiry on the matter will have their access delayed, with deleterious effects. There may also be wasted financial costs in the Commissioner's Office mediating and preparing for inquiries that won't happen. A clearer direction from the Commissioner about the circumstances where a fee waiver is appropriate might result in public bodies granting fee waivers earlier in the process.

(v) Making a decision in the absence of a dispute is still in keeping with the Commissioner's broad general powers under section 51 of the Act, and would not be an intrusion into the role of the legislative branch.

(2) Public Body's arguments

[para 55.] The following is a summary of the Public Body's arguments:

(i) There is no collateral consequence of the outcome of the issue in this case. Each request for a fee waiver under section 87(4)(b), in the public interest, will relate specifically to the records at issue in the particular request. Whether a public interest fee waiver applies or not depends on what the records contain. The head of a public body cannot fetter his or her discretion by determining that all requests by persons of a particular occupation relate to a matter of public interest. Instead, the head must consider the specific records at issue in any given case as well as the ability of the applicant to pay or any other reason the head considers fair to excuse all or part of the fee.

(ii) The fee waiver was granted in a good faith effort to resolve the issues in mediation.

(iii) There are no special circumstances. The Applicant has received a refund of the entire fee and there is no practical effect on the rights of the Applicant and this Public Body. It is unlikely the Applicant will request the same records in the future. As well, the Public Body must consider each new request for a fee waiver in the future in relation to the specified records at issue and any other relevant circumstances under section 87.

(iv) There is no doubt that the issue of the definition of the term "public interest" is one which will continue to be heard by the Commissioner and by the courts in the future. This is and will continue to be one of the roles of the Commissioner and the courts.

(v) If the Commissioner hears and decides this moot issue, it will not assist future applicants whose relevant circumstances under section 87(4) may be very different.

(vi) If the Commissioner makes a decision on the moot issue in the absence of a dispute affecting the rights of the parties, the Commissioner will exceed his jurisdiction and intrude on the role of the legislative branch. The general words in the Act are not intended to extend the Commissioner's operations beyond the authority of the Legislature.

(3) Discussion of the arguments

[para 56.] I have considered all of the Applicant's and the Public Body's arguments. I believe that all the arguments may be answered, as follows.

[para 57.] Any decision under section 87(4)(b) requires that a public body consider whether the specific records requested relate to a matter of public interest. In Order 96-002, I discussed some relevant criteria for deciding whether records relate to a matter of public interest, but there may also be other relevant criteria or other relevant circumstances.

[para 58.] The records and the relevant criteria or circumstances will vary from case to case. It is unlikely that the records and the relevant criteria or circumstances in another case will be exactly the same as in this case.

[para 59.] As Commissioner, I can make a "fresh" decision under section 87(4)(b). In doing so, I would make a decision based on the specific records and the relevant criteria or circumstances of the case.

[para 60.] Therefore, it cannot be said that my decision under section 87(4)(b), including a decision on the moot issue in this case, would be a ruling on a matter of law, strictly speaking. Rather, my decision would be a ruling on the law as it applies to the specific records and the relevant criteria or circumstances of the case. Consequently, a decision on the moot issue would not greatly assist the Applicant, the Public Body or any other public body in a future case. If I were to decide the moot issue in this case, it would be difficult to take my decision and apply it directly to any other request for a fee waiver under section 87(4)(b).

[para 61.] I turn now to the criteria set out in *Borowski v. Canada (Attorney General)*. I do not believe that deciding the moot issue would be an intrusion into the role of the legislative branch. However, because each request for a fee waiver under section 87(4)(b) depends upon whether the specific records relate to a matter of public interest, which in turn depends on the relevant criteria or circumstances of the particular case, I find that: (i) the Applicant will not continue to be engaged in an adversarial relationship and will not suffer any collateral consequences if the merits of the case are left unresolved; (ii) a decision on the moot issue will have no practical effect on the rights of the parties; (iii) the dispute is not likely to occur again; (iv) there can be no social cost of continued uncertainty in the law; (v) deciding the moot issue would consume the scarce resources of my Office and impede the ability of my Office to deal with other files (see Ontario Order M-271 for a similar decision).

[para 62.] On a final note, I find that the Public Body did not use the matter of the fee waiver to delay access to the records in this case. Provided that a public body is not using a fee waiver to delay access, I would not discourage a public body from exercising its discretion to waive fees at any stage of the process.

b. Other particular circumstances of the case, as criteria to consider in exercising discretion

[para 63.] Being mindful of Mr. Justice Sopinka's concern about the undesirability of establishing an exhaustive list of guidelines or criteria that might fetter discretion in future cases, I intend to consider only the particular circumstances of this case. I do not intend to establish an exhaustive list of guidelines or criteria for application to other cases.

[para 64.] In the particular circumstances of this case, I intend to consider whether there is any practical remedy available to the Applicant.

[para 65.] It is important in this case that there is no effective order that I can make: see *Fountain v. British Columbia (Minister of Forests)*. Section 68(3)(c) of the Act allows me to make an order to confirm or reduce a fee or order a refund. As the fee has been waived, there is no fee that I can confirm or reduce, or for which I can order a refund.

c. Conclusion

[para 66.] Having considered the criteria set out in *Borowski v. Canada (Attorney General)* and the particular circumstances of this case, I decline to exercise my discretion to hear the moot issue.

6. If I exercise my discretion to hear the moot issue, do the records relate to a matter of public interest, as provided by section 87(4)(b)?

[para 67.] Since I have declined to exercise my discretion to hear the moot issue, I do not find it necessary to decide whether the records relate to a matter of public interest.

ISSUE B: Are certain records excluded from the application of the Act by section 4(1)(l) (record created by or for a member of the Executive Council or a Member of the Legislative Assembly and sent to a member of the Executive Council or a Member of the Legislative Assembly)?

[para 68.] The Public Body says that Document #9 and Document #10 are excluded from the application of the Act by section 4(1)(l), which reads:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(l) a record created by or for*
> >
> > > *(a) a member of the Executive Council,*
> > >
> > > *(b) a Member of the Legislative Assembly, or*
> > >
> > > *(c) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly*
> >
> > *that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly.*

[para 69.] I have reviewed Document #9 and Document #10. Document #9 is a record created by a member of the Executive Council and sent to members of the Executive Council. Document #10 is a

record created by a member of the Executive Council and sent to a Member of the Legislative Assembly. Therefore, I find that those two documents meet the requirements of section 4(1)(l) and are excluded from the application of the Act by section 4(1)(l). Consequently, I do not have any jurisdiction over those two documents.

[para 70.] However, the Applicant wants to know whether section 4(1)(l) is still applicable if the record has been circulated to persons other than those persons in the list under section 4(1)(l). I note that both Document #9 and Document #10 have been "cc'd" (copied) to persons listed in section 4(1)(l) and to persons not listed in section 4(1)(l).

[para 71.] In my view, the fact that a record is copied to someone other than those persons listed in section 4(1)(l) does not in any way affect the application of section 4(1)(l). A record need only meet the criteria of section 4(1)(l) for that section to apply. Section 4(1)(l) focuses on the creation of the record and to whom the record is to be sent in the first instance. Section 4(1))(l) does not contain any restrictions on copying a record to persons other than those listed in section 4(1)(l).

[para 72.] Furthermore, if section 4(1)(l) applies, a public body can copy a record to whomever it chooses. The record does not thereby lose its status as a record which is excluded from the application of the Act by section 4(1)(l).

ISSUE C: Did the Public Body correctly apply section 20(1)(a)(i) of the Act (harm to intergovernmental relations) or section 20(1)(b) of the Act (information supplied explicitly or implicitly in confidence by a government, local government body or an organization listed in section 20(1)(a) or its agencies)?

[para 73.] The Public Body said that section 20(1)(a)(i) and section 20(1)(b) apply to Document #6, which the public body identified as a report.

[para 74.] The relevant portions of section 20 read:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*

(i) the Government of Canada or a province or territory of Canada,

…

or

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

…

(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or an organization that the supplies the information, or its agency.

[para 75.] At the inquiry, the Public Body said that it was not focusing on section 20(1)(a)(i) so much as it was focusing on section 20(1)(b).

[para 76.] To convince me that Document #6 meets the requirements of both section 20(1)(b) and section 20(3), the Public Body provided me with an affidavit and supporting evidence, which I accepted *in camera*. In addition, I had independently obtained the evidence of the Affected Party concerning the application of section 20(1)(b) and section 20(3).

[para 77.] I accept that Document #6 meets the requirements of section 20(1)(b): it could reasonably be expected to reveal information supplied implicitly, if not explicitly, in confidence, by an agency of a government or governments listed in section 20(1)(a).

[para 78.] Furthermore, the requirements of section 20(3) have been met, as that agency has refused to consent to disclosure of the information.

[para 79.] Therefore, the Public Body correctly applied section 20(1)(b) to Document #6. As the agency that supplied the record implicitly, if not explicitly, in confidence, has refused to consent to disclosure of the record, the Public Body must not disclose the record, as provided by section 20(3).

[para 80.] Having decided that the Public Body correctly applied section 20(1)(b) to Document #6, I do not find it necessary to decide whether the Public Body also correctly applied section 20(1)(a)(i) to that same document.

ISSUE D: Did the Public Body correctly apply section 26(1)(a), (b) or (c) of the Act (privileged information)?

1. Application of sections 26(1)(a), (b) and (c)

[para 81.] The Public Body says that sections 26(1)(a), (b) and (c) apply to Document #1 and Document #8.

[para 82.] Sections 26(1)(a), (b) and (c) read:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
> >
> > *(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of legal services, or*
> >
> > *(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.*

[para 83.] I will first consider the application of section 26(1)(a) (solicitor-client privilege). For solicitor-client privilege to apply, a document must meet the following three criteria:

(i) it must be a communication between a solicitor and client,

(ii) which entails the giving or seeking of legal advice, and

(iii) which the parties intend to be confidential.

[para 84.] I have reviewed Document #1 and Document #8. Document #1 consists of four documents. The document dated August 24, 1993 is a communication between the Public Body's solicitor at Alberta Justice and the Public Body. That document meets the criteria for solicitor-client privilege. The other three documents are legal opinions of other solicitors at Alberta Justice. Those three documents are attached to the

August 24, 1993 document. Because those three attached documents form part of the continuum of legal advice between the Public Body and its solicitor, solicitor-client privilege also applies to those three attached documents. See Order 96-020 for a similar decision.

[para 85.] Document #8 consists of two documents. One of the documents is a fax cover sheet, which is a communication between the Public Body's solicitor at Alberta Justice and the Public Body. The fax cover sheet itself meets the criteria for solicitor-client privilege. The other document is a legal opinion of another solicitor at Alberta Justice. Because that attached document forms part of the continuum of legal advice between the Public Body and its solicitor, solicitor-client privilege applies to that attached document.

[para 86.] Document #1 and Document #8 have been "cc'd" (copied) to other individuals. I have determined that those other individuals are employees of the Public Body or Alberta Justice. In one case, the individual is the Deputy Minister of the Public Body. Therefore, the Public Body did not waive solicitor-client privilege by sending those two documents to other individuals.

[para 87.] As Document #1 and Document #8 both meet the criteria for solicitor-client privilege, I find that the Public Body correctly applied section 26(1)(a) (solicitor-client privilege) to those two documents. Having made this finding, I do not find it necessary to decide whether section 26(1)(b) and section 26(1)(c) also apply to those two documents.

2. Exercise of discretion under section 26(1)(a) (solicitor-client privilege)

[para 88.] The Public Body says that the issues concerning Document #1 and Document #8 are still outstanding, and the Public Body is still getting legal advice on those issues. Therefore, the Public Body decided to withhold only those two documents under section 26(1)(a) (solicitor-client privilege).

[para 89.] Given this explanation, and the fact that the Public Body located approximately forty boxes of records responsive to the Applicant's request, and, of the five records at issue, only two records have been withheld under section 26(1)(a) (solicitor-client privilege), I find that the Public Body exercised its discretion properly under section 26(1)(a) (solicitor-client privilege).

V. ORDER

ISSUE A: If the issue about the fee waiver is "moot", do I have the jurisdiction under the Act to hear the moot issue? If I have the jurisdiction to hear the moot issue, what criteria should I consider in exercising my discretion to hear the moot issue? If I exercise my discretion to hear the moot issue, do the records relate to a matter of public interest, as provided by section 87(4)(b)?

[para 90.] I have the jurisdiction under the Act to hear the moot issue of the fee waiver. In the alternative, whether I can hear the moot issue is not a matter of jurisdiction, but a matter of general policy or practice, as discussed in *Borowski v. Canada (Attorney General).*

[para 91.] In considering whether to exercise my discretion to hear the moot issue, I will consider the criteria or guidelines set out in *Borowski v. Canada (Attorney General).* I will also consider the particular circumstances of the case. In this case, I decline to exercise my discretion to hear the moot issue.

[para 92.] Since I have declined to exercise my discretion to hear the moot issue, I do not find it necessary to decide whether the records relate to a matter of public interest.

ISSUE B: Are certain records excluded from the application of the Act by section 4(1)(l) (record created by or for a member of the Executive Council or a Member of the Legislative Assembly and sent to a member of the Executive Council or a Member of the Legislative Assembly)?

[para 93.] Document #9 and Document #10 meet the requirements of section 4(1)(l) of the Act. Therefore, those two documents are excluded from the application of the Act by section 4(1)(l). Consequently, I do not have any jurisdiction over those two documents.

ISSUE C: Did the Public Body correctly apply section 20(1)(a)(i) of the Act (harm to intergovernmental relations) or section 20(1)(b) of the Act (information supplied explicitly or implicitly in confidence by a government, local government body or an organization listed in section 20(1)(a) or its agencies)?

[para 94.] The Public Body correctly applied section 20(1)(b) to Document #6. As the agency that supplied that document implicitly, if not explicitly, in confidence, refused to consent to disclosure of that document, the Public Body must not disclose Document #6, as provided

by section 20(3). I uphold the Public Body's decision not to disclose that document.

[para 95.] Having decided that the Public Body correctly applied section 20(1)(b) to Document #6, I do not find it necessary to decide whether the Public Body also correctly applied section 20(1)(a)(i) to that same document.

ISSUE D: Did the Public Body correctly apply section 26(1)(a), (b) or (c) of the Act (privileged information)?

[para 96.] The Public Body correctly applied section 26(1)(a) (solicitor-client privilege) to Document #1 and Document #8, and exercised its discretion properly to withhold those two documents. Therefore, I uphold the Public Body's decision not to disclose those two documents.

[para 97.] Having decided that the Public Body correctly applied section 26(1)(a) to Document #1 and Document #8, I do not find it necessary to decide whether the Public Body also correctly applied section 26(1)(b) and section 26(1)(c) to those same two documents.

Robert C. Clark
Information and Privacy Commissioner