ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-011

August 18, 1999

LEGISLATIVE ASSEMBLY OFFICE

Review Number 1437

I. BACKGROUND

[para 1.] On January 7, 1998, the Legislative Assembly Office (the "Public Body") received the Applicant's access request under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Applicant asked for:

> *…[R]ecords relating to the provision of health and other benefits to former members of the Legislature and their families for the years 1990 to the present.*

[para 2.] The Applicant then went on to say that the Applicant was interested in all the relevant records related to the following:

> *1. Analyses or comparisons of the costs of providing and administering these benefits;*
>
> *2. Budgets or other materials prepared for the Members' Services Committee;*
>
> *3. Internal correspondence and policy guidelines;*
>
> *4. Schedule of benefits covered; and*

5. Listing of aggregate benefits paid.

[para 3.] The Public Body wrote to the Applicant to clarify the request. The Public Body and the Applicant also had a number of telephone conversations to discuss the Applicant's request. In a January 28, 1998 telephone call, the Applicant asked to view the records prior to the Public Body's releasing the records, which would allow the Applicant to determine if the record was what the Applicant wanted.

[para 4.] The Public Body extended the time limit for responding to the Applicant, by 30 days, to March 9, 1998. The Public Body then completed its review of the records and wrote to the Applicant on March 5, 1998. That letter included a list of the records the Public Body was prepared to release (the "Releasable Documents"), and a $7220.00 "fee estimate". That letter also said that if the Applicant did not require all the Releasable Documents, the Applicant could view severed samples to determine what the Applicant wanted. The Public Body further informed the Applicant that a considerable amount of information about former Members' benefits was already available in the Legislature Library.

[para 5.] The Applicant viewed most, but not all, of the Releasable Documents on April 3 and 6, 1998. On April 21, 1998, the Public Body provided a revised "fee estimate" of $4295.50. The Public Body included a Statement of Costs with that letter, which indicated that most of the costs were the Public Body's actual costs for producing 5000 pages of records to that date.

[para 6.] By letter received May 19, 1998, the Applicant asked me to review the revised fee estimate. The Applicant believed the fee estimate might be excessive, given the number of records the Applicant actually requested (approximately 40 pages). The Applicant also said:

> If the Public Body has assembled or reviewed or made copies of other records, I believe it has done so because of a misunderstanding of what was requested, or because of a refusal to engage in any meaningful dialogue with me that would have allowed the request to be clarified.

[para 7.] On July 30, 1998, the Acting Commissioner extended the deadline to October 30, 1998, for completion of the Applicant's request for review. No further time extensions were issued by my Office.

[para 8.] On August 20, 1998, the Public Body provided the Applicant with a further revised "fee estimate" of $3798.00.

[para 9.] On October 22, 1998, the Public Body enquired about the status of my Office's October 30, 1998 deadline for resolution of the case.

The Public Body made the same enquiry in a December 2, 1998 letter to my Office.

[para 10.] On November 20, 1998, my Office made a final, unsuccessful attempt to settle the matter by mediation. On January 7, 1999, the matter of the $3798.00 fee estimate was set down for a written inquiry. It was agreed that the date for receiving initial written submissions would be rescheduled to February 5, 1999, and to February 19, 1999 for rebuttal submissions. Besides the issues relating to the calculation of the fees, section 9(1) (duty to assist) was added to the issues for the inquiry.

[para 11.] The Public Body's initial submission raised the further issue of whether I had lost jurisdiction over this case by not extending the ninety-day deadline for completing the review, as provided by section 66(6) of the Act.

[para 12.] On February 16, 1999, the Applicant phoned my Office, asking me to extend the time for filing the rebuttal submission, to April 16, 1999. I decided not to extend the time. By letter dated February 18, 1999, the Applicant asked me to reconsider my decision not to extend the time for filing the rebuttal submission. By letter dated March 5, 1999, I said that I would not extend the time. Consequently, the Applicant did not file a rebuttal submission.

[para 13.] In conducting the inquiry, I decided that I needed further information from the Public Body and the Applicant so that I could make an Order under section 68(3)(c) (confirm or reduce a fee or order a refund). By letter dated March 17, 1999, I asked the parties to provide further information and to answer some questions. I also asked the Public Body to produce certain other records. The Applicant did not provide further information or answer my questions.

[para 14.] By letter dated March 31, 1999, the Public Body expressed concern about my requirements for further information and my questions. Briefly, those concerns were that I was (i) breaching mediation by asking to see certain documents the Portfolio Officer saw during mediation; (ii) unfairly extending the scope of the inquiry, presumably by asking questions about the Public Body's $7220.00 initial fee estimate and $4295.50 revised fee estimate provided to the Applicant; (iii) proceeding on the inquiry when it appeared as though, in the Public Body's view, the Applicant had abandoned the request for review; and (iv) ignoring the jurisdictional issue raised by the Public Body. The Public Body did answer the questions, but did not produce certain records.

Instead, the Public Body notified me that those records were available for examination.

[para 15.] By letter dated April 13, 1999, I send a Notice to Produce Records to the Public Body, quoting my authority under section 54(2) of the Act. On April 23, 1999, the Public Body produced the records, but not without objecting. The Public Body also complained that I did not respond to the concerns raised in its March 31, 1999 letter to me. This Order will deal with all the issues raised by the Public Body, both in its submission and its subsequent letters to me.

[para 16.] This Order proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 17.] As this inquiry primarily concerns a calculation of fees and the duty to assist, there are no records directly at issue.

III. ISSUES

[para 18.] The Notice of Inquiry set out four issues for this inquiry:

A. Did the Commissioner lose jurisdiction over this case (the Applicant's request for review) by not extending the deadline for completing the review, as provided by section 66(6) of the Act?

B. Did the Public Body fulfil its duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as provided by section 9(1) of the Act?

C. Is the Applicant correct in the claim that the estimated fee is not a reasonable expression of the proper charges rightly associated with the access request as it was made to the Public Body?

D. Is the fee estimated by the Public Body based upon correct methods of fee calculation?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Commissioner lose jurisdiction over this case (the Applicant's request for review) by not extending the deadline for completing the review, as provided by section 66(6) of the Act?

[para 19.] The Public Body's submission is simply that I have lost jurisdiction over this case by not extending the ninety-day deadline for completing the inquiry, as required by section 66(6) of the Act.

[para 20.] Section 66(6) reads:

> *66(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner*
>
> > *(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for review that the Commissioner is extending that period, and*
> >
> > *(b) provides an anticipated date for the completion of the review.*

[para 21.] Section 66(6) says that an inquiry "must" be completed within ninety days after receiving the request for review, unless the Commissioner extends that period. In this case, the ninety-day period was extended once, but was not extended again before it expired on October 30, 1998.

[para 22.] Section 25(2)(c.1) of the *Interpretation Act*, R.S.A. 1980, c. I-7 says that "must" is to be interpreted as imperative, that is, as a command or compulsory. A "must" provision is also referred to as a "mandatory" provision.

[para 23.] On the wording alone, section 66(6) of the Act is a mandatory ("must") provision. However, the Act does not say what happens if there is non-compliance with this legislative requirement.

[para 24.] In *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344 (S.C.C.), the Supreme Court of Canada has said that, regardless of the mandatory wording of a statutory provision, the Court may nevertheless interpret the provision as directory in its effect (that is, as a "may" provision) if certain factors are present. The Court quoted

Montreal Street Railway Co. v. Normandin, [1917] A.C. 170 (P.C.) as the case that summarized those factors:

> When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only…

[para 25.] The Court then went on to say:

> This Court has since held that the object of the statute and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory: *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41.

[para 26.] In this case, one of the objects of the Act is "to provide for independent reviews of decisions made by public bodies under this Act": see section 2(e). I agree with the British Columbia Information and Privacy Commissioner when, in British Columbia Order 291-1999, he said:

> …[T]he ninety-day period…is not intended to create a technical barrier which robs applicants, public bodies or third parties of my Office's independent review of decisions made under the Act. The ninety-day period is intended to benefit the independent review process by requiring that inquiries proceed in a timely way, but without creating a structure of strict compliance which would be, in itself, counterproductive to the delivery of a fair yet flexible review process to those who are affected by decisions under the Act.

[para 27.] The effect of ruling that my non-compliance with section 66(6) ends my jurisdiction over the Applicant's request for review would work serious general inconvenience or injustice to the Applicant, who has no control over my review process. The Applicant would lose the right to have the Public Body's decision reviewed. Therefore, I interpret section 66(6) as directory only ("may").

[para 28.] I did not lose jurisdiction over this case (the Applicant's request for review) by not extending the ninety-day deadline for completing the review, as provided by section 66(6) of the Act.

[para 29.] I also want to deal briefly here with the Public Body's complaint that I did not answer its letters about the jurisdictional issue, among other issues, and its assertion that, since the Applicant did not provide a rebuttal submission, I should ask the Applicant whether the Applicant has abandoned the request for review. The Public Body's

letters arrived during the course of my conducting the written inquiry and making decisions on the issues.

[para 30.] First, as Commissioner, I do not discuss issues with a party while deciding those issues during an inquiry. In that circumstance, a party should not expect me to personally respond to the party's correspondence related to the issues. The Order will answer any issues the parties have raised for the inquiry.

[para 31.] Second, section 66(1) of the Act (before the May 19, 1999 amendments) provides that, if a matter is not settled by mediation, I must conduct an inquiry. Section 68(1) of the Act requires that I dispose of the issues by making an order. Consequently, the only way to halt this inquiry and order-making process would be if an applicant withdrew the request for review.

[para 32.] The Applicant has not withdrawn the request for review. Although the Applicant did not supply a rebuttal submission or further information, that is not evidence of the Applicant's having withdrawn the request for review. Furthermore, I have no intention of chasing down applicants to find out whether they have abandoned the request for review. The onus is on an applicant to withdraw and to inform me accordingly.

ISSUE B: Did the Public Body fulfil its duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as provided by section 9(1) of the Act?

1. General

[para 33.] The Applicant complains that the Public Body was unwilling to engage in discussion and did not involve itself in a "meaningful dialogue" with the Applicant regarding the Applicant's request, thereby breaching the duty to assist under section 9(1) of the Act.

[para 34.] In the Applicant's view, compliance with the duty to assist under section 9(1) in this case involves the Public Body's (i) engaging in discussion or "meaningful dialogue", ideally before the request is submitted; (ii) engaging in ongoing discussions and clarification leading up to the fee estimate; (iii) providing detailed inventories of records; (iv) preparing samples of records for the Applicant to view; (v) not doing any work beyond the $150 cutoff set out in the Act, without the Applicant's approval; and (vi) providing assistance concerning the fee estimate.

[para 35.] Section 9(1) 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.*

[para 36.] In Interim Order 97-015, I said that how a public body fulfills its duty to assist varies according to the fact situation of each request. In Order 96-014, Mr. Justice Cairns, acting as Adjudicator under the Act, said that the duty to assist is less onerous when dealing with a sophisticated user of the Act. The Applicant is a sophisticated user. A number of my other Orders concern a public body's duty to assist in clarifying an applicant's request for access. In essence, the Applicant's six points, set out above, relate to the Public Body's duty to assist in clarifying the Applicant's request in this case. I will deal with each of those six points in turn.

(i) Duty to engage in discussion or "meaningful dialogue", ideally before the request is submitted

[para 37.] I disagree with the Applicant's contention that a public body has a duty under section 9(1) of the Act to engage in discussion or "meaningful dialogue" before an applicant submits an access request. A public body's duty to assist under section 9(1) is triggered by an access request. No duty under section 9(1) arises before that triggering event.

[para 38.] It may be that, prior to an access request, a duty to assist arises elsewhere, but it does not arise under section 9(1). Ideally, a public body will nevertheless assist, if for no other reason than to save some time and effort when an applicant finally does make an access request.

(ii) Duty to engage in ongoing discussions and clarification leading up to the fee estimate

[para 39.] To determine this issue, I required the Public Body to produce its "running record" of the work it performed in connection with the Applicant's request. The Public Body had referred to that running record in its affidavit provided for the inquiry, and had shown the running record to the Portfolio Officer who conducted the mediation. When I required production of the running record, the Public Body complained that I was breaching mediation.

[para 40.] Under section 54(2) of the Act, I have the power to require the production of records, whether or not those records are subject to the

Act. I require production of records as a matter of course to independently verify statements made to me under oath, among other reasons.

[para 41.] Requiring production of records does not breach mediation. In my view, I would be breaching mediation only if I enquired about the steps taken in the mediation process and the result of each step, or if I enquired about the conduct of the parties during mediation. I did not do so in this case, nor in any case. In this case, I asked the Portfolio Officer to identify the record to which the Public Body referred in its affidavit, then required the Public Body to produce that record.

[para 42.] Having reviewed the Public Body's affidavit and the running record, I am satisfied that there is no basis for the Applicant's allegation that the Public Body would not talk to the Applicant or engage in a "meaningful dialogue" on an ongoing basis. In fact, the running record is independent evidence that the Public Body was diligent in returning the Applicant's calls, questioning the Applicant about the scope of the request and discussing the types of records available, so that the Applicant could decide what records were wanted.

[para 43.] Furthermore, as early as its March 5, 1998 response to the Applicant, the Public Body informed the Applicant that a considerable amount of information about former Members' benefits was already available in the Legislature Library.

[para 44.] Therefore, I find that the Public Body met its duty to assist the Applicant by engaging in ongoing discussions and clarification leading up to the fee estimate.

(iii) Duty to provide detailed inventories of records

[para 45.] In Interim Order 97-015, I said that there may be cases in which providing an applicant with an index of records is necessary in responding to an applicant openly, accurately and completely under section 9(1).

[para 46.] In this case, the Public Body did provide a detailed index of Releasable Documents when the Public Body responded to the Applicant on March 5, 1998. On April 21, 1998, the Public Body provided the Applicant with a complete list of all the records located in the Public Body's initial search. Therefore, I find that the Public Body met its duty to assist the Applicant by providing an index of records.

(iv) Duty to prepare samples of records for the Applicant to view

[para 47.] In Interim Order 97-015, I said that providing samples of records that do not disclose the contents of the records can satisfy the duty to assist where a public body does not provide an index of records.

[para 48.] As the Public Body provided an index of records, the Public Body was not required to also provide samples of records. If the Public Body did have a duty to provide samples, the Public Body more than met that duty by providing most of the Releasable Documents for examination.

(v) Duty not to do any work beyond the $150 cutoff set out in the Act, without the Applicant's approval.

[para 49.] A public body has a statutory duty to provide a fee estimate under the Act. The Act does not require an applicant's approval to provide a fee estimate.

[para 50.] I agree that a public body should do no more than provide a fee <u>estimate</u>. However, in my view, what is required in providing a fee estimate is more appropriately dealt with under the fee estimate provisions of the Act, discussed below.

(vi) Duty to provide assistance concerning the fee estimate

[para 51.] The Applicant is concerned about the Public Body's not having provided assistance concerning the fee estimate, in the Applicant's view.

[para 52.] However, I do not intend to consider this matter under section 9(1). I agree with the British Columbia Information and Privacy Commissioner that the issue about the kind of assistance a public body provides concerning a fee estimate is more appropriately dealt with under the fee estimate provisions of the Act: see British Columbia Order 240-1998. That discussion follows below.

2. Conclusion under section 9(1)

[para 53.] I find that the Public Body fulfilled its duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as provided by section 9(1) of the Act.

ISSUE C: Is the Applicant correct in the claim that the estimated fee is not a reasonable expression of the proper charges rightly associated with the access request as it was made to the Public Body?

[para 54.] I have viewed this issue as one in which I must decide whether the Public Body provided a fee estimate as required by the Act and the *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95 (the "Regulation").

[para 55.] By way of summary, the Public Body gave the Applicant an initial "fee estimate" of $7220.00, then revised that "fee estimate" to $4295.50 (about 60% of the initial estimate), and then further revised it to $3798.00 (about 53% of the initial estimate). I asked the Public Body for information about all the "fee estimates" so that I would have the broader perspective of how the Public Body was estimating fees.

[para 56.] I am aware that the Notice of Inquiry said that only the $3798.00 "fee estimate" is at issue.

[para 57.] Section 87(1) and section 87(3) of the Act are relevant to the issue. The sections provide:

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

[para 58.] The "fees for services" referred to in section 87(1) are set out in section 12(1) and Schedule 2 of the Regulation. Those fees for services are discussed in more detail below.

[para 59.] The purpose of section 87(3) is to give an applicant some idea of the total cost of the access request, thereby giving the applicant an opportunity to modify the request and reduce the fees. Section 12(4) of the Regulation anticipates this process:

> *12(4) An applicant has up to 20 days to indicate if the fee estimate is accepted or to modify the request to change the amount of the fees assessed.*

[para 60.] In addition to providing an estimate of the total fee, a public body must provide an applicant with the breakdown of the estimated fee. Section 12(1) of the Regulation reads:

> *12(1) An estimate provided under section 87(3) of the Act must set out*
>
> *(a) the time and cost required*
>
> *(i) to search, locate and retrieve the record;*
>
> *(ii) to prepare the record for disclosure*
>
> *(a.1) the cost of copying the record*
>
> *(b) the cost of computer time involved in locating and copying a record or, if necessary, re-programming to create a new record;*
>
> *(c) the cost of supervising an applicant who wishes to examine the original record, when applicable;*
>
> *(d) the cost of shipping the record or a copy of the record.*

[para 61.] Section 87(3) of the Act requires that an applicant be provided with the estimate of the total fee (which includes the estimate of the fees set out under section 12(1) of the Regulation) <u>before</u> providing the services. In other words, a public body must provide this estimate before a public body actually searches for, locates and retrieves the record, prepares the record for disclosure, and copies the record for an applicant.

[para 62.] The Public Body's "fee estimate" of $3798.00 is contained on a record entitled "Statement of Costs", which was provided to the Applicant. The Statement of Costs is divided into a number of parts, the relevant parts being "Costs to Date" and "Estimated Costs to Complete".

[para 63.] It is evident from the "Costs to Date" that the Public Body provided the services and then invoiced the Applicant for those services. The Public Body's approach of charging, as an estimate, a fee for services completed defeats the purpose of section 87(3), which is to provide an estimate <u>before</u> providing the services. Therefore, the Public Body is in

breach of section 87(3) of the Act for the “Costs to Date” because those costs are not an estimate.

[para 64.] Similarly, the Public Body is in breach of section 12(1) of the Regulation, which requires a breakdown of the total estimate. The Public Body’s breakdown is for the actual costs, not the estimated costs.

[para 65.] Nevertheless, the Public Body’s “Estimated Costs to Complete” comply with section 87(3) of the Act and section 12(1) of the Regulation.

[para 66.] I emphasize here again that, when a public body gets an access request, it must not provide all the services at the outset; instead, it must estimate the services it may ultimately have to provide, based on the request.

[para 67.] In Order 97-019, I said that a public body does not have to provide the services until it gets an agreement to pay the fee and 50 per cent of any fee over $150.00, as set out in section 13(1) of the Regulation. The purpose of section 13(1) of the Regulation is to prevent a public body from doing more work than is necessary, only to find out that the applicant now wishes to modify the request to reduce fees, as here, or does not want to proceed with the request.

[para 68.] I will now consider whether a public body has any other duties with respect to the fee estimate itself.

[para 69.] A public body’s duties under section 87(3) of the Act and section 12(1) of the Regulation are to provide a fee estimate. A fee estimate is based on what the Applicant asked for. If a public body does not think the Applicant was clear on the access request, a public body has a duty to clarify the request. I discussed that duty under section 9(1) above.

[para 70.] However, once a public body has clarified the request and provided a fee estimate based on the clarified request, the public body has fulfilled its duty with regard to the fee estimate. Section 12(4) of the Regulation then places a duty on an applicant, as follows:

> *12(4) An applicant has up to 20 days to indicate if the fee estimate is accepted or to modify the request to change the amount of fees assessed.*

[para 71.] On the evidence, the Applicant appears to have made some comments to the Public Body about the initial $7220.00 “fee estimate”. I assume that those comments resulted in the $4295.50 revised “fee

estimate". However, the Applicant then asked me to review that revised fee estimate, as the Applicant has every right to do under the Act. The $3798.00 further revised fee estimate ultimately became the issue for the inquiry.

[para 72.] In summary, as to the "Costs to Date", I have concluded that the Public Body breached section 87(3) of the Act and section 12(1) of the Regulation by not providing a fee estimate before providing the services. Therefore, the "Costs to Date" is not a reasonable expression of the proper charges rightly associated with the access request as it was made to the Public Body.

[para 73.] However, as to the "Estimated Costs to Complete", I have concluded that the Public Body complied with section 87(3) of the Act and section 12(1) of the Regulation by providing a fee estimate before providing the services. Therefore, the "Estimated Costs to Complete" is a reasonable expression of the proper charges rightly associated with the access request as it was made to the Public Body.

[para 74.] Under other circumstances, I would consider ordering the public body to provide a fee estimate as provided by the Act and the Regulation. However, in this case, such an order would serve no useful purpose because the Public Body has already provided most of the services, except for photocopies. Furthermore, it appears that the Applicant has decided what records the Applicant wants. Therefore, I intend to determine the fee the Applicant must pay.

ISSUE D: Is the fee estimated by the Public Body based upon correct methods of fee calculation?

1. General

[para 75.] I have viewed this issue as one in which I must decide whether the Public Body reasonably calculated the fee.

[para 76.] As I have said, the "Costs to Date" is not a fee estimate, but the "Estimated Costs to Complete" is properly a fee estimate. In this case, I will determine whether the public body reasonably calculated the fees for both the actual costs and the estimated costs.

2. "Costs to Date"

(i) Locating and retrieving the record

[para 77.] Schedule 2 of the Regulation allows a public body to charge a maximum of $6.75 per ¼ hour for locating and retrieving a record ($27.00 per hour). The Public Body said that it took 40 hours to locate and retrieve the records, at a total cost of $1,080.00.

[para 78.] However, the Public Body was not required to initially locate and retrieve all the records the Applicant requested. The Public Body should have simply estimated the time it would take to locate and retrieve the records. Methods of estimating location and retrieval time are discussed in the November 1996 FOIP Bulletin (the "Bulletin"), published by the Information and Privacy Branch, Alberta Public Works, Supply and Services (now Information Management and Privacy, Alberta Municipal Affairs). My Office provided the parties with a copy of that Bulletin before this inquiry.

[para 79.] If the Public Body had provided an initial fee estimate of $1,080.00 for locating and retrieving records, it should have then revised the estimate based on a reasonable interpretation of the Applicant's request, discussed below.

[para 80.] In the Applicant's request for access received on January 7, 1998, the Applicant asked for records. That request complied with section 7(2) of the Act, in that it was in writing. That request did not ask for copies of the records, as the Applicant could have done according to section 7(3)(a) of the Act.

[para 81.] On January 28, 1998, the Applicant asked to view the records prior to the Public Body's releasing the records, which would allow the Applicant to determine if a record was what the Applicant wanted.

[para 82.] Section 7(3)(b) of the Act allows an applicant to ask to examine the record. The Applicant is a sophisticated user of the Act. Therefore, I have decided that the Applicant's January 28, 1998 request to view the records is a request to examine the record and, as such, is a request under section 7(3)(b). Since the Applicant's original request was in writing, as required by section 7(2), I do not believe it is necessary that the subsequent oral request to view also be in writing.

[para 83.] The Applicant viewed most, but not all, of the records contained on the Public Body's list of Releasable Documents, provided to the Applicant on March 5, 1998. I counted 219 pages of records that the

Applicant viewed from that list. This number differs significantly from the 5000 pages the Public Body apparently located and retrieved, according to the "Costs to Date".

[para 84.] Therefore, I have determined that the Public Body should have provided an estimate for the location and retrieval of only those 219 pages the Applicant viewed as part of the Applicant's request. I have calculated the cost of locating and retrieving those 219 pages, as follows:

219/5000 x 100 = 4.38% x $1080.00 = $47.30

(ii) Preparing and handling the record for disclosure

[para 85.] Schedule 2 of the Regulation allows a public body to charge a maximum of $6.75 per ¼ hour for preparing and handling a record for disclosure ($27.00 per hour). The Public Body said that it took 50 hours to prepare and handle the 5000 pages of records for disclosure, at a total cost of $1,350.00. Although the Public Body was not able to provide me with a breakdown of only the cost of preparing and handling the records for viewing, that cost would have included physically deleting text in preparing records for viewing and the cost of reconstructing the file after viewing had occurred.

[para 86.] The Bulletin sets out some criteria for a public body to follow in determining those two costs: (i) two minutes per page is a reasonable time for severing records where only a few severances per page are being made, and (ii) an estimated processing time of four feet of records in a 7.25 hour day is a reasonable starting point where about a third of the records have to be replaced. These criteria seem reasonable, and I intend to follow them in this case.

[para 87.] Of the 219 pages of records the Applicant viewed, only 161 of those pages required severing. At two minutes per page for severing, the severing would have required 322 minutes or 5.37 hours, which I have rounded to 5.5 hours. At $6.75 per ¼ hour ($27.00 per hour), the cost to sever the 161 pages for viewing would be $148.50.

[para 88.] The 219 pages of records are about 1.5 inches of records. If processing time is four feet of records (48 inches) in a 7.25-hour day, then I calculate the time to replace the 219 pages in this case, as follows:

1.5/48 x 100 = 3.125% x 7.25 hours = .23 hours (rounded to ¼ hour)

[para 89.] At $6.75 per ¼ hour, the cost to replace the records viewed would be $6.75.

[para 90.] Therefore, the total cost of preparing and handling the records for disclosure would be $155.25, consisting of $148.50 to sever 161 pages for viewing and $6.75 to replace the 219 pages viewed.

(iii) Supervising the examination of the record

[para 91.] Schedule 2 of the Regulation allows a public body to charge a maximum of $6.75 per ¼ hour for supervising the examination of a record ($27.00 per hour). The Public Body said that it took three hours to supervise the Applicant when the Applicant viewed the Releasable Documents, at a total cost of $81.00.

[para 92.] I find that $81.00 is a reasonable fee for supervising the examination of the records.

(iv) Photocopies

[para 93.] Schedule 2 of the Regulation allows a public body to charge a maximum of 25 cents per page for copying a record. The Public Body charged $1,250.00 for copying 5000 pages of records.

[para 94.] The Public Body copied all the records that were responsive to the Applicant's request and charged the Applicant, before giving the Applicant an estimate. In my view, a public body may only charge photocopying costs for copies of records for which the Applicant asks, after the Public Body gives an estimate. Section 3 of the Regulation, which allows for a person to be given a copy of the record rather than the opportunity to examine the record, has no application here.

[para 95.] Therefore, I find that the Public Body did not reasonably charge for the cost of copying the records. I will deal with that cost below, under "Estimated Costs to Complete".

3. "Estimated Costs to Complete"

[para 96.] The Public Body says that, after the Applicant viewed the records, the Applicant asked for approximately 40 pages of records. Therefore, the Public Body estimated that the cost of preparing and handling the 40 pages of records for disclosure would be $27.00 (one hour), and that the cost of copying the 40 pages requested would be $10.00.

[para 97.] However, those 40 pages are included in the 219 pages the Public Body prepared for viewing by the Applicant. The Public Body has already charged for preparing and handling the 219 pages. Therefore,

the Public Body may not charge any further amount for preparing and handling the 40 pages for disclosure. I have included the charge for preparing and handling the 219 pages (including those 40 pages) in my recalculation under "Costs to Date".

[para 98.] I have counted 45 pages for which the Applicant asked for photocopies. At 25 cents per page, the cost to the Applicant is $11.25 for copying those 45 pages.

4. What the Applicant must pay

[para 99.] I have determined what the fee should be after the Applicant has decided what the Applicant wants by way of records. That determination is not an estimate, but an actual cost. Therefore, there is no issue about the fees exceeding the actual cost of services provided (section 87(5) of the Act). Furthermore, since the Applicant has not yet paid for the services, there is no issue of the Public Body's refunding fees where the amount paid on an estimate is higher than the actual fees required to be paid (section 13(3) of the Regulation).

[para 100.] The following is the fee for service to be paid by the Applicant:

Locating and retrieving the record		$ 47.30
Preparing and handling the record for disclosure		$155.25
Supervising the examination of the record		$ 81.00
Photocopies		$ 11.25
	Total	$294.80

[para 101.] The $25.00 initial fee paid by the Applicant is not to be subtracted from the foregoing fees for services. Section 10(4) of the Regulation makes it clear that the initial fee paid on a request for access is separate and apart from the fees for services set out in Schedule 2 of the Regulation.

5. Conclusion

[para 102.] Most of the fee "estimated" by the Public Body is not based upon correct methods of fee calculation. Therefore, I intend to order that the Public Body reduce the fee to $294.80.

V. ORDER

[para 103.] I make the following Order under section 68 of the Act.

ISSUE A: Did the Commissioner lose jurisdiction over this case (the Applicant's request for review) by not extending the deadline for completing the review, as provided by section 66(6) of the Act?

[para 104.] As Commissioner, I did not lose jurisdiction over this case (the Applicant's request for review) by not extending the deadline for completing the review, as provided by section 66(6) of the Act.

ISSUE B: Did the Public Body fulfil its duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as provided by section 9(1) of the Act?

[para 105.] The Public Body fulfilled its duty to make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as provided by section 9(1) of the Act.

ISSUE C: Is the Applicant correct in the claim that the estimated fee is not a reasonable expression of the proper charges rightly associated with the access request as it was made to the Public Body?

[para 106.] As to the "Costs to Date", the Public Body breached section 87(3) of the Act and section 12(1) of the Regulation by not providing a fee estimate before providing the services. Therefore, the "Costs to Date" is not a reasonable expression of the proper charges rightly associated with the access request as it was made to the Public Body.

[para 107.] However, as to the "Estimated Costs to Complete", the Public Body complied with section 87(3) of the Act and section 12(1) of the Regulation by providing a fee estimate before providing the services. Therefore, the "Estimated Costs to Complete" is a reasonable expression of the proper charges rightly associated with the access request as it was made to the Public Body.

ISSUE D: Is the fee estimated by the Public Body based upon correct methods of fee calculation?

[para 108.] Most of the fee "estimated" by the Public Body is not based upon correct methods of fee calculation. Therefore, under section 68(3)(c) of the Act, I order that the Public Body reduce the fee to $294.80.

[para 109.] I further order the Public Body to notify me in writing, within 45 days of being given a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner