

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-021

January 20, 2000

ALBERTA TREASURY

Review Number 1439

I. BACKGROUND

[para 1.] On April 6, 1998, Alberta Treasury (the “Public Body”) received the Applicant’s access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The request was dated March 24, 1998, and asked for:

Documents constituting the basis for the note in the 1991-1992 Province of Alberta Public Accounts at page 1.11 that reads:

(e) Other Contingencies

The Province has a contingent liability to return to Indian Bands its share of oil export tax relating to the period October 1, 1973 to March 31, 1974 in respect of oil production from Indian lands. The Province is committed to return its share of oil export tax, which amounts to approximately \$4,650,000, if the federal government makes a similar decision in respect of its share.

Specifically, we are seeking the documents that explain:

1. why this note was included,
2. who decided that the return of oil export tax revenues to Indian Bands was a contingent liability to Indian Bands,
3. when it was decided that this return of revenues was a contingent liability, and
4. on what basis it was decided that this return of revenues was a contingent liability.

In addition, we require documents that

5. identify the contemplated future event that would confirm the liability referred to, and
6. how the amount was estimated.

[para 2.] The Public Body numbered that request as 98-A-00108.

[para 3.] On April 6, 1998, the Public Body received a second access request from the Applicant. That request was also dated March 24, 1998, and asked for:

Documents that list or explain the liabilities of the Government of Alberta as at March 31, 1993. Specifically, any documents that explain whether or not the return of oil export tax revenue to Indian bands was accrued as a “liability” in the 1993-1994 Province of Alberta Public Accounts, pursuant to the meeting referenced in the following paragraph. This paragraph was written by the Deputy Provincial Treasurer to the Honourable Jim Dinning, Provincial Treasurer, and was located in an Alberta Treasury Memorandum dated April 26, 1993:

We will review contingent liabilities for legal claims at March 31, 1993 with the Department of Justice. Those which meet these conditions will be included as liabilities in the financial statements at that date.

Conversely, if the note was deleted on the basis that there was no longer any contingent liability, documents that explain the change in circumstances between March 31, 1977 and March 31, 1993.

[para 4.] The Public Body numbered that request as 98-A-00109. The Public Body said that requests 98-A-00108 and 98-A-00109 were considered simultaneously, in that records pertaining to one request were reasonably related to the other.

[para 5.] By letter dated May 5, 1998, the Public Body responded to the Applicant as follows: “We have been advised by the manager of the area responsible that no records were created pertaining to the matters raised in either request.”

[para 6.] The Public Body says it initiated a search for records on the substance of the Applicant’s two 1998 requests. However, it discontinued the search, for two reasons.

[para 7.] First, the Public Body said it had conducted a search in 1997 for substantially the same records, based on the Applicant’s then request for access, as follows:

Documents explaining the basis of the Province’s assessment that it may have a contingent liability to return to certain Indian bands its 4.65 million share of oil export tax. The liability is referred to in a note to the Public Accounts for the

Province for the fiscal years 1978/79 through 1985/86. In addition, documents explaining the basis upon which that note was removed from the Public Accounts.

[para 8.] The Public Body said that the Applicant's 1998 request 98-A-00108 covered the same field of information sought in the Applicant's 1997 request (the "1997 request").

[para 9.] Second, the Public Body had consulted with its employee (the "Employee"), who was involved in preparing the Province's Public Accounts from 1978-1979 to the present. To the best of that person's knowledge, no records were created pertaining to the matters raised in either of the Applicant's requests in 1998, and no new records had been created since the 1997 request.

[para 10.] By letter dated June 1, 1998 and received by my Office on June 4, 1998, the Applicant asked that I review the Public Body's decision that there were no records pertaining to the matters raised in the Applicant's two requests for access.

[para 11.] Mediation was authorized. The Public Body subsequently provided the Applicant with two written statements from the Employee, one for each of the Applicant's 1998 requests. The statement for request 98-A-00108 in particular attempted to explain why no records had been created, and attempted to answer the Applicant's questions about the Province's contingent liabilities.

[para 12.] Based on that information, on January 6, 1999, the Applicant amended request 98-A-00108 to read "1978-1979" instead of "1991-1992" and "may have a contingent liability" instead of "has a contingent liability". The Public Body informed the Applicant that it had nothing further to release with respect to the Applicant's amended request.

[para 13.] Mediation ultimately was not successful. The matter of the adequacy of the Public Body's search was set down for a written inquiry. I received the parties' initial written submissions by the June 11, 1999 deadline. I received a written rebuttal submission from the Applicant only, by the June 25, 1999 deadline.

[para 14.] The Applicant's initial submission clarified that the Applicant had asked for an inquiry only for request 98-A-00108, not for request 98-A-00109. The Applicant focused on the adequacy of the Public Body's search, based on the fact that the Public Body did not conduct a search for request 98-A-00108 (the "1998 request"). The Public Body maintained that the issue was whether records were created that were

responsive to the Applicant's request. The Public Body said that no such records were created.

[para 15.] At the conclusion of the written inquiry, I asked the Public Body to provide me with further information about its records retention and disposition schedules. A record retention and disposition schedule is the authority under which a public body may destroy records. I also asked for an affidavit from the Employee about matters relating to the 1997 search, and whether records were, in fact, created.

[para 16.] On August 6, 1999, I received the records retention and disposition schedules and a statement from the Employee, which I returned as it was not in the form of an affidavit. The Employee subsequently provided me with a statutory declaration, which I found acceptable. As permitted by my powers under section 66(3) of the Act, I did not provide the Applicant with a copy of that additional information.

[para 17.] 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 18.] As the issue is one of duty to assist under section 9(1) of the Act, the records themselves are not directly at issue.

III. ISSUE

[para 19.] There is one issue in this inquiry:

Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 9(1) of the Act?

IV. DISCUSSION OF THE ISSUE

1. The Applicant's and the Public Body's perspectives on the issue under section 9(1)

[para 20.] Section 9(1) of the Act reads:

9(1) The head of a public body must make every reasonable effort to assist applicants and to

respond to each applicant openly, accurately and completely.

[para 21.] The Public Body and the Applicant have taken differing views as to what the issue is under section 9(1).

[para 22.] The Public Body says that the issue is whether records were created that are responsive to the Applicant's request. The Public Body maintains that no such records were created. Relying on the records search it conducted in 1997 and on the Employee's opinion, the Public Body asserts that there are no records concerning the contingent liability for the dates the Applicant has indicated.

[para 23.] The Applicant says that the issue is the adequacy of the search, that is, the fact that the Public Body did not conduct a search on the 1998 request. The Applicant argues that there have to be records because, in 1979, the Institute of Chartered Accountants required supporting documents for contingent liabilities.

[para 24.] In Order 98-003, I said that an adequate search is based on the facts relating to how a public body conducted the search in the particular circumstances.

[para 25.] However, in this case, the Public Body did not conduct a records search on the 1998 request. Therefore, I must decide whether it was reasonable that the Public Body did not conduct a search, and whether the Public Body is in breach of section 9(1) for not having done so.

2. Was it reasonable that the Public Body did not conduct a records search on the 1998 request?

[para 26.] The Public Body believes it was reasonable not to conduct a records search on the 1998 request because it relied on the records search conducted on the 1997 request and on the Employee's opinion that no records were created. The Public Body further said that the 1997 request was for substantially the same information as the 1998 request. Therefore, I intend to consider the following:

- a. Was it reasonable for the Public Body to rely on the Employee's opinion that no records were created, when deciding not to conduct a records search on the 1998 request?
- b. Was it reasonable for the Public Body to rely on a records search conducted on the 1997 request, when deciding not to conduct a records search on the 1998 request?

- c. Related issues that the Applicant has raised.
- d. Other issues incidental to those raised by the parties.

a. Was it reasonable for the Public Body to rely on the Employee's opinion that no records were created, when deciding not to conduct a records search on the 1998 request?

[para 27.] The Public Body outlined its process on the 1998 request, as follows.

[para 28.] On receiving the Applicant's 1998 request, the Public Body sent it to the Employee, requesting location of the records pertaining to the request. A reply was received indicating that there were no records pertaining to the request. The Employee stated: "Records were searched during the course of responding to a previous request of a similar nature."

[para 29.] The Public Body subsequently asked the Employee to clarify as to whether there were no records that pertain to the substance of the request because (a) records were never created, (b) records were created but were destroyed, or (c) records were created but could not be found. The Employee responded:

...[W]here I've indicated that there are no records, the reason is that records were never created. We cannot prove that records were never created but we have a reasonable expectation that records were never created. This reasonable expectation flows from the nature of the situation, e.g. why are there no records that explain why the note was included in the 1991-92 public accounts? It is common practice to include a note in one year's public accounts because it was included in the previous year's public accounts. It would be most unusual to create a record to explain this and we therefore expect that no such record was created in this situation. This kind of reasoning applies to all the situations where I've said that there are no records.

[para 30.] Based on the Employee's response, the Public Body considered it unnecessary to repeat the 1997 search for records. The Head agreed with the recommendation to advise the Applicant that there were no records that related to the information requested.

[para 31.] The gist of the Public Body's argument appears to be that, if no records were created, it does not have to search.

[para 32.] In a statutory declaration provided to me, the Employee said: "I believe no records were created during the period from 1978 to 1997, during which period I have been involved in preparing the Alberta Public

Accounts, based on my having no recollection of having seen any such records.”

[para 33.] In my view, there would have to be very unusual circumstances for it to be reasonable for a public body to rely on an individual’s opinion that no records were created, when deciding not to search.

[para 34.] Moreover, I do not think that a public body should rely on anyone’s memory as to whether records were created. A public body cannot know in advance of doing a search whether an individual will be right about whether records were created. All an individual can say, with any reasonable certainty, is whether he or she personally created any records. Otherwise, the individual is merely expressing an opinion as to the likelihood of whether anyone else created records, but the individual cannot speak for others.

[para 35.] A public body cannot absolve itself of its duty to search based on an individual’s opinion about whether records were created. If a public body could forego its duty to search based on such an opinion, the Act would be frustrated.

[para 36.] Furthermore, after I asked the Public Body to provide me with information about its records retention and disposition schedules, the Public Body found what it said were relevant archival records from 1991 to 1994.

[para 37.] As to records for the period 1973 to 1977, the Employee said:

It is my understanding that the other searches were only for records dating from 1978 to 1997. In practice, because Accounting has only been in existence since 1978, no records would have been searched from 1973 to 1977...It is not my belief that no records were created in the period from 1973 to 1977, although it is possible that no records were created during this period.

[para 38.] Although there is no evidence before me that the Public Body relied on the Employee’s opinion about whether records were created for the period 1973 to 1977, there is also no evidence that the Public Body searched for records for that period. However, because preparation of the Public Accounts was not the Public Body’s responsibility before 1978, I will deal with records for the period 1973 to 1977 under (b) below.

[para 39.] Since there are no unusual circumstances in this case that would justify the Public Body’s relying on the Employee’s opinion, I find that it was unreasonable for the Public Body to rely on the Employee’s

opinion that no records were created, when deciding not to conduct a records search on the 1998 request. For the same reason, I find that it was unreasonable for the Public Body to rely on the Employee's opinion that no new records were created for the interval between the 1997 request and the 1998 request, when deciding not to search for records for that interval.

b. Was it reasonable for the Public Body to rely on a records search conducted on the 1997 request, when deciding not to conduct a records search on the 1998 request?

[para 40.] The Public Body says that it did not find it necessary to conduct a records search on the 1998 request because the Public Body's search on the 1997 request covered the same field of information.

[para 41.] The Applicant argues that the Public Body must meet its search duty in relation to the current request, regardless of the fact that the current request is related to the same matter as a previous request. The Applicant concludes that the Public Body should not have applied the search results from the 1997 request to the 1998 request. In effect, the Applicant is arguing that a public body must conduct a complete search on each access request it receives, even if the requests are the same.

[para 42.] To decide whether it was reasonable to rely on the records search conducted on the 1997 request, I intend to consider (i) the wording of the 1997 request and the 1998 request; (ii) the scope of the records search conducted on the 1997 request; and (iii) the records for the interval between the 1997 request and the 1998 request.

i. Wording of the 1997 request and the 1998 request

[para 43.] Before a public body may consider relying on a search conducted on an earlier request, in responding to a later request, it seems to me that a public body must ensure that the later request is for substantially the same information as the earlier request. On a review, I will decide this issue on a case-by-case basis.

[para 44.] I have reviewed the wording of the 1997 request and the 1998 request. The dates cited are the main differences between the two requests. The 1997 request cites the dates 1978-1979 to 1985-1986. The 1998 request cites the dates 1973-1974 to 1991-1992 (before the Applicant's amendments) and 1973-1974 to 1978-1979 (after the Applicant's amendments).

[para 45.] If, on the 1997 request, the Public Body had confined itself to a date search, it would have missed earlier records (1973-1974 to 1978-1979). It would also have missed any subsequent records (1985-1986 to 1991-1992) on the later request. However, it is evident from the Public Body's description of what it searched, and the Employee's statutory declaration, that the Public Body searched for records irrespective of dates, except for the 1973 to 1977 period.

[para 46.] Furthermore, although the 1998 request is more specific, I believe that the more generally worded 1997 request would encompass substantially the same information as the 1998 request. Therefore, I conclude that the 1997 request and the 1998 request are for substantially the same information.

[para 47.] Given that both requests are for substantially the same information and that the Public Body did not restrict itself to a date search, I find that it was reasonable for the Public Body to rely on the records search conducted on the 1997 request, except for records for the 1973 to 1977 period (discussed below).

[para 48.] In my view, it would be unrealistic and unfair to require a public body, in all cases, to repeat an earlier search for substantially the same information. I recognize that circumstances may not warrant repeating an earlier search, such as in the present case, where the Applicant appears to be asking for an updated search (much like on a continuing request) or when there are repetitious requests from the same applicant.

[para 49.] However, any doubt about whether a later request is for substantially the same information as an earlier request should be resolved by conducting a complete search on the later request. This is so whether the request is from the same or a different applicant.

ii. Scope of the records search conducted on the 1997 request

[para 50.] The Public Body's submission sets out the scope of the records search conducted on the 1997 request. The Employee and others conducted that search. In general, the Public Body searched for files concerning contingent liabilities, the audit committee, consolidated accounts, and the general revenue fund. The Public Body said it could not locate a number of the earlier files (1978-1979, and one 1993 file). Two 1979 contingent liability files had been properly destroyed in 1991 (Disposal Number 91-1047). Of the files located by the Public Body's Records Management, nothing relevant was identified.

[para 51.] The Employee provided me with a statutory declaration specifically about what the Employee searched. The Employee did a search of the Public Body's electronic media, irrespective of dates, using the following key words: "contingency", "contingent liability", "commitment", "oil export tax", "Indian bands", and "federal government". The Employee also searched the current year's contingencies files in the Employee's office, and prior years' contingencies files in Accounting's vault. The Employee did not locate any relevant records.

[para 52.] Given the foregoing, I am satisfied that, on the 1997 request, the Public Body conducted an adequate search for records within its own department and vault. To that extent, I find that the Public Body reasonably relied on the records search conducted on the 1997 request.

[para 53.] During the inquiry, I asked the Public Body to provide me with its records retention and disposition schedules for the period from 1973 to 1993. Upon reviewing those schedules, the Public Body came across some files that it thought might be relevant to the Applicant's request. Specifically, for records that had not been destroyed, the Public Body identified relevant files in Schedules 88/10 and 92/35. The Public Body subsequently located those files in storage at Treasury Storage and the Alberta Records Centre. Those files contained what the Public Body said were some relevant records, dating from 1991 to 1994, which the Public Body provided to me.

[para 54.] Page 39 of the *Freedom of Information and Protection of Privacy Policy and Practices* manual (the "FOIP Manual"), published by the Information Management and Privacy Branch of Alberta Labour in August 1998, says that a public body must make a reasonable search of all repositories where records relevant to the request might be located, including off-site storage areas. I agree.

[para 55.] Given that during, but not before, the inquiry, the Public Body found "archival" records at Treasury Storage and the Alberta Records Centre, I am not satisfied that, on the 1997 request, the Public Body conducted a proper search for archival records.

[para 56.] The Public Body provided the destruction certificate number for two 1979 contingent liability files. I note that the Public Body has what appears to be a maximum seven-year retention period for most of the Public Body's records, after which records may properly be destroyed under the records retention and disposition schedules. However, there is no evidence before me that other contingent liability files dated after 1979 and other relevant archival records (the audit committee, consolidated accounts, and the general revenue fund) have in fact been destroyed.

[para 57.] Furthermore, there is no evidence before me as to whether the Public Body searched for records for the 1973 to 1977 period. The Employee has said that “In practice, because Accounting has only been in existence since 1978, no records would have been searched from 1973 to 1977.” If the Public Body did not search for that period, the Public Body has not indicated to me whether the reason was that those records either pre-date the time for which the Public Body would have created those types of records, or those records have properly been destroyed.

[para 58.] Therefore, I find that it was not reasonable for the Public Body to rely on the records search conducted on the 1997 request, to the extent that the Public Body did not properly search Treasury Storage or the Alberta Records Centre for archival records on the 1997 request, and did not indicate what it did about searching for records for the 1973 to 1977 period.

[para 59.] I intend to order that the Public Body search Treasury Storage and the Alberta Records Centre for archival records from 1973 to September 1, 1998, for the same categories of records the Public Body has indicated to me: contingent liabilities, the audit committee, consolidated accounts, and the general revenue fund. It is not necessary that the Public Body repeat that part of the search it conducted and reported to me during the inquiry.

[para 60.] However, the Public Body must respond to the Applicant about the results of the search it reported to me during the inquiry. The Public Body must also respond to the Applicant about the results of the further searches that I intend to order. That response must also indicate whether records were destroyed. To that end, the Public Body must provide the relevant destruction certificate numbers for records that have been destroyed: see page 55 of the FOIP Manual, discussed later in this Order.

[para 61.] Furthermore, I intend to order that the Public Body provide information about whether it searched for records for the 1973 to 1977 period. If the Public Body did not search, I intend to have the Public Body tell the Applicant whether the reason was that the records pre-date the time for which the Public Body would have created those types of records, or those records have properly been destroyed.

[para 62.] The Public Body said that, in 1997, an attempt was also made to locate a federal-provincial agreement from the period 1978 or 1979. The Valuable Papers of Treasury, maintained by the Treasury Library, were searched. The Head of Library Services indicated that the

Treasury Library did not have any intergovernmental agreement from 1978 or 1979 dealing with “contingent liability” or “oil export tax”.

[para 63.] The Applicant now asks that I compel the Public Body to conduct a search of all federal-provincial agreements.

[para 64.] I do not intend to order the Public Body to conduct a search of all federal-provincial agreements, as that would be requiring the Public Body to cast an unreasonably wide search net, wider than the Applicant’s original request. Furthermore, it is unclear to me how a federal-provincial agreement dealing with oil export tax would answer the Applicant’s specific questions about the Province’s contingent liability.

iii. Records for the interval between the 1997 request and the 1998 request

[para 65.] On the 1998 request, the Public Body did not search for records for the interval between the 1997 request and the 1998 request.

[para 66.] In my view, unless two requests coincide in time, there is no basis on which a public body may rely on a previous search to justify not searching for records that may have been created in the interval between the two requests.

[para 67.] Therefore, I find that it was not reasonable for the Public Body to rely on a records search conducted on the 1997 request, when deciding not to conduct a records search for the interval between the 1997 request and the 1998 request. I intend to order that the Public Body conduct a records search for that interval.

c. Related issues that the Applicant has raised

[para 68.] The Applicant has raised three related issues:

- i. Should the Applicant’s name have been removed from the 1998 request before the Public Body conducted a search?
- ii. Is the Public Body responsible for searches conducted by other public bodies?
- iii. Should the Public Body have provided the Applicant with a detailed accounting of what it and other public bodies searched?

i. Should Applicant's name have been removed from the 1998 request before the Public Body conducted a search?

[para 69.] The Applicant asserts that the duty to assist must be conducted in an impartial manner. The Applicant states that the application of the search results from the 1997 request to the 1998 request does not constitute impartiality. The Applicant relies on Investigation Report 98-IR-009 issued by my Office. That report contains the following recommendation:

When access requests are sent to various staff for action, only the text associated with the request is sent and the name of the applicant is kept confidential.

[para 70.] In addition, page 39 of the FOIP Manual says:

The identity of the applicant should only be disclosed:

- *to those officials and employees of the public body who have a need to know it in order to carry out their job duties; and*
- *when the disclosure is necessary and proper to carry out the public body's functions in processing the applicant's request.*

[para 71.] The Applicant appears to be drawing an inference that, because the Public Body knew who the Applicant was on both the 1997 request and the 1998 request, that knowledge influenced the Public Body's decision not to conduct a records search on the 1998 request. Thus, in the Applicant's mind, retaining the Applicant's name on the request did not ensure impartiality of the Public Body's response.

[para 72.] In this case, there is no direct evidence before me as to whether the Applicant's name was removed from either the 1997 request or the 1998 request before those requests were sent to the Public Body's staff to search. The only evidence I have is that the Employee knew that the two requests were similar.

[para 73.] Therefore, in the absence of evidence, I can make no finding as to whether the Public Body removed the Applicant's name from the two requests before sending them to the Public Body's staff for searching. However, nothing turns on this, because there is also no evidence before me that the Public Body did not act impartially in providing a response. The Applicant's assertion that the Public Body did not act impartially is unsubstantiated.

ii. Is the Public Body responsible for searches conducted by other public bodies?

[para 74.] The Public Body says it asked four other public bodies to conduct searches on the 1997 request: the Auditor General, Alberta Justice, Alberta Energy, and the Provincial Archives. Alberta Justice found one relevant record.

[para 75.] The Public Body also asked Federal and Intergovernmental Affairs to look for a 1978 or 1979 federal-provincial agreement. Although Federal and Intergovernmental Affairs did not find such an agreement, in the course of its search, it found some other relevant records that were provided to the Applicant.

[para 76.] The Applicant argues that Order 96-022 applies to cloak the Public Body with the responsibility for searches conducted by other public bodies. Consequently, the Applicant asks that I order the Public Body to request further searches from Alberta Energy, Alberta Justice and Federal and Intergovernmental Affairs for documents dated from 1973 to 1992 inclusive.

[para 77.] I do not intend to comply with the Applicant's specific request, for the following reasons.

[para 78.] In Order 96-022, I discussed the duty to assist as it relates to a public body's search of archival records held by the Provincial Archives. I said that, by a public body's undertaking to itself search the Provincial Archives, the public body was responsible for that search.

[para 79.] This case can be distinguished from Order 96-022. In this case, the Public Body did not itself search the four other public bodies. Instead, the Public Body asked those public bodies to search. Those public bodies conducted their own searches.

[para 80.] In Order 96-022, I agreed that a public body must make every reasonable effort to search for the records that have been requested. I further agreed that a public body will meet its duty to assist an applicant where it makes every reasonable effort to search for the records requested. But a public body must search only for records that are in its custody or under its control. Order 96-022 should not be interpreted as imposing a requirement that a public body search for records in the custody or under the control of another public body.

[para 81.] Therefore, the Public Body is not responsible for the searches conducted by the four other public bodies. The Public Body

would be responsible for those searches only if it had conducted those searches itself.

[para 82.] Consequently, I will not order the Public Body to ask those other public bodies to conduct further searches.

[para 83.] Furthermore, I have not been asked to review the decisions of the other public bodies who conducted searches. They are not parties to this inquiry. Therefore, I cannot make any finding as to whether those public bodies conducted adequate searches, and I cannot order them to conduct further searches. If the Applicant wants further searches from those public bodies, the Applicant will have to make access requests to them.

[para 84.] The Applicant nevertheless submits that searches conducted by the other public bodies are insufficient to determine the issue of the adequacy of the Public Body's search. By this, I understand the Applicant to mean that the fact that other public bodies conducted searches does not assist the Public Body's claim to itself having conducted an adequate search.

[para 85.] I agree that another public body's conducting a search does not concern the Public Body's duty to assist. A public body's duty to assist is independent of what other public bodies do.

[para 86.] However, I want to deal briefly here with the informal administrative practice the Public Body has established in asking another public body to search for records on a request, rather than transferring the request to that public body under section 14 of the Act or sending an applicant directly to that other public body.

[para 87.] Page 34 of the FOIP Manual discusses transfers of requests to other public bodies under section 14 of the Act. Although that section deals with transfers of requests where two or more public bodies have an interest in the same record, I nevertheless find the following comment relevant to the process the Public Body used in simply asking other public bodies to search:

For the sake of administrative simplicity and good client service, the public body receiving a request should process it, consulting and seeking advice from the other interested bodies, rather than attempt to negotiate a complicated sharing of the request.

[para 88.] I do not want to discourage reciprocal arrangements among public bodies, such as an informal request to other public bodies to search, without a formal transfer of the request under section 14. It

seems to me that such an arrangement saves an applicant additional time and cost, and goes far in assisting an applicant.

[para 89.] However, I believe that a public body should inform an applicant that it is informally requesting another public body to search, so as to give the applicant a choice as to whether to ask for a formal transfer of the request or to go directly to that other public body and make an access request.

iii. Should the Public Body have provided the Applicant with a detailed accounting of what it and other public bodies searched?

[para 90.] The Applicant complains that the Public Body provided no information whatsoever about the search it conducted. In particular, the Public Body did not inform the Applicant about what steps had been taken to locate the records. Consequently, the Applicant has no information about the details of the search. The Applicant maintains that the Public Body's having set out the details of its search in its written submission to me is not sufficient to meet the duty to assist under section 9(1).

[para 91.] The Applicant again argues that Order 96-022 applies to cloak the Public Body with the responsibility for searches conducted by other public bodies. Consequently, the Applicant believes that the Public Body must provide a detailed accounting of what those other public bodies searched.

[para 92.] I have said that the Public Body is not responsible for the searches conducted by those other public bodies. Therefore, the Public Body is also not responsible for accounting for those other searches. I would not order the Public Body to provide a detailed accounting of the searches conducted by those other public bodies.

[para 93.] Furthermore, I would not review the searches conducted by those other public bodies because the Applicant has not made access requests to those other public bodies and has not asked me to review their decisions. Those public bodies are not parties to this inquiry. Therefore, I would not order those public bodies to provide a detailed accounting of the searches they conducted.

[para 94.] The Applicant also asks that I order the Public Body to provide a detailed accounting of its search by indicating the procedure the Public Body used in conducting the search, including but not limited to the individuals contacted, the departments contacted, the files and records reviewed and the archived materials searched.

[para 95.] In Order 96-022, I said that a public body must make every reasonable effort to search for the records requested and inform the applicant in a timely way of what it has done.

[para 96.] Page 55 of the FOIP Manual discusses the appropriate response to an applicant when a record does not exist:

The Public Body cannot locate records responsive to the request. If, after consulting with the applicant, it still appears that no records exist, a letter informs the applicant of that fact and the steps taken to attempt to find records. Where a record has been destroyed prior to receipt of the request, information is provided on the date of destruction and the authority for carrying it out (e.g., the appropriate records disposition number or authorization).

[para 97.] I agree that that kind of response would meet the response requirements of section 9(1).

[para 98.] The Public Body's May 5, 1998 response to the Applicant said only that the Public Body was advised by its manager that no records were created.

[para 99.] That response was not open, accurate or complete because it did not say anything about what the Public Body had done to arrive at its conclusion that no records were created.

[para 100.] Specifically, the response was not open because the Public Body was relying on the records search conducted on the 1997 request and on the opinion of the Employee that no records were created, but the response did not tell the Applicant this. The response was not accurate from the point of view that no records were created, when it was unknown as to whether records were created. The response was also not complete because it did not tell the Applicant what the Public Body searched on the records search conducted on the 1997 request. The Public Body would have met its duty to respond completely if it had given the Applicant a description of that search, as contained in the Public Body's submission to me, and an explanation that the Public Body did not conduct a further search because it was relying on the records search conducted on the 1997 request and on the Employee's opinion.

[para 101.] The kind of detailed accounting about the search conducted in 1997, as set out in the Public Body's submission, goes far to meeting the response requirements of section 9(1). That accounting includes:

- a chronology of the Public Body's search
- a list of files the Public Body searched

- a summary of the electronic and manual search the Employee conducted
- names and numbers of files the Public Body became aware of, but could not locate
- files the Public Body determined had properly been destroyed, and the disposal number for those files

[para 102.] However, to respond completely, the Public Body is not required to name the individuals contacted or to tell the Applicant about the kinds of records contained in files that were searched, contrary to what the Applicant believes. That would go beyond what is required by section 9(1).

[para 103.] I agree with the Applicant that the description of the search, contained in the Public Body's submission, does not meet the Public Body's duty to respond to the Applicant openly, accurately and completely, as provided by section 9(1). However, given the details contained in the submission, I believe that it would serve no useful purpose now to order the Public Body to comply with its duty to respond to the Applicant openly, accurately and completely with regard to the records search conducted on the 1997 request.

d. Incidental issues

[para 104.] There are three incidental issues remaining to be dealt with: (i) the accuracy of the Employee's written statement, which the Public Body provided to the Applicant; (ii) the Applicant's amendment of the 1998 request; and (iii) the Applicant's request, contained in the Applicant's rebuttal submission, that I order an oral hearing and cross-examination.

i. Accuracy of the Employee's written statement

[para 105.] Because the Public Body decided that no records were created, the Public Body subsequently agreed to provide the Applicant with a written statement from its Employee, which was intended to answer the Applicant's questions on the 1998 request.

[para 106.] The Applicant complains about what the Applicant says is inaccurate information contained in the Employee's statement, arguing that an inaccurate statement does not comply with the Public Body's duty to respond accurately, as provided by section 9(1). The Applicant also says that information provided in the statement does not indicate that the Public Body conducted an adequate search.

[para 107.] In my view, “accuracy” under section 9(1) goes to the Public Body’s response on the 1998 request, not to the contents of the Employee’s statement the Public Body chose to provide the Applicant subsequent to the Public Body’s response on the 1998 request. The accuracy of any information contained in the Employee’s statement is not an issue under section 9(1), and I do not intend to consider it. The Employee’s statement expresses an opinion; the Applicant does not have to accept it.

ii. Applicant’s amendment of the 1998 request

[para 108.] On January 6, 1999, after the Public Body had responded to the Applicant and the Applicant had received the Employee’s statement, the Applicant unilaterally amended the 1998 request. The Applicant now appears to be arguing that the duty to assist and respond, as provided by section 9(1), should also apply to that amended request.

[para 109.] In my view, it is open to an applicant to amend a request for access during the time that an applicant and public body are negotiating to clarify or narrow the applicant’s request. It seems to me that it would be reasonable for an applicant to amend a request any time up until a public body responds to an applicant on the access request.

[para 110.] However, it is not reasonable for an applicant to unilaterally amend an access request after an applicant has asked me to review a public body’s decision on the access request before amended, as here. The Public Body is not under a duty to respond to that amended request or to conduct a further search. Consequently, I will review only the adequacy of the search and the Public Body’s response on the access request before amended.

[para 111.] Nevertheless, the inclusive date of records asked for in the 1998 request, as amended (1978-1979), is encompassed in the inclusive date of records asked for in the 1998 request before amended (1991-1992). Therefore, my review of the Public Body’s search for records and response to the 1998 request will coincidentally include the Applicant’s amended request.

iii. Applicant’s request for an oral inquiry and cross-examination

[para 112.] In the Applicant’s rebuttal submission, the Applicant asked that I make an order granting the Applicant the right to have an oral hearing for the purpose of cross-examining the Public Body’s witness(es) about the matters in issue, particularly as to the destruction of records.

[para 113.] I decline to make such an order, for two reasons.

[para 114.] First, the Applicant has no right to an oral hearing and cross-examination: see section 66(3) of the Act and Order 97-009. There are no special circumstances in this case that would justify allowing the Applicant these rights.

[para 115.] Second, I have the power under the Act to independently review decisions of public bodies. In this case, I have asked the Public Body to provide me with information about its records retention and disposition schedules, so that I may determine whether records have properly been destroyed.

3. Conclusion under section 9(1)

[para 116.] Under section 9(1) of the Act, the Public Body did not meet its duty to assist the Applicant as the Public Body did not conduct an adequate search for records on the 1998 request. The Public Body breached its duty under section 9(1) in that it:

(a) relied unreasonably on the Employee's opinion that no records were created, when deciding not to conduct a records search on the 1998 request;

(b) relied unreasonably on the Employee's opinion that no new records were created, when deciding not to conduct a records search for the interval between the 1997 request and the 1998 request; and

(c) relied unreasonably on a records search conducted on the 1997 request, when deciding not to conduct a records search on the 1998 request, in regard to the following records:

(i) archival records contained at Treasury Storage and the Alberta Records Centre;

(ii) records for the period from 1973 to 1977; and

(iii) records for the interval between the 1997 request and the 1998 request.

[para 117.] I intend to order that the Public Body conduct searches for the records set out in (c) above.

[para 118.] Under section 9(1) of the Act, the Public Body did not meet its duty to respond to the Applicant openly, accurately and completely on the 1998 request. The Public Body breached its duty under section 9(1)

in that it did not provide the Applicant with (i) an explanation that it was relying on the records search conducted on the 1997 request and on the Employee's opinion; and (ii) an accounting of what it searched on the 1997 request.

[para 119.] However, given the details contained in the Public Body's submission, I believe that it would serve no useful purpose now to order the Public Body to comply with its duty to respond to the Applicant openly, accurately and completely with regard to the records search conducted on the 1997 request.

V. ORDER

[para 120.] I make the following Order under section 68(3)(a) of the Act.

[para 121.] I order the Public Body to conduct a search for the following records:

(i) archival records contained at Treasury Storage and the Alberta Records Centre (1973 to September 1, 1998), for the following categories of records: contingent liabilities, the audit committee, consolidated accounts, and the general revenue fund. It is not necessary that the Public Body repeat that part of the search it conducted and reported to me during the inquiry;

(ii) records for the period from 1973 to 1977; and

(iii) records for the interval between the 1997 request and the 1998 request.

[para 122.] As set out in paragraphs 60 and 61 of this Order, I order the Public Body to respond to the Applicant about the search it conducted and reported to me during the inquiry, and about the searches I have now ordered it to conduct. The Public Body's response to the Applicant is also to comply with the requirements set out in paragraph 96 of this Order.

[para 123.] I further order that the Public Body 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