ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-035

April 28, 2000

ALBERTA JUSTICE
ALBERTA INFRASTRUCTURE

Review Numbers 1612 and 1624

I. BACKGROUND

[Para 1.] Several years ago, the Applicant's daughter, a young adult who resided with the Applicant and his spouse, was killed in a train/automobile collision in Alberta. She was a passenger in the automobile. The driver of that car also was killed.

[Para 2.] From that collision there resulted a number of official reports, most notably the usual compendium of reports from members of the local police service who attended the scene of this tragedy. The officers' reports include witness statements, observations at the scene, accounts of reactions from next-of-kin, intersection measurements and traffic movement calculations, and speculation about possible causes of the collision.

[Para 3.] Parts of the compendium of police reports were forwarded by the police service to the Chief Medical Examiner's Office, a branch of Alberta Justice ("Justice"). A slightly different but overlapping extract from the compendium of police reports was forwarded by the police service to Alberta Transportation and Utilities, now Alberta Infrastructure ("Infrastructure") for analysis and inclusion in the Alberta Collision Information System. The forwarding of the extracted reports is required and authorized under Alberta legislation, and is standard procedure in fatality occurrences.

[Para 4.] On February 7, 1997, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Justice. The Applicant asked for:

> “…a copy of the investigation into my daughter’s accident…”

His request cited file numbers from records held by the police department, the railway company, and a federal investigative body, as well as his daughter’s name and the date of the accident.

[Para 5.] Justice numbered that access request as #97-P-00133.

[Para 6.] When the 1997 access request was processed by Justice, the Chief Medical Examiner’s Office replied on behalf of Justice. By letter dated April 28, 1997, the Chief Medical Examiner’s Office sent to the Applicant a 54-page report (called a “partial release”), in response to access request #97-P-00133. In that letter, the Chief Medical Examiner, in his second paragraph, wrote:

> “The affected third parties have consented (or failed to respond) to the disclosure of the information. I am pleased to advise you that The Office of the Chief Medical Examiner has decided to provide partial access to the records you requested.”

[Para 7.] On February 24, 1999, the Applicant initiated another access request to Justice, remade or finally made on March 8, 1999. The Applicant asked for:

> “ a full and complete copy of (*the police service file cited by its police number*)…”

He again added the date of the accident and his daughter’s name for clarity.

[Para 8.] Justice numbered that access request as #98-P00264.

[Para 9.] On March 17, 1999, an Assistant Deputy Minister of Justice sent the Applicant a letter in response to access request #98-P00264, along with another copy of the police report, now 61 pages, with just one page from the Medical Examiner’s report “missing”.

[Para 10.] On March 17, 1999, the Applicant personally delivered an access request to Infrastructure. The Applicant asked for:

> “…all information into accident (*police file number*).”

He cited the precise file number assigned to the investigation reports by the local police service.

[Para 11.] Infrastructure numbered that access request as #98-P-00022.

[Para 12.] Infrastructure took an extension of time under the Act to consult with Justice and the local police service. On April 26, 1999, Infrastructure responded to the Applicant on access request #98-P-00022, sending a confirmation summary but not the records themselves. At the Applicant's insistence, Infrastructure provided copies of its records (57 pages) to the Applicant for access request #98-P-00022 on May 4, 1999. On May 12, 1999, the Applicant requested that Infrastructure give him a copy of a file specified by the police service's file designation.

[Para 13.] On April 26, 1999, the Applicant requested that the Information and Privacy Commissioner review Justice's response to access request #98-P-00264. The Commissioner's Office numbered that request for review as Review Number 1612. On May 12, 1999, the Applicant requested that the Commissioner review Infrastructure's response to access request #98-P-00022. The Commissioner's Office numbered that request for review as Review Number 1624.

[Para 14.] On May 5, 1999, the Commissioner assigned Review Number 1612 to a Portfolio Officer for mediation. On May 18, 1999, the Commissioner assigned Review Number 1624 to the same Portfolio Officer for mediation.

[Para 15.] Mediation ultimately was not successful. On August 5, 1999, the Portfolio Officer wrote to the Applicant, Justice and Infrastructure, setting down Review Numbers 1612 and 1624 to written inquiry, with briefs due September 16 and rebuttals due October 14, 1999.

[Para 16.] On September 17, 1999, the Commissioner's Office exchanged written briefs among the Applicant, Justice and Infrastructure.

[Para 17.] On October 19, 1999, the Commissioner's Office exchanged the rebuttal briefs among the parties.

[Para 18.] On October 19, 1999, the Commissioner elected to delegate his powers to conduct an inquiry and issue an order in respect of Review Numbers 1612 and 1624. The Commissioner delegated that responsibility to me, John Ennis, an officer of the Office of the Information and Privacy Commissioner.

[Para 19.] As the delegated Inquiry Officer, I accepted the Portfolio Officer's recommendation that the two reviews be joined into a single inquiry. I also decided to continue the process already begun to conduct the inquiry in writing. During the inquiry I had the benefit of initial submissions from the Applicant and from both public bodies. The public bodies' submissions

included copies of the disclosed materials in their pre-severed form. I also had the benefit of rebuttal briefs from each party.

[Para 20.] On November 15, 1999, I opened the inquiry and commenced the examination of written briefs and rebuttal briefs.

[Para 21.] The version of the Act that I am applying to the review of their actions is that consolidated on February 2, 1999. That version has since been superceded by later amendments.

II. RECORDS AT ISSUE

[Para 22.] As this inquiry concerns the duty to assist and the adequacy of the search for records, the records themselves are not directly at issue.

III. ISSUES

[Para 23.] The issues before the inquiry were capsulated in the August 5, 1999 letter sent out to the Applicant by the Portfolio Officer assigned to mediate Review Numbers 1612 and 1624. The Portfolio Officer summarized the issues as:

> "Duty of the public bodies to assist the applicant, including the thoroughness of the search for the records. You have indicated that you believe that either or both public bodies are in possession of records that have not been made available to you. The records relate to the death of your daughter, [named], in a motor vehicle collision with a train on [date]. You have also indicated that the public bodies did not respond to you openly, accurately and completely as required by Section 9…"

[Para 24.] Consequently, there are two issues in this inquiry:

A. Did Alberta Justice make every reasonable effort to assist the Applicant and to respond to him openly, accurately and completely, as provided by section 9(1) of the Act?

B. Did Alberta Infrastructure make every reasonable effort to assist the Applicant and to respond to him openly, accurately and completely, as provided by section 9(1) of the Act?

[Para 25.] 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."*

It is necessary that I consider whether Justice and Infrastructure each conducted an adequate search for records under section 9(1) and whether they responded to the Applicant openly, accurately and completely.

[Para 26.] The Applicant said that he wants a new (and more thorough) investigation of the accident. That is not relevant to this review process since the Act does not give the Commissioner or his delegate the power to order a new investigation.

[Para 27.] I note as well in the Applicant's rebuttal submission that the Applicant refers to an access request he made in 1998 to Justice (no details provided) and another request he made in August 1999 to numerous public bodies. Those requests are not at issue in this inquiry.

IV. BURDEN OF PROOF

[Para 28.] It is the Applicant who claims that Justice and Infrastructure have not properly assisted him and have not responded openly, accurately and completely. His claim is summarized in the Portfolio Officer's August 5, 1999, letter, cited above. I look to the Applicant to explain his claim. I then look to the Justice and Infrastructure to carry the burden of proving their searches were adequate.

V. DISCUSSION: ISSUE A (Justice)

1. Adequacy of the search for records

[Para 29.] The Applicant submits that he made an access request in 1997, and received certain records. He also claims that he made an access request in 1999, and that he received the same information plus an additional record, with further indications that, based on gaps in document pagination, there might still be records accessible to him that have not been disclosed to him by Justice.

[Para 30.] The Applicant's comparison of the two disclosures to him, one in 1997 and another in 1999, leaves him convinced that a third run through the information, as a result of a Commissioner's Order, would produce even more information. Hence his claim that the disclosure he has received under his 1999 access request is not adequate.

[Para 31.] The Applicant's claim concerning Justice's response is built on the belief that Justice has the comprehensive police file, including all parts of all reports in the police compendium of reports concerning the accident.

[Para 32.] While I do not accept the Applicant's view that, because he has had two deficient responses from Justice, there must be a better third response, I am sympathetic to the wariness he feels in having received more information on the second go-round, but having received it under Part 2 of the Act. He might reasonably feel there is something being hidden from him.

[Para 33.] However, I do not accept that belief as warranted. There is good reason to accept the view that the police would only send those parts of the compendium that are of interest and use to the Chief Medical Examiner in the exercise of the Chief Medical Examiner's functions. It is reasonable to accept that some portions are not forwarded, and so there will occur gaps in the page series for the records as they are received at the Chief Medical Examiner's Office.

[Para 34.] Though such cautionary disclosures appear to have been standard practice before the Act came into force, selective transfer of purpose-specific, limited information between public bodies, where allowed for in law, is very much in keeping with the principles of the Act. It likely would not be appropriate for the police service to transfer its whole file on this accident to either Justice or Infrastructure.

[Para 35.] The one place where the compendium of reports can be found in whole would be at the police service involved. At the time that the Applicant made his requests to Justice and to Infrastructure, police services were not public bodies subject to the Act. As of October 1, 1999, they are public bodies subject to the Act.

[Para 36.] Based on the Applicant's access request, Justice says it searched through its Central records, its Medical Examiner's Office, and the Prosecutions Branch of the Criminal Justice Division. At page 7 of its brief, Justice further states that it searched for records using "broader terms than just the Report which the Applicant had requested."

[Para 37.] Alberta Justice describes the extraordinary efforts it went through to satisfy this Applicant, including meeting with the Applicant and his spouse to explain the apparent inconsistencies between the 1997 response and the 1999 response.

[Para 38.] The public body's explanations are reasonable on that point. The 1999 disclosure did include more material than the 1997 disclosure, but not any different material in the area of overlap. The information had not changed, and the severing of it remained as before.

[Para 39.] However, the 1999 edition contained an extra report not previously disclosed to the Applicant. Justice does not explain how it is that the "External Examination Report" was included in the 1999 response but was not found in the 1997 response. At point 8 on page 4 of Justice's submission, I am led to believe that this particular document, a graphic drawing of a human figure with injuries marked for reference, may not be part of "the usual disclosure of information to family members of deceased persons." The external examination is said on the form to have been done on the morning after the accident, and the External Examination Form is clearly a handwritten, working record rather than a piece of catch-up paperwork done at a later date. It must have existed at the time of the 1997 request, yet somehow was not provided in the response material. I view the omission of this report from the 1997 response as a lapse in administration probably caused by confusion between traditional practices at the Chief Medical Examiner's Office and the new requirements arising out of the Act.

[Para 40.] I am satisfied by the explanations from Justice regarding the scope of the search and the completeness of the record. I find that Justice conducted an adequate search for records.

2. Response to the Applicant

[Para 41.] Sometime between February 24 and March 8, 1999, the Applicant made a proper access request to Justice under Part 1 of the Act. Justice registered that request as a proper access request, giving it a number in series with other accepted requests.

[Para 42.] Justice's subsequent letter to the Applicant, sent March 17, 1999, by an Assistant Deputy Minister, told the Applicant, at the fourth paragraph, that:

> "Given the fact that we are sending to you information which you have already received, we are treating your request for information as being outside of the usual request process under the *Freedom of Information and Protection of Privacy Act*, and we are releasing this information to you under section 38(1)(aa) of the Act: …"

[Para 43.] Section 38(1)(aa) states:

> *"38(1) A public body may disclose personal information only*
>
> > *(aa) to a relative of a deceased individual if, in the opinion of the head of the public body, the disclosure is not an unreasonable invasion of the deceased's personal privacy, …"*

[Para 44.] Section 38(1)(aa) allows discretion to the head to make a disclosure of personal information about a deceased person to a relative, provided always that there is no unreasonable invasion of that deceased person's privacy and that the information is not personal information about other persons, including other deceased persons, not related to the relative who is given the information. It is a compassionate mechanism to overcome the obvious problem that deceased persons cannot express consent as third parties.

[Para 45.] In his Order 97-002, at paragraph 108, the Commissioner has considered the relevance of section 38 to access requests:

> "Consequently, Section 38 is not relevant to a request for access under the Act. The right to access information is under Part 1 of the Act only."

[Para 46.] Section 38 clearly lies outside Part 1 of the Act. It is the section that enumerates in detail those circumstances in which a public body can disclose personal information to another party without having the express consent of the individual that the personal information is about.

[Para 47.] Section 38 allows discretion to the head to make a disclosure, provided the specific tests contained in the pertinent sub-section are met. Section 38 does not place an obligation on the head to make a disclosure, and does not attract the rigourous standards for openness, accuracy and completeness enforced upon responses to Part 1 access requests.

[Para 48.] It follows then that how openly, accurately and completely a head discloses information under Part 2 is entirely at the head's discretion, confined of course by the specific cases and conditions prescribed in each sub-section of section 38.

[Para 49.] Justice's submission to this inquiry, at page 4, point 10, makes it clear that Justice purposely chose to reply to the Applicant under Part 2, though I do note that Justice characterized its reply as a response under the Act, and advised the Applicant of his right to request a review by the Commissioner:

> "10. The response letter from Justice (TAB 2) indicates that the head of Justice made the decision to respond to the Applicant under Part 2 of the Act rather than Part 1. This decision was made for various reasons.
>
> a. The head appreciated that this is an extremely difficult issue for the Applicant, and wanted to take special care in responding to him. The head took this factor into consideration when he decided to respond in the way which would be most timely and would cause the least amount of additional emotional distress, both to the Applicant and to the third parties.

b. The Applicant had already received this exact copy of the Report in response to his 1997 request, and Justice had no further records related to the Report. The head decided that because the third parties had already been asked for their input about the disclosure of exactly the same information, it was appropriate to apply that previous third party input to this request. Proceeding under Part 2 of the Act enabled Justice to respond quickly to the Applicant, since he would not be receiving any new information except for the one-page External Examination Report.

c. By responding under Part 2 of the Act rather than Part 1, the head was able to avoid causing additional distress to the third parties by contacting them for input about information which they had already provided comments on in 1997, and to save the considerable amount of time which would have been required to contact those third parties again and receive their input. As a result, Justice was able to respond to the Applicant within 10 days of his submitting his request. As well, the Applicant did not have to pay the usual $25 application fee, nor any processing fees.

d. The third parties mentioned had already been contacted at the time of the Applicant's 1997 request. Given the highly sensitive and traumatic nature of this accident, the head decided that contacting the third parties again with notices under Part 1 of the Act would be unnecessarily traumatic for those third parties.

e. The Applicant had already received the personal information of the third parties who had consented to the disclosure of their information in response to the Applicant's 1997 request, so the head determined that it would not be an unreasonable invasion of those third parties' privacy if their information were released again to the Applicant.

f. The head decided not to release to the Applicant the third party personal information which had been removed from the Report when it was disclosed to the Applicant pursuant to his 1997 request."

[Para 50.] I surmise from this explanation that the problem of reliving third-party notices was the prime reason that Justice decided to not respond under Part 1. It is not clear to me that the notices should present so daunting an obstacle if they were properly done, and third-party privacy rights properly respected, on the earlier access request.

[Para 51.] Section 9(1) sets out the standard for public bodies when they are presented with an access request by an applicant under Part 1 of the Act. By logic, the standard in section 9(1) cannot be met without responding to the applicant under Part 1. Once that response has been made, the actions of the public body can be subjected to independent review to see if the standard truly has been met.

[Para 52.] Justice went out of its way to provide the 1999 disclosure outside the workings of Part 1 of the Act. I cannot see anything in the Act that allows the head that measure of latitude, unless of course the Applicant concurs and agrees to withdraw the standing Part 1 access request. No party is saying that happened in this case. There is nothing in the correspondence between the parties, or in Justice's submission, indicating that the Applicant was agreeable to receiving the information outside Part 1 of the Act. Therefore, the head's action was unilateral and without authority.

[Para 53.] The Applicant had a legal right to a response, and the head deliberately denied him that response and so that right. The head did disclose some records to the Applicant, but did so under the discretionary powers of Part 2.

[Para 54.] Through Justice's submission, the Applicant is asked to believe that he was given alternative treatment as a compassionate measure, and that may be. Nevertheless, the public body has denied the Applicant his right to access under Part 1 of the Act.

[Para 55.] In providing records to the Applicant under Part 2 of the Act, I find that Justice did not respond to the Applicant's access request, as provided by section 9(1) of the Act. It follows that the question of response standards, the attributes of *openly, accurately and completely* prescribed in section 9(1), cannot be assessed by independent review. They are not met until they are met through a proper response, and that response has not been made.

VI. DISCUSSION: ISSUE B (Infrastructure)

1. Adequacy of the search for records

[Para 56.] In his request to Infrastructure, the Applicant identified the records by using the file number assigned to them by the local police service. The evidence from the Unit Head in Infrastructure's Collision Research and Analysis Section indicates that she was able to locate the precise records in her Unit's files by using the police file number. She states that all records in Infrastructure's file related to that forwarding of information by the police service "were considered relevant to the request and included in the response" to the Applicant's request.

[Para 57.] I am satisfied by the explanation from Infrastructure regarding the scope of the search and the completeness of the record. The evidence from Infrastructure, supported by a Statutory Declaration from a knowledgeable administrative employee, addresses the requirement for adequate search. I am satisfied that there are no more records to be had from Infrastructure.

[Para 58.] I find that Infrastructure conducted an adequate search for records.

2. Response to the Applicant

[Para 59.] The Applicant has two complaints about the Infrastructure's response: (i) Infrastructure copied Justice's response to the Applicant; and (ii) Infrastructure consulted with the police about disclosure to the Applicant.

(i) Copying Justice's response

[Para 60.] It appears that Infrastructure took the view that a prior disclosure by Justice in March 1999 left Infrastructure safe to respond in exactly the same manner to the Applicant in May 1999. To the extent that the records are identical and other circumstantial factors are equal, that would appear to be a reasonable proposition, provided Infrastructure has satisfied itself that Justice had responded openly, accurately and completely under Part 1 of the Act. But that was not the case here. Infrastructure based its response on a discretionary release of information by Justice under Part 2 of the Act.

[Para 61.] Comments at page 3 of Infrastructure's submission make it clear that Infrastructure's reliance on Justice's actions was complete and unquestioning:

> "It should be noted that our department would have considered other sections of the FOIP Act in the severing of the records, if the same records had not been severed and disclosed by Alberta Justice previously."

[Para 62.] Infrastructure's actions in relying on Justice are outside anything described in the procedural sections of the Act. That reliance was, in effect, an abdication of the responsibilities of Infrastructure under the Act. It had the effect of leaving to Justice the obligations Infrastructure had for responding to the Applicant under Part 1 of the Act. It did not fulfill Infrastructure's own duty to respond to the Applicant openly, accurately and completely, as provided by section 9(1).

[Para 63.] While the Act does set up situations where public bodies must consult with one another about the nature of records, it does not licence public

bodies to collaborate in dealing with applicants, or even in sharing the identity of applicants.

[Para 64.] In copying Justice's response to the Applicant, I find that Infrastructure did not respond to the Applicant's access request, as provided by section 9(1) of the Act.

(ii) Consulting with the police

[Para 65.] Infrastructure took an extension of time under the Act to consult with the police about the disclosure of records to the Applicant.

[Para 66.] It is reasonable for the Applicant to question the interference of the police in the processing of Infrastructure's request. While Infrastructure's response to the Applicant's claims casts the Applicant's concerns as being focused on the thoroughness of the search for records, the Applicant has pointed to the consultation with the police as compelling evidence of a willful effort to deny him information. At paragraph 12 of his submission, the Applicant writes about the meaning of missing pages:

> "This indicates that Alberta Justice and Alberta Transportation willfully did not respond openly, accurately and completely as required in Section 9 of the Freedom of Information and Privacy Act (sic). In addition Alberta Transportation contacted the (named police service) and asked what to release to me."

[Para 67.] The declaration from the Unit Head at Infrastructure's Collision Research and Analysis branch states that the police "did not request that records be removed from our file or that records not be disclosed to the Applicant." This goes only part way to alleviating the concern about possible interference. It is still not clear what role the police played in Infrastructure's decision to delay release of the records until the police had talked with the Applicant. Infrastructure's submission, at page 2, says that the police requested the delay:

> "…(the police service) had a meeting scheduled with the Applicant and requested that the meeting take place prior to the disclosure of our records."

[Para 68.] I must interpret that sentence as saying that the police asked Infrastructure to hold off responding until the police had talked with the Applicant. Infrastructure responded to the Applicant six days after his April 20, 1999, meeting with the police.

[Para 69.] I do find the extension and the consultation activity surrounding Infrastructure's response to be unsettling. The taking of a 30-day extension to

consult with Justice's FOIP officials and with FOIP officials from the local police service that created the records is not satisfactorily explained in Infrastructure's submissions.

[Para 70.] The records at Infrastructure resulted from the police's selective forwarding of police investigation reports. Some portions were not included as those portions have no bearing on the accident analysis function performed by Infrastructure. The Applicant either does not accept the possibility that the whole police report was not forwarded, or believes that the provincial public bodies he is dealing with under the Act have the authority to command the police to produce their entire files so that those files may in turn be available to the Applicant under the access provisions of the Act.

[Para 71.] The police service was not yet a public body under the Act in April and May 1999. The Applicant was using the Act to gather information about the police file from public bodies which were subject to the Act. He should not be surprised or offended that Infrastructure sought advice about the records from the police. It is reasonable to project that the Applicant would have withdrawn his access request to Infrastructure if he had been able to convince the police service to provide the entire report to him from its records. I do not accept that the consultation between Infrastructure and the police was proof of any willful plot by the authorities to deny records to the Applicant.

[Para 72.] Infrastructure does not state its reason(s) for deciding to consult with the police. I believe that Infrastructure was driven to consult with the police by the exhortations of the Applicant himself. He specified his request by a police file number, and he challenged both Justice and Infrastructure to turn up the entire police file in their responses to him. The consultation with the police and the delay associated with that step were valid service outcomes given the insistence by the Applicant that he should receive the entire compendium of police reports from Justice and Infrastructure.

[Para 73.] I find that, in consulting with the police about disclosure of the records to the Applicant, Infrastructure did not thereby fail to respond to the Applicant openly, accurately and completely, as provided by section 9(1).

IX. ORDER

[Para 74.] I make the following Order under section 68 of the Act.

[Para 75.] I find that Justice and Infrastructure conducted adequate searches for records.

[Para 76.] However, in providing the records to the Applicant under Part 2 of the Act, I find that Justice did not respond to the Applicant's access request, as provided by section 9(1).

[Para 77.] I order Justice to respond to the Applicant openly, accurately and completely under Part 1 of the Act, as provided by section 9(1). I order Justice to review the responsive records and to properly sever any responsive records, including any records that may not have been provided to the Applicant as a result of Justice's response to the Applicant's 1999 access request under Part 2 of the Act, without regard or reference to any disclosures of information that may have been made to the Applicant by any public body in the past.

[Para 78.] In the event that there are no further records, I order Alberta Justice to provide a statutory declaration to that effect, with the original of that document sent to the Office of the Information and Privacy Commissioner and a copy sent to the Applicant.

[Para 79.] I find that Infrastructure, in relying on Justice's response to model its own reply to the Applicant, did not respond to the Applicant's access request, as provided by section 9(1) of the Act.

[Para 80.] I order Infrastructure to respond to the Applicant openly, accurately and completely under Part 1 of the Act, as provided by section 9(1). I order Infrastructure to review the responsive records and to properly sever any responsive records, without regard or reference to any disclosures of information that may have been made to the Applicant by any public body in the past.

[Para 81.] I further order Alberta Justice and Alberta Infrastructure to notify me in writing, within 50 days of being given a copy of this Order, that each respectively has complied with this Order.

John A. Ennis
Inquiry Officer