

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-039

April 6, 2000

ALBERTA ENERGY AND UTILITIES BOARD

Review Number 1619

I. BACKGROUND

[para 1.] The Applicant represents freehold mineral owners in Alberta. The freehold mineral owners hold title to all mines and minerals, except coal and petroleum on or under their lands. A petroleum company holds title to the petroleum on or under those lands. This division of minerals has resulted in the term “split title” and, hence, “split title lands”.

[para 2.] The word “petroleum” has been equated with the word “oil”. In *Borys v. Canadian Pacific Railway Company and Imperial Oil Limited*, [1953] 2 D.L.R. 65 (Judicial Committee of the Privy Council); affirming [1952] 3 D.L.R. 218 (Alberta Supreme Court, Appellate Division); reversing [1951] 4 D.L.R. 427 (Alberta Supreme Court, Trial Division), the Judicial Committee of the Privy Council agreed that “petroleum” (oil) and “gas” were different substances.

[para 3.] Thus, the petroleum company holds title to the petroleum (oil) and the freehold mineral owners hold title to the gas. This petroleum and non-petroleum ownership is sometimes referred to as “split title ownership”.

[para 4.] The freehold mineral owners have been involved in ongoing litigation to determine when and where their entitlement to gas should be established. As plaintiffs in the litigation, they argued that the

determination should be made after production has begun, when fluids enter the bottom of the well bore. At that point, pressure will usually have declined, resulting in some increase in gas and decrease in oil. The defendants argued that the determination should be made under initial reservoir conditions, before the equilibrium is disturbed and any pressure changes occur.

[para 5.] On July 15, 1998, the Alberta Court of Queen's Bench issued a decision on the plaintiffs' entitlement: see *Anderson v. Amoco Canada Oil and Gas*, [1998] A.J. No. 805 (Alta. Q.B.). Following the decision of the Judicial Committee of the Privy Council in *Borys v. Canadian Pacific Railway Company and Imperial Oil Limited* ("Borys"), the Alberta Court of Queen's Bench decided that entitlement was to be determined under initial reservoir conditions.

[para 6.] On September 1, 1998, the Applicant applied to the Public Body, as follows:

...

On behalf of our clients, [the Applicant] seeks to review all documents in the possession of the Board dealing with how the aforesaid definitions ["oil" and "gas"] were developed and how the Board interpreted these definitions in the 1949-1960 period. We further seek to review all documents having to do with the Board's interpretation of the 1951 decision of the Alberta Supreme Court in *Borys*, the 1952 Appellate Division decision, and the 1953 Privy Council decision, as these interpretations related to the Board's duties and obligations under the Act.

...

We would expect that each level of decision in *Borys* would have resulted in the Board reviewing its policies and procedures with respect to the licensing of wells on split title lands or spacing units comprising split title lands, and with respect to production, marketing or flaring of gas from such wells.

The Board has amended its well license application forms on a number of occasions with respect to the information which an applicant must disclose as to mineral rights under control. The Board may have files dealing with historical well license requirements in general, or with the licensing of Imperial Leduc No. 250 in particular.

During the 1949-1960 period, the Board played a role in assessing the value of freehold mineral rights for taxation purposes. We would expect that each level of decision in *Borys* would have caused the Board to review its method of assessment with respect to split title lands, and files may exist indicating what substances the Board considered subject to tax.

The decision of the Judicial Committee of the Privy Council in *Borys* is generally regarded as authority for the Rule of Capture in Canada. This rule impacts both Crown and freehold mineral rights. We would expect that the Board would have considered the *Borys* decision in any rulings it has made with respect to the application of the Rule of Capture. It may be that 'Rule of Capture' files exist within the Board.

The foregoing is not meant to be exhaustive. We note that in his authorized history of the pre-1960 Board, Mr. David Breen makes frequent references to 'Board history files' and 'ERCB' minutes. It may be that files equivalent to the 'Acts and Letters PNGCB about 1949', which we have examined, exist for the years 1950-1960, or that other Board history files are relevant.

[para 7.] The Applicant said that the "Act" to which the Applicant was referring was the 1949 Alberta *Oil and Gas Conservation Act*.

[para 8.] The Applicant did not receive a response from the Public Body. On October 7, 1998, the Applicant wrote to the Public Body, requesting a response. Again the Applicant did not receive a response. The Applicant followed up with three telephone calls, on October 20, November 2 and November 3, 1998. On November 6, 1998, the Applicant sent a further letter to the Public Body, asking about the status of the request.

[para 9.] On November 12, 1998, the Public Body finally responded by letter to the Applicant, but said that "It was not possible to be specific as to when a final response by the EUB will be forthcoming as there are no readily identifiable files containing the information requested."

[para 10.] On November 25, 1998, the Public Body provided the Applicant with a letter indicating that the time and cost to search for records would be eight weeks and \$8,600.00, respectively. On December 1, 1998, the Applicant paid \$4,300, which was half the estimated fee.

[para 11.] In a February 9, 1999 letter to the Public Body, the Applicant asked the Public Body for a fee waiver under section 87(4)(b) (the records relate to a matter of public interest).

[para 12.] On February 19, 1999, the Public Body informed the Applicant that an initial review had yielded no information or references to the records sought by the Applicant, and that additional materials were being brought in from off-site to be reviewed.

[para 13.] On February 22, 1999, the Applicant sent a letter to the Public Body, pointing out that twelve weeks had passed since the Public Body had estimated that eight weeks would be required for the search, and asking the Public Body how long it would take to complete its search.

[para 14.] On March 9, 1999, the Public Body wrote to the Applicant, indicating that ten additional boxes of records were scheduled to be delivered to the Public Body on March 9, 1999. That off-site documentation was to include supplemental legal files, including

material from the Public Body's former Drilling and Production Department. The Public Body also denied the fee waiver under section 87(4)(b).

[para 15.] On May 4, 1999, the Applicant wrote to me, as follows:

Although the Applicant has not yet been apprized of the results of its September 1, 1998 request, the Applicant hereby applies to the Information and Privacy Commissioner (the "Commissioner") to be excused from the payment of the fee for services associated with the request. The Applicant submits that in all of the circumstances it is fair to excuse payment, and the records relate to a matter of public interest.

In the event that the Commissioner is not prepared to excuse the Applicant from the payment of all of the aforesaid fee, the Applicant requests that the Commissioner review the Board's method of fee calculation.

[para 16.] On May 10, 1999, I authorized mediation of the Applicant's request.

[para 17.] On May 12, 1999, in a telephone call the Applicant made to the Public Body, the Public Body informed the Applicant that records responsive to the Applicant's request might exist in the Provincial Archives.

[para 18.] On May 21, 1999, the Public Body responded to the Applicant's September 1, 1998 access request, as follows:

A search by the Alberta Energy and Utilities Board (the "EUB") has failed to reveal any information or references as to how the definitions of "oil" and "gas" in the 1949 *Oil and Gas Conservation Act* were developed and interpreted by the Board in the 1949-1960 period. Nor did the search uncover information or references to judicial decisions in *Borys v. C.P.R. and Imperial Oil Limited* respecting the ownership of hydrocarbons produced from wells on split title lands.

The EUB's fee to address your request was estimated at \$8,600. You submitted a deposit of \$4,300 on December 1, 1999. The EUB suggested that [the Applicant] review the records of Board Minutes themselves to reduce the costs of completing the request which is what you did. I will complete an accounting of the actual EUB costs to address the request by the end of next week and I anticipate a refund to [the Applicant] for a portion of the deposit submitted.

[para 19.] On May 25, 1999, my Office informed the Public Body that the Applicant had asked that I review a number of matters, particularly the adequacy of the Public Body's search and the timeliness of the Public Body's response to the Applicant.

[para 20.] On June 3, 1999, the Public Body informed the Applicant that the actual fee was \$1458, and indicated that it would refund the remainder of the Applicant's deposit.

[para 21.] On August 9, 1999, the Public Body informed the Applicant that it decided to waive the fee "...due to the delay experienced by the Applicant and the fact that the Public Body was unable to produce records responsive to the request." In that letter, the Public Body also gave a breakdown of the hours it spent searching the records.

[para 22.] Mediation ultimately was not successful. By letter dated November 4, 1999, my Office set the following matters down for a written inquiry: the adequacy of the Public Body's search, the timeliness of the response, and the Public Body's exercise of discretion in initially refusing the request for a fee waiver.

[para 23.] I received written submissions from both the Applicant and the Public Body, by the November 26, 1999 deadline for those submissions. I also received rebuttal submissions from both the Applicant and the Public Body, by the December 10, 1999 deadline for those submissions.

[para 24.] As part of its submission, the Public Body included an employee's "affidavit" as to the search conducted. However, that "affidavit" was a statement from the employee, which was not sworn. Consequently, my Office requested that the Public Body arrange to have the employee's statement sworn, which the Public Body did.

[para 25.] 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 26.] As the inquiry relates primarily to the adequacy of the search and the timeliness of the Public Body's response, the records themselves are not directly at issue.

III. ISSUES

[para 27.] There are three issues in this inquiry:

- A. Did the Public Body conduct an adequate search for the records responsive to the Applicant's access request, such that the Public

Body met its duty to assist the Applicant, as provided by section 9(1) of the Act?

B. Did the Public Body respond to the Applicant in accordance with the time limits set out by section 10 of the Act?

C. Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(b) of the Act?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body conduct an adequate search for the records responsive to the Applicant's access request, such that the Public Body met its duty to assist the Applicant, as provided by section 9(1) of the Act?

1. General

[para 28.] The Applicant complains not only about the adequacy of the Public Body's search for records, but also about the Public Body's not having met its general duty to assist the Applicant. Both matters are contemplated by section 9(1) of the Act, which 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 29.] In this Order, I will deal separately with the matters of adequacy of the search for records and the Public Body's general duty to assist.

2. The adequacy of the Public Body's search for records

a. General

[para 30.] The Public Body maintains that it conducted an adequate search, based on the Applicant's access request. The Public Body provided an employee's affidavit to support its argument that it conducted an adequate search.

[para 31.] The Applicant maintains that the Public Body did not conduct an adequate search, for reasons that I will discuss below. The

Applicant wants me to order the Public Body to conduct a further and better search.

[para 32.] As to whether I should order a further and better search, I will consider this from the following three perspectives:

(1) Based on the Applicant's access request, for what dates of records was the Public Body required to search?

(2) Based on the Applicant's access request, for what records was the Public Body required to search?

(3) For what time period do I review the adequacy of the Public Body's search?

(1) Based on the Applicant's access request, for what dates of records was the Public Body required to search?

[para 33.] The Applicant complains that the Public Body searched for records only for the period of 1949-1960. The Applicant says that the Applicant placed no time limits on the request for information dealing with how the Public Body interpreted the three levels of *Borys* decisions in carrying out its duties and obligations under the 1949 *Oil and Gas Conservation Act*.

[para 34.] Consequently, I must decide whether the Applicant also asked for records from 1961 to September 1, 1998 (the date of the Applicant's access request), in relation to the *Borys* decisions. That answer will determine whether it was reasonable that the Public Body searched only for records for the period of 1949-1960.

[para 35.] The Applicant's access request, part of which is cited above, was long and complex. However, the Applicant's access request mentions only the period of 1949-1960. Furthermore, when I read the entirety of the Applicant's access request, it appears that the Applicant is focusing solely on historical interpretations, perhaps to gather evidence to appeal the 1998 decision of *Anderson v. Amoco Canada Oil and Gas*. I am left with the distinct impression that the Applicant was interested only in records for the period of 1949-1960.

[para 36.] In its November 25, 1998 letter to the Applicant, it is evident that the Public Body understands the Applicant's access request as being one for records for only the period of 1949-1960. The Public Body says:

This estimate is based on the estimated time required to go through the Board Minutes for the period 1949 through to 1960 to search for any references to *Borys*

v. CPR and Imperial Oil Limited, split title lands, definitions of oil, and Rule of Capture. Research time would also include searching, locating and retrieving legal opinions of the same time period, any legal files including information regarding Rule of Capture, and any historical files that may include well license policies and in particular, any policies having to do with split title lands.

[para 37.] The Applicant did not object to the Public Body's characterization of the Applicant's request as encompassing a search for records for only the period of 1949-1960. As the Applicant did not object, it was reasonable that the Public Body searched for records for only that period.

[para 38.] In a February 9, 1999 letter to the Public Body, the Applicant further summarized that the Applicant was seeking documents dealing with:

(a) how the definitions of 'oil' and 'gas' in the 1949 Oil and Gas Conservation Act (the "Act") were developed and interpreted by the Board in the 1949-1960 period; and

(b) how judicial decisions by the Supreme Court of Alberta, the Appellate Division of the Supreme Court, and the Judicial Committee of the Privy Council in Borys v. C.P.R. and Imperial Oil Limited respecting the ownership of hydrocarbons produced from wells on split title lands have been interpreted by the Board in the context of carrying out its duties and obligations under the Act.

[para 39.] That letter also mentions only the period of 1949-1960, but not in the context of the *Borys* decisions. However, the Applicant clearly indicates that the "Act" to which the Applicant refers is the 1949 *Oil and Gas Conservation Act*. The Applicant then refers to that "Act" in the context of the *Borys* decisions.

[para 40.] Therefore, it was reasonable that the Public Body searched for records for only the period of 1949-1960, and did not search for records for the period of 1961 to September 1, 1998. Consequently, I find that the Public Body was required to search for records only for the period of 1949-1960, which are the dates for which the Public Body says it searched.

(2) Based on the Applicant's access request, for what records was the Public Body required to search?

[para 41.] Based on the Applicant's access request, I have summarized what I believe are the records the Applicant requested for the period of 1949-1960:

- Documents dealing with how the definitions of "oil" and "gas" were developed

- Documents dealing with how the Board interpreted the definitions of oil and gas
- Documents having to do with the Board's interpretation of the *Borys* decisions, as those interpretations related to the Board's duties and obligations under the 1949 *Oil and Gas Conservation Act*
- The Board's review of its policies and procedures with respect to licensing of wells on split title lands or spacing units comprising split title lands
- The Board's review of its policies and procedures with respect to production, marketing or flaring of gas from wells on split title lands
- Files dealing with the historical well license requirements in general
- Files dealing with the licensing of Imperial Leduc No. 250 in particular
- The Board's review of its method of assessing the value of freehold mineral rights for taxation purposes with respect to split title lands
- Files indicating what substances the Board considered subject to tax
- Board rulings that consider the *Borys* decisions with respect to the application of the Rule of Capture
- Rule of Capture files
- Board history files
- ERCB minutes

[para 42.] In a June 3, 1999 letter to the Applicant, the Public Body listed the following files searched by the Public Body's staff on the Applicant's access request:

- EUB History Project Files
- Historical Letters to All Operators
- Board Decision Reports
- Board and Legal files (on-site and historical)
- Resource Development Group files (formerly part of Drilling and Production Department)

[para 43.] In the Public Body's affidavit, the Public Body lists the particular files it searched:

- Unnumbered Board Approval files – all files. These are the earliest Board applications, approvals and decisions. Decisions included in these files may or may not be included in the earliest "Decision Reports" files. (fiche)

- Board Orders (General Files) – 1950 (earliest files) Boxes 18, 26, 27
- All application files for Leduc Field, 1954 or earlier (fiche)
- Board Minutes – earliest minutes to 1955 (fiche)
- Well file for Leduc No. 250 (fiche)
- Old well card for Leduc No. 250 (fiche)
- Approvals – earliest files (Boxes 1-16)
- F Orders (Field Orders) 1950 (earliest files) Box 13
- G Orders (Pool Orders) 1950 (earliest files) Box 16
- Acts and Regulations for 1949-1950
- Arbitration Act for 1949-1950 (noted on well license) – brought in from the Court House Library

[para 44.] The Applicant’s submission contains the following complaints about the adequacy of the Public Body’s search:

(a) The Public Body was aware of the Application Advisory Group Minutes, but did not search them or the associated “extensive paper records”.

(b) In spite of the Applicant’s suggestion, the Public Body did not review files dealing with the Board’s role in assessing the value of split title freehold lands for mineral taxation purposes during the 1949-1960 period.

(c) In spite of the Applicant’s suggestion, the Public Body did not review Board History files.

(d) The Public Body should have searched administrative and policy files (both those sent to “storage” and current files), given that the information sought relates to matters of policy and procedure.

(e) The Public Body should have searched correspondence files.

[para 45.] In deciding whether the Public Body conducted an adequate search, I have reviewed the Applicant’s complaints and compared what the Applicant originally requested, with what the Public Body said it searched. I have also reviewed the Public Body’s Records Retention and Disposition Schedule, which the Public Body provided for the inquiry. I am mindful that the records requested pre-date any formal records management system of the Public Body.

***(a) Application Advisory Group (“AAG”) Minutes
and associated “extensive paper records”***

[para 46.] The Public Body says that the AAG was not formed until 1961, and the Applicant asked only for records and definitions from 1949-1960. The Public Body says it did search the index to the AAG files for key words and phrases.

[para 47.] Since the AAG minutes and associated “extensive paper records” are outside of the period of 1949-1960 for which the Applicant requested access, I find that the Public Body was not required to search for those records.

***(b) Files dealing with the Board’s role in assessing
the value of split title freehold lands for mineral
taxation purposes during the period of 1949-1960***

[para 48.] The Applicant did not ask for files dealing with the Board’s role in assessing the value of split title freehold lands for mineral taxation purposes during the period of 1949-1960. What the Applicant asked for was the Board’s review of its method of assessing the value of freehold mineral rights for taxation purposes with respect to split title lands.

[para 49.] I can reasonably assume that the Applicant wanted records dealing with this subject matter. Therefore, the Public Body would have been required to search through its files to find records containing that subject matter.

[para 50.] The Applicant did request files indicating what substances the Board considered subject to tax for that same period. The Public Body’s Records Retention and Disposition Schedule does not appear to contain files by that name. Therefore, the Public Body would also have been required to search through its files to find records containing that subject matter.

[para 51.] The Public Body said it reviewed all Board Approval files, as well as Board Orders (General Files) – 1950 (earliest files) Boxes 18, 26, 27. I agree that those would be logical records to review for the subject matters requested.

[para 52.] However, there is no evidence before me that the Public Body searched Board Orders (General Files) for 1951-1960. Therefore, I intend to order that the Public Body search for those files. If they exist, I intend to order that the Public Body search them for the foregoing subject matters.

[para 53.] I note from the Public Body's Records Retention and Disposition Schedule that the Administrative Department must permanently retain (off-site) the microfilmed master copy of all Board Orders and Approvals (Items 104 and 114). Assuming that Board Orders and Approvals are different from Board Order (General Files), I also intend to order that the Public Body search Board Orders and Approvals for the foregoing subject matters for the period of 1949-1960.

(c) Board History files

[para 54.] There appears to be some confusion about whether the Public Body was required to search for and review Board History files.

[para 55.] The Public Body says that, prior to the access request, it provided the Applicant with access to Board History files. Therefore, I assume that the Public Body must have searched for and located those files in order to provide them to the Applicant, but did not itself actually review the files for what the Applicant wanted.

[para 56.] Furthermore, on November 3, 1999, the Public Body informed the Applicant that the Board History files referred to in the Applicant's September 1, 1998 request were publicly available through the Board library.

[para 57.] Was the Public Body required to search again for and review Board History files on the Applicant's access request, even though the Public Body had given the Applicant access to those files just before the Applicant's access request?

[para 58.] In most situations, I believe that a public body would be required to conduct a search for and review whatever records an applicant requests, regardless of whether an applicant has been given access to those records outside of the Act. However, I believe this case is different.

[para 59.] There is evidence that the Public Body and the Applicant had agreed on one other occasion that the Applicant would review certain records, rather than the Public Body. The Applicant's February 9, 1999 letter to the Public Body said:

[The Applicant] has now completed its review of microfiche Board minutes for the period 1948 [sic] through to 1960. We thank you for making these records available...

Unfortunately, these minutes include no references whatsoever to the information which [the Applicant] seeks...

[para 60.] The Public Body's May 21, 1999 letter to the Applicant says:

...The EUB suggested that [the Applicant] review the records of Board Minutes themselves to reduce the costs of completing the request which is what you did.

[para 61.] Therefore, it was reasonable for the Public Body to assume that it did not have to search again for and review Board History files that it had previously provided to the Applicant for review, as that would reduce the Applicant's costs. Consequently, in this case, I find that the Public Body was not required to search for and review Board History files.

[para 62.] I believe the Applicant has a more sophisticated understanding of the records than do the persons within the Public Body who conducted the search for records. In my view, it was reasonable for the Public Body to assume that the Applicant could more readily locate what the Applicant wanted in those records than could the Public Body.

(d) Administrative and policy files ("storage" and current files)

[para 63.] The Applicant did not request access to "administrative" and "policy" files as such. The Applicant did request access to records relating to the Board's review of its policies and procedures (i) with respect to licensing of wells on split title lands or spacing units comprising split title lands; and (ii) with respect to production, marketing or flaring of gas from wells on split title lands.

[para 64.] Consequently, the Public Body was required to search its files for records containing the foregoing subject matters. However, the Public Body was required to search only for the period of 1949-1960, not for anything beyond that period.

[para 65.] The Public Body says it searched EUB History Project Files, Board Decision Reports and Board files (on-site and historical). The Public Body says it specifically searched Board Order (General Files) – 1950 (earliest files) Boxes 18, 26, 27.

[para 66.] However, there is no evidence that the Public Body searched Board Order (General Files) from 1951-1960. Therefore, I intend to order that the Public Body search for those files. If they exist, I intend to order that the Public Body search them for the foregoing subject matters.

[para 67.] The Public Body's Records Retention and Disposition Schedule requires that: (i) the Gas Department permanently retain in

that department all Policy Development records (Item 1136); (ii) Organization (policy and procedures) (Item 1412) records originating from the Legal Department be sent to the Provincial Archives for selective retention, after being retained off-site for 15 years; and (iii) the General Files (Correspondence relating to operational policies) (Item 1505) originating from the Oil Department be sent to the Provincial Archives for selective retention, after being retained in the Department for six years.

[para 68.] I am satisfied that the Public Body adequately searched its off-site records originating from the Legal Department. I am further satisfied that any relevant records for 1949-1960, originating from the Public Body's Oil and Gas Departments, would have been sent to the Provincial Archives for selective retention. Therefore, the Public Body was not required to search for those records.

(e) Correspondence files

[para 69.] The Applicant did not request access to "correspondence files". The Applicant did request access to documents or files containing a number of subject matters, such as files dealing with the historical well license requirements in general, or with the licensing of Leduc No. 250 in particular.

[para 70.] The Public Body was required to search for files only for the period of 1949-1960, not for anything beyond that period. The Public Body says it searched Historical Letters to All Operators and Resource Development Group files. The Public Body says it specifically searched all applications for Leduc Field, 1954 or earlier (fiche); well file for Leduc No. 250 (fiche); old well card for Leduc No. 250 (fiche); and approvals – earlier files (Boxes 1-16).

[para 71.] The Public Body's Records Retention and Disposition Schedule lists three potentially relevant areas in which correspondence is kept: (i) the Accounting Department, which has Operators' records containing general correspondence (Item 029); and (ii) the Gas Department, which has Administrative (General Files) records containing correspondence on administrative and operational matters (Item 1101); and (iii) the Oil Department, which has General Files containing correspondence relating to operation policies (Item 1505, previously discussed).

[para 72.] The retention period for the foregoing correspondence records is as follows: (i) Accounting Department, six years within the department, and destruction thereafter; (ii) Gas Department, two years within the department, and destruction thereafter; (iii) Oil Department, six years in the department, and selective retention by the Provincial

Archives thereafter. Given that these records would have been destroyed or sent to the Provincial Archives for selective retention, I find that the Public Body was not required to search for them.

[para 73.] Consequently, I find that the Public Body conducted an adequate search for the records dealing with the foregoing subject matters.

(f) Other records for which the Applicant requested access

[para 74.] The Applicant's February 9, 1999 letter to the Public Body said:

[The Applicant] has now completed its review of microfiche Board minutes for the period 1948 [sic] through to 1960. We thank you for making these records available...

[para 75.] Since the Applicant requested and reviewed ERCB (Board) minutes, I assume that the Public Body located all the minutes the Applicant requested. Therefore, the adequacy of the Public Body's search for ERCB minutes is not at issue.

[para 76.] The Applicant asked for documents dealing with how the definitions of oil and gas were developed. In my view, those documents likely would have been in the Public Body's legal files.

[para 77.] In its March 9, 1999 letter to the Applicant, the Public Body said that ten additional boxes were scheduled to be delivered to the Public Body on March 9, 1999. The off-site documentation was to include supplemental legal files. The Public Body further said that EUB staff were currently in the process of finalizing their review of existing on-site legal files.

[para 78.] Consequently, I find that the Public Body conducted an adequate search of its legal files for documents dealing with how the definitions of oil and gas were developed.

[para 79.] The Applicant also requested access to (i) documents dealing with how the Board interpreted the definitions of oil and gas; (ii) documents having to do with the Board's interpretation of the *Borys* decisions; and (iii) Board rulings that consider the *Borys* decisions with respect to the application of the Rule of Capture.

[para 80.] The Public Body says it searched for Board Decision Reports and Board files (on-site and historical). The Public Body says it

specifically searched Board Order (General Files) 1950 (earliest files) Boxes 18, 26, 27.

[para 81.] However, there is no evidence before me that the Public Body searched Board Orders (General Files) for 1951-1960. Therefore, I intend to order that the Public Body search for those files. If they exist, I intend to order that the Public Body search them for records containing the foregoing subject matters.

[para 82.] I note again from the Public Body's Records Retention and Disposition Schedule that the Administrative Department must permanently retain (off-site) the microfilmed master copy of all Board Orders and Approvals (Items 104 and 114). Assuming that Board Orders and Approvals are different from Board Orders (General Files), I also intend to order that the Public Body search Board Orders and Approvals for the foregoing subject matters for the period of 1949-1960.

[para 83.] Finally, the Applicant requested access to Rule of Capture Files. The Public Body's evidence is that it searched F Orders (Field Orders) 1950 (earliest files) Box 13 and "G Orders (Pool Orders) 1950 (earliest files) Box 16.

[para 84.] However, there is no evidence before me that the Public Body searched for Field Orders and Pool Orders for 1951-1960. Therefore, I intend to order that the Public Body search for those records. If they exist, I intend to order that the Public Body search them for Rule of Capture Files.

[para 85.] The Public Body's Records Retention and Disposition Schedule says that its Geology Department has Field and Pool Files (Item 1229) and Board Orders (Field and Pool Orders) (Item 1230), which are kept in the department until superseded or obsolete, and then destroyed. Given that those records would have been destroyed, the Public Body was not required to search for records in its Geology Department.

[para 86.] I believe that the Field Orders and Pool Orders may also be among the microfilmed master copy of all Board Orders and Approvals permanently retained (off-site) by the Administrative Department. Assuming that Board Orders and Approvals are different from Field Orders and Pool Orders, I intend to order that the Public Body search Board Orders and Approvals for Rule of Capture Files for the period of 1949-1960.

(g) Amount of time the Public Body spent searching

[para 87.] The Applicant complains that, despite informing the Public Body of the importance of the records sought, the Public Body spent only 54 hours searching, which was not adequate in the circumstances.

[para 88.] In my view, the amount of time spent searching is not determinative of the adequacy of the search under section 9(1). What is determinative is that the Public Body searched for what was requested.

(3) For what time period do I review the adequacy of the Public Body's search?

[para 89.] I find it necessary to deal with this matter because I perceive that the Applicant's access request became what I will call a "moving target" after the Applicant asked me to review the adequacy of the Public Body's search.

[para 90.] I say "moving target" because of what I see from the Applicant's submission are additional records requested after the request for review, such as records beyond the period of 1949-1960 generally; AAG minutes; and current administrative and policy files.

[para 91.] The Applicant cannot unilaterally modify the access request during mediation, and have me review the adequacy of the Public Body's search based on that modified request. I will consider the adequacy of the Public Body's search only to the date of the Applicant's request for review under section 9(1). That date is May 25, 1999.

[para 92.] In this case, if I were to review anything that occurred after the date of the Applicant's request for review, I would, in effect, be reviewing what went on in mediation, which I do not do: see Order 99-021.

[para 93.] It was open to the Public Body, during mediation, to search for additional records that the Applicant wanted, but the Public Body was under no duty to do so.

b. Conclusion as to the adequacy of the Public Body's search

[para 94.] I find that the Public Body did not conduct an adequate search for the following records the Applicant requested:

- Documents dealing with how the Board interpreted the definitions of "oil" and "gas"

- Documents having to do with the Board's interpretation of the *Borys* decisions
- The Board's review of its policies and procedures with respect to licensing of wells on split title lands or spacing units comprising split title lands
- The Board's review of its policies and procedures with respect to production, marketing or flaring of gas from wells on split title lands
- The Board's review of its method of assessing the value of freehold mineral rights for taxation purposes with respect to split title lands
- Files indicating what substances the Board considered subject to tax
- Board rulings that consider the *Borys* decisions with respect to the application of the Rule of Capture
- Rule of Capture Files

[para 95.] I intend to order that the Public Body search for Board Orders (General Files) for 1951-1960. If files exist, I intend to order that the Public Body search them for records containing the foregoing subject matters. If files do not exist, I intend to order that the Public Body say so. If files existed but have been destroyed, I intend to order that the Public Body say so, and provide the destruction certificate number, if available.

[para 96.] Assuming that Board Orders and Approvals are different from Board Orders (General Files), I also intend to order that the Public Body search the microfilmed master copy of all Board Orders and Approvals for 1949-1960 for records containing the foregoing subject matters. If records do not exist, I intend to order that the Public Body say so. If records existed but have been destroyed, I intend to order that the Public Body say so, and provide the destruction certificate number, if available.

[para 97.] I also intend to order that the Public Body search the following records for Rule of Capture Files:

- F Orders (Field Orders) for 1951-1960
- G Orders (Pool Orders) for 1951-1960
- the microfilmed master copy of all Board Orders and Approvals for 1949-1960, assuming that those records are different from Field Orders and Pool Orders

[para 98.] If Rule of Capture files do not exist, I intend to order that the Public Body say so. If files existed but have been destroyed, I intend to

order that the Public Body say so, and provide the destruction certificate number, if available.

[para 99.] Because the Applicant asked about fees on any further searches I might order, I further intend to order that the Public Body not charge the Applicant any fees for the further searches.

3. The Public Body's general duty to assist

a. General

[para 100.] The Applicant complains that the Public Body did not meet its general duty to assist under section 9(1). I intend to consider that matter from the following perspectives:

(1) For what time period do I review the Public Body's general duty to assist?

(2) What complaints does the Applicant have about the Public Body's general duty to assist?

(1) For what time period do I review the Public Body's general duty to assist?

[para 101.] As with my review of the adequacy of the Public Body's search, my review of the Public Body's general duty to assist covers only the period up to the time that the Applicant asked for a review. My reasoning is the same as discussed under adequacy of the search.

(2) What complaints does the Applicant have about the Public Body's general duty to assist?

[para 102.] The Applicant complains that the Public Body did not meet its general duty to assist under section 9(1), as follows:

(a) During the time it took the Public Body to respond, the Public Body did not seek additional information to focus the search. Additional information the Applicant provided appears to have been ignored by the Public Body.

(b) The Public Body did not become involved as an intermediary with the Provincial Archives, and did not inform the Applicant that relevant records might exist in the Provincial Archives until more than eight months after the request.

(c) AAG Minutes for 1985 to 1997 were destroyed rather than being transmitted to the Provincial Archives, but microfilm copies remain in the Public Body's law department.

(d) The Public Body has not provided the Applicant with its Records Retention and Disposition Schedule.

(e) Until more than one year after the request, the Public Body did not inform the Applicant that an index to the Board History files existed (contrary to Order 97-015) and that all these files were available for review in the Board's library.

(a) Did the Public Body have a duty to seek additional information to focus the search?

[para 103.] It is incumbent upon a public body to seek additional information to focus a search if it does not understand an applicant's request.

[para 104.] In an August 28, 1998 telephone call the Applicant made to the Public Body, the Public Body requested that the Applicant provide any information that might assist the Public Body in a search for the documents. Furthermore, in the Public Body's November 25, 1998 letter to the Applicant, the Public Body summarized what it understood to be the Applicant's access request. The Applicant did not object to that summary. Therefore, it appears that the Public Body felt that it understood the access request, and did not find it necessary to seek additional information. Consequently, the Public Body did not breach its duty to seek additional information.

[para 105.] Furthermore, there is no evidence that, prior to the Applicant's request for review, the Public Body ignored any information that the Applicant may have provided as to what the Applicant was seeking.

[para 106.] There is evidence that the Applicant provided additional information after the request for review, but I will not review what happened during that time period in which mediation occurred.

(b) Did the Public Body have a duty to inform the Applicant that records might exist in the Provincial Archives, and to become an intermediary with the Provincial Archives?

[para 107.] It was not until a May 12, 1999 telephone call the Applicant made to the Public Body that the Public Body informed the Applicant

that records responsive to the Applicant's request might exist in the Provincial Archives.

[para 108.] In June 1999, the Applicant reviewed a microfilm index at the Provincial Archives and found references to File No. 90 and File No. 196, which files had not been transferred to the Provincial Archives. It was determined that these files were in the possession of Alberta Resource Development, from which the Applicant subsequently obtained them.

[para 109.] In my view, a public body does not have a duty under section 9(1) to inform an applicant as to where other records exist, unless that public body knows that records might exist elsewhere. Then the public body should suggest that the applicant search that body, but the public body does not have a duty to become an intermediary in that search.

[para 110.] Given that most records retention and disposition schedules provide for records to be selected by the Provincial Archives, public bodies should probably inform applicants of this.

[para 111.] However, there is no evidence before me that the Public Body knew early on in the Applicant's access request that records might be available in the Provincial Archives. Therefore, I find there was no duty to tell the Applicant to try the Provincial Archives.

(c) Did the Public Body have a duty to provide the Applicant with Application Advisory Group Minutes?

[para 112.] On October 8, 1999, the Public Body informed the Applicant that paper records existed in the Application Advisory Group ("AAG") files of the Board's legal department, which records were not reviewed during the Public Body's search. On October 27, 1999, the Applicant was informed that "AAG" Minutes were kept as hard copies for two years, then microfilmed and forwarded to the Provincial Archives.

[para 113.] On November 24, 1999, the Applicant sought clarification of the whereabouts of the AAG Minutes for 1985 to 1997.

[para 114.] Since the AAG Minutes are records that are not included in the period of 1949-1960 for which the Applicant asked for records, I find that the Public Body did not have a duty to provide those records.

[para 115.] Nevertheless, on November 3, 1999, the Public Body informed the Applicant that AAG minutes back to 1961 were in existence and working notes, memos and correspondence relating to particular

applications were generally included in the file corresponding to the particular application minutes.

(d) Did the Public Body have a duty to provide its Records Retention and Disposition Schedule?

[para 116.] The Applicant's access request did not ask for the Public Body's Records Retention and Disposition Schedule.

[para 117.] It was not until November 8, 1999 that the Applicant asked for a copy of the Public Body's Records Retention and Disposition Schedule and asked if the Public Body was prepared to examine the files, corresponding to three forced pooling orders, for information about the records sought by the Applicant.

[para 118.] On November 3, 1999, the Public Body informed the Applicant that: the Records Retention and Disposition Schedule of the Board was available to the Applicant upon request; and that field files respecting particular forced pooling applications were kept within the Public Body business units and might provide additional information with regard to specific pooling applications.

[para 119.] Given that the Applicant's access request did not ask for this record, I find that the Public Body did not have a duty to provide it as part of the access request.

(e) Did the Public Body have a duty to provide the Applicant with an index to Board History files?

[para 120.] On November 3, 1999, the Public Body informed the Applicant that a copy of the index to the Board History files was included in its letter.

[para 121.] On November 15, 1999, the Applicant asked the Public Body to provide the index to Board History files, which had not been included with the Public Body's November 3, 1999 letter.

[para 122.] The Applicant maintains that the index should have been provided as part of the access request, as provided by Order 97-015. Order 97-015 deals with the necessity for a public body to provide an index to responsive records in certain circumstances.

[para 123.] However, I have found that the Public Body did not have to search for and review Board History files. Therefore, I find that the Public Body was not required to provide an index of those files.

[para 124.] The Applicant complains that the Public Body said it would provide a copy of the index, but has not yet done so. Although the Public Body should do as it promised, it is under no duty to do so.

[para 125.] Had I found that the Public Body was required to search for and review Board History files, it seems to me that the Public Body would have been under a duty to provide the index to the Applicant.

b. Conclusion as to the Public Body's general duty to assist

[para 126.] Having reviewed the Applicant's additional complaints, I find that the Public Body did not breach its general duty to assist the Applicant.

ISSUE B: Did the Public Body respond to the Applicant in accordance with the time limits set out by section 10 of the Act?

[para 127.] Section 10 of the Act reads:

10(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

(a) that time limit is extended under section 13, or

(b) the request has been transferred under section 14 to another public body.

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

[para 128.] The Applicant complains that:

(a) The Public Body was not diligent in responding to letters or telephone calls, and only responded to the request once the Commissioner's Office became involved.

(b) No time estimate was provided in the Public Body's initial response. An estimate of eight weeks was provided only after the Commissioner's Office became involved.

(c) The Public Body informed the Applicant that the eight weeks could be reduced if the Applicant reviewed some of the records. The Public Body nevertheless did not complete its search until May 21, 1999, more than 24 weeks after the Applicant paid the deposit on the estimated fee. During that time, the Public Body spent 54 hours searching.

(d) The total elapsed time to respond was 36 weeks (September 1, 1998 to May 21, 1999).

[para 129.] The Applicant's access request was made on September 1, 1998. The Applicant had to write two further letters and make three telephone calls before the Public Body finally responded on November 12, 1998.

[para 130.] Therefore, I find that the Public Body was not diligent in responding to letters and telephone calls, and thereby did not respond to the Applicant within the 30 days required by section 10(1).

[para 131.] The Public Body admits that there were delays in processing the Applicant's request for access. The Public Body attributes the delays to:

- lack of FOIP training for its staff
- the Applicant's request for a fee waiver
- a FOIP staff member's unplanned extended absence from work
- the age of the documents, which predated any formal records management systems, making it difficult not only to determine where the information might appear, but also to estimate fees
- the complexity of the Applicant's request

[para 132.] The Public Body also says it informed the Applicant that, due to the nature of the request, the request would take considerable time to process.

[para 133.] There is no doubt that the Public Body breached section 10(1) of the Act. The breach of section 10(1) is a deemed refusal under section 10(2).

[para 134.] I further note that the breach of section 10(1) of the Act appears to have resulted from a lack of knowledge about and experience with the Act and with the historical records of the Public Body.

[para 135.] Besides the breach of section 10(1), I note that the Public Body breached other provisions of the Act, such as section 11 (the Public

Body did not inform the Applicant, at each step of the process, that the Applicant could ask me to review the Public Body's decision) and section 13 (the Public Body did not extend the time for responding, with my permission).

[para 136.] The Public Body's breach of section 10(1) has since been remedied by the Public Body's response to the Applicant. Consequently, ordering the Public Body to comply with its duty to respond would serve no useful purpose now. Therefore, I do not intend to make such an order.

[para 137.] However, the manner in which the Public Body processed the Applicant's request raises concerns about the search. Therefore, I have dealt with the matter of the adequacy of the Public Body's search under section 9(1), and have provided the Applicant with remedies there.

[para 138.] Contrary to what the Applicant says, the Public Body, in its November 25, 1998 letter, provided the Applicant with a breakdown of the time and cost to search for the records, and thereby did not breach the Act: see section 87(3) of the Act, section 12(1) of the Regulation to the Act (Alta. Reg. 200/95), and Order 99-011.

ISSUE C: Did the Public Body exercise its discretion properly when it refused the Applicant's request for a fee waiver under section 87(4)(b) of the Act?

[para 139.] Section 87(4)(b) reads:

87(4) The head of a public body, or the Commissioner at the request of an applicant, may excuse the applicant from paying all or part of a fee if, in the opinion of the head or the Commissioner, as the case may be,

...

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

[para 140.] The Public Body says that it initially denied the Applicant's request for a fee waiver because the Applicant did not demonstrate how the records related to a matter of public interest under section 87(4)(b). The Public Body says that it did not view the private litigation as a matter of public interest.

[para 141.] However, the Public Body subsequently informed the Applicant that it decided to grant the fee waiver because of the Public Body's delay in responding to the Applicant. Therefore, the Public Body believes the issue is now moot.

[para 142.] The Applicant argues that the issue is not moot because the Applicant has asked me to order the Public Body to conduct a new search and to waive the fees on that search.

[para 143.] In my view, since the Public Body has waived the fees on that search, the matter is moot. No present live controversy exists, which affects the rights of the Applicant and the Public Body with regard to the fees. Furthermore, the Applicant cannot meet the criteria set out in *Borowski v. Canada (Attorney General)*, and there are no other relevant circumstances such that I would exercise my discretion to hear the moot issue: see Order 99-005. Therefore, I decline to exercise my discretion to hear the moot issue.

[para 144.] I intend to order a further search and require that the Public Body not charge the Applicant any fees on that search. However, that search and waiver of fees are irrelevant to the issue of a fee waiver on the Applicant's access request to the Public Body.

[para 145.] The Applicant nevertheless asks that I order the Public Body to now refund the \$1458 the Public Body charged to the Applicant. There is no evidence before me that the Public Body has refunded the Applicant's fee.

[para 146.] The Public Body has numerous duties to comply with under the Act and the Regulation to the Act. One of those duties is set out under section 13(3) of the Regulation, which reads.

13(3) Fees, other than an initial fee, or any part of those fees will be refunded if the amount paid is higher than the actual fees required to be paid.

[para 147.] Section 13(3) says that a Public Body has a duty to refund any amount paid that is higher than the amount required to be paid. In this case, the actual fees the Applicant is required to pay after the fee waiver are nil.

[para 148.] I am able to order that the Public Body comply with its duties under the Act and the Regulation to the Act. Therefore, if the Public Body has not yet refunded the fee, I intend to order that the Public Body comply with its duty to refund the fee under section 13(3) of the Regulation.

V. ORDER

[para 149.] I make the following order under section 68 of the Act.

A. Search for records and general duty to assist the Applicant under section 9(1) of the Act

[para 150.] The Public Body did not conduct an adequate search for the following records the Applicant requested:

- Documents dealing with how the Board interpreted the definitions of oil and gas
- Documents having to do with the Board's interpretation of the *Borys* decisions
- The Board's review of its policies and procedures with respect to licensing of wells on split title lands or spacing units comprising split title lands
- The Board's review of its policies and procedures with respect to production, marketing or flaring of gas from wells on split title lands
- The Board's review of its method of assessing the value of freehold mineral rights for taxation purposes with respect to split title lands
- Files indicating what substances the Board considered subject to tax
- Board rulings that consider the *Borys* decisions with respect to the application of the Rule of Capture
- Rule of Capture Files

[para 151.] I order the Public Body to search for Board Orders (General Files) for 1951-1960. If files exist, I order the Public Body to search them for records containing the foregoing subject matters. If files do not exist, I order the Public Body to say so. If files existed but have been destroyed, I order the Public Body to say so, and to provide the destruction certificate number, if available.

[para 152.] Assuming that Board Orders and Approvals are different from Board Orders (General Files), I also order the Public Body to search the microfilmed master copy of all Board Orders and Approvals for 1949-1960 for records containing the foregoing subject matters. If records do not exist, I order the Public Body to say so. If records existed but have been destroyed, I order the Public Body to say so, and to provide the destruction certificate number, if available.

[para 153.] I also order the Public Body to search the following records for Rule of Capture Files:

- F Orders (Field Orders) for 1951-1960
- G Orders (Pool Orders) for 1951-1960
- the microfilmed master copy of all Board Orders and Approvals for 1949-1960, assuming that those records are different from Field Orders and Pool Orders

[para 154.] If Rule of Capture files do not exist, I order the Public Body to say so. If files existed but have been destroyed, I order the Public Body to say so, and to provide the destruction certificate number, if available.

[para 155.] I also order the Public Body to report to me and to the Applicant as to the process it went through to locate the records or files, and the results of the searches conducted. If the Public Body locates responsive records or files, I order it to tell the Applicant whether it will disclose those records or files.

[para 156.] I further order the Public Body not to charge the Applicant any fees for the searches I have ordered.

[para 157.] The Public Body did not breach its general duty to assist the Applicant.

B. Time limits under section 10 of the Act

[para 158.] The Public Body breached section 10(1) of the Act by not responding to the Applicant within the 30-day time limit. Such a breach is a deemed refusal under section 10(2).

[para 159.] However, it would serve no useful purpose to order the Public Body to comply with its duty under section 10(1) now because the Public Body has responded to the Applicant. Therefore, I decline to make an order under section 10.

C. Fee waiver under section 87(4)(b) of the Act

[para 160.] The Public Body waived the fees under section 87(4)(a) of the Act (for any other reason it is fair to excuse payment). Consequently, the issue of the fee waiver is moot, and I do not intend to hear it.

[para 161.] However, there is no evidence that the Public Body has refunded the Applicant's fee. The Public Body has a duty to refund the

Applicant's fee under section 13(3) of the Regulation to the Act. Consequently, if the Public Body has not yet refunded the Applicant's fee, I order the Public Body to comply with its duty under section 13(3) of the Regulation to refund the fee.

[para 162.] I further order that the Public Body notify me in writing, within 50 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