ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-015

January 24, 2001

Alberta Children's Services

Review Number 1543

Office URL: http://www.oipc.ab.ca

Summary: The Applicant requested specific correspondence from the Public Body. During an initial search, a letter was recovered, but access was refused. Reconsideration by the Public Body resulted in a severed copy of the record being disclosed and two subsequent searches for records. Each search uncovered further records. The Inquiry Officer found that the Public Body did not fulfil its general duty to respond to the Applicant openly, accurately and completely. The Inquiry Officer also ordered the Public Body to conduct a further search for records.

Statutes Considered: AB: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c.F-18.5, s. 9.

Authorities Considered: AB: Order 96-022; Order 97-003; Order 99-021; Order 99-039 **BC:** No. 30-1994

I. BACKGROUND

[Para. 1] On November 13, 1998, Alberta Children's Services (the "Public Body") received a request from the Applicant for personal information under the *Freedom of Information and Protection of Privacy Act* (the "Act"). At that time, the Public Body was a portion of the former Alberta Family and Social Services. The Applicant's request consisted of a completed departmental form and an attached sheet with two specific items written on it. On the form under the heading "Information or records you want access to", the box beside "Child Welfare" contained an "X". Under the "Personal Information"

section was the name of the Applicant's minor child (the "Child"). The requested items contained on the attached sheet were as follows:

1. *Any written and/or verbal correspondence from lawyer* [lawyer's name] [law firm] *requesting information from this (shared) file at any time in 1990.*
2. *Any written and/or verbal response, to* [lawyer's name]*'s request from Social Services.*

[Para. 2] For the purposes of this inquiry, I will refer to the lawyer named in the Applicant's request as "the Lawyer."

[Para. 3] In 1988 and 1989, the Applicant, the Applicant's spouse, and the Child had been the subjects of an investigation conducted by the Public Body. Allegations had been made that the Applicant had sexually abused the Child. No charges were laid and the investigation was closed. During 1990, the Applicant and the Applicant's spouse were involved in custody and access proceedings. The specific correspondence referred to in the Applicant's request to the Public Body related to a request from the Lawyer (legal counsel for the Applicant's spouse) to release the investigation and associated reports to a psychologist contracted by the lawyers for both parties to aid in the preparation of an independent assessment for the custody proceedings.

[Para. 4] In a letter dated November 30, 1998, the Public Body responded to the Applicant. The letter stated, in part:

> *Unfortunately, access to all the information that you requested is denied under section 26(2) of the Freedom of Information and Protection of Privacy Act. The records you are requesting contain information which is subject to solicitor-client privilege. Section 26(2) is a mandatory exception and the Act stipulates that the public body must refuse this type of information when it relates to a person other than the public body. As the legal correspondence in question was created on behalf of your ex-spouse, the Information and Privacy Branch has no discretion in this matter and must withhold the information.*

[Para. 5] On January 27, 1999, the Applicant wrote to the Office of the Information and Privacy Commissioner and requested that the Public Body's decision to refuse access to the records be reviewed.

[Para. 6] Mediation was authorized and a Portfolio Officer from the Commissioner's Office was assigned. Mediation was partially successful. A severed copy of a June 14, 1990 letter, originally exempted under section 26(2) of the Act, was released to the Applicant. Two additional searches were conducted by the Public Body, resulting in the release of further records. These events will be discussed further in this order as specific issues are dealt with.

[Para. 7] In a letter dated April 6, 2000, the matter was set for a written inquiry. Final submissions were exchanged June 13, 2000.

[Para. 8] On April 11, 2000, the Commissioner delegated his authority to conduct an inquiry and issue an Order, as set out in Part 4 of the Act, to Dave Bell as Inquiry Officer.

[Para. 9] This inquiry proceeds on the basis of the Act as it existed before the amendments to the Act came into force May 19,1999.

II. RECORDS AT ISSUE

[Para. 10] The records at issue in this inquiry consist of the records released to the Applicant by the Public Body on three separate occasions, as follows:

- First Release (May 18, 1999) - June 14, 1990 letter from the Lawyer to the Public Body
- Second Release (July 30, 1999) – July 20, 1990 letter from the Minister to the lawyer
- Third Release (January 5, 2000) – June 25, 1990 Ministerial B.F. and Contact Notes from November 1988, January 1989, and April 1989

III. ISSUES

[Para. 11] The issue for this inquiry, as stated in the Notice of Inquiry is as follows:

> *The Applicant is requesting the Commissioner to review whether the Public Body complied with section 9(1) of the Act which states:*
>
> > *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. 12] Section 9(1) of the Act is fairly broad. It covers the manner in which the Public Body responded to the Applicant's request and includes the thoroughness of the search for records. Both of these broad issues where raised by the Applicant and will be dealt with in this inquiry.

IV. DISCUSSION OF THE ISSUES

ISSUE A: Are the events that occurred during mediation part of my review?

[Para. 13] It is extremely unusual for the Commissioner or an Inquiry Officer to be privy to the events which took place during mediation. However, in this inquiry, both the Public Body and the Applicant made reference to the events that took place during mediation in their written briefs and referred to the events and records in their arguments. The Public Body included copies of the correspondence as appendices to their submission. It is clear that both parties wanted me to consider information about the events that took place during mediation, because they both included those events in their written submissions.

[Para. 14] In Order 99-039, the Commissioner stated at paragraph 92:

> *...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. 15] In this inquiry, it is reasonable that I look at the events which occurred prior to the Applicant's request for review. Those events include interaction between the Public Body and the Applicant and the search for records conducted by the Public Body. That search resulted in the recovery and eventual disclosure of one record, namely the letter dated June 14, 1990.

[Para. 16] In this inquiry, I will only review the actions of the Public Body which took place prior to the Applicant's request for a review. In looking at the events of mediation, I will only look at the evidentiary value of the records. I will not review the actions of the Public Body or the positions taken by either of the parties regarding possible resolutions during the mediation process.

ISSUE B: Did the Applicant make additional requests for information that are not to be considered in this inquiry?

[Para. 17] In their written submission, the Public Body refers to "additional requests" for information from the Applicant in describing the letters that resulted in the second and third releases of information. The Public Body also describes the efforts to which it went in subsequent searches to satisfy the Applicant.

[Para. 18] The Applicant submits in his rebuttal:

> *When I reviewed the records that they had released, I merely pointed out that all of the correspondence which was cross-referenced, but not included in the released records, should ALSO be included within the parameters of my initial request for information. I was making a very reasonable observation and a very reasonable request. I was NOT making an additional request for information.*

[Para. 19] In deciding whether the Applicant made additional requests for information, I came at the question in two ways. First, I compared the subsequent requests to the initial

request to determine whether the same information was requested. Second, I looked at the records that were recovered as a result of the subsequent requests to determine whether they were responsive to the initial request.

[Para. 20] The Applicant's initial request was as follows:

1. *Any written and/or verbal correspondence from lawyer* [lawyer's name] [law firm] *requesting information from this (shared) file at any time in 1990.*
2. *Any written and/or verbal response, to* [lawyer's name]*'s request from Social Services.*

[Para. 21] The Public Body's initial response informed the Applicant that a letter, dated June 14, 1990, had been located but was being exempted under section 26(2) of the Act. After reconsideration, the letter was released to the Applicant. This resulted in the Applicant's subsequent letter of June 7, 1999, pointing out that he had not received a letter to the Minister which was referred to in the released letter. He also pointed out that there should be responses to both letters. The Applicant's letter is referred to in the Public Body's brief as a request for "additional information."

[Para. 22] I reviewed the June 14, 1990 letter and found a reference to a letter written by the Lawyer to the Minister which was written concurrently to the released letter. The letter to the Minister clearly falls into the first part of the Applicant's initial request. Therefore, I conclude that the Applicant's letter of June 7, 1999, relates directly to the initial request and that it is not a request for additional information.

[Para. 23] At the conclusion of a second search for records, the Public Body released a copy of a letter, dated July 20, 1990, signed by the Minister and addressed to the Lawyer. This letter was in response to the letter referred to in the released letter of June 14,1990. This record clearly falls within the second category of the Applicant's initial request. Therefore, I find that the record is responsive to the Applicant's initial request.

[Para. 24] The second release resulted in the Applicant's letter of October 14, 1999, in which he sets out four categories of records that the Applicant felt should be present as a result of references in the two released letters. Just as the Public Body did with the Applicant's letter of June 7, 1999, this letter was characterized as a request for additional information in the Public Body's written submission. Because the categories contain a great deal of third party personal information, I will not quote them. However they can be summarized as follows:

Category 1: The letter written by the Lawyer to the Minister on July 20, 1990, as referred to in both of the released letters.

Category 2: Correspondence between the Lawyer and an identified employee of the Public Body. This contact is acknowledged in the released letter from the Minister to the Lawyer. The identified employee is different than the person to whom the June 14, 1990 letter is written.

Category 3: The response to the released letter of June 14, 1990.

Category 4: There is a reference in the June 14, 1990, letter about discussions the Lawyer had with various individuals in the Public Body. The Applicant states that he believes he would be entitled to any records made as a result of the discussions.

[Para. 25] The first three categories clearly are consistent with the Applicant's initial request for all correspondence involving the Lawyer to and from the Public Body during 1990. In his initial request, the Applicant specified written or verbal correspondence. From this I conclude that his original intent included a request for notes made as a result of conversations. The fourth category asks for "any records," which would include notes, made as a result of discussions. Therefore, I conclude that the Applicant's letter of October 14, 1999, is a clarification of the initial request and not a request for additional information.

[Para. 26] As a result of the third search by the Public Body, a record referred to as a "Ministerial B.F.," dated June 25, 1990, was located that summarized the letter written by the Lawyer to the Minister. The letter itself was not found. Contact notes from November 1988, January 1989 and April 1989 were also located and supplied. The Ministerial B.F. refers directly to a record which falls within the Applicant's initial request. In this case, it is particularly relevant because the letter itself was not located. The contact notes relate to the Applicant's fourth category but are not responsive to the initial request because they are outside the time frame specified in the Applicant's initial request.

[Para. 27] I find that the Applicant's letter's of June 7, 1999 and October 14, 1999 were not requests for additional information as characterized by the Public Body. It is my conclusion that they related directly to the initial request for information from the Public Body. Therefore, I will include the records recovered during the second and third searches as evidence in this inquiry.

ISSUE C: Did the Public Body conduct a thorough search for records?

[Para. 28] In its written submission, the Public Body indicated that the initial search was for records from Child Welfare. There is no evidence that any other area of the Public Body was searched. I conclude that the search was limited to this area because the Applicant placed an "X" in the box beside Child Welfare on the form supplied by the Public Body for the purpose of making access requests under the Act. The other categories on the form as follows:

Day Care, Foster Care, HCS, Family Maintenance, Widows' Pension, AISH, Income & Employment Programs, and Other

[Para. 29] Given the circumstances of the Applicant's involvement with the Public Body, it would appear that Child Welfare is the most appropriate choice. The Applicant also attached a second page which includes the two specific categories of records that he was seeking. The second category ends with the words *from Social Services.* This is the terminology that many people use in referring to the Public Body, which at the time was called Alberta Family and Social Services.

[Para. 30] The subsequent searches resulted in records being located in the archived records of the Minister's Office and in the records of the Edmonton Regional Office. Neither of these areas are specifically listed as choices on the Public Body's access form and, even if they were, it is not reasonable for the Public Body to expect applicants to know every organizational unit in which records could be stored. In order for the Public Body to respond completely to an applicant, the Public Body should not assume that, because a box is not ticked off, the applicant is not interested in records housed in that or other areas.

[Para. 31] In this case, the first record found by the Public Body was the letter of June 14, 1990. In that letter there is a very clear reference that the Lawyer had also written to the Minister. That reference should have prompted the Public Body to look further. There were references in the second letter that should also have prompted the Public Body to search further.

[Para. 32] Section 9(1) of the Act required the Public Body to respond to the Applicant openly, accurately and completely. In order to fulfil this duty, the Public Body must search wherever records responsive to the Applicant's request can be found. I find that the Public Body did not conduct a thorough search for records.

ISSUE C: Did the Public Body respond to the Applicant openly, accurately and completely?

General

[Para. 33] In addressing the Public Body's duty to assist the Applicant under section 9(1) of the Act, the Applicant complained that the Public Body:

1. should not have asked him why he wanted the records

2. initially refused to confirm the existence of the June 14, 1990 letter

3. purposely used section 26(2) of the Act to deny access to the June 14, 1990 letter when the Public Body should have known that section 26(2) did not apply

[Para. 34] In addition, the Applicant refers to a Court Order obtained in the Court of Queen's Bench of Alberta subsequent to June of 1990. In his rebuttal submission, the Applicant makes the following request:

> *I am further requesting that the Commissioner determine whether the Court Order, which entitles me to all information in this file, but which the AFSS refuses to fully comply with, applies to all of the information which I request from this file.*

[Para. 35] The Commissioner does not have jurisdiction to determine whether the Public Body is violating a Court Order. Any concerns that the Applicant has in this regard may be taken back to the Court for resolution. Consequently, I will not deal with any issues relating to the Court Order in this inquiry.

[Para. 36] As previously stated, I will only review the actions of the Public Body prior to the Applicant's request for review. I will deal with each of the sub-issues raised by the Applicant.

> **1. Was it appropriate for the Public Body to ask the Applicant why he wanted the records?**

[Para. 37] An applicant's reason for wanting access to records is not specifically contemplated in the Act. It is therefore not a condition under which access is granted or denied. In reference to the first telephone contact made to him by the Public Body, the Applicant wrote in his written submission:

> *The tone for AFSS's response to my request was set early in the process.* [A staff member] *phoned me… Her conversation did not portray openness or willingness to assist me with my request; instead I was grilled rather defensively by* [the staff member] *as to why I required this information. ...During my entire conversation with* [the staff member] *it was obvious to me that AFSS would refuse my request for information and that* [the staff member] *was calling to impart the message that I would not be successful…*

[Para. 38] In their rebuttal submission, the Public Body states:

> *It is not normal practice to ask an applicant why they need the information they are requesting. The only reason this subject was broached is because the applicant indicated that he already had a complete and unsevered version of the file.* [The staff member] *felt it was necessary to clarify how the… request could assist the applicant and whether there might be another process, possibly outside the Act that would better meet his needs.*

[Para. 39] I note that there is a section in the Public Body's initial submission that talks about the telephone conversation in some detail. The reason why the Applicant wanted the records is included. There is no mention that the staff member asked the Applicant why he wanted the records. I make no specific conclusion about this apparent omission in the Public Body's submissions.

[Para. 40] Asking the question is potentially problematic for a public body. If the question is asked as a means to legitimately assist an applicant, and the applicant perceives it that way, there is nothing wrong with asking. However, if it is perceived as a means to dissuade an applicant or as a means of obtaining information to which a public body is not entitled, the question should not be asked. The perception of an applicant about why the question was asked is very important. Since a public body cannot predict how an applicant will perceive the asking of the question, a public body should proceed very cautiously. Generally, the question should not be asked.

[Para. 41] In this case, it is clear that the Applicant did not perceive the questioning as assisting him in any way. There is also no evidence that the Public Body was better able to assist the Applicant as a result of asking. By the time the staff member called the Applicant, she knew from reviewing the files that the Applicant had been investigated for child abuse. While there is no direct evidence to suggest that this information may have affected the staff member's attitude towards the Applicant, the Public Body must ensure that any interaction with an applicant is not affected by personal beliefs about what an applicant may or may not have done. Considering the reason for the Applicant's previous interaction with the Public Body, it might be expected that asking why the Applicant wanted records would not be perceived as helpful.

[Para. 42] I find that the Public Body should not have asked the Applicant why he wanted the records.

2. Did the Public Body initially refuse to confirm the existence of the June 14, 1990 letter?

[Para. 43] In relation to the initial phone contact made by the Public Body, the Applicant wrote in his submission:

> *Since I had already informed* [the staff member] *that I did not believe that* [the Lawyer] *had written to AFSS in 1990, the issue of prime importance to my FOIP request, at that point, was determining whether that* [the Lawyer] *had or had not written. Instead of making every reasonable effort to assist me…*[the staff member] *refused to confirm whether any letters …even existed (even though she already knew that one did exist).* [The staff member's] *singular position was that "solicitor client privilege" prevented me from knowing anything.*

[Para. 44] In relation to the same conversation with the Applicant, the Public Body's submission states:

> *When* [the staff member] *advised the applicant that a record, responsive to part 1 of his request exists, but that the branch had made the decision that it was excepted from disclosure under section 26(2) of the Act, the applicant revised his request verbally and indicated that he would be satisfied with any one of the three following outcomes:*

(1) A letter from the Public Body stating that no letter exists, or
(2) A letter from the Public Body confirming that the letter exists but can't be released due to section 26(2),
(3) The release of a severed version of the letter.

The applicant was told that the Public Body would comply by providing option #(2).

[Para. 45] In his rebuttal, the Applicant agrees that he indicated that he would be satisfied with one of the three options. However, he disagreed that he was ever told of the existence of the letter. He stated:

> *If* [the staff member] *had informed me in the phone conversation that the letter ... actually existed, ... ,then it would be absurd for me to include 1) "a letter from the public body stating that no letter exists", as a possible option and it would have been just as absurd for* [the staff member] *to confirm that…*

[Para. 46] I agree with the Applicant's argument that the first option would not have been offered or accepted if the Public Body had initially confirmed the existence of the record. I find the Public Body's evidence on this issue to be contradictory and unreliable. Therefore, I conclude that the Public Body refused to confirm or deny the existence of the record to the Applicant.

[Para. 47] I must now decide if the Public Body responded accurately by using section 11(2) of the Act. Section 11(2) states:

> *11(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> *(a) a record containing information described in section 17 or 19, or*
>
> *(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.*

[Para. 48] Section 26(2) of the Act is not included as a section for which section 11(2) applies. Considering that the record was eventually disclosed to the Applicant, and in absence of evidence to the contrary, I conclude that subsection (2)(b) does not apply. Therefore I find that the Public Body did not respond accurately to the Applicant by refusing to confirm or deny the existence of a record.

3. Did the Public Body purposely use section 26(2) of the Act to deny access to the June 14, 1990 letter, knowing that section 26(2) did not apply?

[Para. 49] In his submission, the Applicant spent a great deal of time attempting to prove why he feels that the Public Body purposely used section 26(2) in what he believes was

an attempt to deny him access to the record It is his belief that the Public Body should know that the section does not apply. He states that the use of section 26(2) was *deliberately used in a misleading attempt to further obfuscate my FOIP request.*

[Para. 50] The Public Body stated that they had used the section in good faith and honestly believed that the mandatory exception applied to the record.

[Para. 51] The issue of whether section 26(2) was properly applied to the record is not a matter before me in this inquiry. What I must decide is whether there is any evidence to support the allegation that the Public Body purposely used a section which they knew did not apply as a means to prevent the Applicant from obtaining the record. To assist in making this decision, I must first satisfy myself whether or not section 26 (2) could apply. Section 26 (2) states:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*

[Para. 52] The record is a letter from a lawyer for a third party, the Applicant's former spouse. On the face of it, section 26(2) could apply to the record. When the Portfolio Officer asked the Public Body to reconsider its use of 26(2) during mediation, the Public Body released the record, with minor severing of third party personal information.

[Para. 53] I can understand why the Applicant has reached his conclusion on this issue. However, the Applicant's belief that the Public Body made the decision for the purpose of obstructing his access request is insufficient for me to come to the same conclusion. I have no evidence before me that the Public Body's motive for using section 26(2) was anything other than an honest belief that it applied to the record. Therefore, I conclude that the Public Body applied the section in good faith.

Conclusion

[Para. 54] For the reasons stated, I find that the Public Body did not fulfil its duty to respond to the Applicant openly, accurately and completely, as required by section 9(1) of the Act.

V. ORDER

[Para. 55] I make the following Order under section 68 of the Act.

[Para. 56] I order the Public Body to conduct a search for the records set out in the Applicant's letter of clarification dated October 14, 1999.

[Para. 57] I order the Public Body to respond to the Applicant about the details of the search conducted in compliance with this Order.

[Para. 58] I have found that the Public Body did not fulfil its duty to respond openly, accurately and completely as required by section 9(1) of the Act. It would not serve any useful purpose to order the Public Body to start the process over so that those duties may be fulfilled. Through this Order, I draw the Head's attention to the deficiencies in the Public Body's response to the Applicant.

[Para. 59] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public body has complied with this Order.

Dave Bell
Inquiry Officer