ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-022

November 23, 2000

ALBERTA GOVERNMENT SERVICES

Review Number 1727

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

Summary: The Applicant asked for access to records concerning the authority for certain changes that the Land Titles Office had allegedly made to split mineral titles prior to 1912, and discussions or decisions about correcting those titles. The Commissioner held that the records the Applicant requested were records made from information in a Land Titles Office, and were excluded from the application of the Act by section 4(1)(h)(iii). Therefore, the Commissioner did not have jurisdiction over the records.

Statutes Considered: AB*: Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 1(1)(q), 4(1)(h)(iii), 9, 9(1), 9(2), 28(1)(a), 54(2), 62(1), 68, 87(3), 87(4), 87(4)(a)(b*); Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, s. 12(1); *Land Titles Act*, R.S.A. 1980, c. L-5, ss. 1(b)(j)(k)(l)(u)(w), 16(1), 17(1), 17.3, 18, 24.1, 25.

Authorities Considered: AB: Orders 97-020, 99-011, 99-033.

I. BACKGROUND

[para 1.] On March 17, 1999, the Freehold Petroleum & Natural Gas Owners Association (the "Applicant") applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Municipal Affairs, now Alberta Government Services (the "Public Body"), asking to examine all documents having to do with:

> …the authority under which the Registrar omitted the "which may be found to exist" wording in the transfers from the CPR which gave rise to the titles of registered owners of all mines and minerals except coal and petroleum in Alberta, in cancellation memorandae on the CPR's certificates of title, and in titles to petroleum issued to the CPR, CPOG, and PanCanadian. We further seek access to all documents in the possession of your department having to do with discussions or decisions respecting corrections to the aforesaid titles.

[para 2.] In a June 9, 1999 letter to the head of the Public Body, the Applicant summarized the request as one for access to the following documents:

> a) the authority under which the "which may be found to exist" wording, which described the petroleum reserved unto the Canadian Pacific Railway Company (the "CPR") in transfers from the CPR to settlers who had purchased land from the CPR during the 1906-1912 period, was omitted by the Registrar of Land Titles in certificates of titles issued to the settlers and their successors as registered owners of all mines and minerals except coal and petroleum, in cancellation memorandae on the CPR's certificates of title, and in titles to petroleum issued to the CPR, Canadian Pacific Oil and Gas Limited ("CPOG") and PanCanadian Petroleum Limited ("PanCanadian"); and
>
> b) discussions or decisions respecting corrections to the aforesaid titles.

[para 3.] For ease of the public's understanding, I am summarizing the Applicant's request as being for documents having to do with (i) the authority for omitting the words "which may be found to exist" on split mineral titles (titles for which there is separate ownership of petroleum and natural gas); and (ii) discussions or decisions about correcting the titles that omitted those words.

[para 4.] By letter dated April 3, 1999, the Public Body provided the Applicant with an "informal" fee estimate of $400,000 to search approximately 61,000 "mineral files" of the Land Titles Office, in which the Public Body believed the records the Applicant requested might be located.

[para 5.] A series of letters and phone calls ensued between the Applicant and the Public Body. On June 9, 1999, the Applicant asked the Public Body to waive the $400,000 fee. The Applicant provided information in support of a fee waiver under section 87(4)(a) (applicant

cannot afford payment) and section 87(4)(b) (records relate to a matter of public interest). On June 30, 1999, the Public Body asked the Applicant whether the Applicant would consider narrowing the request before the Public Body responded to the fee waiver request. On July 16, 1999, and again on September 15, 1999, the Applicant again asked for a fee waiver.

[para 6.] By letter dated September 1, 1999 and purportedly received by the Applicant on September 15, 1999, the Public Body responded that it had not yet provided a "formal" fee estimate and that the request for a fee waiver was premature until the time that the exact scope of the search was defined by both parties. That letter also said:

> There are no guarantees that such record(s) exist and we would like to remind you that FOIP provides that certain records are exempt from the access provisions of the Act. This includes records made from information in a Land Titles Office, pursuant to s. 4(1)(h)(iii). There are also exceptions to access. Because the exact nature of the records is not known at this point, we reserve the right to claim any applicable exemption or exception should the record(s) be located.

[para 7.] On October 5, 1999, the Applicant provided the Public Body with 3,500 legal land descriptions, "In a further effort to reduce the time and expense associated with its access to information request…" The Applicant also provided the Public Body with information to support its request for a fee waiver. The Applicant further informed the Public Body that it would be asking me to review the Public Body's decisions.

[para 8.] By letter dated October 5, 1999 and received by my Office on October 13, 1999, the Applicant complained that the Public Body had not provided an estimate of fees in accordance with the Act, had provided an excessive estimate, had not complied with the time period for providing an estimate, had not made every reasonable effort to assist the Applicant and had not responded to the Applicant openly, accurately and completely.

[para 9.] By letter dated October 13, 1999, the Public Body provided the Applicant with a "formal" fee estimate of $23,675 under the Act, to search the 3,500 mineral files corresponding to the legal land descriptions the Applicant provided. The Public Body informed the Applicant that "The scope of your request would therefore extend only to those mineral files that may exist for the land descriptions you provided."

[para 10.] In that letter, the Public Body mentioned the exclusion for records under section 4(1)(h)(iii) and reserved its right to claim any applicable exclusion or exception. The Public Body also said:

> You have indicated that you would request any fee associated with your request to be waived. In anticipation of your request and after due consideration of the

> information you have provided to us, your request is being denied unless additional information is provided that would require us to reconsider whether or not there is sufficient reason under the Act to waive the fee.

[para 11.] By letter dated October 15, 1999, the Applicant asked that I also review the Public Body's refusal to waive the $23,675 fee.

[para 12.] Mediation was authorized. Subsequently, the Public Body decided to rely on 4(1)(h)(iii) of the Act as applying to the records the Applicant requested. Section 4(1)(h)(iii) is a jurisdictional provision of the Act. If section 4(1)(h)(iii) were to apply to the records, those records would be excluded from the application of the Act, and I would have no jurisdiction over those records. The Applicant could not get access to those records under the Act.

[para 13.] Mediation was not successful. The matters were set down for an oral inquiry on July 25, 2000. I received advance written submissions from the Applicant and the Public Body.

[para 14.] The Applicant argued that the Public Body could not now rely on section 4(1)(h)(iii) when it did not initially inform the Applicant of this. The Applicant also maintained that the burden of proof is on the Public Body for section 4(1)(h)(iii), and that the Public Body could not meet the burden when it had not located the records the Applicant requested.

[para 15.] During the course of the inquiry, the Public Body and the Applicant informed me that they were disputing the date range of records the Applicant's request encompassed. I allowed the parties to provide an additional written submission on that matter. I also asked the Public Body to answer some questions regarding the electronic database of records of the Land Titles Office.

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

II. RECORDS AT ISSUE

[para 17.] My first task is to clarify what records are at issue in this inquiry.

[para 18.] The Applicant and the Public Body have focused on what records the Public Body must search to locate the records the Applicant requested. Both parties agree that the Public Body must search the "mineral files" of the Land Titles Office, and more specifically 3,500

mineral files (paragraphs 15 and 20 of the Public Body's additional written submission and paragraphs 33 and 34 of the Applicant's additional written submission).

[para 19.] The Public Body describes the "mineral files" as being administrative files compiled by staff of the Land Titles Office for the purpose of reviewing the history of mineral titles. Specifically, the Public Body says that the mineral files were created exclusively by employees at the Land Titles Offices over a period of time after approximately 1954, for the purpose of determining if the Registrar had made any corrections in the past to mines and mineral titles. The review was an attempt to evaluate and limit liability of the Land Titles Assurance Fund. Some mineral files are maintained and updated by the Land Titles Office to this day as a result of examination of legal documents dealing with mineral titles being submitted for registration.

[para 20.] The Public Body says that there are approximately 61,000 mineral files. Approximately 10,500 of the mineral files are at the Land Titles Office in Edmonton, another 10,500 at the Land Titles Office in Calgary, and the remainder at the "Public" (Provincial) Archives. The mineral files are paper files, filed in filing cabinets by legal land description only, and not incorporated or indexed into any form of computer database. The Public Body says that the mineral files are not accessible to the public.

[para 21.] The Public Body claims that it conducted a preliminary, but unsuccessful, search for records responsive to the Applicant's access request, in all areas except the 61,000 mineral files. The Public Body provided me with a list of the various places it searched. The Public Body says that the 61,000 mineral files are the only place remaining to be searched. The Public Body believes that the records the Applicant requested, if they exist at all, would be in the 61,000 mineral files. There is no dispute that the Applicant provided specific legal land descriptions to the Public Body, so that the Public Body could narrow the search to 3,500 of the mineral files corresponding to those legal land descriptions.

[para 22.] However, the matter of what records the Public Body must search is relevant only to the issue of the fee estimates. In this inquiry, I must first decide whether records are subject to the Act, before I consider the fee estimates.

[para 23.] To decide whether records are subject to the Act, I must consider the records the Applicant requested (the "responsive" records). "Responsive" records are those records that reasonably relate to an applicant's request for access: see Order 97-020.

[para 24.] The Applicant requested documents having to do with the authority for omitting the words "which may be found to exist" on split mineral titles and discussions or decisions about correcting the titles that omitted those words. Consequently, the records the Applicant requested (the responsive records) are the records at issue. I must decide whether those records are excluded from the application of the Act by section 4(1)(h)(iii).

[para 25.] As the mineral files are not the responsive records, they are not the records at issue. I am not going to decide whether the mineral files are excluded from the application of the Act by section 4(1)(h)(iii).

[para 26.] The parties dispute the date range of records that the Applicant's request encompasses. The dispute goes to what records within the mineral files might ultimately be responsive to the Applicant's request. The Public Body believes the date range is between 1900 and 1912 (paragraph 15 of the Public Body's additional written submission). The Applicant believes that it did not specify a date range.

[para 27.] For reasons discussed later in this Order, I do not find it necessary to deal specifically with each record that could be responsive. Therefore, it is not necessary for me to make a finding about the date range of records that the Applicant's request encompasses.

III. ISSUES

[para 28.] The Notice of Inquiry sets out the issues, as follows:

> A. Are the Records requested by the Applicant excluded from the application of the Act by section 4(1)(h)(iii)?
>
> B. If the Act applies to the Records,
>
> > 1. Did the Public Body properly refuse the Applicant's two requests for fee waiver under section 87(4) of the Act?
> >
> > 2. Are the two fee estimates provided by the Public Body appropriate?
>
> C. Did the Public Body breach section 9 of the Act?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Are the Records requested by the Applicant excluded from the application of the Act by section 4(1)(h)(iii)?

1. General

[para 29.] A record may be excluded from the application of the Act by section 4(1)(h)(iii). Section 4(1)(h)(iii) reads:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *…*
>
> *(h) a record made from information*
>
> *…*
>
> *(iii) in a Land Titles Office,*
>
> *…*

[para 30.] The Applicant maintains that the burden of proof is on the Public Body under section 4(1)(h)(iii). I agree, as the Public Body raised the issue, and the Public Body is in the best position to prove the issue.

2. My analysis of section 4(1)(h)(iii)

a. Meaning of "information in a Land Titles Office"

[para 31.] To decide what "information in a Land Titles Office" means, I have reviewed the *Land Titles Act*, R.S.A. 1980, c. L-5, as to the information in a Land Titles Office and as to the statutory functions of a Land Titles Office.

[para 32.] The *Land Titles Act* requires a Land Titles Office to maintain information, as follows:

- *Daily record* (section 16(1)). This is a record that must contain the particulars of every "instrument", defined in section 1(l), and caveat accepted by the Registrar for filing or registration.

- *Register* (section 17(1)). "Certificates of title", defined in section 1(b), and the particulars of all instruments, caveats, etc. recorded on certificates of title, constitute the "register", defined in section 1(u).

- *Record of names* (section 17.3). This is a record that enables the Registrar to provide a list of land owned by persons who have the same name as a person named in a search request.

[para 33.] A Land Titles Office has two main statutory functions:

- to conduct searches of information contained in the register (section 18), as well as to furnish copies of instruments and caveats (section 24.1)
- to provide for "filing" (defined in section 1(j)) or "registration" (defined in section 1(w)) of grants (defined in section 1(k)), instruments or caveats (section 25 and following).

[para 34.] In my view, much of the information in a Land Titles Office would initially come from outside a Land Titles Office. A Land Titles Office gets its information primarily from you and me. We provide information to a Land Titles Office when we take in our mortgage documents and transfers of land to register them, for example. The information you and I provide to a Land Titles Office becomes part of the underlying information in a Land Titles Office.

[para 35.] This underlying information, that is, the information on which a Land Titles Office bases its existence, is information that relates to the search, registration or filing functions of a Land Titles Office. I believe that the Legislature intended that section 4(1)(h)(iii) encompass information relating to those functions when it used the words "information in a Land Titles Office".

[para 36.] Therefore, considering the information a Land Titles Office must maintain and the statutory functions of a Land Titles Office, I find that "information in a Land Titles Office" is information in a Land Titles Office that relates to the search, registration or filing functions of a Land Titles Office, including the three kinds of information I have listed above.

b. Meaning of "record made from" information in a Land Titles Office

[para 37.] The Applicant argues for a restrictive interpretation of section 4(1)(h)(iii) to exclude from the Act only records in a land title registry that are available to the public for a fee (page 11 of the Applicant's submission).

[para 38.] The Public Body rejects an interpretation of section 4(1)(h)(iii) that would exclude only records for which a fee must be paid, particularly since such an interpretation would render pointless section

28(1)(a) of the Act (refusal to disclose records that are available for purchase by the public).

[para 39.] "Record" is defined is section 1(1)(q) of the Act, as follows:

> *1(1) In this Act,*
>
> > *(q) "record" means a record of information in any form and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records.*

[para 40.] I intend to give the words "made from" their ordinary meaning.

[para 41.] Considering the definition of "record" in the Act, the information a Land Titles Office must maintain, and the statutory functions of a Land Titles Office, I believe that a "record made from" information in a Land Titles Office is a record made from information in a Land Titles Office that relates to the search, registration or filing functions of a Land Titles Office. Such records would include:

> 1. The daily record, register and record of names, as discussed above, made from information you and I, among others, supply to a Land Titles Office.
>
> 2. A record made for someone who registers a grant, instrument or caveat. An example would be a certificate of title, which a Land Titles Office makes for a purchaser of land. That record would be made from information in the register.
>
> 3. A record made for someone who requests a search. That record could be made from information in the register or the record of names. A Land Titles Office would make a copy (record) of any instrument or caveat requested.
>
> 4. Generally, any record made from information in a Land Titles Office that relates to the search, registration or filing functions of a Land Titles Office.

[para 42.] Based on my foregoing analysis, I find that section 4(1)(h)(iii) is not limited to records that are available to the public for a fee.

c. Application of section 4(1)(h)(iii) to the records the Applicant requested (the responsive records)

[para 43.] The Public Body believes that that records the Applicant requested, if they exist, will be in the mineral files. The Public Body describes the subject matter of records contained in a typical mineral file (page 15 of the Public Body's submission), as follows:

- copy of the patent from the Crown in Right of Alberta
- copies of township plans (if applicable)
- copies of all pertinent registered plans (if applicable)
- copies of all registered instruments and caveats which support the chain of title from patent to current title
- copies of all titles from patent to current title, showing the chain of ownership
- copies of mineral certificates
- summary reports on chain of title prepared by Land Titles employees
- flow charts depicting the chain and evolution of title prepared by Land Titles employees
- correspondence/memos/handwritten notes between the Registrar and Land Titles employees or between Land Titles employees
- correspondence to lawyers from Land Titles requesting legal opinions on a Land Titles issue
- correspondence from lawyers to Land Titles providing legal opinions to Land Titles on a Land Titles issue
- correspondence from third parties external to the Department (excluding legal opinions to the Department discussed above)

[para 44.] I have reviewed one mineral file and confirm that it contains records of many of the subject matters the Public Body describes.

[para 45.] In the Public Body's view, the mineral files contain records made from information in a Land Titles Office, which would be excluded from the application of the Act by section 4(1)(h)(iii). The Public Body thinks that only correspondence from third parties external to the Land Titles Office may not fall within section 4(1)(h)(iii) if that record was not made from information in a Land Titles Office.

[para 46.] The Applicant says that any record relating to the authority for the omission of the words would not be a record made from information in a Land Titles Office, based on having obtained a similar record from the Saskatchewan Land Titles Office (Tab 20 of the

Applicant's submission). I believe the Applicant's argument to be that a record generated within a Land Titles Office cannot be a record made from information in a Land Titles Office.

[para 47.] As to records relating to discussions or decisions about correcting titles, the Applicant believes that not all of those records would be made from information in a Land Titles Office, whether located in the mineral files or in locations the Applicant has suggested the Public Body search.

[para 48.] Considering the records the Applicant requested (the responsive records), I have decided that neither the Public Body's nor the Applicant's analysis is correct in this case. My analysis follows.

[para 49.] The Applicant asked to examine documents having to do with the authority for omitting the words "which may be found to exist" on split mineral titles, and discussions or decisions about correcting the titles that omitted those words. In my view, the subject matter of what the Applicant asked to examine is information in Land Titles Office that relates to the search, registration or filing functions of a Land Titles Office.

[para 50.] The Applicant asked to examine documents in which that information might be recorded. According to the definition of "record" in section 1(1)(q) of the Act, such a document would be a "record".

[para 51.] The subject matter of the Applicant's request is information in a Land Titles Office that relates to the search, registration or filing functions of a Land Titles Office. It follows that any record responsive to that request would be "made from" that information. Therefore, I conclude that any responsive record that the Public Body might have located would fall within section 4(1)(h)(iii) and be excluded from the application of the Act.

[para 52.] Consequently, it does not matter that the Public Body has not been able to locate responsive records. Furthermore, in this case, I do not find it necessary to require the Public Body to produce responsive records, as provided by section 54(2).

[para 53.] Since 1988, the Land Titles Office has stored information electronically in the "ALTA System" (discussed later in this Order). However, the information in the Land Titles Office from 1988 onward may still be in both paper and electronic format. Information prior to 1988 is in paper format. My decision under section 4(1)(h)(iii) is not affected by the method of storing the information, whether in paper or

electronic format, since the definition of "record" contemplates storage in any manner.

[para 54.] My decision under section 4(1)(h)(iii) is also not affected by the fact that not all the mineral files and, potentially, responsive records, are presently in a Land Titles Office (some are now in the "Public" [Provincial] Archives).

3. Conclusion under section 4(1)(h)(iii)

[para 55.] The records the Applicant requested are records made from information in a Land Titles Office, as provided by section 4(1)(h)(iii) of the Act. Consequently, those records are excluded from the application of the Act by section 4(1)(h)(iii), and I have no jurisdiction over those records. The Applicant cannot obtain access to those records under the Act.

4. Other matters under section 4(1)(h)(iii)

a. Timing of the Public Body's reliance on section 4(1)(h)(iii)

[para 56.] The Applicant argues that the Public Body cannot now rely on section 4(1)(h)(iii) when the Public Body did not initially inform the Applicant of this. In essence, I believe the Applicant's complaint is that the Public Body should have raised the issue in first dealing with the Applicant, rather than at some later point. The Applicant implies that the timing in this case is somehow unfair.

[para 57.] In previous Orders, I have dealt extensively with the matter of late raising of issues at the inquiry stage. However, this is a case of the Public Body's raising section 4(1)(h)(iii) in the Public Body's September 1, 1999 letter to the Applicant, before the Applicant even requested a review by me on October 5, 1999.

[para 58.] At the very least, the Public Body's actual reliance on section 4(1)(h)(iii) must have been made known to the Applicant before the matter was set down for an inquiry, as the issue of section 4(1)(h)(iii) was set out in the Notice of Inquiry. Furthermore, the Applicant was given ample opportunity to respond to the issue. Consequently, I find no unfairness to the Applicant in the timing of the Public Body's reliance on section 4(1)(h)(iii).

b. Raising section 4(1)(h)(iii) as an issue before locating the records the Applicant requested (the responsive records)

[para 59.] The Public Body raised section 4(1)(h)(iii) as an issue before it located responsive records. The Applicant maintains that the Public Body cannot meet the burden under section 4(1)(h)(iii) when it has not located the records. To some extent, the Public Body's September 1, 1999 and October 13, 1999 letters to the Applicant foster that view.

[para 60.] Can the Public Body meet the burden under section 4(1)(h)(iii) when it has not located responsive records?

[para 61.] In Order 99-033, I said that it was not necessary for Alberta Treasury Branches (ATB), the public body in that case, to conduct a search in order to decide whether records were excluded from the application of the Act by section 4(1)(m). Given the subject matter of the records an applicant asked for, it was possible for ATB to decide, without conducting a search, that a record of the kind an applicant sought would fall within the provision.

[para 62.] This case can be compared with Order 99-033. In addition, in this case, the Public Body conducted a preliminary search and determined that the only location in which there could possibly be responsive records is in the mineral files of the Land Titles Office. That location, which points to a Land Titles Office as the source of any responsive records, makes it possible to consider the applicability of section 4(1)(h)(iii) at the outset. I accept the Public Body's evidence that it has conducted a preliminary search except through the mineral files, and that responsive records, if any, will be in the mineral files of the Land Titles Office.

[para 63.] Although the Public Body has not located responsive records, I nevertheless find that the Public Body has met the burden under section 4(1)(h)(iii), for the following reasons: (i) the Public Body conducted a preliminary search to locate responsive records and determined that, if responsive records existed, they would be located in the mineral files of the Land Titles Office; and (ii) the subject matter of the records the Applicant requested otherwise meets the requirements of section 4(1)(h)(iii).

[para 64.] There is a further matter. Implicit in the Applicant's argument is that a public body must first locate responsive records before it may raise a jurisdictional issue such as section 4(1)(h)(iii).

[para 65.] If I accept this implicit argument, a public body would always be required to use the following procedure on an access request

under the Act: provide a fee estimate; agree upon fees; search for and locate responsive records; claim that certain records are excluded from the application of the Act by section 4(1)(h)(iii) or any other jurisdictional provision. This is the process contemplated by Practice Note 4, published by my Office.

[para 66.] It follows that a public body could never raise section 4(1)(h)(iii) as an issue before providing a fee estimate because the public body would not yet have searched for and located responsive records: see Order 99-011, which says that a public body must provide an estimate of the total fee before providing the services, that is, before it searches for, locates and retrieves the records.

[para 67.] However, there may be occasions when it is appropriate for a public body to raise a jurisdictional issue before it searches for and locates responsive records.

[para 68.] If a public body properly raises a jurisdictional issue at the outset when an applicant makes an access request, the public body would be justified in not providing a fee estimate. On an access request, a public body would inform an applicant that it was raising the jurisdictional issue, and would not provide a fee estimate until such time as I had dealt with the jurisdictional issue (assuming that an applicant requested, under section 62(1), that I review the public body's decision on the jurisdictional issue).

[para 69.] I will decide on a case-by-case basis the appropriateness of raising the jurisdictional issue at the outset. Order 99-033 was one such case. It seems to me that this would have been another such case, because of what I believe to be the uniqueness of the land titles registry system and the intention of the Legislature to exclude from the application of the Act a record made from information in a Land Titles Office.

ISSUE B: If the Act applies to the records,

1. Did the Public Body properly refuse the Applicant's two requests for fee waiver under section 87(4) of the Act?

2. Are the two fee estimates provided by the Public Body appropriate?

[para 70.] As the Act does not apply to the records the Applicant requested, I do not find it necessary to decide whether the Public Body properly refused the Applicant's requests for a fee waiver of the informal

and formal fee estimates under section 87(4) of the Act, or whether the informal and formal fee estimates provided by the Public Body were appropriate.

ISSUE C: Did the Public Body breach section 9 of the Act?

[para 71.] The burden of proof is on the Public Body under section 9.

1. Section 9(1) (duty to assist and to respond)

[para 72.] The Applicant maintains that the Public Body breached its duty to make every reasonable effort to assist the Applicant, as provided by section 9(1), because the Public Body's fee estimates were not appropriate, and the Public Body improperly denied the Applicant's requests for fee waivers.

[para 73.] Section 9(1) reads:

> *9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 74.] I have found that the records the Applicant requested are not subject to the Act. However, section 9(1) is a duty that does not refer to records. It seems to me that the duty to assist under section 9(1) is independent of whether or not records are subject to the Act. Consequently, I intend to consider whether the Public Body met its duty under section 9(1) in its dealings with the Applicant.

[para 75.] The Public Body maintains that it made reasonable efforts to assist the Applicant to narrow the request and to explain in detail the limitations of the organization of documents in the Land Titles Office, including the computer systems. In Order 99-011, I agreed that a public body had a duty to engage in ongoing discussions and clarification leading up to the "formal" fee estimate, in order to assist an applicant in narrowing the request. I accept the Public Body's evidence that it made every reasonable effort to assist the Applicant in this regard.

[para 76.] In Order 99-011, I also agreed that the issue of an appropriate fee estimate was to be dealt with under the fee estimate provisions of the Act and the *Freedom of Information and Protection of Privacy Regulation* (the "Regulation"), rather than as a complaint that the public body did not comply with its duty under section 9(1). Similarly, I find that the propriety of a public body's denial of a fee waiver is to be

dealt with under section 87(4) of the Act, rather than as a complaint that the public body did not comply with its duty under section 9(1) (with one exception discussed below). Therefore, I do not intend to consider the propriety of the Public Body's fee estimates or denial of a fee waiver under section 9(1).

[para 77.] In any event, I have decided that the records are not subject to the Act. Consequently, I do not find it necessary to consider the propriety of the fee estimates or the denial of a fee waiver.

[para 78.] The Public Body initially provided the Applicant with an "informal" fee estimate, meaning that the Public Body complied with the requirement under section 87(3) to provide an estimate of the total fee. However, the informal fee estimate did not comply with section 12(1) of the Regulation, which requires that a public body inform an applicant of the various components of the fee estimate.

[para 79.] After being given the informal fee estimate, the Applicant asked the Public Body to waive the fee. However, the Public Body was insistent that the Applicant first narrow the request before the Public Body would consider the Applicant's request for a fee waiver. At least twice more, the Applicant asked the Public Body to waive the fee. The Public Body's response was that it had not yet provided a formal fee estimate and, therefore, the Applicant's request for a fee waiver was premature. When the Applicant finally narrowed the request, the Public Body provided the Applicant with a formal fee estimate, that is, an estimate according to section 12(1) of the Regulation.

[para 80.] I acknowledge that there may be some value in a public body's providing an informal fee estimate, which can have the effect of encouraging an applicant to narrow the request. However, the danger is that an applicant will treat the informal fee estimate as the public body's fee estimate and insist upon pursuing a fee waiver, rather than narrowing the request, as here.

[para 81.] It seems to me that, if an applicant receives an informal fee estimate and persists in asking for a fee waiver rather than narrowing the request, a public body has a duty to move the process along by providing a formal fee estimate and responding to the fee waiver request.

[para 82.] In the face of repeated requests for a fee waiver of an informal fee estimate, a public body cannot continue to refuse to respond until the applicant narrows the request, as here. In my view, the Public Body was too aggressive in trying to get the Applicant to narrow the request.

[para 83.] I find that the Public Body's failure to respond to the Applicant's repeated requests for a fee waiver of the informal fee estimate is a breach of the Public Body's duty to respond to the Applicant under section 9(1) of the Act.

[para 84.] It would serve no useful purpose now to order the Public Body to respond, as the Public Body ultimately responded to the Applicant's request for a fee waiver. However, by this Order, I intend to bring to the head's attention the Public Body's breach of section 9(1).

2. Section 9(2) (duty to create a record)

[para 85.] The Public Body says that it is not able to search electronically for, or to create in electronic form, the records the Applicant requested. I believe the Public Body's argument to be that it would first have to identify split mineral titles in the electronic database of the Land Titles Office, before it could locate responsive records. The Public Body maintains that it is not able to search for split mineral titles in its database.

[para 86.] The Applicant says that the Public Body should be able to write a computer program to make a search for split mineral titles work. The Applicant's position raises the issue of whether 9(2) of the Act is applicable.

[para 87.] Section 9(2) reads:

> *9(2) The head of a public body must create a record for an applicant if*
>
> > *(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
> >
> > *(b) creating the record would not unreasonably interfere with the operations of the public body.*

[para 88.] Section 9(2) is concerned with creating a record to answer an applicant's access request. I have found that the records the Applicant requested are not subject to the Act. As such, I would normally not consider section 9(2).

[para 89.] However, before deciding to rely on section 4(1)(h)(iii) as excluding the records from the application of the Act, the Public Body went through the process of conducting a preliminary search for records and explaining to the Applicant the electronic database of the Land Titles Office. Therefore, I intend to consider whether the Public Body had any duty under section 9(2).

[para 90.] In its affidavit, the Public Body explains why it cannot create a record for the Applicant, as follows.

> All of the titles at Land Titles are recorded in electronic form on the Alberta Land Titles Automation ("ALTA") system (the "ALTA System").
>
> There are approximately 160,000 mineral titles in the Province of Alberta.
>
> Mineral titles are identified on the ALTA System with an "M" or a "B" in a coded search field. "M" indicates a mineral only ownership title and "B" indicates a title which contains both surface and mineral ownership. The Land Titles Office can search those symbols, to determine the total number of mineral titles.
>
> There is no search term or coding in the ALTA database that would enable the Land Titles Office to identify split mineral titles from the total 160,000 mineral titles. The text that would identify the split title on the individual titles is described, in computer terms, "non-intelligent text".
>
> The ALTA System is platformed on a mainframe IBM computer, storing data in ASCII comma delimited fields. As this is not a relational database, queries on non-structured text fields produce only marginal results, with questionable accuracy.
>
> [The Public Body has been advised by its IT outsourcing partner and believes] that the Land Titles Office could not write a computer program to make a search for split titles work, with any reliable results.
>
> In order to identify which titles are split mineral titles, the Land Titles Office would have to individually print off or pull up on a screen each of the 160,000 total mineral titles and read the text of the legal description to determine if a split title exists in a particular case.
>
> Based on the foregoing, in order to determine which titles relate to split titles prior to reviewing any Mineral Files, the Land Titles Office would have to: (1) review the non-intelligent text of the 160,000 mineral titles to determine if a mineral title was a split title; and (2) examine whether or not the split title was incorporated in a Mineral File. The Land Titles Office would then have to review the relevant Mineral Files.
>
> Alternatively, the Land Titles Office could manually search each of the 61,000 Mineral Files to determine if they relate to a split mineral title.

[para 91.] The Public Body is of the view that manually searching the 61,000 mineral files is the most efficient method to conduct a search for the records the Applicant requested.

[para 92.] The Applicant nevertheless maintains that it is relatively easy for a computer programmer to write an algorithm to search non-intelligent text. Furthermore, the Applicant says that most modern database programs allow for the searching of non-intelligent text fields without additional algorithms.

[para 93.] I have reviewed the Public Body's explanation and the additional information I asked the Public Body to provide regarding the ALTA System. I have also taken into consideration the Applicant's arguments.

[para 94.] I believe that the Public Body would first have to identify split mineral titles in the ALTA System before it could locate the records the Applicant requested. I am satisfied that the ALTA System is not presently capable of identifying split mineral titles, using normal computer hardware and software and technical expertise.

[para 95.] As a result, the records the Applicant requested cannot be created from a record in electronic form. Therefore, I find that section 9(2) is not applicable, and the Public Body is not required to create a record for the Applicant, as provided by section 9(2) of the Act.

V. ORDER

[para 96.] I make the following Order under section 68 of the Act.

Issue A: Application of section 4(1)(h)(iii) of the Act

[para 97.] The records the Applicant requested are records made from information in a Land Titles Office, as provided by section 4(1)(h)(iii) of the Act. Consequently, those records are excluded from the application of the Act by section 4(1)(h)(iii), and I have no jurisdiction over those records. The Applicant cannot obtain access to those records under the Act.

Issue B: Fee waiver under section 87(4) of the Act, and fee estimates

[para 98.] As the Act does not apply to the Records, I do not find it necessary to decide whether the Public Body properly refused the Applicant's requests for fee waivers of the informal and the formal fee estimates under section 87(4) of the Act, or whether the informal and formal fee estimates provided by the Public Body were appropriate.

Issue C: Public Body's duties under section 9 of the Act

[para 99.] The Public Body's failure to respond to the Applicant's repeated requests for a fee waiver of the informal fee estimate is a breach of the Public Body's duty to respond to the Applicant under section 9(1) of the Act. However, it would serve no useful purpose now to order the Public Body to respond, as the Public Body ultimately responded to the Applicant's request for a fee waiver. Nevertheless, by this Order, I am bringing to the head's attention the Public Body's breach of section 9(1).

[para 100.] The records the Applicant requested cannot be created from a record in electronic form. Therefore, section 9(2) is not applicable, and the Public Body is not required to create a record for the Applicant, as provided by section 9(2) of the Act.

Robert C. Clark
Information and Privacy Commissioner