ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-005

June 25, 2007

ALBERTA INFRASTRUCTURE AND TRANSPORTATION

Case File Number 3023

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

Summary: The Applicant, a reporter for the Edmonton Journal, made an access request to Alberta Infrastructure and Transportation [formerly Alberta Infrastructure] (the "Public Body") for the flight logs of government airplanes. The Applicant also asked for a fee waiver. When the fee waiver was refused by the Public Body, the Applicant asked this Office to review the decision.

During mediation, the Applicant decided to pay the fees and receive the documents, while still challenging whether a waiver of fees was appropriate. The Public Body took longer to respond than the Applicant felt was necessary. The Applicant alleged that the delay was done deliberately to prevent him from reporting on the contents of the records until after the Provincial Election on November 22, 2004. An oral inquiry was convened to decide the timeline and fee issues.

During the course of the inquiry, the Applicant brought the Adjudicator's attention to the existence of two versions of an email, one version of which had been entered as an exhibit in the inquiry by the Public Body. The Adjudicator adjourned the inquiry to determine if there was a simple explanation for the existence of two versions of the same email. When a simple explanation was not forthcoming, the Adjudicator recommended that the Commissioner commence an investigation into a possible breach of section 92 of the Act (the offence section). The investigation was commenced and the findings sent to the Special Prosecutions Branch of Alberta Justice. The investigation continues.

The Adjudicator hearing the inquiry is retiring from the Office of the Information and Privacy Commissioner, effective June 30, 2007. He would not be able to issue a decision after that date. After a review of the evidence presented to date and the consequences of having to start the inquiry over, the Adjudicator made the decision to issue an Order, concluding the issues without re-convening the inquiry.

The Adjudicator found that the Public Body did not comply with the timeline for response, as provided by section 11 of the Act. He also found that the Public Body was not authorized to extend the timeline for response, as provided by section 14 of the Act.

The Adjudicator found that, on a balance of probabilities, the Public Body delayed the Applicant's access to the records until after the Provincial Election. Because the Adjudicator found that this was not an inadvertent breach of the timelines, he ordered the Public Body to refund all fees paid by the Applicant in relation to this access request. This included the initial $25.00 administration fee.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 10(1), 11, 14, 14(1), 14(1)(b), 14(4)(b), 14(4)(c), 69(2), 69(4), 72, 72(3)(c), 92, 92(1), 92(1)(c), 93(4); *Freedom of Information and Protection of Privacy Regulation, AR 200/1995,* s. 13.

I. BACKGROUND

[para 1] The Applicant, a reporter for the Edmonton Journal, made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act"), to Alberta Infrastructure and Transportation [formerly Alberta Infrastructure] (the "Public Body") for the flight logs of government airplanes. The Applicant also asked for a fee waiver. The access request was received by the Public Body on June 2, 2004.

[para 2] The Public Body refused to waive the fees and supplied the applicant with a fee estimate.

[para 3] The Applicant made a request for review of the Public Body's decision to the Office of the Information and Privacy Commissioner on June 25, 2004. During the course of mediation, the Applicant decided to pay the fees and receive access to the records from the Public Body.

[para 4] The Public Body extended the time for response, citing section 14 of the Act. At the end of the extension period, the Applicant was given access to the severed records.

[para 5] The Applicant was not satisfied with the timeliness of the Public Body's response. He also wished to continue to challenge the Public Body's decision regarding

fees. The matter was set down for a public, oral inquiry on March 10, 2005. The following issues were set out in the Notice of Inquiry:

1. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?
2. Did the public body comply with section 11 of the Act (time limit for responding)?
3. Did the Public Body properly extend the time limit for responding to a request, as authorized by section 14 of the Act?
4. Should the Applicant be excused from paying all or part of the fee, as provided by section 93(4) of the Act?
5. Did the Public Body properly estimate the fees for service?

[para 6] The severing of third party personal information from the records was not an issue for the Applicant. Consequently, it will not be dealt with as an issue for this inquiry.

II. THE INQUIRY

[para 7] The inquiry was convened at 9:33 am on March 10, 2005, and adjourned at 4:00 pm. The Public Body was represented by legal counsel. The Applicant was not. Most of the day was used by the Public Body presenting evidence and argument regarding its position on the issues. The Public Body called three witnesses; the FOIP Co-ordinator, Assistant FOIP Co-ordinator and the FOIP and Legislative Assistant.

[para 8] The Applicant was given the opportunity to ask questions of all three witnesses. I also questioned the witnesses at length. The Public Body closed its case.

[para 9] At the end of the day, I asked the Applicant to present his case. He indicated that he was not ready to offer his evidence and argument. The Applicant also indicated that he wished to retain the services of a lawyer. I adjourned the inquiry, to be re-convened when the Applicant had counsel.

[para 10] On March 14, 2005, I received a letter from the Applicant indicating that his employer, the Edmonton Journal, had retained counsel and that they intended to re-call all of the witnesses and call new ones.

[para 11] On March 15, 2005, I wrote to the Applicant and advised him that I did not intend to cover testimony already covered by the Public Body's witnesses. On that same date, the Inquiries Clerk sent copies of the voice recordings of the oral inquiry on compact disk to both parties. This followed a request from the Applicant for the recordings.

[para 12] On March 18, 2005, a notice was sent to all parties, setting April 19, 2005 as the date for a continuance of the inquiry.

[para 13] On April 7, 2005, I received a letter from the Applicant's counsel, requesting a time extension. He also pointed out that the voice-recordings of the inquiry were very poor, making it impossible to make a transcription. He argued that the Applicant was in a disadvantaged position because: "There is no record of what was said at the hearing, and the Journal's representative, [the Applicant], was unable to take notes given his involvement. For this reason, the Applicant's counsel stated that he wanted all three of the Public Body's witnesses re-called. He also indicated that he wanted the Deputy Minister and Director of Communications called as witnesses.

[para 14] By letter, dated April 11, 2005, I responded:

> At the inquiry on March 10, 2005, Alberta Infrastructure called its witnesses. Your client was present, heard the evidence, and had the opportunity to cross-examine those witnesses. The fact that your client subsequently decided to retain legal counsel is not a reason for me to start the inquiry anew by recalling the witnesses. The fact that the recordings of the inquiry are not of the quality you may wish is also not a reason for me to start the inquiry anew, as your client was present to hear the evidence and has already cross-examined the witnesses. Therefore, I have decided not to grant your request to recall Alberta Infrastructure's witnesses.
>
> On March 10, 2005, Alberta Infrastructure concluded its evidence. It decided not to call the two individuals you have now requested be called.
>
> In my view, it is Alberta Infrastructure's decision regarding who to call as witnesses. My decision regarding whether Alberta Infrastructure met its burden for a number of the issues in the inquiry, including section 10, will be based on the witnesses that were called, their evidence, as well as the evidence of your client. I see no reason to require additional witnesses from Alberta Infrastructure for the purpose of assisting them to prove or disprove their case. Therefore, I have decided not to grant your request to require Alberta Infrastructure to call additional witnesses.

[para 15] I went on in that letter to advise the Applicant's counsel that I intended to continue with the inquiry on April 19, 2005, re-stated the five issues, and set out how I intended to proceed on that date.

[para 16] On April 13, 2005, the Applicant's counsel wrote to me confirming my decision regarding continuing without calling the requested witnesses. In that letter, he made the following request:

> It remains our position that there are several important questions that were not put to the witnesses at the initial hearing. Having regard to your ruling on our request to recall these individuals, we request that we be given the opportunity to put questions to them by way of written interrogatories. We propose to set out five questions for each witness, and to forward the same to your office. The witnesses can then provide sworn responses to these discrete questions. In our view, this addresses your concern about recalling witnesses, and our concern regarding important evidence.
>
> Regarding [the Deputy Minister], we believe that the evidence indicated that [the Deputy Minister] was the individual responsible (i.e. the head of the Public Body) for approving the disclosure of the information from Alberta Infrastructure. In our view, his evidence is directly relevant to the issues in this inquiry. We believe that his evidence is essential. You have ruled that the Public Body will not be required to call [the Deputy Minister] as a witness. As such, our client proposed to call [the Deputy Minister] as its witness. Please advise us of the procedure to provide a Notice

> to Attend to [the Deputy Minister]. Lastly, in the event that [the Deputy Minister] does not attend, we will be requesting that you find an adverse inference as a result of this lack of critical evidence.

[para 17] On April 13, 2005, I responded as follows:

> I have received your letter of April 13, 2005. As I stated in my letter of April 11, 2005, it is my intention to proceed with the continuance of this inquiry on April 19, 2005. You may raise the issues contained in your letter at that time. This will allow [lawyer's name], Counsel for Alberta Infrastructure, to make any representations he may have regarding your issues or raise any new issues of his own.

[para 18] On April 14, 2005, I received a letter from the Applicant's counsel indicating that, due to a recently discovered conflict, he was unable to continue. He provided the name of the Applicant's new counsel.

[para 19] On April 15, 2005, I received a letter from the Applicant's new counsel asking that the inquiry date be postponed so that he could become familiar with the file. A new date of May 12, 2005 was set down for the inquiry to continue.

[para 20] On April 27, 2005, I received a letter indicated that the new counsel was also in a conflict position and would be unable to continue. The letter identified new counsel for the Applicant.

[para 21] On May 4, 2005, I received the following request from the Applicant's latest counsel:

> I have reviewed correspondence with [law firm] and particularly your letter to [counsel] of April 11th, 2005. Your letter was in response to [counsel's] request that [the Deputy Minister] and [the Director of Communications] be called to attend as witnesses. Your letter of April 11th, 2005 to [counsel] indicates (at the top of page 2) that you were under the impression that [counsel] was requesting you to require Alberta Infrastructure to call additional witnesses. I believe that this was an incorrect impression, and in any event would not be the request I am making. On behalf of [the Applicant] I would like to call [the Deputy Minister], [the Director of Communications, and [the Minister's Executive Assistant] as our witnesses once the hearing resumes.

[para 22] On May 5, 2005, I responded to the Applicant's counsel quoting from my April 13, 2005 letter. I stated that I would only address this issue further with all parties present.

[para 23] On May 12, 2005, the oral inquiry resumed. The Applicant and Public Body were both represented by counsel. After some preliminary issues that I addressed, the Applicant made representations regarding witnesses. During this presentation, the Applicant revealed that, as a result of a subsequent access request, he had been given a copy of an November 12, 2004 email message, introduced during the first day of oral proceedings by the Public Body as Exhibit "D". The email received during the second access request had wording which differed from the wording in Exhibit "D".

[para 24] The last line of the email entered as Exhibit "D" read:

> You are reminded that the records **MUST** be released on or <u>before</u> November 25, and no further extensions of time are possible. (Underlining added.)

[para 25] The last line of the email received by the Applicant as a result of his second access request read:

> You are reminded that the records **MUST** be released on or <u>after</u> November 25, and no further extensions of time are possible. (Underlining added.)

[para 26] The existence of two versions of the email was new information for counsel for the Public Body, who was unable to give an explanation. There was discussion about the significance of the two versions and it was agreed that this was a serious enough matter that an explanation was required in order to determine if there had been a deliberate attempt by someone to mislead me in deciding the issues.

[para 27] I informed the parties that I would not make a decision on the witness issue at that time and that I would release a written decision on that issue. I asked that the Applicant and Public Body both supply me with a copy of the records released to the Applicant on his second access request. I wanted to compare what was sent to the Applicant and what he had received. I then adjourned the inquiry so that an answer could be sought regarding the cause of the discrepancy in the two versions of the November 12, 2004, email.

[para 28] On May 13, 2005, I sent a letter to the Public Body asking for the following:

> Please send me a copy of all versions, in any format, including electronic and printed, of [*date of the email was later corrected to November 12, 2004*] email including, but not limited to the following:
>
> - copies residing on the hard drives or any other form of media at individuals work stations and/or offices,
> - copies residing on servers,
> - copies residing on back-up tapes or any other form of media used for the purpose of business continuity, disaster recovery, or archival purposes
> - copies included in a string of email messages residing in any location, including paper versions
> - any paper versions of the email either filed centrally or in individual offices
>
> In preparing this information for my review, I would ask that each individual copy is clearly marked with the location it was recovered from. In addition, I would like a detailed listing of the locations searched, with particular attention paid to the workstations and/or offices of the individuals to whom the email was addressed or copied.

[para 29] On May 27, 2005, I received a letter from the Public Body, indicating that they had retained the services of PriceWaterhouseCoopers to retrieve the copies which I requested in my May 13, 2005 letter. This letter was accompanied by an email attachment from PriceWaterhouseCoopers to the Public Body outlining the general process which was being undertaken to recover and collect the data. I accepted the attachment in camera.

[para 30] On June 10, 2005, I received a copy of the interim findings of PriceWaterhouseCoopers from the Public Body with paper copies of the November 12 email. The Public Body did not request that this specific correspondence be accepted in camera. This information was shared with the Applicant.

[para 31] On July 8, 2005, I received a copy of the PriceWaterhouseCoopers report titled "Alberta Infrastructure and Transportation Email Report" and a copy of the follow-up addendum to the report from the Public Body. These reports were accepted in camera.

[para 32] On July 28, 2005, I wrote the following letter to the parties:

> I have now had an opportunity to review the contents of the PricewaterhouseCoopers Report ("the Report") which was sent to me by the Public Body on July 8, 2005. The Report satisfies the requests made in my May 13, 2005 letter to the Public Body, in which I requested all copies of the November 12, 2004 email.
>
> The Report further concludes that the email was modified by someone and offers some evidence of the modification. However, the Report leaves many questions unanswered. Those questions may only be answered by interviewing the individuals concerned. It remains possible that there has been an offence committed under section 92(1)(c) of the *Freedom of Information and Protection of Privacy Act* ("the Act"), which states:
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>> 92(1) A person must not wilfully
>>
>>> (c) make a false statement to, or mislead or attempt to mislead, the Commissioner or another person in the performance of the duties, powers or functions of the Commissioner or other person under this Act,
>>
>> (2) A person who contravenes subsection (1) is guilty of an offence and liable to a fine of not more than $10 000.
>
> The Act does not grant the Commissioner the authority to make a finding of guilt or innocence and levy a fine. Consequently, if there is sufficient evidence of an offence under section 92 of the Act, the matter must be referred to Special Prosecutions to be heard in the Provincial Court of Alberta.
>
> I have recommended to the Commissioner that an investigation be commenced to determine if sufficient evidence exists to refer the matter for prosecution. He has agreed. You can expect a letter from the Commissioner in this regard.
>
> The commencement of an investigation into a possible offence under section 92 means that the matter moves from the rules that govern administrative law to quasi-criminal law. Anyone who may be the subject of this investigation is entitled to all of the rights contained in the Charter of Rights and Freedoms. It also means that I will not be sharing the Report with the Applicant.
>
> Until the investigation into a possible offence under section 92 has concluded, I am suspending the inquiry. I will re-convene the inquiry once the investigation and any related actions are complete.

[para 33] On July 29, 2005, the Commissioner wrote to the parties confirming that he had commenced an investigation under section 92(1) of the Act.

III. PRELIMINARY ISSUES

[para 34] The following issues must be decided before I can proceed with the issues set out in the Notice of Inquiry:

1. Do I grant the Applicant's request to compel the attendance of further witnesses?
2. Do I allow the applicant to re-call three witnesses?
3. Do I release a copy of the PriceWaterhouseCoopers report to the Applicant?
4. Do I proceed with the inquiry or simply issue a decision?

IV. DISCUSSION OF THE PRELIMINARY ISSUES

1. Do I grant the Applicant's request to compel the attendance of further witnesses?

[para 35] Prior to the commencement of oral presentations on March 10, 2005, the Public Body and the Applicant were sent a Notice of Inquiry, dated January 6, 2005. In that notice, a request was made for both parties to submit a written brief by noon of Thursday, February 17, 2005. The Public Body prepared a written brief, which was delivered before the deadline. The Applicant did not respond to the request for a written submission until after receiving a copy of the Public Body's brief. I accepted his late submission, which was then copied to the Public Body. It is this Office's normal practice to have parties respond at the same time and for our office to exchange copies of the submissions.

[para 36] On the first day of the oral portion of the inquiry, the Public Body was represented by counsel. The Applicant was not. The Applicant is not an unsophisticated participant in the access to information process. Consequently, I conclude that he was fully aware, prior to the commencement of the inquiry, that he could have retained counsel to represent him or his employer at the inquiry. I also note that for all but the latter portion of the day, he had an associate sitting at the table with him, taking notes, and another associate sitting in the back of the room.

[para 37] At the conclusion of the Public Body's lengthy presentation, all that remained was for the Applicant to make his presentation. When the Applicant was given the opportunity to proceed, he indicated that he was not prepared to proceed and that he felt that he should have a lawyer in order to complete his presentation. I am unaware of any reason why the Applicant would have expected the inquiry to continue past the one-day scheduled for its completion. However, I decided to adjourn the inquiry to allow the Applicant time to prepare his presentation.

[para 38] What followed was a letter from the Applicant indicating that he wished to call the Deputy Minister and the Director of Communications and to re-call the Public

Body's three witnesses. Clearly, the Applicant misinterpreted the purpose for the adjournment. Granting of the adjournment was to allow him to prepare his presentation and, if he felt it was necessary, retain the services of legal counsel to assist in that process. This was not an opportunity to conduct an investigation into the actions of the Public Body, but rather to present any evidence that he had which was relevant to the issues in front of me and to present his views related to those issues.

[para 39] It is not uncommon for applicants to confuse a public oral inquiry held by this Office under the *Freedom of Information and Protection of Privacy Act* with a Public Inquiry as set out in the *Public Inquiries Act*. Section 69(4) of the Act allows the Commissioner or his delegate to decide whether the representations are to be made orally or in writing. Section 69(2) of the Act allows an inquiry to be held in private. In this case, I decided to hold an oral inquiry, open to the public. This should not be confused with a Public Inquiry.

[para 40] A Public Inquiry is commenced by the Lieutenant Governor in Council to inquire and report on a matter of public interest which is under the jurisdiction of the legislature. The mandate of a Public Inquiry is well defined and usually allows the Commissioner appointed to conduct such an inquiry a great deal of latitude to reach his or her findings. Generally, a Public Inquiry amounts to a full investigation into a defined matter and results in a report recommending some course of action for consideration by the legislature.

[para 41] That is not the case with an inquiry under the *Freedom of Information and Protection of Privacy Act.* Most inquiries, as with this one, result from a request by an applicant for the Commissioner to review the decisions of a public body relevant to its duties under the Act. In this case the review commenced into the Public Body's refusal to waive fees. This was later broadened to include a review of the Public Body's decisions regarding timelines and its general duty to assist the Applicant.

[para 42] In deciding the issues before me, I must decide whether, on a balance of probabilities, the Public Body has met its duties under the Act and, where the Public Body has made a decision under the Act, whether that decision was reasonable or correct under the circumstances. At the conclusion of an inquiry, I must issue an Order as set out in section 72 of the Act. I am limited to the remedies set out in section 72, which states:

> 72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.
>
> (2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:
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> (a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;
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> (b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;

(c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.

(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

(a) require that a duty imposed by this Act or the regulations be performed;

(b) confirm or reduce the extension of a time limit under section 14;

(c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;

(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;

(e) require a public body to stop collecting, using or disclosing personal information in contravention of Part 2;

(f) require the head of a public body to destroy personal information collected in contravention of this Act.

(4) The Commissioner may specify any terms or conditions in an order made under this section.

(5) The Commissioner must give a copy of an order made under this section

(a) to the person who asked for the review,

(b) to the head of the public body concerned,

(c) to any other person given a copy of the request for the review, and

(d) to the Minister.

[para 43] In this case, the Applicant has alleged that the Public Body purposely delayed his access to the requested records in order to prevent him from reporting on the contents of those records until after the Provincial Election. In reaching my decision, I must decide if the Public Body breached the provisions of the Act relative to timelines.

[para 44] With all due respect to the Applicant, it is evident that he would like to know who is responsible for the alleged breach. I do not need to determine which individual or individuals are responsible for an alleged breach, nor do I have to decide if someone issued an instruction to breach the Act. I do not have authority under the Act to make a finding of guilt against an individual. I am confined to the remedies set out in section 72. If there is evidence that an individual has breached one of the penalty provisions of the Act (section 92), I must send that evidence elsewhere so that an investigation may be conducted. The results of such an investigation would be forwarded to Special Prosecutions Branch for a decision regarding the commencement of a prosecution to be heard in the Provincial Court of Alberta.

[para 45] In my March 15, 2005, letter to the Applicant I told him that I did not intend to revisit testimony already covered by the Public Body's witnesses, nor did I

intend to start over. I stated that it was my intention to hear his evidence and views on the five issues set out in the Notice of Inquiry.

[para 46] What followed was correspondence from a series of legal counsel for the Applicant all requesting further witnesses. Each time, I responded indicating that I was not going to allow further witnesses. Each new legal counsel came up with an altered request and new reasons why I should decide the issue again. Finally, I wrote that I would not deal with the issue any further until both parties were present.

[para 47] When the oral portion of the inquiry resumed on May 12, 2005, the Applicant, represented by counsel, renewed his request to have the Deputy Minister, Director of Communications and the Minister's Executive Assistant brought before the inquiry as witnesses. By way of written brief and oral presentation, the Applicant set out my authority under the Act and the *Public Inquiries Act* which allows me to call witnesses. He also made a presentation relative to when witnesses should be called, including case law regarding the likelihood that witnesses have relevant testimony.

[para 48] The Applicant also drew my attention to the sign-off sheet and indicated that there was a need to determine why people not properly delegated under the Act were required to sign off before records could be released. The witnesses requested were named on the sign-off sheet and the Applicant pointed out that the evidence before me was that only the Deputy Minister had delegated authority under the Act. The Applicant argued that all of these individuals were likely to give testimony which was relevant to this issue. This was the Applicant's most compelling argument for calling these individuals as witnesses.

[para 49] The Public Body made a presentation against calling further witnesses. The Public Body argued that it had the burden of proof on all issues with the exception of the fee waiver. The Public Body pointed out that it had called the witnesses it felt were necessary to discharge that burden and it had concluded the presentation of its case. It was now up to me to decide whether the Public Body had properly discharged that burden. The Public Body stated that it was willing to "live or die" on the merits of its presentation.

[para 50] I have recently reviewed all written submissions from the parties regarding the calling of further witnesses and have listened to the recordings of the oral presentations. I have decided not to grant the Applicant's request to call the Deputy Minister, Director of Communications and the Minister's Executive Assistant as witnesses.

[para 51] I agree with the Applicant that it is likely that these three individuals may have relevant information regarding their roles regarding the sign-off sheet. However, the number of individuals on a sign-off sheet and whether they are properly delegated under the Act is not of such importance in deciding the matters in front of me that I need to hear direct testimony regarding it.

[para 52] The Public Body presented a copy of the sign-off sheet as an exhibit in the inquiry. It also presented evidence regarding which individuals are delegated under the Act to make decisions relative to an access request. I am free to take notice of the fact that there were more people required by the Public Body to sign off on the Applicant's access request than were necessary under the Act. I am also free to decide whether the length of the list and the time required to complete it contributed to a delay which caused the Public Body to be in breach of the Act. Calling witnesses to explore this matter any further would, in my view, be an abuse of my authority to call witnesses.

2. Do I allow the applicant to re-call three witnesses?

[para 53] On March 15, 2005, the Applicant also renewed his request to re-call the three witnesses who had given testimony on the first day of oral presentations, namely: the FOIP Co-ordinator, Assistant FOIP Co-ordinator and the FOIP and Legislative Assistant.

[para 54] I had denied previous requests to re-call these witnesses because they had given testimony relative to the matters in front of me and the Applicant had been present and had the opportunity to cross-examine them on their testimony.

[para 55] The Applicant's current request to re-call these three individuals was directly related to the revelation that two copies of the same email had surfaced. The Applicant argued that it was important to hear from one or more of these individuals in order to determine why there were two versions of the same email and whether there had been an attempt by someone to mislead me in my deliberations on the issues.

[para 56] I agree with the Applicant that gaining some understanding about how and why two versions of the same email came into existence is very important. If the email was altered in an attempt to mislead me in this inquiry, it may also be a violation of section 92 of the Act.

[para 57] The inquiry was adjourned and I asked the Public Body to search for and supply me with all copies of the email, either in electronic or paper form, with a list of where the copies were found. The Public Body retained the services of PriceWaterhouseCoopers to complete this task and I received a report from the Public Body with their findings. Once I determined that there was no simple answer for the existence of two copies of the email, I asked the Commissioner to commence an investigation into a possible violation of section 92 of the Act.

[para 58] As I stated in my letter of July 28, 2005, any proceedings under section 92 of the Act must be heard in the Provincial Court of Alberta. Consequently, I do not have the authority to add this issue to those already before me. The most appropriate way to determine whether the existence of two versions of the email constituted a breach of the Act was to commence an investigation in which the three individuals, and others, could be properly interviewed after being afforded the rights set out in the Charter. The findings of such an investigation could then be referred to Special Prosecutions for a

decision regarding whether to lay a charge or charges. This is the path which commenced as a result of the Commissioner's investigation.

[para 59] I would be exceeding my authority to require anyone to appear before me to answer questions about an issue which is clearly outside of my jurisdiction. Therefore, I will not grant the Applicant's request to re-call the witnesses.

3. Do I release a copy of the PriceWaterhouseCoopers report to the Applicant?

[para 60] The Applicant made a request to be given a copy of the PriceWaterhouseCoopers Report. The report was completed as a result of my request that the Public Body locate any copies of the duplicate email and a list of where they resided. As I have stated earlier, my review of the report resulted in a request to the Commissioner to initiate an investigation into a possible breach of section 92 of the Act. The contents of that report have relevance to the investigation into the existence of the two versions of the email and whether there was a breach of section 92 of the Act. It is my understanding that the investigation into that matter is ongoing.

[para 61] There is nothing in the report which is relevant to the five issues which are properly in front of me in this inquiry. The contents of the report would not assist either of the parties in addressing those issues. Therefore, the Applicant is not entitled to a copy as a party to this inquiry. Likewise, it would be inappropriate for me to make a decision regarding the release of a document which is relevant to a legal process which is outside of my jurisdiction.

4. Do I continue with the inquiry or simply issue a decision?

[para 62] It has now been two years since this inquiry was adjourned awaiting the conclusion of the investigation into the existence of the two emails. It is my understanding that, once this Office's portion of the investigation concluded and the file was handed to Special Prosecutions, it was assigned by the Minister of Justice to a Special Prosecutor outside of Alberta Justice. It is also my understanding that the file has been referred to the Royal Canadian Mounted Police for further investigation.

[para 63] As I have stated in the previous sections of this Order, the issue relating to the existence of the two emails is clearly outside of my jurisdiction. It is also very apparent to me that a decision on the matters properly in front of me will have no bearing on the outcome of the investigation into the existence of the emails or any possible charges related to that matter. This is particularly true considering that the limitation period for any charges under the Act has expired.

[para 64] Since the parties have waited this long for a conclusion to this inquiry, why not wait until the investigation is over before proceeding? Unless there is a good reason to delay any further, and I have decided that there is not, the parties have a right to have the matter concluded.

[para 65] A more pressing issue is that I am retiring from my position with the Office of the Information and Privacy Commissioner, effective June 30, 2007. I cannot issue a decision after that date. Consequently, I am faced with the following options in this case:

1. Do nothing. Wait for the conclusion of the investigation.
2. Restart the inquiry and attempt to finish in an extremely short period of time.
3. Issue a decision, based on the submissions to date.

[para 66] Given the date of my retirement, option #1 would guarantee that the inquiry would have to be re-heard by another decision maker. This would be a very costly option for all involved. Both of the parties and this office have already invested a great deal of time and money into this matter. Those expenses, with the exception of the Applicant's, have been public money, funded by taxpayers. Re-hearing the case would also result in increased delay in concluding this matter.

[para 67] Option #2 may be possible, but considering the short time frame, any delays, even a short one, would also likely cause the matter to be re-heard.

[para 68] Under normal circumstances, I would not consider option #3. However given my pending retirement, I must at least give it some consideration. If it is possible to issue a decision on the original issues without causing prejudice to either party and avoid starting over, this may be the best option. In order to reach a decision, I must consider the following:

- Are anyone's rights prejudiced by proceeding directly to Order?
- Is there any evidence missing that may come forward?

[para 69] In retrospect, the inquiry should have concluded on the first date. There was no reason for the Applicant not to be ready to present his evidence and arguments on that date. The Applicant made a written submission which outlined his concerns regarding the Public Body's alleged breach of the timelines and its duty to assist the Applicant. Throughout his questioning of the witnesses, he gave explanations regarding what points he was attempting to highlight with his questions of the witnesses. It was also very evident from the types of questions he asked, the points that he wanted to make. In fairness to the Applicant, however, I did grant an adjournment when he asked for more time to make his presentation. I also note that his request came at the end of a very long day.

[para 70] The Public Body, on the other hand, used the full day to make its presentation and enter evidence. The Public Body closed its case and argued on the second day of oral presentations, quite convincingly, that I should not allow the Applicant to call new witnesses to cover evidence and testimony already covered by the Public Body. By proceeding directly to a decision, I am only denying the Public Body the opportunity to make closing arguments.

[para 71] By proceeding directly to a decision, the Applicant will be at the greatest disadvantage of the two parties. The Applicant has not had an opportunity to present his case in one uninterrupted oral presentation. He also has not been given the opportunity to make final arguments. However, other than the public interest nature of the records regarding a fee waiver, he does not have a burden. I must also state that he has made his position on the issues very well known to me. In addition, for the reasons outlined later in the Order, I intend to find in the Applicant's favour on the issues in front of me. This causes me to conclude that the Applicant's disadvantage is extremely minor. In addition, I have decided that I have all the evidence before me that is necessary to decide the issues. Therefore, I intend to issue my decision on the issues without reconvening the inquiry.

V. ISSUES

[para 72] The following issues were set out in the Notice of Inquiry and remain to be decided in this inquiry, although I have changed the sequence in which I will decide the issues:

1. Did the public body comply with section 11 of the Act (time limit for responding)?

2. Did the Public Body properly extend the time limit for responding to a request, as authorized by section 14 of the Act?

3. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

4. Should the Applicant be excused from paying all or part of the fee, as provided by section 93(4) of the Act?

5. Did the Public Body properly estimate the fees for service?

VII. DISCUSSION OF THE ISSUES

1. Did the public body comply with section 11 of the Act (time limit for responding)?

[para 73] Section 11 of the Act states:

> 11(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 14, or
>
> (b)the request has been transferred under section 15 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 74] The Applicant's access request was received by the Public Body on June 2, 2004. At the time of his request, the Applicant included a request that all fees, except the initial $25.00 administration fee, be waived.

[para 75] The Public Body responded to the Applicant on June 17, 2004. In its letter, the Public Body stated that it would not grant a waiver of the fee, which was estimated at $378.00. The Public Body cited a large volume of requested records (estimated at 2450 records over a 17 month period) as its reason for not granting a waiver. The Public Body offered to supply information for a specific flight or date at no charge.

[para 76] On June 25, 2004, the Applicant wrote to the Commissioner and requested a review of the Public Body's decision not to waive the fees.

[para 77] When a public body sends a fee estimate to an applicant, the 30-day clock, set out in section 11 for responding to an access request, is effectively stopped. Processing of the access request resumes when the applicant accepts the fee estimate and pays 50% the estimated fee. The remainder of the fee is paid to a public body on receipt of the requested records (see section 13 of the *Freedom of Information and Protection of Privacy Regulation, AR 200/1995*, the "Regulation"). In this case, the Public Body's letter to the Applicant stopped the clock on day 16 of the 30-day period for response.

[para 78] The Public Body entered a copy of the Applicant's October 7, 2004 letter to the Public Body, accompanied by a cheque for $378, as evidence in the inquiry. This is the full amount of the Public Body's June 17, 2004, fee estimate. There is a date stamp on the upper right hand corner of the copy indicating that the letter was received by the Public Body on October 12, 2004. Receipt of this payment meant that the Public Body had 14 days remaining in the initial time period to process the response to the Applicant's access request.

[para 79] The 14-day remaining time period is acknowledged in an October 8, 2004 email from the Assistant FOIP Co-ordinator to the FOIP Co-ordinator, and copied to the FOIP and Legislative Assistant, in which the Assistant FOIP Coordinator warned the other two that she had heard from the Portfolio Officer assigned to mediate the file that the Applicant was about to pay the fees. A copy of the email was entered by the Public Body and marked as "Exhibit A" on the first day of oral presentations to this inquiry. The last sentence of the first paragraph of the October 8, 2004, email states:

> We can't extend any further because the Commissioner knows that the records are ready, so resist any suggestion from the third floor that we do so.

[para 80] The reference in this passage to the Commissioner relates to the Portfolio Officer from this office who was assigned to mediate the file. She had attended at the

hangar to view the records. The reference to the third floor relates to the offices of the Deputy Minister and Director of Communications for the Public Body.

[para 81] The Public Body spent a great deal of time through its three witnesses during oral presentations explaining that this statement, made by the Assistant FOIP Coordinator, was a misunderstanding. The FOIP and Legislative Assistant stated in evidence that she had stated that the work at the hanger was done. This did not include additional severing that was required. The other witnesses indicated that that they had been led to believe that the work was nearly complete when, in fact there was a great deal of severing left to be done, making it impossible to complete the preparation of records in the time remaining.

[para 82] The records were characterized by the Public Body as a very high volume (estimated at 2450 records) requiring a great deal of time to review. In the Notice of Inquiry, I had asked that the Public Body supply me with a representative sample. During the first day of oral presentations, I asked the Public Body to supply me with copies covering a time period of three additional months.

[para 83] My review of the records confirmed that the Public Body was dealing with a large number of records. I am unaware of the exact number, because I still only reviewed a portion of the 17-month period requested by the Applicant. However, I did not conclude that severing the records would be particularly complicated. The records consist of several forms and some letters and memos. The information requiring severing was located in the same location on each of the representative forms, which means that the reviewer would not be required to read each page word by word and line by line. On most pages, the information was quickly identifiable. Where the records consisted of letters or memos, they were typically short in length. Information requiring severing was also quickly identifiable.

[para 84] The Applicant drew my attention to a copy of a page from the Public Body's "Freedom of Information and Protection of Privacy Report", dated October 22, 2004. This record was entered as Exhibit "E" in the inquiry. The notation in the status column of the report, relating to the Applicant's original request, stated:

> Applicant provided a cheque on October 12. Records have been severed where required and are ready for department review and Minister's review and approval to release. Records must be released by October 26 (if no extension) or November 25 (with 30-day extension).

[para 85] This entry from the Public Body's internal report makes it pretty clear that the severing was completed by October 22, 2004. All that remained, according to this notation, was the approval and sign-off by Public Body officials.

[para 86] The Public Body offered evidence, by way of affidavit, from the witnesses, outlining their activities. I note that the bulk of the time recorded for severing was before this date. There are notations after this date that relate to the checking of the initial severing by two levels of supervision.

[para 87] This report was dated 14 days after the October 8 email and 10 days after the Applicant paid the required fees, which re-started the clock. Taking into account the apparent political sensitivity that this request had, I find it doubtful that any potential misunderstanding regarding the completion of severing that may have been in place at the time of the email would not have been corrected before this date. I also note that the two dates appear to be offered as a choice, without any indication that the earlier date may note be achievable. I am prepared to accept this evidence at face value. I conclude that the required severing was either complete, or close to complete, on or before October 22, 2004.

[para 88] The Public Body had until October 26, 2004, to finish processing the Applicant's access request. On October 25, the government dropped the writ, calling for a Provincial Election on November 22, 2006. On October 27, 2004, the Public Body wrote to the Applicant, informing him that they were taking up to an additional 30 days, pursuant to section 14 of the Act. If the Public Body was authorized to extend the time, this decision should have been made and the Applicant notified before the expiration of the 30-day period. I find that the Public Body did not comply with section 11 of the Act.

2. Did the Public Body properly extend the time limit for responding to a request, as authorized by section 14 of the Act?

[para 89] Section 14 of the Act states:

> 14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if
>
> > (a)the applicant does not give enough detail to enable the public body to identify a requested record,
> >
> > (b)a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,
> >
> > (c)more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or
> >
> > (d)a third party asks for a review under section 65(2) or 77(3).
>
> (2) The head of a public body may, with the Commissioner's permission, extend the time for responding to a request if multiple concurrent requests have been made by the same applicant or multiple concurrent requests have been made by 2 or more applicants who work for the same organization or who work in association with each other.
>
> (3) Despite subsection (1), where the head of a public body is considering giving access to a record to which section 30 applies, the head of the public body may extend the time for responding to the request for the period of time necessary to enable the head to comply with the requirements of section 31.
>
> (4) If the time for responding to a request is extended under subsection (1), (2) or (3), the head of the public body must tell the applicant
>
> > (a)the reason for the extension,

> (b)when a response can be expected, and
>
> (c)that the applicant may make a complaint to the Commissioner or to an adjudicator, as the case may be, about the extension.

[para 90] Section 14 gives the head of a public body the discretion to extend the time to respond to an access request by up to 30 days if one or more conditions set out in section 14(1) are present. A public body may also make a request to the Commissioner for a longer period. No such request was made.

[para 91] The FOIP Coordinator's letter to the Applicant on October 17, 2004, contained the following statement:

> Due to the large number of records to be reviewed and processed to provide the information you requested, we will be extending the time limit for a maximum of 30 days.

[para 92] The letter went on to explain to the Applicant that he had the right to request a review of this decision by the Commissioner's office, as required by section 14(4)(c) of the Act.

[para 93] The letter cited a "large number of records" as the reason for the extension but did not indicate to the Applicant when a response might be expected, as required by section 14(4)(b) of the Act.

[para 94] Section 14(1) states that a public body may extend the time to respond for "up to 30 days." In my view, the wording of this section contemplates that a decision must be made, not only about the existence of a reason for an extension, but what time period is required to respond. A public body is not free to take the full 30 days without any consideration about how much time is actually needed. This view is further strengthened by the requirement that a public body must notify an applicant when a response can be expected, as required by section 14(4)(b) of the Act. If the 30-day period were automatic, there would be no need to specify when a response might be expected.

[para 95] At the inquiry, I specifically asked the FOIP Coordinator if a lesser time was contemplated in this case. She indicated that if they needed additional time, it was their practice to take the full 30 days.

[para 96] When determining whether there is sufficient reason to extend the time to respond, a public body must decide whether one of the conditions set out in section 14(1) exists. It is evident in this case that the Public Body determined that the existence of a large number of records authorized the use of the additional time. Section 14(1)(b) has two requirements. In order for section 14(1)(b) to apply, the Public Body must establish that a large number of records exist <u>and</u> that responding within the time period set out in section 11 would adversely interfere with the operations of the Public Body.

[para 97] There is no evidence from the Public Body that the processing of this access request within the time limit set out in section 11 would unreasonably interfere with the operations of the Public Body. The evidence offered by the Public Body about

the activities of the witnesses does not support such a proposition. In fact, the notations on the activity reports of the witnesses reveals that there is a noticeable slow down in any activity on this file after October 26, 2004. Therefore, I conclude that the Public Body did not have sufficient reason to extend the time for response under section 14 of the Act.

[para 98] This finding is further strengthened by the Public Body's evidence, by way of a copy of the sign-off sheet, that it took 10 days (November 15 to November 24) to have the finished product approved. This process required the approval of seven people. As well as the three witnesses, sign-off included the Director of Air Transportation, the Director of Communications, the Deputy Minister and the Office of the Minister. The FOIP Coordinator, under questioning, confirmed that this is the department's normal practice.

[para 99] The Applicant argued that several of these people do not have delegated responsibility under the Act and therefore, they should not have been involved in the process. The Public Body provided a copy of Ministerial Order 03/03 which delegates authority to the Deputy Minister and FOIP Coordinator.

[para 100] I agree with the Applicant that many of the signatures were not necessary, from a statutory perspective. However, a public body is free to use whatever approval process it deems appropriate. What is important, however, is that a public body's approval process must be completed within the time allotted in the Act. There is nothing in section 14 that would allow for a time extension to accommodate an unusually long approval process. I also make particular note that the final approval was signed on November 24, 2004. This is one day before the maximum 30-day extension date of November 25, and probably more significantly in this case, two days after the Provincial Election of November 22, 2004.

3. Conclusion Regarding Timelines

[para 101] The Applicant alleged that the processing of his access request was purposely delayed so that he would not be able to report about whatever he could glean from the records until after the Provincial Election. When one places the timeline of events regarding the processing of the access request up against the timelines of the Provincial Election, it is very difficult to come to a different conclusion. The Public Body would have me believe that two sets of events are purely coincidental and that it was impossible to make the records available to the Applicant any sooner. The evidence does not support such a finding.

[para 102] I find that, on a balance of probabilities, the Public Body delayed the Applicant's access to the records until after the Provincial Election. I am satisfied that the Public Body could have met the timeline set out under section 11 of the Act. I am also satisfied that the Public Body was not authorized to extend the time limit to respond, as set out in section 14 of the Act.

[para 103] In coming to my conclusions, I have given no weight to the existence of the email which was presented in two versions. As I have stated earlier, this is a matter to be resolved in a separate process.

[para 104] In my view, manipulating the timelines for response to an access request for political reasons is far more serious than an inadvertent breach of the timelines. Consequently, I intend to order the Public Body to refund all fees paid by the Applicant related to his request, as allowed by section 72(3)(c) of the Act.

4. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 105] For the reasons stated above, I find that the Public Body did not fulfil its duty to respond to the Applicant openly, accurately and completely.

5. Should the Applicant be excused from paying all or part of the fee, as provided by section 93(4) of the Act?

[para 106] Having decided to order the Public Body to refund all fees to the Applicant, I do not need to decide whether the Applicant should be excused from paying all or part of the fees under section 93(4) of the Act.

6. Did the Public Body properly estimate the fees for service?

[para 107] Having decided to order the Public Body to refund all fees to the Applicant, I do not need to decide whether the Public Body properly estimated the fees for service.

7. Final Comments

[para 108] On February 14, 2007, Service Alberta announced that the type of information requested by the Applicant will now be routinely available on its web site. The flight manifests are also available in hard copy at the Legislative Library, according to Service Alberta’s News Release. In my view, routine disclosure of information does more to foster open government than requiring individuals to follow the lengthy process set out in the Act.

VIII. ORDER

[para 109] I make this Order under section 72 of the Act.

[para 110] I find that the Public Body did not comply with the timeline for response, as provided by section 11 of the Act.

[para 111] I find that the Public Body was not authorized to extend the timeline for response, as provided by section 14 of the Act.

[para 112] I find that the Public Body did not fulfil its duty to respond to the Applicant openly, accurately and completely, as provided by section 10(1) of the Act.

[para 113] I order the Public Body to refund all fees paid by the Applicant in relation to this access request. This includes the initial $25.00 administration fee.

[para 114] I further order the Public Body to notify this Office, in writing, within 50 days of receipt of this order, that it has complied with this order.

Dave Bell
Adjudicator