

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-006

December 23, 2008

City of Edmonton

Case File Number F3956

Office URL: www.oipc.ab.ca

Summary: The Applicant requested records from the Public Body relating to 12 building and development permits. He provided the Public Body with the permit numbers for 11 of the permits and search parameters for the 12th permit. He requested the permit applications and supporting documentation he felt the Public Body ought to have in its custody and control.

The Public Body provided the Applicant with copies of the responsive records it was able to locate. The Public Body was unable to locate three of the permits. It also withheld records which had already been provided to the Applicant as a result of prior requests. As well, the Public Body was not able to locate the supporting documentation the Applicant requested and stated that this information is not always kept. Following the Applicant's request for review, the Public Body forwarded all responsive records in its custody and control to the Applicant, including records the Applicant had received as the result of prior requests. The Public Body was also able, on further searching, to locate the 12th permit requested, and determined that one of the other permits that could not be found was a duplicate of another permit requested that had been provided to the Applicant. No supporting documentation was ever located.

After receiving all of the records, the Applicant wrote to the Public Body asking several questions regarding the responsive records.

The Adjudicator found that the Public Body did not provide sufficient evidence that it conducted an adequate search for records and, therefore, may have failed in its duty to

assist the Applicant under section 10(1) of the *Freedom of Information and Protection of Privacy Act* (“the Act”) when it did not search both possible repositories for records. The Adjudicator also found that not providing the Applicant with copies of responsive records because the records had been provided to the Applicant as the result of prior access requests was contrary to section 10(1) of the Act.

The Adjudicator further found that she did not have jurisdiction over the issue of whether the Applicant can ask questions regarding responsive records because the questions were not part of the original request. However, she commented that the Public Body may answer if it chooses to but is under no obligation under the Act to answer the Applicant’s questions. Within the context of a given request, the Public Body is obligated to provide records in its custody and control that would answer the Applicant’s questions, subject to the proper application of the exceptions in the Act.

Statutes Cited: **AB:** *Alberta Rules of Court; Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 3, 6, 10, 11, 12, 55, 72; *Health Information Act* R.S.A. 2000 c. H-5 s. 10(c); *Personal Information Protection Act*, R.S.A. 2000 C. P-6.5 s.27

Authorities Cited: **AB:** Order 99-021, 2000-021, 2001-033, 2002 F2005-008, F2005-012, F2006-028, F2007-006, F2007-029, Decision [2002] AIPCD No. 13 **BC:** Order No. 02-09; *Sullivan and Driedger on the Construction of Statutes* (Toronto, Ontario Butterworths, 2002).

Cases Cited: *IMS Health Canada Ltd. v. Alberta (Information and Privacy Commissioner)*, 2008 ABQB 213.

I. BACKGROUND

[para 1] On January 5, 2007, the Applicant requested from the City of Edmonton (“the Public Body”):

All information submitted to City by applicant when they applied for the 12 permits listed on page 2 of this FOIP request. The names + addresses of the applicants is also requested (this is an AB Building Code requirement for permit applicant

[para 2] The Applicant attached a list of the following permit numbers:

1. 643579-001
2. 643579-002
3. 243579-007
4. 643579-008
5. 643579-009
6. 643579-010
7. 643657-009 (inspection report dated June 22, 2005 incl)
8. 47115813-001

9. 25280936-001
10. 25280936-002
11. 38094384-001
12. ??916691-001

[para 3] The Applicant did not know the exact number for the 12th permit requested and instead provided several possible search terms in order to assist the Public Body in determining the proper permit to provide to him.

[para 4] The Applicant also noted that:

The Alberta Building Code, Safety Codes Act and various Standatas [*sic*] include detailed description of the mandatory information to be submitted prior to issuance of Development and Building permits. This is a request for all documents submitted in support of the applications for the above permits and the names/addresses of the applicants.

[para 5] On January 16, 2007, the Public Body wrote to the Applicant in response to his access request. The Public Body's FOIP Coordinator attached copies of the documents that resulted from his search and noted that, "POSSE jobs; 643657-009 and 38094384-001 do not exist". As well, the FOIP Coordinator was unable to find records under the search parameters listed for the 12th permit requested. Finally, as the Applicant had made several prior requests, the Public Body also did not include records provided to the Applicant under previous access requests and vault search requests.

[para 6] On January 29, 2007, the Applicant wrote to the Office of the Information and Privacy Commissioner ("this Office") and requested a review of the Public Body's response stating, "I believe that [the FOIP Coordinator's] response to my lawful request is a deliberate attempt to withhold information that he is required to disclose."

[para 7] On April 4, 2007, the Public Body provided the Applicant with the records that he had been provided previously as the result of prior access requests and vault searches. As well, the Public Body searched different parameters and was able to locate the 12th permit requested and also discovered that the 7th permit requested was a duplicate of the 5th permit requested and already provided to the Applicant. The 11th permit requested was still not found.

[para 8] On May 3, 2007, the Applicant wrote to the Public Body asking a series of questions regarding the records the Public Body produced as a result of the access request, and requesting further records. The Public Body states that by letter dated May 18th, 2007, it advised the Applicant that the Public Body's FOIP personnel could not answer his questions but provided him with contact information for three individuals, employed by the Public Body, who might be able to help him. The Applicant contacted the FOIP Coordinator instead.

[para 9] I have not been provided with the Applicant's letter of May 3, 2007 or the Public Body's letter in response dated May 18, 2007. However, the Public Body provided me with a letter from the Applicant to the Public Body dated June 11, 2007 which sets out the questions which the Applicant posed to the Public Body regarding the records at issue.

[para 10] On May 14, 2007, the Applicant requested an inquiry into this matter. The Notice of Inquiry was sent to both parties on June 13, 2008. The Public Body provided submissions but the Applicant did not.

II. RECORDS AT ISSUE

[para 11] This matter arises as the result of a complaint that the Public Body did not perform an adequate search and failed to assist the Applicant as required under section 10 of the Act. There are no responsive records that are being withheld by the Public Body and, therefore, there are no records directly at issue, unless there are records in the vault that have not yet been provided by the Public Body to the Applicant.

III. ISSUES

[para 12] The issues as set out in the Notice of Inquiry dated June 13, 2008 are as follows:

Issue A:

Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act? In this case the Commissioner will also consider whether the Public Body conducted an adequate search for responsive records.

Issue B:

Does the duty to assist set out in section 10 of the Act, include a duty to answer questions arising from responsive records, such as requests for explanations of the contents of records, explanations for how matters arising from the records were dealt or not dealt with, or explanations of why further records that the Applicant believes ought to exist, do not exist?

[para 13] In addition, the Public Body raises a preliminary issue of whether this Office can conduct an inquiry in this matter, as the questions raised by the Applicant did not form part of his original access request, which was the subject of his request for review. Although the Public Body did not wish to pursue this issue at this time, it reserved its right to do so. I will comment on this issue briefly, as a preliminary issue.

IV. DISCUSSION OF ISSUES

Preliminary Issue:

[para 14] In its submissions, the Public Body states:

The City, at this time, does not wish to pursue the jurisdictional issue of whether the OIPC can conduct an inquiry about the actions/inactions of a public body relating to questions posed by an Applicant that did not form part of an original FOIP request, but the City reserves its right to do so.

[para 15] While the Public Body does not wish to raise this issue at this time, as it is a question as to whether this Office has jurisdiction over this matter, I will comment.

[para 16] As outlined above, the Applicant made his request for review that resulted in this inquiry prior to asking the questions of the Public Body which are the subject of Issue B of the Notice of Inquiry.

[para 17] Therefore, I find that I do not have jurisdiction over Issue B, as it was not the subject of the Applicant's request for review, but arose after this investigation and inquiry process had already began. Therefore, I cannot make findings relating to Issue B.

[para 18] However, I do note that the Public Body and the Applicant were aware of Issue B and were given the opportunity to make submissions in this regard. Given this and the fact that the Public Body does not wish to argue the jurisdictional issue at this time, I will comment on Issue B, which I hope the parties will find of assistance, though I cannot make any findings relating to this issue.

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

[para 19] Pursuant to section 6 of the Act, the Applicant, "...has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant." The right to access records is limited by a number of provisions of the Act which establish records to which the Act does not apply, as well as mandatory and discretionary exceptions applicable to certain records.

[para 20] Section 10(1) of the Act states:

10(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 21] Section 10(1) of the Act imposes a general duty on a public body when responding to an applicant's request for records. As a part of this general duty, a specific duty to perform an adequate search for records in response to an access request has evolved.

[para 22] Section 11 of the Act goes on to state the timelines within which a public body must respond, and section 12 dictates the content of the response. Of particular relevance to this matter is section 12(1)(c) which states:

12(1) In a response under section 11, the applicant must be told

...

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based...

[para 23] In Order F2007-029 the Commissioner reiterated prior orders which stated that the onus of proving that section 10 has been complied with rests with the Public Body, as it is in the best position to provide evidence of the adequacy of its search. Therefore, "[t]he Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant." (Order F2007-029 at paragraph 46)

[para 24] Order F2007-029 sets out evidence which the Public Body should provide in order to meet its onus under section 10(1) of the Act to prove that it did make every reasonable effort to search for responsive records. The Public Body should provide information regarding:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

(Order F2007-029 at paragraph 66)

[para 25] As part of its submissions, the Public Body provided me with an affidavit sworn by the FOIP Coordinator for the Public Body. The affidavit sets out the specific steps which the FOIP Coordinator personally took to locate the records. He also states that there were two possible repositories for the records, the POSSE database and the

vault. He personally searched the POSSE database using the Applicant's own search terms to locate responsive records. Finally, the FOIP Coordinator explained that copies of documents examined prior to granting permits are not always kept.

[para 26] The evidence which the Public Body provided touches on all five points set out above. However, on the evidence, I find that the Public Body did not meet its obligations under sections 10(1) and 12(1)(c) of the Act.

Adequacy of the Search:

[para 27] According to the evidence provided to me by the Public Body, since 1995, the Public Body has been using the Planning One-Stop Service database ("POSSE database") to store its planning and development records electronically. In addition, the Public Body also has paper copies of records that were too large to scan into the POSSE database. These are kept in the "vault". A vault search is conducted when an individual makes a specific request for one by filling out a "Search for Records Request Form" and paying a fee. The Applicant made a vault request on July 12, 2005, prior to this access request.

[para 28] There was no evidence provided by the Public Body that there was a search of the vault to find responsive records for the purpose of fulfilling the present request. In its submissions, the Public Body noted that the Applicant's 2007 access request was the 7th related access request made since 2005. As well, the Public Body had done a vault search for this Applicant in 2005 and provided him with all records in the vault responsive to that request at that time. I do not know the details of the prior access requests, nor do I know what records the Applicant asked for in his 2005 vault search request.

[para 29] The Public Body also stated in both its submissions and in the affidavit of the FOIP Coordinator that it will search the vault when a request that it do so is made. Although not made entirely clear by the Public Body, this appears to be an informal process that is not treated as an access request under the Act. The Public Body argues that in this regard it has a parallel system of access. Section 3 of the Act states:

3 This Act

(a) is in addition to and does not replace existing procedures for access to information or records,

...

[para 30] On this basis, the Public Body appears to argue that there was no need for it to search the vault again in responding to the Applicant's 2007 access request.

[para 31] I disagree with the Public Body's submissions in this regard. The Applicant has the right to access records pursuant to section 6 of the Act. It is true that the Act is

not meant to replace existing systems of access; however, it is a complete system. Therefore, when an access request is made under the Act, the provisions of the Act must be fulfilled regardless of the existence of other ways to access information.

[para 32] For instance, there are different rules governing the discovery of documents in the court process. If an applicant is seeking disclosure of documents under the *Alberta Rules of Court*, he or she cannot rely on the provisions of the Act. However, if an applicant then decides to make an access request under the Act, for the same information, the Act applies and must be followed.

[para 33] When the Applicant in this matter chose to make an access request, the fact that he had previously used an informal avenue to access vault records should not have impacted how the Public Body responded to the Applicant's access request under the Act (Order F2006-028).

[para 34] Given that the vault could, and did, contain records responsive to the Applicant's access request, the Public Body ought to have searched it in order to fulfill its obligations under section 10(1) of the Act. It makes no difference under the Act that the Applicant did not make a specific request to search the vault in making the present request; it should have been searched as a matter of course in response to the access request.

[para 35] Whether it is reasonable for a public body to rely on a previous search is to be dealt with on a case-by-case basis (Order F2005-008). The fact the Public Body has searched the vault previously in 2005 may provide a reasonable excuse for it not to have searched the vault again in 2007. This would be so if the Applicant's prior 2005 request was for substantially the same records for the same time period (Order 99-021). In that case, while the Public Body would still have to provide copies of the records a second time, it would not actually have to conduct a search to find the same records a second time.

[para 36] The Public Body did not provide evidence that the earlier vault search had located everything from the vault that the Applicant was requesting in 2007. Therefore, I am not in a position to find that it was reasonable for the Public Body not to search the vault for the purpose of the present request. However, I recognize that if the 2005 vault search located all records in the vault that are responsive to the 2007 access request, it is not necessary for the vault to be searched again. If this is so, the Public Body must advise me and the Applicant that it is the case.

[para 37] I also note that following the Applicant's request for review, the Public Body did find the 12th permit requested, using different search terms. However, as the Public Body had in its initial search used the search terms provided by the Applicant, I find that the Public Body made every reasonable effort to assist the Applicant when it initially searched for the 12th permit.

[para 38] The Public Body was also able to confirm that there were two permits requested that were the same but just had different numbers. I was not provided with any evidence directly on point as to why when it initially responded to the Applicant's request, the Public Body was unable to determine that one of the permits was a duplicate of another permit. However, an adequate search does not require perfection. The Public Body is required only to make every reasonable effort (Order 2000-021 at para 68). On the evidence provided to me, I find that the Public Body did make every reasonable effort to search for responsive records, and that its oversight regarding the duplicate permits did not put it in breach of its duty under section 10(1) of the Act.

Adequacy of the Response:

[para 39] The Public Body also failed to fulfill its obligations under sections 10(1) and 12 of the Act when it chose to not provide the Applicant with copies of records he had received as the result of his prior access and vault requests.

[para 40] By operation of section 12(1)(c) of the Act, cited above, the Public Body's response to an access request must cite which records are being withheld and why. The reasons for not providing records must be based on one or more provisions of the Act. The fact that records were previously provided to the Applicant is not an exclusion or an exception under the Act.

[para 41] It is, therefore, not proper for the Public Body to withhold responsive records on the basis that the records had previously been provided to the Applicant. If a substantially similar access request for records for the same time period was previously made and responded to, the Public Body does not have to search again. However, the Public Body must still provide all records to the Applicant, even the records previously provided. If faced with multiple, repetitive, access requests, it is open to a public body to make an application to the Commissioner under section 55 of the Act, asking to disregard the duplicate access request (Decision 2002 AIPCD No. 13). Such a request was not made in this instance.

[para 42] The Public Body did eventually provide the Applicant with copies of the records that were provided to him previously. However it appears possible that the Public Body still failed to meet its obligation under section 10(1) to perform an adequate search when it did not search the vault. As well, the Public Body contravened sections 10(1) and 12 of the Act in failing to provide prior responsive records and to name the section of the Act on which it was relying to refuse to provide the records that were previously provided.

Issue B: Does the duty to assist set out in section 10 of the Act, include a duty to answer questions arising from responsive records?

[para 43] As noted above, the following comments are to assist the parties only, as I have found I have no jurisdiction to make findings on this question.

[para 44] The Public Body argues that there is no requirement under the Act to respond to the Applicant's questions as this is beyond the scope of the Act, which deals with access to records. The Public Body further states that it should not be required to create a record to answer the Applicant's questions, since the requirements under section 10(2) of the Act do not arise this matter. Section 10(2) of the Act states:

10(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 45] The Public Body then argues that because section 10(c) of the *Health Information Act* ("HIA") specifically states that a public body must explain terms, codes and abbreviations and FOIP has no such provision, by operation of the presumption of consistent expression, section 10 of the Act must be read such that a public body is not required to explain terms, codes and abbreviations. Finally, the Public Body argues that the Applicant should not be permitted to ask questions given the strict timelines in the Act regarding responses to access requests.

Scope of the Act:

[para 46] Section 2 of the Act states:

2 The purposes of this Act are

(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,

(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information,

(c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body,

(d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body, and

(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

[para 47] In this matter, the Applicant made a request to access various permit applications and supporting documentation in the custody and control of the Public Body. Therefore, this matter fits squarely under the purpose in section 2(a) of the Act and section 6(1) of the Act which states:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[para 48] Given these factors, the Public Body argues that the Act contemplates the Applicant's right to access records in its possession, not information.

[para 49] While the purpose of the Act under section 2(a) and the Applicant's right of access deal specifically with access to records, section 10(1) of the Act makes no mention of records. It simply states that a public body must, "respond to each applicant openly, accurately and completely." Section 10(1), therefore leaves open the possibility that a public body is required to answer questions posed by an applicant regarding the content of the records.

[para 50] In this matter, the Applicant asked the following questions, which I have summarized:

1. "gas work not involved.....N" does this mean gas work is or isn't involved?
2. "sewer work not involved"....Y" does this mean sewer work is or isn't involved?
3. "Barrier free design relaxed.....N" does this mean barrier free design was observed?
4. "Electrical work not involved...N" does this mean electrical work is or isn't involved?
5. When the space next to a heading is blank...what does that mean? For example: "to be submitted by".....6 consecutive blanks;
6. "Dev. Permit Occupancy".....Should this reference to the Dev. Permit be blank?
7. On p.2 under "C-2 Structural required" the response was "N/A". However on page 7, D. Arsenault's notes Oct 2/02 state that C-2 Structural "received and on file". Please provide this document.
8. Page 3...The "posted date" for payment of every permit fee is blank. Please provide this information.
- 9-13. The Applicant requests copies of documents that were mentioned in the records provided to him.
14. The Applicant asks the Public Body to explain the meaning of "OKE".

[para 51] In my view, the Applicant asks three types of questions. The first type are questions requesting clarification on matters like the meaning of phrases or abbreviations such as questions, 1, 2, 3, 4 and 14. The second are questions regarding why something was done in a certain way, such as questions 5, 6 and 7. The other questions asked request further records referenced in the documents he was provided, which are questions 9-13.

Explanation of Records:

[para 52] The Applicant's questions 5, 6, and 7 touch on the issue raised in the inquiry of whether a public body is required to give explanations of the contents of records, explanations for how matters arising from the records were dealt or not dealt with, or explanations of why further records that the Applicant believes ought to exist, do not exist.

[para 53] Section 10(1) of the Act is worded very broadly, but must be interpreted in the context of the entire Act. This involves not only reading sections 2(a) and 6 and the access provisions of the Act, but recognizing that, as the Commissioner put it, "...a presumption of greater openness is fundamental to freedom of information legislation and should be supported whenever possible..." (Order F2005-012 at paragraph 37)

[para 54] In order to interpret section 10(1) of the Act, the principles of legislative interpretation must be invoked. *Sullivan and Driedger on the Construction of Statues* states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Sullivan and Driedger on the Construction of Statues (Toronto, Ontario Butterworths, 2002 at page 1)

[para 55] When the Applicant asked questions about the substantive content of the records he was not requesting records; rather he was requesting information which may or may not have been in existence in another record. Section 10(1) could be interpreted broadly to require the Public Body to provide the Applicant with the information he is seeking, even if it is not contained in a record that already exists. However sections 2(a) and 6(1) give the Applicant the right to access records (recorded information) that are in existence only. None of these sections require a public body to develop a record in order to explain a record.

[para 56] Order 2001-033 dealt with a similar situation. The Applicant requested records but asked several questions regarding the Public Body's authority concerning the projects and costs of the projects. In his decision the then Acting Commissioner stated:

The Applicant has a right of access to records (section 6(1) of the Act). The Applicant does not have a right to have the Public Body answer questions. Similarly, the Public Body does not have a duty to answer the Applicant's questions (it may do so if it wishes), but the Public Body does have a duty to respond to the Applicant about whether it has records that will answer the Applicant's questions.

(Order 2001-033 at paragraph 9)

[para 57] In the matter at hand, the Applicant did not ask questions as part of his initial access request, but instead asked questions about the records which he received as the result of his access request. Although this distinguishes the matter at hand from that in Order 2001-033, I still find the reasoning in Order 2001-033 helpful, in that it establishes that a public body does not have a duty to answer questions. The British Columbia Information and Privacy Commissioner has also interpreted the duty to assist an applicant in this way (B.C. Order No. 02-09). I believe that this is true whether an applicant is asking questions as part of an access request or as the result of one.

[para 58] Therefore, I believe that a public body does not have a duty under the Act to answer questions about how matters arising from the records were dealt or not dealt with, or explanations of why further records that the Applicant believes ought to exist, do not exist.

[para 59] The Applicant can ask the questions. The Act does not prohibit him from doing so. The Public Body may answer the questions if it so chooses, but nothing in the Act requires the Public Body to do so. However, to fulfill its obligations under section 10(1) of the Act relative to the Applicant's post-request questions, which I presently have no jurisdiction to make an order, the Public Body is required to provide the Applicant any records that would answer his questions. The Public Body has not taken the step of advising whether or not there are records that would answer the Applicant's questions, subject to the proper application of the Act's exceptions. I am not aware that there are any such records, but I note that for the purpose of responding to the Applicant's post-request questions, which I am merely commenting on, the Public Body still needs to do this in order to fulfill its obligations.

[para 60] However, I note the Public Body did try to fulfilled its section 10 obligations by providing the Applicant with the names of individuals employed by the Public Body who would likely be able to assist the Applicant in answering the questions.

Request for Clarification:

[para 61] The records provided to the Applicant contain terms and abbreviations which the Applicant does not understand.

[para 62] Section 10(c) of the *HIA* requires a custodian to explain terms, codes and abbreviations in the records. I also note that section 27 of the *Personal Information Protection Act* (“*PIPA*”) is a similar provision. The Public Body argues that since the FOIP Act has no similar provision, by operation of the presumption of consistent expression, the Legislature meant to exclude a requirement to answer these types of questions from a public body’s duty to assist under the FOIP Act.

[para 63] Both the *HIA* and *PIPA* allow for only limited access to one’s own personal information. The scope of an access request under the *FOIP Act* is much broader. Requiring a public body to explain terms, codes and abbreviation in records places a far greater burden on a public body than it would for the organizations under the *HIA* and *PIPA*. Given the differences between the scopes of access requests under the acts, I am not convinced that the use of the presumption of consistent expression is appropriate.

[para 64] In any event, the presumption of consistent expression is only one possible indicator of legislative intent (*IMS Health Canada Ltd. v. Alberta (Information and Privacy Commissioner)* 2008 ABQB 213 at paragraph 114). The other factors mentioned above led me to the conclusion that the Legislature did not intend to include answering questions as part of a public body’s duty under section 10(1) of the Act. I believe that this would also include questions regarding codes, abbreviations and terms.

[para 65] However, the Public Body must provide to the Applicant records that would answer his questions if there are any such records in its custody and control. These records may include manuals or any other records which do fit under the scope of the Act and are not excluded from the Act’s operation. If there are no such records in existence, or if the Public Body is refusing to disclose the records pursuant to the Act, the Public Body will need to advise the Applicant of this.

Request for Further Records:

[para 66] The Public Body’s FOIP Coordinator states that supporting documentation is not always kept. Under the Act, the Public Body is required to provide only the records that it has in its custody and control. As the Adjudicator put it in Order F2007-006 involving these same parties, “The Public Body can only provide the records it has in its possession and as they exist” (Order F2007-006 at paragraph 17). Whether anything ought to have been done regarding permit approvals and retention of records in this matter that was not done is something over which the Act gives me no powers.

[para 67] In any event, if the Applicant wishes to obtain records from the Public Body he believes exist and are in the custody and control of the Public Body which he did not already ask for in the present request, he should do so by way of a FOIP request. At that point, the Public Body will be subject to its obligations under the Act.

Application of Section 10(2) of the Act:

[para 68] The Public Body argues that it would have to create a record in order to respond to the Applicant's questions. It further argues that requirements to create a record under section 10(2) of the Act, cited above, are not present in this case and therefore, it does not have to respond to the Applicant's questions.

[para 69] I agree that section 10(2) of the Act does not apply in this matter, as the Applicant is not requesting a hard copy of an electronic record. Given that I believe that the Public Body is under no obligation to answer the Applicant's questions, I do not have to deal with the Public Body's argument about section 10(2) of the Act.

Conclusion:

[para 70] Given that the Applicant asked questions about the responsive records after he had requested a review by this Office of the Public Body's response to his access request, I find that I have no jurisdiction over Issue B above. I have, however, made comments which I hope will be of assistance to the parties in this matter. To summarize, I do not believe that there is a duty on the Public Body to answer questions posed by the Applicant regarding the responsive records it provided. However, the Public Body must provide the Applicant further records that exist at the time of the access request that would answer the Applicant's questions subject to the proper application of the Act's exceptions. The Public Body ought to treat the Applicant's questions as a new access request.

[para 71] Also, if the Applicant wishes to request copies of records referenced in the responsive records already provided by the Public Body, he may do so in the form of another FOIP request.

V. ORDER

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

[para 73] Subject to the following paragraph, I find that the Public Body failed to fulfill its duty to assist under section 10(1) of the Act and order that the Public Body search the vault for responsive records and provide the Applicant with all records from the vault that are responsive to his access request, subject to the proper application of the Act's exceptions.

[para 74] If the Public Body has already performed a search of the vault and provided the Applicant with all records from the vault that are responsive to his current access request, I order the Public Body to provide confirmation to the Applicant that it has already searched the vault and provided all responsive records to the Applicant.

[para 75] I further order that the Public Body notify me in writing within 50 days of being given a copy of the Order, that the Public Body has complied with this Order.

Keri H. Ridley
Adjudicator