ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-017

November 23, 2009

ALBERTA ENERGY

Case File Number F4072

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked Alberta Energy (the "Public Body") for records related to its review of oil and gas royalty rates. The Public Body refused access to some of the requested information under various sections of the Act, including section 24(1) (advice, etc.). The Applicant requested a review of the Public Body's response, including its duty to assist him under section 10(1).

The Adjudicator found that the Applicant's request for review dealt with the application of section 24(1) to two reports and 12 pages of other information. As the Public Body released the two reports in full to the Applicant following investigation and mediation, the Adjudicator found it unnecessary to review the application of section 24(1) to them. The Adjudicator found that the Public Body did not properly apply section 24(1) to the remaining 12 pages of information, as it failed to explain the decision or action to which the claimed advice or analyses were directed.

The Public Body severed the two reports when initially providing them to the Applicant, yet placed complete copies of them in its library around the same time. Although it did not release them in full at the time of its initial response to the Applicant or inform him that they had become publicly available, the Adjudicator found that the Public Body met its duty to assist under section 10(1). The Public Body explained that the inconsistency between its response to the Applicant and its decision to make the reports public was due to a breakdown in internal communications, and the Adjudicator found that it took

appropriate steps to remedy the Applicant's concerns once known. The Adjudicator also found that, even though the Public Body later located two other reports, it conducted an adequate search for responsive records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 3(a), 5, 5(a), 10(1), 24(1), 24(1)(a), 24(1)(b), 24(1)(e), 68, 69(1), 71(1), 72, 72(2)(a) and 93; *Mines and Minerals Act*, R.S.A. 2000, c. M-17, s. 50.

Authorities Cited: AB: Orders 96-006, 96-019, 97-003, 99-001, 99-013, 99-038, 2000-014, 2001-016, F2002-028, F2003-001, F2003-009, F2004-008, F2004-026, F2005-004, F2005-018, F2006-022, F2006-028, F2007-007, F2007-013 and F2007-029.

I. BACKGROUND

[para 1] By letter dated July, 21, 2006, the Applicant, representing a newspaper, made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act" or the "FOIP Act") to Alberta Energy (the "Public Body"). He requested all records related to the Energy Minister's review of oil and gas royalty rates, for the period from July 1, 2005 to the present (being the date of his access request).

[para 2] By letter dated February 13, 2007, the Public Body granted the Applicant access to some of the requested information, but withheld the remaining information under various sections of the Act.

[para 3] By letter dated April 23, 2007, the Applicant requested a review of the Public Body's decision to refuse access to some of the information that it withheld under section 24(1). He also expressed concerns about whether the Public Body had met its duty to assist him under section 10(1) of the Act.

[para 4] Investigation and mediation by a Portfolio Officer was authorized. This was partially successful, as the Public Body decided to release two reports to the Applicant, in their entirety, on July 27, 2007.

[para 5] In a telephone conversation with the Portfolio Officer on or before September 18, 2007, the Applicant requested an inquiry. A written inquiry was set down.

[para 6] On September 20, 2007, the Public Body released additional information to the Applicant.

[para 7] By letter dated September 23, 2007, the Applicant made a second access request for information related to his first access request, this time for the period dating from July 2006. The Public Body responded by letter dated October 26, 2007. I will not be discussing this subsequent access request and response, as they are not the subject of the request for review that has proceeded to this inquiry.

[para 8] Both parties made initial and rebuttal submissions. The Public Body's submissions included *in camera* material. In the course of the inquiry, I asked the Public Body to reformulate, in a submission that could be exchanged with the Applicant, the arguments and evidence found in its *in camera* material that did not actually reveal the records at issue. It complied. The Applicant was then given an opportunity to provide a further rebuttal submission, but he did not.

II. RECORDS AT ISSUE

[para 9] The Public Body submitted a set of records *in camera*, with pages numbering up to 999. As explained below, the records remaining at issue in this inquiry consist only of pages 304-314.

III. ISSUES

[para 10] The Notice of Inquiry, dated August 18, 2008, set out the following issues:

> Did the Public Body properly apply sections 24(1)(a), (b) and (e) of the Act (advice, etc.) to the records/information?
>
> Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist)?

IV. DISCUSSION OF ISSUES

A. Did the Public Body properly apply sections 24(1)(a), (b) and (e) of the Act (advice, etc.) to the records/information?

[para 11] I have determined that this issue is relevant only to a subset of the records that were responsive to the Applicant's access request. This is due to the scope of the Applicant's request for review.

1. Scope of the Applicant's request for review

[para 12] The relevant parts of the Applicant's request for review, dated April 23, 2007, are as follows (I have omitted parts relating to the Applicant's request that he be able to initiate a review late, which was allowed by the Commissioner):

> *I am seeking a review of this file by your office to determine if Alberta Energy properly applied the letter and the spirit of the FOIPP Act in fulfilling my request.*
>
> *On Feb. 13, 2007, just over six months after my initial request [file number indicated] was made, I received a package of documents from Alberta energy. The package had a great deal of information blacked-out, mostly under section 24(1)(a) and (b) and 27(1)(a),(b) and (c).*

[…] On Apr. 16, the documents released under my FOIP request were tabled in the legislature. As part of my research, I went to the Alberta Energy Library to see exactly what had been made public. One of the documents I found was a report, prepared by Wood MacKenzie entitled "Fiscal Terms Report for Alberta Energy."

To my surprise, the document in the library contained information that was blacked out under section 24(1)(a)(b)(c) in my FOIP request. The librarian informed me that they received the document on Feb. 13, the same day my FOIP request was granted. At least one other full report in the library also contains information blacked-out in my request.

This leaves a number of questions. Why didn't Alberta Energy provide me with information they had readily available and were, in fact, making public on the same day? What other information is in the library or elsewhere that was excluded from my request? Is the department properly applying section 24(1)(a)(b)(c)? Don't their actions violate section 10(1) of the Act? […]

[para 13] When the Applicant asks above whether the Public Body is properly applying section 24(1) of the Act, I find that he is only asking that question in respect of certain records, two of which are the reports that he cites. This is shown by an e-mail that he sent to the Public Body's FOIP Advisor on the same day that he requested the review by the Commissioner. In an affidavit, the Public Body's FOIP Advisor states that, on April 23, 2007, the Applicant called to explain his concerns, sending the Public Body a copy of the request for review along with the following e-mail explaining its scope:

As per our conversation, here is the text of the letter I've sent to the FOIP commissioner's office about my Request [file number indicated].

The pages in question are: 889-894. I also have concerns about 269-334.

[para 14] Pages 889-894 were the "Wood Mackenzie Report" dated May 2, 2006, and pages 269-289 were a draft version of the "Andrews Report" dated October 21, 2005 (collectively the "Reports"). I note that pages 269-289 of the records released to the Applicant in February 2007 did not include some sections and exhibits that were in the finalized version of the Andrews Report dated November 1, 2005, which was subsequently released to the Applicant in July 2007. Some of the text of the Report had also been revised.

[para 15] On April 24, 2007, the Public Body's FOIP Advisor forwarded the Applicant's e-mail of April 23, 2007 to the Portfolio Officer assigned to investigate and mediate this matter. It is clear from evidence submitted by the Public Body in this inquiry that the two Reports were among the only records that the Portfolio Officer and the parties considered to be the subject of the Applicant's request for review, and therefore investigation and mediation. The FOIP Advisor's affidavit states: "On

May 10, 2007, the OIPC Portfolio Officer indicated to me that the mediation process would focus on the McKenzie and Andrew Reports only." The Public Body provided copies of material sent within the Public Body to support that this was its understanding, as well as that of the Portfolio Officer.

[para 16] Because the Applicant's request for review expressly referred only to the two Reports – being the "report prepared by Wood MacKenzie" and the "other full report" (i.e. the Andrews Report) – it is arguable that they are the only records that were ever at issue. However, the Applicant's follow-up e-mail of April 23, 2007 shows that he also had concerns about pages 290-334.

[para 17] Pages 290-303 were released in full to the Applicant at the time of the Public Body's February 2007 response, so they are not at issue.

[para 18] Although the Applicant referred to pages 315-334 in his follow-up e-mail, I also find that they are not at issue. The Applicant requested a review only of the Public Body's decision to withhold information under section 24(1), and its duty to assist under section 10(1). Here, the Public Body also withheld pages 315-334 under section 5(a) of the Act, which was clearly noted on a page inserted in the package of records released to the Applicant. Section 5 was also cited in the Public Body's response letter of February 13, 2007. Section 5 determines whether the provision of another enactment prevails over the FOIP Act, and if it does, the FOIP Act does not apply.

[para 19] Because the Applicant did not request a review of the Public Body's application of section 5 to any records, I interpret this to mean that he accepted the decision to withhold the information on pages 315-334 on that basis. It is therefore unnecessary to review the Public Body's alternative application of section 24(1) to them. I find further support for this because the Public Body repeated in its submissions that it had applied section 5 to pages 315-334, and the Applicant raised no concerns in this regard. As the foregoing information is not at issue in this inquiry, I make no findings in relation to section 5 of the Act, or in relation to section 50 of the *Mines and Minerals Act*, which is the enactment that the Public Body says prevails.

[para 20] Pages 304-314 (which include a page numbered 304a) consist of various tables withheld by the Public Body in their entirety. They remain at issue and I review the application of section 24(1) to them below.

[para 21] I considered whether the Applicant's request for review may be interpreted to have been in relation to other – or even all – records that were responsive to his access request. I find that it cannot be so interpreted, first because the context set out in the request for review itself is to the effect that the Applicant's concerns about severing were framed only in relation to the appearance of the two Reports in the library, and second because the Applicant clarified the scope of his request for review in his follow-up e-mail. While his request for review referred to "at least" one other full report in the library – so that perhaps he had in mind other records at issue – his e-mail of April 23, 2007 clearly stated that his concerns were in relation to certain pages only.

Although his request for review asks whether there was other information in the library or elsewhere that was excluded in his package of records, the Applicant did not specifically cite any other records in respect of which he wanted the Public Body's application of section 24(1) reviewed. A review by this Office cannot be conducted in the abstract; an individual's concerns about exceptions to disclosure should be directed toward specific records. Finally, to the extent that the Applicant's question about excluded information raises the adequacy of the Public Body's search for responsive records, I address this issue later in this Order.

[para 22] Given the scope of the Applicant's request for review, the Portfolio Officer would have had limited jurisdiction to investigate and mediate the Public Body's decision to withhold information, and this is why the mediation accordingly focused on certain records only. Under section 68 of the Act, the Commissioner may authorize a mediator to investigate and try to settle any matter "that is the subject of a request for review". I find that nothing other than matters relating to the two Reports and pages 304-314, as well as the Public Body's duty to assist, was the subject of the Applicant's request for review in this case. It follows that nothing other than those matters could have been subject to the Applicant's request for inquiry, apparently conveyed to the Portfolio Officer by telephone sometime around September 18, 2007.

2. Application of section 24(1) to the two Reports

[para 23] By letter dated July 27, 2007, the Public Body released to the Applicant, in their entirety, the Wood Mackenzie Report dated May 2, 2006 and the finalized version of the Andrews Report dated November 1, 2005. The issue regarding the application of section 24(1) to the Reports was accordingly settled. The Applicant disputed the Public Body's severing of the Reports when they were provided in response to his access request, and the Public Body then provided complete and unsevered versions.

[para 24] Under section 69(1) of the Act, the Commissioner must conduct an inquiry in relation to a matter that is not settled under section 68. The matter regarding the application of section 24(1) to the two Reports has been settled, making it unnecessary for me to discuss whether the Public Body properly applied sections 24(1)(a), (b) and (e) to them.

3. Application of section 24(1) to pages 304-314

[para 25] The Public Body did not apply section 24(1)(e) of the Act to pages 304-314. It applied only sections 24(1)(a) and 24(1)(b), which read as follows:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body,*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*

[para 26] In order to refuse access to information under section 24(1)(a), on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options, the information must meet the following criteria: (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2004-026 at para. 55).

[para 27] Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council. A "consultation" occurs when the views of one or more of the persons described in section 24(1)(b) are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order 99-013 at para. 48). The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2004-026 at para. 57).

[para 28] With respect to its application of section 24(1), the Public Body makes the following general submissions:

> *The DOE submits that for each record referred to in Appendix C the factual determinations on whether the severed information falls within the exceptions in sections 24(1)(a), (b) and (e) were made based on the three parts tests listed above for each severed record:*
>
> - *the advice, consultations and deliberations prepared by DOE officials were sought by DOE officials;*
> - *the advice, consultations and deliberations contain factual information intertwined with analysis and options prepared solely for the purpose of, and directed to, the DOE officials to assist in taking an action or making a decision; and*
> - *the DOE is a statutory body with the responsibility for making those decisions.*

[para 29] As for pages 304-314 specifically, the Public Body makes the following submissions:

> *The tables on pages 304-314 outline advice and analyses for policy decisions and were severed under section 24(1)(a) and 24(1)(b) of FOIP. The results shown on the table[s] were based on the assumptions and perspectives of the author. Different individuals may arrive at different conclusions. […] The tables show projections based on various discount rates and time horizon.*

[para 30] Under section 71(1) of the Act, it is up to the Public Body to prove that the Applicant has no right of access to the information that it withheld under section 24(1). I find that it has failed to meet this burden.

[para 31] Part (2) of the test under both sections 24(1)(a) and (b) is that the information must be directed toward taking an action. The information must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient (Order 99-001 at para. 17; Order F2007-013 at para. 108). Taking an action includes making a decision (Order 96-019 at para. 120; Order F2002-028 at para. 29). Sections 24(1)(a) and (b) of the Act are intended to protect the path leading to an action or decision (Order F2005-004 at para. 22; Order F2007-013 at para. 109).

[para 32] In this inquiry, the Public Body does not sufficiently explain the action or decision to which the claimed advice and analyses on pages 304-314 were directed. It refers to a "policy decision" and says, even more generally, that it is "a statutory body with the responsibility for making… decisions". However, this does not tell me the specific decision that the tables on pages 304-311 were used to make. The fact that all of the requested records relate somehow to the Minister's review of oil and gas royalty rates is not enough for me to conclude that the information on pages 304-314 falls under section 24(1)(a) or (b). While the Public Body argues that the results in the tables were based on particular "assumptions" and "perspectives", it does not explain how those assumptions or perspectives mean that the information in the tables was part of the path leading to some type of decision made in the context of the royalty review. I considered whether the content of the tables themselves assist in determining whether they may be withheld under section 24(1), but the content does not assist.

[para 33] I conclude that the information on pages 304-314 does not fall within section 24(1) of the Act. The Public Body therefore did not have the discretion to withhold it under that section.

[para 34] In its submissions, the Public Body addresses its application of section 24(1) to all of the pages that were responsive to the Applicant's access request and that it submitted *in camera*. I also note that, in his submissions, the Applicant requests that "the Commissioner order all documents related to my original request be released, completely uncensored". He specifically discusses, in addition to the two Reports, an "Alberta Energy Executive Committee Decision Request" that he received severed by the Public

Body in September 2007. He also refers to a document that was apparently released to a different applicant in December 2007, but with less information severed than in the copy released to him.

[para 35] As explained above, I cannot review the application of section 24(1) to any remaining records. I do not have the jurisdiction to do so, given the scope of the Applicant's request for review dated April 23, 2007 and the fact that he expressed concerns about severing in relation to pages 269-334 and 889-894 only. I especially do not have the jurisdiction to address the Applicant's concerns about severing in relation to records released to him and another applicant in September and December 2007, as those concerns about severing arose after the Applicant's request for review that has proceeded to this inquiry. Because I have no jurisdiction to review the application of section 24(1) to any other records at issue, I cannot do so even if the parties have chosen to address other records in their submissions. (I do have jurisdiction to address the Public Body's late location of the records released to the Applicant in September 2007, to the extent that it relates to its initial duty to assist him.)

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

[para 36] Section 10(1) of the Act reads as follows:

> *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 37] The Public Body has the burden of proving that it fulfilled its general duty to assist the Applicant under section 10(1) (Order 99-038 at para. 10; Order F2004-008 at para. 10). Having said this, I will limit my review of the Public Body's duty to assist to the specific concerns raised by the Applicant in his request for review and his submissions.

1. Concerns about openness and transparency

[para 38] The Applicant argues, under point 1 of his submissions, that the Public Body has not been committed to the principles of openness and transparency, and refers to six sub-points (i) to (vi), in relation to which it has allegedly failed in this regard. Sub-point (i) concerns the Public Body's initial decision to refuse to waive fees associated with the access request, which decision it later reversed following a review by this Office.

[para 39] The general duty to assist applicants under section 10(1) normally does not encompass other, more specific duties set out under the Act (Order 2000-014 at para. 84; Order F2007-013 at para. 29). The duty to assist under section 10(1) is generally separate from other duties and requirements under the Act (Order F2006-022 at para. 37). Because decisions regarding fees and fee waivers fall under section 93, I find

that the Public Body's decisions and actions regarding the Applicant's request for a fee waiver are not relevant to determining whether it met its more general duty to assist under section 10(1). Moreover, the issue regarding the fee waiver was already addressed in the context of a separate request for review from the Applicant.

[para 40] The Applicant's sub-point (ii) is that, after the Public Body decided to release certain information to the public, it simply placed the information in its library, rather than tell the public or the media what reports were being released and why. His sub-point (vi) is that the Auditor General apparently had difficulty getting cooperation from the Public Body during an investigation of royalty policies. Neither of these points has any bearing on the Public Body's duty to assist under section 10(1). Section 10(1) sets out a public body's duty to assist applicants who have requested access to information under the Act – it does not set out a duty to assist the general public, the media or the Auditor General.

[para 41] The Applicant's sub-points (iii), (iv) and (v) are regarding the Public Body's censoring of the documents released to him, and apparent inconsistencies between the information released to him and that obtained from other sources, released to others, or made available to the general public in the Public Body's library. Again, these concerns are not properly addressed under section 10(1), as they relate to matters falling under other provisions of the Act. In particular, they relate to the Public Body's application of exceptions to disclosure such as those under section 24(1). I already discussed this issue in the preceding part of this Order.

2. Placement of the Reports in the library

[para 42] In points 2 to 4 of his submissions, the Applicant again raises his concern about information being placed in the Public Body's library. Specifically, he expresses concern that the Wood Mackenzie Report and the Andrews Report were made publicly available, yet they were severed when he obtained them from the Public Body and, moreover, he was not informed when they were placed in the library. As just explained, the Public Body's severing decisions are not relevant to its duty to assist under section 10(1). The issue regarding the severing of the two Reports is also now moot, as the Applicant was given complete copies of them by the Public Body in July 2007.

[para 43] What remains relevant, however, to the issue of whether the Public Body met its duty to assist the Applicant is its alleged failure to inform him that the two Reports had been placed in the library and to respond differently to his access request as a result.

[para 44] The Public Body submitted the text of an e-mail sent approximately May 9, 2007 from its FOIP Advisor to the Applicant, in which the FOIP Advisor explained why two paragraphs of the Wood Mackenzie Report were severed in pages 889-894 given to the Applicant, yet an unsevered copy was placed in the library:

> *[…] The determination to sever those two paragraphs was made in accordance with the FOIP legislation and through discussions with Alberta Energy officials. After the initial review of the records which took place early January, the FOIP office continued processing the request, including carrying out notification of affected third parties, preparing the records for final release, etc. Our FOIP office released the records to you in mid-February as part of our normal FOIP process.*
>
> *Subsequent to the initial FOIP process, Alberta Energy considered, and received approval to release certain records outside the FOIP process. The decision made by Alberta Energy to disclose the Wood MacKenzie "fiscal term" report in its entirety is intended to support the principles of openness and transparency. I want to assure you that this situation was not done with intent, it was just a matter of timing. […]*

[para 45] In another e-mail dated April 24, 2007, an Assistant Deputy Minister of the Public Body explains:

> *The a[n]swer is simply timing. At the time the FOIP request was responded to in February we had not yet received approval to put the report in the Library. Betw[e]en then and the request in the legislature in April we received approval. We can send the report if that is what he is after.*

[para 46] The Applicant argues that the above is misleading because it suggests that approval to place the Reports in the library was obtained after the Public Body responded to his access request. He says that the Reports were filed in the library the same day that the records were released to him, meaning that approval to make the Reports publicly available must have been obtained prior to the response to his access request. I agree with the Applicant that approval came prior to finalization of the response to his access request, given my interpretation of the facts below. However, the processing of an access request takes time and a public body cannot be expected to retrace all of its steps just prior to sending records to an applicant.

[para 47] Here, the affidavit of the Public Body's FOIP Advisor indicates that records responsive to the Applicant's access request were reviewed in January 2007, a sign off sheet recommending partial disclosure was prepared on February 5, 2007, and the approval sheet was signed by a delegate of the head of the Public Body on February 12, 2007. The affidavit further indicates that making some royalty information generally available to the public was recommended in a briefing note dated February 4, 2007. This suggests to me that approval to place the Reports in the library came sometime between February 4 and 13, 2007. The Public Body itself indicates that approval was obtained in "mid-February". Regardless of the specific date, the evidence set out in the two e-mails above, in conjunction with that in the affidavit of the Public Body's FOIP Advisor, is that the approval to place the Reports in the library came around the same time that the Public Body was finalizing the response to the Applicant's access

request, but the FOIP Advisor and FOIP office were not aware of that approval. The Public Body explains that the review of the Applicant's access request and the release of documents in the library were separate processes carried out by different staff.

[para 48] How a public body fulfills its duty to assist will vary according to the fact situation in each request; the standard directed by the Act is not perfection but what is "reasonable", which means "fair, proper, just, moderate, suitable under the circumstances" (Order F2005-018 at para. 12). Given the volume of records requested by the Applicant – and the different persons involved in responding to his access request, on one hand, and making the Reports publicly available, on the other – I do not find that the Public Body failed in its duty to assist when it neglected to inform the Applicant about the placement of the Reports in the library and did not consider modifying its February 2007 response to his access request. The Public Body's approach in this case was reasonable, if not perfect. The inconsistency between the response to the Applicant and the decision to make the Reports publicly available was due to human error falling within a tolerable range. I also see, in notes dated June 6, 2007, that the Public Body says that it is committed to improving and coordinating its processes.

[para 49] I also find that the Public Body met its duty to assist because it took appropriate steps to respond to the Applicant's concerns once it became aware of them on receipt of the Applicant's request for review, and his follow-up e-mail, on April 23, 2007. Documentation submitted by the Public Body shows that it proceeded to have internal discussions to determine whether the initial severing of the Reports was proper. It subsequently released the Reports to the Applicant in full. In its letter of July 27, 2007, the Public Body apologized and explained that the failure to provide the Reports earlier was due to a breakdown in the Public Body's internal communications.

[para 50] Finally, the severing of the Reports became the subject of a request for review by this Office, during which time the Public Body was entitled to take whatever position it wanted with respect to that issue. Hypothetically speaking, the Public Body may have been justified in severing the Reports in response to the Applicant's access request. Although a public body should arguably be consistent, a response to an access request under the Act and access to information outside the Act are two separate matters. Section 3(a) clearly provides for a dual process, and states that the FOIP process is in addition to other existing procedures for access to information (Order F2006-028 at para. 11). The fact that the Public Body chose to make the Reports publicly available, and later agreed that it should also grant the Applicant access to them under the Act, does not mean that it failed in its duty to assist him in February 2007. It was taking what it considered to be the proper approach in responding to the access request at the time.

[para 51] On consideration of the Applicant's concern about the Public Body's decision to place the Reports in the library, yet not initially provide complete copies to him, I find that the Public Body fulfilled its duty under section 10(1) of the Act. It made every reasonable effort to assist the Applicant and to respond to him openly, accurately and completely.

3. Search for responsive records

[para 52] The Applicant notes in his submissions that, in September 2007, the Public Body provided him with severed copies of two additional reports that it had previously overlooked. These are found at pages 963-999 of the records submitted by the Public Body and include the "Alberta Energy Executive Committee Decision Request" referenced earlier. The Public Body's failure to initially locate these records raises the possibility that it did not conduct an adequate search for records in advance of its response to the Applicant in February 2007. The Applicant alluded to this issue, in his request for review, when he asked whether there were records elsewhere that were excluded from the package released to him.

[para 53] A public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25; Order F2007-007 at para. 17). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Order 2001-016 at para. 13; Order F2007-029 at para. 50).

[para 54] The affidavit sworn by the Public Body's FOIP Advisor and one sworn by another representative of the Public Body state that the Applicant's access request involved a significant number of records, required searches in a number of offices, and involved various personnel. Supporting documentation in relation to the initial search for responsive records – such as the documentation under Tab 3 of the FOIP Advisor's affidavit – sets out who conducted the search (i.e., various staff members), the specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request (e.g., detailed instructions sent out to the various staff, who were required to complete particular forms), the scope of the search conducted (e.g., storage rooms, staff offices, e-mail, electronic databases), and the steps taken to identify and locate all possible repositories of records responsive to the access request (e.g., the various staff were each asked whether they knew of other areas where responsive records may exist). These are among the things that a public body should address when demonstrating the adequacy of its search for responsive records (Order F2007-029 at para. 66). I find that the Public Body in this inquiry has satisfactorily addressed them.

[para 55] Further, on review of the correspondence sent from the Public Body to the Applicant as well as a "running record" that describes telephone conversations between the parties, I find that the Public Body informed the Applicant in a timely fashion about what was being done or had been done to search for the requested records. As part of this aspect of its duty to assist, a public body should optimally explain why it believes that no more responsive records exist than what has been found or produced (Order F2007-029 at para. 66). Here, I find that the Public Body has also satisfactorily fulfilled this part of its duty, given its letter of September 20, 2007 to the Applicant, with which it enclosed the two additional reports that were located late. In that letter, the Public Body explained

how it came to locate the two additional reports, assured the Applicant of its "very rigorous search process" to locate records, and stated that the two reports had been inadvertently missed. This was an indirect way of saying that it believes that no more responsive records exist than what has been found or produced.

[para 56] Section 10(1) requires that a public body make every reasonable effort to locate responsive records, which does not require perfection; the fact that a public body did not find records on its first search does not prevent a finding that the public body made every reasonable effort (Order F2003-001 at para. 40). I find that the Public Body was reasonable in its search in this case, even though it overlooked the two reports. Moreover, the fact that responsive records have been overlooked may be mitigated if a public body responds in a timely, forthright way once the error is discovered (Order F2003-009 at para. 30). Here, the affidavit of the Public Body's FOIP Advisor and supporting documentation indicate that employees located the overlooked reports on or about August 13, 2007 and quickly notified the Public Body's FOIP office so that it could be determined whether the reports were responsive to the Applicant's access request, and if so, warranted severing. Recommendations about severing were made to the persons whose approvals were required, and information was then released to the Applicant. I find that the Public Body's letter of September 20, 2007 addressed the overlooked records in a forthright and sufficiently timely way.

[para 57] Given the scope and size of the Applicant's access request, and the Public Body's efforts to rectify its oversight, I do not find that the Public Body's failure to initially locate all responsive records means that it did not meet its duty to assist the Applicant under section 10(1) of the Act. It conducted an adequate search for responsive records and therefore met its duty to assist.

V. ORDER

[para 58] I make this Order under section 72 of the Act.

[para 59] I find that the Public Body did not properly apply section 24(1) of the Act to pages 304-314 of the records (which include a page numbered 304a). Under section 72(2)(a), I order the Public Body to give the Applicant access to the information on these pages. I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied.

[para 60] I find that the Public Body met its duty to assist the Applicant under section 10(1) of the Act.

Wade Riordan Raaflaub
Adjudicator