ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-37

August 29, 2022

ENVIRONMENT AND PARKS

Case File Numbers 002671 and 004427

Office URL: www.oipc.ab.ca

Summary: An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Environment and Parks (the Public Body) for records relating to rangeland health inventories. The Public Body located 5911 pages of responsive records, and initially withheld them under section 29(1) of the Act; however, the Public Body withdrew its application of this provision at some point. As the records related to information provided to the Public Body by the Third Party, the Public Body notified the Third Party of the request and its decision to provide some records to the Applicant. The Third Party requested a review by the Commissioner, objecting to the disclosure of any responsive records.

The Applicant also requested a review by the Commissioner of the exceptions applied by the Public Body. The Applicant and Third Party both subsequently requested an inquiry. The files were joined for this inquiry.

The Adjudicator determined that the Public Body conducted an adequate search for records.

The Adjudicator found that the Public Body has custody and control of the responsive records, and that section 16(1) did not apply to any information in the records at issue. The Adjudicator ordered the Public Body to provide the responsive records to the Applicant.

Statutes Cited: AB: *Forest Reserves Regulation*, Alta Reg 42/2005, ss. 1, 15; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 16, 71, 72, 92.

Authorities Cited: AB Orders 96-022, 97-003, 97-006, 2001-016, F2004-013, F2005-011, F2007-007, F2007-029, F2011-002, F2016-64, F2017-81; **Ont** Orders PO-2991, PO-3607

Cases Cited: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII (SCC), *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 (CanLII), [2005] 3 SCR 530, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31, *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247

I. BACKGROUND

[para 1] On November 18, 2015, the Applicant made an access request to Alberta Environment and Parks (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for:

> All records regarding the rangeland health inventories and audit of rangeland health inventories as referred to by [HN] in the email I sent to you with my May 2015 request #E15-G-0728 (if you want another copy, please email me) for the same information; and also referenced by [HF] during a recent W5 program entitled Born Free wherein [Ms. F] says "we do rangeland assessments" (I sent a copy of the show to [TC] in the FOIPP office recently) Please note that I was told that I could purchase the assessments from Rocky Mountain Forest Range Association, however I was refused access by that organization am therefore asking again for access from your department.

[para 2] The Applicant indicated that the date range of responsive records was January 1, 2005 until the date of the request.

[para 3] The Public Body had located 5911 pages of responsive records. It initially refused access to the records, citing section 29(1) of the Act. On January 28, 2016, the Applicant requested a review by the Commissioner of the Public Body's response to her access request. The Commissioner authorized mediation (file #002671). Following this process, the Applicant requested an inquiry (received June 12, 2017).

[para 4] In April 2016, the Public Body informed the Third Party by letter that it had received an access request for records relating to the Third Party. It provided the Third Party with an opportunity to provide input regarding the disclosure of the responsive records. I do not have a copy of this letter; however, it is referred to in a subsequent letter from the Public Body to the Third Party dated October 27, 2016. In this October letter, the Public Body informed the Third Party that it decided to provide 5783 pages of records to the Applicant.

[para 5] By letter of the same date, the Public Body also sought the Third Party's input on the disclosure of an additional 128 pages of records. I do not have any subsequent communications between the Public Body and Third Party relating to the Public Body's decision regarding these 128 pages of records.

[para 6] On November 7, 2016, the Third Party requested a review of the Public Body's decision to provide the responsive records to the Applicant. The Commissioner authorized mediation (file #004427). Attached to the Third Party's request for review are both October 27, 2016 letters to the Third Party from the Public Body; therefore, I conclude that the Third Party objects to the disclosure of the 5783 pages of records identified in one letter, and the 128 pages of records identified in the other letter (5911 pages in total). Following the review process, the Third Party requested an inquiry (received April 7, 2017).

[para 7] As files #002671 and #004427 pertain to the same access request and the same records, the files were joined into one inquiry, with the Applicant, Third Party and Public Body participating.

[para 8] By letter dated February 1, 2022, I asked the Public Body to clarify its position regarding what exceptions it has decided to apply to the information in the records. At that time, it appeared the only exception remaining at issue was section 16(1).

[para 9] By letter dated March 1, 2022, the Public Body indicated that it had not made final decisions regarding access to the responsive records, beyond the application of section 16(1). By letter dated March 8, 2022, the I advised the Public Body that as section 16(1) is the only exception applied by the Public Body, should the inquiry conclude that section 16(1) does not apply to some or all of the information in the records, that information would be ordered to be disclosed to the Applicant; this follows the process for reviews set out in the Act. I informed the Public Body that it would not have another opportunity to apply additional discretionary exceptions to access after the inquiry was concluded. Therefore, any new decisions must be raised in the inquiry, along with an explanation as to why the Public Body should be permitted to raise new exceptions at this stage, if it did.

[para 10] On June 2, 2022, the Public Body informed me and the parties by email that it elected not to provide submissions for the inquiry. I assume from this that the Public Body also decided not to apply any other exceptions to the information in the records.

[para 11] By email dated June 7, 2022, the Registrar of Inquiries reminded the Public Body of its obligation to provide an index of records for the inquiry, as set out in the Notice of Inquiry. The Public Body responded with the following:

> Index of Records:
>
> 1. Parts 1-5 contain the entire responsive record set at issue in this inquiry

> 2. Pages 92-122 are intentionally left blank. Converting Excel spreadsheets to PDF often results in orphaned information appearing on nearly-blank pages. Please review these pages carefully for fragmented information from Excel to PDF conversion. Any other blank page is meant to be as is and there is no missing content from the record set.
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> 3. There is no severing applied to the information, and the records are provided as they have been originally stored by the Public Body
>
> 4. Any further manipulation of the records would not be practical and the records are presented as is.
>
> 5. All records are rangeland inventories responsive to the timeframe and scope of the Applicant's request in the custody of the Public Body

[para 12] The Applicant followed up with an email, asking whether the Public Body's search for records encompassed her entire request, as the Public Body's 'index' indicated that the records at issue involved only rangeland inventories. The Public Body responded (email dated June 7, 2022):

> AEP is only providing to the Inquiry the same records at issue from the Review stage and nothing more. These supplemental records were never described in the scope of the Applicant's request, and at no time were they ever considered for disclosure. This broadened definition of records was never mentioned at Review stage, and the nearly 6000 pages of records are specific to the Rangeland Inventories themselves, and any other record of interest should have been described in the original scope or more likely would require its own access request.

[para 13] By letter dated June 10, 2022, I informed the parties that the documentation around the Applicant's request, provided with the Applicant's request for review and request for inquiry, indicate that the access request was broader than the Public Body's June 7 email suggests. I asked the Public Body to confirm the scope of its search for records, and added the following issue to the inquiry:

> Did the Public Body meet its duty to assist the Applicant under section 10 of the FOIP Act?

[para 14] I also added the issue of whether the Public Body has custody or control of the responsive records, based on information provided by the Third Party with its initial submission.

II. RECORDS AT ISSUE

[para 15] The records at issue consist of 5911 pages of responsive records, withheld in their entirety.

III. ISSUES

[para 16] The issue set out in the Notice of Inquiry dated March 29, 2022, is as follows:

Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records?

[para 17] Per my June 10, 2022 letter, the following issues were added to the inquiry:

Did the Public Body meet its duty to assist the Applicant under section 10 of the FOIP Act?

Are the responsive records in the custody and control of the Public Body?

IV. DISCUSSION OF ISSUES

Preliminary Issue – concern about procedural fairness raised by the Applicant

[para 18] The Applicant objected to my posing questions to the Third Party in my June 10, 2022 letter. The Applicant states (June 15, 2022 email):

> We object to the portion of the Inquiry additions that solicits additional submissions and/or evidence from the third party RMFRA, regarding s.16 of the FIPPA. With this Inquiry, we are now into administrative litigation and procedural fairness is well into play. The case of Baker v Canada (SCC, 1999) makes it clear that when the tribunal (here the IPC) makes representations as to hearing processes to be followed, the other parties have a 'legitimate expectation' that - barring unusual and warranted circumstances - that process should be followed:
> ---
> 26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); *Mercier-Néron v. Canada (Minister of National Health and Welfare)* (1995), 98 F.T.R. 36; *Bendahmane v. Canada (Minister of Employment and Immigration)*, 1989 CanLII 5233 (FCA), [1989] 3 F.C. 16 (C.A.).
> ---
> RMFRA has 'had their shot' at initial s.16 submissions and evidence by their 3 May 2022 letter. Barring any rebuttal opportunities (if utilized appropriately), any additional opportunities would constitute an unfair 'second chance' by the third party to supplement their choices made first time around. With respect to the IPC, this solicitation is not without it's [sic] 'hand-holding' as to what the IPC is seeking from the RMFRA. RMFRA bears the burden of proof in this instance and we submit that they must meet it independently.

[para 19] The principle discussed in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII (SCC) (*Baker*) relates to the level of procedural fairness owed to an applicant in an administrative process, where the rights of the applicant are being decided.

[para 20] The Applicant's argument seems to be that they had a legitimate expectation that the parties would not be given an opportunity to respond to particular questions about their arguments in the course of this inquiry, should their initial submission not suffice.

[para 21] It is not clear why the Applicant believes they had such a legitimate expectation. It is common for the Commissioner or her delegates to ask additional questions of parties in an inquiry; this practice is contemplated in the *Inquiry Procedures* document sent to all parties with the Notice of Inquiry.

[para 22] Further, as discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, I have an 'investigatory' role in deciding this inquiry (at paras. 172-174, 179-180):

> A tribunal is not bound by the authorities cited by parties. By raising an issue, a party opens the door to the existing jurisprudence governing that issue. Put another way, a tribunal is not constrained by the parties' legal research. Tribunal (and judicial) economy extends latitude to decide based on the law rather than on the specific authorities invoked by the parties: ***Grenon v Canada Revenue Agency***, ABCA 96 at para 41. I agree with the IPC that an adjudicator is not obligated "to update or request submissions from the parties on every aspect of the Adjudicator's reasoning process, including references to case law:" IPC Brief at para 174.
>
> Moreover, the Adjudicator was not confined to resolving the solicitor-client privilege dispute on the basis of the issues as framed by the parties (unlike a trial or chambers judge, since, subject to rule 1.3(2),"[i]t is well-established that a trial or chambers judge should not decide a case on a matter not pleaded, and specifically should not grant remedies beyond the pleadings:" ***Mazepa v Embree***, 2014 ABCA 438 at para 8).
>
> Indeed, the IPC Orders issued from "Inquiries" conducted by the Adjudicator. That role gives an adjudicator greater scope for raising issues not raised by the parties than might be available to, say, a trial court: see David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) 297, fn. 170. For example, the Notice of Inquiry for Inquiry F7384 listed the issues in the inquiry, but prefaced the list with the words "[w]ithout limiting the Commissioner" and followed the list with the warning that "[t]he above does not prevent the Commissioner from raising any further issues during the inquiry that are deemed appropriate:" CRP 2, vol. 2, tab 11, Notice of Inquiry, p. 2; IPC Brief at para 171.
>
> …
>
> An adjudicator is not only an investigator. An adjudicator's decisions arise from a relatively formal process permitting parties to make submissions and to respond to matters raised by an adjudicator, as occurred in this case. The submission and counter-submission process drew the procedures into proximity with judicial procedures and

raised legitimate expectations that the matter would be decided based on issues to which the parties had an opportunity to respond: ***Baker*** at paras 23 and 26.

If a tribunal identifies a "new" issue that requires resolution for a just disposition, "new" in the sense that the issue is legally or factually distinct from the issues addressed by the parties and "cannot reasonably be said to stem from the issues as framed by the parties," procedural fairness demands that the parties receive notification of the new issue and be permitted to address the issue: ***R v Mian***, 2014 SCC 54, Rothstein J at para 30; ***R v Barton***, 2019 SCC 33 at para 50; ***Kahkewistahaw First Nation v Taypotat***, 2015 SCC 30 at para 26; ***IWA v Consolidated-Bathurst Packaging Ltd***, 1990 CanLII 132 (SCC), [1990] 1 SCR 282 at 338-339. See also ***Saskatchewan Joint Board, RWDSU v Canadian Linen & Uniform Service Co***, 2005 SKQB 264, Kovach J at paras 18-21. In ***Calgary (City) v Renfrew Chrysler Inc***, 2017 ABQB 197 at para 21, Justice Neufeld quoted Blake, *Administrative Law in Canada*, 5th edition, relied on by the appellant for the following proposition:

> In addition to the evidence, the essential issues to be considered should be identified. A party should not be left in the position of discovering upon receipt of the tribunal's decision, that it turned on a matter on which the party had not made representations because the party was not aware it was in issue …. (at page 43)

I agree with Justice Neufeld's observations at para 43 that

> [43] Procedural fairness accomplishes two broad objectives in administrative hearings. First and foremost, it fulfills the parties' fundamental right to be heard when a decision is being made that affects their interests. Second, (and occasionally overlooked) procedural fairness assists the decision- making process itself by improving the quality of the record through the testing of evidence, and allowing for considered argument on that evidence.

[para 23] The Court in *EPS* seems to indicate that where a sub-issue is considered in an inquiry, the adjudicator is required to put that sub-issue to the parties if the parties have not already spoken to it or are otherwise apparently unaware that it is a matter that the adjudicator is considering.

[para 24] In this case, the Third Party's initial submission relied almost exclusively on the language of a 2018 MOA between the Third Party and the Public Body. As it was unclear to me that this MOA had any bearing on the issues at hand, I provided the Third Party an opportunity to provide additional submissions on the application of section 16(1). Perhaps this situation does not fall squarely within the ambit of the Court's discussion in *EPS*. Nevertheless, the nature of the inquiry process generally, as well as the specific processes of this Office, permit me to ask a party for additional information on an issue to be decided.

[para 25] Arguing that I ought not to be permitted to ask the Third Party for additional arguments regarding the application of section 16(1), especially when the Third Party bears the burden of proof on that issue (as set out in section 71(3)(b) of the Act, cited at paragraph 32 below), might be characterized as attempting to use the doctrines of procedural fairness as a sword against the Third Party, rather than as a shield to protect

one's own rights. In other words, the Applicant may be seeking to limit the Third Party's arguments to those made in its initial submission, which were insufficient to meet its burden. The mandate and processes of this office make it clear that I am not restricted to considering only evidence initially provided by parties, and that I may conduct an inquisitorial process in order to make findings that are as accurate and true to the facts as possible. I do not accept that procedural fairness requires that the Commissioner (or I as her delegate) stop short in the manner the Applicant seems to suggest.

[para 26] The Applicant also argues that the behavior of the Public Body and Third Party in responding to the Applicant's request and during this inquiry amount to an abuse of process and an attempt to avoid duties under the FOIP Act. The Applicant argues that this behavior is relevant to "the Commissioner's credibility fact-findings and its [sic] remedial jurisdiction under FIPPA s.53, 56(1) and elsewhere."

[para 27] The remedy sought by the Applicant is that the records be disclosed to them by the Public Body. For the reasons discussed below, I find that section 16 does not apply to the records at issue and those records must be disclosed to the Applicant. Therefore, there is no further remedy for the Applicant in this regard and I needn't address this argument.

Are the responsive records in the custody and control of the Public Body?

[para 28] In my June 10, 2022 letter to the parties adding this issue, I said:

> The Third Party's submission includes an MOU signed between the Third Party and the Minister of Environment and Parks. That MOU was signed in 2018, which post-dates the date of the records and the Applicant's access request. The MOU that appears to have been in place at the time of the Applicant's access request purports to make all range inventory data the property of the Minister, and the provision of this data cannot be considered to have been done in confidence (MOU dated December 18, 1999, attached to Third Party's request for review).
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> MOUs are not legally binding, and cannot override the application of the FOIP Act; however, they may be helpful as interpretive aids.
>
> The parties should address which MOU, if any, should apply in this case, where the Applicant had made the access request prior to the 2018 MOU.
>
> The present approach to determining whether an entity has custody or control of information was reviewed in Order F2018-37. The Adjudicator in Order F2018-37 stated at paras. 19 to 21:
>
> > The phrase "custody or control" refers to an enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. "Custody or control" also imparts the notion that a public body has duties and powers in relation to a record, such as the duty to preserve or maintain records, or the authority to destroy them.
> > Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering

the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors to determine whether a public body had custody or control over records:

- Was the record created by an officer or employee of the public body?
- What use did the creator intend to make of the record?
- Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
- If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
- Does the public body have a right to possession of the record?
- Does the content of the record relate to the public body's mandate and functions?
- Does the public body have the authority to regulate the record's use?
- To what extent has the record been relied upon by the public body?
- How closely is the record integrated with other records held by the public body?
- Does the public body have the authority to dispose of the record?

Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said, after consideration of the factors, that a public body has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records. In this case, it would appear that the Public Body would have no right to possess the record, and would have no reason or use for the record.

The parties should address whether the Public Body or Third Party had custody or control over the records requested by the Applicant in 2015 *at the time of the request*. If the parties believe that custody or control has changed since then, they should clearly describe how. The parties should also address the impact of an existing access request on any change to custody or control of the records.

[para 29] I also asked additional questions about rangeland data and the relevant program more generally:

What legislation sets out the obligations regarding range management plans, range inventory data, etc.? Who is obliged to provide inventory data to the Government of Alberta? Is it a legal requirement (i.e. required under a statute or under a contract or agreement?) What is the Minister's obligation to create range management plans and/or collect inventory data?

The 2018 MOU provided with the Third Party's initial submission refers to a 2010 policy that requires allotment permit holders to provide certified range inventories to the Minister of Environment and Parks. Can the Public Body please provide me with a copy

> of that policy? What happens if permit holders do not provide this information to the Minister? Is this requirement a condition of the allotment permit?
>
> What is the role of the Third Party? Does it collect the inventory data on behalf of its members for a fee? Who are its members and is membership voluntary? Could allotment permit holders provide inventory data to the Minister on their own? Would inventory data be collected were it not for the requirement to provide it to the Minister? What other interest does the Third Party have in this information? What other interest do allotment permit holders have in this information?

[para 30] I suggested that it might be helpful for the Public Body to provide responses from the relevant program area. The Public Body's response to my letter addressed only the section 10 issue (discussed below). It did not provide any information with respect to the issue of custody and control, despite the fact that it is in the best position to speak to this issue.

[para 31] The Third Party did not provide any response to my letter.

[para 32] Section 71 of the FOIP Act sets out the burden of proof in inquiries regarding access decisions. It states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*
>
> *...*
>
> *(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> > *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
> >
> > *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para 33] The Public Body and/or Third Party have the burden of showing that the Applicant has no right of access to the responsive records. This includes finding that there is no right of access on the basis that the Public Body does not have the requisite custody or control of the requested records.

[para 34] As noted in my letter to the parties, the Third Party's submission relies primarily on the 2018 MOA between it and the Public Body. I also have a copy of the 1999 MOU signed between the Minister of Environment and the Third Party, which was provided to this office by the Third Party with its request for review. From the parties' submissions, I understand that this 1999 MOU was in effect at the time of the Applicant's access request. The Third Party states that it understood the language of the 1999 MOU would "protect us and our technical information from FOIP requests."

[para 35] The 1999 MOU states, in part:

> 4. It is understood that any range resource inventory data or information generated and submitted by the Association to the Minister shall become the property of the Minister, and that the said data or information submitted to the Minister shall not be construed by the Association or the Minister as being confidential for the purposes of the *Freedom of Information and Protection of Privacy Act.*

[para 36] It seems clear from the above that the Public Body had custody and control over rangeland inventory data provided by the Third Party in accordance with that MOU. Despite my letter raising this issue, neither the Public Body nor the Third Party have provided any arguments to dispute this conclusion.

[para 37] While the 2018 MOA (erroneously referred to as an MOU in my letter cited above) post-dates the Applicant's request, it states that it applies to all inventory data in the Minister's possession:

> 3. The Minister acknowledges and agrees that the terms and conditions contained in the licensing agreement shall apply to any Inventory Data in the Minister's possession as of the date hereof. For greater clarity, all Inventory Data in the Minister's possession as of the date hereof is the sole property of the Association, shall not be disclosed or shared with any third parties without the express written consent of the Association, and shall be returned to the Association upon its demand.

[para 38] In providing this MOA with its initial submission, the Third Party is possibly arguing that it applies to the records at issue in such a way that the Public Body no longer has custody and control of the requested records and therefore cannot provide them to the Applicant in response to their access request.

[para 39] Assuming this to be the Third Party's argument, I do not accept it for the following reasons.

[para 40] First, it is not clear to me that the contractual arrangements as set out in either the 1999 MOU or the 2018 MOA are determinative of whether the Public Body has custody and control of the records within the terms of section 6 of the Act. The test for determining whether a public body has custody or control of records has been set out in past Orders of this Office and cited with approval in judicial review decisions (see *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247). This test was set out in my letter to the parties, reproduced at paragraph 28 above.

[para 41] In following the past case law on this point, the determination of whether a public body has custody or control of records is to be made on the basis of a list of factors having largely to do with why the public body has the records, what use it has made of them, and so on. A public body's "right of possession", which possibly includes a right under a contractual arrangement, is only one of a much longer list of factors.

[para 42] In my June 10 letter, I asked the Public Body to provide general information about the program area that collects the inventory data and creates rangeland management plans. I asked whether the Minister has a legislative obligation to create rangeland management plans and collect rangeland inventory data. The purpose of these questions was to determine whether the Public Body collects rangeland inventory data as part of its mandate, which is a factor in determining whether the Public Body has custody or control of the data. The Public Body did not provide any additional information in response to these questions.

[para 43] In a letter from the Third Party to the Public Body from November 2016 regarding any proposed disclosure of the responsive records, the Third Party stated that "[a]ll grazers in the forest reserve must submit range inventory information to the department of Environment and Parks to develop a Range Management Plan." This indicates that the Public Body collects the range inventory information for its own purpose of creating range management plans. Section 1(1)(h) of the *Forest Reserves Regulation* (Alta Reg 42/2005), defines a "range management plan" as "the operational manual or guide, and the map, currently approved by the Minister for each range allotment…". Section 15(1)(b) requires all permit holders to comply with the range management plan.

[para 44] From the minimal information provided to me by the parties regarding the Public Body's role in collecting inventory data and creating range management plans, I understand that the duty to create the plans is a duty of the Public Body and permit holders must comply with the plans. The Third Party's submissions to the Public Body states that its members (i.e. permit holders) are required to provide inventory data to enable the Public Body to create the plans. Based on this, I find that the Public Body has the responsive records in order to perform part of its mandate. This strongly indicates that the Public Body has custody or control of the responsive records. I am also aware that the Public Body has sufficient control to have located the requested records in response to the Applicant's request.

[para 45] Other than the 2018 MOA, there is nothing before me to suggest that the nature of the Public Body's dealings with the records indicates a lack of custody or control at present. The Third Party has not provided me with any basis for treating the 2018 MOA as overriding all the other factors and therefore as determinative of the issue, and consequently I have no basis on which to decide that is the case.

[para 46] The second reason I am not accepting the Third Party's apparent argument that the 2018 MOA should be interpreted such that the Public Body lacks custody or control of the responsive records relates to the fact that the Applicant requested the records, and a review of the Public Body's response to that request, prior to 2018.

[para 47] At the time the access request was made, the 1999 MOU rather than the 2018 MOA was the document setting out the contractual arrangements between the Public Body and the Third Party. However, the 2018 MOA purports to apply to all rangeland inventory information currently in the Public Body's possession. In my view, when an

access request is made to a Public Body that has custody and control of the requested records, the right of access to any records (subject to the exceptions in the Act) crystallizes or vests in the Applicant. Legal principles prevent a crystallized or vested right from being overridden by subsequent legislation (or agreements).

[para 48] In *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 (CanLII), [2005] 3 SCR 530, the Supreme Court of Canada discussed the principle of vested rights (at paras. 30, 32-34, 37-38):

> 30 Vested rights result from the crystallization of a party's rights and obligations and the possibility of enforcing them in the future. Professor Côté writes that, "[w]ithout being retroactive, a statute can affect vested rights; correspondingly, a statute can have a retroactive effect and yet not interfere with vested rights" (p. 156). In general, it will be purely prospective statutes that will threaten the future exercise of rights that were vested before their commencement: Côté, at p. 137.
> …
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> 32 The principle against interference with vested rights has long been accepted in Canadian law. It is one of the many intentions attributed to Parliament and the provincial legislatures. As E. A. Driedger states in *Construction of Statutes* (2nd ed. 1983), at p. 183, these presumptions
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> > were designed as protection against interference by the state with the liberty or property of the subject. Hence, it was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject.
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> This had already been accepted by Duff J. in *Upper Canada College v. Smith* (1920), 1920 CanLII 8 (SCC), 61 S.C.R. 413, at p. 417:
>
> > . . . speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights acquired by transactions perfectly valid and regular according to the law of the time.
>
> (See also *Acme Village School District (Board of Trustees of) v. Steele-Smith*, 1932 CanLII 40 (SCC), [1933] S.C.R. 47, at p. 51; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 569-70.)
>
> 33 The leading case on this presumption is *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, 1933 CanLII 86 (SCC), [1933] S.C.R. 629, at p. 638, where this Court stated the principle in the following terms:
>
> > A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark* [(1890), 15 App. Cas. 384, at 388]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

> 34 The principle has since been codified in interpretation statutes. The *Interpretation Act* is no exception:
>
> > **12.** The repeal of an act or of regulations made under its authority shall not affect rights acquired . . . and the acquired rights may be exercised . . . notwithstanding such repeal.
>
> …
>
> 37 Few authors have tried to define the concept of "vested rights". The appellant cites Professor Côté in support of his arguments. Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pp. 160-61). This analytical approach was used by, *inter alia*, the Saskatchewan Court of Appeal in *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 1992 CanLII 2751 (SK CA), 95 D.L.R. (4th) 706, at p. 727.
>
> 38 I am satisfied from a review of the case law of this Court and the courts of the other provinces that the analytical framework proposed by the appellant is the correct one.

[para 49] The issue of vested rights in relation to an access request made under access-to-information legislation has been considered in other jurisdictions. Ontario Order PO-2991 considered whether an applicant had a right of review of an institution's response to an access request in a situation where the institution ceased being an institution prior to its response to the access request (in Ontario's FOIP Act, an "institution" is the equivalent to a "public body" under Alberta's Act).

[para 50] Like Alberta's FOIP Act, Ontario's Act provides applicants with a right to request a review by the Ontario Information and Privacy Commissioner of any institution's response to an access request. In Order PO-2991, the access request had been made to OMERS Administration Corporation (OMERS), which had been an institution at the time of the access request. However, Ontario's FOIP Regulation had been amended such that OMERS was no longer an institution for the purposes of Ontario's FOIP Act, after the access request was made and before OMERS responded to the applicant. While OMERS had continued to process the applicant's request and respond under the Act, the adjudicator found that the applicant no longer had a right of review of OMERS' response. He found:

> Applying the case law to the facts of this case, I find that Regulation 261/10 does not interfere with vested rights because the legal situation of the appellant was not sufficiently constituted when the regulation came into force. The appellant's rights of appeal arose from OMERS' access decision, and OMERS was no longer an institution subject to the *Act* when its decision was issued October 12, 2010. In this situation, the appellant did not have a vested right to appeal OMERS' decision to this office. Accordingly, the presumption against interference with vested rights does not come into play.

[para 51] In Ontario Order PO-3607, the adjudicator applied the above analysis to a similar situation, in which an applicant had made an access request to Hydro One. Hydro One ceased being an institution under Ontario's Act by virtue of a legislative amendment, at some time during the inquiry process. In that case, Hydro One was an institution under Ontario's Act at the time of the access request, and at the time of Hydro One's response to the applicant. The applicant had also requested a review of Hydro One's response by the Ontario Commissioner prior to the legislative amendment. The adjudicator concluded (at paras. 28-29):

> [28] Adopting the principles articulated in Order PO-2991 to the circumstances of this appeal, I find that the IPC does have jurisdiction to engage in this inquiry. The appellant filed his request with Hydro One on April 25, 2014 and paid the prescribed fee. Hydro One's access decision was issued on August 24, 2014, well before the June 4, 2015 date in which Hydro One's status as an institution under the *Act* was revoked. Accordingly, there is no question that Hydro One was an institution at the time the request was made, at the time it issued its decision and at the time the decision was appealed by both the requester and third party appellant. In order words, "all conditions precedent"[6] were satisfied and the appellants' rights to appeal that decision were vested by the date Hydro One was no longer an institution under the *Act*.
>
> [29] Furthermore, I note that the appeals were well into the IPC's appeals process before June 4, 2015, as the requester appellant filed his appeal on August 26, 2014 and the third party appellant filed its appeal on September 23, 2014. In fact, the mediation stage of the appeals was completed and the appeals had moved to the inquiry stage by June 4, 2015. In light of these facts, I find that both the requester and third party appellant's rights were vested by the date Hydro One was no longer an institution under the *Act*. Accordingly, I find that the issues in these appeals are properly before me. I am also satisfied that the transitional provisions in section 65.3 of the *Act* provide me with the authority to process the appeal, including exercising all of the powers set out in section 52 of the *Act*[7] and issue a binding order on Hydro One until June 3, 2016[8].

[para 52] The facts of the present case are much closer to the facts in Order PO-3607 than PO-2991, insofar as the Applicant in this case made the access request and received the Public Body's response prior to the 2018 MOA that purports to place the records outside the custody or control of the Public Body. The Applicant had already requested an inquiry into the matter prior to that MOA. In my view, the Applicant's right of review has vested.

[para 53] The case law discussed above relates to legislative changes and the extent to which legislative changes can affect individual rights. Aside from my finding that the Applicant's rights have vested, it is also not at all clear that the MOA between the Third Party and Public Body could operate in the same manner as a legislative change, so as to remove the Applicant's right of access to records after an access request was made, or to remove the right of review even if the circumstances here were the same as those in Ontario Order PO-2991 (i.e. if the MOA were signed prior to the Public Body's response to the Applicant). To make such a finding would have the effect that whenever an access request was made for records in a Public Body's custody or control that it was disinclined to disclose, it could avoid its obligations to consider whether exceptions apply and to

provide access if they do not, simply by entering into a contractual arrangement with a private entity under which it transferred custody and divested itself of control of the records. This would be an untenable situation given the Legislature's intention in enacting access to information legislation.

[para 54] Further, once an access request is made for records subject to the Act, interference with those records is an offence. Section 92(1) sets out offences under the Act; the relevant provisions state:

> *92(1) A person must not wilfully*
>
> *...*
>
> *(e) alter, falsify or conceal any record, or direct another person to do so, with the intent to evade a request for access to the record,*
>
> *...*
>
> *(g) destroy any records subject to this Act, or direct another person to do so, with the intent to evade an request for access to the records.*

[para 55] It is clear that once an access request is made, usual processes such as destroying records in accordance with a records retention schedule must be paused. While this provision does not speak to transferring information to another party by contract, the provision makes clear that the intention of the Act is that once an access request is made, the requested information is to be preserved. By implication, this would include not putting the information beyond the reach of the request by way of contract.

[para 56] Lastly, even if the 2018 MOA were relevant to this case, it may be interpreted as an impermissible attempt to 'contract out' of the FOIP Act. Order F2017-81 discusses the concept of 'contracting out of the FOIP Act (at paras. 70-74):

> In Order F2010-027 and P2010-020, the adjudicator noted that the principle regarding "contracting out" of the FOIP Act applies equally in the context of a complaint. She said (at para. 61):
>
> > The Complainant contends that the CDLA or CDLC prohibits British Columbia and Alberta from exchanging information. However, collection of information by a public body is governed by the Act, and not by an agreement which it may have entered into with some other entity or entities. Public Bodies 2017under the Act (Order F06-01 [2006] B.C.I.P.C.D. No. 2, cited with approval in *Business Watch International v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 10). Whether the Public Body properly collected information from British Columbia under the Act is determined by whether it complied with the Act's provisions.
>
> In the BC Order cited in the excerpt above, F06-01, the adjudicator also found that a public body cannot contract out of its obligation to provide access to records created for that public body. She referred to the former BC Commissioner's report on the

implications of the USA Patriot Act (*Privacy and the USA Patriot Act: Implications for British Columbia Public Sector Outsourcing*, 2004). The report states in part:

> The fact that outsourcing is contemplated by FOIPPA does not, however, authorize a public body to do so in circumstances that would reduce security arrangements for personal information below those required of the public body directly. A public body cannot contract out of FOIPPA either directly or by outsourcing its functions. The decision to outsource does not change the public body's responsibilities under FOIPPA. Nor does it change public and individual rights in FOIPPA, which are not balanced against any 'right' to outsource.

The BC adjudicator also referred to a decision of the Ontario Court of Appeal (*Ontario (Criminal Code Review Board) v. Doe*, (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.). Regarding that decision, she said (at para. 83, citations omitted):

> In Ontario (Criminal Code Review Board) v. Doe, the Ontario Criminal Code Review Board had a statutory obligation to keep a record of its proceedings, but the court reporter who created and physically possessed the backup tapes of those proceedings was an independent contractor and the contract for services did not address control of backup tapes. Referring to Neilson v. British Columbia (Information and Privacy Commissioner), and acknowledging that Neilson was about records kept by an employee and not an independent contractor, the Ontario Court of Appeal ruled that the Board's obligation to keep a record of its proceedings related to all forms of records and transcripts, including backup tapes that might have to be referred to in the event of a dispute over the accuracy of a record or transcript. The Board's duty to maintain a record of its proceedings and provide access to records under its control was not, and could not be, avoided by contracting out court reporting services, however silent or deficient the contractual terms as to control of backup tapes might be. The Court clearly considered that labelling the court reporter as "independent" was meaningless when the function that the court reporter fulfilled was part of the public body's functions.

The BC adjudicator concluded (at paras. 84-85, citations omitted):

> I conclude that a public body cannot contract out of its obligations under the Act, or immunize records from its control under the Act, by contracting out a function and labelling it "independent" or failing to enter into adequate contractual arrangements to ensure compliance with the Act.
>
> In this case, the Panel's assignment to provide advice to the Minister on whether offshore oil and gas activity can be undertaken in a scientifically sound and environmentally responsible manner was clearly related to the functions and mandate of the Ministry. The Panel's work consisted of tasks and work phases that the Ministry stipulated in the Panel's terms of reference, and these were not limited to the report that the Panel was required to submit by January 15, 2002.

I note that this principle of not "contracting out" of responsibilities under FOIP legislation has also been stated in Ontario (see Order PO-2917 at para. 42, stating that

public bodies cannot enter into agreements that allow it to "contract out" of Ontario's FIPPA).

[para 57] While I found that the Public Body has custody and control of the records at issue, whether the Public Body has a mandate with respect to rangeland inventory data and management plans may affect the application of the 2018 MOA to more recent inventory data, in the event of an access request for data created after the 2018 MOA was signed. In any event, given my findings above, I do not need to consider how the FOIP Act applies to rangeland inventory data provided to the Public Body under that agreement.

[para 58] I find that the Public Body has the requisite custody or control of the responsive records, for the purpose of the FOIP Act.

Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the information in the records?

[para 59] Section 16 of the Act reads, in part, as follows:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *...*

[para 60] As this inquiry involves information about a third party, the burden of proof set out in section 71(3) of the Act applies (cited at paragraph 32, above).

[para 61] Section 16(1) does not apply to personal information, so the Affected Party has the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the records by virtue of section 16(1).

[para 62] For section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met.

- Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party under section 16(1)(a)?

- Was the information supplied, explicitly or implicitly, in confidence under section 16(1)(b)?

- Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)? (Order F2004-013 at para. 10; Order F2005-011 at para. 9)

[para 63] The Public Body declined to make submissions regarding the application of section 16.

[para 64] For its initial submission, the Third Party provided a copy of a Memorandum of Agreement (MOA) between the Third Party and the Minister of Environment and Parks, signed on January 30, 2018. The Third Party argues that this document satisfies the three-part test in section 16(1). It further states:

> Should our Associations data be released it is important to recognise that the RMFRA views this release of data to be damaging to our business model and the mutually beneficial relationship developed with AEP. The release of our data would cause economic harm to our Association, which may cause us to consider stepping away from our partnership with AEP and consider dissolution of the Association.

[para 65] I discussed the relevance of this MOA above, finding that it cannot apply to the records at issue, as it was signed years after the Applicant made their access request.

[para 66] In my June 10, 2022 letter to the parties, I asked the Third Party to provide additional arguments on the application of section 16(1). It did not respond to this letter.

Section 16(1)(a)

[para 67] The Third Party's submission did not provide specific arguments regarding section 16(1)(a); however, it did refer to the information in the records at issue as its "technical information."

[para 68] Past Orders of this Office have defined "commercial information" as information belonging to a third party about its buying, selling or exchange of merchandise or services. "Technical information" has been interpreted as information of a third party regarding its designs, methods, or technology (Order F2016-64, at para. 68)

[para 69] In Order F2011-002 the adjudicator found that fees for services performed by a third party for a public body, which were contained in requested records, were "commercial information" of third parties because "the information is about the terms

under which [the third parties] performed and sold services to the Public Body" (at para. 15).

[para 70] In my June 10 letter, I asked the Third Party:

> The records contain range land inventories of Crown land. It is unclear how such information constitutes trade secrets or commercial, financial, labour relations, scientific or technical information *of* the Third Party (or whether and how it would reveal such information). The Third Party should clearly set out what information in the records is information *of* the Third Party and how that is so.

[para 71] As noted earlier, the Third Party did not respond to this letter. In its November 2016 letter to the Public Body, the Third Party argued that the information was gathered by contractors hired by the Third Party at the Third Party's cost. It states "[t]he RMFRA subsequently allows review of the data from Environment and Parks to show data meets Environment and Parks standards. RMFRA is the owner of this technical information at this point."

[para 72] The information in the records includes information about the vegetation found in different plots of Crown land, such as type and overall health. The records also include maps and photos of the land. The "field notes" in the records appear to be lists of vegetation found, and the health of that vegetation, recorded in the field before being documented in the inventories/databases.

[para 73] It is not clear that this type of information can be characterized as the Third Party's designs, methods, or technology such that it would fall within the scope of "technical information" as argued.

[para 74] The only other type of information in section 16(1)(a) that seems applicable is commercial information. However, while this inventory data is collected at a cost to the Third Party, the information itself does not reveal anything about the Third Party's buying, selling or exchange of merchandise or services.

[para 75] From the information before me, I cannot conclude that the information in the records at issue falls within one of the types of information set out in section 16(1)(a).

Section 16(1)(b) – Information supplied in confidence

[para 76] In order for section 16(1)(b) to apply, the information must be supplied by the third party to the public body explicitly or implicitly in confidence, or the information must reveal information that was supplied in confidence.

[para 77] In the Third Party's November 2016 letter to the Public Body, the Third Party argued:

> The RMFRA was under the impression that by submitting our data and having it available for purchase that the Government of Alberta would not release our data. This satisfies part 2 of s.16(1) that the data was supplied in confidence by the third party.

[para 78] In my June 10 letter, I asked the Third Party:

> Can the Third Party provide support for the claim that the records were provided by the Third Party to the Public Body in confidence? Is the 1999 MOU relevant and if so, does it indicate that the records were not provided in confidence?

[para 79] As noted above, the 1999 MOU that was apparently in effect at the time the records were provided to the Public Body by the Third Party, states that the information provided by the Third Party becomes the property of the Minister and "shall not be construed by the Association or the Minister as being confidential for the purposes of the *Freedom of Information and Protection of Privacy Act*."

[para 80] Given the language of the MOU and the lack of argument to rebut its presumptive applicability, I find that the information in the records at issue cannot have been provided by the Third Party in confidence.

[para 81] Lastly, it is not clear that the entirety of the records at issue is comprised of information provided to the Public Body by the Third Party. In its June 28 response to my questions, the Public Body noted that it informed the Applicant that the records "were still considered draft; the data was raw and not yet fully-interpreted by the Public Body… The Applicant was informed that despite the state of the responsive records, they would still be considered for disclosure." I understand from this that the Public Body takes 'raw' data from the Third Party and conducts its own analysis. It is not clear from my review of the records what information was supplied by the Third Party and what information may be an analysis performed by the Public Body.

Section 16(1)(c)

[para 82] Section 16(1)(c) requires that disclosure of the information result in one of the harms set out in subsection (i) to (iv).

[para 83] The Supreme Court of Canada clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 16(1)(c)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31, the Court stated:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the

> quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

[para 84] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

[para 85] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054; Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said:

> While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged. [My emphasis]

[para 86] I included the above case law in my June 10 letter to the parties, asking the Third Party to explain how disclosure of the information in the records could reasonably be expected to result in one of the harms set out in section 16(1)(c), keeping in mind the standard set out in the Court decisions cited above. I also asked the Third Party to address how the age of the information affects the analysis. As noted above, the Third Party did not respond to my letter.

[para 87] In the Third Party's November 2016 letter to the Public Body, the Third Party argued:

> The release of the information will cause harm to the RMFRA in the following ways:
>
> 1. Membership in the RMFRA is voluntary. All grazers in the forest reserve must submit range inventory information to the department of Environment and Parks to develop a Range Management Plan. The RMFRA provides this service to members (at a cost). Non-members have to provide this data at their own cost. If any data is released by the FOIP office, non-members could obtain this data for free causing our membership to drop out, which would take away our funding to perform further range inventories.

> 2. Since the RMFRA offers this data for purchase, having it released through FOIP would eliminate a possible means to recover our costs for completing these inventories. To date the RMFRA has spent $1,236,459.11 completing inventory work in forest reserve.
>
> 3. The relationship between the RMFRA and the Government of Alberta will be damaged severely by release of data. Our understanding of the MOU and the other verbal agreements with the Department of Environment and Parks led us to believe our data would not be released by FOIP requests. Should data be released, our membership and board would view this as a severe breech [sic] of the spirit of our MOU. Consequently, the RMFRA would be forced to cancel our current MOU in writing and have to renegotiate a future agreement to continue business with the Government of Alberta.

[para 88] From the above I understand that anyone who leases public rangelands for grazing must provide rangeland data to the Public Body. The Third Party's business model rests, at least in part, on collecting rangeland data for leaseholders who are members of the Third Party. The Third Party charges its members a fee to collect this data and provide it to the Public Body. Non-members must do this on their own.

[para 89] The Third Party argues that if the inventory data is disclosed, that "non-members could obtain this data for free causing our membership to drop out, which would take away our funding to perform further range inventories." However, it is not clear to me why members would withdraw their membership if the data were provided in response to a FOIP request. My understanding is that the obligation is to collect and provide the information to the Public Body, which is presumably an onerous task. For a fee, the Third Party will take on that task. Even if non-members could obtain that information from the Public Body at a later date, it is not clear how that would affect the non-members' obligation to provide that data for their own leased rangeland. In other words, non-members have the same obligation to collect and provide rangeland data to the Public Body; being able to obtain another leaseholder's data after it has been provided to the Public Body does not seem to lessen or annul this obligation.

[para 90] The Third Party also argues that the disclosure of the information in the records at issue could affect its ability to sell the data and recover costs. However, I do not have any evidence or argument to suggest that the Third Party sells this data to third parties. The Applicant's submissions indicate that the Third Party was initially unwilling to sell the data to the Applicant; the Applicant provided communications between the Applicant and Third Party that support this argument. Further, the Applicant also states that they asked the Third Party how frequently people purchase the data, as the Third Party seemed unprepared to sell it to the Applicant. The Applicant states that the Third Party informed them that it had not sold any inventory data before.

[para 91] Given the above, I cannot conclude that the Third Party has any sort of regular practice of selling the data, such that disclosure by the Public Body would thwart this practice.

[para 92] In its November 2016 letter to the Public Body, the Third Party also argued that it had an expectation that the inventory data would not be released in response to an access request. It states:

> [BA] from SRD Range Management Branch presented a strategy developed by the RMFRA that would be compliant with FOIP legislation and the MOU. He quoted section 29 of this legislation states that information that is available for purchase by the public will not be released by Government of Alberta. Therefore the RMFRA has decided that they will make available for purchase range management forms that the RMFRA has collected. This information will be sold at cost. Using the strategy, the investment made by the RMFRA on behalf of its members will be protected.
>
> Working in good faith of this agreement the RMFRA has paid to have inventory data converted into saleable format. That saleable information was offered to Zoocheck for our costs incurred gathering this information and converted to a saleable format. The requested data on File ElS-G-1704 is not currently in saleable form. Once they are in saleable form the RMFRA offers them for purchase. Please see the email to Julie and Zoocheck dated 18th January 2016. The RMFRA clearly states the prices and data available for purchase.

[para 93] While the Public Body initially applied section 29(1)(a.1) to the records at issue when it responded to the Applicant, it later rescinded that decision for reasons that it did not provide to me.

[para 94] Section 29(1)(a.1) permits a public body to withhold information that is available to the public for purchase; section 29 states:

> *29(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is readily available to the public,*
>
> *(a.1) that is available for purchase by the public, or*
>
> *(b) that is to be published or released to the public within 60 days after the applicant's request is received.*

[para 95] This exception is discretionary; this means that even where it applies to information, a public body can nevertheless decide to grant access to the information.

[para 96] The Third Party provided a copy of meeting minutes from a March 8, 2011 general meeting of the Association, with its request for review. In those minutes, it is noted that in order to avoid having its data released in response to an access request, it will make the data available for purchase at cost. The minutes state that this strategy was accepted by Alberta Sustainable Resource Development.

[para 97] I appreciate that the Third Party relied on this understanding. However, under the FOIP Act, it is the Public Body's decision whether to apply section 29(1)(a.1) to withhold information. The Public Body is not applying that exception to the records at

issue. It may be the case that reneging on this informal agreement may hurt the relationship between the Public Body and the Third Party. However, for section 16(1)(c) to be met, the harm must stem from the disclosure of information. In this case, it is not the disclosure of the information *per se* that could harm the relationship; rather, it is the reneging on an informal and non-binding agreement that would arguably cause the harm. This is not the type of harm contemplated under section 16(1)(c).

Conclusion regarding the application of section 16(1)

[para 98] Based on the information before me, I find that the information in the records at issue does not meet the test for sections 16(1)(a), (b), or (c).

Did the Public Body meet its duty to assist the Applicant under section 10 of the FOIP Act?

[para 99] In my June 10, 2022 letter to the parties, I said:

> The Public Body's initial submission and subsequent email (dated June 7, 2022), indicates that the responsive records include only rangeland inventories. The Applicant emailed the Public Body and the Registrar of Inquiries, concerned that these responsive records do not include some records the Applicant expected to receive.
>
> The Applicant's request as set out in the Notice of Inquiry is not straightforward, as it refers to correspondence previously provided, as well as statements made in a TV program. However, according to documents included with the Applicant's request for review, the Public Body clarified the scope of the request as follows:
>
> > All records regarding the range/and health inventories and audit of rangeland health inventories. Requesting information Agriculture and Forestry has on these rangeland reports. Records include but not limited to health inventories, field notes, maps, emails, Alberta government audits of the range/and health data received etc. Timeframe: January 1, 2012 to September 18, 2015
>
> This description of the scope of the request is included in an email from Service Alberta to Applicant dated December 1, 2015, and letter from Service Alberta to the Applicant dated December 2, 2015; both were attached to the Applicant's request for review. In the email, the Public Body asked the Applicant to advise whether this description was incorrect. I have no correspondence indicating that the Applicant disagreed with this clarification.
>
> I further note that the letter to the Third Party from Alberta Environment and Parks (dated October 27, 2016) describes the Applicant's request as follows:
>
> Request for Records Pertaining to rangeland health inventory records initiated in 2014 and 2015 including, but not limited to:
> - rangeland health data,
> - plot data,
> - plot photographs,
> - hard copy plots forms,
> - clippings,

- waypoints,
- polygon maps,
- range management forms,
- rangeland inventory reports,
- rangeland assessments (referred to by Shannon Flint in her WS interview),
- audits (referred by Helen Newsham in email correspondence)
- other analysis of the data (either internal or external to AEP),
- notes collected (including those collected In the field or at any other time),
- information in government databases as referenced by Ms. Sawley when she states "Plot data and range health are entered into various government databases as an audit criteria for the development of the certified RMF."

All of the records should include but not limited to, ones produced, analyzed or audited within the government or received from an outside party such as RMFRA, other contractors or anyone else providing data about rangeland health.

The above descriptions provided by the Public Body (or Service Alberta, on the Public Body's behalf) indicate that the Applicant's access request encompassed more than rangeland inventories, and include emails, government audits, internal or external analyses of the date, etc.

Can the Public Body confirm it interpretation of the Applicant's request and the scope of its search for responsive records? In its response, the Public Body should include direct evidence such as an affidavit regarding the search conducted for records responsive to the Applicant's access request. In preparing the evidence, the Public Body may wish to consider addressing the following:

- 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, such as physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories where there may be records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search? (Note: that person or persons is the best person to provide the direct evidence).
- Why the Public Body believes no more responsive records exist other than what has been found or produced.
- Any other relevant information.

[para 100] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

> *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 101] 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 96-022 at para. 14; Order 2001-016 at para. 13; Order F2007-029 at para. 50).

[para 102] The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

[para 103] In its response to my questions, the Public Body states that it clarified with the Applicant that "clippings", which were specifically requested by the Applicant, meant biological samples in the possession of the Public Body. The Applicant agreed to remove clippings from the scope of their request. The Public Body further states that the records provided for this inquiry encompass all records responsive to the request, as set out in the Public Body's letter to the Third Party (cited above). It states:

> Each bullet of the Applicant's scope describes a record that can be found within a larger record set that can simply be described as a Rangeland Health Inventory. That said, AEP agrees that its initial Index of Records provided in its June 2, 2022 submission lacks the detail that would give the Applicant confidence that all the records of interest to the Applicant could be found in the responsive records package. For this reason, the Public Body has enclosed a delineated Index of Records that accounts for all the records of interest to the Applicant.

[para 104] Regarding its search for records, the Public Body states:

> Ultimately, identifying and locating the responsive records was not difficult, as the responsive records were originally provided by a third party to the RRS program area and kept in the custody of that area. Any subsequent ordination or analysis conducted by RRS was stored alongside these records, allowing the Public Body to conduct a complete and accurate search. Regardless of the high-level of confidence that all potentially-responsive records were in the custody of RRS, as above, AEP elected to distribute search for records requests to all other major records areas within AEP, so that those FOIP search contacts could review their records areas and respond as to whether there were any other responsive records in their custody. No responsive records were identified or provided by any other program area outside RRS, reinforcing the confidence that all relevant records were in the sole custody of RRS.

[para 105] The Public Body states that that other areas searched were the Compliance and Approvals Department; Spruce Grove Records Office; Upper & Lower Peace Records Office; Northern District Records Office; South-Saskatchewan (Lethbridge) Records Office; South-Saskatchewan (Calgary) Records Office; Central Records office; Environmental Law Section; and AEP Communications. The searches included Active files, storage rooms, electronic databases, shared drives, staff offices, and email systems.

[para 106] The Applicant did not raise any issue with the Public Body's submission regarding its search for records.

[para 107] I am satisfied that the Public Body conducted an adequate search for records.

V. ORDER

[para 108] I make this Order under section 72 of the Act.

[para 109] I find that the Public Body has custody and control of the responsive records.

[para 110] I find that section 16(1) does not apply to any information in the records at issue. I order the Public Body to provide the records to the Applicant.

[para 111] I find that the Public Body conducted an adequate search for records as required under section 10 of the Act.

[para 112] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Amanda Swanek
Adjudicator