

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-011

September 11, 1996

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1115

1. Nature of this Request for Review:

In a Request for Review dated February 8, 1996, the Applicant, Rocky Mountain Ecosystem Coalition, asked me to “review” a decision made by Alberta Environmental Protection.¹ The decision by the Minister of Environmental Protection was made pursuant to section 31 of the *Freedom of Information and Protection of Privacy Act* (the “Act”). The Applicant seeks release of a report entitled “Impact of the Petroleum Industry on Cattle Production: Critical Review of Scientific and Other Information”, dated April 21, 1995.

I was uncertain about whether I had jurisdiction to review a decision made by the head of a public body under section 31, and decided to hold a hearing on June 26, 1996, in Calgary in order to hear submissions by interested parties about this question. IPC File 1115 was opened to deal solely with the question of my jurisdiction to review a decision made pursuant to section 31 of the Act.

¹Review No. 1057.

The issues dealt with in this decision are two-fold: first, whether a decision made pursuant to section 31 of the Act is “reviewable” by the Information and Privacy Commissioner when the request to “investigate” or “review” is made by a member of the general public; and, second, whether I can order the head of a public body to release “information” or a “record” following such an “investigation” or “review”.

I must note at the outset that this application does not involve a request for access to a record pursuant to section 62, which is in Part 4 of the Act. While the applicant seeks disclosure of the document as a remedy, the request is to have the document “released to the public under section 31”, which is in Part 1 of the Act. Section 31 states:

- 31(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant
 - (a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or
 - (b) information the disclosure of which is, for any other reason, clearly in the public interest.
- (2) Subsection (1) applies despite any other provision of this Act.
- (3) Before disclosing information under subsection (1), the head of a public body must, where practicable,
 - (a) notify any third party to whom the information relates,
 - (b) give the third party an opportunity to make representations relating to the disclosure, and
 - (c) notify the Commissioner.
- (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form
 - (a) to the last known address of the third party, and
 - (b) to the Commissioner.

Thus, the issue of whether the document entitled “Impact of the Petroleum Industry on Cattle Production: Critical Review of Scientific and Other Information” is a record to which access ought to be given to an applicant pursuant to Part 4, Division 1 of the Act is *not* the subject matter of this decision.²

2. Chronology

Our office first received the application from RMEC on February 7, 1996. Under section 65 of the Act, mediation was authorized between the Applicant and Environmental Protection.

Early in June of 1996, I became involved in the file, and became concerned about whether I had jurisdiction to review a decision made pursuant to section 31 of the Act. I wrote a letter to Mr. Conrad, counsel for RMEC and the Honourable Ty Lund, Minister of Environmental Protection, on June 6, 1996 (faxed on June 7, 1996) identifying seven questions for consideration and advising that a Special Review hearing would be held in Calgary on June 26, 1996 to deal with those questions. The seven questions were:

1. Do I have jurisdiction in a matter where a person requests a review of a head’s performance of the statutory duty described in Section 31?
2. If I have jurisdiction, what would be the standard that I would use in reviewing the performance of the statutory duty?
3. If I have jurisdiction, what process would be involved in conducting a review?
4. If I have jurisdiction, what would be the status of the person who requested the review?

²We have a parallel request for access to the document. In Request for Review No. 1095, the applicant seeks disclosure of the same report, entitled “Impact of the Petroleum Industry on Cattle Production: Critical Review of Scientific and Other Information.” The two applicants in Request for Review No. 1057 and No. 1095 are different persons, but they are closely related.

5. If I have jurisdiction, where would the burden of proof be placed?
6. If I have jurisdiction, what would be the nature of the decision or order I would issue?
7. If I have jurisdiction, could the requirement to produce specific records be included in an order, as contrasted to other ways of disclosing information to the public?

Also on June 7, 1996, I sent letters respecting the Special Review scheduled for June 26 in Calgary to the following recipients:

Hon. Stan Woloshyn, Minister of Public Works, Supply and Services
Mr. Gary Sargent, General Manager, Alberta Cattle Commission
Dr. Malcolm Wilson, Director, Alberta Environmental Centre
Mr. Brian Edy, Alberta Civil Liberties Association
Dr. K.U. Weyer, WDA Consultants Inc.
Mr. Nick Schultz, General Counsel, Canadian Association of Petroleum Producers
Ms. Céline Bélanger, Chair, Alberta Energy and Utilities Board
Hon. Brian Evans, Q.C., Minister of Justice and Attorney General

On June 13, 1996, Mr. Conrad served me, the Minister of Justice, the Minister of Public Works, Supply and Services, and the Minister of Environmental Protection with an Originating Notice together with the Affidavit of David Mayhood, in an application for an injunction preventing the Special Review hearing on June 26, 1996. The motion was scheduled to be heard in Chambers on June 25, 1996. I sent those documents to David Phillip Jones, Q.C., of de Villars Jones, my outside counsel. Counsel for the parties subsequently agreed to adjourn the Chambers hearing *sine die*, with Mr. Conrad reserving his right to proceed on the matters raised in the Originating Notice.

On June 21, 1996, I obtained a legal opinion from de Villars Jones about my jurisdiction to review a section 31 decision made by the head of a public body. I faxed a copy of that legal opinion to all parties who had advised that they would make representations or attend the Special Review. I also provided all parties

with a faxed copy of a decision from the Ontario Commissioner³ and a decision with respect to a similar provision in the British Columbia *Freedom of Information and Protection of Privacy Act*.⁴

On Wednesday, June 26, 1996, a Special Review hearing was held in the Oslo Room, Olympic Volunteer Centre, in Calgary, Alberta. The following people attended:

Office of the Information and Privacy Commissioner:

Robert C. Clark, Commissioner
Frank Work, Director and General Counsel
Karen South, Inquiries Clerk

Government of Alberta:

Donna Molzan, Solicitor, Legal Research and Analysis, Alberta Justice
Greg Hook, Assistant Deputy Minister, Information Technology and
Supply, Department of Public Works, Supply and Services (PWSS)
Diana Salonen, Manager, Information Management Policy, PWSS
Audrey Ellis, Assistant Coordinator, Freedom of Information and Privacy,
Department of Environmental Protection
Catherine Taylor, Assistant Coordinator, Freedom of Information and
Privacy, Department of Municipal Affairs

Other Participants:

Gary Dickson, Member of the Legislative Assembly for Calgary-Buffalo,
Information and Privacy Critic for the Liberal Party of Alberta
Dave Mayhood, Freshwater Research Limited (who is also the Director of
the Applicant, Rocky Mountain Ecosystem Coalition)
Stuart Ross, Barrister and Solicitor, for WDA Consultants
Mike Sawyer, Rocky Mountain Ecosystem Coalition
Nick Schultz, General Counsel, Canadian Association of Petroleum
Producers
Waltraud Weyer, Director, WDA Consultants
Ed Wolf

³*Re Ministry of Government Services*, Order 187 (Appeal Number 890218, dated July 13, 1990).

⁴*Clubb v. Saanich (District)*, [1996] B.C.J. No. 218.

Prior to or during the course of the Special Review hearing, I was given the following submissions:

- 1115-1 Letter from Mr. Conrad to Mr. Jones dated June 25, 1996 with attached response to the legal opinion from de Villars Jones
- 1115-2 Submission on behalf of the Government of Alberta
- 1115-3 Background Documents and Authorities (submitted by Donna Molzan, Alberta Justice, on behalf of the Government of Alberta)
- 1115-4 Submission by the Canadian Association of Petroleum Producers

In addition, I had available the following other documents:

Legal opinion from de Villars Jones dated June 21, 1996

Submission from David Mayhood, Freshwater Research Limited

Submission from Gary Dickson, MLA, Calgary-Buffalo

Order 187, Ontario Information and Privacy Commissioner

Judicial Review: *John Paul Chubb v. The Corporation of the District of Saanich and William O. Nixon* [1996] B.C.J. No. 218 (B.C.S.C.) January 30, 1996

Order 4-1994, British Columbia Information and Privacy Commissioner

Order 56-1995, British Columbia Information and Privacy Commissioner

Order 83-1996, British Columbia Information and Privacy Commissioner

The decision of Justice R.M. Cairns, Adjudicator under the Act, in the matter of a request for access made by Kevin Bosch

3. Issues

Request for Review No. 1057 by the Rocky Mountain Ecosystems Coalition raises a number of issues:

- A. Do I have jurisdiction to review a decision by the head of a public body made pursuant to section 31, as requested by RMEC?
- B. If I do have jurisdiction to review the section 31 decision, what is the standard of review and the process for carrying out the review? Is there a difference between an “investigation” and a “review”, and is it a distinction that is relevant to this question?
- C. If I do have jurisdiction to review the section 31 decision and if, after carrying out the review, I decide that the head of the public body ought to have released the information pursuant to section 31, what kind of Order should I make? Do I have the authority to release the information pursuant to section 31? Ought I to grant the Applicant’s request for a waiver of fees pursuant to section 87(4)(h) of the Act?

At the end of the hearing on June 26, 1996, I told all of the participants that I intended to decide the jurisdictional question first. So, if I decide that I have jurisdiction, I will then hear submissions with respect to the merits of this request. Thus, this decision deals with Issues A and B; I specifically leave deciding Issue C until after I have considered submissions made by any of the participants.

4. Discussion of Issues

Issue A: Do I have jurisdiction to review a decision by the head of a public body made pursuant to section 31, as requested by RMEC?

In the end, the question of my jurisdiction is a very narrow one: Do I have jurisdiction to review a decision by the head of a public body to release or not to release information under section 31, when the request for review comes from a member of the general public.

The Act specifies two circumstances in which I have unquestioned authority (and responsibility) to review a section 31 decision by the head of a public body.

1. The first circumstance is when the decision to release information under section 31 necessitates release of personal information, and where the person whose information is released makes an application to me for a review of that release. My jurisdiction arises under the specific review powers I am given in Part 4, Division 1, specifically section 62.

Section 62(3) specifically allows me to review a decision to release personal information which has been “disclosed in violation of Part 2”. Section 38(1)(a) in Part 2 permits the release of personal information, when that release of information has been done in accordance with Part 1 (which includes section 31).⁵

In Order No. 96-007, Review No. 1013, I reviewed a decision to release personal information which included a discussion of this aspect of the Act.

2. The other circumstance in which I clearly have jurisdiction to review a section 31 decision by the head of a public body occurs when “section 31 information” is disclosed to me by an employee of the Department, pursuant to section 77. This is sometimes referred to as a “whistleblower” provision.

In both of these circumstances, I not only have jurisdiction to review the decision by the head of a public body; I have an obligation to do so.

However, this particular request for review does not come under either of these sections, because the request to review in the present case is made by a member of the general public.

⁵ I am not certain whether the ability of the head of the public body to “override” the protection of personal information provisions of the Act is by virtue of section 31(2) or section 38. It may well be that either section is sufficient.

(i) *Arguments Supporting Jurisdiction of the Commissioner to Review*

There are two sections of the Act which might give me the jurisdiction to review a section 31 decision when requested to do so by a member of the general public: (1) the general powers contained in section 51; and (2) the specific power to review certain decisions contained in sections 62, 68, and 77 (*i.e.* access to records, correction of personal information in a record, release of third party information, improper use of collected information, review of a section 31 decision following disclosure by an employee of the public body, which are all contained in Part 4 of the Act).

Mr. Conrad argues that the general wording of section 62(1) grants me sufficient authority to review a section 31 decision made by the head of a public body. Section 62(1) provides:

62(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.

Mr. Conrad argues that the words “any decision, act or failure to act of the head that relates to the request [for access to a record]” includes a section 31 review power.

Mr. Conrad and Mr. Mayhood both argue that their view (that section 62 in Part 4 is sufficiently broad to grant me jurisdiction to review a decision made by the head of a public body pursuant to section 31) is strengthened by the fact that one of the stated purposes of the Act is to provide for independent reviews of decisions made by public bodies under this Act.⁶

⁶2 The purposes of this Act are

- (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,
- (b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may

Other participants have suggested that the general jurisdiction provisions of the Act grant me jurisdiction to monitor how the Act is administered and ensure compliance with the Act,⁷ as well as to make an order requiring that a duty imposed by the Act must be performed.⁸

(ii) *Arguments Against Jurisdiction of the Commissioner to Review*

make of that information and to control the disclosure by a public body of that information,

- (c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body,
- (d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body, and
- (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

[Emphasis added.]

⁷51(1) In addition to the Commissioner's powers and duties under Part 4 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

- (a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records set out in
 - (i) any other enactment of Alberta, or
 - (ii) *a by-law or other legal instrument by which a local public body acts. (Note: Clause (a)(ii) comes into force on Proclamation.)*

(b) make an order described in section 68(3) whether or not a review is requested, ...

(d) receive comments from the public concerning the administration of this Act, ...

[Emphasis added.]

⁸68(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

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

[Emphasis added.]

Ms Molzan argues that I do not have jurisdiction to review a section 31 decision (when requested by a member of the general public) because there is nothing in the Act specifically granting me that authority.

None of the counsel who made submissions on this point disagrees that section 62 and section 77 each grant specific jurisdiction to review section 31 decisions when the request is made by a person whose personal information is released, or by an employee of the Department.

However, neither of these specific review powers set out in sections 62(1)(3) or 77(1) grants authority to the Commissioner to review a section 31 decision when the request for a review comes from a member of the general public.

The argument against my having general jurisdiction to review a section 31 decision is based on the principle that the general powers cannot be used to “fill in the gaps” of the specific power. According to this view, the authority to “review” is very specific, and if I cannot find a provision specifically granting me the authority to carry out a particular review, then I do not have the authority. There is no section of the Act which specifically says I may review a decision made under section 31.

Ms Molzan also argues that because no person has a specific right to ask for a review of a section 31 decision by the head of a public body, then I do not have jurisdiction to do such a review. This is based on the principle that all of my jurisdiction is conditional on a particular applicant having a right under the Act. The Act does not specifically give anyone a right to ask the head of a public body to do anything under section 31.

(iii) My decision about my jurisdiction to review a section 31 decision

First, I am not persuaded that Part 4 of the Act goes so far as to grant specific jurisdiction to review a section 31 decision, when the review is requested by a member of the general public (*i.e.* a person who does not have personal information involved). I think section 62(1) is specific, in that it allows me to review the response by the head of a public body to a request for access *to a*

record. I do not think the language in section 62(1) can reasonably be interpreted to encompass a request to release *information* to the public pursuant to section 31, when the request is made by a member of the general public.

However, I also think that the interpretation of the Act which says that I only have jurisdiction as set out in the specific review process set out in Part 4 is too narrow. I think the general powers contained in section 51 must be taken into account in deciding what my jurisdiction is. The jurisdictional question which arises in this case is not whether the applicant has a statutory right to a particular record; it is whether I have jurisdiction to “investigate”, “review” or in any way monitor or supervise a section 31 decision made by the head of a public body. I think section 51 grants me that supervisory jurisdiction, in addition to the more specific powers granted in Part 4.

My reading of the general jurisdiction sections of the Act, including section 51, is that the general powers are granted in addition to the specific powers contained in section 62 and following (Part 4) with respect to review. I have the following general jurisdiction:

to monitor how the Act is administered (section 51(1)),

to ensure that the purposes of the Act are achieved (section 51(1)), and

to conduct investigations to ensure compliance with any provision of this Act (section 51(1)(a)).

to make an order described in section 68(3) whether or not a review is requested (section 51(1)(b)). In turn, Section 68(3) also grants me the authority to make an order requiring “that a duty imposed by this Act or the regulations be performed”.

Section 31 places a duty upon the head of a public body to disclose certain information under certain circumstances. I think the general jurisdiction sections of the Act are wide enough to include authority for me to “investigate” a section 31 decision made by the head of a public body, when the request to investigate comes from a member of the general public. I can find nothing in the Act which specifically limits my general jurisdiction so as to preclude an “investigation” or

a “review” of a decision of the head of a public body made pursuant to section 31.

In deciding whether the general powers granted under section 51 of the Act allow me to review a decision of the head of a public body made pursuant to section 31, I must approach the legislation in a purposive and holistic way: *Melnychuk v. Heard*, (1963) 45 W.W.R. 257 (Alta. S.C.). In my view, this requires taking into account the following factors: the wide-ranging powers contained in the general jurisdiction sections; the fact that I have a statutory obligation to investigate a section 31 decision when the matter is raised by an employee of the department; and the fact that I have jurisdiction to review section 31 decisions when requested by the person whose information is released; the fact that section 31 itself requires the head of a public body to notify me each time a section 31 decision of any sort is made; and the fact that section 31 imposes a duty upon the head of a public body.

Issue B: If I do have jurisdiction to review the section 31 decision, what is the standard of review and the process for carrying out the review? Is there a difference between an “investigation” and a “review”, and is it a distinction that is relevant to this question?

Having found that I do have jurisdiction under the Act to investigate a decision made by the head of a public body pursuant to section 31, I must consider the exercise of that discretion. I note that the words used in various sections of the Act are relevant to a determination about the standard of review.

(i) Difference between Investigation and Review

Neither of the words “investigation” nor “review” have been defined in the Act. The words are occasionally used together, and occasionally used alone. Importantly, the following sections use the following words:

section 51(1)(a) states that the Commissioner “may conduct investigations” about compliance with the Act.

section 62(1) entitles a person to “ask the Commissioner to review” certain decisions, and specifies the process for a review.

section 77(2) states that the Commissioner “must investigate and review” any disclosure made by an employee of a public body.

I must assume that “investigate” and “review” mean something different. My “review” powers and responsibilities are clearly set out in the Act, as is the process to be followed during that review. In my view, however, I am not necessarily required to follow the full review process set out in Part 4 of the Act when I receive a request from a member of the general public to “review” a decision made by the head of a public body pursuant to section 31. In addition, section 51 is quite wide-reaching as regards the “process” powers granted to me. These powers include:

the power to receive comments from the public concerning the administration of the Act (section 51(1)(d)),

the power of investigation (section 51(1)(a), which explicitly includes all of the investigatory powers contained in section 54), and

the power to make an order requiring a statutory duty to be performed (sections 51(1)(b) and 68(3)(a)).

These are wide-ranging powers, though not as specific as the powers given in the review process contained in Part 4. I think the term “investigation” suggests a less formal process than does the term “review”. Having said that, I believe that circumstances may arise calling for a more formalized process (and perhaps, on occasion, a hearing with submissions from all interested parties), and I would not want my comments to be taken to preclude me from holding such a hearing at any future point, if I, in my discretion, think such a hearing is necessary. Each individual case will have to be dealt with in whatever manner the type of information involved suggests, and fairness to the interested parties requires.

(ii) *Difference between Information and Record*

The Act defines “personal information”⁹ and also defines “record”¹⁰. However, the Act does not define “information”.

Section 31 refers to release of “information” by the head of the public body. Section 31 does not refer to disclosure of a record. Again, I must assume that the Act means something different when different words are used.

In my opinion, “information” takes in both “personal information” and a “record” and perhaps more. Information must include *any* information known by the head of a public body, and that information may or may not be coextensive with or include a record.

⁹Section 1(1)(n) states that “personal information” means recorded information about an identifiable individual, including:

- (i) the individual’s name, home or business address or home or business telephone number,
- (ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,
- (iii) the individual’s age, sex, marital status or family status,
- (iv) an identifying number, symbol or other particular assigned to the individual,
- (v) the individual’s fingerprints, blood type or inheritable characteristics,
- (vi) information about the individual’s health and health care history, including information about a physical or mental disability,
- (vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,
- (viii) anyone else’s opinions about the individual, and
- (ix) the individual’s personal views or opinions, except if they are about someone else;

¹⁰Section 1(1)(q) defines record as:

- (q) “record” means a record of information in any form and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records;

Accordingly, I think that the statutory obligation to release *information* under section 31 is not dependent upon the existence of a *record* as defined in the Act.

I have already considered the difference between “release of information” and “release of a record” under section 31 in Order 96-007, Review No. 1013. In that decision, I suggested that the head of a public body considering a release of information under section 31 must consider whether to release the actual record, a summary of the record, or a warning of the risk based on the contents of the record.

I note that section 31 also provides for release of the information in a very widespread fashion (to the general public), or to a narrow group (to an applicant or to an affected group). The determining factor with respect to how large or small the group to whom the information is released must be either the number of people who are reasonably considered to be at risk of the significant harm, or the extent of the public interest, whichever is the applicable pre-condition for release under section 31.

(iii) Standard of review and process for investigation of a section 31 decision

Section 31 deals with disclosure of information about a risk of significant harm to the environment or to the health or safety of the public; or release of information which is clearly in the public interest to be disclosed. The obligation of the head of a public body to release section 31 information arises when the head of the public body becomes aware of information about the risk of significant harm as defined in the section.

Section 31 imposes a statutory obligation for the head of a public body to release information of certain risks under “emergency-like” circumstances (*i.e.* “without delay”). It also defines the circumstances where the obligation arises for the head of the public body. The section also provides for an overriding of other provisions in the Act, with respect to release of third party information (if

necessary). The significant override of privacy rights provided by section 31 suggests that the definition of what information is “caught” by the provision, and with respect to which a statutory duty of disclosure applies, must be defined narrowly. I think my power to investigate decisions made pursuant to section 31 of the Act must be exercised carefully.

In the *Bosch* decision,¹¹ Mr. Justice Cairns (appointed as an adjudicator in my place because I was unable to act in that particular case) stated that the applicant has the onus of proof in a section 31 review. The applicant must therefore demonstrate that the information fits within the pre-conditions set out in section 31 of the Act; the head of the public body does not have to prove that the information does not fit within one of these pre-conditions. The *Bosch* decision was primarily a Part 4 review, which included an argument that the information contained in the record ought to have been released pursuant to section 31(1)(b) because it is clearly within the public interest. Thus, the section 31 review was determined during the same formal hearing as that held to determine the Part 4 review.

I agree with the proposition that it is the applicant who bears the burden of proof as a general principle. However, the comments by Mr. Justice Cairns about onus and burden of proof are more applicable for a formal review than for a less formal investigation. The evidentiary burden may not be the same for a section 31 review as for a Part 4 review. On some occasions, a determination about the applicability of section 31 will require only minimal evidence. *Bosch* provides an example of this point, because the “information” the applicant sought to have released was completely contained in the “record” the applicant also wanted disclosed under Part 4. The determination of whether the information in that record fit within section 31(1)(b) could be done without any evidence beyond the actual record. Indeed, the report that is the subject matter in the present case is similar.

Once the pre-conditions set out in section 31 are met, a statutory obligation arises for the head of a public body to release information, notwithstanding that other

¹¹ Order No. 96-014.

sections of the Act protecting individual privacy may have to be over-ridden in releasing that information. The Act cannot be taken to lightly impose this statutory duty on the head of a public body, or to lightly allow an over-riding of individual privacy rights. Thus, in any review of a section 31 decision, I must first consider whether one of the pre-conditions set out in section 31 has occurred. The applicant has the burden of proof at this part of the investigation and it is not a burden that will be easily met. These pre-conditions are:

risk of significant harm to the environment

risk of significant harm to the health or safety of the public

release is clearly in the public interest.

The latter of these pre-conditions was considered by Mr. Justice Cairns in *Bosch*. In the portion of the Bosch decision dealing with section 31(1)(b), Mr. Justice Cairns considered what type of information might be “clearly in the public interest”. He made an important distinction between information that “may well be of interest to the public” and information that is “a matter of public interest.” I agree with this point. I cannot conclude that the Legislature intended for section 31 to operate simply because a member of the public asserts “interest” in the information. The pre-condition that the information must be “clearly a matter of public interest” must refer to a matter of compelling public interest.

Similarly, I cannot conclude that the Legislature intended for section 31 to operate when a member of the public asserts that there is “risk of significant harm”. There must be some actual risk, and there must be some evidence that the harm in question is significant.

I must also note that I am concerned that applications to review section 31 decisions could be used as a way of circumventing the usual review processes (and the cost to the applicant involved in the usual review process). I do not intend to carry out section 31 investigations in a way that would allow such circumvention. Any member of the general public seeking an investigation of a section 31 decision ought to go to the head of the public body first. Only after consideration by the head will I engage my supervisory jurisdiction, and I will

only do so in clear and compelling circumstances. My function under the general powers contained in the Act is not to second-guess each and every decision made by the head of a public body. It is clear that the Legislature has placed the duty to assess risk and determine public interest on the head of a public body. The head will often, but not always, be a Minister, an elected official. This person will likely have the advantage of information and support staff to assist and advise in carrying out this duty. Accordingly, I will be concerned with whether the head's decision is rationally defensible, as opposed to whether I think he decided correctly.

I note also that the outcome of an investigation of a section 31 decision is not necessarily the release of a "record" to an individual "applicant". Indeed, that would be an unusual outcome, given the distinction between "information" and "record", and given that the member of the general public seeking an investigation is (by definition) requesting the head of a public body to release information "to the public, to an affected group or people, to any person or to an applicant".¹² If the primary purpose of the application is to secure release of a record, the applicant should use the process set out in Part 4 of the Act.

Finally, I note that section 68(3)(a) allows me to order that "a duty imposed by this Act ... [must] be performed". The section does not allow me to usurp the particular duty or responsibility in question from the head of the public body. Thus, I contemplate the most likely successful outcome of an investigation of a section 31 decision by the head of a public body is that I will order the head to release the information. I do not think that I would exercise my general jurisdiction in a way that would involve releasing the information myself.

¹²Section 31(1).

Issue C: If I do have jurisdiction to review the section 31 decision and if I decide that the head of the public body ought to have released the information pursuant to section 31, ought I to grant the two remedies sought by the Applicant RMEC? Do I have the authority to release the information pursuant to section 31? Ought I to grant the Applicant's request for a waiver of fees pursuant to section 87(4)(h) of the Act?

This is the portion of my decision on this application about which I have not had the opportunity to receive submissions.

In its application, RMEC asked for two remedies following my review of the decision by Alberta Environmental Protection:

- (1) *release in full to the public without delay (section 31 of the Act) the following document: Impact of the Petroleum Industry on Cattle Production: Critical Review of Scientific and Other Literature; and*
- (2) *waiver of fees (section 87(4)(b) of the Act).*

Before I can consider whether to grant these two specific remedies, I must consider whether Alberta Environmental Protection reasonably denied the applicant's request to release the report to the general public. The section 31 decision which I am being asked to review is the decision of Alberta Environmental Protection referred to in the letter dated January 25, 1996 from Ms Shelley Silzer to Rocky Mountain Ecosystem Coalition.

In this particular case, the information the applicant seeks to have released to the general public is fully contained in one written document. I will make my decision about the whether the Minister of Environmental Protection or a proper delegate made a reasonable decision about release of the information contained in the report entitled "Impact of the Petroleum Industry on Cattle Production: Critical Review of Scientific and Other Literature", after all participants have had an opportunity to make written submissions about the following points:

- whether the information in the report triggers section 31, *i.e.* whether any of the pre-conditions contained in section 31 are operative in this case; and

whether the remedies sought by the applicant are appropriate.

ORDER

I confirm that I have jurisdiction to investigate or review a decision made by the head of a public body pursuant to section 31, when a request to do the investigation or review comes from a member of the general public.

All participants who wish to make written submissions about the merits of the application contained in Request for Review #1057 must have these submissions to my office by October 4, 1996.

Robert C. Clark
Information and Privacy Commissioner