

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-006

June 25, 1997

ALBERTA MUNICIPAL AFFAIRS

Review Number 1157

BACKGROUND:

[1.] In December 1995, the Applicant made a formal request to this office for information regarding the approval and inspection process of a condominium subdivision development (the "Development"). This office forwarded the Applicant's request to Alberta Municipal Affairs (the "Public Body") as a request for information under section 7 of the *Freedom of Information and Protection of Privacy Act* (the "Act").

[2.] In September 1996, the Applicant stated that the "...information I received is incomplete, misleading, edited and does not address my request..." and made a request for review of the Public Body's response.

[3.] Mediation was not successful and an inquiry was held on March 25, 1997. This Order is further to my oral decision provided at the inquiry's conclusion.

ISSUE:

[4.] Did the Public Body conduct an adequate search for the records responsive to the Applicant's request, in accordance with section 9(1) of the Act?

DISCUSSION:

[5.] Section 9(1) of the Act reads:

9(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.

[6.] In assessing the Public Body's duty to assist applicants, the purposes of the Act as set out in section 2 should be noted. Section 2(a) provides a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Section 2(b) sets out the counter-balancing privacy protection purpose of the Act. This provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by public bodies.

[7.] Section 67(1) of the Act, which establishes the burden of proof on the parties, is silent regarding the issue of adequate search. Since the Public Body is in a better position to address the adequacy of a search, the burden of proof should be placed on the Public Body. Nevertheless, there is a requirement on the Applicant under section 7 to provide sufficient clarification of its request to enable the Public Body to locate the appropriate records.

1) Was the wording of the Applicant's initial request and its clarification sufficiently adequate to permit the Public Body to locate the appropriate records?

[8.] Section 7) reads:

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record

(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

[9.] The Applicant stated that the Public Body's response did not address all aspects of the request. The Applicant claims that although sufficient detail was given to describe the records, the Public Body failed to provide what the Applicant was seeking.

[10.] In response to the Applicant's original request, the Public Body conducted a search in the Local Government Services Division (the area previously

responsible for municipal administration for subdivision and development approvals), Alberta Registries, and Housing and Consumer Affairs. Over 300 pages of records, with third party information severed, were disclosed to the Applicant in August 1996.

[11.] As a result of a postscript note in the Applicant's request letter, records from Housing and Consumer Affairs were disclosed. In addition, other records pertaining to an unrelated condominium development were released in error. To define the Applicant's request and to explain the nature and steps involved in processing the request, a meeting was held in Calgary on November 29 1996 between the Applicant, the Public Body and the Portfolio Officer. An agreement was reached amongst the parties that the Housing and Consumer Affairs records, taxes and records on the other development did not form part of the Applicant's request. The Public Body reimbursed the Applicant for the costs of these extra records.

[12.] At the meeting, the Applicant's request for information was clarified as follows:

Identify and locate all of the records in the custody and control of Alberta Municipal Affairs relating to the approval and inspection of the condominium subdivision development, including the sewage disposal system. (The name of the Development has been omitted.)

[13.] Once a Public Body has clarified with the Applicant the nature of its request, it is then obliged to search its records to determine whether they contain information that would respond to the request.

[14.] Based on the clarified request, the Public Body conducted a second search for records relating to the request and no additional records were found.

[15.] I find that the Applicant's request following the meeting was sufficiently clear to enable the Public Body to locate the records.

2) Did the Public Body have custody and control of the records the Applicant was seeking?

[16.] Section 90 reads:

90 This Act applies to any record in the custody or under the control of a public body regardless of whether it comes into existence before or after this Act comes into force.

Under section 1(1) definitions:

- (i) “local government body” means
 - (i) a municipality as defined in the *Municipal Government Act*,
 - (iii) an improvement district under the *Municipal Government Act*,
- (j) “local public body” means
 - (iii) a local government body,
- (p) “public body” means
 - (vi) a local public body.

However, section 1(1)(p)(vi) of the Act has not yet been proclaimed in force.

[17.] The Development is located in what was previously known as Improvement District #14. The Public Body stated in its submission that prior to 1994, it was responsible for the administration of Improvement District #14.

[18.] In accordance with section 13.1(1) of the *Municipal Government Act*, Chapter M-26, R.S.A. 1980, and Order in Council No. 782/93 dated December 15, 1993, the Public Body’s jurisdiction of Improvement District #14 was transferred to the Municipal District of Yellowhead No. 94 effective January 1, 1994. The new Municipal District of Yellowhead took over municipal government responsibility, including land use planning and approval for the area where the Applicant’s Development is located.

[19.] Following the transfer of responsibility, the Public Body transferred the Improvement District land files, organized by legal description, to the respective municipal districts. The Public Body’s evidence shows that as a result, the records the Applicant is seeking were transferred to the Municipal District of Yellowhead in 1994 and 1995. Consequently, the records are no longer in the custody and control of the Public Body.

[20.] Under section (1)(1)(s) of the *Municipal Government Act*, “municipal district” means “municipality”. According to section 1(1)(i) of the *Freedom of Information and Protection of Privacy Act*, a “municipality” is a “local government body” which, in turn, is a “local public body”. However, section 1(1)(p)(vi), which provides that “local public bodies” are within the meaning of “public bodies”, has not yet been proclaimed. Therefore, because the Municipal District of Yellowhead is a “local public body”, it is outside the Act’s jurisdiction. For this reason, the records which were transferred to the Municipal District of Yellowhead in February 1994 and August 1995 are not yet subject to the Act.

[21.] The Applicant is also interested in documents which may be with a private engineering firm. Documents in the private sector are also outside the Act’s jurisdiction.

[22.] With respect to records in the custody and control of other public bodies, the Applicant must make individual requests to the respective public bodies in accordance with section 7 of the Act. Other than transferring a request under section 14 of the Act, the Public Body has no obligation to search for records in the custody or control of other public bodies or private industry, for that matter.

[23.] On the evidence presented by the Public Body, I am satisfied that there is no further information relevant to the Applicant's request and that the records transferred to the M.D. of Yellowhead are no longer in the Public Body's custody and control.

3) Did the head of the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely?

[24.] After hearing the evidence from both parties, I find that the Public Body made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely.

[25.] In making the Order, I considered four factors. First, the Applicant's request was received shortly after the FOIP legislation was proclaimed. Both the Applicant and the Public Body were learning about the Act and the process.

[26.] Second, approximately 41 working days after the Applicant paid the initial fee, the Applicant did receive 300 pages of information from the Public Body.

[27.] Third, from May until August 12, 1996, the Public Body was waiting for the Applicant's fee payment before it could finish producing the information that it had indicated was available. Although the Applicant alleged that there had been a lengthy delay in the Public Body's response to its request, the Public Body showed evidence that any delay was due to the Applicant's late payment of fees. The Public Body processed the Applicant's request in accordance with the fee requirements set out in sections 10(3) and 13 of the Regulations under the Act.

[28.] Fourth, after representation was made by the Applicant to the Public Body, the Public Body did adjust the fees considerably. In responding to the Applicant's request, the Public Body granted a fee waiver on February 13, 1997, pursuant to section 87(4)(a), namely, "any other reason it is fair to excuse payment". This fee waiver was in addition to the reimbursement of fees with respect to the records provided relating to the Housing and Consumer

Affairs investigation, taxes, land titles and the other condominium development.

[29.] It is commendable that the Public Body found and reviewed the records at the Municipal District of Yellowhead. The Applicant was informed that the records it was seeking were not under the custody and control of the Public Body but were located with the Municipal District of Yellowhead. The Applicant was also informed that the Act did not apply to local public bodies such as Municipal Districts. I am perplexed why the Applicant did not follow up with the Municipal District of Yellowhead and make a request for disclosure in accordance with the relevant legislation.

[30.] The Applicant has made significant effort to pursue related records which may be in the custody and control of other public bodies. At the inquiry, I was informed that public bodies have established an informal communication network to coordinate the responses for records which are jointly held with other public bodies. The Applicant has perceived this network to be an obstacle to access since public bodies may consult with other public bodies when processing requests. As Commissioner, I will be monitoring the actions of public bodies on this matter to ensure that the process does not hinder access.

ORDER:

[31.] Section 68(1) requires me to dispose of the issue in this inquiry by making an order under this section.

[32.] I find that the Public Body has met the burden of proof to show that it conducted an adequate search for the responsive records and that it has made every reasonable effort to assist the Applicant, within the meaning of section 9(1).

Robert C. Clark
Information and Privacy Commissioner