

**ALBERTA**  
**INFORMATION AND PRIVACY COMMISSIONER**

**ORDER 2000-021**

November 24, 2000

**ALBERTA JUSTICE**

Review Number 1726

Office URL: <http://oipc.ab.ca>

**Summary:** The Applicant filed an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) with Alberta Justice, (“Justice”), seeking records related to certain land transfers, land titles and internal registrar directives. After searching its records, Justice transferred the request and the records it found to Alberta Municipal Affairs (“Municipal Affairs”). The Applicant subsequently alleged that Justice had failed to discharge its statutory duty to assist and improperly transferred the request. The Commissioner found that Justice had discharged its duty to assist and had properly transferred the request. The Commissioner held that the mandatory duty to assist was distinct from the discretionary power to transfer a request under the Act, and upheld the conduct of Justice.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5, ss. 9(1), 14(1)(a)(b)(c), 14(2)

**Authorities Considered: AB:** 96-020, 96-017, 98-002, 98-012, 98-017, 97-003, 97-007, 98-019, 99-021, 99-032, 2000-022

## I. BACKGROUND

[para. 1.] On March 17, 1999, the Applicant made two identical access requests under the *Freedom of Information and Protection of Privacy Act* (the “Act”). One was filed with Alberta Justice (the “Public Body”) and the other with Alberta Municipal Affairs (“Municipal Affairs”), which is now part of Alberta Government Services (“Government Services”). The gist of the request was this:

...to examine all documents in the possession of your department having to do with the authority under which the Registrar omitted the ‘which may be found to exist’ wording in the transfers from the CPR which gave rise to the titles of registered owners of all mines and minerals except coal and petroleum in Alberta, in cancellation memorandae on the CPR’s certificates of title, and in titles to petroleum issued to the CPR, CPOG, and PanCanadian. We further seek access to all documents in the possession of your department having to do with discussions or decisions respecting corrections to the aforesaid titles.

[para. 2.] The Public Body received the request on March 25, 1999.

[para. 3.] On April 8, 1999, the Public Body relied on section 14 of the Act and transferred the Applicant’s request (the “request”) to Municipal Affairs. The Public Body notified the Applicant of the transfer in a letter dated the same day.

[para. 4.] The Applicant later wrote to my Office, requesting a review of the Public Body’s conduct. The Applicant also asked that I review the conduct of Municipal Affairs in relation to the request.

[para. 5.] On October 26, 1999, I accepted the late request for review. Mediation was authorized, but was unsuccessful.

[para. 6.] The Applicant’s two requests were set down as separate oral inquiries. In this Order I will deal with the Applicant’s request for review of the conduct of the Public Body. I will deal with the conduct of Municipal Affairs in Order 2000-022.

[para. 7.] On July 24, 2000, I held an oral inquiry attended by an agent for the Applicant and counsel for the Public Body. Government Services was present as an affected party at the inquiry, but made no submissions or representations. I adjourned the inquiry, and asked the Public Body to submit additional evidence on issues relating to the duty to assist.

[para. 8.] The Public Body subsequently provided me with the additional evidence that I required. I reviewed this evidence and concluded the inquiry on September 5, 2000.

[para. 9.] This Order proceeds on the basis of the Act as it was before it was amended on May 19, 1999.

## II. RECORDS AT ISSUE

[para. 10.] The records were provided to me *in camera*. They are unnumbered and collected in a duo-tang that contains nine pages of records, followed by nineteen pages of records that were found in the files of a lawyer employed by the Public Body, then seconded, who had provided legal advice to Municipal Affairs. These twenty-eight pages of records were transferred to Municipal Affairs. For the purposes of this Order, I will refer to the records collectively as the “records.”

[para. 11.] Because the Applicant is concerned about the Public Body’s conduct, the records that were transferred are relevant to this inquiry only in so far as I must decide whether they meet the criteria set out under section 14(1)(a), (b) or (c), permitting a discretionary transfer of the request.

## III. ISSUES

[para. 12.] There are three issues in this inquiry:

- A. Did the Public Body properly transfer the Applicant’s request under section 14 of the Act?
- B. Did the Public Body discharge its section 9(1) duty?
- C. What is the relationship, if any, between section 9 and section 14 of the Act?

### **Burden of Proof**

[para. 13.] The Act is silent on the burden of proof relating to each of the three issues above. In previous Orders, I have said that where the Act is silent, I will allocate the burden of proof, which is on a balance of probabilities, to the party that is in the best position to provide evidence on a particular issue. I will also look to who raised the issue, among other considerations.

[para. 14.] Following this principle, although the Applicant raised all of the issues, it is obvious that the Public Body is in the best position to provide evidence on whether it properly transferred a request. So the burden of proof will lie on the Public Body for issue A. I have said in previous Orders that where section 9(1) is at issue, the burden of proof lies upon the public body. Therefore, the burden of proof lies on the Public Body for issue B. As issue C concerns a matter of interpretation, I find that there is no applicable burden of proof lying on either party.

## **IV. DISCUSSION OF THE ISSUES**

### **ISSUE A. Did the Public Body properly transfer the Applicant's request under section 14 of the Act?**

#### **(1.) Summary of the arguments of the parties**

[para. 15.] The Public Body says that the majority of the records show on their face that that they were ultimately produced by or for Municipal Affairs, and they were in the legal control of Municipal Affairs by virtue of solicitor-client privilege, satisfying section 14(1)(a). The rest of the records show on their face that that Municipal Affairs was the first to obtain them, satisfying section 14(1)(b). The head of the Public Body had no power to waive the privilege. The Public Body knew that Municipal Affairs had received the same request from the Applicant and would need to make a decision about the same records in response to the request. Further, Municipal Affairs had the greater interest in the records. Looking to these considerations, the Public Body properly exercised its discretion and transferred the request to Municipal Affairs.

[para. 16.] The Applicant made no submission on whether the records fall within section 14(1)(a)(b) or (c). The Applicant argued that a public body must establish that there is some necessity to transfer a request. The Applicant says that a public body cannot transfer a request unless it has satisfied itself that it has located all responsive records, and established that the records satisfy one of the criteria for transfer. The Public Body failed to locate all responsive records, and failed to ask Municipal Affairs whether the records were in its custody or control before transferring the request, either of which made the transfer improper. Further, the transfer was used to delay responding to the request. In all of the circumstances, the Public Body's transfer of the request was improper.

#### **(2.) Analysis**

[para. 17.] The relevant portions of section 14 read:

14(1) Within 15 days after a request for access to a record is received by a public body, the head of the public body may transfer the request, and, if necessary, the record to another public body if

- (a) the record was produced by or for the other public body,
- (b) the other public body was the first to obtain the record, or
- (c) the record is in the custody or under the control of the other public body.

(2) If a request is transferred under subsection (1),

- (a) the head of the public body who transferred the request must notify the applicant of the transfer as soon as possible...

[para. 18.] There are four elements to examine under section 14: 1) do each of the records satisfy one of the criteria for transfer set out in section 14(1)(a), (b), or (c); 2) if yes, did the Public Body properly exercise its discretion to transfer the request under section 14(1); 3) if yes, did the Public Body transfer the request within fifteen days of receipt of the request; 4) did the head of the Public Body notify the Applicant of the transfer of request as soon as possible.

**(a.) Do each of the records meet one of the criteria for transfer set out in section 14(1)(a), (b), or (c)?**

**(i.) What is the proper interpretation of sections 14(1)(a), (b) and (c)?**

[para. 19.] In Order 97-007, at paragraph 27, I discussed the principle of presumed coherence that is used to interpret legislation. Driedger on the Construction of Statutes (Butterworths: 1994) (3rd Edition) (“Driedger”) explains the principle at page 176:

It is presumed that the provisions of legislation are meant to work together ...as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

The presumption of coherence is also expressed as a presumption against internal conflict.

[para. 20.] In a nutshell, the presumption says that the legislature intended that all the parts of the Act would work together harmoniously, without creating internal conflict, inconsistency or redundancy (overlap). An interpretation that preserves the internal consistency of the Act is preferable to an interpretation that would create internal conflict in the Act. This presumption is fundamental to interpreting the Act as a whole, and each section of the Act.

[para. 21.] Section 14(1) creates a discretionary power allowing the head of a public body to transfer an access request and underlying responsive records if one of three preconditions set out in sections 14(1)(a), (b) or (c) is met. Following the presumption of legislative coherence, I cannot arrive at an interpretation of section 14(1)(a), (b) or (c) by analysing each subsection in isolation. My interpretation of each subsection must allow all three subsections to function together harmoniously, without creating conflict, inconsistency or overlap.

[para. 22.] I will begin with section 14(1)(a), where I must determine how to interpret the phrase “by or for.” In Order 97-007 I considered two possible interpretations of the phrase “by or for” in section 4(1)(l) of the Act. The broad interpretation urged on me at that time was that “by” meant “created by”, and “for” meant “intended to go to” or “destined to go to.” The narrow interpretation argued was that “by and for” should be read to mean simply emanating from, or generated by. In other words, the public body

was either the direct source of the record, or the public body had instructed that the record be created on its behalf.

[para. 23.] In this inquiry the Public Body argues that the majority of the records that were transferred to Municipal Affairs are part of a solicitor's file covered by common law solicitor-client privilege. This privilege is one that only the client, Municipal Affairs, can waive. Consequently, the Public Body argues that although it had custody of those records, the records were produced "by or for" Municipal Affairs under section 14(1)(a), because Municipal Affairs retained control over them.

[para. 24.] Before deciding how I will interpret section 14(1)(a), I must also consider how to interpret section 14(1)(b) and (c).

[para. 25.] None of the parties made submissions on how to interpret section 14(1)(b), as both appeared to read the reference to a public body having been the "first to obtain the record" in the same way. For both parties, this section was taken to permit the transfer of a request to another public body if the latter public body had been the first entity to obtain a copy of the record in question.

[para. 26.] The Concise Oxford Dictionary (9<sup>th</sup> Edition) defines "obtain" as "[to] acquire, secure; have granted to one." Black's Law Dictionary (6<sup>th</sup> Edition) defines "obtain" as: "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way." Both definitions suggest that for the purposes of section 14(1)(b) a public body could "obtain" a record either intentionally or unintentionally. Further, the definitions suggest that a public body that obtains a record did not create it. Section 14(1)(a), which deals with the production of a record, reinforces the view that section 14(1)(b) should not be interpreted to include the creation of a record.

[para. 27.] The essential element under section 14(1)(b) is that the public body that receives the transferred request was the first entity to have obtained the record after its creation by another party, whether or not the public body's obtaining of the record was intentional. Section 14(1)(b) would include correspondence and other documents received by a public body from citizens or other public bodies. The focus of section 14(1)(b) is on who first obtained the record.

[para. 28.] None of the parties made submissions on how to interpret section 14(1)(c). Unlike sections 14(1)(a) and (b), which goes to matters that are historical in nature, section 14(1)(c) goes to the state of affairs at the time the request was transferred.

[para. 29.] The Act does not define "control." The Concise Oxford Dictionary (9<sup>th</sup> Edition) defines control as "1. the power of directing, [to] command... 2. The power of restraining ..." Black's Law Dictionary (6<sup>th</sup> Edition) defines control as the "[p]ower or authority to manage, direct, superintend, restrict, regulate, govern, administer or oversee. The ability to exercise a restraining or directing influence over something."

[para. 30.] Although I have not previously considered what “control” means in the specific context of section 14(1)(c), I have considered the meaning of that word as it is used elsewhere in the Act, and my interpretations are consistent with the definitions set out above. In Order 98-019 I considered the meaning of the words “custody” and “control” in the context of section 4(1)(m) of the Act. In that Order, I indicated that “custody” referred to the physical possession of the actual records at issue, while “control” referred to the authority to manage records, whether or not they are in the physical possession of the public body claiming a right of control.

[para. 31.] In Order 99-032 I considered some non-exhaustive criteria developed by the Ontario Information and Privacy Commissioner to help evaluate whether a public body has custody or control of records. These criteria are the following:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution’s mandate and functions?
7. Does the institution have the authority to regulate the records used?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have authority to dispose of the record?

[para. 32.] Many of these criteria, particularly numbers 5, 7, and 10, imply that a public body has the legal authority to exercise a degree of control over the records in question.

[para. 33.] I find that section 14(1)(c) has two necessary elements: the public body to which the request was transferred had custody (possession) or control of the responsive record, which need not be exclusive; and this custody or control existed at the time the request was transferred.

[para. 34.] Given my interpretation of section 14(1)(b) and (c), the Public Body’s broad interpretation of section 14(1)(a) would result in significant overlap between that section and section 14(1)(c). This is because section 14(1)(c) permits the transfer of a request if the responsive record is in the legal control of another public body. I will adopt the narrow interpretation of the phrase “by or for” in section 14(1)(a), because it best preserves the internal consistency of the Act.

[para. 35.] I conclude that the reference in section 14(1)(a) to a record that was “produced by or for a public body” means that the public body generated the record, whether it created the record itself or instructed an employee or agent to create the record on its

behalf. The reference in section 14(1)(b) to a public body having been the “first to obtain the record” means that the public body was the first to have obtained a responsive record produced by another party not under its control or direction, whether or not obtaining that record was intentional. Section 14(1)(c) requires that a responsive record be in the current custody or control of the public body to which it is transferred at the time of the transfer of the request. This custody or control need not be exclusive.

[para. 36.] The Applicant argues that a public body cannot transfer a request until it finds all of the records in its custody or control. It must then consult with the public body to which it intends to transfer the request and ascertain that the responsive records in the custody or control of the first public body actually fall within one of the subsections interpreted above. Only after retrieval and consultation can a transfer be made.

[para. 37.] There is no statutory basis for this argument. Further, it is practically unworkable within the fifteen-day timeline under section 14, especially where large and complex searches are required. In my view, a public body can often determine from its employees and its own records whether responsive records meet, or likely will meet, the criteria for transfer. If a public body is satisfied that all of the responsive records--retrieved or not--can be properly transferred under section 14(1), the Act does not require it to take the extra step of consulting with the public body that is to receive the records before it transfers the request. The public body that decides to transfer a request does so on the basis of its own analysis that section 14(1) is applicable.

**(ii.) Does each record fall within one of section 14(1)(a), (b) or (c)?**

[para. 38.] The Public Body argued that the nineteen pages of records it located satisfy either section 14(1)(a) or (b). The Public Body says that these records were found in the file of a lawyer who was in the employ of the Public Body. The records were created in the context of that lawyer providing legal advice to Municipal Affairs. Therefore, the records are covered by solicitor-client privilege. This privilege prevents the Public Body from disclosing the records unless its client, Municipal Affairs, waives the privilege and consents to disclosure. The legal privilege gives Municipal Affairs the right to control the disclosure of those records. This right of control satisfies section 14(1)(a) and justifies the transfer of the Applicant’s request so far as those records are concerned.

[para. 39.] I have considered the solicitor-client relationship in the context of government service, where lawyers in the employ of one public body provide legal advice to employees of another client public body. In previous Orders I stated that solicitor-client privilege would apply to communications between employees of public bodies who are providing or receiving legal advice on behalf of public bodies (96-020).

[para. 40.] In Order 96-017 I adopted the common law test for solicitor-client privilege set out in *Solosky v. The Queen* [1980] 1 S.C.R. 821 (“*Solosky*”). The test, set out below, must be met on a document by document basis:



- a) the document must be a communication between a solicitor and client,
- b) which entails the seeking or giving of legal advice, and
- c) which is intended to be confidential by the parties.

[para. 41.] In Order 96-017, at paragraph 23, I said that “legal advice” is a “legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications.” I have held that communications between a solicitor and a client that are part of a continuum of legal advice are covered by the privilege. Notes documenting legal advice given orally to a client by a solicitor are covered by the legal privilege, as are fax cover sheets and attachments, if the records were actually sent between solicitor and client, and contain information which is covered by solicitor-client privilege. In other Orders, including 96-017, I accepted that a solicitor’s briefing notes and working papers that are directly related to the giving or seeking of legal advice are also covered by solicitor-client privilege for the purposes of the Act.

[para. 42.] It is well accepted in law that solicitor-client communications are “privileged”, i.e. the communications are confidential. This legal privilege is of indefinite duration. It cannot be waived--that is, given up--except by the client. In Order 98-017 I accepted that waiver of a right requires the intentional, voluntary relinquishment of a known right. Therefore, if a client has not waived solicitor-client privilege, the client has a continuing right of legal control over the record, despite the fact that a solicitor may physically have custody of the records that are covered by the privilege.

[para. 43.] I examined each of the nineteen records in the context of all of the evidence to determine whether each was covered by solicitor-client privilege, following *Solosky*. I am satisfied each of the nineteen pages of records for which the Public Body claimed solicitor-client privilege is covered by that privilege. And, after reviewing all of the evidence and submissions, I find that there is no evidence that at any time up to the transfer Municipal Affairs waived that legal privilege over the nineteen pages of records. Therefore, I find that Municipal Affairs had a continuing right of control over the records at the time of transfer, satisfying section 14(1)(c).

[para. 44.] If necessary, I would find in the alternative that each of those records satisfies either section 14(1)(a) or (b).

[para. 45.] In addition to the nineteen pages of responsive records, the Public Body transferred nine pages of records relating to the Applicant’s request. Seven of those nine pages are the Applicant’s letter containing the request. The remaining two pages are correspondence from the Public Body. The first asks Municipal Affairs to accept the transfer, and the second is a copy of the memo sent to the Applicant advising of the transfer.

[para. 46.] Section 14(1) permits a public body to transfer the physical record that is the request itself to the other public body, if all of the responsive records satisfy one of the three preconditions set out in section 14(1)(a), (b) or (c). Correspondence from the transferring public body to an applicant advising of a transfer under the Act does not fall within section 14(1). The same is true of correspondence from the transferring public body to the public body receiving the transfer. These are administrative records that do not relate to the request.

[para. 47.] After reviewing the seven pages of records related to the request that were transferred by the Public Body to Municipal Affairs, I am satisfied that they were properly transferred under section 14(1).

[para. 48.] I conclude that twenty-six of the twenty-eight records were properly transferred under section 14(1). The remaining two pages of correspondence do not fall within section 14(1).

**(b.) Did the Public Body properly exercise its discretion under section 14(1)?**

**(i.) The law on discretion**

[para. 49.] The delegation of a discretionary power to a public body by the legislature under the Act gives a public body a degree of flexibility in the exercise of its delegated obligations. The decision taken as a result of this flexibility may not please all concerned. Jones and De Villars in Principles of Administrative Law (Carswell: 1999) (3rd Edition) at page 154 reproduce a comment from Lord Diplock on this point: “[t]he very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.” D. J. Galligan, Discretionary Powers: A Legal Study of Official Discretion (Clarendon Press: 1986) observes at page 8 that to have legislated discretion is “to have a sphere of autonomy within which one’s decisions are in some degree a matter of personal judgement and assessment.” This sphere of autonomy, which can be broad or narrow, is the essence of a discretionary power granted by the legislature to a decision-maker (a “delegate”).

[para. 50.] However, as Galligan notes at page 7, legislated discretion “consists not in the authority to choose amongst different action, but to choose amongst different courses of *action for good reasons*” (emphasis in the original text). Before properly exercising a discretionary power, a delegate must assess the following matters: 1) the relevant facts and circumstances; 2) the applicable law, including the objects of the enactment and the scope of the discretionary power, which includes any preconditions set on the exercise of discretion; 3) how to properly apply the law to the relevant facts and circumstances.

[para. 51.] A delegate’s rationale for exercising his or her discretion in a particular way must be both demonstrable and reasonable. A delegate cannot abuse his or her discretion by making an arbitrary or irrational decision. In Order 96-002 I catalogued five types of

abuse of discretion: 1) where a delegate exercises his or her authority with an improper intention in mind, which includes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations; 2) where a delegate acts on inadequate evidence or without considering relevant matters; 3) where the decision is unreasonable or discriminatory, creating an improper result; 4) where the delegate exercises his discretion on an erroneous view of the law; and 5) where a delegate fetters his discretion by rigidly adopting a policy which precludes a consideration of the individual merits of the case. Abuse of discretion deprives a delegate of his or her jurisdiction in the case, and renders the delegate's decision a nullity.

**(ii.) The Public Body's exercise of discretion**

[para. 52.] In Order 98-012, at paragraph 31, I said that there is no mandatory requirement on a public body to transfer a request under section 14(1). A public body can exercise its discretion to transfer a request if one of the pre-conditions to the exercise of discretion set out in section 14(1)(a), (b) or (c) is satisfied, and the exercise of discretion is reasonable.

[para. 53.] As I have found that the records met the criteria for transfer, I must test the Public Body's discretionary decision to transfer the request. The evidence is that a major consideration motivating the transfer was the Public Body's perception that solicitor-client privilege applied to the responsive records.

[para. 54.] I accept the Public Body's argument that the solicitor-client privilege issue was a reasonable and relevant consideration. The Public Body had no power to unilaterally waive the privilege and disclose the records. It acted properly to preserve the privilege on behalf of Municipal Affairs, while transferring the records so that Municipal Affairs could be in a position to review them, and its own records, and decide whether to waive the privilege. I also accept the Public Body's argument that the fact that Municipal Affairs would have to make a decision about whether to disclose the records in any event was also a reasonable and relevant consideration weighing in favour of transfer.

[para. 55.] I have considered the Public Body's argument about Municipal Affairs' "greater interest" in the records, but I find that this does not pertain to the Act.

[para. 56.] I reject the Applicant's argument that the Public Body must only exercise its discretion to transfer a request to assist an applicant. The legislature did not impose such a pre-condition upon the exercise of discretion under section 14(1). The Applicant may have been misled by the informal practice that has arisen where a public body coordinates a response to an access request without formally transferring the request. This practice has developed in the spirit of assisting applicants and facilitating a quick and

comprehensive response. But, as I indicated in Order 99-021, it is not tantamount to a transfer of a request under section 14.

[para. 57.] As for the Applicant's other argument, I find that the Applicant offered no evidence in support of its allegation that the transfer was intended to delay receipt of the records. I find that there is no evidence at all to substantiate this allegation. The evidence indicates that the Public Body processed the request in a timely fashion.

[para. 58.] In summary, I have reviewed the Public Body's discretionary decision to transfer the request and I find that the discretion was properly exercised.

**(c.) Did the Public Body transfer the records within fifteen days after the request was received?**

[para. 59.] Section 14(1) requires a public body to transfer a request for access to a record within fifteen days of receipt of the request, if each of the records that are to be transferred meet one of the criteria set out in section 14(1)(a)(b) or (c).

[para. 60.] The Public Body provided me with a copy of the Applicant's request. The copy featured a date stamp indicating that the Public Body received the request on March 25, 1999. The Public Body also provided a copy of a letter sent to the Applicant, dated April 8, 1999, advising that the request had been transferred to Municipal Affairs on April 8, 1999. The Applicant did not dispute this evidence. In its submission the Applicant admitted that the transfer had occurred in nine full business days.

[para. 61.] I find that the evidence shows that the Public Body formally transferred the request within fifteen days of receipt of the request. I find that the Public Body has satisfied this requirement under section 14(1).

**(d.) Did the head of the Public Body notify the Applicant of the transfer of the request as soon as possible?**

[para. 62.] The evidence discloses the Public Body notified the Applicant of the transfer of the request on the same day that the Public Body formally transferred the Applicant's request to Municipal Affairs.

[para. 63.] Consequently, I find that the head of the Public Body notified the Applicant of the transfer of the request as soon as possible, as required under section 14(2).

**(3.) Conclusion under section 14**

[para. 64.] I find that twenty-six pages of the records met at least one of the criteria for transfer set out in section 14(1)(a), (b) or (c). Two pages of the records were administrative records that do not relate to the request. I find that the Public Body properly exercised its discretion to transfer the request. I find further that the Public Body transferred the request within fifteen days of receiving it, complying with the time

limitation set out in section 14(1). I also find that the Public Body notified the Applicant of the transfer of the request as soon as possible, satisfying its duty under section 14(2). In summary, I find that the records were properly transferred under section 14 of the Act.

## **ISSUE B. Did the Public Body discharge its section 9(1) duty?**

### **(1.) Summary of the arguments of the parties**

[para. 65.] The Public Body relies upon its conduct as recounted in the Affidavit sworn by the Public Body's Manager of Records Management Services provided at inquiry. The Public Body argues that it conducted an adequate search and responded in a timely manner to the request, discharging its duty to assist the Applicant.

[para. 66.] In its written submission the Applicant argued that the Public Body did not conduct an adequate search for the records before transferring the request. The Applicant questioned whether the Public Body located all of the responsive records in its custody or control, as the Applicant believes that the Public Body must have monitored a series of relevant court decisions, and produced advice on point for other government ministries, producing additional records. As well, the Applicant argued that the Public Body transferred the request to create delay.

### **(2.) Analysis**

[para. 67.] Section 9(1) sets out the duty of a public body to assist applicants:

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.

[para. 68.] The section 9(1) duty is a mandatory one. In previous Orders I have stated that how a public body fulfills that duty will vary according to the facts of each request and the sophistication and knowledge of an applicant. The duty to assist includes the obligation to conduct an adequate search for the records requested by an applicant. An adequate search has two elements: 1) every reasonable effort is made to search for the actual record requested, and 2) the applicant is informed in a timely fashion of what has been done. There is no specific test for determining the adequacy of a search. The standard directed by the Act is not perfection, but what is "reasonable": in Order 98-002 at paragraph 88, I adopted the definition of "reasonable" in Black's Law Dictionary: "fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view."

[para. 69.] The Public Body presented an Affidavit sworn by one of its employees, who is a Manager of Records Management Services responsible for the Act. The Manager was produced as a witness at the inquiry.

[para. 70.] The Affidavit sworn by the Manager is extensive. Before swearing his affidavit the Manager reviewed his predecessor's files, who handled the request, and

consulted with other employees who participated in the search. The Manager swears that his predecessor's files show that his predecessor instructed Central Records to locate and retrieve all records using 18 search terms or search phrases derived from the Applicant's access request. Some twenty boxes of records were located at the Provincial Archives, as the Public Body retained legal control over them. This employee later attended at the Archives with another lawyer to review the twenty boxes for responsive records. The Manager swears that an employee of the Public Body sent an e-mail to all lawyers of the Public Body who might have responsive records.

[para. 71.] The Manager's Affidavit indicates that the only responsive records were recent records of legal advice dated 1998 and 1999. These were transferred to Municipal Affairs on April 8, 1999, along with the letter of request and collateral records related to the request.

[para. 72.] The Applicant argued that the search was inadequate because more responsive records must exist. The Applicant produced no evidence in support of that argument, only a series of speculations founded upon the premise that responsive records must have been produced at some time in the past, and that those records must continue to exist, despite their age and the relatively lax record-keeping protocols of earlier times. The Applicant also argued that the transfer was made to delay access to the records. No evidence was provided in support of this contention.

[para. 73.] I find that the Manager's testimony and Affidavit are credible. After reviewing all of the submissions and the documentary evidence, I find that the Public Body conducted an adequate search for responsive records, and informed the Applicant in a timely manner of what had been done. Finally, I found no evidence of deliberate delay on the part of the Public Body. I am satisfied that the Public Body has discharged its section 9(1) duty.

### **(3.) Conclusion under section 9(1)**

[para. 74.] I am satisfied that the Public Body made every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely under section 9(1). I find that the Public Body has discharged its section 9(1) duty toward the Applicant.

## **ISSUE C. What is the relationship, if any, between section 9 and section 14 of the Act?**

### **(1.) Summary of the positions of the parties**

[para. 75.] The Public Body argues that the mandatory section 9(1) duty arises in every request. It is distinct from the discretionary power to transfer a request found in section 14(1). The two sections co-exist in the Act, but there is no greater relationship between these sections than between any other sections that may apply at the same time.

[para. 76.] The Applicant argues that the discretion to transfer an applicant's request to another public body under s. 14 is fettered with the over-riding obligation imposed on the public body by section 9. In other words, the discretion should be exercised only to assist an applicant.

## **(2.) Analysis**

[para. 77.] Driedger at page 271 observes: “[w]here provisions are grouped together under a heading it is presumed that they are related to one another in some particular way, that there is a shared subject or object or a common feature to the provisions.”

[para. 78.] There is no express language in the Act to indicate what relationship the legislature intended between section 9(1) and section 14(1). However, a structural analysis of the Act provides some guidance. Looking at the Act as a whole, a relationship between these two sections is suggested by the fact that they are both grouped in Part 1, Division 1 of the Act, which is entitled “Obtaining Access to Records.”

[para. 79.] The sections grouped under Part 1, Division 1 share a common subject, which is processing an access request. This unifies them to a limited extent. However, section 9 and section 14 are not closely connected physically or logically in Division 1. A review of the Act shows that following section 9 is section 10, which sets out the time limit for initially responding to a request; section 11 sets out the mandatory contents of a response under section 10; section 12 speaks to how access will be given; and section 13 speaks to extending the time limit for responding to the request. Section 14, setting out the transfer provision, is the final section in the Division. Therefore, a structural analysis suggests that the linkage between the two provisions is quite soft.

[para. 80.] In addition to the structure of the Act, I considered the interpretative principle that says that a specific provision prevails over a more general provision. In this case, the language of a general mandatory duty under section 9(1) is limited by the precise language of section 14. Section 14(1) creates a discretionary power. If this discretionary power is exercised, it gives rise to a distinct and narrow duty to notify an applicant under section 14(2). I see no basis for the Applicant's argument that the section 9(1) duty to assist an applicant can override or impinge upon the discretionary power created in section 14(1).

### **(3.) Conclusion**

[para. 81.] I find that the mandatory section duty to assist an applicant under section 9(1) of the Act is distinct from the discretionary power to transfer a request under section 14(1) of the Act. The discretionary power is not subordinate to the mandatory duty to assist an applicant. There is no relationship between section 9(1) and section 14 that would compel the Public Body to exercise its discretionary power to transfer a request under section 14 only to assist an applicant.

### **V. ORDER**

[para. 82.] Under section 68 of the Act, I make the following order:

1. I find that the Public Body properly transferred the Applicant's request under section 14 of the Act. I find that twenty-six of the twenty-eight records were properly transferred under section 14(1). I find that two pages included in the transfer are administrative records that do not relate to the request. I uphold the Public Body's conduct in transferring the request.
2. I find that the Public Body discharged its section 9(1) duty. I uphold the Public Body's conduct.
3. I find that there is no significant relationship between the mandatory duty to assist an applicant under section 9(1) of the Act and the discretion to transfer a request under section 14 of the Act. In particular, I find that the section 14 discretion is not tied to the section 9 duty to assist an applicant.

Robert C. Clark  
Information and Privacy Commissioner