

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

**ORDER 2000-034**

April 30, 2001

**ALBERTA ENVIRONMENT**

Review Number 1991

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

**Summary:** The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) for access to records concerning an application for approval of a seismic exploration program for oil and gas. The Commissioner found that most of the records fell within section 49(1) of the *Mines and Minerals Act*, as limited by section 16(1) of the *Freedom of Information and Protection of Privacy Regulation* (the “FOIP Regulation”). Section 16(1) of the FOIP Regulation says that section 49(1) of the *Mines and Minerals Act* prevails despite the FOIP Act with respect to any record, return or information obtained under the *Mines and Minerals Act* that would reveal geological work or geophysical work. Therefore, the Commissioner did not have jurisdiction over most of the records. The Applicant could not get access to those records under the FOIP Act.

**Statutes Cited: AB:** *Financial Administration Act*, R.S.A. 1980, c. F-9, s. 1(1)(r); *Engineering, Geological and Geophysical Professions Act*, S.A. 1981, c. E-11.1; *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 5(2), 6(1), 6(2), 31, 31(2); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, ss. 16(1), 16(2), 16(3), 16(5), 16(5)(a), (b) and (c); *Interpretation Act*, R.S.A. 1980, c. I-7, s. 25(1)(a) and (e); *Mines and Minerals Act*, R.S.A. 1980, c. M-15, ss. 1(1)(m), 1(1)(s.1), 46, 47(1), 49(1), 152, 152(c), Part 10; *Exploration*

*Regulation*, Alta. Reg. 214/98; *Metallic and Industrial Minerals Regulation*, Alta. Reg. 213/98, s. 42; *Mines and Minerals Administration Regulation*, Alta. Reg. 262/97, ss. 25, 26, 26(1) and (4).

**Authorities Cited: AB:** Order 99-034.

**Cases Cited:** *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4<sup>th</sup>) 1 (S.C.C.); *Imperial Investments Ltd. v. Saint John (City)* (1993), 106 D.L.R. (4<sup>th</sup>) 585 (N.B. C.A.).

## **I. BACKGROUND**

[para 1.] On May 31, 2000, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to Alberta Environment (the “Public Body”) for access to the following:

All records related to the approval of a seismic program by Lorne L. Consultants [sic] and/or Time Seismic in the Nordegg area including but not limited to a map and/or the description of the surface area included in the seismic program, the number and location of seismic lines, the measures that will be taken to minimize environmental impacts, location & type of stream crossings, description of access, a copy of the application and a copy of the approval. Please exclude geological and geophysical work as defined under the Freedom of Information and Protection of Privacy Act [sic] (Section 16(5)(a) and (b)).

[para 2.] On August 14, 2000, the Public Body responded to the Applicant, as follows:

Pursuant to section 16(1) of the Freedom of Information and Protection of Privacy Regulations, all requested records would fall under section 49(1) of the Mines and Minerals Act, which has paramountcy over the Freedom of Information and Protection of Privacy Act. Subsequently [sic], we are unable to release records to you under the Freedom of Information and Protection of Privacy Act. This is in accordance with section 5(2) of the Act which expressly provides that “*If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless another Act or a regulation under this Act expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.*”

[para 3.] On August 21, 2000, the Applicant asked me to review the Public Body’s decision. Mediation was authorized, but was not successful. The matter was set down for an oral inquiry, held on December 19, 2000.

[para 4.] A Notice of Inquiry was sent to the Public Body, the Applicant and two affected parties: Lornel Consultants and Time Seismic Exchange Ltd. My Office also granted intervenor status to the

Canadian Parks and Wilderness Society, the Alberta Wilderness Association, and the Canadian Association of Petroleum Producers. All the parties and the intervenors appeared before me at the inquiry except Lornel Consultants.

[para 5.] At the conclusion of the oral portion of the inquiry, I asked the parties to answer further questions in writing. I received written responses from the Public Body, Time Seismic Exchange Ltd. and the Canadian Parks and Wilderness Society on January 15, 2001.

[para 6.] This Order proceeds on the basis of the Act as amended on May 19, 1999.

## **II. RECORDS AT ISSUE**

[para 7.] The records at issue consist of documents entitled “Preliminary Geophysical Application”, “Geophysical Field Reports”, and “Geophysical Approval Work Sheets”, as well as various letters and notes relating to the geophysical application, and large maps.

[para 8.] In this Order, I will refer to the records individually by description, where necessary, and will refer to all the records collectively as the “Records”.

## **III. ISSUES**

[para 9.] The Notice of Inquiry set out the following issue:

Is section 5(2) of the FOIP Act and section 16(1) of the FOIP Regulation applicable to the records such that the Commissioner does not have jurisdiction over access to the records?

[para 10.] The Applicant also raised the further issue of whether the Public Body must disclose the records in the public interest, as provided by section 31 of the FOIP Act.

## IV. DISCUSSION OF THE ISSUES

### **ISSUE A: Is section 5(2) of the FOIP Act and section 16(1) of the FOIP Regulation applicable to the Records such that the Commissioner does not have jurisdiction over access to the Records?**

[para 11.] Section 5(2) of the FOIP Act reads:

*5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*

*(a) another Act, or*

*(b) a regulation under this Act*

*expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.*

[para 12.] Often referred to as the “paramountcy” provision, section 5(2) permits another enactment (a statute or regulation), or a provision of the enactment, to prevail despite the FOIP Act. Section 5(2) is jurisdictional because, if another enactment or a provision of it prevails despite the FOIP Act, I do not have jurisdiction to apply the FOIP Act.

[para 13.] Section 5(2) requires that I first decide whether the information withheld falls within another enactment or a provision of it that expressly provides that the enactment or a provision of it prevails despite the FOIP Act. If so, I must then decide whether there is an inconsistency or conflict between a provision of the FOIP Act and the other enactment or a provision of it. If there is an inconsistency or conflict, that enactment or a provision of it prevails despite the FOIP Act.

#### **1. Does the information withheld fall within another enactment or a provision of it that expressly provides that the enactment or a provision of it prevails despite the FOIP Act?**

##### **a. General**

[para 14.] The Public Body says that the information withheld falls within section 49(1) of the *Mines and Minerals Act*, R.S.A. 1980, c. M-15, as provided by section 5(2) of the FOIP Act and section 16(1) of the *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95 (the “FOIP Regulation”).

[para 15.] Section 16(1) of the FOIP Regulation reads:

*16(1) Section 49(1) of the Mines and Minerals Act prevails despite the Freedom of Information and Protection of Privacy Act with respect to any record, return or information obtained under the Mines and Minerals Act that would reveal geological work or geophysical work or allow any person to have access to any record, return or information obtained under the Mines and Minerals Act that would reveal geological work or geophysical work.*

[para 16.] Section 49(1) of the *Mines and Minerals Act* reads:

*49(1) Except as provided under the regulations, no person shall communicate or allow to be communicated any record, return or information obtained under this Act to a person not legally entitled to that information or allow any person not legally entitled to that record, return or information to have access to any record, return or information obtained under this Act.*

[para 17.] The Public Body maintains that section 16(1) of the FOIP Regulation does not encompass all records, returns or information as set out under section 49(1) of the *Mines and Minerals Act*. The Public Body says that section 16(1) of the FOIP Regulation encompasses only those records, returns or information within section 49(1) of the *Mines and Minerals Act* that would reveal geological work or geophysical work. I agree that section 16(1) of the FOIP Regulation limits the application of section 49(1) of the *Mines and Minerals Act* to those records, returns or information that would reveal geological work or geophysical work.

[para 18.] The Public Body also says, and I agree, that the three criteria outlined by section 16(1) of the FOIP Regulation must be met in order for section 49(1) of the *Mines and Minerals Act*, as limited by section 16(1) of the FOIP Regulation, to apply: (i) there must be a record, return or information, (ii) obtained under the *Mines and Minerals Act*, (iii) that would reveal geological work or geophysical work.

**b. Is there a “record”, “return” or “information”?**

[para 19.] Section 1(1)(s.1) of the *Mines and Minerals Act* defines “record” to mean a record as defined in the *Financial Administration Act*, R.S.A. 1980, c. F-9.

[para 20.] “Record” is defined in section 1(1)(r) of the *Financial Administration Act*, as follows:

*1(1) In this Act,*

*(r) “record” includes*

*(i) an account, book, return, statement, report, financial document or other memorandum of financial or non-financial information whether in writing or in electronic form or represented or reproduced by any other means, and*

*(ii) the results of the recording of details of electronic data processing systems and programs to illustrate what the systems and programs do and how they operate...*

[para 21.] “Record” appears in one context in the *Mines and Minerals Act*. Section 46 of the *Mines and Minerals Act* refers to the records a person is required to keep, as set out in the regulations. Section 25 of the *Mines and Minerals Administration Regulation*, Alta. Reg. 262/97, deals with keeping records that are or were used for the purpose of preparing any return or report required to be given or filed with the Minister in relation to an agreement granting mineral rights.

[para 22.] “Return” and “information” are not defined in the *Mines and Minerals Act*.

[para 23.] The word “return” appears in section 47(1) of the *Mines and Minerals Act*, and deals with the information about mineral operations, which a person is required to submit to the Minister on receiving notice from the Minister.

[para 24.] I asked the parties to tell me whether I should confine my interpretation of “record” to the records required by section 46 of the *Mines and Minerals Act* and section 25 of the *Mines and Minerals Administration Regulation*. Similarly, I asked whether I should confine my interpretation of “return” to a return required by section 47(1) of the *Mines and Minerals Act*. I then asked whether I should also interpret “information” narrowly, as that word appears in the context of “record” and “return”.

[para 25.] Both the Public Body and Time Seismic Exchange Ltd. (“Time”) argue that I should not take a narrow interpretation of “record”, “return” or “information” under section 49(1) of the *Mines and Minerals Act*.

[para 26.] Time provided me with evidence that, before 1994, section 49(1) of the *Mines and Minerals Act* read:

*49(1) Except as provided under the regulations, no person shall communicate or allow to be communicated any record, return or information obtained under section 47 or 48...[emphasis added].*

[para 27.] Time says that, in 1994, section 49(1) of the *Mines and Minerals Act* was amended. The reference to “section 47 or 48” was deleted and “this Act” was substituted. In doing this, the Legislature intended to broaden the scope of records, returns or information that section 49(1) covers. Time submits that I should respect the Legislature’s intention and not interpret “record”, “return” or “information” narrowly. I agree.

[para 28.] Finally, I asked the parties to tell me how I would reconcile a broad interpretation of “record”, “return” or “information” in section 16(1) of the FOIP Regulation with what appear to be specific kinds of records, returns and information set out in section 16(2) and (3) of the FOIP Regulation.

[para 29.] Both the Public Body and Time point out that section 16(1) of the FOIP Regulation does not catch all the records, returns or information obtained under section 49(1) of the *Mines and Minerals Act*, but only those records, returns or information that would reveal geological work or geophysical work. Sections 16(2) and (3) of the FOIP Regulation catch two other kinds of records, returns or information. The Public Body and Time therefore submit that there is no overlap or conflict among the narrower set of records, returns or information contemplated by each of sections 16(1), (2), or (3). I agree.

[para 30.] I am confined to the definition of “record” contained in the *Financial Administration Act*. Based on that definition, I find that some of the Records (such as the geophysical field reports) are “records” as contemplated by section 49(1) of the *Mines and Minerals Act*.

[para 31.] “Return” incorporates the notion of a record or information sent back to the Public Body under the *Mines and Minerals Act*. I find that a few of the Records could be said to be “returns”.

[para 32.] “Information” is the catch-all word for anything that would not be a “record” or “return”. I find that the remaining Records contain “information” for the purpose of section 49(1) of the *Mines and Minerals Act*.

**c. Was the record, return or information obtained under the *Mines and Minerals Act*?**

[para 33.] The Public Body says that the records, returns and information were obtained under Part 10 of the *Mines and Minerals Act* and the *Exploration Regulation*, Alta. Reg. 214/98, made under the *Mines and Minerals Act*.

[para 34.] I have reviewed the records, returns and information, which concern the application for an approval of a “3D Geophysical Survey”. The parties have explained that this is an application for a seismic exploration program for oil and gas. I note that the *Exploration Regulation* sets out the kinds of records, returns and information I reviewed. It is evident that the records, returns and information concerning the application for approval of the seismic exploration program were obtained under the *Exploration Regulation*.

[para 35.] I asked the parties whether the interpretation of “obtained under this Act” in section 49(1) of the *Mines and Minerals Act* and the similar wording “obtained under *the Mines and Minerals Act*” in section 16(1) of the FOIP Regulation should be restricted to records, returns and information obtained only under the *Mines and Minerals Act*, and not those obtained under the regulations to the *Mines and Minerals Act*.

[para 36.] I asked this question because section 25(1)(a) of the *Interpretation Act*, R.S.A. 1980, c. I-7, defines “Act” to mean “Act” and not a regulation. If the Legislature had meant something more than an “Act”, it could have used the word “enactment”, which includes a regulation: see section 25(1)(e) of the *Interpretation Act*.

[para 37.] The Public Body and Time urge me to find that records, returns, and information obtained under the *Exploration Regulation* are obtained under the *Mines and Minerals Act* for the purpose of section 49(1) of the *Mines and Minerals Act*.



[para 38.] The rationale for such an interpretation is that the legal authority to obtain the records, returns and information under the *Exploration Regulation* stems from the *Mines and Minerals Act*. Part 10 and section 152 of the *Mines and Minerals Act* authorize records, returns and information to be obtained under the *Exploration Regulation*. The fact that records, returns and information obtained under the *Exploration Regulation* are obtained under the authority of the *Mines and Minerals Act* is sufficient to find that the records, returns and information are obtained under the *Mines and Minerals Act*.

[para 39.] I note that section 152(c) of the *Mines and Minerals Act* authorizes the Lieutenant Governor in Council to make regulations respecting applications for and the issuing of exploration approvals, licences and permits. I have said that the records, returns and information in this case concern an exploration approval.

[para 40.] The Public Body further explained that Part 10 of the *Mines and Minerals Act* deals with exploration in very general terms. The *Exploration Regulation* is an extension of Part 10, and sets out in more detail the powers, activities or items referenced in Part 10. The Public Body submits that the *Mines and Minerals Act* and the *Exploration Regulation* are an integrated scheme that must be read together.

[para 41.] I accept the Public Body's argument. I find that the records, returns and information obtained under the *Exploration Regulation* are obtained under the *Mines and Minerals Act* for the purpose of section 49(1) of the *Mines and Minerals Act*.

[para 42.] I further find that such an interpretation applied to section 16(1) of the FOIP Regulation does not conflict with section 16(2) or (3) of the FOIP Regulation, which address different records, returns and information.

**d. Would the record, return or information reveal geological work or geophysical work?**

[para 43.] Although the Applicant asked the Public Body to exclude geological and geophysical work, both the Public Body and Time argue that the Records the Applicant requested would reveal "geological work" and "geophysical work".

[para 44.] "Geological work" and "geophysical work" are defined in section 16(5)(a) and (b) of the FOIP Regulation, as follows:

*16(5) In this section,*

*(a) “geological work” means reporting, advising, evaluating, interpreting, geological surveying, sampling or examining lithological, palaeontological, petrophysical or geochemical information related to any activity*

*(i) that is aimed at the discovery or development of minerals or water, or*

*(ii) that is aimed at the investigation of geological conditions,*

*and that requires the application of the principles of the geological sciences;*

*(b) “geophysical work” means geophysical reporting on, advising on, acquiring, processing, evaluating or interpreting geophysical data or geophysical surveying that relates to any activity*

*(i) that is aimed at the discovery or development of minerals or water, or*

*(ii) that is aimed at the subsurface investigation of the earth,*

*and that requires the application of the principles of the geophysical sciences...*

[para 45.] Section 16(5)(c) is also relevant, and reads:

*16(5)(c) “mineral” means mineral as defined in the Mines and Mineral Act...*

[para 46.] Section 1(1)(m) of the *Mines and Minerals Act* defines “minerals” to include petroleum, oil, and natural gas, among other things.

[para 47.] I note that section 16(1) of the FOIP Regulation does not use the terms geological or geophysical “information”.

[para 48.] I asked the parties to tell me whether I should interpret “work” to mean the result of an action or a thing done or made by work.

[para 49.] The Public Body argues that adding words to the legislated definitions of “geological work” and “geophysical work” could fundamentally alter the interpretation of the definitions. Time argues that I would be narrowing the definitions, which are broader since they include activities such as evaluating, interpreting, examining, processing and acquiring. Nevertheless, the Public Body and Time maintain that the records, returns and information would meet a narrow definition of “work” because they would reveal the product of “work”.

[para 50.] I find that the word “means” preceding the definitions in section 16(5) of the FOIP Regulation restricts me to the definitions.

[para 51.] Section 16(5) does not explain any of the technical terms to a lay person, particularly “geological”, “geophysical”, or “surveying”. To understand those terms, the Public Body provided the following definitions from the *Gage Canadian Dictionary*:

*Geology*: the science that deals with the earth’s crust, the layers of which it is composed and their history; the features of the earth’s crust in a place or region; rocks, rock formation, etc. of a particular area

*Geophysics*: the science that deals with the relations between the features of the earth and the forces that produce them; the physics of the earth. Geophysics includes magnetism, meteorology, oceanography, seismology [emphasis added], etc.

*Surveying*: the science or technique of measuring the boundaries and contours of particular areas on, above or beneath the earth’s surface by using the principles of geometry; the act or business of making such measurements

[para 52.] Time provided definitions of the “practice of geology” and the “practice of geophysics” from the *Engineering, Geological and Geophysical Professions Act*, S.A. 1981, c. E-11.1.

[para 53.] Time argues that a seismic exploration program for which approval is required from the Public Body falls within the definition of “geophysical work”. The essence of the program is acquiring geophysical data, and that acquisition is related to an activity that is aimed at the discovery of minerals. Further, that acquisition requires the application of the principles of the geophysical sciences. Time argues that a seismic program also involves the other activities listed in the definition of “geophysical work” as well as those set out for “geological work”.

[para 54.] Both the Public Body and Time point out that section 16(1) of the FOIP Regulation says “reveal [my emphasis] geological work or geophysical work”. The ordinary meaning of “reveal” is to disclose, divulge or make known (*Oxford English Dictionary*). Therefore, in order to fall within section 16(1) of the FOIP Regulation, Time submits that the records, returns or information do not need to be the result of geological or geophysical work or contain geological or geophysical work. Rather, the records, returns or information only need to reveal geological or geophysical work.

[para 55.] The Public Body explained that exploration programs are built on the information obtained through previous exploration work. A company determines where it wants to conduct a 3D seismic program based on information it obtains from previous geophysical and geological work that tells it where to conduct the program. The application can reveal this type of information.

[para 56.] The Public Body says that a geophysicist uses his knowledge and professional expertise to design the 3D seismic exploration program to properly evaluate the target zone. The geophysicist determines what the line spacing and orientation will be, the group and shot intervals, the type and size of source, depth of the source, and sample rate, as well as other aspects of the seismic program. He uses his expertise or engages in “geophysical work” to set up and execute the 3D seismic exploration program.

[para 57.] According to the Public Body, geophysical work occurs in different phases. The first phase is the review of existing data, trends and other relevant information. The second phase involves the program design which includes line location, spacing and method of construction. The third phase would be the gathering of new data by shooting the program. The fourth phase would be the interpretation of the new data combined with the existing data.

[para 58.] The Public Body says that any geophysicist could look at the 3D seismic exploration program location, orientation of lines and the spacing of the lines as well as information on the application form to obtain information about a company’s exploration plans.

[para 59.] Time argues that the mere existence of a 3D seismic program in a given area and the related information provided on the application and field report for the program reveal geological work and geophysical work. Time does not randomly choose either the locations for which it applies for exploration approval or the acquisition parameters according to which it plans to carry out a given program. Instead, Time conducts research and uses past seismic data, well results, and other available

scientific information, including geological and geophysical information, to determine where its exploration efforts are best focused. Geophysicists assess the scope of the area that needs to be included in the program as well as the program design necessary to obtain the required results. Similarly, the number and spacing of lines, the shot point location spacing, and the receiver group spacing are driven by the evaluation of the available geological and geophysical data. Therefore, the information as to the existence of a seismic program in a given area reveals all this background geological and geophysical work. The application form and the associated maps as well as the geophysical field report are the product of this geological and geophysical work. Further, the geophysical field report is the product of geophysical surveying, which is covered by the definition.

[para 60.] Time says that even a map setting out the boundaries of a proposed program or a description of the area to be included in the program reveals geological or geophysical work. Again, a company proposing exploration does not simply choose an area at random. Rather, it undertakes an analysis and evaluation of previously acquired geological and geophysical data and determines exactly where the boundaries of new exploration should be. Therefore, not only does a map reveal geophysical work in the sense of the placement and existence of the program, but the map is itself the product of geological and geophysical work. Information about the number and location of seismic lines also reveals geological and geophysical work beyond the existence and location of the program itself. A company determines the number and spacing of lines after evaluating the particular geological and geophysical conditions of the area, based on the nature and extent of the program to be carried out. Similar evaluation and study precedes proposals as to the mode of access to the program area, the location and type of stream crossings, and the measures adopted to minimize environmental impacts. All of this information reveals geological and geophysical work. The application and approval documents are records that contain those types of information, including maps, location of lines, and other data. They reveal geological and geophysical work.

[para 61.] By applying geological and geophysical analysis, Time comes to conclusions about the feasibility of a seismic program in a given area and the details of such a program. Revealing even the existence of Time's proposal for a seismic program implicitly reveals the product of geological and geophysical work.

[para 62.] Time submits that all records generated in respect of an application for approval for a seismic program reveal the existence of the program and, therefore, reveal geophysical work. In most, if not all, cases, the records or information will contain further and more detailed

revelations about the work, where it is being conducted, and the techniques being employed. Time concludes that all records referring to the seismic program fall within section 16(1) of the FOIP Regulation.

[para 63.] Time also submits that the rationale under section 16(1) of the FOIP Regulation for protecting records, returns or information that would reveal geological work or geophysical work is the sensitive and competitive nature of that work. Any information revealing geological or geophysical work, including exploration programs, is valuable to competitors because it is not information available to them without investing the skill, time, and expense required to conduct similar work. In many cases, a company invests significant resources in order to initially determine that a certain area even merits exploration. Therefore, mere knowledge that a company is considering an exploration program is valuable to competitors. Time submits that information relating to activities involving geological and geophysical work goes to the core of the purpose behind section 49(1) of the *Mines and Minerals Act*, which plays a key role in maintaining competition in the exploration industry that is vital to Alberta.

[para 64.] I accept the Public Body's and Time's arguments. I agree that most of the records, returns and information would reveal geological work or geophysical work.

[para 65.] Some of the information and records are those of the Public Body. Except for those records set out below, that information and those records refer to what the Public Body obtained by way of records, returns and information under the *Mines and Minerals Act*, and would reveal geological work and geophysical work.

[para 66.] I find that all the records, returns and information would reveal geological or geophysical work, except the following records:

- One page of the Public Body's notes, behind Tab 2 of the Records
- Schedule II Standard Operating Conditions Applicable to Geophysical Programs in the Province (2 pages), behind Tab 6 of the Records
- Department of Infrastructure Operating Conditions (2 pages), behind Tab 15 of the Records

**e. Are there any exceptions to section 49(1) of the *Mines and Minerals Act*?**

[para 67.] Time says that the initial wording of section 49(1) of the *Mines and Minerals Act*, "Except as provided under the regulations...",

provides for exceptions to section 49(1) in the regulations to the *Mines and Minerals Act*.

[para 68.] Time points out exceptions contained in section 42 of the *Metallic and Industrial Minerals Regulation*, Alta. Reg. 213/98, and section 26 of the *Mines and Minerals Administration Regulation*. Time says that those provisions are not applicable in this case. I agree. There is no evidence before me of any exceptions to section 49(1) of the *Mines and Minerals Act* that are applicable to the Applicant.

**f. Is the Applicant a person legally entitled to the record, return or information?**

[para 69.] Section 49(1) of the *Mines and Minerals Act* permits disclosure of information to a person legally entitled to that information, or permits a person legally entitled to a record, return or information to have access, as provided by the regulations.

[para 70.] The relevant portions of section 26 of the *Mines and Minerals Administration Regulation* read:

*26(1) The Minister may make available any records, returns or other information obtained under the Act, the regulations or an agreement*

*(a) to any person for the purpose of enforcing a law of Canada or a province, or*

*(b) to a person employed in or acting on behalf of the Department for the purpose of administering any enactment under the administration of the Minister or evaluating, formulating or administering a policy or program of the Department.*

...

*(4) A person employed or engaged in the administration of the Act may communicate, disclose or make available records, returns or other information received in respect of an agreement pursuant to the Act, the regulation or the agreement to*

*(a) the person from whom the record, return or other information was obtained, or*

*(b) to a person who has the consent in writing of the person from whom the record, return or other information was obtained.*

[para 71.] In my view, the Applicant does not meet any of the requirements set out in section 26(1) or (4) of the *Mines and Minerals Administration Regulation*. Therefore, the Applicant is not a person legally entitled to disclosure of information, and is not a person legally entitled to access to a record, return or information under the *Mines and Minerals Act*.

### **g. Conclusion**

[para 72.] Except for the records set out above, I find that the records, returns and information fall within section 49(1) of the *Mines and Minerals Act*, as limited by section 16(1) of the FOIP Regulation. Section 16(1) of the FOIP Regulation expressly provides that section 49(1) of the *Mines and Minerals Act*, as limited by section 16(1) of the FOIP Regulation, prevails despite the FOIP Act.

### **2. Is there an inconsistency or conflict between the FOIP Act and section 49(1) of the *Mines and Minerals Act*, as limited by section 16(1) of the FOIP Regulation?**

[para 73.] Having found that most of the records, returns and information fall within section 49(1) of the *Mines and Minerals Act*, as limited by section 16(1) of the FOIP Regulation, I must now consider whether there is an inconsistency or conflict between the FOIP Act and section 49(1) of the *Mines and Minerals Act*, as limited by section 16(1) of the FOIP Regulation.

[para 74.] In Order 99-034, I said that the terms “inconsistent” or “in conflict with” refer to a situation where two legislative enactments cannot stand together, that is, compliance with one law involves breach of the other: see *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4<sup>th</sup>) 1 (S.C.C.); *Imperial Investments Ltd. v. Saint John (City)* (1993), 106 D.L.R. (4<sup>th</sup>) 585 (N.B. C.A.).

[para 75.] Section 6(1) of the FOIP Act gives an applicant a right of access to any record in the custody or under the control of a public body. Section 6(2) of the FOIP Act says that the right of access does not extend to information excepted from disclosure under the FOIP Act. In summary, these access provisions of the FOIP Act allow a right of access, subject to limited exceptions.



[para 76.] I find that section 49(1) of the *Mines and Minerals Act*, as limited by section 16(1) of the FOIP Regulation, does not permit disclosure or access except to a person legally entitled, as provided by the regulations under the *Mines and Minerals Act*. It is evident that the *Mines and Minerals Act* sets up its own scheme for disclosure and access in section 26 of the *Mines and Minerals Administration Regulation*. It is also evident that the Applicant is not one of the persons legally entitled to disclosure or access under section 26.

[para 77.] Consequently, I find that the access provisions of the FOIP Act are inconsistent or in conflict with the disclosure and access provisions contained in section 49(1) of the *Mines and Minerals Act*, as set out in section 26 of the *Mines and Minerals Administration Regulation*.

### **3. Conclusion under section 5(2) of the FOIP Act and section 16(1) of the FOIP Regulation**

[para 78.] Except for those Records set out below, I find that section 5(2) of the FOIP Act and section 16(1) of the FOIP Regulation apply to the Records. Consequently, I do not have jurisdiction over those Records. The Applicant cannot get access to those Records under the FOIP Act.

[para 79.] I find that section 5(2) of the FOIP Act and section 16(1) of the FOIP Regulation do not apply to the following Records:

- One page of the Public Body's notes, behind Tab 2 of the Records
- Schedule II Standard Operating Conditions Applicable to Geophysical Programs in the Province (2 pages), behind Tab 6 of the Records
- Department of Infrastructure Operating Conditions (2 pages), behind Tab 15 of the Records

[para 80.] I have jurisdiction over those Records. I now leave it to the Public Body to process the Applicant's access request for those Records.

[para 81.] The Public Body says that it is looking to review the *Mines and Minerals Act* to include a clause that would allow exploration information to be released to the public after two years.

### **ISSUE B: Does section 31 of the FOIP Act (disclosure in the public interest) require the Public Body to disclose the Records?**

[para 82.] The Applicant argues that section 31 of the FOIP Act applies to require that I consider whether the Records should be disclosed in the

public interest, regardless of the interpretation I give to section 16(1) of the FOIP Regulation. In other words, the Applicant would have me consider the public interest under section 31 even if I decide that I do not have jurisdiction over the Records. The Applicant believes that the wording of section 31(2) gives me this authority.

[para 83.] Section 31(2) reads:

*31(2) Subsection (1) applies despite any other provision of this Act.*

[para 84.] I do not agree with the Applicant's interpretation of section 31(2). The question of my jurisdiction is a fundamental one that goes to whether I can apply the Act. If, as here, I do not have jurisdiction, I cannot apply the Act, and that includes section 31.

[para 85.] Consequently, since I do not have jurisdiction over most of the Records, I cannot consider whether section 31 applies to those Records.

[para 86.] As to the remaining Records over which I have jurisdiction, the Applicant's arguments under section 31 are premature. I may consider section 31 only if, after the Public Body has processed the Applicant's request for those Records, the Public Body refuses access, and then only if the Applicant subsequently asks for a review and raises the section 31 issue.

## **V. ORDER**

[para 87.] Except for those Records set out below, I find that section 5(2) of the FOIP Act and section 16(1) of the FOIP Regulation apply to the Records. Consequently, I do not have jurisdiction over those Records. The Applicant cannot get access to those Records under the FOIP Act.

[para 88.] I find that section 5(2) of the FOIP Act and section 16(1) of the FOIP Regulation do not apply to the following Records:

- One page of the Public Body's notes, behind Tab 2 of the Records
- Schedule II Standard Operating Conditions Applicable to Geophysical Programs in the Province (2 pages), behind Tab 6 of the Records
- Department of Infrastructure Operating Conditions (2 pages), behind Tab 15 of the Records

[para 89.] I have jurisdiction over those Records. I now leave it to the Public Body to process the Applicant's access request for those Records.

[para 90.] Since I do not have jurisdiction over most of the Records, I cannot consider whether section 31 applies to those Records.

[para 91.] As to the remaining Records over which I have jurisdiction, the Applicant's arguments under section 31 are premature. I may consider section 31 only if, after the Public Body has processed the Applicant's request for those Records, the Public Body refuses access, and then only if the Applicant subsequently asks for a review and raises the section 31 issue.

Robert C. Clark  
Information and Privacy Commissioner