Office of the Information Commissioner of Canada
Commissariat à l'information du Canada

The Duty to Assist: *A Comparative Study*

Legal Services

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SUMMARY OF THE DUTY TO ASSIST

Enclosed is a detailed comparative research on the statutory Duty to Assist in Federal and Provincial jurisdictions, as well as Australia, New Zealand, the United Kingdom and the United States. A chart outlining the essential components of the duty in the different jurisdictions is also included for convenience.

It is well established that these statutes provide for a positive duty on public bodies to assist applicants. This obligation continues throughout the request process and will vary according to the circumstances of each request. Further, this obligation is in addition to others imposed by legislation in order to fulfil the formal access process.

The duty can be summarized as a duty to make every reasonable effort to identify and locate records responsive to a request, and to provide the applicant with information regarding the processing of the request in a timely manner.

Every reasonable effort means the effort that a fair and rational person would expect to be made and would find acceptable. An institution's effort is expected to be thorough and comprehensive.

In addition, institutions need to consider releasing information outside the formal access process. It is important to verify whether or not the information needs of the applicant can be satisfied by providing records that are already publicly available or that can be made available through a process of routine disclosure.

There are 3 principal aspects of the duty:

1) Interpretation of the Request / Contacting the Applicant

The purpose and spirit of freedom of information legislation is best served when institutions adopt a liberal interpretation of a request. If there is some ambiguity, the spirit of the FOI legislation compels the institution to resolve this ambiguity in favour of the applicant.

Since broad requests often result in lack of knowledge of the institution's mandate and activities, institutions should assist applicants with their requests. Institutions should contact applicants to discuss their application and if the request does not sufficiently describe the record sought, the institution shall inform the applicant and offer assistance. If an institution fails to discharge its responsibility to clarify a request, it cannot rely on a narrow interpretation of the scope of the request on appeal.

2) Search of Responsive Records
An institution's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. However, it does not impose a standard of perfection.

There are two components to an adequate search: the institution must make every reasonable effort to search for the actual record requested, and it must inform the applicant in a timely fashion of what it has done. There is a threshold of reasonableness in conducting adequate searches for records; the search must be thorough and comprehensive.

The institutions must search all locations, including off-site locations, where records might be found and it may have to search for responsive records under its control that may be in the hands of a third party.

The evidence required will be of the search strategy and how the search was conducted in the particular circumstances

Further, it is the responsibility of the Commissioner to assure that a public body has done a reasonable search to identify documents.

3) Responding to the Applicant
Institutions must respond openly, accurately and completely. Failure to respond within the legislated timeframe is a breach of the duty. The reasons for that failure will not avoid this conclusion.

Institutions should try to respond to requests as quickly as possible, rather than leaving them until close to the expiration of the time limit. It was determined that the time limit is not intended to set the normal period within which to respond to a request, but should be the absolute maximum.

In addition to the three principal aspects of the duty outlined below, the following considerations should be taken into account:

- The failure to fulfill the duty may give rise to waiving fees on grounds of fairness.

- Institutions should maintain documentation systems to record all deliberations and decisions regarding the processing of requests.

- Often, there is no remedy other than to order another search when that part of the duty was not met.

- While generally a person's need for information is not relevant in the context of an appeal, in some cases it provides some insight into the manner in which the appellant believes his request should be interpreted.

- An institution should not disclose the identity of the applicant to anyone who does not have a legitimate need to know.

- It is improper to treat applicants differently depending on who they are or what organization they may represent.

- Where documents are disclosed in response to an FOI request, there is no restriction on the use of the information by the applicant.

It should be noted that, in the United Kingdom, the Information Tribunal held that the Commissioner has a duty to consider if the duty to provide advice and assistance has been complied with, even when an applicant has not raised the matter.

DUTY TO ASSIST

*Note: this Chart contains a summary of the original document *The Duty to Assist: A Comparative Study*.

Relevant Provisions	Components of the Duty
Canada	
Federal *Access to Information Act*	
4. (2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.	
Provinces	
Alberta *Freedom of Information and Protection of Privacy Act*	
7(2) A request must be in writing and must provide enough detail to enable the public body to identify the record. **10(1)** The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely. (…)	**General** Obligation continues throughout the request process. A reasonable effort is an effort which a fair and rational person would expect to be done, or would find acceptable. - Will vary according to the circumstances of each request and requires the exercise of judgment. - Duty engaged when access request is received. - Must inform the applicant if there is more than one procedure for obtaining access to information (publicly available or through routine disclosure). **Interpretation of the Request / Contacting the Applicant** - May involve assisting the applicant in defining the subject of the request, the specific kinds of records of interest, and the time period. - If the request is not clear, the applicant should be contacted. - If an applicant changes the scope of the request, it should be documented. - Must exercise care in questioning an applicant about the nature of his or her interest in a particular subject; should not be seen as dissuading the applicant. - Duty to engage in the clarification process up to the point when the fee estimate is provided. - For very broad requests: the objective is to narrow the request while still meeting the applicant's information needs. - There is no provision in the Act for putting a request on hold pending clarification.

Relevant Provisions	Components of the Duty
	Search - Must make a reasonable effort to identify and locate records responsive to the request. - Two components: must make every reasonable effort to search for the actual record requested and must inform the applicant in a timely fashion of what has been done. - Must search all locations, including off-site locations, where records might be found; not required to search for records in the custody or under the control of other public bodies; may have to search for responsive records under its control that may be in the hands of a third party. - Evidence: of the search strategy: how the search was conducted in the particular circumstances. **Responding to the Applicant** - Must respond openly, accurately and completely. - Each public body must respond to the request on its own behalf when more than one public body has received the same request from the same applicant. - Copies of records must be legible. - The public body should clearly identify the basis on which the record was severed. - If the public body cannot locate records responsive to the request, it should inform the applicant. - May disclose available records as soon as possible, rather than waiting until all records are ready for disclosure. - Does not require to answer questions about the record or to provide medical or legal interpretations of the information in records, or provide information to clarify the information in the records. **Other Considerations** - May take into consideration that a sophisticated applicant, such as a professional researcher, may not require the same level of assistance as another kind of applicant. - Should maintain documentation systems to record all deliberations and decisions regarding the processing of requests. - The failure to fulfill the duty is one of the circumstances where fees may be waived on grounds of fairness. - It is generally not necessary to ask why an applicant is asking for particular records. - It is not possible to attach conditions to the disclosure of records or control the use of those records after disclosure.

Relevant Provisions	Components of the Duty
British Columbia *Freedom of Information and Protection of Privacy Act*	
5. (1) To obtain access to a record, the applicant must make a written request that (a) provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought, **6(1)** The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.	**General** - Shall make every effort to assist applicants in all reasonable ways in responding to requests. - Upon receiving a request under the Act, the public body shall cease all final disposition actions pertaining to the records requested, including destruction or transfer activities. - Not required to create a new record in response to a request, except in accordance with s. 6(2). - Must work with applicants in a partnership to process every request. - In some cases, the applicant's information needs can be satisfied by releasing routinely available records. **Interpretation of the Request / Contacting the Applicant** - If it is agreed to change the original scope of a request, it should be documented. - Should assist applicants in defining their requests and in making them as specific as possible. **Search** - Does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. - Threshold of reasonableness in conducting adequate searches for records; the search must be thorough and comprehensive. - The burden of proof is on the public body to show that it has conducted an adequate search. - Evidence should describe all the potential sources of records; identify those it searched and identify any sources that it did not check (with reasons for not doing so); indicate how the searches were done and how much time its staff spent searching for the records. - Evidence: Affidavits that attest to the institution general file-keeping and management practice and description of the institution search efforts. **Responding to the Applicant** - Information that cannot be understood on the face of the records is explained; is not required to provide a technical explanation, nor an interpretation of medical or psychological personal information where it does not have professional staff competent to do so. - If a record contains illegible handwriting, the public body should transcribe this portion of the record.

Relevant Provisions	Components of the Duty
	- Failure to respond within the legislated timeframe is a breach of the duty. The reasons for that failure will not avoid this conclusion. **Other Considerations** - Duty to be met when receive request, but subsequent actions may remedy the breach. - Failure of an applicant to be reasonable may have an impact. - Often, there is no remedy other than to order another search when that part of the duty was not met.
Manitoba *Freedom of Information and Protection of Privacy Act*	
8. (2) A request must be in the prescribed form and must provide enough detail to enable an experienced officer or employee of the public body to identify the record. **9.** The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.	**General** - Should advise the individual how the information may be obtained without making a formal request. - Is additional to other obligations that the legislation requires entities to follow in order to fulfill the formal access process, the principle should underlie all actions under the legislation. - Should always be considered and be applied in a manner that is reasonable on a case-by-case basis and throughout the application process. **Interpretation of the Request / Contacting the Applicant** - Explaining the access and Ombudsman complaint processes. - Clarifying incomplete, incomprehensible or broad requests. - For broad requests: the objective is to narrow the request while still meeting the requester's access needs and not dissuading the requester. - The time for responding does not stop when an entity is clarifying a request with a requester. **Search** - Communicating with the requester may assist. - Must make a reasonable effort to identify and locate records responsive to the request. - An adequate search would include a strategy for seeking the requested records. - Should search all reasonable locations, including off-site locations, where the requested records might be found, includes records in the entity's "control", if not possession. - Explain the search to the requester, if asked, and to the Ombudsman if this is the subject of a complaint.

Relevant Provisions	Components of the Duty
	Responding to the Applicant - Creating a record in the form requested if it would be simpler or less costly for the entity to do so. - Explaining the record: may give any additional information believed necessary to explain the record. **Other Considerations** - The reason for the requester seeking the record(s) should not be probed. - The duty to assist is also fulfilled when considering discretionary actions set out under the legislation and applying them when appropriate. - Considering requests for a fee waiver is part of the duty: the institution should provide the requester adequate opportunity to provide evidence in support, be clear about the criteria used, and, if all or part of the fees are not waived, explain why that decision was made. - Assisting in the making of verbal requests.
New Brunswick *Right to Information Act*	
3(2) The application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document. 3(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.	- If the request is too broad, the applicant should be more specific. - A further search can be ordered by the Court if there were more documents relevant to the request.

Relevant Provisions	Components of the Duty
Newfoundland and Labrador *Access to Information and Protection of Privacy Act*	
8. (2) A request shall be in the form set by the minister responsible for this Act and shall provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify the record containing the information. **9**. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.	**General** - Statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. - The duty to assist under British Columbia's legislation is equivalent in all material respects to that found in this province. - Determination made on a fact-specific basis. - "Reasonableness" rather than "perfection" is the standard by which a public body should be judged in this regard. - Should notify the applicant and advise of the process if the information is available through routine channels. **Interpretation of the Request / Contacting the Applicant** - Meet with the applicant to try to determine his needs. - Forward an acknowledgement to the applicant within the 30 day time period that the request was received. - Adequately address each part of the request. - Respond to the points and questions raised by the applicant. - The applicant must provide enough details to enable an experienced employee of the public body to identify the record. - The Act enables the head of the public body to extend the time for responding to a request for up to an additional 30 days if the applicant does not give enough details to enable the public body to identify a requested record. **Search** *(use Ontario criteria)* - Although an applicant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the applicant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist. - Must be conducted by knowledgeable staff in locations where the records in question might reasonably be located. - Does not require the institution to prove with absolute certainty that records or further records do not exist. - Must provide sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. - Personnel should maintain a record of all search terms and parameters used. - Involves communication with applicants to ensure that electronic searches are clearly defined and reflect the applicant's intention as closely as possible. - Onus on the public body to show that a reasonable search has taken place.

Relevant Provisions	Components of the Duty
	Responding to the Applicant - Respond quickly, accurately and fully to applicants and to help them to as reasonable an extent as possible. - Respond within legislated timeframe. - At a minimum, expect some level of notification, explanation and confirmation when denying an applicant access to records. - May create a record in the form requested; to do so would be simpler or less costly. - Should try to respond to requests as quickly as possible rather than leaving them until close to the time limit. **Other Considerations** - The duty applies only to the applicant for the release of information. It does not apply to a third party.
Nova Scotia *Freedom of Information and Protection of Privacy Act*	
7 (1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; and (…)	**General** - The Act imposes a positive duty on public bodies to assist applicants. - Should make every attempt to meet the purpose of the Act found in section 2 to ensure they are fully accountable to the public to facilitate informed public participation in policy formulation. **Interpretation of the Request / Contacting the Applicant** - A public body is expected to go beyond a narrow interpretation of an application. The Act expected the public body to provide an applicant with the same document provided to another. - With almost all applications it is incumbent on public bodies to contact applicants to discuss their applications. - Should avoid technical interpretations of an Act that is designed to promote openness and accountability. **Search** - Requires a public body to do an adequate search for documents which respond to an application. - It is the responsibility of the Review Officer to assure that a public body has done a reasonable search to identify documents. - The Department must provide the Review Officer with sufficient evidence to show it has made an adequate search and the applicant who is not in a position to know which documents have not been identified, must provide the Review Officer with a reasonable basis for concluding that a specific document may, in fact, exist.

Relevant Provisions	Components of the Duty
	Responding to the Applicant - A reasonable effort to assist an applicant should include telling him where the published material can be found. - It is incumbent on the institution to inform the applicant of how many records are relevant to the request. An applicant making a Request for Review should know how many records are involved. - A public body that cannot provide the majority of the records requested should be prepared to offer some alternatives to the applicant. **Other Considerations** - In the event of a third party consultation process, the public body shall not disclose the name of the applicant to the third party without the consent of the applicant.
Ontario *Freedom of Information and Protection of Privacy Act*	
24. (1) A person seeking access to a record shall, (…) (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and (…) (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).	**General** - Imposes an obligation on the institution to offer assistance. **Interpretation of the Request / Contacting the Applicant** - Requirement for Requesters: shall provide sufficient details to enable an experienced government employee to identify the record. - Requirement for Institutions: if the request does not sufficiently describe the record sought, the institution shall inform the applicant and offer assistance. - Speaking with a requester offers an invaluable opportunity to provide explanations, answer questions and resolve issues on the spot. - If there is some ambiguity, the spirit of the Act compels to resolve this ambiguity in favour of the applicant. - The purpose and spirit of freedom of information legislation is best served when institutions adopt a liberal interpretation of a request. - If an institution fails to discharge its responsibility to clarify a request, it cannot rely on a narrow interpretation of the scope of the request on appeal. - "Responsiveness": anything that is reasonably related to the request. - For requests in the form of questions: may require the creation of a record, there is no obligation to do so. - Until the request is “clarified”, the 30-day time limit for responding does not begin. **Search** - May in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the applicant.

Relevant Provisions	Components of the Duty
	- Where a requester provides sufficient details about the records that he is seeking and the institution indicates that records or further records do not exist, it is the Commissioner's responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The Act does not require the institution to prove with absolute certainty that records or further records do not exist. - The Commissioner has the responsibility to determine what questions are objectively relevant in assessing the adequacy of the search. - An institution should provide the Commissioner with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request. - Evidence of details on the record keeping practices, areas searched, the files reviewed, and the employee who conducted the search will be required. - An institution should be prepared to verify, in an affidavit, the steps taken to locate the records. **Other Considerations** - While generally a person's need for information is not relevant in the context of an appeal, in some cases it provides some insight into the manner the applicant believes his request should be interpreted.
Prince Edward Island *Freedom of Information and Protection of Privacy Act*	
7. (2) A request shall be in writing and shall provide enough detail to enable the public body to identify the record. (4) Where the head of a public body contacts an applicant in writing respecting the applicant's request including (a) seeking further information from the applicant that is necessary to process the request, or	**General** - This is an important duty and should be kept in mind throughout the request process. - A public body must make every reasonable effort to identify and locate records responsive to a request, and provide the applicant with information regarding the processing of the request in a timely manner. - Every reasonable effort means the effort that a fair and rational person would expect to be made and would find acceptable. A public body's effort is expected to be thorough and comprehensive. - Release of information outside FOIPP should be considered. **Interpretation of the Request / Contacting the Applicant** - Should acknowledge receipt of a request. - If processing cannot begin immediately, an effort should be made to contact the applicant to resolve any problems quickly. - If a request does not sufficiently describe the records sought, should advise the applicant and offer assistance in reformulating the request. - Narrowing a request: the objective is to narrow the request while still meeting the applicant's needs.
8. (1) The head of a public body shall make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.	

Relevant Provisions	Components of the Duty
	- Changing the scope: should document the change and send a notice to the applicant. - If the request is incomplete and further information is required from the applicant should seek this information immediately. - The requirement to clarify the request does not change the date on which the time period commences, but may necessitate a time limit extension. **Search** - Scope of search: the Act applies to all records in the custody or under the control of the public body. All types of records responsive to the request, including electronic records, must be located and retrieved. - Will have to demonstrate that it made a reasonable search of all repositories where records relevant to the subject of the request might be located. - The amount of time searching for the records is not determinative of the adequacy of the search. **Responding to the Applicant** - Must respond to a request without undue delay, and in any event, make every reasonable effort to respond to a request no later than 30 days. **Impact on Fees** - For the exercise of discretion to waive fees, fulfillment of the duty is to be considered. **Other Considerations** - Onus is on the Public Body
Quebec *An Act respecting access to documents held by public bodies and the protection of personal information*	
42. To be receivable, a request for access to a document must be sufficiently precise to allow the document to be located. If the request is not sufficiently precise or if a person requires it, the person in charge must assist in identifying the document likely to contain the information sought. 84.1. Where a health services or social services institution referred to in the second paragraph of section 7, the Commission de la santé et de la sécurité du travail, the Société de l'assurance automobile du Québec, the Régie des rentes du Québec or a professional order	**General** - The Act does not require institutions to create records. - Institutions have to file their documents in a manner that will allow them to retrieve the records. **Interpretation of the Request / Contacting the Applicant** - Use an objective criteria to evaluate the request. - The 20 day delay will not start until the request is specific enough. - It is the power of the Commission and not the person in charge to conclude if the request is receivable. - The request needs to be specific enough for the institution to be able to locate the records; but the requester does not have to use the specific titles of documents.

Relevant Provisions	Components of the Duty
provides a person with personal information of a medical or social nature which concerns him, it shall, upon the request of the person, provide him with the assistance of a professional qualified to help him understand the information.	**Search** - When poor records management of the institution is the reason why it is difficult to find records, section 42 cannot be used. - Section 84.1: cannot be used when the requester understands the information in the file.
Saskatchewan *Freedom of Information and Protection of Privacy Act*	
6(1) An applicant shall: (a) make the application in the prescribed form to the government institution in which the record containing the information is kept; and (b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record. **(2)** Subject to subsection (4) and subsection 11(3), an application is deemed to be made when the application is received by the government institution to which it is directed. **(3)** Where the head is unable to identify the record requested, the head shall advise the applicant, and shall invite the applicant to supply additional details that might lead to identification of the record. **(4)** Where additional details are invited to be supplied pursuant to subsection (3), the application is deemed to be made when the record is identified.	**General** - There is not explicit duty in the *Act*, however, the OIPC takes the position that there is an implied duty on the part of government institutions to take reasonable steps to ensure that they respond to access requests openly, accurately, and completely. - Should contact the applicant to see if the request can be accommodated informally outside of the Act. **Interpretation of the Request / Contacting the Applicant** - Engage in informal discussion with an applicant to clarify an access request and ensure that there is clarity on the nature of the records sought by the applicant. - If an access request is broad in scope and would involve voluminous material, the Commissioner expects some discussion between the applicant and the institution to see if some kind of parameters could be identified. **Search** - Summary, condensation, or secondary document is not a satisfactory substitute for source documents. - Should contact appropriate persons who are likely to have knowledge. - Should record details of the search for responsive records. - Should consider all responsive records under the control of an institution (includes records in possession of agents and consultants). - Search efforts should be documented. **Responding to the Applicant** - Does not include an obligation to create records which do not currently exist, however, there may be some unusual circumstances that might make it appropriate.

Relevant Provisions	Components of the Duty
	- Institution should accurately identify the specific exemptions that it is relying upon in denying access. - Should provide accurate contact information for the Commissioner's office. - Should advise the applicant if another institution might have responsive records. **Fee Waiver** - Should contact the applicant and advise as to what information would be required to be able to assess the fee waiver request. **Other Considerations** - The burden of proof lies with the institution. - No right to demand the applicant's reasons for the request, but this doesn't prevent an applicant from volunteering a reason, nor does it prevent the reason underlying a request from being discussed between an applicant and a FOIP Coordinator. - Can suspend processing of the access request until the applicant supplies additional details that might lead to identification of the record. - Should not disclose the identity of the applicant to anyone who does not have a legitimate need to know. - It is improper to treat applicants differently depending on who they are or what organization they may represent. - It would also be improper to broadcast the identity of an applicant throughout a government institution or to disclose the identity outside of that particular department.
Northwest Territories *Access to Information and Protection of Privacy Act*	
6. (2) The request must provide enough detail to enable the public body to identify the record	
7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.	
Nunavut *Access to Information and Protection of Privacy Act*	
6. (2) The request must provide enough detail to enable the public body to identify the record	

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<tr><td>7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.</td><td></td></tr>
<tr><td colspan="2">Yukon
Access to Information and Protection of Privacy Act</td></tr>
<tr><td>6. (2) A request for access to a record may be made orally or in writing verified by the signature or mark of the applicant and must provide enough detail to identify the record. If the request is made orally the person who receives it must make a written record of the request and the request is not complete and does not have to be dealt with until its written form is verified by the signature or mark of the applicant.

7. The records manager must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately, and completely.

10. The public body that has the record in its custody or control must make every reasonable effort to assist the records manager and enable the records manager to respond to each applicant openly, accurately and completely.</td><td>General
- The procedures for handling access requests must include a transition from the “information” to a “record” that will be responsive to the request. The ATIPP Act imposes a duty on the applicant, the archivist and the public body to make this transition.

Interpretation of the Request / Contacting the Applicant
- Should establish contact with the applicant to better understand what specific records will satisfy the applicant’s request.
- The ATIPP Act places a duty on the applicant to provide sufficient detail to identify the record.

Search
- A duty is imposed on the Archivist and the public body to assist the applicant, and to carry out a diligent search for the responsive records.

Responding to the Applicant
- A response to the applicant must be open, accurate and complete.
- A public body cannot rely on another public body response for similar records for the same applicant, it needs to developed its own search for, and a proper examination of, any responsive records.</td></tr>
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Relevant Provisions	Components of the Duty
Other Countries	
Australia *Freedom of Information Act 1982* (Cth.).	
15 (2) The request must: (…) (b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and (…) (3) Where a person: (a) wishes to make a request to an agency; or (b) has made to an agency a request that does not comply with this section; it is the duty of the agency to take reasonable steps to assist the person to make the request in a manner that complies with this section. (…)	**General** - The assistance should be given in an equitable, even-handed way without regard to the public servant's view of the quality of the application or of its likely outcome. - Officers handling requests should also have in mind the objects of the FOI Act and that it is the express intention of the Parliament that any discretions conferred by the Act should be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information. **Interpretation of the Request / Contacting the Applicant** - A valid request should provide sufficient information to enable the agency to identify the requested documents, a precise description is not necessary. - A request must be read fairly and extends to any documents which might reasonably be taken to be comprised within the description used by the applicant. - A request cannot be refused on the grounds that it does not sufficiently identify the documents sought, unless the applicant is given a reasonable opportunity to provide a more adequate identification. - An applicant must be assisted in completing a request if he or she is uncertain on how to identify the documents sought. - If the applicant ought to make the request to another agency, he or she must be helped to direct the request to that other agency. - Where a request is very broad and may relate to a large number of documents, it is sensible to discuss the request with the applicant in order to clarify its terms and, where appropriate, to narrow its scope. - Any changes to the request should also be confirmed in writing. **Responding to the Applicant** - Should acknowledge its receipt as soon as practicable. - Access should be provided as soon as practicable. - The time spent by an agency, in consulting an applicant to narrow a request, is not to be taken into account in calculating the 30-day period. - When transferring a request, the applicant should be advised. - The fact that another agency has been consulted and does not wish a document to be disclosed does not absolve the agency that received the request from making its own decision on whether access to the document should be given.

Relevant Provisions	Components of the Duty
	Other Considerations - At the consultation stage, it is unnecessary and inadvisable to disclose the name of the applicant, although it may become necessary to do so at a later stage. - Where documents are disclosed in response to a FOI request, there is no restriction under the FOI Act on what the applicant may do with them. <u>Applicant's identity or interest in seeking access to documents</u> - The applicant's identity, or any particular use he or she will make of the documents, makes no difference on the decision whether to grant access to documents, subject to limited exceptions.
New Zeland *Official Information Act 1982* (N.Z.)	
12. (…) (2) The official information requested shall be specified with due particularity in the request.	**General** - Having regards to the purposes of the Act and to the principle of availability of information, it is incumbent on the recipient of a request to take all reasonable steps to provide assistance.
13. It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who— (a) Wishes to make a request in accordance with section 12 of this Act; or (b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or (c) Has not made his request to the appropriate Department or Minister of the Crown or organisation or local authority,— to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation or local authority.	**Interpretation of the Request / Contacting the Applicant** - The request should be considered carefully in order to identify the specific information that has been requested. - A request cannot be refused simply because the agency considers it to be so vague that it is not reasonably possible to determine what information is being requested. - The aim of the assistance should be to enable the requester to refine the request so that it is specific enough to enable the information sought to be readily identified. - The fact that a request is for a large amount of information does not of itself mean that the request lacks due particularity. - The OIA does not bar a requester from seeking a large amount of information or from defining the parameters of a particular request in broad terms. **Responding to the Applicant** - The time limit of 20 days is not the normal period within which to respond to a request, but should be the absolute maximum. - Subject to certain exceptions, information should be released to the requester in the way preferred by the requester. - While it is not mandatory for an agency to provide grounds in support of the statutory reasons for refusal, a requester does have the right to ask for these.

Relevant Provisions	Components of the Duty

	Other Considerations
	- Section 18(f) is a provision of last resort; before deciding whether it provides grounds to refuse a request, agencies must first consider:
	  o Imposing a charge for the supply of the information at issue or extending the time frame.
	  o Consulting with the requester would assist the requester to make their request in a manner which would not involve substantial collation and research.
	- The conduct of the requester and the purpose of the request may well be relevant to the question of whether a request by that person is "frivolous or vexatious".

United Kingdom *Freedom of Information Act 2000* (U.K)	
8.(1) In this Act any reference to a "request for information" is a reference to such a request which— (…) (c) describes the information requested. **16. (1)** It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it. **(2)** Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.	**General** - Conformity with the provisions of the Code concerning advice and assistance will ensure compliance with section 16. However, in terms of best practice, it may be possible to provide advice and assistance that exceeds the requirements of the Code. - The provision of advice and assistance is a wide-ranging duty–it applies both to prospective and actual applicants for information – and has the potential to be relevant to most, if not all, stages of the request process under the Act. - Should adopt a flexible approach and treat each application, or potential application, on a case by case basis. - The aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. - Should consider whether there is any information that may be of interest to the applicant that is available free of charge. - Public authorities should consider what information can be made available on a proactive basis. - There is nothing to prevent an authority volunteering advice and assistance; an applicant does not have to ask for it. **Interpretation of the Request / Contacting the Applicant** - Assist an applicant to focus his or her request. - Where an authority is not obliged to comply with a request for information because the cost of complying would exceed the "appropriate limit", the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. - If there was any doubt on the part of the institution as to what information the applicant is seeking, it has an obligation to assist the applicant to clarify the request - When faced with an unclear request, institutions should not place their own definition upon the information being requested.

Relevant Provisions	Components of the Duty
	Search - Should check relevant records, for example, indexes, files and directories. - Should consult staff as appropriate. **Responding to the Applicant** - Should keep an applicant advised of progress of the request. - Should advise a potential applicant of his or her rights under the Act. - Should advise an applicant if information is available elsewhere, and explain how to access it. - There is no duty to create information, may provide additional information in response to a request, for example, to put the information requested into context. - Should consider whether the request could be transferred to a more appropriate public authority. **Other Considerations** - Other Acts of Parliament may be relevant to the way in which authorities provide advice and assistance to applicants or potential applicants (e.g. the *Disability Discrimination Act 1995*). - An authority is not expected to provide assistance to applicants whose requests are vexatious. - The provision of advice and assistance does not normally affect the 20 working days deadline; if further information is needed in order to identify the information requested, the authority is not obliged to comply with the request until it is received. - It is good practice for a public authority to keep a record of the advice and assistance that has been provided. <u>Purpose of the applicant</u> - Although it is true that in general an applicant's reasons should not be material in the manner in which a public authority responds to the request; if the Tribunal feels that it should perhaps be clarified if a request is ambiguous, then the public authority should invariably seek not only further details of the request but also seriously consider formulating its own motion questions designed to elicit the true and precise nature of the request. <u>Duty of Commissioner</u> - The Commissioner has a duty to consider if the duty to provide advice and assistance has been complied with, even if the applicant does not mention it.

Relevant Provisions	Components of the Duty
United States *Freedom of Information Act*, 5 U.S.C. § 552 (1966).	
(a) Each agency shall make available to the public information as follows: (3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.	**General** In responding to a FOIA request, agencies shall respond courteously and appropriately. Agencies shall process requests under the FOIA in an efficient and appropriate manner. **Interpretation of the Request / Contacting the Applicant** Although applicants do not have to give a record's title, they should identify the records as specifically as possible in order to increase the likelihood that the agency will be able to locate them. - Should use sound administrative discretion when determining the nature of a request. - The fact that a request is very broad or "burdensome" does not entitle an agency to deny that request on the basis that it does not "reasonably describe" the records sought. The key factor is the ability of an agency's staff to reasonably ascertain exactly which records are being requested and then locate them. - Should carefully consider the nature of each request and give reasonable import to its terms and full content overall, even if the request is not a model of clarity. - Not required to answer questions posed as requests. **Search** - Agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records. - The adequacy of an agency's search is determined by a test of "reasonableness", which may vary from case to case, the reasonableness will depend on how the agency conducted its search in light of the scope of the request and the requester's description of the records sought. - An agency's inability to locate every single responsive record does not undermine an otherwise reasonable search. - Further, agencies that maintain field offices in various locations ordinarily are not obligated to search offices other than those to which the request has been directed. - To prevail in a FOIA action, the agency must show that it made a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested. - To prove the adequacy of its search, an agency relies upon its declarations – which should be relatively detailed, nonconclusory, and submitted in good faith – with declarations that identify the types of files that an agency maintains, and states the search terms.

Relevant Provisions	Components of the Duty
	- While the initial burden certainly rests with an agency to demonstrate the adequacy of its search, once that obligation is satisfied, the agency's position can be rebutted only by showing that the agency's search was not made in good faith. **Responding to the Applicant** - Does not require the agencies to create records. - Agencies need not add explanatory materials to any records disclosed. - Shall make its disclosable records promptly available upon request. - There is no mechanism under FOIA for a protective order allowing only the requester to see the requested information or for proscribing its general dissemination. - Agencies should honor a requester's specific choice among existing forms of a requested record and to make "reasonable efforts" to disclose a record in a different form or format when requested. - Must provide the requester with certain information: should include an estimate of the amount of denied information; the reasons for denial; the right to appeal; and of the name and title of each person responsible for the denial. - Should provide a requester with the "best copy available" of a record. **Other Considerations** - As a general rule, FOIA requesters are not required to state the reasons why they are making their requests. - The Supreme Court has observed that a requester's identity generally has no bearing on the merits of the request.

COMPARATIVE RESEARCH
DUTY TO ASSIST

Note: the *Guidelines / Manuals / Examples* sections contain integral quotes of pertinent sections from the actual documents.

Canada

Federal

Websites
http://www.infocom.gc.ca/ (Commissioner)
http://laws.justice.gc.ca/en (Department of Justice)
http://www.tbs-sct.gc.ca/atip-aiprp/index_e.asp (Treasury Board of Canada, Chief Information Officer Branch)

STATUTES

Access to Information Act, R.S.C. 1985, c. A-1.
Loi sur l'accès à l'information, L.R.C. 1985, c. A-1.

RELEVANT PROVISIONS

4. (2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

11. (6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.

30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints
(…)
(f) in respect of any other matter relating to requesting or obtaining access to records under this Act.

RELEVANT REGULATIONS

Access to Information Regulations, SOR/83-507.

8.1 (1) For the purposes of subsection 4(2.1) of the Act, if access to a record involves giving a copy of the record, the copy does not have to be provided in the requested format if the record does not exist in that format within the government institution and the head of the government institution considers, taking into account the factors described in subsection (3), that the conversion of the record to the requested format is unreasonable.

(2) If the head of the government institution considers that the conversion of the record to the requested format is unreasonable, the copy of the record must be provided in a format chosen by the person making the request

(a) from a format in which the record already exists within the government institution; or

(b) from a format the conversion to which the head of the government institution considers is reasonable taking into account the factors described in subsection (3).

(3) The following factors are to be taken into account in determining if the conversion to the requested format is reasonable or unreasonable:

(a) the costs to the government institution;

(b) the potential degradation of the record;

(c) if the person making the request is to be given access to only a part of a record, the facility with which the record may be severed in the format requested;

(d) the existence of the record within the government institution in another format that is useful to the person making the request;

(e) the possibility that the record can be converted to another format that is useful to the person making the request;

(f) the impact on the operations of the government institution;

(g) the availability of the required personnel, resources, technology and equipment.

GUIDELINES / MANUAL / EXAMPLES

N/A

RECOMMENDATIONS OF THE COMMISSIONER

N/A

DECISIONS OF THE COURT

N/A

Provinces

Alberta

Websites
http://www.oipc.ab.ca/home/?CFID=488325&CFTOKEN=12814372 (Commissioner)
http://foip.gov.ab.ca/index.cfm (Government)

STATUTE

Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25.

RELEVANT PROVISIONS

7(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

93(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,(…)

94(1) The Lieutenant Governor in Council may make regulations

(f) respecting standards to be observed by officers or employees of a public body in fulfilling the duty to assist applicants; *(note: there is no Regulations on this issue)*

RELEVANT REGULATIONS

Alberta Regulation 200/95 with amendments up to and including Alberta Regulation 254/2007.

3. Where a person is given access to a record, the head of the public body may require that the person be given a copy of the record, rather than the opportunity to examine it, if the head is of the opinion that

(a) providing for examination of the record would unreasonably interfere with the operations of the public body, or

(b) providing examination of the record might result in the disclosure of information that is restricted or prohibited from disclosure under section 5 of the Act or Part 1, Division 2 of the Act.

4. An applicant may make an oral request for access to a record if

(a) the applicant's ability to read or write English is limited, or

(b) the applicant has a physical disability or condition that impairs the applicant's ability to make a written request.

GUIDELINES / MANUAL / EXAMPLES

- **Guidelines and Practices: 2005 Edition, Chapter 3: Access to Records**
  (from the government website)

3.2 Receiving a FOIP Request

Duty to assist applicant (Section 10(1))
The head of a public body must make every reasonable effort to assist applicants, and to respond to each applicant openly, accurately and completely. The public body's obligations under section 10(1) continue throughout the request process.

Every reasonable effort is an effort which a fair and rational person would expect to be done, or would find acceptable (IPC Order 98-002).

The Information and Privacy Commissioner has provided a considerable amount of guidance on the duty to assist in Orders issued on a broad range of different cases. These Orders relate to situations that vary widely with respect to the type of applicant, the records involved, and the nature and context of the request. The public body's assistance to the applicant was often just one issue among many to be decided by the Commissioner. How a public body fulfils its duty to assist will vary according to the circumstances of each request, and requires the exercise of judgment in each case.

The duty to assist applies to a request by an applicant under the section 7 of the Act. This duty also applies to an applicant's request for a fee waiver under section 93(3.1).

The Act does not expressly require a public body to meet the duty to assist under section 10(1) when responding to an individual's request for a correction of personal information under section 36(1). While the Commissioner has so far not ruled on this point (see IPC Order 98-010), public bodies are advised to consider the purposes of the Act when responding to any request under the Act.

The duty to assist under section 10(1) generally arises when a public body is performing activities that are not explicitly addressed in other provisions of the Act (as are, for example, fees and time limits). The most important aspects of the duty to assist are likely to arise in the course of

providing the information necessary for an applicant to exercise his or her rights under the Act;
clarifying the request, if necessary;
performing an adequate search for records; and
responding to the applicant.

Some of these stages are discussed in detail later in this chapter. This section is concerned with the way in which the duty to assist is engaged when performing these activities. The Commissioner has said that a public body may take into consideration that a sophisticated applicant, such as a professional researcher, may not require the same level of assistance as another kind of applicant (IPC Orders 96-014 and 2000-021).

Providing information necessary for the exercise of rights under the Act
A public body's duty to assist is engaged when the public body has received an access request under section 7 of the Act. A public body has no legal obligations under section 10(1) until a prospective applicant has submitted a request (IPC Order 99-011 and IPC Investigation Report 2001-IR-004).

If there is any uncertainty as to whether a request is a request under section 7 of the Act, the public body should clarify this with the person making the request and inform the individual of the procedure for making a request under the Act (IPC Investigation Report 99-IR-004 and IPC Order 2001-013). If there is more than one procedure for obtaining access to information, a public body must inform the applicant that a dual process is in place (IPC Order 98-002).

A public body that has received a request for personal information under section 7 of the Act will not meet its duty to assist under section 10(1) unless it responds in accordance with the requirements of Part 1 of the Act (see IPC Order 99-035). If the public body believes it would be more appropriate to disclose personal information under section 40 of the Act, the public body should advise the applicant of the implications of a decision to proceed in that way (for example, the person would have no right to request a review by the Commissioner). If the person agrees to a different process, the person must withdraw the access request.

Clarifying the request
Many applicants are unfamiliar with the organization and administrative practices of public bodies. They may not be aware of the process by which a public body reaches or implements a decision or policy, the kind of records that may be generated in the course of that process, and the process of disposing of the records.

The FOIP Coordinator may need to assist the applicant in clarifying the request so that the public body can retrieve records of interest to the applicant (IPC Orders 97-006 and 98-012). Clarification of the request may involve assisting the applicant in defining the subject of the request, the specific kinds of records of interest, and the time period for which records are being requested.

The FOIP Coordinator must exercise care in questioning an applicant about the nature of his or her interest in a particular subject. If a question to an applicant could be seen as dissuading the applicant, or as a means of trying to obtain information not needed to process the request, the question should not be asked (IPC Order 2000-015). It is generally not necessary to ask why an applicant is asking for particular records.

Narrowing a request as a result of the clarification process can have significant implications for fees. The Commissioner has said that a public body has a duty to engage in the clarification process up to the point when the fee estimate is provided (IPC Orders 99-011 and 2000-022). However, a public body has no obligation to request clarification of a request that is, on its face, very clear (IPC Order 2001-013).

Clarifying requests is discussed in greater detail later in this section.

Performing an adequate search for records

A public body must conduct an adequate search for records that are responsive to the applicant's request (IPC Orders 97-006 and 98-012).

The Commissioner has said that there are two components of an adequate search. The public body must

- make every reasonable effort to search for the actual record requested; and
- inform the applicant in a timely fashion of what it has done (IPC Orders 96-022 and 98-012).

A public body must make a reasonable effort to identify and locate records responsive to the request (see IPC Order 2000-030). A public body cannot decide not to conduct a search for records on the basis of an opinion that no responsive records exist (IPC Order 99-021). In a case where a public body has conducted a previous search in response to another request, if there is any doubt that the request is for substantially the same information, the public body must conduct a completely new search. If the other search was substantially similar but earlier, the public body must search for records that may have been created since the earlier request (IPC Order 99-021).

A public body must search all locations, including off-site locations, where records might be found (IPC Order 99-021). The search strategy, not the amount of time spent on a search, will determine whether a public body has conducted an adequate search (IPC Order 99-039).

A public body must be prepared to support claims for the adequacy of a search with evidence as to how the public body conducted its search in the particular circumstances (IPC Orders 98-003 and 2000-030).

A public body is not required to search for records in the custody or under the control of other public bodies (IPC Orders 97-006, 99-021 and F2003-001). It is not part of the duty to assist for a public body to inform an applicant of the location of other records (unless the public body knows that records may exist elsewhere), to provide indexes to files that are not required to be located and reviewed as part of the request, or to provide records retention and disposition schedules when they have not been requested (see IPC Order 99-039).

A public body's responsibilities in searching for and retrieving responsive records are discussed in greater detail in section 3.4 of this chapter.

A public body must make every reasonable effort to identify and locate records responsive to a request, and provide the applicant with information regarding the processing of the request in a timely manner (IPC Order 98-012).

Responding to the applicant
A public body must respond openly, accurately and completely. Even if an applicant has requested records that are not subject to the Act, the public body must respond and inform the applicant that records cannot be obtained under the Act (see IPC Order 2000-022).

In a case where more than one public body has received the same request from the same applicant, each public body must respond to the request on its own behalf (see IPC Order 99-035).

Copies of records must be legible where possible. When a record is severed, the public body should clearly identify the basis on which the record was severed (IPC Order F2003-020).

The duty to assist does not require that public bodies provide medical or legal interpretations of the information in records, or provide information to clarify the information in the records. It is also not necessary to disclose the nature or contents of records that are withheld in a response to an access request (IPC Order 2001-041). A public body is not generally required to make an applicant aware of records that may relate to the applicant's request but have not been specifically requested (IPC Investigation Report 2001-IR-010).

Responding to an applicant is discussed in greater detail in section 3.8 of this chapter.

Acknowledging receipt of request
The public body should acknowledge receipt of a request. This acknowledgment may indicate that the request

- has been received and processing will commence;
- is incomplete because the initial fee has not been paid and is required before processing can commence; or
- is not clear or precise enough and more information is needed to clarify it before processing can commence.

Under section 7(2) of the Act, a request must provide enough detail to enable the public body to identify the record. If processing cannot begin immediately because the request is not clear, an effort should be made to contact the applicant by telephone to resolve any problems quickly. There is no provision in the Act for putting a request on hold pending clarification with the applicant (see “Clarifying requests” later in this section). However, the time limit for responding to the request may be extended under section 14(1)(a) if the applicant does not give enough detail to enable the public body to identify a requested record.

A written follow-up to the initial telephone contact with an applicant is good practice. It will provide a definite reference point as to when processing commenced and a statement of the agreement between the public body and the applicant as to the nature and scope of a request that has been clarified.

Model Letter A in Appendix 3 sets out various options for acknowledging receipt of a FOIP request.

Clarifying requests
Vague or overly general requests may increase workloads and lead to review of information that is of little interest to the applicant. Often requests are broad or vague because the applicant lacks knowledge of the public body, its mandate and programs and the type of records available.

The FOIP Coordinator should establish contact with the applicant to better understand what information will satisfy the applicant's needs. If a request does not sufficiently describe the records sought, a public body should advise the applicant and offer assistance in reformulating the request.

Model Letter A in Appendix 3 deals with this type of situation. There are several things to keep in mind when seeking to define or clarify a request.

Release of information outside the FOIP process
A public body may be able to satisfy an applicant's information needs by providing records that are already publicly available, or that can be made available through a process of routine disclosure. When a FOIP request can be dealt with outside the Act, and if no other fee structure applies, the initial fee should be returned to the applicant, along with a copy of the requested record(s). If there is a procedure in place to refer an applicant to the appropriate program area, the fee should not be returned until the applicant has agreed to have the request handled outside the Act by the program area.

The applicant must agree to withdraw the request; otherwise, the public body is required to respond to it under the Act. In some instances, only part of the information can be routinely released. In such cases, this information should be released and the rest of the request processed under the Act.

Narrowing a request
It is important to discuss with the applicant any request that involves a large amount of information or is estimated to require a large amount of search time. An example would be a request for all the records concerning planning in a public body. The objective is to narrow the request while still meeting the applicant's information needs. This can result in a reduction of fees and provision of better service, in terms of both time and results.

Changing the scope
After discussion of the nature of a request, an applicant will sometimes change the scope of the request. When this occurs, the public body should document the change and send a notice to the applicant (see Model Letter A in Appendix 3 of this publication).

Clarifying a request in relation to a public body's duty to assist under section 10(1) is discussed earlier in this section.

Documenting and tracking requests
All public bodies should maintain documentation systems to record all deliberations and decisions regarding the processing of requests and to help ensure that the processing of the request meets the requirements of the Act. This documentation may become a critical part of the evidence required during a review by the Information and Privacy Commissioner. It can also be of assistance in the processing of subsequent similar requests (see IPC Order 99-011).

(…)

3.4 Processing a FOIP Request – Search and Retrieval

Scope of search
A public body must make a reasonable effort to identify and locate records responsive to the request (see IPC Order 2000-030).

A search for responsive records must consider all records, as defined in the Act, including electronic records, that are in the custody or under the control of the public body. A public body must search all locations, including individual offices, central active files and off-site locations, where records might be found (see IPC Order 99-021). Also, a public body may have to search for responsive records under its control that may be in the hands of a third party (see IPC Order F2002-014). A public body is not required to search for records in the custody or under the control of other public bodies (IPC Order 97-006).

A public body must be prepared to support claims for the adequacy of a search with evidence as to how the public body conducted its search in the particular circumstances (IPC Orders 98-003 and 2000-030).

Staff in search locations should be told to keep track of and report on the amount of time spent on locating and retrieving records. If the search is expected to involve a large number of hours, the FOIP Coordinator should be notified. The FOIP Coordinator may want to contact the applicant to discuss whether the scope of the request, and resulting fees, could be reduced.

Fees
Section 93(4)(a) may also be used by a public body when it wishes to grant a fee waiver on its own initiative.

The reasons to excuse fees on grounds of fairness may relate to any number of matters. The following are some examples of circumstances where the fees may be waived on grounds of fairness.

The public body has assessed fees where the records provide little or no information (see IPC Order 99-027).

The public body has failed in its duties in processing the access request, for example, by conducting an inadequate search for records or allowing undue delay (see IPC Order 99-039).

More than one applicant made the same or a similar request at around the same time, and it would not be fair for the public body to collect the total estimated amount of fees from both applicants or to charge the first applicant substantially more than the second (see Adjudication Order 2).

The information requested is important to bring closure to issues and concerns that have been outstanding between the public body and the applicant for a long time (IPC Order 2001-042).

Some of the following factors may also be relevant to a decision on fairness.

> The records are critical for the applicant to exercise his or her rights, or are directly related to an individual's personal financial or health management.
> A person has a legitimate reason to request the personal information of another individual, but cannot exercise that individual's rights under section 84 (if the individual requested the information the request would be subject to copying fees only).
> If the public body set aside the fees associated with records that would likely be withheld, the fee would be likely to fall below the $150 threshold, or marginally above the threshold

3.8 Responding to an Applicant

Section 12(1) of the Act provides that an applicant must be told

> whether access to the requested record or part of it is granted or refused;
> if access is to be granted to the record or part of it, where, when and how access will be given; and
> if access is to be refused, the reason for refusal and the provision of the Act on which this is based, the name and location of an employee who can explain the reasons for the refusal, and that the applicant may ask for a review of that decision by the Information and Privacy Commissioner.

In its response to an applicant, the FOIP Act does not require a public body to answer questions about the record or to clarify what is written. For example, in Order F2002-025, the adjudicator found that an applicant's right to access was fulfilled when he was given complete, unsevered copies of the records he had requested.

When providing an applicant with access to his or her own personal information, a public body must be satisfied that the individual receiving the information is, indeed, the individual the information is about or a duly appointed representative of that person.

Identification can usually be confirmed from the context of the request process, but, where there is doubt or the information is sensitive, the public body should request normal identification (e.g. a birth certificate or driver's licence) before providing the information.

For information on appointment of representatives, see Chapter 2.5 of this publication.

Responding to an applicant in relation to a public body's duty to assist under section 10(1) is discussed in section 3.2 of this chapter.

Model responses
The applicant must be provided with a response to a request. Model Letters G, H, I, and J in Appendix 3 provide guidance and options for drafting the various types of final responses to FOIP requests.

In all cases when access is denied, where the record is excluded from the Act, or where the public body refuses to confirm or deny the existence of a record, the response letter must state that, if the applicant requests a review of the decision by the Information and Privacy Commissioner, he or she should provide the Commissioner with

> the request number assigned by the public body,
> a copy of the decision letter, and
> a copy of the original request.
>
> Although the Act does not require written notification of the right to request a review, a portfolio officer of the Office of the Information and Privacy Commissioner recommended that a public body revise its response letter to include this notification (see IPC Investigation Report 2001-IR-004).

Generally, the response letter should address the outcomes of the search and review of records in response to a request.

Record does not exist
If the public body cannot locate records responsive to the request, even after contacting the applicant to clarify or reformulate the request, a letter should be sent informing the applicant of that fact and of the steps taken to attempt to find records. Where a record has been destroyed prior to receipt of the request, information should be provided on the date of destruction and the authority for carrying it out (e.g. the appropriate records disposition number or authorization).

Access is granted
If the public body determines the information falls within the scope of the Act, and the information does not qualify for any exception, or that it qualifies for a discretionary exception but the public body has used its discretion in favour of disclosing the information, the letter to the applicant will say that access is granted.

Some requests will involve records that take little time to review or are easily disclosable. In these instances, the public body may disclose available records as soon as possible, rather than waiting until all records are ready for disclosure. This situation may occur when some records are ready for disclosure and other records have been sent to third parties for consultation.

When records are disclosed in stages, it may not be clear when the 60-day period for requesting a review by the Commissioner would begin. The Commissioner has not commented on this issue to date, but it should be noted that the FOIP Act does not contemplate partial or interim disclosure. Under section 12(1)(c), if some of the records disclosed early have been severed, the applicant must be told that he or she has a right to ask for a review of the decision to apply an exception.

Arguably, the time period under section 65 for requesting a review of that decision would begin when the applicant has been notified of the decision to disclose some records on an interim basis. However, in the interests of providing the applicant with the longest opportunity to request a review of any decision regarding disclosure of records, it is likely that the Commissioner would determine that the 60-day review period would commence on the date on which the public body sends notice to the applicant of its decision regarding the final disclosure of records.

The applicant will have indicated, in accordance with section 7(3) of the Act, whether he or she wishes a copy of the record or to examine the original record. If the request is for a copy and it can be reasonably reproduced, section 13(2) of the Act requires that the copy be included in the package. This will be done only if the balance of the fees has been paid.

In responding to applicants, public bodies must collect all outstanding fees before releasing the records to the applicant.

See section 3.5 of this chapter for information on assessment of fees.

If it is not possible to include the records, the same provision requires that the applicant be given the reason for the delay and told where, when and how the copy will be provided. Delay at this stage is unusual, except where there is a requirement to pay any outstanding fees before access is provided.

In some instances, the applicant may have asked to examine a record but the record cannot be reasonably severed for examination, or the record is in a format that does not readily lend itself to examination (e.g. a microfilm with much excepted material on it). In these instances, the public body may choose to provide a copy of the record to the applicant.

Section 3 of the FOIP Regulation covers the two types of situations described above.

Public bodies should understand that it is not possible to attach conditions to the disclosure of records or control the use of those records after disclosure.

Excluded records
If the public body determines that all or some of the records may be excluded from the scope of the Act under section 4, the public body should notify the applicant that the record or information is excluded from the application of the Act. The letter should cite the specific exclusion in section 4 that applies, and state that the applicant has the right to ask the Information and Privacy Commissioner to review the decision of the public body that the specified exclusion in section 4 of the Act applies.

It may occur that a record responsive to a request is excluded from the application of the Act, but the public body is considering providing access to it outside the Act. In such cases, public bodies should consult with any affected parties. For example, if the record was created by or for an Officer of the Legislature or an MLA, the Officer of the Legislature or the MLA concerned should be consulted.

In instances where access is provided to an excluded record, it is important that the letter of response inform the applicant that the record is excluded, citing the provision of section 4 that applies, but indicating that the public body has chosen to provide access to the record outside the Act.

Access denied
If the public body determines that the information falls within a mandatory exception, the information falls within a discretionary exception and the decision is to deny access, or the information lies outside the scope of the Act, the response letter to the applicant should state

the reasons for refusal and the sections (i.e. the specific subsections and paragraphs) on which the refusal is based;
the name, title, business address and business telephone number of the FOIP Coordinator or other official who may be able to answer questions the applicant may have; and
that the applicant has the right to request a review of the decision under section 65(1) of the Act and that this request must be made within 60 days after notification of the decision (see IPC Order 2000-014).

Refusal to confirm or deny existence of record
In certain cases, a public body may believe that an applicant's knowledge that a record exists may cause harm to a law enforcement matter (section 20), may pose a danger to an individual's or the public's safety (section 18) or would be an unreasonable invasion of a third party's personal privacy (section 17). Section 12(2) of the Act permits the public body to refuse to confirm or deny the existence of a record in these cases (see IPC Orders 98-009, 2000-004 and 2000-016).

Section 12(2) does not apply to records protected by other exceptions, such as the legal privilege exception (see IPC Order 2000-015).

If a public body does not indicate whether certain information exists, the Commissioner must not disclose whether the information exists, although the Commissioner may be asked to review the decision to apply section 12(2). The public body does not have to specify to the applicant the portion(s) of the exception provision(s) it relied upon to justify refusing to confirm or deny the existence of a record. However, the public body would nevertheless be required to provide the Commissioner with information regarding which exceptions it is relying upon (see IPC Order 2000-016).

Request file
When a public body has responded to the applicant, the FOIP Coordinator should ensure that the public body request file is complete and includes

all internal and external correspondence;
copies of records reviewed;
copies of all records that were released, either severed or complete, to the applicant; and
any other information documenting the request management process.

DECISIONS OF THE COMMISSIONER

All relevant decisions are referred to in the Manual. The decisions rendered since the last update of the Manual were reviewed, and none of them added to what is already in the Manual.

DECISION OF THE COURT

There was only one decision relating to the duty to assist in *Stubicar v. Alberta (Information and Privacy Commissioner)* 2007 ABQB 480 where the decision of the Commissioner (H2006-003) was upheld.

The request was made pursuant to the *Health Information Act* (duty to assist is the same as in the *Freedom of Information and Protection of Privacy Act)*. The Court listed some of the aspects noted by the Commissioner and concluded that the decision was patently reasonable. The Court did not undertake any detailed analysis of the duty. The Commissioner's decision noted the following:

- Upon receipt of the request, several attempts were made to contact the Applicant regarding the fee to be charged, but did not end up charging her for the service

- Response was within one month of the request and, in doing so, provided her with a large amount of information in an organized and timely manner.

- The institution communicated clearly and appropriately with the Applicant regarding the information severed from the records; all severed information was clearly identified with the justification

- the Applicant was provided with a contact phone number should she have any questions, at no time did the Applicant contact the institution to express any concerns with the information released or the manner in which it was provided, or to request further assistance.

British Columbia

Websites
http://www.oipcbc.org/ (Commissioner)
http://www.mser.gov.bc.ca/privacyaccess/index.htm (Ministry of Labour and Citizens' Services)

STATUTE

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165.

RELEVANT PROVISIONS

5. (1) To obtain access to a record, the applicant must make a written request that

(a) provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought,
(…)

6. (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

42. (1) In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(a) conduct investigations and audits to ensure compliance with any provision of this Act,
(…)

(j) bring to the attention of the head of a public body any failure to meet the prescribed standards for fulfilling the duty to assist applicants.

(2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that

(a) a duty imposed under this Act has not been performed,
(…)

76. (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows:
(…)
(a) prescribing procedures to be followed in making, transferring and responding to requests under this Act;
(…)
(c) setting standards, including time limits, to be observed by officers or employees of a public body in fulfilling the duty to assist applicants;

RELEVANT REGULATIONS

Freedom of Information and Protection of Privacy Regulation 323-93.

2. An applicant may make an oral request for access to a record if
(a) the applicant's ability to read and write English is limited, or
(b) the applicant has a physical disability that impairs his or her ability to make a written request.

GUIDELINES / MANUAL / EXAMPLES

- **POLICIES AND PROCEDURES Manual** (November 2006) (from the Commissioner's Website)
  This document has nothing on the duty

- **FOIPP Act Policy and Procedures Manual, PART 2 - FREEDOM OF INFORMATION**
  (From the government site)

Division 1 - Information Rights and How to Exercise

OVERVIEW
Section 6 requires the head of the public body to make every reasonable effort to assist applicants and to respond to formal requests without delay.

A public body is not required to create a record to satisfy a request except as outlined under subsection 6(2).

SECTION REFERENCE

6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of a public body using its normal computer hardware and software and technical expertise, and,

(b) creating the record would not unreasonably interfere with the operations of the public body.

SUMMARY
Subsection 6(1) requires the public body to make every reasonable effort to locate and retrieve the records requested in a formal request. The response is to be open, accurate and complete.

Subsection 6(2) requires a public body to create a record from an existing machine readable record if the record can be created using existing resources and if creating the record will not unreasonably interfere with the operations of the public body.

POLICY
Public bodies shall respond openly, accurately and completely to all requests for information made under the Act.

Public bodies shall make every effort to assist applicants in all reasonable ways in responding to requests for information under the Act.

Upon receiving a request under the Act, the public body shall cease all final disposition actions pertaining to the records requested, including destruction or transfer activities.

Public bodies are not required to create a new record in response to a request, except in accordance with subsection 6(2). Public bodies are not required to create a new record in cases where new computer software or hardware would be needed to create the record, where staff do not have the technical expertise required or where the task would unreasonably interfere with operations.

Public bodies are not required to translate a record from one language to another or to another medium such as Braille.

Public bodies are not required to prepare a transcript of an audio or video tape if one does not already exist.

The public body's obligation to create a record from machine readable records does not extend to electronic mail that has been deleted and exists only on back-up tape.(OIPC Order 73-1995).

PROCEDURE
The head of the public body responds to the applicant in accordance with section 7 (Time limit for responding), section 8 (Contents of response) and section 9 (How access will be given).

If the public body and the applicant agree to change the original scope of a request, the public body documents the change.

INTERPRETATION
Interpretation Subsection 6(1)
Public bodies must meet a threshold of reasonableness in conducting adequate searches for records. The burden of proof is on the public body to show that it has conducted an adequate search.

"Every reasonable effort" is an effort which a fair and rational person would expect to be done or would find acceptable. The use of "every" indicates that a public body's efforts are to be thorough and comprehensive and that it should explore all avenues in verifying the completeness of the response. Public bodies should record the efforts made to respond to a request.

A public body's initial contacts with an applicant are critical to satisfying the applicant's information needs. It is also a time when the public body acquaints the applicant with the steps involved in processing a request. The access "partnership" between public bodies and applicants covers both the formal rights and duties under the Act and the informal contacts during the request process.

Employees, members and officials of public bodies must work with applicants in a partnership to process every request: both parties have an interest in the efficient, timely processing of requests. Informal contacts between both parties should extend well beyond the formal duties imposed by the Act and regulations.

In some cases, the public body and the applicant may jointly decide that some or all of the applicant's information needs can be satisfied by releasing routinely available records.

Public bodies assist applicants in defining their requests and in making them as specific as possible. Vague and overly general requests unnecessarily increase workloads for information and privacy staff and may result in the release of information that is of no interest to the applicant. For non-personal information, narrowing the request reduces the fee for the applicant.

Where requests are vaguely worded, public bodies attempt to contact applicants by telephone, when possible, to clarify their requests. An applicant's request may be overly broad, for instance, because of a lack of knowledge of the public body's mandate. Without assistance from the public body, applicants may not be able to specify what information satisfies their information needs.

In responding to an applicant's request for information, the duty to assist obliges the head of the public body to defer to the applicant's wishes, if practicable, but does not require the public body to make unreasonable efforts to satisfy an applicant's request for information. For example:

> the public body may provide contextual information to assist the applicant to understand the record, if the record itself provides incomplete or misleading information;
>
> information that cannot be understood on the face of the records is explained. For example, if information in a record is encoded, the public body provides the applicant with an explanation of the codes;
>
> the public body is not required to provide a technical explanation, e.g., the principles of civil engineering, to assist the applicant to understand a technical report on the structural design of bridges;

a public body is not required to provide an interpretation of medical or psychological personal information where it does not have professional staff competent to do so. Public bodies providing medical or counseling services to clients should, however, incorporate into the duties of professional staff a responsibility for assisting clients who wish access to their own personal information; and,

if a record contains illegible handwriting, the public body normally assists the applicant by transcribing this portion of the record.

DECISIONS OF THE COMMISSIONER

- **Summary of the duty**

Order 00-32 , Inquiry regarding Ministry of Employment and Investment's Search for Gaming Policy Records, August 4, 2000, [2000] B.C.I.P.C.D. No. 35

This decision summarizes the duty as follows:

> [17] (…) Although the Act does not impose a standard of perfection, a public body's efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In an inquiry such as this, the public body's evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records. (…)
>
> [*Note: this paragraph was reiterated in several decisions: 00-35; 01-10, 01-47*]
>
> [37] An applicant should not have to initiate the review process under the Act in order to ensure that a public body has discharged its s. 6(1) duty. The Act requires a public body to meet the above-described search standards - and its other duties under s. 6(1) - at the time it responds to an applicant. It can still meet its s. 6(1) duties after an applicant makes a request for review under s. 52 of the Act: any steps taken by a public body after its initial search and response - including during the review and inquiry processes - will be relevant to any order I might make. But the first question to be considered in an inquiry such as this is whether, at the time it responded to an applicant's access request, the public body met its duty to make every reasonable effort to assist" the applicant and to "respond without delay … openly, accurately and completely" to the applicant.

- **Interpretation of the request / contacting the applicant**

Order 03-32, City of Vancouver, July 24, 2003 [2003] B.C.I.P.C.D. No. 32

> [35] Although the duty in s. 6(1) of the Act to make "every reasonable effort" sets a high standard for public bodies, there may still be more than one reasonable way to interpret an access request as broad as the one CPR made and there may also be more than one reasonable conclusion about whether or not specific records or classes of records fall within its scope. The applicant and the public body needed to engage in constructive dialogue about this access request, as it was being processed. This is not necessarily true of all access requests, but it was true of this complex request by a sophisticated requester. For whatever reason – the City and CPR cannot agree why – that dialogue did not happen. This hampered the City in fulfilling its duty to assist under the Act in a way that satisfied CPR.

- **Search**

Evidence of efforts in locating and retrieving records: Affidavits that attest to the institution general file-keeping and management practice. (**Order 00-43: Inquiry regarding Child, Family and Community Service Act Records, September 25, 2000**)

Description of the institution's search efforts. (**Order 138-1996, Re Ministry of Attorney General, December 18, 1996, 1996 CarswellBC 3103, para. 68)**

Subsequent searches can remedy the situation. **(Order 03-32, City of Vancouver, July 24, 2003 [2003] B.C.I.P.C.D. No. 32, para. 36)**

- **Responding to the applicant**

Order 01-47, Insurance Corporation of British Columbia, October 12, 2001, [2001] B.C.I.P.C.D. No. 49

> [28] Although ICBC was clearly faced with a large number of very broad requests made by the applicant, however, I am not prepared to find that, although it responded late – in breach of its s. 7 obligation to respond in time – it nonetheless fulfilled its s. 6(1) duty. In my view, where a public body does not respond sooner than s. 7 requires, or within the time s. 7 lays down, it will not have met its s. 6(1) obligation to assist. The reasons for that failure – or evidence of the public body's good faith efforts to meet an applicant's needs – will not avoid this conclusion. ICBC clearly attempted to respond as quickly as it could in the circumstances, but the fact remains that it did not respond within the required time. Compliance with s. 7 is a necessary condition of fulfilling the s. 6(1) duty to assist.

Order 02-40, British Columbia Archives, August 21, 2002, [2002] B.C.I.P.C.D. No. 40

[9] The Information and Privacy Commissioner has discussed in a number of orders the issue of a public body's failure to respond within the legislated time lines set out in s. 7 and whether, in doing so, it has met it s. 6(1) duty. At paras. 19-23 of Order 02-38, [2002] B.C.I.P.C.D. No. 38, for example, the Commissioner rejected arguments from the public bodies which were similar to those made in this case. Where a public body has breached its duty to respond within the time required under s. 7, "It is simply not tenable", the Commissioner said, "to say that a public body can still be found to have fulfilled its statutory duty to respond to an applicant 'without delay'." The Commissioner then pointed out that the s. 6(1) duty to respond without delay requires a public body to make every reasonable effort to respond before the time required under s. 7(1) and that a public body which has breached its s. 7(1) duty cannot be found to have fulfilled its s. 6(1) duty. The Commissioner made similar findings at paras. 43 and 59, of Order 01-47, [2001] B.C.I.P.C.D. No. 49.

Order 03-32, City of Vancouver, July 24, 2003 [2003] B.C.I.P.C.D. No. 32

[16] The intent of s. 6(1) is to require public bodies to make every reasonable effort to respond sooner than required under s. 7. A public body that has failed to respond to an access request within the legislated time cannot be said to have made every reasonable effort to respond "without delay" as required by s. 6(1). See, for example, Order 03-22, [2003] B.C.I.P.C.D. No. 22, another case in which the City failed to respond in time but nonetheless argued that it had fulfilled its s. 6(1) duty to the applicant.

[20] The City is a large and sophisticated public body. The City's delay in responding to the request, without an extension under s. 10(1) or CPR's consent, is not acceptable.

- **<u>Other considerations:</u>**

Order 01-47, Insurance Corporation of British Columbia, October 12, 2001, [2001] B.C.I.P.C.D. No. 49

[18] I will not go so far as to say applicants "must" exercise their access rights reasonably. The Act does not require them to do so and the courts have not gone that far. I will say, however, that an applicant's failure to be reasonable may have an impact on the outcome of issues such as those involved here under s. 6(1). If an applicant, for example, has information that would assist the public body in searching for responsive records, failure to divulge that information could lead to an inadequate search by the public body. Although the public body might be found not to have searched adequately for records, and might be ordered to conduct a further search, the applicant could have avoided the delay inevitably entailed in the inquiry process in the first place. Further, my ability to authorize, under s. 43 of the Act, the public body to disregard certain access requests tacitly acknowledges that, where a requester is acting unreasonably in making systematic or repetitious requests that unreasonably interfere with the public body's operations, that abuse of the right of access under the Act can be curbed.

> [37] I should say at once that the applicant could have approached ICBC directly about the missing information, rather than immediately requesting a review under the Act. It would be preferable in such a case for an applicant to approach the public body first with any concerns when records appear to be missing or the disclosure is otherwise not completely responsive. More often than not, such an approach will reveal any good-faith errors on the part of the public body more quickly than this Office's review process can hope to do. This approach will also reduce costs to the taxpayers entailed in the formal review process under the Act.

Lack of remedy

Order 01-47, Insurance Corporation of British Columbia, October 12, 2001, [2001] B.C.I.P.C.D. No. 49

> [43] ICBC did indeed miss its extended deadline by one day and thus I find that it did not comply with its ss. 6(1) and 7 obligations respecting this aspect of these requests. For the reasons given above, I cannot find otherwise. In so finding, however, I note ICBC's efforts went beyond the letter of the law, in an attempt to live up to the principles of openness and accountability that underpin the Act. I also consider this aspect of the OPEIU's case to fall under my earlier general comments about its forcing an issue of this kind to inquiry, especially given the lack of any remedy other than a finding of non-compliance.

Order 02-40, British Columbia Archives, August 21, 2002, [2002] B.C.I.P.C.D. No. 40

> [10] BC Archives admitted that it did not meet the s. 7 timelines and was two months late in responding. In the circumstances of this case, which echo those noted just above, I find that BC Archives did not meet its ss. 6(1) and 7 duties. Given that BC Archives has responded, however, there is nothing under s. 58 that I can order it to do. It is indeed regrettable that the applicant chose to press this matter to inquiry, with the accompanying burden on the resources of BC Archives and this Office, when there is clearly no useful remedy available to the applicant.

onus

The onus is on the institution to prove that it has discharged its duty under section 6(1). (**Order 286-1998: Re Kamloops Thompson School District No. 73, December 22, 1998, [1998] B.C.I.P.C.D. No. 81**)

DECISIONS OF THE COURT

N/A

Manitoba

Websites
http://www.ombudsman.mb.ca/access.htm (Ombudsman)
http://www.gov.mb.ca/chc/fippa/manuals/resourcemanual/index.html (Government)

STATUTES

Freedom of Information and Protection of Privacy Act, S.M. 1997, c. 50.
Loi sur l'accès à l'information et la protection de la vie privée, C.P.L.M. c. F175.

RELEVANT PROVISIONS

8. (2) A request must be in the prescribed form and must provide enough detail to enable an experienced officer or employee of the public body to identify the record.

(3) An applicant may make an oral request for access to a record if the applicant

(a) has a limited ability to read or write English or French; or

(b) has a disability or condition that impairs his or her ability to make a written request.

9. The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.

14. (2) The head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain it.

49. In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may

(a) conduct investigations and audits and make recommendations to monitor and ensure compliance

(i) with this Act and the regulations, and

(ii) with requirements respecting the security and destruction of records set out in any other enactment or in a by-law or other legal instrument by which a local public body acts;
(…)
(f) bring to the attention of the head of a public body any failure to fulfil the duty to assist applicants;

59. (1) A person who has requested access to a record under Part 2 of this Act may make a complaint to the Ombudsman about any decision, act or failure to act of the head that relates to the request, including a refusal to make a correction under section 39.

RELEVANT REGULATIONS

Access and Privacy Regulation 64/98.

9. (1) At the applicant's request, the head of a public body may waive all or part of the fees payable under this regulation if the head is satisfied that

(a) payment would impose an unreasonable financial hardship on the applicant;

(b) the request for access relates to the applicant's own personal information and waiving the fees would be reasonable and fair in the circumstances; or

(c) the record relates to a matter of public interest concerning public health or safety or the environment.

GUIDELINES / MANUAL / EXAMPLES

- **MANITOBA OMBUDSMAN PRACTICE NOTE September 2007**

DEALING WITH ACCESS REQUESTS FOR INFORMATION THAT IS AVAILABLE TO THE PUBLIC

Public sector bodies or trustees should advise the individual how the information may be obtained without making a formal request. This is in keeping with the duty to assist (section 9 of FIPPA; subsection 6(2) of PHIA).

- **MANITOBA OMBUDSMAN PRACTICE NOTE may 2006**

THE DUTY TO ASSIST UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (FIPPA) AND THE PERSONAL HEALTH INFORMATION ACT (PHIA)

The duty to assist under Manitoba's FIPPA and PHIA relates to access requests under Part 2 of both Acts. The Acts require public bodies to "make every reasonable effort to assist" a requester and "to respond without delay, openly, accurately and completely" (section 9 of FIPPA and subsection 6(2) of PHIA).

The duty to assist is additional to other obligations that FIPPA and PHIA require entities to follow to fulfill the formal access process (e.g. responding within time limits and providing the prescribed contents in refused access responses). This duty should always be considered and be applied in a manner that is reasonable on a case-by-case basis and throughout the application process.

EXAMPLES OF DUTY TO ASSIST

The duty to assist is commonly fulfilled when communicating with the requester, performing an adequate search for the requested records and being transparent when considering a request for fee waiver under FIPPA. The following are some examples of the assistance to be provided in communications, searches and when (under FIPPA only) considering fee waivers.

1. Communication with the Requester
- explaining the access and Ombudsman complaint processes
- clarifying incomplete or incomprehensible requests
- clarifying requests that are ambiguous, broad or which encompass a large volume of records
- discussing whether the request can be accommodated informally outside of the information privacy legislation (e.g. is this the type of information that would be routinely released by the entity? does the requester really want an answer to a question rather than access to a record? is there another Act that provides a right to access?)
- determining whether the request can be clarified in the interests of focusing on certain key records and avoiding unnecessary costs to the requester (the objective would be to narrow the request while still meeting the requester's access needs and not dissuading the request; remember, the reason for the requester seeking the record(s) should not be probed)

Note: The time for responding does not stop when an entity is clarifying a request with a requester.

2. Performing Adequate Search of Records
- communicating with the requester may assist in performing this task
- an entity must make a reasonable effort to identify and locate records responsive to the request (it is not sufficient to believe that there are no responsive records; a search must be undertaken)
- an adequate search would include a strategy for seeking the requested records
- an entity should search all reasonable locations, including off-site locations, where the requested records might be found
- the search should include records in the entity's "control", if not possession, for example records maintained by agents, consultants or other contracted services
- the entity should be able to explain the search to the requester, if asked, and to the Ombudsman if this is the subject of a complaint

3. Considering Request for a Fee Waiver under FIPPA
- under FIPPA, the head of the entity may waive all or part of the fees under Regulation 64/98 if the head is satisfied that one or more situations set out in subsection 9(1) of the Regulation applies; the head should provide the requester adequate opportunity to provide evidence in support of that provision, be clear about the criteria used in this provision and, if all or part of the fees are not waived, explain why that decision was made.

The duty to assist is also fulfilled when considering discretionary actions set out under FIPPA and PHIA and applying them when appropriate. The following are examples of such discretionary actions.

4. Assisting in the Making of Verbal Requests
- under FIPPA, an applicant may make an oral request for access to a record if the requester has a limited ability to read or write English or French or has a disability or condition that impairs his or her ability to make a written request (subsection 8(3)); entity should be able to accommodate this provision (in contrast, under PHIA an access request may be verbal although the entity may require it be in writing, subsection 5(3))

5. Creating a Record
- under FIPPA, if a record exists but is not in the form requested by the applicant, the entity may create a record in the form requested if in its opinion it would be simpler or less costly for the entity to do so (subsection 10(2); FIPPA and PHIA do not require an entity to create a record in this or any other context, but an entity could discuss with the
requester whether this approach would meet his or her request and, if so, create a new record.

6. Explaining the Record
- under FIPPA, an entity that provides access to a record may give any additional information believed necessary to explain the record (subsection 14(2)); an entity should be able to accommodate this process. Under PHIA, an entity, if asked, shall provide an explanation of any term, code or abbreviation used in the personal health information (subsection 7(2))

COMPLAINT TO MANITOBA OMBUDSMAN ABOUT DUTY TO ASSIST
Both FIPPA and PHIA provide a right of complaint to the Ombudsman "about any decision, act or failure to act" that relates to the request (subsection 59(1) of FIPPA and subsection 39(1) of PHIA). Additionally, under FIPPA, the Ombudsman may bring to the attention of the head of a public body any failure to fulfill the duty to assist applicants (clause 49(f) of FIPPA).

POSTSCRIPT ON PROVIDING ASSISTANCE
Although the duty to assist applies to the process of making an access request under Part 2 of FIPPA and PHIA, our office is of the view that this should be a principle that underlies all actions under Manitoba's information privacy legislation. For example, with respect to the Part 3 protection of privacy provisions of FIPPA and PHIA, as best practice and in the spirit of the legislation, entities should be able to explain privacy practices and provide assistance with respect to an individual's privacy concerns.

- **FIPPA Resource Manual** *(from the government site)*

Chapter 3 - Access Request Management

Duty to Assist Applicant [Section 9]

> 9 The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.

FIPPA requires that public bodies try to respond quickly, accurately, and fully to applicants and to help them to a reasonable extent.

The duty to assist the applicant is an important, underlying provision of FIPPA. It is a duty throughout the request process, but it is critical during the applicant's initial contact with the department or government agency. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.

Both the applicant and the public body will benefit from a cooperative, respectful relationship.

Oral Requests [Subsection 8(3)]

FIPPA allows an applicant to make an oral request for access to a record if he or she has a limited ability to read or write English or French, or has a disability or condition that impairs his or her ability to make a written request. In this situation, a senior staff member should fill out the form as directed by the individual, have the individual sign it if possible, date stamp it and send it immediately to the Access and Privacy Coordinator.

Receiving a Request

On the day an access request is received, the Access and Privacy Coordinator, or whichever employee first receives the application, must date stamp the application [Regulation, subsection 3(3)]. The Coordinator should record the application in an access request tracking log.

On the same day, or as soon after as possible, the Coordinator should review the request to determine whether the application is understandable and complete, whether it has been sent to the appropriate public body, whether a formal application under FIPPA is necessary in order for the applicant to obtain the information, and whether consultation with third parties or another public body may be required.

If the request is unclear, provides insufficient information, or is overly broad: the Access and Privacy Coordinator should contact the applicant as quickly as possible (preferably by telephone, fax or e-mail) to clarify his or her information needs. Vague or overly general applications are usually the result of a lack of understanding of the functions of the public body, its records or how to best articulate the request.

Clause 15(1)(a) of FIPPA does enable the head of the public body to extend the time for responding to a request for up to an additional 30 days, or longer if the Ombudsman agrees, if the applicant does not give enough detail to enable the public body to identify a requested record.

If the request should have been sent to another public body: the Coordinator should transfer the application as soon as possible, and no later than 7 days after receipt, to that other public body. (See "Transferring a Request to Another public body" in the following section)

If the information is available through routine channels: the Coordinator should notify the applicant right away and advise him or her of the normal process. In most cases, the public body will simply provide the information, subject to any copying charge. In some instances, the applicant may be required to fill out a different application form. For example, if the applicant wants access to records governed by The Vital Statistics Act, he or she will have to complete the appropriate form of the Office of Vital Statistics and submit the required fee. The Coordinator should ensure that the applicant understands what is required or who to contact for further information and should then confirm that the applicant wishes to withdraw the application.

Explaining a Record [Subsection 14(2)]
The head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain it. This is in keeping with section 9 (Duty to assist an applicant) and the underlying philosophy of FIPPA, which is to try to assist applicants. Time spent preparing or giving the applicant an explanation of a record is not an activity for which the applicant can be charged a fee [Regulation, clause 4(3)(e)].

Chapter 6 - Powers and Duties of the Ombudsman

Monitoring Compliance [Section 49]
In addition to the Ombudsman's powers and duties respecting complaints under Part 5 of FIPPA, the Ombudsman may do any of the following:
(…)

> (7) The Ombudsman may bring to the attention of the head of a public body any failure to fulfil the duty to assist an applicant requesting access to information under Part 2 of FIPPA (clause 49(f)).

The duty to assist applicants requesting access to information is set out in section 9 of FIPPA. The head of a public body is required to make "every reasonable effort to assist" an applicant and to "respond without delay, openly, accurately and completely" to a request for access to records under Part 2 of FIPPA.

- **Ombudsman's Annual Report of 2001**

Processing Time for Requests for Information
Access Coordinators and Officers are central to the process of providing information requested by applicants. A multiplicity of factors may impinge on their reasonable efforts to meet the head of a public body's duty to assist an applicant and to respond without delay, openly, accurately and completely as required under the legislation. These factors include the complexity of the request or requests for information, the specific sections of the Acts engaged, sensitivity of the information involved, the volume of applications at any given moment, and the availability of resources. Few entities under the statutes have or may even need to have full-time staff dedicated to responding to information requests, but all must be committed to the spirit, intent, and letter of the legislation and ensure that they have the expertise and resources in place when needed. (p.12)

- **Ombudsman's Annual Report of 2003**

Duty to assist
Turning again to the "duty to assist" provision of the legislation, I have long thought that this was one of the most important additions to the requirements of FIPPA and PHIA. *The Freedom of Information Act* did not have this explicit requirement to assist an applicant or individual, though one would think that this is simply an underlying and well understood part of the daily duties of public service. The duty to assist requires the heads of a public bodies and trustees to make every reasonable effort to assist an applicant for access to information and "to respond without delay, openly, accurately and completely." The duty to assist should be the byword in administering the legislation. (p. 10)

For Public Bodies and Trustees:
FIPPA and PHIA set out responsibilities for public bodies and trustees in responding to access requests and handling personal and personal health information to ensure the privacy of that information. Both *Acts* impose a duty to assist individuals making requests for access to information. We are of the view that increased communication with individuals using the *Acts* would assist them in understanding the basis of decisions being made by public bodies and trustees. This could result in faster resolution of an access issues and fewer complaints made to the Ombudsman about those decisions or, at least narrow the focus of complaints made.

Additionally, providing explanations for decisions concerning access requests could identify misunderstandings between the individual and public body or trustee and thereby eliminate unnecessary work based on these misunderstandings.

Where requests for information are unclear, we feel public bodies and trustees should contact the individual to clarify the interpretation or intended scope of the request. We note that this could pre-empt unnecessary work in processing the request, such as requiring an extension of the time limit to complete the work or preparing a fee estimate based on records the individual may not have intended to fall within the scope of the request.

When an extension of the 30-day time limit under FIPPA is needed to complete the processing of an access request, the *Act* requires the public body to provide the individual with written notice of the decision to extend. In our experience, such letters generally quote the provision of the *Act* that forms the basis for the extension; however, we believe it would be helpful in assisting the individual to understand the decision if an explanation of the need for the extension were provided. For example, when relying on section 15(1)(b) of FIPPA, an explanation of the volume of records involved or the scope of the searches conducted would assist the individual to appreciate the need for the extension. This should be accompanied by an explanation of why such work would interfere unreasonably with the operations of the public body. Additionally, providing an explanation may result in the individual clarifying what was intended by the request, which could result in less time being needed to process the request.

FIPPA and PHIA provide for fees to be assessed for the processing of access requests. Where a request may be interpreted in different ways, contact with the individual to confirm the interpretation of a broad or unclear request could reduce the time needed for calculating a fee estimate as well as the time for processing the request. Providing information to explain how the amount of chargeable time estimated for processing the request was determined would assist the individual in understanding the basis for fees and may pre-empt a complaint about the fees. As noted earlier, being notified of fees can signal to an individual a misunderstanding about the records being requested and, where a request was interpreted more broadly than the individual intended, a revised fee estimate can be calculated.

When notifying an applicant of a decision to refuse access under FIPPA, the *Act* requires a public body to advise the individual in writing of this decision. Section 12(1)(c) dictates the contents required in the written response, including the specific provision of the *Act* on which the refusal is based and the reasons for the refusal. We have observed that response letters are more often than not incomplete in one or more aspects of the contents that are required by law. Frequently, we see examples of non-compliance where public bodies have identified the general rather than the specific provision. For example, section 18(1) is identified rather than specifying 18(1)(c)(i). Despite the mandatory requirement to provide reasons for the refusal, in addition to identifying the specific provision, we have also noted that public bodies routinely do not provide any reasons.

As noted earlier, the reasons may consist of an explanation of how or why the referenced provision applies to the withheld information. For example, an explanation concerning section 18(1)(c)(i) might include explaining whether the withheld information reveals commercial or financial or labour relations or scientific or technical information, and explaining how or why disclosure of that information could reasonably be expected to harm the competitive position of a third party.

Our concerns about the repeated occurrence of non-compliant responses led to the development in 2001 of a *Checklist for Contents of a Complete Response under Section 12 of FIPPA.* This concern was noted in our two previous Access and Privacy Annual Reports. We will be increasing our efforts to address the issue of non-compliance with section 12.

If the decision not to give access is based on the public body or trustee determining that the requested records do not exist or cannot be located, we encourage them to explain to the applicant how it was determined that the records do not exist or to explain the searches conducted to try to locate the requested records.

Providing fully compliant response letters to individuals not only would demonstrate accountability and transparency for access decisions, but also would assist individuals in understanding the decisions, which in turn may pre-empt some complaints about those decisions.

Concerning privacy matters, we have encouraged individuals to first contact the public body or trustee to seek an explanation about the handling of their personal or personal health information. When this occurs, the public body or trustee could provide information to the individual to explain its handling of the individual's information and clarification about its actions in relation to the relevant privacy provisions of the legislation. In doing so, the public body or trustee may be able to resolve the privacy concern or perhaps the concern may raise issues that could be addressed pro-actively by the public body or trustee to ensure compliance in the future. (p.17-18)

- **Ombudsman's Annual Report of 1998**

The two complaints received against Manitoba Finance in 1998 were carried forward to 1999. Two other complaints received by our office in the first days of 1999 and handled by the Department in 1998, raised the issue of the duty to assist an Applicant. They resulted in our opening a special investigation file.

99-001, 99-002, S99-003: the Duty to Assist Missed
The Freedom of Information and Protection of Act, unlike *The Freedom of Information Act* which was silent on the issue, explicitly sets out a duty to assist Applicants as follows:

> Duty to assist applicant
> 9 The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.

The duty to assist an Applicant is an important and pervasive principle of *The Freedom of Information and Protection of Privacy Act* and is reflected in various provisions relating to decisions, actions or failures to act. For example, one of the Ombudsman's new general powers and duties under *The Freedom of Information and Protection of Privacy Act* provides:

> General powers and duties
> 49 In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may
>
> f) bring to the attention of the head of a public body any failure to fulfil the duty to assist applicants;

This particular matter concerned two applications for access made by an Applicant on forms prescribed under *The Freedom of Information Act*, after that *Act* was repealed and replaced by *The Freedom of Information and Protection of Privacy Act*. The applications for access were dated November 5, 1998. The Department responded to the applications by letter dated December 3, 1998, denying access and citing exceptions under *The Freedom of Information and Protection of Privacy Act*. The Department's letter also stated "for future reference…your request was not in accordance with the format prescribed by *The Freedom of Information and Protection of Privacy Act*".

On January 5, 1999, the Applicant submitted two complaints of refused access to our office. Enquiries were made with the Department. The Department advised our office that as the applications for access were not made on the form required by *The Freedom of Information and Protection of Privacy Act*, they were not considered by the Department to be applications under that *Act*. We had several discussions with the Department at this time. We advised the Applicant that we were technically unable to investigate the complaints of refused access under *The Freedom of Information and Protection of Privacy Act*. Nevertheless, we indicated that we would be further considering the matter of how the applications for access were handled by the Department.

In our communication with the Department and the Applicant, we noted the mandatory provision of *The Freedom of Information and Protection of Privacy Act* concerning the Department's duty to assist an Applicant. Under our general powers and duties to conduct investigations, we opened a special investigation file.

We contacted the Access Officer again and noted that the applications were made on the form prescribed under the repealed *Freedom of Information Act* and not the form prescribed under the recently proclaimed *Freedom of Information and Protection of Privacy Act*. We also observed that the Department responded to the applications by letter, referring to the applications as "information requests". The Department's letter of response denied access to the requested records, relying on exceptions under *The Freedom of Information and Protection of Privacy Act*. The Department also noted in its response that, for future reference, the requests were not on the prescribed form.

In reviewing this matter, it was noted that the Department did not advise the Applicant that his requests for information were made on the wrong application forms until approximately one month after receiving them. The Department did not provide the Applicant with copies of the proper application forms to assist him in exercising his rights under the *Act* in a timely manner.

We noted that the failure by the Department to assist the Applicant resulted in the Applicant's inability to make a complaint to the Ombudsman about the decision to deny access, which was a decision made by the Department on or before December 3, 1998. We said that the Applicant now had to reapply, some two months later, and await a response from the Department before obtaining all or some of the documents requested and, potentially, exercising his right under the *Act* to file a complaint with the Ombudsman. We stated that we felt the manner in which these applications requesting information were handled was not in keeping with the spirit of the *Act* or with section 9 of the *Act*, concerning the duty to assist an Applicant.

We advised the Department that any further comments would be considered before our office concluded the review of this matter.

The Access Officer responded to our letter. He advised our office that the Applicant's requests were considered to be informal information requests as they were not made on the forms prescribed under *The Freedom of Information and Protection of Privacy Act*. The Access Officer felt that the Applicant received the benefit of having the Department undertake work consistent with an application while receiving the benefits of timely, no-cost processing of requests associated with an informal process.

We responded to the Department and reiterated our position. We noted that almost one month after the applications were submitted, the Department advised the Applicant that the applications were not made on the proper forms. We advised that we did not feel this was in keeping with the duty to assist an Applicant. The failure by the Department to assist the Applicant resulted in his inability to exercise his rights properly under the *Act*, including the right to file a complaint with our office concerning the refusal of access. In addition, it required the Applicant to reapply and await a response from the Department, in order to gain the ability to exercise his rights under *The Freedom of Information and Protection of Privacy Act.*

For these reasons, we advised the Department and the Applicant that we felt the manner in which these applications for access had been handled by the Department was not in keeping with the spirit of the *Act* or with section 9 of the *Act*. (p. 28-29)

DECISIONS OF THE COURT

N/A

New Brunswick

Websites
http://www.gnb.ca/0073/Index-e.asp (Ombudsman)
http://www.gnb.ca/0062/acts/index-e.asp (Legislation)

STATUTES

Right to Information Act, S.N.B. 1978, c. R-10.3.
Droit à l'information, L.N.-B. 1978, c. R-10.3.

RELEVANT PROVISIONS

3. (2) The application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document.

(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.

7. (1) Where an applicant is not satisfied with the decision of an appropriate Minister or where an appropriate Minister fails to reply to a request within the time prescribed, the applicant may in the prescribed form and manner either

(a) refer the matter to a judge of The Court of Queen's Bench of New Brunswick, or

(b) refer the matter to the Ombudsman.
(…)

RELEVANT REGULATIONS

N/A

GUIDELINES / MANUAL / EXAMPLES

N/A

LEGISLATIVE RECOMMENDATIONS

- **Inside and Outside the Box: Proposals for an Information and Privacy Rights Code for New Brunswick** A submission to the New Brunswick Task Force on Right to Information and Protection of Personal Information, Bernard Richard, Ombudsman, July 5, 2007

Duty to Assist
In many cases that have been the subject of reviews by this office, it has been clear that the need for any review could have been avoided and considerable time saved by public officials if the department concerned and the individual requester had communicated directly from the start to clarify the access request. Several provinces have in their legislation provisions similar to section 6 of the B.C. legislation which places an obligation upon public authorities to assist applicants and avoid technical interpretations of the access request with a view towards limiting disclosure.

It is recommended that new legislation in New Brunswick include an obligation upon public authorities to assist applicants with their Right to Information requests.(p. 14)

- **Access to Information and Privacy Review, Final Report, September 2007 (Right to Information and Protection of Personal Information Review Task Force)** (http://www.gnb.ca/Info/index-e.asp)

16. The legislation should provide that public bodies have a duty to assist information-seekers in identifying and securing desired information and in overcoming technical interpretations of the legislation. (p. 29)

RECOMMENDATIONS OF THE OMBUDSMAN

N/A

DECISIONS OF THE COURT

Pursuant to section 7(a), a complainant can refer the matter to the courts without going to the Ombudsman first.

The following decisions are relevant to the application of section 3:

In *Secord v. New Brunswick Electric Power Commission* ([1989] N.B.J. No. 245, 97 N.B.R. (2d), 245 A.P.R. 323, Action No. F/M/12/89, New Brunswick Court of Queen's Bench, Trial Division, Stevenson J, March 16, 1989) the judge explained that:

> It seems to me that the Chairman and Commission employees involved have extended Mr. Secord the utmost in courtesy and patience in attempting to meet his seemingly insatiable appetite for information.

With respect to Mr. Secord's request for the minutes of the commission from 1960 to 1985 I note, first of all, that on September 14, 1988 the Chairman informed Mr. Secord that the Commission was prepared to allow him access to the Executive Committee minutes for the same period. Second, I do not accept the statements of Mrs. Russell that at commission meetings issues are discussed which would be the subject of possible exemption under the Act and that she believes the minutes contain information which my fall under section 6 of the Act as sufficient to discharge the onus the Chairman has of showing that there is no right to the information.
(…)

The answer to Mr. Secord's request for access to the background material provided to the Commissioners is found in s.-s. 3(2) and (3) of the Act which provide:

> 3(2) The application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document.
>
> 3(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.

Mr. Secord's request with respect to background material in not specific and he did not respond to the Chairman's request that he be more specific. I have not examined the background material for 1982 nor do I see any need to do so. Having perused the minutes for that year I am sure that when Mr. Secord peruses them he will find only minimal references to items that fall within the ambit of his thesis. If, on examining the minutes, he is both reasonable and selective in his requests for specific background material the Chairman and the Commission's staff will probably accommodate him. (p. 3-4)

In *Hayes v. New Brunswick (Minister of Intergovernmental Affairs and International Relations),* ([2007] N.B.J. No. 121, 2007 NBQB 47, Dockets: S/M/20/06, S/M/21/06, S/M/22/06, S/M/23/06, New Brunswick Court of Queen's Bench, Trial Division , W.T. Grant J., February 5, 2007.) the judge stated that:

> [32] (…) I find that this information and these documents are all related to the information Mr. Hayes requested and I hereby order the Minister to conduct a further search for this information and provide a further written response to Mr. Hayes in respect to it within 30 days of the date of this decision.
>
> [68] Section 3(2) of the RTIA states:
>
> > 3(2) The application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document.

[69] When the NBPower documents are deleted from Mr. Hayes' request it is reduced to paragraphs 1, 10 and 11. While Mr. Hayes' request complies with this section of the Act, it is, nevertheless, somewhat broad in scope. Making allowances for this, I am satisfied, based on all the evidence before the Court, that the search conducted by the Department was a reasonable attempt to comply with its obligation under the Act.

[70] That said, it is clear that there were more documents in the Department's possession than were disclosed in the reply to Mr. Hayes of February 13, 2006. I therefore order the Minister to undertake a further search for e-mails relevant to the orimulsion issue such as those filed by Mr. Hayes with his application and to provide a written response to Mr. Hayes within 30 days of the date of this decision.

Newfoundland and Labrador

Websites
http://www.oipc.gov.nl.ca/default.htm (Commissioner)
http://www.justice.gov.nl.ca/just/civil/atipp/ (Government)

STATUTE

Access to Information and Protection of Privacy Act, S.N. 2002, c. A-1.1.

RELEVANT PROVISIONS

8. (2) A request shall be in the form set by the minister responsible for this Act and shall provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify the record containing the information.

9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

11. (1) The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it, unless

(a) the time limit for responding is extended under section 16 ;

(b) notice is given to a third party under section 28 ; or

(c) the request has been transferred under section 17 to another public body.

(2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record.

16. (1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where

(a) the applicant does not give sufficient details to enable the public body to identify the requested record;

51. In addition to the commissioner's powers and duties respecting reviews, the commissioner may

(a) make recommendations to ensure compliance with this Act and the regulations;
(…)
(f) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants; and
(…)

73. The Lieutenant-Governor in Council may make regulations
(…)
(c) setting standards, including time limits, to be observed by officers or employees of a public body in fulfilling the duty to assist applicants;

RELEVANT REGULATIONS

Despite having the authority to make Regulations pursuant to s. 73(c), none were made.

GUIDELINES / MANUAL / EXAMPLES

- **Access to Information and Protection of Privacy Act Policy and Procedures Manual** (Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice)

Chapter 2 – Administration of the *Act*

2.3 Access and Privacy Coordinator
(…)

Access Request Management Duties:
- assist applicants and potential applicants in various ways, including explaining the *Act*, helping them to narrow their requests, directing them to other sources of information, bearing in mind at all times the statutory duty to assist an applicant (section 9). (…)

Chapter 3 – Access Request Management

3.3 Duty to Assist
The Act requires that public bodies try to respond quickly, accurately and fully to applicants and to help them to as reasonable an extent as possible.

> **9**. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.

The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.

(…)

3.4 Applications

To apply for access to a record under the *Act*, a person must complete an application in the prescribed form as per subsection 8(2). The applicant must provide enough detail to enable an experienced employee of the public body to identify the record (see Form 1 in Appendix 1).

(…)

If a person sends and access request in a format other than the application form, the Access and Privacy Coordinator should immediately fax or mail an application form to the person or instruct them how to obtain an application form electronically. The Coordinator should process the request so long as all the information required to locate the records being sought is provided and the appropriate fee is attached. This would be in keeping with the duty to assist in section 9 of the *Act*.

(…)

3.6 Receiving a Request

(…)

- *If the request is unclear, provides insufficient information, or is overly broad*, the Access and Privacy Coordinator should contact the applicant as quickly as possible (preferably by telephone, fax or e-mail) to clarify his or her information needs. Vague or overly general applications are generally the result of a lack of understanding of the functions of the public body, its records or how to best articulate the request. If, despite the Access and Privacy Coordinator's best efforts to clarify the request with the applicant, there is still some confusion, subsection 16(1) of the *Act* enables the head of the public body to extend the time for responding to a request for up to an additional 30 days if the applicant does not give enough details to enable the public body to identify a requested record.

(…)

- *If the information is available through routine channels*, the Coordinator should notify the applicant immediately and advise him or her of the normal process. In most cases, the public body will simply provide the information or direct the applicant to the appropriate office where the information may be obtained. The coordinator should ensure that the applicant understands what is required or who to contact for further information and should then confirm that the applicant wishes to withdraw the ATIPP application.

(…)

3.9 Searching for the Records

To respond to ATIPP applications in an efficient and timely manner, the public body must be able to locate and retrieve the requested records quickly. The requested records may be in one of these locations: in the office of the public body (in a central filing system or a staff member's office); in the Newfoundland and Labrador Government Records Center; at the Provincial Archives of Newfoundland and Labrador or the archive of another public body; or in some other location outside the office of the public body.

(…)

For request involving large volumes of materials, substantial photocopying may be required. For this reason, it is important that Access and Privacy Coordinators work with the applicants to narrow or clarify the scope of the request and, subsequently, the amount of material to be searched and copied.

(…)

3.14 Responding to a Request

(…)

When the record does not exist or cannot be located:

A requested record may never have existed, may have been destroyed in accordance with the *Archive Act* or other authority, or may have been lost.

The written response must inform the applicant that access is refused as the record does not exist or cannot be located and should explain briefly the steps taken to locate the record or, in the case of a record lawfully destroyed the disposal date and the authority for doing so. The response must also provide the title and business telephone number of an officer or employee (normally the Access and Privacy Coordinator) who can answer the applicant's questions about the refusal. Finally, the response must also tell the applicant that he or she has the right to ask for a review of the refusal by the Information and Privacy Commissioner, in accordance with section 60. In addition, the response must inform the applicant of the applicable time limits for filing complaints and appeals (within 60 days for complaints to the Information and Privacy Commissioner and within 30 days for appeals to the Trial Division). Note, however, that the Commissioner may allow a period longer than 60 days [paragraph 45(1)(c)].

3.17 Explaining a Record

The head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain it. This is in keeping with section 9 (Duty to Assist an Applicant) and the underlying philosophy of ATIPP. Time spent preparing or giving the applicant an explanation of a record is not an activity for which the applicant can be charged a fee.

3.19 Creating a Record in the Form Requested

Subsection 10(2) is a discretionary provision, which enables the public body to comply with an access request by creating a record in the form requested if the head of the public body is of the opinion that to do so would be simpler or less costly than to produce the records as they exist. The public body, however, is not obligated to create a record in a form requested by an applicant if the public body does not normally produce such records.

(…)

3.20 Time Limit for Responding and Extending the Time Limit

3.20.1 *Time Limit for Responding*

(…)

Note: Public bodies should try to respond to requests as quickly as possible rather than leaving them until close to the time limit. Section 9 of the *Act* requires that the head of a public body make every reasonable effort to respond to an applicant without delay.

If the request is incomplete and further information is required from the applicant, the Access and Privacy Coordinator should seek this information immediately. The official date of receipt cannot be changed. Nevertheless, the need to obtain more information may be grounds for extending the time limit under paragraph 16(1)(a), as discussed below (see section 3.6 of this Chapter for additional information).

(…)

Glossary
(…)
Reasonable
Fair, proper, just, moderate, suitable under the circumstances. There are a variety of situations under the *Act* where reasonableness comes into play in a decision or course of action on the part of a public body, in particular:

- fulfilling the duty to assist applicants and to respond to requests without delay
  (…)

RECOMMENDATIONS OF THE COMMISSIONER

In this province, the Commissioner makes several specific suggestions to institutions regarding the duty to assist. These recommendations include reviewing the procedures to respond to requests, developing proper record management procedures, training, internal audits, etc. The following are some quotes of the various recommendations.

- **<u>General</u>**

Report 2005-001, College of the North Atlantic, May 17, 2005

> [23] Obviously, the Coordinator was not able to honour his obligations under section 67 if he had not been advised of the existence of the request. I believe this to be a significant failure on the part of the College to appropriately assist the Applicant. (…)
>
> (…)
> [45] Based on the information before me it is evident that the College has failed to meet many of its obligations in this situation. They have clearly failed to respond within the time frames as evidenced by the documentation and acknowledged by the College; they failed to engage, and in fact did not even notify, their Access and Privacy Coordinator; they failed to assist the Applicant in an open, accurate and complete manner; and they failed to apply the fee schedule and fee estimate process appropriately.

(note: several files were about this institution for the same kind of problems and the recommendations were similar)

Report 2007-009, College of the North Atlantic, July 6, 2007

> [57] (…)I have no problem in accepting the College's assertion that "reasonableness" rather than "perfection" is the standard by which a public body should be judged in this regard. (…)
> *[note: this paragraph was reiterated in 2007-010]*

Report 2007-014, College of the North Atlantic, October 24, 2007

> [73] Clearly, the duty to assist under British Columbia's legislation is equivalent in all material respects to that found in this province's ATIPPA. (…)
>
> [80] Failure to locate records is not automatically cause for a determination that a public body has failed in its duty to assist. Such a determination can only be made on a fact-specific basis. (…)
>
> [103] (…) Although I acknowledge that the College has faced a steep learning curve in handling requests such as these from this and other Applicants, I think it is reasonable to conclude that CNA should no longer be making the kind of errors which it still appears to be making. (…)

The Commissioner recommended: [para. 104]

> 1. That the College make every reasonable effort to assist an applicant in making an access to information request and to respond without delay to an applicant, in an open, accurate and complete manner, as required by section 9 of the ATIPPA;
>
> 2. That the College take more care to ensure the accuracy of its statements to applicants and to the Commissioner's Office; and (…)

- **<u>Interpretation of the request / contacting the applicant</u>**

Report 2006-007, Department of Government Services, May 9, 2006

In this file, the department failed to forward, to the Applicant and within the 30 day time period, an acknowledgement that it received the request; the letter issued to the Applicant was somewhat vague in responding to the request. Also, the failure to adequately address each part of the Applicant's request detracts from other efforts to fulfill the duty to assist, including meeting with the Applicant to attempt to determine his needs in filing his many requests.

The Commissioner recommended the following:

> "1. That the Department review its procedures for responding to access requests in order to ensure that it can fully comply with its obligations under sections 9 and 11 of the ATIPPA;
>
> 2. That the Department further develop its records management procedures, including clear guidelines for the retention and destruction of records in its control and custody." [para 31]
>
> *[note: same recommendations in 2006-008 (same department)]*

Report 2006 – 015, College of the North Atlantic, November 20, 2006

> [46] CNA appears to have made no effort in its recorded communication with the Applicant to correct the Applicant's apparent notion that amending his request would mean he could not request the attachments at a later date in another request. Some form of explanation, perhaps along with a more detailed proposal from CNA, might have prevented this matter from coming before me, and would certainly have been more in line with the duty to assist, as set out in section 9 of the ATIPPA: (…)

[53] In terms of better communication, I place the onus primarily on CNA in relation to its duty to assist, as set out in section 9. I have no doubt that a significant amount of effort went into dealing with this request, however, I also note that CNA did not respond to a number of the points and questions raised by the Applicant in various e-mails he sent to the College during the process, until after the Applicant's request was ultimately refused.

- **Search**

Report 2005-006, College of the North Atlantic, November 14, 2005

[64] (…) The failure to check the Qatar campus for records was a failure of the duty to assist, as was the failure of the College to do a more thorough search each time valid evidence was presented by the Applicant that records were likely to be found there.(…)

[65] Adequacy of search with regard to access to information requests has been dealt with by other jurisdictions in Canada. In Ontario Order M-909, the Inquiry Officer commented that

> Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

In the present Review, the Applicant has put forward enough of a case to justify, at each stage of this saga, a reasonable basis for further searches. The Inquiry Officer in Order M-909 also states that records searches "must be conducted by knowledgeable staff in locations where the records in question might reasonably be located." Clearly, this did not always take place. Searches were not always conducted as thoroughly as it was reasonable to do, nor were they conducted in all of the locations it was reasonable to search. (…)

[66] Also in Ontario, the Assistant Commissioner stated in Order PO-1954 that:

> The Act does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

I agree with this perspective. (…)

[note: paragraph 65 and 66 were reiterated in 2006-003, 2007-011 and 2007-016]

Report 2006-003, College of the North Atlantic, March 14, 2006

[62] Be that as it may, e-mails (and their attachments) are records and are subject to the ATIPPA. Public bodies must therefore ensure that whatever capabilities are present in their e-mail systems to perform searches for access requests are used to their utmost degree. This involves trained personnel who are well versed in all the search capabilities of their e-mail system. It involves personnel maintaining a record of all search terms and parameters used in access requests so that they can support their actions should the matter come to this Office for a review. It also involves communication with applicants as part of the duty to assist, to ensure that electronic searches are clearly defined and reflect the applicant's intention as closely as possible. In some cases it may also involve a discussion with the applicant about the limitations of electronic searches, leaving open the possibility that an electronic search may not be able to accomplish the intended result. In such cases, perhaps some combination of an electronic and a physical search may be necessary in order to respond to an access request.

[65] Under authority of Section 49(1) of the ATIPPA, I hereby make the following recommendations: (…)
2. That the College take all reasonable steps using the normal software, hardware and expertise at its disposal to recover and provide to the Applicant any e-mail account or accounts or portions thereof belonging to the Applicant which were lost or destroyed as a result of technical errors or mistakes;

3. That CNA keep a complete record of the steps used in conducting all future electronic searches, including a list of key words and combinations of words used in undertaking such searches; (…)

6. That in future the College identify to applicants the limitations, if any, involving electronic searches (for example, if it is determined following an audit that e-mail attachments may not be reliably searched using the normal hardware, software and expertise at the disposal of the College). Further, that the College use any reasonable means at its disposal to mitigate such limitations when responding to access to information requests; and

7. That the College ensure that persons involved in conducting electronic records searches for the purpose of responding to access to information requests receive adequate training in such matters.

Report 2007-016, College of the North Atlantic, September 20, 2007

[24] Although Ontario Order M-909 referenced in the above quotation does not specifically reference the duty to assist, it establishes a similar onus on the public body to show that a reasonable search has taken place. Furthermore, if a public body can show that it has done such a search, there is also some onus on the Applicant to provide some reasonable basis that would contradict that result, thus concluding that records may in fact exist.

[25] In this case, CNA has described the search it undertook, maintaining that the search would amply fulfil the reasonableness requirement. Conversely, the Applicant has put forth his reasons for concluding that records may in fact exist.

[26] CNA contacted those people who would likely have had such records in their possession, if they existed, and also searched those places where any such records were likely to have been stored. CNA is not required to prove that the records do not exist, but rather to show that it undertook a reasonable search. I accept that CNA did indeed undertake a reasonable search for the responsive records, and that no records were found.

- **Responding to the applicant**

Report 2005-005, Department of Labrador and Aboriginal Affairs, November 7, 2005

[96] I have also commented at length on the manner in which this request was handled by the Department and have highlighted a number of their inappropriate actions and decisions. I find several aspects of this case to be disturbing, including the amount of time involved, the withholding of information that had already been publicly released, the application of a blanket approach to information, the Department's improper application of section 27, the introduction of new exceptions late in the process and an apparent lack of appreciation of the role and authority of this Office. It is also evident from my investigation that the Department did not follow established protocols specified in governments own ATIPPA Policy and Procedures Manual. As such, I have found that the Department in this case has failed to meet its duty to assist the Applicant as mandated by section 9 of the legislation.

Report 2006-003, College of the North Atlantic, March 14, 2006

[52] (…) I do feel that there is an onus which can be read into section 9 of the ATIPPA. Such an onus obligates public bodies to communicate with applicants when there are records responsive to a request which are not being provided to the applicant on the basis of an assumption that the records are already in the possession of that applicant.

[65] Under authority of Section 49(1) of the ATIPPA, I hereby make the following recommendations:
(…)
4. That in handling future access to information requests, if the College believes that an Applicant already has possession of some portion of the responsive records, the College should first contact the Applicant as per the duty to assist set out in section 9 of the ATIPPA in order to confirm whether in fact this is the case before refusing to provide such records under section 13;

Report 2007-007, Town of Portugal Cove – St. Philip's, June 26, 2007

[10] In considering the duty to assist, I am guided by the clear language of the ATIPPA and the corresponding language of the Manual. I am also guided by a number of Orders of the Office of the Information and Privacy Commissioner of Alberta. In his Order F2005-020 the Alberta Commissioner summarized as follows:

> [para 16] Interim Order 97-015 stated that how a public body fulfills its duty to assist will vary according to the fact situation in each request. In Order 2001-024, it was stated that a public body must make every reasonable effort to assist an applicant and respond openly, accurately and completely to him. The standard directed by the Act is not perfection, but what is "reasonable". In Order 98-002, Commissioner Clark adopted the definition of "reasonable" found in Blacks' Law Dictionary (St. Paul, Minnesota, West Corp., 1999) as "fair, proper, just, moderate, suitable under the circumstances. Fit and Appropriate to the end in view."
>
> *[note: this paragraph was reiterated in 2007-012 and 2007-015]*

(…)
[16] At a minimum, I would expect this same level of notification, explanation and confirmation when denying an applicant access to the record. Failure to do so is a clear violation of a public body's statutory duty to assist an applicant in the manner mandated by section 9 of the ATIPPA.
(…)

Report 2007-010, College of the North Atlantic, August 7, 2007

[42] In my view, when CNA agreed to provide certain additional pages of the responsive record to the Applicant as part of the informal resolution process, but then failed to provide some of those pages, there was a failure to respond in an "accurate and complete" manner, which is a partial failure of the duty to assist. The duty to assist, in my view, involves dealing with applicants with due care and diligence, even when those dealings may occur after a Request for Review has been filed, and this Office is involved in brokering an informal resolution. It is essential to the basic purpose of the ATIPPA that applicants can count on public bodies to fulfil their commitments, particularly in such an essential element as providing access to the pages of a record which they have agreed to provide. Failure to do so undermines confidence in the entire process.

- **Other considerations**

Report 2007-012, Town of Torbay, September 20, 2007

[58] (…) Neither Act excuses a Town from its statutory duties because the Town was not familiar with the duties imposed on it or because the Town's staff did not have time or resources to carry out those duties. The Town has to accept the fact that its obligations under ATIPPA must be complied with in the same manner as its duties under the Municipalities Act, 1999, or any other Act.

The Commissioner recommended:

(…)

8. That the Town forward a letter to the Applicant apologizing for the manner in which it dealt with his access to information request, with a copy of that letter forwarded to this Office;

9. That the Town ensure that its Access and Privacy Coordinator has received adequate training from the ATIPP Office of the Department of Justice and provide written confirmation to this Office that such training has been received;

10. That the Town appoint an Alternate Access and Privacy Coordinator, who is to perform the required duties of the Access and Privacy Coordinator when that Coordinator is away from the Town's office or is performing other duties, and the Town is to ensure that the Alternate Access and Privacy Coordinator receives adequate training from the ATIPP Office of the Department of Justice, with written confirmation of the appointment and the training of the Alternate Access and Privacy Coordinator to be forwarded to this Office; and

11. That the Town ensure that both its Access and Privacy Coordinator and its Alternate Access and Privacy Coordinator have a copy of the ATIPPA Policy and Procedures Manual, produced by the Access to Information and Protection of Privacy Coordinating Office with the Provincial Department of Justice. [para. 105]

- **Record management / resources**

Report 2005-006, College of the North Atlantic, November 14, 2005

> [68] Speaking optimistically, this experience should be seen as a learning opportunity for CNA. CNA is one of the largest public bodies in this province and it may simply have to dedicate more resources to the job of complying with this legislation. This should not be seen as an additional expenditure of resources, but a wiser use of resources. The College should be spending their time and effort in correctly responding to access requests, rather than in dealing with the consequences of an inadequate response.
>
> [71] Under authority of Section 49(1) of the ATIPPA, I hereby make the following recommendations:
>
> 1. That the College take steps to upgrade and update records management systems at the College of the North Atlantic in Qatar and in Newfoundland and Labrador, using diagnostic procedures to identify any further issues. The College must ensure that all records are appropriately catalogued, such that a search of this nature can be accomplished with a reasonable degree of efficiency and accuracy in future;
>
> 2. That the College review its records management and storage policies with a view to ensuring better compliance with the ATIPPA. For example, there was clearly a disconnect between CNA Stephenville and CNA Qatar regarding the assumption that legal invoice records were not being paid nor were located at CNA Qatar. If such policies are needed, they should be properly instituted, with copies distributed to all those involved in records management and accounting;
>
> 3. That the resources directed by the College towards compliance with the ATIPPA be reviewed with a view to ensuring that it is able to fulfill its obligations under this legislation; and

Report 2006-003, College of the North Atlantic, March 14, 2006

> [65] Under authority of Section 49(1) of the ATIPPA, I hereby make the following recommendations: (…)
>
> 5. That the College undertake an internal audit of its e-mail system in order to determine the full range of its normal operating capabilities with regard to e-mail searches, including the extent to which (if at all) e-mail attachments are searchable using key word electronic searches;

DECISIONS OF THE COURT

In *Professional Diving Contractors Ltd. v. Newfoundland and Labrador (Minister of Innovation, Trade and Rural Development)*, ([2008] N.J. No. 16, 2008 NLTD 7, Docket: 200701T1374, Newfoundland and Labrador Supreme Court - Trial Division, R.M. Hall J., Judgment: January 22, 2008), the third party sought to extend the delay to file an application for an appeal of the institution's decision to release its information. The third party argued section 9 for the duty to assist, but the judge concluded:

29 However, this section applies only to a person applying (the applicant) for the release of information. It does not apply to Pro-Dive about whose business affairs information is being sought from Government. This is one example of where this Act has what appears to have a somewhat excessive focus upon the rights of an applicant for the release of information as opposed to adequate protections for the rights of those who claim privacy rights with respect to the information. However I am of the view that s. 9 cannot be of use to Pro-Dive in this application to assist it in having the time for its appeal extended.

Nova Scotia

Website
http://foipop.ns.ca// (Review Officer)
http://www.gov.ns.ca/just/Divisions/IM/FOIPOP/foisvcs.asp (Department of Justice)

STATUTE

Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5.

RELEVANT PROVISIONS

7. (1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall

(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; and

(b) either

(i) consider the request and give written notice to the applicant of the head's decision with respect to the request in accordance with subsection (2), or
(ii) transfer the request to another public body in accordance with Section 10.

(2) The head of the public body shall respond in writing to the applicant within thirty days after the application is received and the applicant has met the requirements of clauses (b) and (c) of subsection (1) of Section 6, stating

(a) whether the applicant is entitled to the record or part of the record and

(i) where the applicant is entitled to access, stating that access will be given on payment of the prescribed fee and setting out where, when and how, or the manner in which, access will be given, or
(ii) where access to the record or to part of the record is refused, the reasons for the refusal and the provision of this Act on which the refusal is based;

(b) that the record is not in the custody or control of the public body; or

(c) where the record would contain information exempted pursuant to Section 15 if the record were in the custody or control of the public body, that confirmation or denial of the existence of the record is refused,

and stating

(d) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the decision; and

(e) that the applicant may ask for a review by the Review Officer within sixty days after the applicant is notified of the decision.

(3) The head of a public body who fails to give a written response pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

(4) The head of a public body may refuse to disclose to an applicant information

(a) that is published and available for purchase by the public; or

(b) that, within thirty days after the applicant's request is received, is to be published or released to the public.

(5) The head of a public body shall notify an applicant of the publication or release of information that the head has refused to disclose pursuant to clause (b) of subsection (4).

(6) Where the information is not published or released within thirty days after the applicant's request is received, the head of the public body shall reconsider the request as if it were a new request received on the last day of that period, but the information shall not be refused pursuant to clause (b) of subsection (4).

8. (1) Where an applicant is informed pursuant to subsection (2) of Section 7 that access will be given, the head of the public body concerned shall

(a) where the applicant has asked for a copy pursuant to subsection (2) of Section 6 and the record can reasonably be reproduced,

(i) provide a copy of the record or part of the record with the response, or
(ii) give the applicant reasons for delay in providing the record; or

(b) where the applicant has asked to examine the record pursuant to subsection (2) of Section 6 or where the record cannot reasonably be reproduced,

(i) permit the applicant to examine the record or part of the record, or
(ii) give the applicant access in accordance with the regulations.

(2) The head of a public body may give access to a record that is a microfilm, film, sound recording, or information stored by electronic or other technological means by

(a) permitting the applicant to examine a transcript of the record;

(b) providing the applicant with a copy of the transcript of the record;

(c) permitting, in the case of a record produced for visual or aural reception, the applicant to view or hear the record or providing the applicant with a copy of it; or

(d) permitting, in the case of a record stored by electronic or other technological means, the applicant to access the record or providing the applicant a copy of it.

(3) The head of a public body shall create a record for an applicant if

(a) the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and

(b) creating the record would not unreasonably interfere with the operations of the public body.

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

RELEVANT REGULATIONS

N/A

GUIDELINES / MANUAL / EXAMPLES

- **Procedures Manual (2005)**

(from Information Access and Privacy Office, Department of Justice)

(The Manual is not available online. It is currently being revised and updated to provide procedures and best practices. The following is the section regarding duty to assist)

1.10 Obligations

In processing any requests for information, either through the formal application process or the routine access process, it is important to keep in mind the following statutory responsibilities of the public body:

clause 7(1)(a) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall

(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely.

In the event of a third party consultation process, subsection 22(4) The public body shall not
(a) disclose the name of the applicant to the third party without the consent of the applicant; or
(b) disclose the name of the third party to the applicant without the consent of the third party".

- **On the Justice site, section on Access to Information**

Contact With the Applicant
FOIPOP requires that the head of the public body make every reasonable effort to assist applicants with their application and to respond without delay, openly, accurately, and completely.

The initial contact between an applicant and an administrator will usually be either by telephone or in writing. This step will assist in clarifying the nature and scope of the application and will insure that the application is clear to both the public body and applicant. This will allow the public body to locate and review all the records sought by the applicant.

RECOMMENDATIONS OF THE REVIEW OFFICER

- **Interpretation of the request / contacting the applicant**

Report FI-02-41, Office of Economic Development, June 10, 2002

> This Act imposes a positive duty on public bodies to assist applicants. Section 7(1)(a) expects a public body to "make every reasonable effort to assist the applicant . . . openly, accurately and completely." Decisions on both applications, on the same matter, were passed to the two applicants on the same day. I believe it is reasonable to expect the OED to conclude, in this case, that although the Applicant did not specifically ask for the document given to the first applicant, it would be useful to him. A public body is expected to go beyond a narrow interpretation of an application. The Act, in my view, expected the OED to provide this Applicant with the same document provided to the other.
>
> With almost all applications it is incumbent on public bodies to contact applicants to discuss their applications. It is part of their duty to assist an applicant and part of the attempt a FOIPOP Administrator should make to develop a working relationship with the applicant to define the nature and scope of the application. Some do this as a matter of practice. In this case I am told this was not done, although five months passed between the time the application was received and a decision was made.
>
> Public bodies should avoid technical interpretations of an Act that is designed to promote openness and accountability. They should make every attempt to meet the purpose of the Act found in section 2 to ensure public bodies are fully accountable to the public to facilitate informed public participation in policy formulation. The response to this application did not, in my view, meet that expectation. (p. 5-6)

- **Search**

Report FI-02-29, Sydney Steel Corporation, Executive Council and Office of Economic Development, January 22nd, 2003

In determining if the search was adequate, the review Officer asked the institution the following questions:

By whom was the search conducted? (p. 2)
What places were searched? (p. 2)
What types of files were searched? (p. 2)
What were the results of the searches? (p. 3)
Is it possible that such records existed but no longer exist? (p. 3)

[Note: approach also used in Report FI2003-55)

Report FI-02-50, Department of Education, June 17, 2002

Section 7 of the Act expects a public body to "make every reasonable effort" to assist an applicant openly, accurately and completely. This requires a public body to do an adequate search for documents which respond to an application. I agree with the Assistant Information and Privacy Commissioner of Ontario, in Order P-1721, that it is my responsibility to assure myself that a public body has done a reasonable search to identify documents. The Department must provide me with sufficient evidence to show it has made an adequate search and the Applicant who, naturally, is not in a position to know which documents have not been identified, must provide me with a reasonable basis for concluding that a specific document related to the diploma may, in fact, exist. (p.2)

(note: reiterated in Report FI-03-45; in Report FI2003-55)

- **<u>Responding to the applicant</u>**

Report FI-02-85, Nova Scotia Business Inc., November 29th, 2002

With due respect to NSBI, which provides thorough explanations of its decisions under this Act, it is not, in my view, living up to its obligations under s.7(1)(a) which it cites above. S.7(4) appears in the part of the Act entitled "Duty of head of a public body" and should be taken to mean that the reason a public body would choose not to disclose documents in this section, was so that it could direct the applicant where to get the information on her or his own without having to apply for it under the Act. A reasonable effort to assist this applicant should include telling him where he can find the published material. (p.4)

Report FI-03-11, Office of Economic Development, June 10th, 2003

I agree with the Applicant that it was incumbent on the OED to inform him that 12 more relevant documents existed even though they were denied in their entirety. Section 7(1)(a) requires a public body "to make every reasonable effort assist the applicant and to respond without delay to the applicant openly, accurately and completely". An applicant making a Request for Review should know how many relevant records are involved. (p.6)

Report FI-04-03, Acadia University, June 28, 2004

While Section 7(1)(a) obliges public bodies to respond to applications "accurately" it is, in my view, not practicable for the Review Officer to investigate accuracy on such a scale as this. I believe my suggestion to the two parties to sit down together and go over the figures in the record is a useful one. [for salary and benefits of employees] (p.2)

Report FI-05-65, Tri-County Regional School Board, January 23, 2006

With respect to Section 7, the TCRSB could not have been said to have made "a reasonable effort to assist" the Applicant. A public body that cannot provide the majority of the records requested should be prepared to offer some alternatives to the Applicant. I am convinced that poor record keeping practices are a factor in lack of information available. (p.6)

- **Fees and Records management**

Report FI-05-13, Department of Environment and Labour, April 22, 2005 [was reported in the Annual report of 2005]

> Because the Department chose not to ask NSP if it had a copy of the assessment report, I cannot conclude that "every reasonable effort" was made to assist the Applicant and that the requirements of Section 7(1)(a) were met. Section 7(1)(a) states:
>
> > 7 (1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall
> > (a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely
>
> The search undertaken confirms that the Department assumed such a record would be kept on file. It is reasonable to conclude that in this particular case there was a problem with records management. In my Review, FI-04-62, I questioned whether the applicant in that case was being asked to pay a sizable processing fee because of questionable records management. It was my view then, and is now, that the fee is unfairly levied even if the Applicant, in this case, raised no objections. The Department, when it provided a fee estimate, and the Applicant, when she paid it, assumed the assessment report would be found somewhere in the voluminous file.
>
> Both parties were acting in good faith. In my view the Department should continue acting in good faith, and reduce the fee to the amount of the application fee, and return the rest. (p.2-3)

DECISIONS OF THE COURT

N/A

Ontario

Websites
http://www.ipc.on.ca/index.asp?navid=58&fid2=6 (Commissioner)
http://www.accessandprivacy.gov.on.ca/english/manual/index.html (Access and Privacy Office, Ministry of Government and Consumer Service)

STATUTE

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F-31.
Loi sur l'accès à l'information et la protection de la vie privée, L.R.S., 1990, ch. F-31.

RELEVANT PROVISIONS

24. (1) A person seeking access to a record shall,
(a) make a request in writing to the institution that the person believes has custody or control of the record;
(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
(c)at the time of making the request, pay the fee prescribed by the regulations for that purpose.
(…)

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Note: On a day to be named by proclamation of the act will be amended by adding:

60.(b.1) *requiring the head of an institution to assist persons with disabilities in making requests for access under subsection 24 (1) or 48 (1); [See: 2006, c. 34, Sched. C, ss. 9, 29 (1)]*

RELEVANT REGULATIONS

N/A

- **IPC Practices, Number 15: Clarifying Access Requests** (Revised March 2000)

Individuals who request access to information under the Freedom of Information and Protection of Privacy Act or the Municipal Freedom of Information and Protection of Privacy Act (the Acts) do not always know the kinds of records a government institution has, or how it keeps its records. For this reason, clarification is often required.

The purpose of this issue of IPC Practices is to remind institutions of the legislative requirements regarding the clarification of requests; and to emphasize that clarification will make things easier for everyone concerned — the institution; requesters, appellants and affected persons; and the Information and Privacy Commissioner/Ontario (IPC).

It is vital that government institutions have a clear understanding of the nature and scope of requests in order to process them efficiently.

Requirement for Requesters
The Acts specify that a person seeking access to a general record or to his or her own personal information shall provide sufficient detail to enable an experienced government employee to identify the record.

Requirement for Institutions
The Acts also state, that if the request does not sufficiently describe the record sought, the institution "shall inform the applicant of the defect and shall offer assistance in reformulating the request."

Manner of Clarification
In most cases, it would be more expeditious and productive to have the employee who is most knowledgeable about the requested records communicate directly with the requester. While a letter may be appropriate in some instances, speaking with a requester offers an invaluable opportunity to provide explanations, answer questions and resolve issues on the spot.

"Clarify" or "Narrow?"
It is important that institutions understand the difference between a clarified request and a narrowed request. To "clarify" is to make clear what he requester is seeking. For example, a requester wants "a job competition file", but has provided no further information. Clarification is needed. To "narrow" is to reduce the scope of the request, i.e., decreasing the number of records requested.

Standard Questions
The following are some typical questions that may be used by an institution as it attempts to clarify a request:
• Are you interested in any particular records? Please elaborate.
• Do the records you are requesting involve a specific incident? Please elaborate.
• Are you interested in access to another individual's personal information?
• Do the records in which you are interested involve a specific time period? (For example, "…all information related to X, between April 1, 1991 and March 31, 1992.")
• Are you seeking records from a particular branch or from a particular geographic region?
• Have you already spoken with a specific branch or with particular individuals from the government organization? Can you name the branch or individuals? (This may help avoid a duplication of effort.)

More Information
Institutions with questions concerning clarification of a request may contact a Policy Adviser at the Freedom of Information Branch, Management Board Secretariat.

Regarding the clarification of requests, the important provisions of the Acts are: sections 24, 47(1)(b), 48(1), and 48(2) of the provincial Act; and 17, 36(1)(b), 37(1), and 37(2) of the municipal Act.

- **Access and Privacy Manual** *(From the Access and Privacy Office, Ministry of Government and Consumer Service)*

Chapter 3: Access procedures

Clarifying Requests
A request may not sufficiently describe the record sought and therefore may not be considered a "complete request".

An institution that receives a broadly worded request has three options:

- respond literally to the request, which may involve an institution wide search for the records;
- request further information from the requester in order to narrow its search; or
- narrow the search unilaterally, outlining the limits of search to the requester

Clarifying a request is helpful to both the institution and the requester. The institution should notify (see notification no.1, in Appendix IV, Sample Notification Letters) or telephone the requester and offer assistance in reformulating the request to identify the general class or type of record and the institution with custody or control of the record. After a request has been clarified it should be clear to each party what records are being requested. For an institution this means that an experienced employee will be able to identify the records sought.

For example:

A requester might ask to see "all the minutes that the Hydro-Electric Commission has". Does this mean all the board minutes, the committee minutes, or both? For what year?

In the example above, the requester may be interested in only the board minutes for a particular date or date range, not all of the minutes that exist. By clarifying the request the institution could save considerable time searching through records and preparing them for release. It would also save the requester considerable costs if a fee is charged.

The records descriptions and descriptions of personal information banks can be used to help clarify requests.

(…)

When an access request is received, the institution must search for the requested records, examine them and decide what will be released. During the review of the records, an institution may find it necessary to extend the time period to respond to a request, notify affected parties and/or issue a fee estimate. In these instances the time period for processing the request is suspended or extended.

Search for Records
Searches for records responsive to a request should include, where practicable, enquiries of staff responsible for the issue at the time the records were created or might have been created.

The following should also be considered when searching for records:

- identify the specific files and data banks that should be searched;
- ensure that if a requester claims certain records should exist, they have been searched for in the appropriate files; and
- establish whether other files and data banks including e-mails and those of alternative media might contain records responsive to the request.

An institution should be prepared to verify in an affidavit, the steps taken to locate a record.

(…)

Checklist for Processing a Request
A Request is Received

1. Is the request in writing, does it mention FIPPA/MFIPPA and does it include the $5.00 application fee?

2. Does it provide sufficient detail to enable an experienced employee to identify the requested record(s)?

If not, assist the requester to rewrite the request.

DECISIONS OF THE COMMISSIONER

- **Interpretation of the request / contacting the applicant**

Order 134, Ministry of Financial Institutions, December 27, 1989

> Nonetheless, the Act imposes an obligation on the institution to offer assistance, (…). In my view, given the circumstances that existed at the time the request was made, it was at least possible that the appellant intended his request to include access to the legal files. This possibility was not specifically identified or addressed by the institution at that time. In its representations on this point, the institution points out that the legal files are not routinely kept in the division of the institution which received the request. Since the appellant was not in a position to know this, I do not think this submission advances the institution's argument. (…)

While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the Act compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal. (p. 16-17)

[reiterated in PO-1730, p. 4; PO-2591, p. 3; PO-2486, p. 4]

Order P-880, Ministry of the Attorney General, February 28, 1995

(…) That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

In my view, an approach of this nature will in no way limit the scope of requests as counsel fears. In fact, I agree with his position that the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the Act to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records. It must outline the limits of the search to the appellant. (p. 11-12)

[reiterated in PO-1730, p. 3, PO-2591, p. 3, PO-2486, p. 4-5]

Order P-995, Ministry of the Attorney General, September 6, 1995

For requests in the form of questions, it was specified that:

In this case, the Ministry could have taken steps to clarify the request. However, in my view, the appellant is clearly seeking answers to his questions from the Ministry rather than seeking access to records, which may require the creation of a record.

The Ministry is under no obligation, pursuant to the Act, to create records. I agree with the Ministry that determination of the appellant's complaints must be made in another forum. The Ministry indicates that it has provided the appellant with the address of the Justice of the Peace Review Counsel. In my view, it would be appropriate for the appellant to direct his queries to that body. (p. 3)

Order PO-1730, Ontario Hydro, November 17, 1999

Section 24 of the Act imposes obligations on both requesters and institutions when submitting and responding to requests for access to general records. (…)

At the time of making his request, the appellant was not in a position to know any of the details regarding the corporate structure that would be taking over Ontario Hydro’s operations, (…)

Ontario Hydro, on the other hand, clearly had more detailed knowledge of its restructuring activities at the time it received the appellant's request, including intentions regarding ongoing coverage of any successor companies under the Act. In my view, it was reasonable for Ontario Hydro to conclude, without further discussions with the appellant, that his request covered both Ontario Hydro and its successor companies. It was not reasonable, however, to narrowly interpret the request to exclude any successor companies without first raising this issue with the appellant. Ontario Hydro had an obligation to seek clarification under section 24(2) if it had any doubts, and I find that it failed to discharge this responsibility in its dealings with the appellant. (p.3)

Order PO-2634, Ministry of Natural Resources, January 9, 2008

The mandatory section 24(2) requires the institution to undertake the process of clarifying a request that is not sufficiently detailed, and until the request is "clarified", the 30-day time limit for responding does not begin (see Order 81).

Thus the character of any discussions that take place concerning the scope of a previously-submitted request is crucial for determining the date it is considered to have been submitted. I agree with former Commissioner Wright that unilateral narrowing by a requester, subsequent to filing an initial request, is not "clarification" for the purposes of section 24(2), and in such a case, the 30-day time limit begins to run on the date the request was first received by the institution. (p. 9)

- **<u>Search</u>**

Order P-486, Ministry of Health , June 25, 1993

Upon receipt of a request, the Ministry must first be satisfied, pursuant to section 24(1) of the Act that the request is sufficiently clear that "an experienced employee of the institution, upon a reasonable effort, [could] identify the record." If the request is not sufficiently clear, the Ministry is required by section 24(2) to offer the requester assistance in reformulating the request so as to comply with section 24(1). The Act does not require the Ministry to prove to the degree of absolute certainty that the requested records do not exist.

The Ministry's representations include details on the areas searched, the files reviewed and the employee who conducted the search. The Ministry also states that an additional search was conducted to locate the specific records identified by the appellant. I have reviewed the representations of the Ministry and am satisfied that the search conducted by the Ministry for responsive records was reasonable in the circumstances of this appeal. (p.2)

[note: reiterated in P-995, p. 5)

Interim Order PO-1954-I, Ministry of the Solicitor General, Ministry of the Attorney General, Cabinet Office, Ministry of Natural Resources, October 3, 2001

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records or further records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records that are responsive to the request. The Act does not require the institution to prove with absolute certainty that records or further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response, the appellant must, nevertheless, provide a reasonable basis for concluding that such records exist. (p. 3-4)

[Note : reiterated in M-909 (under the Municipal Act)]

In conducting a reasonable search inquiry, the Act gives me the power as well as the obligation to satisfy myself that all reasonable steps have been taken to locate and identify records responsive to a request. I have the ability as well as the responsibility to determine what questions are objectively relevant in this regard, and to require that these questions be answered. In the context of these four inquiries, I determined that the most basic of questions associated with any reasonable search appeal of this nature were relevant and needed to be answered, and it is not acceptable for the government to refuse to answer direct questions of this nature, and to require me to accept indirect answers derived from the evidence it chooses to submit. (p. 10)

(…)

Although the search activities undertaken by the four institutions in these appeals were unquestionably extensive, given the approach adopted by the institutions, and the resulting error in defining the proper search parameters, I am unable to satisfy myself that all reasonable efforts have been made. The reason for these deficiencies, in my view, stems from the apparent decision on the part of the government to rely on indirect evidence when direct evidence would have been more appropriate. (…) (p.11)

I order the four institutions listed in Appendix A of this interim order to provide me with affidavits sworn by each of the individuals listed under the institution's name, answering the following questions: (…)(p. 12)

Order PO-2486, Ministry of Government Services, July 25, 2006

In my view, based on the description in the Coordinator's affidavit, the Ministry's inquiries placed too much emphasis on whether anyone was aware of a document called a "Records Index" of retention and disposal schedules. As I stated above, any record, no matter what its title, that provides or contains a list of retention schedules should be considered responsive. Based on the information provided, I am not satisfied that a search of this nature was in fact conducted.

In addition, beyond the assertion that the three areas identified (i.e., the program area, "Information Management Solutions" and Archives) are the "only ones" that have retention schedules, the Coordinator's affidavit does not provide any context for the Ministry's record keeping practices that would support a finding that a reasonable search was conducted. No details are provided about the overall responsibility within the Ministry (or the former Ministry of Consumer and Business Services) for records management. The role of "Information Management Solutions" is not explained. Presumably the Coordinator has responsibilities in this area, but these are not explained either. In addition, the question of who might prepare or keep an index or list of retention schedules (as opposed to the schedules themselves) is not explored, nor is the possibility that there could be a Ministry-wide list of such schedules, or some other kind of record that would, if it existed, contain the information the appellant seeks. (p.5)

- **Other considerations**

Order P-880, Ministry of the Attorney General, February 28, 1995

> In this re-determination, the appellant himself has submitted representations in addition to those provided by his counsel. He states his reasons for seeking access to the information. While generally a person's need for information is not relevant in the context of an appeal, I believe in this case it provides some insight into the manner the appellant now believes his request should be interpreted. (p. 13-14)

Order PO-2374, Ministry of Community Safety and Correctional Services, March 3, 2005

> (…) I note that the Ministry has expended a great deal of time and expense in attempting to respond to the appellant. It has provided him with a great many records and arranged for records on microfiche to be made available to the appellant at no cost. As far as I am able to determine, the appellant has not assisted in this process in any meaningful way.
>
> In the circumstances of this appeal, I find that the Ministry has complied with its obligations under section 24(2) of the Act in attempting to assist the appellant to provide the Ministry with sufficient detail in his request to enable it to respond. (p. 11)

Order PO-2634, Ministry of Natural Resources, January 9, 2008

> In my view, the appellant makes a good point in this regard. The length of time it will take to receive an access decision (and any records that are being released) could well be a factor in a requester's decision about paying a requested deposit and continuing to pursue access. For this reason, I have decided that institutions should be encouraged to identify that they will require a section 27 time extension, and the reasons for taking that position, as early as possible in the request process, and in the event of an interim access decision, this could be communicated in the interim decision letter. Since it is not certain when the deposit would be paid and the clock re-activated, it will not be possible to name a date by which the access decision would be given; rather, the estimate must be given by number of days, as the Ministry eventually did in this case.
>
> On the other hand, since institutions have the entire 30-day response period to claim a time extension, and the clock is stopped by issuing the interim decision, I am not in a position to insist that the time extension be claimed in the interim access decision, but in my view this would be a good practice to adopt because it assists the requester in making an informed decision about whether to pay the deposit. Addressing the time extension issue in the interim access decision also appears to be the most practical approach for the institution, given that in formulating the fee estimate that accompanies the interim access decision, the institution would also have occasion to consider how much time it will likely require to process the request. (p. 15)

DECISIONS OF THE COURT

N/A

Prince Edward Island

Websites
http://www.assembly.pe.ca/index.php3?number=1013943 (Commissioner)
http://www.gov.pe.ca/foipp/ (Government)

STATUTE

Freedom of Information and Protection of Privacy Act, S.P.E.I. 2001, c. 37.

RELEVANT PROVISIONS

4. An applicant may make Oral requests for access to a record if
(a) the applicant's ability to read or write English or French is limited; or
(b) the applicant has a physical disability or condition that impairs the applicant's ability to make a written request.

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

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

(3) In a request, the applicant may ask examination
(a) for a copy of the record; or
(b) to examine the record.

(4) Where the head of a public body contacts an applicant in writing respecting the applicant's request including
(a) seeking further information from the applicant that is necessary to process the request, or
(b) requesting the applicant to pay a fee or to agree to pay a fee, and the applicant fails to respond to the head of the public body, as requested by the head, within 30 days of being contacted, the head of the public body may, by notice in writing to the applicant, declare the request abandoned.

(5) A notice given by the head of a public body under subsection (4) shall state that the applicant may ask for a review, under Part IV, of a declaration of abandonment of the applicant's request.

8. (1) The head of a public body shall make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

(2) The head of a public body shall create a record for an applicant if
(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise; and
(b) creating the record would not unreasonably interfere with the operations of the public body.

12. (1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if
(a) the applicant does not give enough detail to enable the public body to identify a requested record;

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

(a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records set out in any other enactment of Prince Edward Island;
(…)
(g) bring to the attention of the head of a public body any failure by the public body to assist applicants under section 8; and

(h) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this Act.

(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that Resolution of complaints
(a) a duty imposed by section 8 has not been performed;
(…)

77. (1) The Lieutenant Governor in Council may make regulations
(…)
(f) respecting standards to be observed by officers or employees of a public body in fulfilling the duty to assist applicants;

Note: Prince Edward Island's legislation is modeled on Alberta's legislation (Order No. 03-001)

RELEVANT REGULATIONS

Freedom of Information and Protection of Privacy Act General Regulations, c. F-15.01.

Disclosure of personal information
5.(5) The head of the public body that has custody or control of the record may require that an applicant who makes a request for access to a record containing information relating to the applicant's mental or physical health must examine the information in person, and may not examine the record until a medical or other expert or a member of the applicant's family or some other person approved by the head of the public body is present to clarify the nature of the record and to assist the applicant in understanding the information in the record. (EC564/02)

- **Guidelines and Practices Manual** (May 2006)

(from the Office of Provincial Access and Privacy, Department of Provincial Treasury)

Chapter 3 Access to Records

3.2 RECEIVING A FOIPP REQUEST
(…)

Duty to Assist Applicants
Section 8(1) of the Act requires the head of each public body to make every reasonable effort to assist applicants, and to respond to each applicant openly, accurately and completely.

This is an important duty and should be kept in mind throughout the request process. It is critical during the applicant's initial contact with a public body. The FOIPP Coordinator and staff should attempt to develop a working relationship with the applicant to define the nature and scope of the request and determine the steps involved in processing the request. A public body must make every reasonable effort to identify and locate records responsive to a request, and provide the applicant with information regarding the processing of the request in a timely manner.

Both parties have an interest in the efficient, timely processing of requests. When a FOIPP request can be dealt with outside the Act, a public body should return to the applicant any fees paid and provide copies of the requested record. Procedures for responding to a request outside the Act are discussed in section 3.4 of this chapter.

See Commissioners Order No. 04- 003 at http://www.assembly.pe.ca/foipp/04-003.pdf

Acknowledging Receipt of Request
The public body should acknowledge receipt of a request. This acknowledgment may indicate that the request:
• has been received and processing will commence;
• is incomplete because the initial fee has not been paid and is required before processing can commence; or
• is not clear or precise enough and more information is needed to clarify it before processing can commence.

If processing cannot begin immediately, an effort should be made to contact the applicant by telephone to resolve any problems quickly.

A written follow-up to this call is good practice. It will provide a definite reference point as to when processing commenced and a statement of the agreement between the public body and the applicant as to the nature and scope of a request that has been clarified. (p. 26)

(…)

Clarifying Requests

Vague or overly general requests may increase workloads and lead to review of information that is of little interest to the applicant. Often requests are broad or vague because the applicant lacks knowledge of the public body, its mandate and programs and the type of records available.

The FOIPP Coordinator should establish contact with the applicant to better understand what information will satisfy the applicant's needs.

If a request does not sufficiently describe the records sought, a public body should advise the applicant and offer assistance in reformulating the request.

There are several things to keep in mind when seeking to define or clarify a request.

Release of information outside FOIPP: It is important to verify whether or not the information needs of the applicant can be satisfied by providing records that are already publicly available or that can be made available through a process of routine disclosure. If this is the case, then the relevant information should be released to the applicant without delay.

The applicant should be advised that such information is available without a FOIPP request and that there is no need to make an application under the Act for similar information in the future.

In some instances, only part of the information can be routinely released. In such cases, this information should be released and the rest of the request processed under the Act.

Narrowing a request: It is important to discuss with the applicant any request that involves a vast amount of information. An example would be a request for all the records concerning planning in a public body. The objective is to narrow the request while still meeting the applicant's information needs. This can result in a reduction of fees and provision of better service, in terms of both time and results.

Changing the scope: After discussion of the nature of a request, an applicant will sometimes change the scope of the request. When this occurs, the public body should document the change and send a notice to the applicant. (p.28)

Time limits: The Act establishes a time limit of 30 calendar days to respond to a request. The time period begins on the day following receipt of a FOIPP request. A request is complete if it mentions the Act, is signed and includes the initial fee, if required.

The time period begins when an authorized office receives a request, even when the request is vague and imprecise. An effort should be made to help the applicant to clarify the request, although this cannot be an endless task.

Time extension: When an applicant will not narrow or be more precise in a request, or when a request is genuinely broad in nature, section 12(1)(a) enables the public body to extend the time for responding to a request for another 30 days (allowing a total processing time of 60 calendar days). (…) (p. 29)

(…)

Response Time Limits

Section 9(1) of the Act provides that public bodies must respond to a request without undue delay and in any even make every reasonable effort to respond to a request no later than 30 calendar days after receiving it, unless:

- the time limit is extended under section 12; or
- the request is transferred to another public body under section 13.

Every reasonable effort means the effort that a fair and rational person would expect to be made and would find acceptable. A public body's effort is expected to be thorough and comprehensive.

The 30-day time limit is based on calendar days. The time limit begins on the day after the request is received in an office duly authorized to deal with it and any initial fee is paid.

If the request is incomplete and further information is required from the applicant in order to identify the records sought, a public body should seek this information immediately. The requirement to clarify the request does not change the date on which the time period commences, but may necessitate a time limit extension. (p.32)

See Commissioner Order No. 04-003 at http://www.assembly.pe.ca/foipp/04-003.pdf

3.3 PROCESSING A FOIPP REQUEST

(…)

Locating Records

The program area is normally responsible for locating and retrieving all records relevant to a request under its custody or control, including those records that may reside in individual employees' offices, vehicles or homes, or in filing systems in storage areas. When applicable, records in the possession of contracted agencies may have to be located.

The program area should draw on the support of records or information management staff in providing the indexes and guides to appropriate records, where these are available, and to locate records.

Speed and accuracy are essential in identifying, locating, retrieving and, where appropriate, copying records pertinent to a request (where a request is for a large number of records, it may be appropriate that copies are not made immediately).

A rule of thumb for a basic, uncomplicated request involving the coordination of staff in different areas is that four working days are needed to pull together the working program file, with the pertinent records that need to be reviewed.

Scope of search: The Act applies to all records, as defined in the legislation, including electronic records, in the custody or under the control of the public body. All types of records responsive to the request, including electronic records, must be located and retrieved.

In addition, all areas where records are held – central active files, working files in individual offices, electronic repositories and off-site storage areas – must be searched, and staff requested to produce relevant records, as dictated by the nature and subject of the request.

Any records in the possession of contracted agencies and under the control of the public body will have to be located, copied, if appropriate, and transferred.

An applicant can ask the Information and Privacy Commissioner to review the adequacy of a search undertaken to locate records. When this happens, the public body will have to demonstrate that it made a reasonable search of all repositories where records relevant to the subject of the request might be located.

Conditions relating to the disposition of records: Public bodies must not dispose of any records relating to a request after it is received, even if the records are scheduled for destruction under an approved records retention and disposition schedule.

This includes any e-mail and transitory records relevant to the request that may exist at the time the request is received. In effect, the receipt of a FOIPP request freezes all disposition action relating to records covered by the request until the request has been completed and any appeal to the Commissioner decided.

The file transmitting the request to the program area should include a reminder that it is an offence to destroy any record or direct another person to do so (section 75(1)(e)) or to alter, falsify or conceal any record, or direct another person to do so (section 75(1)(f)) in order to evade a request for access to records. These offences are punishable by a fine of up to $10,000.

Where records have been destroyed prior to the receipt of a request, in accordance with an approved records retention and disposition schedule, the public body's response to the applicant should indicate that the records have been destroyed, quoting the authority for and date of destruction.

When records have been transferred to the Public Archives and Records Office or the archives of the public body, the request should be transferred to the archival authority for processing, unless some other arrangement between the two organizations exists.

Copying retrieved records: Once the records have been located, either the program area or the office of the FOIPP Coordinator, as appropriate, prepares them for review and completes the request documentation.

This may involve the copying and numbering of all records pertinent to the request and preparing:
• a list of all records areas searched;
• a list of the records located in each records area, along with identifying data and parts of file lists, data dictionaries or other finding aids used in locating the records; and
• a log of staff time spent searching for and retrieving the records.

When there is a very large number of records involved, lists of the records rather than copies of them may be more appropriate.

Preliminary Assessment
There are a number of administrative matters that the FOIPP Coordinator should consider very early in the request process, but after the program area has had an opportunity to consider the extent and nature of the request and to locate the records. This discussion will inform the preliminary review of the records, which will be done either by the FOIPP Coordinator or, in larger organizations, by the FOIPP Coordinator in cooperation with the program contact and representatives knowledgeable about the subject matter and records involved.

Questions to ask at this stage are:
• Does it appear that all relevant records have been located and do they appear to satisfy the request?
• Are there any records referenced in the request or the located records that have not yet been located?
• Are any of the records excluded from the scope of the Act under section 4 or subject to other legislation that prevails over the FOIPP Act?
• Can the records, in whole or in part, be released immediately without lineby- line review?
• Should all or a portion of the request be transferred to another public body with greater interest in the records? See section 3.2 of this chapter, Response Time Limits, for legislative requirements and policies relating to the transfer of requests.
• Does it appear that records may be found in program areas other than those already identified, and should the search be widened?
• What is the extent and nature of consultation required with other program areas within the public body? Responsibility for ensuring that these consultations occur should be clearly assigned.
• What is the extent and nature of external consultation required with other public bodies and levels of government? Responsibility for conducting these consultations should also be clearly assigned.
• Do the records contain third party business information or personal information that may require third party notification?
• Will the time required to respond to the request likely exceed the 30-day time limit? Are there grounds for an extension of the time limit?
• Will fees in addition to the initial fee (if applicable) be assessed for the processing of the request? (p. 36-39)

Deposit and Payment of fees
(…)
Section 76(4) establishes the criteria for excusing payment of all or part of a fee.
(…)
A matter of public interest, including the environment, public health or safety: This category of fee waiver generally covers situations where there is a public interest in disclosing all or part of a record.

This occurs when the information is likely to contribute significantly to public understanding of the operations or activities of the public body or is of major interest to the public in terms of environmental protection or protection of public health or public safety.

There are two overriding statutory principles that must be taken into account on a general basis when dealing with both FOIPP fees and fee waivers:
• the Act is intended to foster open and transparent government, subject to the limits contained in the legislation; and
• the Act contains the principle that the user should pay.

In deciding whether to grant a waiver in the public interest, a public body should consider the following questions:

- Is the applicant motivated by commercial or other private interests?
- Will members of the public, other than the applicant, benefit from disclosure?
- Will the records contribute to the public understanding of an issue (that is, will they contribute to open and transparent public administration)?
- Will the disclosure add to public research on the operation of the public body or its responsibilities?
- Has access been given to similar records at no cost?
- Have there been persistent efforts by the applicant or others to obtain the records?
- Would the records contribute to debate on issues of public interest or to their resolution?
- Would the records be useful in clarifying public understanding of issues that fall within the mandate of the public body?
- Do the records relate to a conflict between the applicant and the public body?
- Should the public body have anticipated the need of the public to have the record?
- How responsive has the public body been to the applicant's request? For example, were some records made available at no cost or did the public body help the applicant narrow the request so as to reduce costs?
- Would the waiver of the fee shift an unreasonable burden of the cost from the applicant to the public body, such that there would be significant interference with the operations of the public body?
- What is the probability that the applicant will disseminate the contents of the record?

Public bodies should consider these questions when exercising their discretion whether or not to waive or reduce fees. A public body may ask an applicant requesting a fee waiver in the public interest to provide information relating to any of the points that appear relevant to the records under consideration.

If the Commissioner conducts a review of a decision not to grant a fee waiver in the public interest, the public body may find it helpful to show that it considered these points in making its assessment. (p. 44-45)

DECISIONS OF THE COMMISSIONER

- **Aspects of the duty**

Order No. 05 – 001, Re: Department of Transportation and Public Works, February 25, 2005

> I have reviewed several Orders of the Alberta and British Columbia Information and Privacy Commissioners which deal with their equivalent to our section 8 above. I have concluded that, while the Applicant has an initial responsibility to indicate his or her reason(s) for belief that the section 8 duty to assist was not fulfilled by the Public Body, it is the Public Body who has the onus of proving that it fulfilled its duty in accordance with section 8, and considering the underlying principles of the Act. (Alberta Order 96-022)
>
> I agree with the British Columbia Information and Privacy Commissioner in Order No. 30- 1994, that "a public body will meet its duty to assist an applicant where it makes every reasonable effort to search for records requested and it informs the applicant in a timely way what it has done."

> In addition, the amount of time searching for the records is not determinative of the adequacy of the search. What is determinative is that the Public Body searched for what was requested. (Alberta Order 99-039) (p. 3)

The Commissioner was satisfied that the institution fulfilled its duty:

> However, my investigation reveals that the records of the Public Body were thoroughly searched, and searched a second time, in a conscientious fashion, as is contemplated by section 8 of the Act. In addition, the search of actual hard copy invoices was cross-checked against records of invoices paid by the Public Body, and the results of the search were once again confirmed. (p. 4)

Order No. 04 – 003, Re: Department of Health and Social Services, November 10, 2004

> Sections 8 and 9 of the Act create a mandatory duty upon the Public Body to assist the Applicant, and to respond without undue delay. The burden is upon the head of the Public Body, therefore, to demonstrate that it fulfilled these duties.(p. 3-4)
>
> Based on the above, it is my view that the Public Body failed in its duty to assist the Applicant when the Applicant requested the missing receipts on August 8th, 2003 and again on November 14th, 2003. More specifically, the Public Body failed by not responding to the Applicant's note, and by not investigating the whereabouts of the receipts when the Applicant made a specific verbal request on November 14, 2003. A brief conversation between the Public Body and the Applicant would have easily pinpointed the exact receipts requested. Such a conversation never took place. (p.6)

- **<u>Fee waiver</u>**

Order No. 06 – 002, Re: Department of Environment, Energy & Forestry, July 4, 2006

For the exercise of discretion to waive fees, there are two steps, the first one being whether the record relates to a matter of public interest and the second one being:

> In the second and final step of the decision-making process, the Public Body should consider all of the relevant circumstances, including the purposes of the FOIPP Act. The Public Body should be guided by the following questions:
> 1. Is there a reasonable expectation that the public could benefit from disclosure of this record?
> 2. Would waiver of the fee shift an unreasonable cost burden for responding from the applicant to the public body?
> 3. Would the records contribute to debate on or resolution of the matter of public interest?
> 4. During the Request for Access process:
> (a) Was the public body timely in responding to the request and did it fulfill its duty to assist?
> (b) Did the applicant, viewed reasonably, cooperate or work constructively with the public body, where the public body so requested, during the processing of the access request, including narrowing or clarifying the access request where it was reasonable to do so?; and
> (c) Has the applicant unreasonably rejected a proposal by the public body which would reduce the costs of responding to the access request? (p.11)
>
> *[Note: that process is also mentioned in Order no. 04-004 and in Order no. 03-001)*

> The most compelling evidence provided to me is that the Public Body and Applicant had many contacts throughout the application process in early 2003, during which the Public Body made every effort to aid the Applicant in their request. During this time, the Public Body states there were 17 contacts between the Public Body and the Applicant. In addition, the FOIPP Co-ordinator for the Public Body made contacts within the Public Body and made several attempts to reduce the costs to the Applicant, fulfilling its duty to assist. The Public Body also went beyond the requirements of the FOIPP Act by responding to questions from the Applicant which did not relate to the Public Body's obligation to disclose records.(p. 17)

Order No. 04 – 004 Re: Department of Environment, Energy and Forestry, November 10, 2004
In this order, the Commissioner considered that the institution attempted to minimize the costs by working with the applicant to narrow the request; that the institution has an informal policy of underestimating the costs; and that the institution and the applicant worked cooperatively to narrow the request and to determine exactly what information the Applicant was looking for. (p. 7-9)

DECISIONS OF THE COURT

N/A

Quebec

Website
http://www.cai.gouv.qc.ca/index-en.html (Commission)

STATUTES

An Act respecting access to documents held by public bodies and the protection of personal information, R.S.Q. c. A-2.1.
Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels, Loi sur l', L.R.Q. c. A-2.1.

RELEVANT PROVISIONS

42. To be receivable, a request for access to a document must be sufficiently precise to allow the document to be located.

If the request is not sufficiently precise or if a person requires it, the person in charge must assist in identifying the document likely to contain the information sought.

(s. 95 mirrors section 42 for access to personal information)

84.1. Where a health services or social services institution referred to in the second paragraph of section 7, the Commission de la santé et de la sécurité du travail, the Société de l'assurance automobile du Québec, the Régie des rentes du Québec or a professional order provides a person with personal information of a medical or social nature which concerns him, it shall, upon the request of the person, provide him with the assistance of a professional qualified to help him understand the information.

138. The members of the personnel of the Commission must lend assistance in drafting an application for review to every applicant concerned who requires it.

RELEVANT REGULATIONS

N/A

GUIDELINES / MANUAL / EXAMPLES

- **Annual Report 2006-2007**

[Translation] Access to public organisations' documents is favoured by a new obligation of automatic broadcast. The accessible information and documents to be broadcasted on a website will be identified by a government regulation. Amongst the new measures to favour access to documents, the person responsible for the access is obligated to help a requester when his request is not sufficiently precise, as well as provide reasonable accommodations to disabled person in order for them to exercise their access right. (p. 19-20)

DECISIONS OF THE COMMISSION

- **Section 42**

Raymond Doray et François Charrette, *Accès à l'information, Loi annotée, jurisprudence et commentaires*, vol. 1, looseleaf (Cowansville, QC.: Les éditions Yvon Blais, 2001):

- the act does not require institutions to create records, p. 42-1.
- institutions have to file their documents in a manner that will allow retrieval of the records p. 42-2.
- a request that is too broad is not receivable, p. 42-2.
- the 20 day delay will not start until the request is specific enough, p. 42-3.
- with the amendment to section 42, in 2006, institutions shall assist requesters when they ask for it and when the request is not specific enough, p. 42-2.
- the Commission will use the criteria of "reasonableness" to determine if the request is specific enough. It will not take into account the knowledge or job of the requester, p. 42-2.
- as for section 95, the requester cannot know in which document or where the information he seeks is located, as such, it may not be justified to ask a him to specify his request, p. 95-1.

***Bobula c. Commission scolaire protestante de Chateauguay Valley*, 1997 C.A.I. 147, p. 7**

It is the power of the Commission and not the person in charge to conclude if the request is receivable

***Bureau d'animation et d'information logement du Québec Métropolitain* c. *Régie du logement*, 1993 CAI 362**

The cost and difficulty associated with retrieving records is not considered a restriction to the right of access, when the records management of the institution is the reason why it is difficult to find records, section 42 cannot be used.

***Côte St-Luc (Ville de)* c. *Vecsei*, 1987 C.A.I. 460**
The institution cannot reject a request as being too broad when the requester did not use specific titles and dates for documents. The requester was not in a position to know these specific elements. The request needs to be specific enough for the institution to be able to locate the records

[Note: also in *Fournier* c. *Commission scolaire de Charlesbourg*, 1992 C.A.I. 280; *Desrochers* c. *Commission scolaire Bladwin-Cartier*, 1990, C.A.I. 203]

***C.U.M.* c. *Winters*, 1984-86 C.A.I. 269**
Section 42 establishes objective criteria, the evaluation of the request to determine if it is specific enough cannot take into account the professional status of the requester

- **Section 84.1**

***X* c. *Société de l'assurance automobile du Québec*, 1998 C.A.I. 362**
Section 84.1 cannot be used when the requester understands the information in the file.

(note: there is no decision on section 138)

DECISIONS OF THE COURT

N/A

Saskatchewan

Website
http://www.oipc.sk.ca/ (Commissioner)

STATUTE

Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01.

RELEVANT PROVISION

6(1) An applicant shall:
(a) make the application in the prescribed form to the government institution in which the record containing the information is kept; and
(b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record.

(2) Subject to subsection (4) and subsection 11(3), an application is deemed to be made when the application is received by the government institution to which it is directed.

(3) Where the head is unable to identify the record requested, the head shall advise the applicant, and shall invite the applicant to supply additional details that might lead to identification of the record.

(4) Where additional details are invited to be supplied pursuant to subsection (3), the application is deemed to be made when the record is identified.

RELEVANT REGULATIONS

N/A

- **FOIP FOLIO, January 2004 (Newsletters)**

Duty to Assist
The FOIP Act does not stipulate a duty to assist applicants. The OIPC however takes the position that there is an implied duty on the part of government institutions (and local authorities under the LA FOIP Act) to take reasonable steps to ensure that they respond to access requests openly, accurately and completely. Many applicants do not have detailed knowledge about the types of records your organization maintains. In our view this kind of implied duty to assist is essential to meet the purpose of the FOIP and LA FOIP Acts. This is the standard that is clearly stated in the Health Information Protection Act. (p. 5)

- **FOIP FOLIO, September 2004 (Newsletters)**

Duty to Assist the Applicant
The early experience of our office working with many government institutions is that access requests are being interpreted very narrowly. Our view is that this is inconsistent with the purpose of the FOIP Act. The fundamental right of access should not be frustrated by a failure to assist an applicant.

It is useful for a FOIP Coordinator to actually contact an applicant to see (a) if what the Applicant is looking for is clear; (b) if the request can be accommodated informally outside of the FOIP Act, and (c) if the request can be clarified in the interests of focusing on certain key records and avoiding unnecessary costs to the Applicant.

In a number of cases, we have found that government institutions or local authorities will provide summary or secondary documents when they should have provided the original source documents in responding to an access request.

The definition of a record is very broad in the FOIP Act. Unless the applicant has agreed to accept a summary or secondary document, you should be considering all records that may be responsive to the request. (p. 2)

- **Commissioner's Presentations**

- Unlocking the Secrets of Access to Information" (2005)

Upon Receipt of an Access Request
Duty to Assist
• Implied duty to take reasonable steps to assist an applicant
• Respond openly, accurately and completely

Conduct an adequate search
• Summary, condensation, or secondary document is no satisfactory substitute for source documents
• Should contact appropriate persons who are likely to have knowledge
• Should record details of the search for responsive records
• OIPC may find an inadequate search and recommend a further & better search

Determining if exemptions (mandatory or discretionary) apply & sever records, if necessary

Consider fees

Respond within the time limit (p.12)

- Access to Information - Statutory Alternatives Canadian Bar Association (Saskatchewan) Mid-Winter Meeting February 2, 2007

2. THE FORMAL ACCESS REQUEST
The right of access is not restricted to Saskatchewan residents or even to Canadian citizens.

The right of access is qualified in two ways:

1) A number of mandatory and discretionary exemptions are described in Part III. If that information exempted from disclosure can "reasonably be severed" from a record, access must be given to the remainder of the record.

2) Access is subject to the payment of fees prescribed by regulation.

Each of these qualifications will be discussed in detail later in this paper.

The access may be to personal information concerning the applicant ("request for personal information") or it may be to general information such as a government program or survey ("request for general information").

Sections 5 to 12 outline the procedure to obtain access to a record subject to FOIP.

The Commissioner has determined that there is an implicit ‘duty to assist’ on each public body responding to an access request. This duty is to make “every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely”. (Saskatchewan Information and Privacy Commissioner, *Review Reports F-2005-005, F-2004-007, F-2004-005, F-2004-003, LA-2004-00*1) (p. 10)

- OIPC Reviews & Investigations (Government House - December 10, 2007)

Duty to Assist (p. 27)
• When FOIP applies, the duty is implicit.
• When HIPA applies, the duty is explicit.
• Must take reasonable steps to assist an applicant.
• Must respond without delay to each applicant openly, accurately and completely.
• Must undertake an adequate search for all records responsive to the access request.

- **Duty to Assist, OIPC Brown Bag Workshop 6, September 13, 2006**

Purpose of the Act

To make public bodies more accountable to the public and to protect personal privacy by:
- Giving the public a right of access to records
- Giving individuals a right of access to and a right to request correction of personal information about themselves
- Specifying limited exemptions to the right of access
- Preventing the unauthorized collection, use or disclosure of personal information by public bodies
- Providing for an independent review of decisions made under the Act

Routine Disclosure – Active Release

Processing a formal access request is:
- cumbersome
- time intensive
- expensive

FOIP, s. 3: This Act does not apply to:
(a) published material or material that is available for purchase by the public;
(b) material that is a matter of public record; or
(c) material that is placed in the custody of The Saskatchewan Archives Board by or on behalf of persons or organizations other than government institutions.

Identity of the Applicant
A government institution should not disclose the identity of the applicant to anyone who does not have a legitimate need to know (relates to the processing of the access request).

It is improper to treat applicants differently depending on who they are or what organization they may represent.

It would also be improper to broadcast the identity of an applicant throughout a government institution or to disclose the identity outside of that particular department.

To avoid differential treatment, we encourage the FOIP coordinator to mask the Applicant's identity. This approach is consistent with direction from the Federal Court of Canada and the practices in other provinces.

There is a useful discussion of this issue in the Annual Report of the Information Commission of Canada 2001-2002 at pages 22 to 24.

Duty to Assist

HIPA, s. 35; Explicit duty to assist: "a trustee shall respond to a written request for access openly, accurately and completely."

FOIP, LA FOIP; Implicit duty to make every reasonable effort to assist an applicant and to respond without delay openly, accurately and completely

Contact applicant to see:
- If what applicant is looking for is clear
- If request can be accommodated informally
- If request can be clarified in the interests of focusing on key records and avoiding unnecessary costs to the applicant

Remember you have no right to demand the applicant's reasons for the request

What is a Record?
The Acts are "record driven"

Formal access request entitles applicant to documents in their original form

No legal duty to create records that do not exist – ie. summaries.

Duty to Search
What is a record (any form or format)

Plan the search:
- Identify time period of requested records
- Discuss with applicant to narrow search
- How did you search for records in your possession:
- Did you search yourself?
- Did you delegate to others? If so, how can you be certain the search was comprehensive?
- Did you send out an email to other units?

Could responsive records exist that are not in your possession, but are in your control?
- Did agents, consultants or other contracted services have any role?
- Are these records included in the record prepared in response to the request?

Document your search efforts. This will assist you in supporting your position in the event of an application for review to the OIPC.

Remember that the burden of proof lies with the government institution to establish access/refusal to records (FOIP, s. 61; LA FOIP, s. 51; HIPA, s. 47)

Resources
OIPC Review Report F-2005-005, OIPC Review Report F-2004-007, OIPC Review Report F-2004-005, OIPC Review Report F-2004-003, OIPC Review Report LA-2004-001

LEGISLATIVE RECOMMENDATIONS

- **Annual report 2004-2005**

VI. PRIVACY AND ACCESS: A SASKATCHEWAN 'ROADMAP' FOR ACTION
B. UPDATING OUR LAW
(…)

10. Create an express duty to assist applicants.

> • Example: Head must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely. (p. 10)

(…)

RECOMMENDATIONS OF THE COMMISSIONER

- **Implicit duty to assist**

The legislation contains no explicit duty to assist. However, the Commissioner concluded that there was an implicit duty to assist. The relevant parts of the decision are:

Report 2004 – 003, Saskatchewan Government Insurance, May 31, 2004

> Issue A: Does a government institution have a duty to assist an applicant on a request for access under the Freedom of Information and Protection of Privacy Act?
>
> [5] To answer this question, we need to consider the first principles of the Freedom of Information and Protection of Privacy Act ("the Act"). The Act does not include an object clause or purpose clause. Such a feature would be valuable to an oversight body that must interpret and apply the legislation to particular fact situations in attempting to resolve access requests and complaints.
>
> [6] In the absence of an explicit purpose clause in the Act, our office is required to infer the Legislative Assembly's purpose in designing such an instrument. This office has, in the past, been guided by decisions of the Saskatchewan Court of Appeal and the Saskatchewan Court of Queen's Bench.
>
> [7] In *Amendt v. Canada Life Assurance Company* [1999] S.J. No. 157, Goldenberg J. observed as follows:
>
> > "The right of persons to apply for access to information in the hands of a government agency has no basis in common law. It is purely statutory. The Act is a code unto itself. The code sets out a detailed method for applications, reviews, and ultimately for appeals to the Court of Queen's Bench. Absent compliance with the process contained therein, this Court has no jurisdiction to entertain the matter." [43]
>
> [8] In *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance* [1993] S.J. No. 601 at [11], the Saskatchewan Court of Appeal has stated as follows:

> "The [Freedom of Information and Protection of Privacy Act's] basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy is the dominant objective of the Act. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemptions, prescribe the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny." [underlining added for emphasis]

[9] The Saskatchewan Act closely corresponds to provisions in the federal Access to Information Act. The purpose of the Access to Information Act is described as follows:

> "2(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government."

In 1997, a Government of Canada Green Paper discussed the reasons for access to information legislation. The authors of that paper concluded that:

> • "Effective accountability - the public's judgment of choices taken by government - depends on knowing the information and options available to the decision-makers";
> • "Government documents often contain information vital to the effective participation of citizens and organizations in government decision-making"; and
> • (as) "government has become the single most important storehouse of information about our society, information that is developed at public expense so should be publicly available wherever possible."

[10] Over the twenty two years since the Access to Information Act came into force, provincial and territorial governments have enacted their own access to information and protection of privacy legislation. Many of those more recent provincial instruments have included a more comprehensive purpose clause. Those purpose clauses tend to reflect and reinforce the approach taken by the federal Information Commissioner and numerous decisions of superior courts in Canada. A good example is section 2 of the British Columbia Freedom of Information and Protection of Privacy Act:

> "2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
> (a) giving the public a right of access to records
> (b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves
> (c) specifying limited exceptions to the rights of access
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
> (e) providing for an independent review of decisions made under this Act"

[11] I find that this neatly summarizes and clearly identifies the purpose of legislation such as the Saskatchewan Act. Our office will deal with the subject request for review and future requests for review by reference to those same five purposes.

[12] There is no explicit duty to assist applicants in the Saskatchewan Freedom of Information and Protection of Privacy Act. Such an explicit duty exists in certain other provinces. For example, in the British Columbia Freedom of Information and Protection of Privacy Act the head of a public body "must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely". [section 6(1)] A similar provision appears in the Alberta Freedom of Information and Protection of Privacy Act [section 10(1)].

[13] The right of access under the Act is described in section 5 as follows:

> "Subject to this Act and the regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a government institution."

14] I am mindful that most citizens will not have a detailed knowledge of the types and description of records that a government institution maintains. A requirement for government institutions to take reasonable steps to search for responsive records is an important feature to address the knowledge imbalance between the institution and the applicant. If there is no duty to assist, the right of access may be more illusory than real.

[15] My view is that to realize and respect the "right" guaranteed to Saskatchewan residents by the Act, there is an implicit requirement for government institutions to assist applicants and to respond openly, accurately and completely to an access request.

Although the duty to assist is only an implicit requirement we want to clearly signal to government institutions, local authorities and health trustees that this office views it as an important duty. It is intended to complement those objectives articulated by the Saskatchewan Court of Appeal.

> [Note: Also in 2004-005, [19]; 2004-007, [13] to [17], Report F-2006-001, para. 96 , F-2006-002, para. 20; Also, the Commissioner found that the *Local Authority Freedom of Information and Protection of Privacy Act* has an implied duty: Report LA-2004-001]

- **<u>Interpretation of the request / contacting the applicant</u>**

Report 2004 – 007, Saskatchewan Property Management Corporation, October 14, 2004

[18] We encourage FOIP coordinators for government institutions to engage in informal discussion with an applicant to clarify an access request and ensure that there is clarity on the nature of the records sought by the Applicant. This case would have benefited from such discussion at the initial stages of the processing of the request.

Report F-2007–001, Saskatchewan Northern Affairs , March 22, 2007

[13] It was appropriate for the government institution to communicate with the Applicant to clarify the access request. Such action is consistent with the implied duty to assist that must be met by government institutions. This duty has been described by our office as a duty to respond openly, accurately and completely to an applicant.

- **Search**

Report 2004 – 005, Executive Council, September 23, 2004

> [19] (…)This [the duty] also means that the government institution must make an adequate search for all records responsive to the access request.

Report 2004 – 007, Saskatchewan Property Management Corporation, October 14, 2004

> [13] SPMC, at the commencement of this review candidly acknowledged that it had determined that the specific request for "any other material showing activities, revenues and expenditures relating to the facility" was viewed as extremely broad. SPMC determined that the request could lead to "volumes of material". As a consequence, and without consultation with the Applicant, SPMC 'read down' the scope of activities "…thus placing reasonable limits around the request." If an access request is broad in scope and would involve voluminous material, we would normally expect some discussion between the Applicant and the government institution to see if some kind of parameters could be identified. One of the considerations at this point would be the opportunity to estimate fees in accordance with the *FOIP Regulation* and to require one half of the estimated costs before proceeding to respond to the request. We note that SPMC did not at any time provide the Applicant with a fee estimate. In the result, I find that the search initially undertaken by SPMC was inadequate.

- **Responding to the applicant**

Report 2004 – 003, Saskatchewan Government Insurance, May 31, 2004

> [26] My conclusion is that as a general rule, the obligation on a government institution to assist an applicant does not include an obligation to create records which do not currently exist. There may be some unusual circumstances that might make it appropriate to require that the institution create a record (…)

Report 2004 – 005, Executive Council, September 23, 2004

> [21] (…)In responding to an access request, it is not sufficient for the government institution to either prepare or produce a summary and disclose only that summary instead of the source documents from which it has been prepared.

Report 2004 – 007, Saskatchewan Property Management Corporation, October 14, 2004

> [15] It is important that the government institution accurately identify the specific exemptions that it is relying upon in denying access. In this particular case, the Applicant is a Saskatchewan journalist who would be considered a 'sophisticated' Applicant very familiar with the Act and its application. The confusion may be less because of the Applicant's familiarity with the statute however this cannot relieve the government institution of its responsibility to communicate clearly to an applicant why access is denied.

Report F-2006–004, Saskatchewan Human Rights Commission, November 29, 2006

> [17] Providing inaccurate contact information for our office to an applicant may interfere with the individual's attempts to request a review of the matter by our office. The government institution is responsible to provide accurate information with respect to applicants' right to request a review.

Report F-2007–001, Saskatchewan Northern Affairs, March 22, 2007

[61] I find that Northern Affairs failed to discharge its duty to assist the Applicant by:

a) failing to advise the Applicant that Department A and/or Department B may have responsive records;

(…)

d) failing to provide an interim notice as to whether the Applicant was likely to receive any documents in any event.

- **Fee waiver**

Report F-2007–001, Saskatchewan Northern Affairs, March 22, 2007

[21] Consistent with the implicit duty to assist, Northern Affairs should have contacted the Applicant immediately upon receipt of the request for the fee waiver and advised the Applicant as to what information would be required to be able to assess the fee waiver request. Ideally all government institutions should have a form letter or document that explains the Act's fee waiver provision and that indicates the kind of information that is required to enable the government institution to assess a fee waiver request. By sending such information to the Applicant at an early date, further delays can be avoided once the fee estimate has been prepared and supplied to the applicant.

- **Other considerations**

Report 2004 – 002, Saskatchewan Government Insurance, April 2, 2004

Postscript: Public bodies need to remember that the FOIP Act does not allow them to insist on a reason as to why an Applicant makes an access request. Access to records is a right guaranteed to Saskatchewan residents and is not conditional on providing a reason or a sufficiently good reason to exercise that right of access. This doesn't prevent an Applicant from volunteering a reason nor does it prevent the reason underlying a request to be discussed between an Applicant and a FOIP Coordinator when the FOIP Coordinator is making reasonable efforts to assist an Applicant. (p.5)

Report F-2007–001, Saskatchewan Northern Affairs, March 22, 2007

[12] (…) Section 6(3) of the Act permits the government institution to suspend processing of the access request until the applicant supplies "additional details that might lead to identification of the record". An employee of Northern Affairs, other than the Access Officer, spoke with the Applicant by telephone to clarify the request. The Northern Affairs employee was apparently satisfied after the telephone exchange that the request was clear. As Northern Affairs did not invoke section 6(3) of the Act, I find that Northern Affairs was satisfied it understood what records the Applicant sought.

DECISIONS OF THE COURT

N/A

Territories

Northwest Territories

Website
The Commissioner does not have a website
http://www.justice.gov.nt.ca/Legislation/SearchLeg&Reg.htm (Legislation)

STATUTE

Access to Information and Protection of Privacy Act, S.N.W.T. 1994, c. 20.
Loi sur l'accès à l'information et la protection de la vie privée, L.T.N.-O. 1994, c. 20.

RELEVANT PROVISIONS

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

(2) The request must provide enough detail to enable the public body to identify the record.

(3) The applicant may ask for a copy of the record or ask to examine the record.

7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

(2) The head of a public body shall create a record for an applicant where
(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
(b) creating the record would not unreasonably interfere with the operations of the public body.

(3) The head of a public body shall give access to a record in the Official Language of the Territories requested by an applicant where
(a) the record already exists in the control of the public body in that language; or
(b) the head of the public body considers it to be in the public interest to have a translation of the record prepared in that language.

(4) An applicant shall not be required to pay a fee for the translation of a record.

RELEVANT REGULATIONS

N/A

GUIDELINES / MANUAL / EXAMPLES

N/A

RECOMMENDATIONS OF THE COMMISSIONER

Note: NWT and Nunavut have the same Commissioner.

DECISIONS OF THE COURT

N/A

Nunavut

Website
http://www.info-privacy.nu.ca/en/home (Commissioner)

STATUTE

Access to Information and Protection of Privacy Act, S.N.W.T. 1994, c. 20
Loi sur l'accès à l'information et la protection de la vie privée, L.T.N.-O. 1994, c. 20

RELEVANT PROVISIONS

(same as Northwest Territories)

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

(2) The request must provide enough detail to enable the public body to identify the record.

(3) The applicant may ask for a copy of the record or ask to examine the record.

7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

(2) The head of a public body shall create a record for an applicant where
(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
(b) creating the record would not unreasonably interfere with the operations of the public body.

(3) The head of a public body shall give access to a record in the Official Language of the Territories requested by an applicant where
(a) the record already exists in the control of the public body in that language; or
(b) the head of the public body considers it to be in the public interest to have a translation of the record prepared in that language.

(4) An applicant shall not be required to pay a fee for the translation of a record.

RELEVANT REGULATIONS

N/A

GUIDELINES / MANUAL / EXAMPLES

N/A

RECOMMENDATIONS OF THE COMMISSIONER

The website does not contain recommendations.

DECISIONS OF THE COURT

N/A

Yukon

Website
http://www.ombudsman.yk.ca/infoprivacy/info_index.html (Commissioner)

STATUTE

Access to Information and Protection of Privacy Act, R.S.Y. 2002, c. 1
Accès à l'information et la protection de la vie privée, Loi sur l', L.R.Y. 2002, c. 1

RELEVANT PROVISIONS

6. (1) To obtain access to a record, an applicant must make their request to the records manager.

(2) A request for access to a record may be made orally or in writing verified by the signature or mark of the applicant and must provide enough detail to identify the record. If the request is made orally the person who receives it must make a written record of the request and the request is not complete and does not have to be dealt with until its written form is verified by the signature or mark of the applicant.

(3) The applicant may ask for a copy of the record or ask to examine the record.

7. The records manager must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately, and completely.

10. The public body that has the record in its custody or control must make every reasonable effort to assist the records manager and enable the records manager to respond to each applicant openly, accurately and completely.

RELEVANT REGULATIONS

N/A

- **Annual report 1999**

"Information" vs. "Records"
During 1999, on at least two occasions an important question was raised about the distinction between "information" and "records", particularly in relation to access requests. This issue deserves some discussion because it is often found to be at the centre of confusion and, at times, frustration. Many people making access requests seek information related to an event, decision or perhaps their personal records, without knowing if a specific record will be responsive to their request.

Although the ATIPP Act includes in its title the words "Access to Information", all references to "information" in the ATIPP Act are expressed in terms of "records". Here are some examples:
- The ATIPP Act gives the public " a right of access to records".
- Personal Information is defined as "recorded information about an individual".
- In setting out the Scope of the ATIPP Act, it states, "the Act applies to all records in the custody, or under the control of a public body…"
- In making an access request, the applicant must provide enough detail to identify a record.
- In a response to the applicant, the archivist must tell the applicant whether access will be given to a record, or part of it.
- Requests for a review by the Information & Privacy Commissioner of decisions by the Archivist and the Public Body must relate to a record.

The procedures for handling access requests must, therefore, include a transition from the "information" an applicant seeks to a "record" that will be responsive to the request. The ATIPP Act imposes a duty on the applicant, the archivist and the public body to make this transition. The applicant, pursuant to Section 6 must provide enough information to identify a record. The archivist, pursuant to Section 7 must "make every reasonable effort to assist applicants and to respond to each openly, accurately and completely". The public body, pursuant to Section 10 must "make every reasonable effort to assist the archivist and enable the archivist to respond to each applicant openly, accurately and completely".

Despite these requirements, cases are coming forward for review where it is clear the transition has not been made successfully. Some factors identified by the Office of the Information & Privacy Commissioner contributing to this are:
- Extremely broad, and often vague details given by the applicant in relation to the information being sought.
- A lack of understanding by the applicant of the kind of information that would be helpful to the archivist and the public body in identifying the record.
- The request being processed by the archivist and the public body without the identification of a specific record.
- The absence of an information directory to assist in identifying and locating records, as required by section 63 of the ATIPP Act.

The Office of the Information & Privacy Commissioner, through its reviews and general communication with public bodies and the archivist, makes every effort to reinforce the need for an effective transition process from an applicant's information request to the identification of a record.

It is the view of the Information & Privacy Commissioner that government can assist in this process. The ATIPP Act makes no provision for the Commissioner to make formal recommendations to government through the Annual Report. However, the Commissioner urges government to consider the following informal recommendations:

1. Complete the publication of the information directory.
2. Provide specific training to the staff of the Archivist and to departmental ATIPP Coordinators on making a successful transition from an information request to the identification of responsive records.
3. Conduct a review of information management systems to ensure the storage and retrieval of the records of all public bodies allows efficient record identification in response to access requests. (p. 7-8)

- **Annual report 2001**

WHAT IS THE CONNECTION BETWEEN "INFORMATION" AND "RECORDS"?

A vague or overly general request may unnecessarily increase the time that is spent by the Archivist and public body to respond to an access request. It may also lead the public body to consider information that was not within the intended scope of the request. Often a request is broad or vague because the applicant lacks knowledge about the public body or the type of records it has. It is always of benefit for the public body to establish contact with the applicant to better understand what specific records will satisfy the applicant's request. The applicant can clarify the request and also has an opportunity to change the scope of the request, if appropriate. The efficient administration of the Act requires a successful transition from "information" to "records". Information is anything that is contained in or on records. A record is defined in the ATIPP Act as any medium on which information is stored or recorded. If an access request is for general information, the ATIPP Act requires that the relevant records relating to that request be identified. The ATIPP Act places a duty on the applicant to provide sufficient detail to identify the record. A duty is also imposed on the Archivist and the public body to assist the applicant, and to carry out a diligent search for the responsive records. A response to the applicant must be open, accurate and complete.

In 2001, in the course of a review of a public body's decision to refuse access, the Commissioner considered whether the Archivist and the public body properly identified "records" responsive to the request. In this situation the Archivist had asked for clarification from the applicant because it was difficult to identify the specific records the applicant sought. Because the applicant did not provide any further clarification, despite requests by the Archivist to do so, the Commissioner found that the public body had discharged the duty to assist the applicant. (p. 18)

- **Annual Report 2003**

The final situation I want to highlight involves a aces in which I found it necessary to formally summon a representative of the Department of Community Services to answer questions under oath for me to understand how the public body could refuse an applicant access to records, that on review, it claimed not to have in its custody or under its control. Neither the pre-inquiry stage of the review, nor my written communication to the public body, could resolve the discrepancy. The explanation that finally emerged was that the public body followed the response of another public body for similar records for the same applicant, rather than developing its own search for, and a proper examination of, any responsive records. The public body refused access to the applicant in the mistaken belief that it had the records being sought. However, a subsequent search revealed it did not have the records,

In my report after review I commented that the Act requires public bodies to take all necessary steps so that a response to an applicant's access request is open, accurate and complete. The response in this case was inaccurate and the review process was unnecessary impeded and frustrated by the public body's unwillingness or inability to openly explain its error. (p. 19)

- **Annual Report 2004**

Does the record exist?
Section 13(2) of the ATIPP Act was relied on by several public bodies in responding to Access Requests in 2004.

Section 13(2) is a discretionary provision permitting the public body to refuse to confirm or deny the existence of records containing law enforcement information or personal information. The use of this exception requires the public body to determine whether the record, if it exists, contains law enforcement information or personal information about the applicant or a third party, and whether circumstances justify the refusal to confirm or deny the existence of the record.

The use of section 13(2) is discretionary because it states: " ... the public body may refuse to confirm or deny the existence of a record." It is the Commissioner's view that "the exercise of discretion by a public body in making decisions under the Act must take into consideration the purposes of the Act."

To justify its decision to apply section 13(2) to the applicant's request for records, the public body must provide evidence that it took into consideration relevant factors, including public accountability and its responsibility to protect personal privacy. Another factor the public body must consider is the requirement of section 10 of the Act, which is to assist the Records Manager in responding to the applicant openly, accurately and completely.

In one instance, an applicant requested access to their own personal information in a record related to an internal workplace investigation. The public body refused to confirm or deny the existence of the record being sought, despite having previously shown the applicant the record during the course of the investigation.

At inquiry, the Commissioner determined that the use of section 13(2) was not justified in this instance. He stated: "[the] response by the public body not only confirms the existence of draft reports, but also acknowledges the Applicant's awareness that such records exist. I therefore find that any basis for applying section 13(2) is effectively removed. The public body cannot refuse to confirm or deny the existence of a record it has previously shown to the applicant as part of the investigation process."

In this case, the public body failed to meet the burden of proof since it did not demonstrate why it should refuse to disclose whether the records exist. The public body applied section 13(2) as if it simply had a right to do so when records relate to workplace investigations.

At inquiry, the Commissioner determined that the public body failed to meet the burden of proof under section 54(1) in demonstrating that the Applicant had no right of access to the records on the basis of applying section 13(2). Accordingly, the public body could not refuse to confirm or deny the existence of the records. In his Report after Review, the Commissioner stated: “It would be contrary to the purposes and overall intent of the Act for a public body to refuse to confirm or deny the existence of a record without some supporting rationale for its decision.” (p. 20)

RECOMMENDATIONS OF THE COMMISSIONER

N/A

DECISIONS OF THE COURT

N/A

Other countries

Australia

In Australia, every person may ask an agency for access to information. The agency has 30 days to answer the request. Only the demands for access to exempted documents will be denied, which can then be subject to an internal review by the principal officer of the agency. This review can be appealed at the Administrative Appeals Tribunal, and, in the case of a question of law only, be further appealed to the Federal Court.

A complaint can also be lodged with the Commonwealth Ombudsman who can investigate actions taken under the Freedom of Information Act, including decisions, delays, and refusal or failure to act. The Ombudsman will make his recommendations to the agency. The ombudsman's decisions can be internally appealed.

Websites
http://www.comb.gov.au/ (Ombudsman)
http://www.comlaw.gov.au/comlaw%5Cmanagement.nsf/lookupindexpagesbyid/IP200401430?OpenDocument (government site)
http://www.ag.gov.au/www/agd/agd.nsf/Page/Freedom_of_Information (government site)

STATUTE

Freedom of Information Act 1982 (Cth.).

RELEVANT PROVISIONS

11. (2) Subject to this Act, a person's right of access is not affected by:

(a) any reasons the person gives for seeking access; or
(b) the agency's or Minister's belief as to what are his or her reasons for seeking access.

15 (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.

(2) The request must:

(a) be in writing; and
(b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and
(c) specify an address in Australia at which notices under this Act may be sent to the applicant; and
(d) be sent by post to the agency or Minister, or delivered to an officer of the agency or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory; and
(e) be accompanied by the fee payable under the regulations in respect of the request.

(3) Where a person:

(a) wishes to make a request to an agency; or
(b) has made to an agency a request that does not comply with this section;

it is the duty of the agency to take reasonable steps to assist the person to make the request in a manner that complies with this section.

(4) Where a person has directed to an agency a request that should have been directed to another agency or to a Minister, it is the duty of the first-mentioned agency to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister.

(5) On receiving a request, the agency or Minister must:

(a) as soon as practicable but in any case not later than 14 days after the day on which the request is received by or on behalf of the agency or Minister, take all reasonable steps to enable the applicant to be notified that the request has been received;
and
(b) as soon as practicable but in any case not later than the end of the period of 30 days after the day on which the request is received by or on behalf of the agency or Minister, take all reasonable steps to enable the applicant to be notified of a decision on the request (including a decision under section 21 to defer the provision of access to a document).

(6) Where, in relation to a request, the agency or Minister determines in writing that the requirements of section 26A, 27 or 27A make it appropriate to extend the period referred to in paragraph (5)(b):

(a) the period is to be taken to be extended by a further period of 30 days; and
(b) the agency or Minister must, as soon as practicable, inform the applicant that the period has been so extended.

16 (1) Where a request is made to an agency for access to a document and:

(a) the document is not in the possession of that agency but is, to the knowledge of that agency, in the possession of another agency; or

(b) the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made; the agency to which the request is made may, with the agreement of the other agency, transfer the request to the other agency.
(…)

(4) Where a request is transferred to an agency in accordance with this section, the agency making the transfer shall inform the person making the request accordingly and, if it is necessary to do so in order to enable the other agency to deal with the request, send the document to the other agency.

(5) Where a request is transferred to an agency in accordance with this section, the request is to be taken to be a request:

(a) made to the agency for access to the document that is the subject of the transfer; and
(b) received by the agency at the time at which it was first received by an agency.

(6) In this section, agency includes a Minister.

24 (1) The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request:
(a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or
(b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions.

(…)
(4) In deciding whether to refuse, under subsection (1), to grant access to documents, an agency or Minister must not have regard to:
(a) any reasons that the person who requests access gives for requesting access; or
(b) the agency's or Minister's belief as to what are his or her reasons for requesting access.

(6) An agency or Minister must not refuse to grant access to a document:
(a) on the ground that the request for the document does not comply with paragraph 15(2)(b); or
(b) under subsection (1);

unless the agency or Minister has:
(c) given the applicant a written notice:
(i) stating an intention to refuse access; and
(ii) identifying an officer of the agency or a member of staff of the Minister with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and
(d) given the applicant a reasonable opportunity so to consult;
and
(e) as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.

RELEVANT REGULATIONS

N/A

GUIDELINES / MANUAL / EXAMPLES

- **FREEDOM OF INFORMATION ACT 1982: FUNDAMENTAL PRINCIPLES AND PROCEDURES**
  (December 2005) Attorney-General's Department

5. Exercising the Right of Access

The requirements of a request (section 15)

5.1 All that is required by subsection 15(2) for a valid request for access to a document of an agency or an official document of a Minister is that it:
- be in writing
- provide sufficient information to enable the agency to identify the requested documents
- give an Australian address to which notices can be sent
- be sent or delivered to the address of the agency's central or regional office, or the Minister's address, in the phone book, and

- be accompanied by the $30 application fee (where the application fee is remitted under section 30A, no application fee is payable for the purposes of subsection 15(2): see subsection 30A(2) and New FOI Memorandum No 29 on fees and charges).

An applicant need not specify that the request is made under the FOI Act (see paragraph 6.3 for the position where the request is not valid under section 15).

5.2 In making an FOI request, there is no requirement that a person use a particular form (for example, a standard request form). A sample application form is at the back of the FOI at a glance document on the FOI website at <www.ag.gov.au/foi>.

5.3 While an agency may encourage an applicant to follow particular procedures in making requests for access, the agency cannot refuse a request solely on the grounds that the applicant failed to observe its published procedures.

Right of access (section 18)

5.4 Where a person makes a valid request under section 15 for access to a document, and pays any fees and charges that are required under the *Freedom of Information (Fees and Charges) Regulations*, he or she is entitled to be given access to the document in accordance with the FOI Act, although an agency or Minister is not required to give access to a document at a time when it is exempt (see subsections 18(1) and (2)). Decisions to grant or refuse access to documents are in effect made under section 18 (see comments by the AAT in Re Wilson and Australian Federal Police (1983) 5 ALD 343 at 350–1 (D5)).

Applicant's identity or interest in seeking access to documents

5.5 As a general rule, an applicant's identity or reasons for seeking access to documents are considerations irrelevant to an access decision. In particular, an applicant need not establish a need to know basis before he or she is given access to documents (Re Mann and Commissioner of Taxation (1985) 3 AAR 261 (D67)). Subsection 11(2) provides that, subject to the Act, a person's right of access is not affected by any reasons the person gives for seeking access, or an agency's or Minister's belief as to what are those reasons. Therefore, in general, the applicant's identity, or any particular use he or she will make of the documents, makes no difference to the decision whether to grant access to documents (Re Sunderland and Defence (1986) 11 ALD 265 (D154)) There are statutory exceptions to this proposition (see subsections 38(2), 41(2)) and 43(2), and in the case of some exemptions, the public interest in an applicant obtaining access to information relating to herself or himself may be taken into consideration in assessing the balance of the public interest in disclosure.

5.6 Where documents are disclosed in response to an FOI request, there is no restriction under the FOI Act on what the applicant may do with them – disclosure is to the public generally (News Corporation Ltd v NCSC (1984) 57 ALR 550 at 559 (D9/5); Re S and Commissioner of Taxation (D239); Searle Australia Pty Ltd v PIAC & DCSH (1992) 108 ALR 163 at 179 (D294)) (but note para 9.7 below on the restriction on some further publication in subsection 91(2)). The question, whether justice would be frustrated by the applicant's failure to obtain access should not be taken into account (Re Green and AOTC (D298)). An access decision should therefore normally be made on the assumption that the content of any documents disclosed will become public.

5.7 Subsection 24(4) of the FOI Act states that an applicant's reasons for seeking access cannot be taken into account in decisions under subsection 24(1) concerning 'substantial and unreasonable diversion' of an agency's resources (see below paras 8.6–8.10 on subsection 24(1)).

Identification of documents and scope of a request (section 15)

5.8 An applicant is required only to provide such information about the documents to which he or she seeks access as will enable a responsible officer of the agency, or the Minister concerned, to identify those documents (subsection 15(2)). A precise description is not necessary.

Documents may be described in broad terms as so long as the description is sufficiently informative to enable the documents to be identified. Examples are:

- all documents relating to a particular person
- all documents relating to a particular subject matter, and
- all documents of a specified class that contained information of a particular kind.

An applicant does not have to quote a file and folio number or give the precise date of the document. It may be sufficient, for example, to describe a document by reference to a newspaper report of its existence, or by reference to a particular place at which documents are located, for example, 'all documents relating to X held in the Townsville regional office' of an agency.

5.9 An FOI request is not invalid because it is framed as a request for information rather than documents. While the right of access under the Act is to documents, not information (see para 3.33) a request should be read fairly and, if it is clear that the applicant seeks material under the FOI Act, it should be treated as a request for access to documents (Young v Wicks (1986) 13 FCR 85 (D90)).

5.10 A request for access should be construed in a broad commonsense way and not by rules of construction developed for the interpretation of legal documents (Re Timmins and NMLS (1986) 4 AAR 311 (D105)). An applicant normally does not know the content of documents in question and often the best he or she can do is to identify a document described by a genus or class of documents (Timmins).

5.11 A request must be read fairly and extends to any documents which might reasonably be taken to be comprised within the description used by the applicant (Re Gould and Department of Health (D57)). In Re Anderson and AFP (1986) 4 AAR 414 (D137), the AAT said that 'in urging a commonsense approach to the identification of the documents containing the requested information (the Tribunal) would not wish to be understood ... as suggesting a narrow or pedantic approach to the construction of any request for access'. A request cannot be refused on the ground that it does not sufficiently identify the documents sought, unless the applicant is given a reasonable opportunity to provide a more adequate identification (see subsection 24(6) and para 6.4).

5.12 An applicant must be assisted in completing a request if he or she is uncertain how to identify the documents sought (subsection 15(3)).

5.13 If the applicant ought to make the request to another agency, he or she must be helped to direct the request to that other agency (subsection 15(4)). Officers are more likely than most applicants to be in a position to identify, from the Commonwealth Government Directory and other sources, which agency is likely to have the requested documents.

5.14 Where a request is very broad and may relate to a large number of documents, it is sensible to discuss the request with the applicant in order to clarify its terms and, where appropriate, to narrow its scope (see below para 6.6). This may occur either before the provision under section 29 of an estimate of charges (see New FOI Memo No.29, para 26), or afterwards, in an attempt to cut down unnecessary charges to the applicant and unnecessary expenditure of resources on the agency's part. Any changes to the request should also be confirmed in writing in a letter to the applicant to avoid misunderstandings.

Cut–off date for requests

5.15 The FOI Act gives an applicant a right of access only to documents in existence at the time a request is lodged with an agency. An applicant cannot insist that his or her request covers documents created after the request is received (Re Edelsten and AFP (1985) 4 AAR 220 (D140)). However, if it is administratively convenient to do so, it is recommended that agencies include subsequent documents which relate directly to the request (since the applicant could submit a further request for them).

5.16 On internal review under section 54, the date of receipt of the request is still the cut-off date for determining which documents are the subject of the request, although once again an agency should where possible include any subsequent relevant documents. The AAT has power to consider all documents within the ambit of a request notwithstanding that they came into existence between the time of the decision under review and the time of the Tribunal's decision (Re Murtagh and Commissioner of Taxation (1984) 54 ALR 313 (D27); Re S and Commissioner of Taxation (D296A)), and agencies will need to be ready to respond to a direction from the AAT to produce such documents and to make submissions as to whether they are exempt or not.

6. The Obligations of Agencies and Ministers in Responding to Requests Processing requests

6.1 Appendix 1 contains a paper setting out a brief overview of 'Processing FOI Requests' and a small number of sample letters. The other parts of these Guidelines deal only with those issues needing to be dealt with in greater depth than in Appendix 1. New FOI Memo No.29 contains details on the fees and charges aspects of processing requests, and includes some sample letters.

6.2 Guidance on section 23 arrangements for decision makers may be found in Revised FOI Memo No 45/1 issued on 7 December 1984.

Consultations with applicants

6.3 Amongst the statutory requirements to consult with or assist applicants are sections 15, 22 and 24 of the FOI Act. Where a person wishes to make a request to an agency, or has made a request that does not comply with section 15, subsection 15(3) imposes a duty on the agency concerned to take reasonable steps to assist the person to make a request in a manner that complies with section 15. Where a person has made a request to one agency that should have been directed to another agency, the first agency has a duty under subsection 15(4) to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister, or it may transfer the request in appropriate cases (section 16; see paras 6.19–6.25). Subsection 15(4) does not apply to a Minister (although the transfer provisions do—see subsection 16(6). However, sensible administrative practice suggests that Ministers or their staff should assist applicants to make a valid request to the appropriate person or body (see Re Said and John Dawkins, MP (D307).

6.4 There is further provision for helping applicants in subsection 24(6), which provides that an agency or Minister must not refuse to grant access to a document on the ground either that it doesn't comply with subsection 15(2) (see para 5.1) or that the work involved in processing the request would substantially and unreasonably divert the resources of the agency or Minister (see Part 8 below), unless the agency or Minister takes certain steps. These steps are discussed in para 8.11.

6.5 Section 22, which concerns the provision of edited copies of documents with exempt matter deleted (see paras 7.18–7.21), acknowledges that it may be appropriate to consult with an applicant as to whether the applicant would wish to be given access to an edited copy. It will often be advisable to check with an applicant whether he or she is happy to receive edited copies. This is especially the case where most of what is in the documents will be deleted from the copies released. If it is quite clear, either from the request or from consultation that the documents are not useful to the applicant in that form, there is no point in providing them, and a simple refusal will be preferable.

6.6 Agencies should be alert to the need to consult with applicants so as to reduce the volume of material covered by a request (or 'narrow the scope of a request'), whether before or after notification of estimated charges under section 29. While consultation is required by the FOI Act in some circumstances, the process of consultation should not be limited to those cases where the FOI Act requires it (see paras 6.3–6.5). Early consultation with an applicant, even in those cases where there is no suggestion that compliance with the FOI Act involves a 'substantial and unreasonable diversion of resources' (subsection 24(1)), can reduce the work involved in dealing with the request while at the same time ensuring that the applicant is given early access to all relevant documents which are being sought. In many cases, for example, an applicant may not be aware of the nature and volume of the agency's record holdings, and, as a result, a request will be expressed in wider terms than is necessary to meet the applicant's needs. The assistance which agencies give to applicants should be given in an equitable, even-handed way without regard to the public servant's view of the quality of the application or of its likely outcome.

6.7 Officers handling requests should also have in mind the objects of the FOI Act set out in subsection 3(1) and that it is the express intention of the Parliament that any discretions conferred by the Act should be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information (see subsection 3(2)).

Time limits for responding to a request

6.8 On receiving a valid request under section 15 of the FOI Act, an agency or Minister must take reasonable steps to acknowledge its receipt as soon as practicable, but in any case, not later than 14 days after the day on which the request is received (paragraph 15(5)(a)).

6.9 An agency or Minister is also required to take all reasonable steps to enable the applicant to be notified of a decision on a request that is valid under subsection 15(2) (see paras 5.1–5.3) as soon as practicable, but in any event not later than 30 days after the day on which the request is received by the agency or Minister (see paragraph 15(5)(b)). The 30 days are calendar days commencing on the day after the request is received (Acts Interpretation Act 1901, subsection 36(1)).

6.10 The 30-day time period for notifying a decision on a request may be extended to 60 days if an agency or Minister determines in writing that consultation with an individual person, a State Government or a business organisation is appropriate under sections 26A, 27 or 27A before a decision on access can be made (subsection 15(6)). The agency or Minister must inform the applicant as soon as possible that the period has been extended (paragraph 15(6)(b)).

6.11 If a time period expires on a weekend, public holiday or bank holiday, then the period can be extended to the following day that is not a weekend, public holiday or bank holiday (*Acts Interpretation Act 1901*, subsection 36(1)).

6.12 The 30-day period ceases to run where the applicant is notified of a preliminary assessment of an amount of a charge (subsection 29(1)), or of imposition of a charge (subsection 29(6)) in respect of the request, and does not recommence until payment of the charge or a deposit or a number of other occurrences take place (subsections 31(1) and (3), and see New FOI Memo No.29, para32). Where an applicant does not receive a decision on a valid request within the 30 day period, or that period as extended, he or she is entitled to appeal to the AAT as if the request had been refused on the last day of that period (subsection 56(1)). This process is known as a 'deemed refusal'. Subsection 56(3) enables the Ombudsman to intervene within the 30-day or 60 day period if, on receipt of a complaint of unreasonable delay by an agency, the Ombudsman believes that complaint to be justified.

6.13 The 30 day limit applies only to the notification of the decision on the request, and not to the actual provision of access to the documents sought. However, access should be provided as soon as practicable after the decision to grant access has been made and any charge has been paid. Undue delay in providing access is a ground for complaint to the Ombudsman.

6.14 The time spent by an agency, in consulting an applicant under section 24 to narrow a request, is not to be taken into account in calculating the 30-day period (subsection 24(7)).

6.15 It is open to an applicant and an agency to agree on a program for progressive (or staged) release of documents outside the time limits set by the FOI Act (Re Eastman and Department of Territories (1983) 5 ALD 187 (D1)); and see Re Geary and Australian Wool Corporation (D203) where the AAT allowed staged release but reduced the time the agency wanted for completion of processing a complex request).

(…)

Redirecting and transferring requests (sections 15 & 16)

6.19 Where a person has directed to an agency a request which should have been directed to another agency or a Minister, it is the duty of the agency receiving the request to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister (subsection 15(4)—see para 6.3).

6.20 The obligation to assist an applicant under subsection 15(4) is complemented by section 16, which sets out the procedural requirements for the transfer of a request from one agency to another. Revised FOI Memo No. 31 (issued January 1985) deals with inter–agency consultation and transfer of requests under section 16, and the details are not repeated here (and see paras 3.28–3.33 in Appendix 1).

6.21 An agency may transfer a request to another agency in relation to some only of the documents covered by the request (subsection 16(3A)).

6.22 Where a transfer occurs, whether it is partial or for all documents requested, the request is taken to be a request made to the transferee agency for access to the document(s) that is (are) the subject of the transfer, and is taken to have been received by the transferee agency at the time at which it was first received by the transferee agency (subsection 16(5)). Subsection 16(3A) restricts a transferred request to the documents which are the subject of the transfer. Therefore, the request does not apply to all documents in the transferee agency's possession which fall within the terms of the request (those parts of paras 12, 17 and 37 of Revised Memo No. 31 dealing with this issue are now superseded). See also paras 6.26–6.28 and 7.14–7.17 on compulsory transfers.

6.23 When transferring a request:

- forward a copy of the request
- forward a copy of the receipt for payment of the application fee, if applicable
- advise the date of receipt of the request
- advise the applicant (subsection 16(4)), and
- where it is necessary to enable the transferee agency to deal with the request, send it a copy of the document(s) (subsection 16(4)).

6.24 Section 51C enables a transfer of a request for amendment or annotation of personal records in circumstances similar to those relating to requests for access to documents. The only significant difference is the provision in subsection 51C(7) that, where a transferee agency or Minister decides to amend or annotate a record, that agency or Minister must give to the transferor agency a written notice of the decision and of any amendment or annotation made to a record. The transferor agency or Minister must then amend or annotate their records in the same manner as in the case of the transferee agency's or Minister's records.

6.25 If it may be necessary to neither confirm nor deny the existence of documents (which may have originated from a confidential source or a security agency) under section 25 (see New FOI Memo No.26, Part 5), consultation with any relevant agency should be undertaken before completing transfer. If an applicant is advised of the existence of documents when notified of transfer then a refusal neither confirming nor denying existence of the documents cannot be made. See also paras 6.26 and 7.14–7.17.

(…)

Consultations with other agencies

(…)

6.33 Except where a request has been transferred in accordance with section 16 of the FOI Act, the legal responsibility for dealing with the request remains with the agency to which the request was made. The fact that another agency has been consulted and does not wish a document to be disclosed does not absolve the agency that received the request from making its own decision on whether access to the document should be given.

(…)

Statutory consultations with third parties (sections 26A, 27 & 27A)
(…)

6.41 At the consultation stage it is unnecessary and inadvisable to disclose the name of the applicant, although it may become necessary to do so at a later stage, particularly in response to an FOI request for that information.

(…)

RECOMMENDATIONS OF OMBUDSMAN

N/A

DECISIONS OF THE COURT

The *Fundamental Principles and Procedures* contain relevant decisions from Australian Courts. A case-law research did not provide any new information.

New Zealand

In New Zealand, two acts provide analogous rights to obtain information. Citizens, residents, persons in New Zealand and companies incorporated in New Zealand, may request official information to a government department. The department has 20 working days to respond to an information request. When a request is denied, the first stage of the appeal process is a complaint with the Ombudsman, who has the normal power under the *Ombudsmen Act 1975*. After investigation, the Ombudsman makes a report with recommendations to the department, who must observe the recommendations, unless the Governor General, by order in Council, vetoes the recommendations. These proceedings can then be judicially reviewed by the High Court and then by the Court of Appeal.

Websites
http://www.ombudsmen.govt.nz/ (Office of the Ombudsmen)
http://www.legislation.govt.nz/act/public/1987/0174/latest/DLM122242.html (Government Site)
http://www.legislation.govt.nz/act/public/1982/0156/latest/DLM64785.html (Government Site)

STATUTES

Local Government Official Information and Meetings Act 1987 (N.Z.), 1987/174 – covers information held by local authorities.

Official Information Act 1982 (N.Z.), 1982/156 – covers all other information.

*These acts provide analogous rights. For the purpose of this document, only the *Official Information Act 1982* is examined.

RELEVANT PROVISIONS

12. (…)
(2) The official information requested shall be specified with due particularity in the request.

13. It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who—

(a) Wishes to make a request in accordance with section 12 of this Act; or
(b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or
(c) Has not made his request to the appropriate Department or Minister of the Crown or organisation or local authority,—

to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation or local authority.

15A. (1) Where a request in accordance with section 12 of this Act is made or transferred to a Department or Minister of the Crown or organisation, the permanent head of that Department or an officer or employee of that Department authorised by that permanent head or that Minister of the Crown or that organisation may extend the time limit set out in section 14 or section 15(1) of this Act in respect of the request if—

(a) The request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of the Department or the Minister of the Crown or the organisation; or

(b) Consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.

18A (1) In deciding whether to refuse a request under section 18(f), the Department, Minister of the Crown, or organisation must consider whether doing either or both of the following would enable the request to be granted:

(a) fixing a charge under section 15:

(b) extending the time limit under section 15A.

(2) For the purposes of refusing a request under section 18(f), the Department, Minister of the Crown, or organisation may treat as a single request 2 or more requests from the same person—

(a) that are about the same subject matter or about similar subject matters; and

(b) that are received simultaneously or in short succession.

18B If a request is likely to be refused under section 18(e) or (f), the Department, Minister of the Crown, or organisation must, before that request is refused, consider whether consulting with the person who made the request would assist that person to make the request in a form that would remove the reason for the refusal.

RELEVANT REGULATIONS

N/A

GUIDELINES / MANUAL / EXAMPLES

- **<u>Practice Guidelines - Official Information</u>** (From the Ombudsmen's Web Site)

Part A: How the official information legislation works

2. Responding to a request for official information

When processing and responding to a request for official information, an agency needs to consider a number of different issues. A checklist of these is set out below, and a more substantive discussion of each issue is contained on the following pages.

- What specific information has been requested?
- Can the information be identified?
- Is the information *"held"?*
- Is the information held *"official information"*?
- Are there any administrative or procedural reasons for refusal?
- Is it possible to make a decision on the request within the time limits of the Act?
- Is there good reason to withhold some or all of the information?

- In what form should the information be released?

What specific information has been requested?
The actual request should be considered carefully in order to identify the specific information that has been requested.

If a decision-maker begins to make assumptions about the information that is being sought, there is a risk that those assumptions will be wrong. Where it is evident that an assumption about the scope of the request is being made, it can often be helpful to contact the requester if that is reasonably practicable. Often a simple telephone conversation can resolve any ambiguity.

Can the information be identified?
A request cannot be refused simply because the agency considers it to be so vague that it is not reasonably possible to determine what information is being requested.

Section 13[1] of the OIA provides that:

> *"**13. Assistance –** It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who –*
>
> *(a) Wishes to make a request in accordance with Section 12 of this Act; or*
>
> *(b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or*
>
> *(c) Has not made his request to the appropriate Department or Minister of the Crown or organisation or local authority, -*
>
> *to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation or local authority."*

If the information requested cannot be identified, there is a duty on the recipient of the request to give reasonable assistance to the requester to make the request in a manner that is in accordance with section 12[2] of the Act. Reasonable assistance requires more than telling the requester that the request is not specific. Having regard to the purposes of the Act and to the principle of availability of information, it is incumbent on the recipient of a request to take all reasonable steps to provide assistance. The aim of the assistance should be to enable the requester to refine the request so that it is specific enough to enable the information sought to be readily identified.

The fact that a request is for a large amount of information does not of itself mean that the request lacks due particularity. The term *"fishing expedition"* appears to have received general recognition in the vocabulary of those concerned with making decisions on requests for information. It should be clearly understood that this term is not recognised in the Act as a withholding reason. If the information requested meets the test of *due particularity* it cannot be refused simply on the basis that it is considered to be a *fishing expedition*. The request must be given proper consideration under the Act.

[1] Section 11 LGOIMA
[2] Section 10 LGOIMA

If an agency is considering whether to refuse a request pursuant to section 18(f)[3] of the OIA (on the basis that the information requested cannot be made available without substantial collation or research – discussed further in Part B, chapter 2.4), recent amendments to the OIA make it clear that the agency must first consider whether:

- imposing a charge for the supply of the information at issue or extending the time frame for responding to the request would enable the request to be granted;[4] and

- consulting with the requester would assist the requester to make their request in a manner which would not involve substantial collation and research.[5]

These amendments to the OIA confirm the Ombudsmen's general approach to section 18(f), namely that it is a *"provision of last resort"* which should only be used if the other mechanisms in the OIA do not provide a reasonable basis for managing the administrative burden of processing the request.

Is the information *"held"?*

The duty to provide assistance only applies to requests for information that is *"held"* for the purposes of the OIA. If the information requested is not held by the agency, the agency should consider whether to transfer the request or to refuse the request under sections 18(e) or (g) of the Act[6] [for a discussion of when these sections apply, see Part B chapter 2].

Section 14(b)[7] of the Act provides that where the information to which the request relates:

> *"(i) Is not held by the Department or Minister of the Crown or organisation but is believed by the person dealing with the request to be held by another Department or Minister of the Crown or organisation, or by a local authority; or*
>
> *(ii) Is believed by the person dealing with the request to be more closely connected with the functions of another Department or Minister of the Crown or organisation, or of a local authority…"*

then the agency should transfer the request *"promptly, and in any case not later than 10 working days after the day on which the request is received."*

Under section 15A[8], the 10 working day time limit can be extended in certain limited circumstances where there is a large quantity of information or there is a need to consult other parties. However, any extension must be notified within the original 10 working day time limit.

It is at this initial stage (within 10 working days of receipt of a request unless extended pursuant to section 15A) that agencies should determine who is to accept responsibility for responding to the request – for example, whether it is more appropriate for the request to be answered by a Department (or Ministry, Crown entity or SOE) or the Minister. In the case of requests made to a Minister, often the information at issue is not physically held by the Minister at all but is held (and is often being worked on) by a Department or Ministry. Unless there are genuine policy concerns which require Ministerial input, many such requests could be transferred to the relevant Department or Ministry.

[3] Section 17(f) LGOIMA
[4] Section 18A OIA, section 17A LGOIMA
[5] Section 18B OIA, section 18B LGOIMA
[6] Sections 17(e) or (g) LGOIMA
[7] Section 12(b) LGOIMA
[8] Section 14 LGOIMA

If an agency does decide to transfer the request, it should first ensure that it has identified any relevant information that it holds. It should identify that information when making the transfer, and explain whether:

(a) it will retain responsibility for responding to the request with regard to that information; or

(b) it is transferring responsibility for responding to the request with regard to that information.

It seems to be common practice for an agency to respond to a request so far as it relates to information that it has generated, and transfer the request to the extent that it relates to information generated by other agencies. To avoid unnecessary confusion, in these types of cases it is good practice to identify the information to which the transfer relates.

Is the information held *"official information"*?
All information held by a Department, a Minister of the Crown in his or her official capacity, or an organisation subject to the OIA or Local Government Official Information and Meetings Act (LGOIMA) is official information. This includes information held by an independent contractor engaged by an agency, and information held by any advisory council or committee established for the purpose of assisting or advising a department, Minister or organisation.

The Ombudsmen consider that the definition of official information also includes knowledge of a particular fact or state of affairs held by officers in such organisations or Departments in their official capacity. The fact that such information has not yet been reduced to writing does not mean that it does not exist and is not *"held"* for the purposes of the Act.

As a consequence of the Privacy Act 1993 (PA), requests made by or on behalf of natural persons for personal information about themselves must be considered under the PA rather than the OIA. However, requests from bodies corporate for personal information about themselves still fall to be considered under the OIA. Similarly, all requests for information relating to natural persons other than the requester must be considered under the OIA.

Are there any administrative or procedural reasons for refusal?
Administrative and procedural reasons for refusal are set out in section 18[9] of the OIA. This section provides that requests may be refused if:

- The making available of the requested information would:
  - be contrary to the provisions of a specified enactment; or
  - constitute contempt of Court or of the House of Representatives.
- The information is or will soon be publicly available.
- The document alleged to contain the information requested does not exist or cannot be found.
- The information requested cannot be made available without substantial collation or research.
- The information requested is not held and the request cannot be transferred to another organisation.

[9] Section 17 LGOIMA

- The request is frivolous or vexatious or that the information requested is trivial.

For a more detailed discussion of the Ombudsmen's approach to these reasons, refer to chapter 2 of Part B of these guidelines.

Is it possible to make a decision on the request within the time limits of the Act?
When a request is received for official information, that request must be considered and a decision made and conveyed to the requester **as soon as reasonably practicable**, and in any event no later than 20 working days after the date upon which the request is received.[10]

It is important to note that when the time limit was inserted into the Act in 1987 Parliament made it clear that 20 working days should not be treated as the normal period within which to respond to a request, but should be the absolute maximum. The Law Commission in its report, *"Review of the Official Information Act 1982"*, reinforces this view: [11]

> *"We consider that the basic obligation upon agencies should remain to deal with requests as soon as reasonably practicable. This requirement remains paramount notwithstanding the existence of a 20 working-day limit."*

Extension
Section 15A[12] of the Act provides that the time limit (for transfer in section 14[13] and decision in section 15[14]) may be extended if:

- The request is for a large quantity of information or necessitates a search through a large quantity of information, and meeting the original time limit would unreasonably interfere with the operations of the agency; or

- Consultations which are necessary to make a decision on the request mean that a proper response to the request cannot reasonably be made within the original time limit.

Any extension of the time limit for response must be for a *"reasonable period of time having regard to the circumstances"*.

If an agency intends to extend the time limit for response, it must notify the requester before the expiry of the original time limit of the intention to extend the time for reply, the period of the extension, the reason for the extension and the right to make a complaint to the Ombudsman about the extension.

The Act does not allow for further extensions to be notified if the original extension cannot be met. In this regard, agencies should bear in mind that the time limits expressed in the Act are maximums. Any extension of the maximum time limit for response should be realistic, given that multiple extensions are not permitted.

Breach of time limits
If a decision is not made within 20 working days, or within the extended time frame, the request is deemed to have been refused and the requester has the right to ask an Ombudsman to investigate that deemed refusal.[15]

[10] Section 15 OIA; section 13 LGOIMA
[11] (NZLC R40), paragraph 158; page 61
[12] Section 14 LGOIMA
[13] Section 12 LGOIMA
[14] Section 13 LGOIMA
[15] Section 28(4) OIA; section 27(4) LGOIMA

Similarly, if a decision is made and the requester is notified within the statutory time limit that the information will be made available, but there is then an unreasonable delay in actually supplying the information to the requester, the request is deemed to have been refused. The requester has the right to ask an Ombudsman to investigate that deemed refusal.[16] For example, if the requester is advised within the statutory time limit that the information will be made available upon payment of a charge, then once the charge has been paid, the information should be released as soon as reasonably practicable. There is not a further time frame of 20 working days from the time the requester pays the charge.

Is there good reason to withhold some or all of the information?
Sections 6 and 9 of the OIA set out what is considered to be *"good reason"* under the Act to withhold information.[17] When considering whether one of those withholding grounds applies to the information requested, thought should be given to:

- whether there are grounds to believe that disclosure of the information would cause a harmful effect;
- whether that harmful effect would prejudice one of the conclusive interests protected by section 6; or
- whether that harmful effect would prejudice one of the interests protected by section 9(2) – if so, whether the interest in withholding the information is outweighed by any countervailing considerations which favour its release, in the public interest, in terms of section 9(1).

The approach of the Ombudsmen to a number of these withholding grounds is set out in Part B of these guidelines.

If an agency considers that there is good reason to refuse the request, it should advise the requester of:

- the decision to refuse the request;
- the reason for its decision to refuse the request;
- if possible, the grounds in support of that reason; and
- the right to complain to an Ombudsman about the decision to refuse the request.

While it is not mandatory for an agency to provide grounds in support of the statutory reasons for refusal, a requester does have the right to ask for these.[18] Advising a requester of these grounds at the time of the refusal:

- enhances the decision-making process, by ensuring that the agency has satisfied itself that there is sufficient basis to support the decision to withhold; and
- allows the requester to form a better understanding of why the agency considered it necessary to withhold information - if the requester finds these reasons acceptable, there is less likely to be a complaint to an Ombudsman.

In what form should the information be released?
Once it is decided that some or all of the information should be released, consideration should be given to the form in which the information should be released. However, subject to certain exceptions, information should be released to the requester in the way preferred by the requester. The exceptions are set out below.

There are a number of different ways an agency can make information available to satisfy a request made under the OIA:

[16] Section 28(5) OIA; section 27(5) LGOIMA
[17] Sections 6 and 7 LGOIMA
[18] Section 19(a)(ii) OIA; section 18(a)(ii) LGOIMA

- Release the information in its entirety;
- Release the information in its entirety subject to certain conditions, such as a restriction regarding its further disclosure or an agreement to pay a reasonable charge;
- Release of the information together with a contextual statement – this is useful if there is a concern that the information on its own might be misleading or incomplete;
- Partial disclosure of the information – for example:
  - release of a document with certain information deleted;
  - release of the information in the form of a worthwhile summary; or
  - release of an excerpt from a document;
- Making the information available by way of inspection or an oral briefing;
- Releasing other relevant information to satisfy any considerations favouring disclosure in the public interest – the public interest in disclosure may be satisfied by release of a statement confirming the status of the matter at issue, the procedures or the decision-making process, rather than release of the actual information itself.

Where the information requested is contained in a document, section 16(2)[19] requires that information shall be made available in the way preferred by the requester unless to do so would:

- Impair efficient administration;
- Be contrary to any legal duty in respect of the document; or
- Prejudice the interests protected by sections 6, 7 or 9 of the Act and in the case of section 9 there is no countervailing public interest.

Part B: Reasons for refusing requests

2. Administrative reasons for refusal - section 18
(…)

2.4 Substantial collation and research

Section 18(f) of the OIA allows a request to be refused on the basis that:

> "… the information requested cannot be made available without substantial collation or research."

The OIA does not bar a requester from seeking a large amount of information or from defining the parameters of a particular request in broad terms. However, although the Act does not expressly preclude "fishing expeditions", the Danks Committee commented that:

> "It is not envisaged that individuals should have a right to conduct 'fishing expeditions' in the hope or expectation that material of interest or use will turn up or make vague or sweeping requests for a class of information."

Section 18(f) of the Act allows a request to be refused if other mechanisms in the legislation do not provide a reasonable basis for managing the administrative burden of processing a large or broadly defined request. This approach has been confirmed by recent amendments to the OIA.

[19] Section 15(2) LGOIMA

What is "substantial collation and research"?
The following factors have been identified as relevant when assessing whether meeting a particular request would involve "substantial collation and research" in terms of section 18(f):

(i) the amount of work involved in determining what information falls within the scope of the request;

(ii) the difficulty involved in locating, researching or collating the information;

(iii) the amount of documentation to be looked at;

(iv) the work time involved;

(v) the nature of the resources and the personnel available to process requests for information and

(vi) the effect on other operations of the diversion of resources to meet the request.

When should section 18(f) be relied upon?
In its "Review of the Official Information Act 1982", the Law Commission stated that:

> "Agencies familiar with the scheme of the Act should already regard s.18(f) as a provision of last resort, which must be considered in the light of the obligation in s.13 to help requesters with the 'due particularity' requirement, and the Act's charging and extension provisions."

The Act provides statutory mechanisms to assist the management of large and broadly defined requests by:

(a) encouraging early identification of the specific information that the requester is seeking;

(b) promoting communication between the organisation receiving the request and the requester to assist the identification process;

(c) providing incentives for requesters to keep requests within reasonable administrative requirements or risk:

- reasonable extension of the time limit for consideration of the request;
- reasonable charges for making available the information requested;
- alternative forms of disclosure under section 16 (release of summaries or extracts, oral briefings) which may avoid the need to peruse large volumes of information.

If none of these mechanisms provide a reasonable basis for managing the administrative burden of processing a large or broadly defined request in a particular case, then refusal under section 18(f) may be justified.

This approach has been confirmed by recent amendments to the OIA, which read:

> **18A** Requests involving substantial collation and research
>
> (1) In deciding whether to refuse a request under section 18(f), the Department, Minister of the Crown, or organisation must consider whether doing either or both of the following would enable the request to be granted:
>
> (a) fixing a charge under section 15:
> (b) extending the time limit under section 15A….
>
> (2) For the purposes of refusing a request under section 18(f), the Department, Minister of the Crown, or organisation may treat as a single request 2 or more requests from the same person—
>
> (a) that are about the same subject matter or about similar subject matters; and
> (b) that are received simultaneously or in short succession.
>
> **18B** Duty to consider consulting person if request likely to be refused under section 18(e) or (f)
>
> If a request is likely to be refused under section 18(e) or (f), the Department, Minister of the Crown, or organisation must, before that request is refused, consider whether consulting with the person who made the request would assist that person to make the request in a form that would remove the reason for the refusal.

Accordingly, before deciding whether section 18(f) of the OIA provides grounds to refuse a request, agencies must first consider:

- imposing a charge for the supply of the information at issue or extending the time frame for responding to the request would enable the request to be granted; and
- consulting with the requester would assist the requester to make their request in a manner which would not involve substantial collation and research.

In addition, if a requester makes more than one request on the same, or similar, topics simultaneously or in short succession, those requests may now be treated as one for the purposes of section 18(f) of the OIA.

2.5 Frivolous and vexatious requests, requests for trivial information

Section 18(h) of the OIA provides that a request may be refused if:

> "… the request is frivolous or vexatious or that the information requested is trivial."

It contemplates the refusal of a request in two different contexts:

(i) the request, irrespective of the nature of the information requested, is frivolous or vexatious; or
(ii) the information requested is trivial.

Each of these contexts is discussed below.

The request is frivolous or vexatious

What does "frivolous or vexatious" mean?
The expression "frivolous or vexatious" has a long legal background in the context of striking out proceedings. A Court's power to strike out proceedings on these grounds is discretionary, and it is a discretion that is not lightly exercised.

The Ombudsmen have followed the interpretation that the Courts have taken when considering whether a request is "frivolous or vexatious". In this context, the Courts have considered that:

- to be "frivolous", pleadings must be so clearly frivolous that to put them forward would be an abuse of the process of Court; and
- to be "vexatious", the claim must be such that no reasonable person could properly treat it as bona fide (that is, having been made in good faith).

In terms of the OIA, therefore, for a request to be refused on the grounds that it is "frivolous" or "vexatious" a requester must be believed to be patently abusing the rights granted by the legislation for access to information, rather than exercising those rights in good faith.

Is the "request" frivolous or vexatious?
It is important to note that a distinction needs to be drawn between requests that are considered to be "frivolous or vexatious" and requesters who are considered to be so.

The Act does not permit requests to be refused simply on the grounds that a requester has already made numerous, possibly time consuming requests which, in the eyes of the organisation dealing with the requester, appear to serve no practical purpose. It is not the identity of the requester that determines whether a request is frivolous or vexatious", but the nature of the request made in light of the surrounding circumstances.

However, the conduct of the requester and the purpose of the request may well be relevant to the question of whether a request by that person is "frivolous or vexatious". Past experience may well indicate that a new request is simply an abuse of the official information rights rather than a request for information made in good faith, and therefore it is "frivolous or vexatious". That is a judgment that must be made having regard to past dealings with that requester, but having had vexatious requests from a particular individual in the past is not of itself sufficient to conclude that a new request is also automatically vexatious.

The Danks Committee, in its Supplementary Report, commented with regard to this provision that:

> "It seems plainly wrong that an unbalanced, mischievous or malicious individual should be able to inundate a department with time-wasting requests."

It did not, however, suggest that any person should be denied the opportunity to make a genuine request, or that organisations should be able to differentiate between requests on the basis of the identity of the requester. Rather, it appears to have been the intention that requests seen to be of a time wasting nature (that is, made for irrational, mischievous or malicious purposes) should be able to be refused on the grounds that the requests (not the requester), were "frivolous or vexatious".

The information requested is trivial
The question of whether the information is trivial is a judgment to be made taking into account the circumstances of a particular case. Information which may appear trivial to an agency, may be particularly relevant to the purpose for which a requester is seeking information. Some relevant factors to consider include:

- the nature of the information;
- the purpose for which the information is requested; and
- the connection between the information requested and any information that is already in the public domain

This issue often arises where widely-framed requests have been made for all information in relation to a particular subject. Such requests will often cover trivial information which refers to the subject matter.

A common example is an e-mail which refers to the subject in the context of making administrative arrangements for a meeting – for example:

"Re: [subject matter]

Shall we meet at 3 pm. and walk over to the Minister's office for our 3:15 meeting with [relevant persons]?"

If the purpose of the request is to obtain information which reflects the manner in which a particular policy has been developed, the type of information referred to above could be considered 'trivial'. To the extent that the request includes such information it might be refused in reliance upon section 18(h).

If, however, the purpose of the request was to determine who was involved in the development of the policy under consideration, then such information might be relevant. A refusal in terms of section 18(h) might not be justified in such circumstances.

- **Ombudsmen Quarterly Review**

The Office of the Ombudsmen publishes the "Ombudsmen Quarterly Review", which is meant to provide help and guidance on the application of the *Official Information Act*. The publication intends to serve as future reference for issues relating to the *Act*. The publications are not included here, as the *Practice Guidelines* extensively cover the same topics.

DECISIONS OF THE OMBUDSMAN

Case Notes [W3541] - by: Office of the Ombudsmen

CASE NO. W3541

Section 12(2) and section 13
What constitutes "due particularity" - duty to provide reasonable assistance.

The Minister of State Owned Enterprises was asked to provide any documents prepared for him since October 1990 regarding claims under the Treaty of Waitangi in general, and in relation to Railways Corporation land in particular. The Minister declined the request in reliance upon sections 9(2)(b)(ii), (f)(iv) and (j) and 12(2) of the Official Information Act.

In response to my request for a report on that decision, I was advised that the major difficulty had been to identify with sufficient particularity the specific documents requested because of the extensive range of material relating to claims under the Treaty of Waitangi general. Thus, while the Minister's advisers were of the view that certain information likely to be covered by the request would be protected under the provisions of s.9(2) referred to, the major reason for refusing the request was that it was not specific enough.

I explained to the Minister that s.12(2) of the Act is not a reason for refusal and I pointed out the obligations which the Act places on departments, Ministers of the Crown and organisations when they receive a request where the official information requested is not "specified with due particularity". Where the recipient of the request unable to identify the information at issue, the appropriate course to give reasonable assistance to the requester to identify the information sought.

In this case, no attempt had been made to assist the requester. Furthermore, given that the particular information which the request was seeking had not been identified, the reasons given for refusing the request could only have been based on an assumption by the Minister's advisers as to the specific information which was being sought. Such reasoning is not sufficient to meet the purposes of the Act. Before a reason can be given for refusing a request, the information at issue must be identified by the holder.

In this case, after discussions with the officials and the requested the request was clarified and the Minister undertook to consider that request afresh and make a decision on it. I therefore discontinued my investigation of the earlier decision.

This case note sets out the Ombudsman’s view on this specific case. It records a view formed on the particular facts of that case in light of the then applicable laws and policies. It is not to be taken as establishing any legal precedent for the view an Ombudsman may form on a similar matter in the future.

DECISIONS OF THE COURT

N/A

United Kingdom

In the United Kingdom, every person may ask an agency for access to information. When access is denied, the first appeal stage is an internal reconsideration. If access is further denied, an application can be made to the Information Commissioner, who will investigate and make a decision. This last decision may be appealed by either party before the Information Tribunal, and then before the High Court for a question of law.

Website
http://www.ico.gov.uk/ (Commissioner)
http://www.opsi.gov.uk/acts/acts2000/ukpga_20000036_en_1 (Legislation)
http://www.foi.gov.uk/reference/imprep/codepafunc.htm (Department for Constitutional Affairs)

STATUTE

Freedom of Information Act 2000 (U.K.), 2000, c. 36.

RELEVANT PROVISIONS

1(1) Any person making a request for information to a public authority is entitled—
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
(b) if that is the case, to have that information communicated to him.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and
(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

8.(1) In this Act any reference to a "request for information" is a reference to such a request which—
(…)
(c) describes the information requested.

16. (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

45 (1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I.

(2) The code of practice must, in particular, include provision relating to—

(a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information to them, (…)

(4) Before issuing or revising any code under this section, the Secretary of State shall consult the Commissioner.

(5) The Secretary of State shall lay before each House of Parliament any code or revised code made under this section.

47.(1) t shall be the duty of the Commissioner to promote the following of good practice by public authorities and, in particular, so to perform his functions under this Act as to promote the observance by public authorities of—

(a) the requirements of this Act, and

(b) the provisions of the codes of practice under sections 45 and 46.

50. (1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

RELEVANT REGULATIONS

N/A

GUIDELINES / MANUAL / EXAMPLES

- **Code of Practice**

(from the Department for Constitutional Affairs, no statutory force, November 2004)

Introduction
(…)
Duty to provide advice and assistance
Section 16 of the Act places a duty on public authorities to provide reasonable advice and assistance to applicants. A public authority is to be taken to have complied with this duty in any particular case if it has conformed with the provisions of this Code in relation to the provision of advice and assistance in that case. The duty to assist and advise is enforceable by the Information Commissioner. If a public authority fails in its statutory duty, the Commissioner may issue a decision notice under section 50, or an enforcement notice under section 52.

Public authorities should not forget that other Acts of Parliament may be relevant to the way in which authorities provide advice and assistance to applicants or potential applicants, e.g. the Disability Discrimination Act 1995 and the Race Relations Act 1976 (as amended by the Race Relations (Amendment) Act 2000).
(…)

Code of Practice
(…)

II The provision of advice and assistance to persons making requests for information

3. The following paragraphs of this Code apply in relation to the provision of advice and assistance to persons who propose to make, or have made, requests for information to public authorities. They are intended to provide guidance to public authorities as to the practice which it would be desirable for them to follow in the discharge of their duty under section 16 of the Act.

Advice and assistance to those proposing to make requests:
4. Public authorities should publish their procedures for dealing with requests for information. Consideration should be given to including in these procedures a statement of:

> what the public authority's usual procedure will be where it does not hold the information requested (see also III - "Transferring requests for information"), and
>
> when the public authority may need to consult other public authorities and/or third parties in order to reach a decision on whether the requested information can be released (see also IV - "Consultation with third parties"),

5. The procedures should include an address or addresses (including an e-mail address where possible) to which applicants may direct requests for information or for assistance. A telephone number should also be provided, where possible that of a named individual who can provide assistance. These procedures should be referred to in the authority's publication scheme.

6. Staff working in public authorities in contact with the public should bear in mind that not everyone will be aware of the Act, or Regulations made under it, and they will need where appropriate to draw these to the attention of potential applicants who appear unaware of them.

7. Where a person is unable to frame his or her request in writing, the public authority should ensure that appropriate assistance is given to enable that person to make a request for information. Depending on the circumstances, consideration should be given to:

> advising the person that another person or agency (such as a Citizens Advice Bureau) may be able to assist them with the application, or make the application on their behalf;
>
> in exceptional circumstances, offering to take a note of the application over the telephone and then send the note to the applicant for confirmation (in which case the written note of the telephone request, once verified by the applicant and returned, would constitute a written request for information and the statutory time limit for reply would begin when the written confirmation was received).

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

Clarifying the request:

8. A request for information must adequately specify and describe the information sought by the applicant. Public authorities are entitled to ask for more detail, if needed, to enable them to identify and locate the information sought. Authorities should, as far as reasonably practicable, provide assistance to the applicant to enable him or her to describe more clearly the information requested.

9. Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.

10. Appropriate assistance in this instance might include:

providing an outline of the different kinds of information which might meet the terms of the request;

providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;

providing a general response to the request setting out options for further information which could be provided on request.

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

11. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

Limits to advice and assistance

12. If, following the provision of such assistance, the applicant still fails to describe the information requested in a way which would enable the authority to identify and locate it, the authority is not expected to seek further clarification. The authority should disclose any information relating to the application which has been successfully identified and found for which it does not propose to claim an exemption. It should also explain to the applicant why it cannot take the request any further and provide details of the authority's complaints procedure and the applicant's rights under section 50 of the Act (see "Complaints Procedure" in section VI).

Advice and assistance and fees

13. Where the applicant indicates that he or she is not prepared to pay the fee notified in any fees notice given to the applicant, the authority should consider whether there is any information that may be of interest to the applicant that is available free of charge.

14. Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.

15. An authority is not expected to provide assistance to applicants whose requests are vexatious within the meaning of section 14 of the Act. Guidance on what constitutes a vexatious request can be found in the DCA Handbook - 'Guidance on Processing Requests'. The Information Commissioner has also issued advice on dealing with vexatious and repetitious requests.

- **Freedom of Information (FOI) Guidance on Processing Requests**

(from the Department for Constitutional Affairs)

Chapter 01: Purpose and introduction
(…)
The importance of getting procedures right
In particular, departments need to ensure: (…)

- That officials understand and act on new obligations to provide an applicant with advice and assistance in formulating their request for information and meet the stringent deadlines laid down in the Act; (…)

Chapter 03: The limits of your duty to answer requests
(…)
Repeated and vexatious requests
A number of requests under the Act are very broad requests for information and they may not describe the information that is sought sufficiently precisely to enable you to identify and locate the information. If the request is too broad or general in nature (eg. seeks all information on a topic over many years) you have a duty to provide advice and assistance to the applicant in order to focus the request. More information on advice and assistance can be found in the section in the relevant section of the Guidance. But the breadth of a request is not in itself an automatic reason to refuse it (although cost considerations might well be relevant here). (…)

Chapter 04: What is a request
What is a request? Your duty to provide advice and assistance - what does this mean in practice?
You are under a duty to provide advice and assistance, so far as it would be reasonable to expect your public authority to do so, to people who have made or who propose to make requests for information.

The Section 45 Code of Practice provides detailed guidance on the provision of advice and assistance to applicants and gives examples of where the duty may arise and how public authorities might comply with it. The Code of Practice should be consulted as and when necessary. The Information Commissioner's Office has produced an awareness guide on advice and assistance which can be found on his website.

The provision of advice and assistance does not normally affect the 20 working days deadline, which is dealt with in the Time and Fees chapter of this guidance. However, if you are providing advice and assistance because you need further information in order to identify the information requested, you are not obliged to comply with the request until you receive this.

If you have to request more information from applicants as to the precise nature of the information they are requesting, then you should consider the most appropriate way of obtaining it. It may be quicker to e-mail or, as a matter of good customer service, telephone the applicant.

It is important that you keep a detailed record of any letters, e-mails and telephone conversations you may have with applicants in the course of providing advice and assistance. This should form part of any records management system your department uses when dealing with Freedom of Information requests.

- **Freedom of Information Awareness Guidance No 23** (from the Commissioner) (updated January 2006)

Advice and Assistance
The Information Commissioner's Office (ICO) has produced this guidance as part of a series of good practice guidance designed to aid understanding and application of the Freedom of Information Act 2000. The aim is to introduce some of the key concepts in the Act and to suggest the approaches that may be taken in response to information requests.

The guidance will be developed over time in the light of practical experience.

Here we consider the duty placed on public authorities by section 16 of the Act to provide advice and assistance to applicants for information. The Guidance takes the form of Frequently Asked Questions (FAQs).

A) WHAT DOES THE ACT SAY?

Section 16 of the Freedom of Information Act 2000 (the Act) places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it. The section goes on to state that this duty is complied with when the provision of advice and assistance in any case conforms with the section 45 Code of Practice (the "Access Code").

The provision of advice and assistance is a wide-ranging duty– for example it applies both to prospective and actual applicants for information – and has the potential to be relevant to most, if not all, stages of the request process under the Act. The provision of advice and assistance can be seen as the means by which a public authority engages with an applicant in order to establish what it is that the applicant wants and, where possible, assists him in obtaining this, maintaining a dialogue with the applicant throughout the process.

B) GENERAL QUESTIONS

1. How does a public authority judge what is a reasonable provision of advice and assistance?
A public authority should adopt a flexible approach and treat each application, or potential application, for information on a case by case basis. In many straightforward cases, the nature of the advice and assistance to be offered will be clear at the outset. In other cases, dialogue with the applicant will be necessary to establish what advice and assistance might be appropriate, and therefore reasonable. In the case of valid requests this should be addressed promptly as the 20-day clock will be ticking. The duty to provide advice and assistance under the Act will much of the time be fulfilled by the delivery of an authority's usual customer service standards.

Examples of what is reasonable may include:

- keeping an applicant advised of progress with regard to his or her request;
- advising a potential applicant of his or her rights under the Act;
- assisting an applicant to focus his or her request, perhaps by advising of the types of information available within the requested category;
- advising an applicant if information is available elsewhere, and explaining how to access this (for example via the authority's publication scheme).

In all cases the Commissioner strongly recommends that early contact is made with an applicant and that for any advice and assistance to achieve its purpose it should be delivered in a clear and intelligible manner.

2. In order to offer advice and assistance to an applicant, is it permitted to enquire into the reasons why the request has been made?
No. The purpose of providing advice and assistance is to help an applicant to exercise his rights under the Act; it cannot be the means by which a public authority seeks to discover the reasons for a particular, or potential, application. However, public authorities should bear in mind that section1(3) of the Act does allow them to request further information from the applicant if this is needed in order to identify and locate the information requested. The Access Code provides an indication of the types of assistance that can be offered so that the applicant can describe the information he is seeking.
While it will be good practice to make contact with the applicant as soon as possible after the request is made, public authorities should be sensitive to the circumstances of the applicant when considering the appropriate method of contact. For example, requests for information will often be made in the context of complaints against the public authority. In such cases it may be inappropriate to contact an applicant by telephone – which would otherwise be the preferred means of establishing early contact – if this would give the impression of the public authority exerting undue pressure on the applicant.

3. Will other statutory provisions influence the advice and assistance that a public authority should offer?
It is for each public authority to determine whether the requirements of other pieces of legislation will impose further obligations in relation to how they may advise and assist an applicant for information. For example, compliance with the Disability Discrimination Acts may impose requirements on how an authority responds to requests for information from a disabled applicant. In the same way, there may be statutory provisions – such as the Welsh Language Act and the amended Race Relations Act 1976 – which require public authorities in some circumstances to provide information in other languages. However, even in circumstances where there is no statutory duty to provide information in languages other than English, if an authority routinely deals with minority communities in their own languages, it may be appropriate, and a matter of good practice, to respond to requests for information in the same way.

Similar considerations will apply to communications received by public authorities in foreign languages. There is no general duty under the Freedom of Information Act to translate such communications, but, as above, duties may be imposed by other statutes. For those authorities who deal with languages other than English (or Welsh) on a regular basis it will be good practice to obtain a translation. In either case, if it then becomes clear that the communication is a request for information, the public authority should ensure that the requirements of the Freedom of Information Act are complied with.

These issues are considered in Awareness Guidance No 6on the exemption in the Act concerning information that is reasonably accessible to the applicant by other means (section 21).
The Information Commissioner has received a number of enquiries from public authorities who are concerned about the consequences of a failure to recognise when communications written in a foreign language are in fact requests for information. Whilst the Commissioner acknowledges that this may, on occasion, lead to a technical breach of the Act, it is hard to imagine circumstances where a public authority would be penalised for failing to deal with such cases as requests for information in accordance with the requirements of the Act.

4. If an applicant does not respond to the advice and assistance that is provided by a public authority, is the authority obliged to offer the advice and assistance a second time?
In most cases a public authority will not be required to contact the applicant a second time, for example where the applicant simply elects not to follow the advice and assistance offered by the authority. However, there may be cases where there is genuine doubt whether the advice and assistance has been received by the applicant. Here, it would be sensible for the public authority to reissue the advice and assistance. (This is an example of circumstances where it would be good practice for a public authority to keep a record of the advice and assistance that has been provided.)

5. Which staff within a public authority should have responsibility for providing advice and assistance when a request is received?
As a request for information under the Act can be received anywhere in an organisation it is important that all staff whose role brings them into contact with the public and other organisations are able to identify a request for information under the Act and provide appropriate advice and assistance to applicants where possible. Where this is not possible, the request should be passed to the appropriate person/department. This relates to the wider issue of general FOI awareness-raising and staff training at various levels throughout an organisation, and it will be for each public authority to determine its own procedures for handling information requests.

6. In order to comply with section 16 is a public authority limited to providing the advice and assistance highlighted in the code of practice?
Conformity with the provisions of the Access Code concerning advice and assistance will ensure compliance with section 16 of the Act. However, in terms of best practice, it is may be possible to provide advice and assistance that exceeds the requirements of the Access Code. The circumstances of each case will determine the most appropriate course of action, which again emphasises the need for public authorities to adopt a flexible approach.

C) ADVICE & ASSISTANCE TO THOSE WHO ARE CONSIDERING MAKING A REQUEST

7. In what circumstances might a public authority offer advice and assistance to some-one who proposes to make a request?

It is anticipated that there will be three common circumstances:

- Where someone has made it clear that they intend to make a request for information. Examples of advice and assistance in such cases will include explaining the types of information the authority holds and the format in which it is available, and providing information on the fees regulations and the charging policy of the authority.
- Where a request has been made, but it cannot be regarded as a valid request as insufficient information has been provided to allow the public authority to identify and locate the information requested. This is discussed at Question 9.
- Where a request has been refused, for example on grounds of excessive cost, and it is appropriate for the public authority to assist the applicant in the making of a subsequent request. This is discussed at Question 12.

In addition to these particular cases, public authorities should consider what information can be made available on a proactive basis which would assist people in the event of them making a request for information at some time in the future. General promotion of the right to know through the public authority's website or publication scheme is one example of this. Also the Access Code recommends that each public authority should provide details of its procedures for dealing with requests by means of its publication scheme. This will be an important means of providing general advice to a wide range of potential applicants.

8. What advice and assistance should be offered to those people who have difficulties in making or framing a written request?

A public authority should use its own discretion in deciding what level of advice and assistance is appropriate for applicants who clearly have difficulty in making a written request. This could apply equally to persons who have made a request or are proposing to make a request. Some applicants may have difficulty reading and writing; others will be able to write but have difficulty in expressing themselves clearly. Public authorities should adhere to their usual customer service procedures in such cases and provide the level of assistance appropriate to the circumstances of the individual applicant. The Access Code provides some examples of appropriate assistance. Good practice could include: directing the applicant to another agency who may be able to assist, taking a written note over the telephone which it then sends to the applicant for confirmation (although, on receipt of the note, the applicant would still require assistance in verifying the note and providing written confirmation). In cases where some elements of a request can be clearly identified, they should be complied with in the usual way, with assistance being provided regarding the remainder of the communication.

9. What further information can be requested by a public authority to assist it in identifying and locating the information requested by an applicant?

If an authority has informed the applicant that it requires further information in order to be able to identify and locate the information requested, it is not obliged to comply with the request. However, advice and assistance should still be offered to the applicant so that the request can be clarified. This is likely to occur in cases where applicants have little or no knowledge of what information a public authority holds and how it is structured. Public authorities should be flexible. In cases where more information is required, an applicant should be contacted as soon as possible, and authorities should be prepared to explain why they are asking for more information. As discussed in the answer to question 2, the Code stresses the importance of not giving the impression that a public authority is enquiring into the reasons behind a request.

D) ADVICE & ASSISTANCE TO PERSONS WHO HAVE MADE REQUESTS

10. Once a valid request has been received, does the 20 working day period stop whilst a public authority offers advice and assistance to the applicant?
The 20 working day period does not stop. See question 4 of the Commissioner's Awareness Guidance No 11 Time for Compliance. Once again it is important to stress the distinction between advice and assistance that is offered before a valid request is made and that offered following receipt of a valid request. As regards the former, this could be where the public authority requires the applicant to provide clarification so that the information requested can be identified and located. In such cases the 20 working day clock does not start until that further clarification is provided. On the other hand, any advice and assistance provided following receipt of a valid request does not stop the 20 day clock.

11. What sorts of advice and assistance should be offered to someone who makes a request for information that relates to more than one piece of legislation, for example a request involving the Freedom of Information Act and the Data Protection Act?
Each public authority should develop its own procedures for handling such requests. However, the applicant should be informed at an early stage if their request spans legislation other than the Freedom of Information Act, and a clear explanation of the possible consequences should be given, for example, differences in timescale and, possibly, fees. It is good practice to keep the applicant advised of progress and any unexpected delays or difficulties that may arise.

12. If an authority estimates that complying with a request will exceed the cost limit, can advice and assistance be offered with a view to the applicant refocusing the request?
In such cases the authority is not obliged to comply with the request and will issue a refusal notice. Included within the notice (which must state the reason for refusing the request, provide details of complaints procedure, and contain particulars of section 50 rights) could be advice and assistance relating to the refocusing of the request, together with an indication of the information that would be available within the cost limit (as required by the Access Code).

This should not preclude other 'verbal' contact with the applicant, whereby the authority can ascertain the requirements of the applicant, and the normal customer service standards that the authority usually adopts.

13. Can a public authority assist an applicant in focusing a request even where compliance with the original request falls within the cost limit?
In such cases the public authority cannot issue a refusal notice on the basis of the cost limit, and so any refocusing must be done in the context of the original request. It is therefore advisable for the authority to make early contact with the applicant and establish whether they would welcome any help in reducing the scope of the request. For example, in the case of a large amount of information there may be a high cost in terms of photocopying and other disbursement charges and the applicant may appreciate the chance to reduce this cost. Once again good customer service practice will dictate that dialogue with the applicant is established so that the options available to him can be clearly spelt out.

14. If an applicant indicates that he is not prepared to pay the fee requested by a public authority, is the authority still obliged to offer any advice and assistance?
Paragraph 13 of the Access Code explains that in these circumstances the public authority should consider what, if any, information may be provided to the applicant free of charge. It should also consider whether any of the requested information may already be available elsewhere, for example via its publication scheme. It might also be good practice for a public authority to consider assisting in refocusing the request by explaining what sorts of information may be available for a lesser fee.

15. If a person requests that information is communicated by specific means or in a specific format, but it is not practicable for the public authority to give effect to the preference, will it be appropriate to offer advice and assistance to the applicant?
It is important that if a public authority is unable to meet such a request, it considers whether the information can be provided in another format, and discusses this with the applicant. For example, if a request is received asking for information to be forwarded in a particular format such as a CD-Rom, and the public authority decides this is too costly to produce, alternatives should be considered and discussed with the applicant.

16. When a public authority receives what appears to be a request that is designed to disrupt the work of the authority and may potentially be vexatious, is there any requirement to offer advice and assistance?
The Information Commissioner recognises the difficulty in establishing whether a request is indeed vexatious and has provided further advice on this subject in Awareness Guidance No 22 There may be cases where appropriate advice and assistance has been offered as part of the process of ascertaining whether a request is vexatious (e.g. to assist in clarification of the request - see questions 2 and 10; or to assist in refocusing a request – see question 13). If such advice and assistance is not acted upon by the applicant this could also contribute to the decision as to whether the particular request may be deemed vexatious.

17. When might a public authority provide advice and assistance to an applicant whose request for information has been refused on the basis of an exemption?
There are likely to be many instances where this will be the case. For example, the exemption at section 21 may be applicable if a public authority is aware that the information requested is reasonably accessible to the applicant by other means. In such cases the authority should advise the applicant so that he is no doubt as to how the information can be obtained. For example, although information is exempt if it is available through an authority's publication scheme, the authority should explain that the requested information is available through their scheme and enclose a copy or direct the applicant to it. Similarly, if information requested is exempt under s.22 (information intended for future publication) it would be reasonable for a public authority to indicate clearly to the applicant when that information is expected to be published.

The provision of advice and assistance may also be appropriate in cases involving other types of exemption. For example information may legitimately be exempt if it is subject to legal professional privilege (section 42). A request may be made to one public authority for details of legal advice given to another. As the privilege belongs to the client, the applicant can be directed to the client authority to see whether it would be prepared to waive the privilege.

18. What advice and assistance should be provided when the authority does not hold some or all of the information or it is available elsewhere?
If the requested information is already publicly available (either via their publication scheme or elsewhere), the applicant should be advised of this and assistance offered where appropriate.

If a public authority receiving a request is aware that the information is held by another authority, the request may be transferred to that authority, in line with Part III of the Access Code. The Information Commissioner also advises that as best practice, the applicant should be consulted prior to any transfer taking place.

Similarly, if it is known that the information is held by a public body in another jurisdiction – for example a Scottish public authority subject to the Freedom of Information (Scotland) Act 2002 – the applicant should be advised accordingly.

- **Freedom of Information Good Practice Guidance**

(…)

Stage 1 - receive the request

• Establish if the request is valid - see section 8 for the criteria (it is in writing, states the name and address, and describes the information).
• If the request is invalid, where possible, advise the applicant to reformulate their request.
• Provide advice and assistance as appropriate (see section 16 FOIA and section 45 code of practice (Access Code)).
• Ask the applicant for any further information necessary to identify or locate the information requested. (This applies to all information, whether personal or nonpersonal.)
(…)

Stage 2 - establish if the information is held

• Check relevant records, for example, indexes, files and directories. Consult staff as appropriate.
• If you do not hold the information, let the applicant know. (Consider whether you could transfer the request to a more appropriate public authority – see section 45 code of practice (Access Code) for guidance.)
• If it is not obvious why the information is not held it may be appropriate to provide further explanation. For example, if the information has been destroyed in line with an authority's retention and disposal schedule, it would be helpful to explain this.

Stage 3 - estimate the cost

• If you hold the information, estimate whether the cost of complying with the request exceeds the 'appropriate limit' as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (Fees Regulations). This has been set at £600 for public authorities listed in Schedule 1, Part 1 of the FOIA (central government), and £450 for all other public authorities. You may only consider the following factors when estimating the cost.
- Determining whether the information is held
- Locating the information or documents containing the information
- Retrieving the information
- Extracting the information from documents
• Any costs incurred by staff carrying out these activities must be calculated at the rate of £25 per person per hour, regardless of the actual costs involved.
• Under section 12(2), if you estimate that the cost of complying with the request would exceed the appropriate limit, you do not have to comply. However, you must provide advice and assistance to the applicant (see section 16 FOIA, and paragraph 14 of the Access Code).
• If the costs exceed the appropriate limit, advise the applicant to reformulate their request and provide advice and assistance as appropriate (…)

Refusing requests

(…)

Reasons for refusing a request

1 Vexatious or repeated requests (see 'Request for information' stage 1)

• Under section 14 of the FOIA, you do not have to comply with:
- a vexatious request; or
- a repeated request. (This is any request which is 'identical or substantially similar' to a request from the same person, that you have previously complied with, unless a reasonable amount of time has passed, see Awareness Guidance 22).

• Issue a refusal notice stating that you are relying on an exemption for a vexatious or repeated request (section 14 (1) to (2)).
• Under the section 45 code of practice, you do not have to provide assistance to applicants whose requests are vexatious.
(…)

2 The cost of locating and retrieving the information exceeds the appropriate limit (see 'Request for information' stage 3)

• Under section 12(1), you do not have to comply with a request if the estimated cost of doing so would exceed the appropriate limit.
• If the cost of locating the information would exceed the limit, issue a refusal notice* stating that fact (section 17(5)) and provide advice and assistance in reformatting the request (see section 16 FOIA and paragraph 14 of the Access Code).

- **Awareness Guidance 29** *(from the Commissioner)*

(…)

Means of communication

(…)

4 What should the authority take into consideration if it is asked to provide a digest or summary?

Dictionary definitions of the words 'digest' and 'summary' suggest they are statements of the main points of a piece of information.

If the FOI request does not make it clear what is needed in the digest or summary, then under section 16 (the duty to provide advice and assistance), a public authority may need to ask an applicant how detailed the summary or digest should be. For more information on section 16 see Awareness Guidance 23.
(…)

5 Is there a duty to create information under the Freedom of Information Act?

No. A public authority may provide additional information in response to a request, for example, to put the information requested into context. Public authorities may find it beneficial to anticipate and address likely queries relating to the information.

6 What is the procedure for specifying a preferred method of communication?

The applicant must specify their preferred method of communication, if any, when they make the FOI request.

A public authority does not have to consider a preference specified at a later time, even if the information has not yet been released.

The applicant must specify the preferred form. It will not be sufficient for an applicant to ask for information in "all the forms in which it is held". An applicant may request the information be provided by more than one of the means specified in section 11, for example, to inspect a record and be provided with a copy.

If no preference is specified, the public authority may communicate the information 'by any means which are reasonable in the circumstances'.

7 Who bears the cost of supplying the information in the preferred form?

The public authority may charge the applicant for the cost of communicating the information, for example, photocopying and posting costs. These charges must be reasonable.

If the public authority is required by other legislation to provide information in a particular form or language at no additional cost, for example, on audio tape to comply with the Disability Discrimination Act 1995, or in Welsh to comply with their Welsh Language Scheme, they may not charge for providing the information in this way.

8 What if the information requested is in the public authority's publication scheme?
Information is exempt under section 21 of the Freedom of Information Act if it is reasonably accessible to the applicant. This includes information contained within the public authority's publication scheme. Where an applicant requests information that is within a publication scheme and specifies a particular form, the public authority should explain that as the information is already available, it does not have to comply with section 11. It should give the applicant details of where to find the information. For more information on section 21 see Awareness Guidance 6.

9 What other considerations may a public authority take into account when considering whether it is reasonably practicable to provide the information in the form preferred by the applicant?
An authority may take account of all the circumstances when deciding whether it is reasonably practicable to agree to the preference, for example:

- The information is contained in a particularly old or fragile document and to provide a copy of the document may have a detrimental effect on it.
- The amount of work required to meet the applicant's request would exceed the appropriate fees limit.
- Whether the information is available elsewhere, under section 21 or otherwise.
- Whether there are security or other issues which may prevent members of the public entering a building. Such barriers would not be sufficient to justify refusing the information requested. The authority would need to provide the information in another form.
- Nothing in section 11 should prevent a public authority from discharging any duty to make special arrangements for people with disabilities under the Disability Discrimination Act.

10 What if a public authority decides that it is not reasonably practicable to provide the information in the form preferred by the applicant?
In this case, the authority must tell the applicant and give its reasons. The duty on the public authority is then to provide the information by any means which are reasonable in the circumstances.

If the applicant is not satisfied with the decision and wants to make a complaint, they must complete the public authority's complaints procedure (if there is one). Once this process is complete, if the applicant remains dissatisfied, they may write to the ICO.
(…)

12 How do the provisions relating to means of communication affect the duty to provide advice and assistance?
Every authority shall provide advice and assistance 'so far as it would be reasonable to expect the authority to do so'. Appropriate advice and assistance may include, but is not limited to:

- outlining the different types of information that may meet the request; and
- providing access to indexes and catalogues of information, and in what forms it exists, to help applicants decide what information they want.

(…)

- **Freedom of Information Act Awareness Guidance No. 11**

(from the Commissioner, updated January 2006)

Time for Compliance

(…)

2. When does the 20 working day clock start?

The 20 working day clock starts:

> • the day after the public authority receives the request. According to section 10(1) the time limit for compliance is the twentieth working day following the date of receipt.
> or
> • the day the authority receives further information it reasonably requires in order to identify and locate the information requested; section 1(3).

Please refer to question 4 below, regarding the effect of section 1(3) of the Act.

4. What if the authority is unable to find the information requested, because the applicant has not provided enough details?

Under section 1(3) of the Act,

> "where a public authority –
> (a) reasonably requires further information in order to identify and locate the information requested, and
> (b) has informed the applicant of that requirement"
> the authority is not required to comply with the request until that further information is provided.

Whilst the applicant may have made an FOI request under the terms of the Act, by describing the information he/she seeks, the 20 working day time limit would not start until the authority had sufficient information to enable it to deal with that request.

However, authorities should not delay contacting the applicant under s1(3), in order to give themselves more time to respond to the request.

Part II of the Lord Chancellor's Code of Practice deals with the provision of advice and assistance where an authority is relying on section 1(3). The following guidance is provided in paragraph 9:

> "Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought."

The Code goes on to suggest forms such assistance might take, for example, 'providing access to detailed catalogues and indexes'.

There is a distinction, however, between requiring further details in order to identify and locate information and providing advice and assistance in order to help the applicant focus his request, for example, because the request is voluminous and retrieving all the information would be likely to exceed the cost ceiling. In the latter case, the authority would not be able to rely on s.1(3) and the 20 working days would begin the day after receipt of the request, as described in question 2.

(…)

- **Awareness Guidance No. 12**

(from the Commissioner, Updated 26 Feb 2007)

When is information caught by the Freedom of Information Act?

(…)

5. Is information held by a public authority, when it has read-only access to it?

An example would be a central electronic repository containing information created by a number of public authorities. Each public authority would be able to access each other's information from it but on a read-only basis.

In this case, it is the public authority which created the information and provided it to the repository that holds it for the purposes of FOI. This means that if a public authority receives a request for information located in the repository that it has not created, it should at the very least refer the applicant to the authority that holds the information.

However, public authorities are under a duty to provide reasonable advice and assistance to applicants. If an authority is confident that the information requested and to which it has read-only access is not exempt, and it would be as easy to provide a copy of the information as to redirect the applicant, then it would be good practice to provide a copy.

6. What steps should a public authority take if it is unclear whether information is held?

As the Act is wholly retrospective, there may be occasions when a public authority is required to undertake a search in order to determine whether or not requested information is held. However an authority is relieved of the duty to inform an applicant whether information is held if the estimated time spent searching for the information would exceed the appropriate limit (Mr P Quinn v The Information Commissioner)

The Commissioner expects such a circumstance to arise infrequently, as authorities should have due regard to the Section 46 Records Management Code of Practice (Lord Chancellor's Code of Practice on the Management of Records).

The Commissioner may issue a Practice Recommendation in cases where it is clear that an authority is failing to meet its obligations under the Code.

7. Are public records that have been transferred to a Public Record Office (or another place of deposit appointed by the Lord Chancellor) still held by the public authority?

No. These records would now be held by the Public Record Office. As such, if the public authority were to receive a request for a transferred record, the public authority would be under a duty to inform the applicant that it is no longer held by them and provide the applicant with the appropriate advice and assistance that would enable them to redirect their request as appropriate.

(…)

- **Responding to the complainant / clarification**

FS50068839, University of Cambridge, 7 February 2006

In this case the University did not respond to the letter of 2 February 2005 referred to above, despite the fact that the Complainant attempted to clarify his request. In addition, the University did not respond to a further letter of 10 March 2005 in which the Complainant made a formal complaint. Therefore, in failing to provide advice and assistance to the Complainant so far as it would be reasonable to expect it to do so, the Commissioner is satisfied that the University has breached its duty under s.16 of the Act.

It is the Commissioner's view that the Complainant should not be expected to be familiar with the specific information held by a public authority and as such the public authority is under a duty to provide advice and assistance in order to clarify the nature of the request in relation to the information it holds. Therefore, if the University required more detail to enable them to identify and locate the information sought they should have provided the Complainant with appropriate advice and assistance in order to assist him to describe more clearly the information requested. (p.7)

FS50082257, The Department for International Development, 21 March 2006

4.1 The Commissioner requested that DFID explain how it estimated that the Complainant's initial request would exceed the appropriate limit and how it conducted its search for information in response to the complainant's refined request. In the course of the investigation it emerged that when searching for the information in response to the complainant's refined request, DFID confined their search to Reference information related to "Women's Health; reproductive rights; abortion; family planning; condoms; contraception and so on." They failed to search for information related to the wider area of "Health and Education" an area DFID had themselves suggested when advising the complainant to refine his request. However DFID have informed the Commissioner that to comply with the complainant's refined request for information related to the area of "Health and Education" would exceed the appropriate limit. It is therefore alleged that DFID are in breach of section 16 of the Act by failing to provide the complainant with advice and assistance.

5.1 (…) It may appear that that DFID offered the complainant advice and assistance in their letter of 14 January 2005 by suggesting that the complainant refine his request. However, given that when the complainant refined his request DFID subsequently stated that to comply with this refined request would also exceed the appropriate limit, DFID's suggestion that the complainant refine his request can not be seen to be an offer of advice and assistance. Consequently DFID are in breach of section 16 of the Act.

FS50081951, Whipps Cross University Hospital NHS Trust, 18 May 2006

5.1 (…)Section 16 – in that it failed to offer the complainant advice and assistance by way of clarifying that the information it had already provided prior to requests being made was the only information held which answered the requests. The Trust also failed to advise which parts of the information provided answered which requests for information.

FS50075094, Her Majesty's Revenue and Customs, 12 July 2006

5.1 The Commissioner is satisfied that the requested information is not held by the public authority. However, the Commissioner is not satisfied with the level of advice and assistance provided by the public authority to the complainant.

6. Action Required
6.1 (…)The public authority should offer advice and assistance to the complainant by explaining to him why its systems do not permit the creation of the aggregated figures that he has requested. The public authority is required to provide this explanation to the complainant within 35 days of the date on which this Notice is served.

FS50083138, The Cabinet Office, 7 July 2006

5.6 (…)The result was that it was unclear precisely how the Cabinet Office had interpreted the request and particularly, what information was deemed to be relevant to it.

5.10 On this occasion the Commissioner has concluded that the Cabinet Office failed to provide sufficient advice and assistance to the complainant to clarify how the request had been interpreted. He also considers that it would have been appropriate for the Cabinet Office to have provided further advice about the type of information it holds relating to legal advice on military action in Iraq to assist the complainant in clarifying or refining their request. In failing to provide advice and assistance the Cabinet Office did not comply with section 16 (1) of the Act.

DECISIONS OF THE COURT (INFORMATION TRIBUNAL)

- **Duty in relation with vexatious requests**

EA/2007/0076, Billings and Information Commissioner, 6th February 2008

14. (…)But we think that it also capable of meaning that the obligation is not triggered at all in circumstances where a public authority reaches a rational conclusion that a request is vexatious. It seems to us that this conclusion not only represents an appropriate construction of the language of the section but also reflects the common sense approach adopted in the Code of Practice. Its effect is that if a public authority comes to the reasonable conclusion that a request is vexatious it should not be open to criticism, (if the Information Commissioner or Tribunal subsequently disagrees with its assessment), for having failed to engage in further communications with the person making the request. This does not, of course, mean that public authorities may adopt a cavalier attitude to information requests: seeking to avoid their obligations by perversely or unreasonably characterising any inconvenient request as vexatious. The protection provided by the qualification to section 16 will not be available to a public authority which has been unreasonable in deciding to treat the request as vexatious.

- **Section 16 in relation with section 12: limited costs**

EA/2007/0058, Harcup and Information Commissioner, 5 February 2008

35. More fundamentally, there was no attempt at a dialogue with Mr Harcup, to make him aware of the cost limit and to suggest ways in which he might restrict or focus his request so as to make it, or at least some of it, attainable. It would be reasonable to expect the authority to offer information on the costs position as part of its duty to offer advice and assistance. The relationship is one sided: Mr Harcup has no way of knowing the costs involved (or whether or when the authority will consider applying the costs limit); the authority knows what information it has available, and what will take time to obtain. Offering the information already collated and available could have been part of such a dialogue, but it should have been provided as one, partial option, alongside others, not as a full response, whose limitations only became apparent during the appeal. An authority which arbitrarily provides some information in answer to an extensive request and then refuses to provide more under cover of section 12 is likely to act in breach of its duty to provide advice and assistance to those requesting information in section 16. Such an approach effectively prevents the requester making an informed choice, in the knowledge of the likely constraints, as to what information they wish to request.

EA/2006/0088, Brown and Information Commissioner and the National Archives, 2 October 2007

76. We consider that in this case, like in many others, section 12 cannot be regarded independently of section 16. This is a view which we indicated to the parties at the hearing, and indeed, TNA expressly accepted in its submissions that sections 12 and 16 must be viewed together. We consider that before the Tribunal can find that a given public authority is not obliged to comply with a request for information because it estimates that the cost of doing so would exceed the appropriate limit, it may need to consider whether, with assistance and advice that it would have been reasonable for the public authority to provide pursuant to section 16, the applicant could have narrowed, or re-defined his request such that it could be dealt with without exceeding the cost limits in section 12. If so, it may mean that the public authority's estimate that the cost of complying with the request would exceed the appropriate limit has not been made on a reasonable basis. To hold otherwise could allow section 12 to be used in a way that significantly undermines the effect of section 16.

(…)

78. The duty on a public authority to provide assistance and advice under section 16 is expressly qualified by the words "only in so far as it would be reasonable to expect the authority to do so". It is clear from this that the advice and assistance that it would be reasonable to expect depends on the particular public authority in question. The issue is about what is reasonable for "the" public authority in question to do. Unlike most other public authorities, searches are a core function of TNA. We find that it would have been clear to TNA, from the outset of the Appellant's individual requests, and particularly given the background of the Global Request and the telephone discussions between them in June 2005, that the Appellant would be making numerous individual requests, which, by their nature, were going to involve searching through a large number of records. We also find that it would have been clear to TNA that this would exceed the section 12 cost limits.

79. The Appellant's requests were demanding, but primarily in terms of the number of records that would have to be searched. The task lent itself, quite obviously and logically, to being dealt with in phases, each phase being subject to the section 12 cost limit. In these circumstances, we find that it would have been reasonable to expect TNA to advise the Appellant to phase his request in intervals of more than 60 days, and to assist him to do so in a manner that was logical, took account of his priorities and the nature of the searches that TNA could offer, as well as TNA's knowledge of the time that would be involved. We find that its failure to do so means that its estimate under section 12, made on the basis of the request just as originally presented, and not on the basis of the request as it may have been phased (or otherwise narrowed or re-defined), was not an estimate made on a reasonable basis. We find that TNA cannot rely on that estimate to relieve it of its obligation to comply with the Appellant's requests.

- **<u>Interpretation of the request / contacting the applicant</u>**

EA/2006/0059; Meunier and Information Commissioner and National Savings and Investments, 5th June 2007

47. (…) When faced with an unclear request rather than place their own definition upon the information being requested, it would be of assistance to the applicant if they were advised that the request was unclear and this was the way that the public authority proposed to define the request thus enabling the applicant to clear up any confusion and if necessary refine his request. (…)

48. Had NS&I sought to clarify the request either as envisaged under section 1(3) or section 16 FOIA, Mr Meunier would have been able to define more clearly the terms of his request. Mr Meunier has from time to time tried to do this in the absence of any advice and assistance (see his letters of 11th and 15th July and 21st December 2005 paragraphs 9-11 above). He stresses that what he wants is information that shows that "money has changed hands" i.e. bank statements. The Tribunal is satisfied that this information was covered by his original request and that 7 months before the NS&I issued their refusal notice pursuant to his application for a review that they were aware that Mr Meunier wanted evidence of payments i.e. money changing hands.
(…)

50. The Tribunal finds it surprising that the Commissioner made no reference to section 16 FOIA in his decision notice in light of the lack of clarity in the original request and the consequential difficulty in defining the information that was sought and held.

EA/2006/0047, Lancashire County Council and Information Commissioner, 27th March 2007

14. (…) In Barber v Information Commissioner (Appeal EA2005/0004: 14 October 2005), the Tribunal emphasised, particularly at paragraphs 8 and 9, that a public authority cannot pick and choose which request it responds to. The Tribunal agrees and feels that overall a common sense approach should be taken vis-à-vis the content of a request. Even if the Tribunal is wrong in finding that Mr Hill's request is plain on its face, it agrees with the contention that the Council should at least have considered exercising its obligations under section 16 of FOIA to provide advice and assistance to Mr Hill in an attempt to crystallise his request.

EA/2006/0034, Brigden and the Information Commissioner and Northe Lincolnshire and Goole Hospitals NHS Trust, 5th April 2007

20.(…) If there was any doubt on the part of the Trust as to what information the Appellant was seeking, then the Trust had an obligation to assist the Appellant to clarify this, pursuant to its duties under section 16 of the Act (duty to provide assistance and advice).

- **Purpose of the applicant**

EA/2006/0085, Johnson and the Information Commissioner and the Ministry of Justice, 13 July 2007

63. It is also relevant to note that the Appellant acknowledged at the hearing, that an answer to only the first of his two questions would not be of interest to him. The information he is seeking is useful to him only if he has the answers to both questions. While the Act is motive blind, the Appellant's purpose is clearly relevant to whether it would have been possible, through any process of advice and assistance rendered by the MoJ pursuant to its obligations under section 16, to delineate the request in a way that would have been acceptable to the Appellant and still come within the section 12 cost limits. We are satisfied that it would not. (…)

EA/2006/0046, Lamb and the Information Commissioner, 16.11.06

2. There is nothing to prevent an authority volunteering advice and assistance: an applicant does not have to ask for it. Moreover, nothing on the face of the section restricts the duty to advise and assist only to those cases when some form of request has been made. In the Tribunal's view, the duty must include at least one to advise and assist an applicant with regard to the formulation of an appropriate request. These principles are reflected in the relevant Code of Practice which the Tribunal does not feel it necessary to recite in any further detail for this purpose.

3. A "request for information" under FOIA must in the words of section 8(1)(c) "describe" the information requested. In the Tribunal's view it is sufficient to observe that the subject matter of the information must be set out and described as precisely as possible. If a request does not describe the information with sufficient detail in a case where its terms are otherwise ambiguous or vague, the public authority should consider whether to exercise its duty to offer advice and assistance; in the alternative it should, in an appropriate case, ask for further details or particulars of the request. These simple propositions do no more than reflect the various means of clarifying requests which are set out in the relevant code of practice already mentioned and which points out that if despite the assistance offered the applicant remains unable to describe the information sought sufficiently clearly, then the public authority is not expected to seek further clarification. The above matters are reflected in the terms of section 1(3) of FOIA which provides that:

> "Where a public authority -
> (a) reasonably requires further information in order to identify and locate the information requested, and
> (b) has informed the Applicant of that requirement,
>
> the authority is not obliged to comply with subsection (1) unless it is supplied with that further information".

4. The Information Commissioner (the "IC") has published an Awareness Guidance (No.2) in relation to the duty to advise and assist. The Tribunal notes that the following answer to question 2 reads as follows beginning with the question itself, namely "In order to offer advice and assistance to an applicant, is it permitted to enquire into the reasons why the request is being made? No. The purpose of providing advice and assistance is to help an applicant to exercise his rights under the Act; it cannot be the means by which a public authority seeks to discover the reasons for a particular, or potential, application. (…)

Although it is true that in general an applicant's reasons, in the sense of his or her motives should not be material in the manner in which a public authority responds to the request, insofar as it is suggested that the factual context in relation to which the request is made is not relevant, the Tribunal respectfully disagrees. The Tribunal feels that it should perhaps be clarified either in the Code of Practice or in the Awareness Guide or perhaps in both that if a request is ambiguous then the public authority should invariably seek not only further details of the request but also seriously consider formulating its own motion questions designed to elicit the true and precise nature of the request.

19. The present case shows the dangers necessarily inherent in a public authority failing to address the true nature of a request allowing it to be transformed into something other than what may have been thought to be its original ambit and purpose. It also shows the danger in not alerting a complainant to the need to specify his request at the earliest possible reasonable opportunity. Particularly in view of the IC's finding that the request was "slightly unclear", in the Tribunal's view the Decision Notice should have concentrated upon the need to extract from the complainant, if necessary by asking all relevant question, the precise nature of the request, as well as the intention of the Complainant's request.

EA/2006/0049 & 50, Berend and Information Commissioner and The London Borough of Richmond upon Thames, 14th May 2007

42. The only obligation to initiate contact with the applicant under the Section 45 Code relates to the situation that arises where the request requires clarification (a similar duty to that set out in section 1(3) FOIA). The other requirements to initiate contact are dealt with pursuant to the duties to supply or refuse information within the timescales set out in sections 1, 10 and 17 FOIA. 46. The Tribunal is satisfied that the request should be read objectively. The request is applicant and motive blind and as such public authorities are not expected to go behind the phrasing of the request. Indeed the section 45 Code at paragraph 9 specifically warns against consideration of the motive or interest in the information when providing advice and assistance. Additionally section 8 FOIA appears to provide an objective definition of "information requested".

> 8. - (1) In this Act any reference to a "request for information" is a reference to such a request which- ..
> (c) describes the information requested

(…)There is no statutory requirement for an "information officer", and a named individual should be identified only "where possible". The Code appears to be seeking to prevent an applicant dealing with a faceless authority with no point of contact and no accountability to enable them to keep track of their request. In this case Mr Berend had the direct contact details of the administrator, lawyer and person who was sourcing the information. As such the Tribunal is satisfied that Mr Berend reads too much into the Code and that LBRT complied with their obligations under the Code in this respect.

- **Other considerations**

EA/2006/0064, Evans and Information Commissioner and Ministry of Defence, 26 October 2007

50. However, quite apart from questions of reasonableness, on which we heard little evidence and no argument, there is a more fundamental objection. “Information” under FOIA means ”information recorded in any form”: see section 84. The duty under FOIA is to provide recorded information, not information as such. To interpret section 16 as imposing a duty to create a new document, setting out either explanatory notes or a formal, considered record of a meeting, would come close to creating a duty to record information. Such a duty is imposed in many statutory contexts, but not by FOIA. We cannot see that the duty under section 16 to provide advice and assistance could be stretched to include a duty to produce a formal record of the meeting, where none exists, or to provide footnotes or a transcript. Nevertheless, these may be steps which a public authority, faced with a request for raw data, may consider taking voluntarily.

EA/2005/0019, Slann and the Information Commissioner and Financial Services Authority, 11 July 2006

45. Although the Tribunal recognises the force of the FSA’s contentions it recognises equally that the wording of this section does not proscribe the range of matters as to which advice and/or assistance should be sought.

EA/2005/0004, Barber and Information Commissioner, 11/11/2005

18. We have not had to make a finding in relation to s.16 in this appeal. However, we would observe that a complainant in person should not be expected to be familiar with all the provisions of Part I of FOIA and that just because a complainant does not specify a breach of the duty to provide advice and assistance in his complaint, that should not mean that the Commissioner is under no further obligation to consider the public authority s duty in this respect. We come to this conclusion because we consider that where an authority has not complied with its duty unders.16 this may go to the very nature of the request and that any exercise of discretion by the Commissioner which does not take this into account may be flawed. Moreover the Commissioner has a general duty to promote the following of good practice by public authorities under s.47(1) FOIA so as to promote the observance of the requirements of the Act. Again if he does not consider the s.16 duty then it could be argued that the Commissioner is in breach of s.47, particularly because a Code of Practice has been provided under s.45 of the Act to cover this area.

19. As a result of the above observation it may be helpful for the Tribunal to outline what in practice this might mean. It is suggested that the Commissioner should consider when investigating a complaint, whether or not compliance with s.16 has been specified in the complaint, drawing the attention of the parties to the duty of the authority under s.16 to provide advice and assistance and the guidance in the associated Code of Practice issued by the Secretary of State. The hope is that by drawing the matter to the parties attention it may help to deal with the request, avoiding the need for the Commissioner having to make a decision in the matter.

United States

In the United States, a federal agency is required to make its records available to any person who requests them, in the form prescribed by the agency's published regulations. The agency has 20 working days to respond. When an agency denies an access demand, the applicant has the right to an internal appeal. If the decision is upheld by the agency, the applicant can ask for judicial review in federal courts, which in turn, can be appealed in the Courts of Appeals. Furthermore, each state has its own access to information laws.

> *Note: A law bringing several changes to the FOI legislation was enacted December 31, 2007 (OPEN Government Act of 2007, Pub. L. No. 110-175 (2007). It provides for the creation of the Office of Government Information Services (OGIS) to function as a FOIA ombudsman (s. 6(h)(1)office not created yet). The Office will be set up to serve the functions of overseeing government-wide FOIA compliance and mediating disputes that arise between requesters and agencies. It will be housed at the National Archives and Records Administration (NARA), but no funding has been provided in this year's budget to set up the new office. (However, there is a provision in the administration's fiscal year 2009 budget proposal that would move the functions of the new OGIS from NARA to the Department of Justice)*
>
> *The law changes the definition of "representative of the news media" contained in the FOIA for purposes of allowing media requesters to pay reduced processing fees for their requests. Another significant provision of the law will allow requesters to collect attorneys' fees when they are forced to sue to get information under the FOIA. Finally, federal agencies, for the first time, will face penalties when they do not respond to FOIA requests within the 20-day statutory limit—for these requests, the agencies will be unable to collect some processing fees.*
>
> *Several provisions of the law became effective immediately on December 31, 2007, while others will not be applied until one year following enactment.*

Websites
http://www.usdoj.gov/oip/foiastat.htm (Government)
http://www.usdoj.gov/oip/foiapost/mainpage.htm (Government)
http://www.rcfp.org/ogg/index.php (State laws)
http://www.pueblo.gsa.gov/cic_text/fed_prog/foia/foia.pdf (Guide)

STATUTE

Freedom of Information Act, 5 U.S.C. § 552 (1966).

RELEVANT PROVISIONS

(a) Each agency shall make available to the public information as follows:

(…)

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request. (…)

(4) (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

RELEVANT REGULATIONS

N/A

- **Executive Order 13,392, Improving Agency Disclosure of Information**

(GEORGE W. BUSH, THE WHITE HOUSE, December 14, 2005.)

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure appropriate agency disclosure of information, and consistent with the goals of section 552 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy.
(a) The effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed. For nearly four decades, the Freedom of Information Act (FOIA) has provided an important means through which the public can obtain information regarding the activities of Federal agencies. Under the FOIA, the public can obtain records from any Federal agency, subject to the exemptions enacted by the Congress to protect information that must be held in confidence for the Government to function effectively or for other purposes.

(b) FOIA requesters are seeking a service from the Federal Government and should be treated as such. Accordingly, in responding to a FOIA request, agencies shall respond courteously and appropriately. Moreover, agencies shall provide FOIA requesters, and the public in general, with citizen-centered ways to learn about the FOIA process, about agency records that are publicly available (e.g., on the agency's website), and about the status of a person's FOIA request and appropriate information about the agency's response.

(c) Agency FOIA operations shall be both results-oriented and produce results. Accordingly, agencies shall process requests under the FOIA in an efficient and appropriate manner and achieve tangible, measurable improvements in FOIA processing. When an agency's FOIA program does not produce such results, it should be reformed, consistent with available resources appropriated by the Congress and applicable law, to increase efficiency and better reflect the policy goals and objectives of this order.

(d) A citizen-centered and results-oriented approach will improve service and performance, thereby strengthening compliance with the FOIA, and will help avoid disputes and related litigation.

Sec. 2. Agency Chief FOIA Officers.
(a) Designation. The head of each agency shall designate within 30 days of the date of this order a senior official of such agency (at the Assistant Secretary or equivalent level), to serve as the Chief FOIA Officer of that agency. The head of the agency shall promptly notify the Director of the Office of Management and Budget (OMB Director) and the Attorney General of such designation and of any changes thereafter in such designation.

(b) General Duties. The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency:

(i) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

(ii) monitor FOIA implementation throughout the agency, including through the use of meetings with the public to the extent deemed appropriate by the agency's Chief FOIA Officer, and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA, including the extent to which the agency meets the milestones in the agency's plan under section 3(b) of this order and training and reporting standards established consistent with applicable law and this order;

(iii) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to carry out the policy set forth in section 1 of this order;

(iv) review and report, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; and

(v) facilitate public understanding of the purposes of the FOIA's statutory exemptions by including concise descriptions of the exemptions in both the agency's FOIA handbook issued under section 552(g) of title 5, United States Code, and the agency's annual FOIA report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.

(c) FOIA Requester Service Center and FOIA Public Liaisons. In order to ensure appropriate communication with FOIA requesters:

(i) Each agency shall establish one or more FOIA Requester Service Centers (Center), as appropriate, which shall serve as the first place that a FOIA requester can contact to seek information concerning the status of the person's FOIA request and appropriate information about the agency's FOIA response. The Center shall include appropriate staff to receive and respond to inquiries from FOIA requesters;

(ii) The agency Chief FOIA Officer shall designate one or more agency officials, as appropriate, as FOIA Public Liaisons, who may serve in the Center or who may serve in a separate office. FOIA Public Liaisons shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the Center, following an initial response from the Center staff. FOIA Public Liaisons shall seek to ensure a service-oriented response to FOIA requests and FOIA-related inquiries. For example, the FOIA Public Liaison shall assist, as appropriate, in reducing delays, increasing transparency and understanding of the status of requests, and resolving disputes. FOIA Public Liaisons shall report to the agency Chief FOIA Officer on their activities and shall perform their duties consistent with applicable law and agency regulations;

(iii) In addition to the services to FOIA requesters provided by the Center and FOIA Public Liaisons, the agency Chief FOIA Officer shall also consider what other FOIA-related assistance to the public should appropriately be provided by the agency;

(iv) In establishing the Centers and designating FOIA Public Liaisons, the agency shall use, as appropriate, existing agency staff and resources. A Center shall have appropriate staff to receive and respond to inquiries from FOIA requesters;

(v) As determined by the agency Chief FOIA Officer, in consultation with the FOIA Public Liaisons, each agency shall post appropriate information about its Center or Centers on the agency's website, including contact information for its FOIA Public Liaisons. In the case of an agency without a website, the agency shall publish the information on the Firstgov.gov website or, in the case of any agency with neither a website nor the capability to post on the Firstgov.gov website, in the Federal Register; and

(vi) The agency Chief FOIA Officer shall ensure that the agency has in place a method (or methods), including through the use of the Center, to receive and respond promptly and appropriately to inquiries from FOIA requesters about the status of their requests. The Chief FOIA Officer shall also consider, in consultation with the FOIA Public Liaisons, as appropriate, whether the agency's implementation of other means (such as tracking numbers for requests, or an agency telephone or Internet hotline) would be appropriate for responding to status inquiries.

Sec. 3. Review, Plan, and Report.
(a) Review. Each agency's Chief FOIA Officer shall conduct a review of the agency's FOIA operations to determine whether agency practices are consistent with the policies set forth in section 1 of this order. In conducting this review, the Chief FOIA Officer shall:

(i) evaluate, with reference to numerical and statistical benchmarks where appropriate, the agency's administration of the FOIA, including the agency's expenditure of resources on FOIA compliance and the extent to which, if any, requests for records have not been responded to within the statutory time limit (backlog);

(ii) review the processes and practices by which the agency assists and informs the public regarding the FOIA process;

(iii) examine the agency's:

(A) use of information technology in responding to FOIA requests, including without limitation the tracking of FOIA requests and communication with requesters;

(B) practices with respect to requests for expedited processing; and

(C) implementation of multi-track processing if used by such agency;

(iv) review the agency's policies and practices relating to the availability of public information through websites and other means, including the use of websites to make available the records described in section 552(a)(2) of title 5, United States Code; and

(v) identify ways to eliminate or reduce its FOIA backlog, consistent with available resources and taking into consideration the volume and complexity of the FOIA requests pending with the agency.

(b) Plan.

(i) Each agency's Chief FOIA Officer shall develop, in consultation as appropriate with the staff of the agency (including the FOIA Public Liaisons), the Attorney General, and the OMB Director, an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth in section 1 of this order. The plan, which shall be submitted to the head of the agency for approval, shall address the agency's implementation of the FOIA during fiscal years 2006 and 2007.

(ii) The plan shall include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including (as applicable) changes that will make the processing of FOIA requests more streamlined and effective, as well as increased reliance on the dissemination of records that can be made available to the public through a website or other means that do not require the public to make a request for the records under the FOIA.

(iii) The plan shall also include activities to increase public awareness of FOIA processing, including as appropriate, expanded use of the agency's Center and its FOIA Public Liaisons.

(iv) The plan shall also include, taking appropriate account of the resources available to the agency and the mission of the agency, concrete milestones, with specific timetables and outcomes to be achieved, by which the head of the agency, after consultation with the OMB Director, shall measure and evaluate the agency's success in the implementation of the plan.

(c) Agency Reports to the Attorney General and OMB Director.

(i) The head of each agency shall submit a report, no later than 6 months from the date of this order, to the Attorney General and the OMB Director that summarizes the results of the review under section 3(a) of this order and encloses a copy of the agency's plan under section 3(b) of this order. The agency shall publish a copy of the agency's report on the agency's website or, in the case of an agency without a website, on the Firstgov.gov website, or, in the case of any agency with neither a website nor the capability to publish on the Firstgov.gov website, in the Federal Register.

(ii) The head of each agency shall include in the agency's annual FOIA reports for fiscal years 2006 and 2007 a report on the agency's development and implementation of its plan under section 3(b) of this order and on the agency's performance in meeting the milestones set forth in that plan, consistent with any related guidelines the Attorney General may issue under section 552(e) of title 5, United States Code.

(iii) If the agency does not meet a milestone in its plan, the head of the agency shall:

(A) identify this deficiency in the annual FOIA report to the Attorney General;

(B) explain in the annual report the reasons for the agency's failure to meet the milestone;

(C) outline in the annual report the steps that the agency has already taken, and will be taking, to address the deficiency; and

(D) report this deficiency to the President's Management Council.

Sec. 4. Attorney General.
(a) Report. The Attorney General, using the reports submitted by the agencies under subsection 3(c)(i) of this order and the information submitted by agencies in their annual FOIA reports for fiscal year 2005, shall submit to the President, no later than 10 months from the date of this order, a report on agency FOIA implementation. The Attorney General shall consult the OMB Director in the preparation of the report and shall include in the report appropriate recommendations on administrative or other agency actions for continued agency dissemination and release of public information. The Attorney General shall thereafter submit two further annual reports, by June 1, 2007, and June 1, 2008, that provide the President with an update on the agencies' implementation of the FOIA and of their plans under section 3(b) of this order.

(b) Guidance. The Attorney General shall issue such instructions and guidance to the heads of departments and agencies as may be appropriate to implement sections 3(b) and 3(c) of this order.

Sec. 5. OMB Director.
The OMB Director may issue such instructions to the heads of agencies as are necessary to implement this order, other than sections 3(b) and 3(c) of this order.

Sec. 6. Definitions.
As used in this order:

(a) the term "agency" has the same meaning as the term "agency" under section 552(f)(1) of title 5, United States Code; and

(b) the term "record" has the same meaning as the term "record" under section 552(f)(2) of title 5, United States Code.

Sec. 7. General Provisions.
(a) The agency reviews under section 3(a) of this order and agency plans under section 3(b) of this order shall be conducted and developed in accordance with applicable law and applicable guidance issued by the President, the Attorney General, and the OMB Director, including the laws and guidance regarding information technology and the dissemination of information.

(b) This order:

(i) shall be implemented in a manner consistent with applicable law and subject to the availability of appropriations;

(ii) shall not be construed to impair or otherwise affect the functions of the OMB Director relating to budget, legislative, or administrative proposals; and

(iii) is intended only to improve the internal management of the executive branch and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, instrumentalities, or entities, its officers or employees, or any other person.

- **Your Right To Federal Records, Questions and Answers on the Freedom of Information Act and Privacy Act** (May 2006, Department of Justice)

How do I request information under the FOIA?
In order to make a FOIA request, simply write a letter to the appropriate agency. For the quickest possible handling, mark both your letter and the envelope "Freedom of Information Act Request." Although you do not have to give a record's title, you should identify the records that you want as specifically as possible in order to increase the likelihood that the agency will be able to locate them. Any facts that you can furnish about the time, place, authors, events, subjects, and other details of the records will be helpful to the agency in deciding where to search and in determining which records respond to your request, saving you and the government time and money.

As a general rule, FOIA requesters are not required to state the reasons why they are making their requests. You may do so if you think it might help the agency to locate the records. If you are not sure whether the records you want are exempt from disclosure, you may request them anyway. Agencies often have the legal discretion to disclose information even if it falls within a FOIA exemption.

May I request records in a specific format?
Yes, but the records may not be available in the requested format. If you request records that already exist in an electronic format, the FOIA requires agencies in almost all cases to provide these records to you in that same format, if that is what you prefer. However, if you request records that exist only in paper form, and would like them in some electronic format, the agency is obligated to provide the records in that electronic format only if it can do so with a reasonable amount of effort. The same is true if you request that electronic records be provided to you in an electronic format in which they do not already exist.

Is there any way for me to speed up the response time?
If an agency is unable to respond to your request in time, it may ask you to modify your request so that you can receive a response more quickly. Generally, it takes agencies less time to process simple requests involving a small number of records. Complex requests involving a greater number of records can take considerably more time to process. Therefore, you and an agency FOIA Officer may want to discuss narrowing the scope of your request to speed up the response time or to agree on an alternative time frame for record processing.(…)

What happens if the agency denies my request?
If the agency locates records in response to your request, it can withhold them (or any portion of them) only if they are exempt from disclosure. If an agency denies your request, in whole or in part, it ordinarily must provide an estimate of the amount of material withheld, state the reason(s) for the denial, and inform you of your right to appeal to a higher decisionmaking level within the agency.

- **Justice Department Guide to the Freedom of Information Act** (March 2007) (http://www.usdoj.gov/oip/foia_guide07.htm)

PROCEDURAL REQUIREMENTS (Footnotes omitted)

FOIA Requesters (p. 62-69)
(…)
Inasmuch as FOIA requests can be made for any reason whatsoever, FOIA requesters generally do not have to justify or explain their reasons for making requests. Consistent with this, the Supreme Court has stated that a FOIA requester's basic access rights are neither increased nor decreased because the requester claims to have a particular interest in the records sought. Yet despite repeated Supreme Court admonitions for restraint, requesters have invoked the FOIA successfully as a substitute for, or a supplement to, document discovery in the contexts of both civil and criminal litigation.

Nevertheless, there are two types of circumstances in which a requester's reason for making a FOIA request can properly affect the manner in which it is processed, either procedurally or substantively. First, the resolution of certain procedural issues -- i.e., expedited access, the assessment or waiver of fees, and the award of attorney fees and costs to a successful FOIA plaintiff -- can depend upon the reason for which the request was made. Second, a requester's reason for making a FOIA request -- as it is reflected in an evidentiary showing of "public interest" -- can substantively affect the agency's decision to disclose or withhold information that is potentially subject to the FOIA's privacy exemptions. (For discussions of the proper application of those exemptions, see Exemption 6, below, and Exemption 7(C), below.)

On a related note, the Supreme Court has observed that a FOIA requester's identity generally "has no bearing on the merits of his or her FOIA request." However, the Court has recognized an exception to this general rule by noting that the requester's identity can be significant in one substantive respect: "The fact that no one need show a particular need for information in order to qualify for disclosure under the FOIA does not mean that in no situation whatever will there be valid reasons for treating [an exemption] differently as to one class of those who make requests than as to another class." In short, this means that an agency should not invoke a FOIA exemption to protect a requester from himself.
(…)

Proper FOIA Requests (p. 69-90)
The FOIA specifies only two requirements for an access request: It must "reasonably describe" the records sought and it must be made in accordance with the agency's published FOIA regulations. Because "a person need not title a request for government records a 'FOIA request,'" agencies should use sound administrative discretion when determining the nature of an access request. For example, a first-party access request that cites only the Privacy Act of 1974 should be processed under both that statute and the FOIA. The legislative history of the 1974 FOIA amendments indicates that a description of a requested record that enables a professional agency employee familiar with the subject area to locate the record with a "reasonable amount of effort" is sufficient. Courts have explained that "[t]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters," or to allow requesters to conduct "fishing expeditions" through agency files.

Accordingly, one FOIA request was held invalid because it required an agency's FOIA staff either to have "clairvoyant capabilities" to discern the requester's needs or to spend "countless numbers of personnel hours seeking needles in bureaucratic haystacks."

The fact that a FOIA request is very broad or "burdensome" in its magnitude does not, in and of itself, entitle an agency to deny that request on the basis that it does not "reasonably describe" the records sought. The key factor is the ability of an agency's staff to reasonably ascertain exactly which records are being requested and then locate them. The courts have held only that agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records. An agency in receipt of a request that it deems burdensome may contact the requester in an attempt to clarify or narrow the breadth of the request -- and it should do so of course whenever such action is required by agency regulations.

By the same token, an agency should "carefully consider" the nature of each FOIA request and give reasonable import to its terms and full content overall, even if the request "is not a model of clarity." Likewise, an agency "must be careful not to read [a] request so strictly that the requester is denied information the agency well knows exists in its files, albeit in a different form from that anticipated by the requester." Specifically, agencies should be careful to undertake any "scoping" of documents found in response to a request only with full communication with the FOIA requester.

When determining the scope of a FOIA request, however, agencies should remember that they are not required to answer questions posed as FOIA requests. Nor does the FOIA require agencies to respond to requests by creating records, such as by modifying exempt information in order to make it disclosable. Likewise, agencies need not add explanatory materials to any records disclosed in response to a FOIA request. Agencies also cannot be required by FOIA requesters to seek the return of records over which they retain no "control" (even records that were wrongfully removed from their possession); to re-create records properly disposed of; or to seek the delivery of records held by private entities.
(…)

Searching for Responsive Records (p. 103-113)
The adequacy of an agency's search under the FOIA is determined by a test of "reasonableness," which may vary from case to case. As a general rule, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." The reasonableness of an agency's search depends, in part, on how the agency conducted its search in light of the scope of the request and the requester's description of the records sought -- particularly if the description includes specific details about the circumstances surrounding the agency's creation or maintenance of the records. The reasonableness of an agency's search also can depend on the standards that the agency applied in determining where responsive records were likely to be found, especially if the agency fails to locate records that it has reason to know might well exist, or if the search requires the agency's FOIA personnel to distinguish any "personal" records from "agency" records. Nevertheless, an agency's inability to locate every single responsive record does not undermine an otherwise reasonable search.
(…)

Consistent with these latter cases, and to promote electronic database searches, the Electronic FOIA amendments now require agencies to make "reasonable efforts" to search for requested records in electronic form or format "except when such efforts would significantly interfere with the operation of the agency's automated information system." The Electronic FOIA amendments expressly define the term "search" as meaning "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." (For a discussion of the litigation aspects of adequacy of search, see Litigation Considerations, Adequacy of Search, below.)

Responding to FOIA Requests (p. 123-126)
The FOIA provides that each agency "shall make [its disclosable] records promptly available" upon request. Although the D.C. Circuit has suggested that an agency is not required to make requested records available by mailing copies of them to a FOIA requester if the agency prefers to make the "responsive records available in one central location for [the requester's] perusal," such as in a "reading room," the Department of Justice strongly advises agencies to decline to follow such a practice unless the requester prefers it as well. However, agencies certainly may require requesters to pay any fees owed before releasing the processed records; otherwise, agencies "would effectively be bankrolling search and review, and duplicating expenses because there would never be any assurance whatsoever that payment would ever be made once the requesters had the documents in their hands."

The FOIA does not provide for limited disclosure; rather, it "speaks in terms of disclosure and nondisclosure [and] ordinarily does not recognize degrees of disclosure, such as permitting viewing, but not copying, of documents." Moreover, "[t]here is no mechanism under FOIA for a protective order allowing only the requester to see [the requested information] or for proscribing its general dissemination." In short, "once there is disclosure, the information belongs to the general public."

An agency must "provide the [requested] record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format" and "make reasonable efforts to maintain its records in forms or formats that are reproducible" for such purposes. Together, these two provisions require agencies to honor a requester's specific choice among existing forms of a requested record (assuming no exceptional difficulty in reproducing an existing record form) and to make "reasonable efforts" to disclose a record in a different form or format when that is requested, if the record is "readily reproducible" in that new form or format.
(…)

When an agency denies an initial request in full or in part, it must provide the requester with certain specific administrative information about the action taken on the request. Pursuant to the requirements of the Electronic FOIA amendments, such information should include an estimate of the amount of denied information, unless doing so would undermine the protection provided by an exemption. The Electronic FOIA amendments require agencies to also indicate the deletion of information at the point in the record where the deletion was made, wherever it is "technically feasible" to do so.

While "[t]here is no requirement that administrative responses to FOIA requests contain the same documentation necessary in litigation," a decision to deny an initial request must inform the requester of the reasons for denial; of the right to appeal; and of the name and title of each person responsible for the denial. Agencies also must include administrative appeal notifications in all of their "no record" responses to FOIA requesters.

Notifications to requesters should also contain other pertinent information: when and where records will be made available; what fees, if any, must be paid prior to the granting of access; what records are or are not responsive to the request; the date of receipt of the request or appeal; and the nature of the request or appeal and, when appropriate, the agency's interpretation of it. Furthermore, because an agency is obligated to provide a FOIA requester with the "best copy available" of a record, an agency should address in its correspondence any problem with the quality of its photocopy of a disclosed record. (p. 127-130)

LITIGATION CONSIDERATIONS

Adequacy of Search (p. 954-975)

In many FOIA suits, the defendant agency will face challenges not only to its reliance on particular exemptions, but also to the nature and extent of its search for responsive documents. Sometimes, that is all that a plaintiff will dispute. (For discussions of administrative considerations in conducting searches, see Procedural Requirements, Searching for Records, above.) To prevail in a FOIA action, the agency must show that it made "'a good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested.'" The fundamental question is not "'whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'" In other words, simply put, "the focus of the adequacy inquiry is not on the results."

The adequacy of any FOIA search, of course, is necessarily "dependent upon the circumstances of the case." Searches through agency or component indices, for example, which contain records in which a requester is the subject of the record, have been held to be adequate in almost all instances. With respect to the processing of "cross references" or "see references" -- records in which the subject of the request is just mentioned -- only those parts of the file that pertain directly to the subject of the request ordinarily are considered within the scope of the request. Further, agencies that maintain field offices in various locations ordinarily are not obligated to search offices other than those to which the request has been directed.

It is incumbent upon an agency, of course, not to interpret the scope of a FOIA request too narrowly. For example, a request that asks for all records pertaining to a specific subject and then, in addition, enumerates certain items within that subject should be interpreted broadly, according to a ruling by the Court of Appeals for the District of Columbia Circuit. Chiding the agency for its "implausible reading," the D.C. Circuit explained that "[t]he drafter of a FOIA request might reasonably seek all of a certain set of documents while nonetheless evincing a heightened interest in a specific subset thereof," but it emphasized that the reverse would not be true: "We think it improbable, however, that a person who wanted only the subset would draft a request that first asks for the full set." (For a further discussion of determining the scope of a FOIA request, see Procedural Requirements, Proper FOIA Requests, above.)

On another search-related point, the D.C. Circuit has expressly held that an agency "is not obligated to look beyond the four corners of the request for leads to the location of responsive documents." Similarly, "[b]ecause the scope of a search is limited by a plaintiff's FOIA request, there is no general requirement that an agency search secondary references or variant spellings." Nor is an agency required to undertake a new search based on a subsequent "clarification" of a request, especially after the requester has examined the released documents. Indeed, the D.C. Circuit has explicitly observed that "[r]equiring an additional search each time the agency receives a letter that clarifies a prior request could extend indefinitely the delay in processing new requests," and that "if the requester discovers leads in the documents he receives from the agency, he may pursue those leads through a second FOIA request."

The proper scope of an agency's search is limited not only by what the requester asks for but also by the date the agency uses as a temporal limit for its search. Referred to as "cut-off" dates, these temporal limits are used to determine which agency records are encompassed within the scope of a request. Courts have held that an agency's use of an inappropriate "cut-off" date can unduly restrict a FOIA request's temporal scope, thereby rendering the agency's subsequent search for responsive records unreasonable. Searches conducted using a "cut-off" based on the date that the search begins (i.e., a "date-of-search cut-off") have been viewed by the courts much more favorably than a search that uses a less inclusive "cut-off," such as one based on the date of the request or of the request's receipt (i.e., a "date-of-request cut-off").

A date-of-search approach also has been preferred to a more expansive, but simply unworkable, "cut-off" based on the date that documents actually are released. Indeed, one court realistically described a "date-of-release cut-off" as "inherently flawed," because it creates "an ever moving target for the production of documents under FOIA." (For a further discussion of the proper scope of a FOIA request, see Procedural Requirements, Proper FOIA Requests, above.)

In extraordinarily onerous cases, an agency may not be compelled to undertake even an initially requested search that is of such range or magnitude as to make it "unreasonably burdensome." Indeed, "'it is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome . . . [because the] FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters.'"

On the other hand, while "[t]here is no requirement that an agency search every record system," an agency "'cannot limit its search to only one record system if there are others that are likely to turn up the information requested.'" Stated another way, "if an agency has reason to know that certain places might well contain responsive documents, it is obligated under FOIA to search [those places] barring an undue burden. "Of course, those places should be within the agency or in a federal records center at which the agency has stored its records."

When documents that are located as a result of an initial search suggest other fruitful areas to search, an agency might be required to explore those areas, because "the court evaluates the reasonableness of an agency's search based on what the agency knew at [the search's] conclusion rather than what the agency speculated at its inception." Of course, when a requester has set limitations on the scope of his request, either at the administrative stage or in the course of litigation, he cannot subsequently challenge the adequacy of the search on the ground that the agency limited its search accordingly. Moreover, the D.C. Circuit has held that when the subject of a request is involved in several separate matters, but information is sought regarding only one of them, an agency is not obligated to extend its search to other files or to other documents that are referenced in records retrieved in response to the initial search, so long as that search was reasonable and complete in and of itself.

To prove the adequacy of its search, as in sustaining its use of exemptions, an agency relies upon its declarations, which should be "relatively detailed, nonconclusory, and submitted in good faith." Such declarations should show "that the search method was reasonably calculated to uncover all relevant documents." This ordinarily is accomplished by a declaration that identifies the types of files that an agency maintains, states the search terms that were employed to search through the files selected for the search, and contains an averment that all files reasonably expected to contain the requested records were, in fact, searched. In recent years, courts have been increasingly stringent in enforcing this requirement.

It is not necessary that the agency employee who actually performed the search supply an affidavit describing the search; rather, the affidavit of an official responsible for supervising or coordinating the search efforts should be sufficient in any FOIA litigation case to fulfill the "personal knowledge" requirement of Rule 56(e) of the Federal Rules of Civil Procedure. (For a further discussion of this "personal knowledge" requirement, see Litigation Considerations, Summary Judgment, below.)

While the initial burden certainly rests with an agency to demonstrate the adequacy of its search, once that obligation is satisfied, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith," because agency declarations are "entitled to a presumption of good faith." Consequently, a requester's "'[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.'" Even when a requested document indisputably exists or once existed, summary judgment will not be defeated by an unsuccessful search for the document, so long as the search was diligent. Indeed, "[n]othing in the law requires the agency to document the fate of documents it cannot find." And when an agency does subsequently locate additional documents, or documents initially believed to have been lost or destroyed, courts generally have accepted this as evidence of the agency's good-faith efforts.

DECISIONS OF THE COMMISSIONER/ OMBUDSMAN

There is a plan for an ombudsman's office (Office of Government Information Services), but it has not been created yet.

DECISIONS OF THE COURT

- **Interpretation of the request / contacting the applicant**

***Lahr v. National Safety Transportation Board, et al.*, 2006 WL 2854314 (C.D.Cal.).**

> Under FOIA, an agency is required to make records promptly available upon a request that "reasonably describes" the records sought. 5 U.S.C.A. § 552(a)(3)(A). "A description 'would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." ' *Marks v. United States Dep't of Justice*, 578 F.2d 261 (9th Cir.1978) (citation omitted). This requirement should not be treated as a loophole by agencies, but "broad, sweeping requests lacking specificity are not permissible." *Id.*
>
> If an agency knows " 'precisely' which of its records have been requested and the nature of the information sought" from those records, then the records requested have been adequately described. *See, e.g., Yeager v. Drug Enforcement Agency*, 678 F.2d 315 (D.C.Cir.1982). Here, unlike in *Yeager*, there is evidence that the agency was truly and understandably unclear as to the nature of Plaintiff's request. *See Moye Decl.*, Exhs. II-14, II-15 (November 6, 2002 and November 6, 2003 letters to Plaintiff that requested clarification of the meeting of "process"). If Lahr intended this to be a catch-all provision-as is suggested by his description that this "request seeks any records not otherwise specifically identified"-then even if he had drafted it as such the NTSB could not have conducted a reasonable search, under the circumstances.

***Nation Magazine, Washington Bureau v. U.S. Customs Service*, 71 F.3d 885 (C.A.D.C. 1995).**

> Although a requester must "reasonably describe [ ]" the records sought, 5 U.S.C.A. § 552(a)(3)(A), an agency also has a duty to construe a FOIA request liberally. *Truitt v. Dep't of State*, 897 F.2d 540, 544-45 (D.C.Cir.1990) (citing Senate Report accompanying relevant provision of FOIA); *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836-37 (D.C.Cir.1979) (same). […]

- **Search**

An agency must undertake a search that is "reasonably calculated to uncover all relevant documents". The adequacy of the search will depend upon the specificity of the request. ***Weisberg v. Department of Justice*, 705 F.2d 1344 at 1351 (D.C. Cir. 1993).**

The courts may review the adequacy of the search. ***Krikorian v. Department of State*, 984 F.2d 461 (D.C. Cir. 1993).**

The agency must show that it made a "good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested". ***Weisberg v. Department of Justice*, 745 F.2d 1476 at 1485 (D.C. Cir. 1984); *Truitt v. Department of State*, 897 F.2d 540 at 542 (D.C. Cir. 1990); *Oglesby v. Department of the Army*, 920 F.2d 57 at 61 (D.C. Cir. 1990); *Campbell v. Department of Justice*, 164 F.3d 20 at 28 (D.C. Cir. 1998); *Rugiero v. Department of Justice*, 257 F.3d 534 at 547 (6th Cir. 2001)**.

- **Responding to the applicant**

An agency is not required to create a record in order to respond to a request. ***National Labor Relations Board v. Sears, Roebuck & Co*, 421 US 132 (1975).**

- **Other considerations**

The reason for the making of a request has no bearing on the merits of that request. ***Environmental Protection Agency v. Mink*, 410 US 73 (1973); *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 US 749 (1989)**.

SCHEDULE – ACTS / ANNEXE – LOIS

Canada

Federal / Fédéral

Access to Information Act, R.S.C. 1985, c. A-1 / *Loi sur l'accès à l'information*, L.R.C. 1985, c. A-1

4. (2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.	**4 (2.1)** Le responsable de l'institution fédérale fait tous les efforts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.
11. (6) The head of a government institution to which a request for access to a record is made under this Act may waive the requirement to pay a fee or other amount or a part thereof under this section or may refund a fee or other amount or a part thereof paid under this section.	**11. (6)** Le responsable de l'institution fédérale peut dispenser en tout ou en partie la personne qui fait la demande du versement des droits ou lui rembourser tout ou partie du montant déjà versé.
30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints (…) (f) in respect of any other matter relating to requesting or obtaining access to records under this Act.	**30. (1)** Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes : (…) f) portant sur toute autre question relative à la demande ou à l'obtention de documents en vertu de la présente loi.

Provinces

Alberta

Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25
(*Loi sur l'accès à l'information et la protection des renseignements personnels*) *[traduction non officielle]*

7(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.	**7(2)** La demande doit être présentée par écrit et contenir suffisamment de renseignements pour permettre à l'organisme public d'identifier le document.
10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.	**10(1)** Le responsable de l'organisme public doit faire tous les efforts raisonnables pour assister le demandeur et lui répondre de façon franche, exacte et complète.
(2) The head of a public body must create a record for an applicant if	**(2)** Le responsable de l'organisme public doit créer un document pour le demandeur si :
(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and	a) le document peut être créé à partir d'un document sur support électronique sous la garde ou le contrôle de l'organisme public, au moyen de son matériel informatique et de ses logiciels habituels ainsi que de son expertise technique;
(b) creating the record would not unreasonably	b) la création du document n'entraverait pas de

interfere with the operations of the public body.	façon déraisonnable le fonctionnement de l'organisme public.
93(4) The head of a public body may excuse the applicant from paying all or part of a fee if, in the opinion of the head,(…)	**93(4)** Le responsable de l'organisme public peut dispenser le demandeur de tout ou partie des frais s'il est d'avis (…)
94(1) The Lieutenant Governor in Council may make regulations	**94(1)** Le lieutenant gouverneur en conseil peut prendre des règlements :
(f) respecting standards to be observed by officers or employees of a public body in fulfilling the duty to assist applicants;	f) relatifs aux normes que doivent observer les agents ou les employés de l'organisme public dans l'exécution de l'obligation de prêter assistance ;
British Columbia / Colombie-Britannique *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 *(Loi sur l'accès à l'information et la protection des renseignements personnels) [traduction non officielle]*	
5. (1) To obtain access to a record, the applicant must make a written request that	**5.(1)** Pour obtenir l'accès à un document, le demandeur doit présenter une demande écrite qui :
(a) provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought, (…)	a) fournit les détails suffisants permettant à un employé expérimenté de l'organisme public, à la suite d'une démarche normale, d'identifier le document, (…)
6. (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.	**6.(1)** Le responsable de l'organisme public doit faire tous les efforts raisonnables pour assister le demandeur et lui répondre de façon franche, exacte et complète.
(2) Moreover, the head of a public body must create a record for an applicant if	**(2)** De plus, le responsable de l'organisme public doit créer un document pour le demandeur si :
(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and	a) le document peut être créé à partir d'un document lisible par machine sous la garde ou le contrôle de l'organisme public, au moyen de son matériel informatique et de ses logiciels habituels ainsi que de son expertise technique;
(b) creating the record would not unreasonably interfere with the operations of the public body.	b) la création du document n'entraverait pas de façon déraisonnable le fonctionnement de l'organisme public.
42. (1) In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may	**42.(1)** Outre les attributions qui lui sont conférées par la partie 5 relativement aux révisions, le Commissaire est chargé de contrôler l'application de la Loi pour veiller à la réalisation de ses objets et peut :
(a) conduct investigations and audits to ensure compliance with any provision of this Act, (…)	a) effectuer des enquêtes et des vérifications en vue d'assurer la conformité à toute disposition de la Loi, (…)

(j) bring to the attention of the head of a public body any failure to meet the prescribed standards for fulfilling the duty to assist applicants.	j) porter à l'attention du responsable de l'organisme public le non-respect des normes prescrites pour l'exercice de l'obligation de prêter assistance.
(2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that	**(2)** Il est entendu, sans restreindre la portée du paragraphe (1), que le Commissaire peut entreprendre des enquêtes et tenter de régler des plaintes concernant :
(a) a duty imposed under this Act has not been performed, (…)	a) une obligation imposée par la Loi qui n'a pas été exécutée, (…)
76. (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the Interpretation Act.	**76.(1)** Le lieutenant gouverneur en conseil peut prendre les règlements énoncés à l'article 41 de la *Loi d'interprétation*.
(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations as follows: (…) (a) prescribing procedures to be followed in making, transferring and responding to requests under this Act; (…) (c) setting standards, including time limits, to be observed by officers or employees of a public body in fulfilling the duty to assist applicants;	**(2)** Il est entendu, sans restreindre la portée du paragraphe (1), que le lieutenant gouverneur en conseil peut prendre des règlements qui : (…) a) prescrivent les procédures à suivre en matière de formulation, de transfert et de réponse des demandes présentées en vertu de la Loi; (…) c) établissent des normes, notamment les délais, que doivent observer les agents ou les employés de l'organisme public dans l'exécution de l'obligation de prêter assistance.
Manitoba *Freedom of Information and Protection of Privacy Act*, S.M. 1997, c. 50 / *Loi sur l'accès à l'information et la protection de la vie privée*, C.P.L.M. c. F175	
8. (2) A request must be in the prescribed form and must provide enough detail to enable an experienced officer or employee of the public body to identify the record.	**8. (2)** La demande revêt la forme réglementaire et est rédigée en des termes suffisamment précis pour permettre à un fonctionnaire ou à un employé expérimenté de l'organisme public de trouver le document.
(3) An applicant may make an oral request for access to a record if the applicant	**(3)** La demande de communication peut être présentée oralement si l'auteur de la demande :
(a) has a limited ability to read or write English or French; or	a) a une capacité limitée de lire ou d'écrire en français ou en anglais;
(b) has a disability or condition that impairs his or her ability to make a written request.	b) a une incapacité ou une affection qui diminue sa capacité de présenter une demande écrite.
9. The head of a public body shall make every reasonable effort to assist an applicant and to respond without delay, openly, accurately and completely.	**9.** Le responsable d'un organisme public fait tous les efforts possibles pour prêter assistance à l'auteur de la demande et pour lui répondre sans délai de façon ouverte, précise et complète.

14. (2) The head of a public body who gives access to a record may give the applicant any additional information that the head believes may be necessary to explain it.

14. (2) Le responsable de l'organisme public qui donne communication d'un document peut fournir à l'auteur de la demande les renseignements supplémentaires qui, selon lui, peuvent être nécessaires à sa compréhension.

49. In addition to the Ombudsman's powers and duties under Part 5 respecting complaints, the Ombudsman may

49. En plus des attributions qui lui sont conférées sous le régime de la partie 5 au sujet des plaintes, l'ombudsman peut :

(a) conduct investigations and audits and make recommendations to monitor and ensure compliance

(i) with this Act and the regulations, and

(ii) with requirements respecting the security and destruction of records set out in any other enactment or in a by-law or other legal instrument by which a local public body acts;
(…)

(f) bring to the attention of the head of a public body any failure to fulfil the duty to assist applicants;

a) procéder à des enquêtes et à des vérifications et faire des recommandations pour contrôler et garantir l'observation :
(i) de la présente loi et des règlements,

(ii) des exigences concernant la sécurité et la destruction des documents prévues dans tout autre texte ou dans un instrument juridique, notamment un règlement ou un règlement administratif, au moyen duquel un organisme public local agit;
(…)
f) porter à la connaissance du responsable d'un organisme public tout manquement à l'obligation de prêter assistance aux auteurs de demandes; ou au ministre responsable au sujet de l'application de la présente loi;

59. (1) A person who has requested access to a record under Part 2 of this Act may make a complaint to the Ombudsman about any decision, act or failure to act of the head that relates to the request, including a refusal to make a correction under section 39.

59. (1) La personne qui a demandé la communication d'un document en vertu de la partie 2 peut déposer une plainte auprès de l'ombudsman au sujet d'une décision, d'un acte ou d'une omission du responsable ayant trait à la demande, y compris un refus d'effectuer une correction en application de l'article 39.

New Brunswick / Nouveau-Brunswick
Right to Information Act, S.N.B. 1978, c. R-10.3 / *Droit à l'information*, L.N.-B. 1978, c. R-10.3

3. (2) The application shall specify the documents containing the information requested or where the document in which the relevant information may be contained is not known to the applicant, specify the subject-matter of the information requested with sufficient particularity as to time, place and event to enable a person familiar with the subject-matter to identify the relevant document.

3. (2) Le demandeur doit préciser dans sa demande les documents contenant l'information sollicitée ou, s'il ne connaît pas le document qui peut la contenir, y indique le sujet de l'information sollicitée avec des détails tels que la date, le lieu et les circonstances, qui permettront à une personne connaissant ce sujet de trouver le document correspondant.

(3) Where the document in which the information requested is unable to be identified the appropriate Minister shall so advise the applicant in writing and shall invite the applicant to supply additional information that might lead to identification of the relevant document.

(3) Lorsqu'il est impossible de déterminer quel document contient l'information sollicitée, le ministre compétent en informe par écrit le demandeur et l'invite à fournir de plus amples renseignements qui pourraient permettre de trouver ce document.

7. (1) Where an applicant is not satisfied with the decision of an appropriate Minister or where an appropriate Minister fails to reply to a request within the time prescribed, the applicant may in the prescribed form and manner either	**7. (1)** Tout demandeur non satisfait de la décision d'un ministre compétent, ou si ce dernier omet de répondre à une demande dans le délai prescrit, peut, dans les formes prescrites,
(a) refer the matter to a judge of The Court of Queen's Bench of New Brunswick, or	a) soit soumettre l'affaire à un juge de la Cour du Banc de la Reine du Nouveau-Brunswick, ou
(b) refer the matter to the Ombudsman. (…)	b) soit la soumettre à l'Ombudsman. (…)
Newfoundland and Labrador / Terre-Neuve et Labrador *Access to Information and Protection of Privacy Act*, S.N. 2002, c. A-1.1 *(Loi sur l'accès à l'information et la protection des renseignements personnels) [traduction non officielle]*	
8. (2) A request shall be in the form set by the minister responsible for this Act and shall provide sufficient details about the information requested so that an employee familiar with the records of the public body can identify the record containing the information.	**8.(2)** La demande doit suivre la forme prescrite par le ministre chargé de l'application de la Loi et fournir les détails suffisants permettant à un employé connaissant bien les documents de l'organisme public d'identifier le document contenant les renseignements.
9. The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.	**9**. Le responsable de l'organisme public doit faire tous les efforts raisonnables pour aider le demandeur à présenter sa demande et lui répondre sans délai de façon franche, précise et complète.
11. (1) The head of a public body shall make every reasonable effort to respond to a request in writing within 30 days after receiving it, unless	**11.(1)** Le responsable de l'organisme public doit faire tous les efforts raisonnables pour répondre à une demande par écrit dans un délai de 30 jours de sa réception, sauf dans les cas suivants :
(a) the time limit for responding is extended under section 16 ;	a) le délai de réponse est prorogé en vertu de l'article 16 ;
(b) notice is given to a third party under section 28 ; or	b) l'avis prévu à l'article 28 est donné à un tiers; ou
(c) the request has been transferred under section 17 to another public body.	c) la demande a été transférée à un autre organisme public en vertu de l'article 17.
(2) Where the head of a public body fails to respond within the 30 day period or an extended period, the head is considered to have refused access to the record.	**(2)** Lorsque le responsable de l'organisme public ne répond pas pendant le délai de 30 jours ou un délai prorogé, il est présumé avoir refusé l'accès au document.
16. (1) The head of a public body may extend the time for responding to a request for up to an additional 30 days where	**16.(1)** Le responsable de l'organisme public peut proroger le délai de réponse à une demande d'une période maximale supplémentaire de 30 jours dans les cas suivants :

(a) the applicant does not give sufficient details to enable the public body to identify the requested record;

51. In addition to the commissioner's powers and duties respecting reviews, the commissioner may

(a) make recommendations to ensure compliance with this Act and the regulations;
(…)

(f) bring to the attention of the head of a public body a failure to fulfil the duty to assist applicants; and
(…)

73. The Lieutenant-Governor in Council may make regulations
(…)
(c) setting standards, including time limits, to be observed by officers or employees of a public body in fulfilling the duty to assist applicants;

a) le demandeur ne fournit pas les détails suffisants permettant à l'organisme public d'identifier le document sollicité;

51. Outre les attributions qui lui sont conférées en matière de révision, le Commissaire peut prendre les mesures suivantes :

a) formuler des recommandations visant la conformité à la Loi et aux règlements;
(…)

f) porter à l'attention du responsable de l'organisme public l'inexécution de l'obligation de prêter assistance;
(…)

73. Le lieutenant gouverneur en conseil peut prendre des règlements :
(…)
c) énonçant les normes, dont les délais, que doivent observer les agents et les employés de l'organisme public dans l'exécution de l'obligation de prêter assistance;

Nova Scotia / Nouvelle-Écosse
Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5
(Loi sur l'accès à l'information et la protection des renseignements personnels) [traduction non officielle]

7. (1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall

(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; and

(b) either

(i) consider the request and give written notice to the applicant of the head's decision with respect to the request in accordance with subsection (2), or
(ii) transfer the request to another public body in accordance with Section 10.

(2) The head of the public body shall respond in writing to the applicant within thirty days after the application is received and the applicant has met the requirements of clauses (b) and (c) of subsection (1) of Section 6, stating

7.(1) Lorsqu'une demande d'accès à un document est présentée en vertu de la Loi, le responsable de l'organisme public auquel la demande est présentée :

a) fait tous les efforts raisonnables pour aider le demandeur et lui répondre sans délai de façon franche, précise et complète;

b) soit

(i) examine la demande et avise par écrit le demandeur de sa décision relativement à la demande conformément au paragraphe (2),
(ii) transfère la demande à un autre organisme public conformément à l'article 10.

(2) Le responsable de l'organisme public répond par écrit au demandeur dans les 30 jours de la réception de la demande et du respect par le demandeur des exigences des alinéas 6(1)b) et c), en indiquant :

(a) whether the applicant is entitled to the record or part of the record and

(i) where the applicant is entitled to access, stating that access will be given on payment of the prescribed fee and setting out where, when and how, or the manner in which, access will be given, or

(ii) where access to the record or to part of the record is refused, the reasons for the refusal and the provision of this Act on which the refusal is based;

(b) that the record is not in the custody or control of the public body; or

(c) where the record would contain information exempted pursuant to Section 15 if the record were in the custody or control of the public body, that confirmation or denial of the existence of the record is refused,

and stating

(d) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the decision; and

(e) that the applicant may ask for a review by the Review Officer within sixty days after the applicant is notified of the decision.

(3) The head of a public body who fails to give a written response pursuant to subsection (2) is deemed to have given notice, on the last day of the period set out in that subsection, of a decision to refuse to give access to the record.

(4) The head of a public body may refuse to disclose to an applicant information

(a) that is published and available for purchase by the public; or

(b) that, within thirty days after the applicant's request is received, is to be published or released to the public.

(5) The head of a public body shall notify an applicant of the publication or release of information that the head has refused to disclose pursuant to clause (b) of subsection (4).

a) si le demandeur a droit à tout ou partie du document et :

(i) soit, lorsque le demandeur y a droit, que l'accès sera accordé sur paiement des frais prescrits ainsi que l'endroit, le moment et la manière dont l'accès sera accordé,

(ii) soit, lorsque l'accès à tout ou partie du document est refusé, les motifs du refus et la disposition de la Loi sur laquelle le refus est fondé;

b) que le document n'est pas sous la garde ou le contrôle de l'organisme public;

c) lorsque le document contient des renseignements visés par une exemption en vertu de l'article 15 s'il était sous la garde ou le contrôle de l'organisme public, que la confirmation ou la négation de l'existence du document est refusée;

d) le nom, le titre, l'adresse et le numéro de téléphone d'un agent ou d'un employé de l'organisme public qui peut répondre aux questions du demandeur au sujet de la décision;

e) que le demandeur peut solliciter un examen auprès de l'agent d'évaluation dans un délai de 60 jours après avoir été avisé de la décision.

(3) Le responsable de l'organisme public qui ne fournit pas de réponse par écrit conformément au paragraphe (2) est réputé avoir donné avis, le dernier jour de la période prévue à ce paragraphe, d'une décision de refuser de donner accès au document.

(4) Le responsable de l'organisme public peut refuser de divulguer au demandeur des renseignements :

a) qui sont publiés et susceptibles d'achat par le public;

b) qui, dans les 30 jours de la réception de la demande, doivent être publiés ou communiqués au public.

(5) Le responsable de l'organisme public doit aviser le demandeur de la publication ou la communication des renseignements qu'il a refusé de divulguer conformément à l'alinéa 4b).

(6) Where the information is not published or released within thirty days after the applicant's request is received, the head of the public body shall reconsider the request as if it were a new request received on the last day of that period, but the information shall not be refused pursuant to clause (b) of subsection (4).

8. (1) Where an applicant is informed pursuant to subsection (2) of Section 7 that access will be given, the head of the public body concerned shall

(a) where the applicant has asked for a copy pursuant to subsection (2) of Section 6 and the record can reasonably be reproduced,

(i) provide a copy of the record or part of the record with the response, or
(ii) give the applicant reasons for delay in providing the record; or

(b) where the applicant has asked to examine the record pursuant to subsection (2) of Section 6 or where the record cannot reasonably be reproduced,

(i) permit the applicant to examine the record or part of the record, or
(ii) give the applicant access in accordance with the regulations.

(2) The head of a public body may give access to a record that is a microfilm, film, sound recording, or information stored by electronic or other technological means by

(a) permitting the applicant to examine a transcript of the record;

(b) providing the applicant with a copy of the transcript of the record;

(c) permitting, in the case of a record produced for visual or aural reception, the applicant to view or hear the record or providing the applicant with a copy of it; or

(d) permitting, in the case of a record stored by electronic or other technological means, the applicant to access the record or providing the applicant a copy of it.

(6) Lorsque les renseignements ne sont pas publiés ni communiqués dans les 30 jours de la réception de la demande, le responsable de l'organisme public doit réexaminer la demande comme s'il s'agissait d'une nouvelle demande reçue le dernier jour de cette période, mais la communication des renseignements ne peut être refusée sous le régime de l'alinéa 4b).

8.(1) Lorsque le demandeur est informé en vertu du paragraphe 7(2) que l'accès sera fourni, le responsable de l'organisme public doit :

a) lorsque le demandeur a sollicité une copie en vertu du paragraphe 6(2) et que le document peut raisonnablement être reproduit,

(i) fournir une copie de tout ou partie du document accompagnée de la réponse;
(ii) donner au demandeur les motifs du délai lors de la remise du document;

b) lorsque le demandeur a demandé l'autorisation d'examiner le document en vertu du paragraphe 6(2) ou lorsque le document ne peut raisonnablement être reproduit,

(i) permettre au demandeur d'examiner tout ou partie du document,
(ii) donner accès au demandeur conformément aux règlements.

(2) Le responsable de l'organisme public peut donner accès à un document sous forme de microfilm, de film, d'enregistrement sonore ou de renseignements conservés par voie électronique ou au moyen d'une autre technologie :

a) en permettant au demandeur d'examiner la transcription du document;

b) en remettant au demandeur une copie de la transcription du document;

c) en permettant au demandeur, dans le cas d'un document visuel ou audio, de visualiser ou d'entendre l'enregistrement ou en lui fournissant une copie;

d) en permettant, dans le cas d'un document conservé par voie électronique ou au moyen d'une autre technologie, au demandeur d'y avoir accès ou en lui en fournissant une copie.

(3) The head of a public body shall create a record for an applicant if	**(3)** Le responsable de l'organisme public doit créer un document pour le demandeur si :
(a) the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and	a) le document peut être créé à partir d'un document sur support électronique sous la garde ou le contrôle de l'organisme public, au moyen de son matériel informatique et de ses logiciels habituels ainsi que de son expertise technique;
(b) creating the record would not unreasonably interfere with the operations of the public body.	b) la création du document n'entraverait pas de façon déraisonnable le fonctionnement de l'organisme public.
32. (1) A person who makes any request pursuant to this Act for access to a record or for correction of personal information may ask for a review of any decision, act or failure to act of the head of the public body that relates to the request. (…)	**32.(1)** La personne qui, en vertu de la présente Loi, présente une demande d'accès à un document ou de correction de renseignements personnels peut solliciter la révision de la décision, de l'acte ou de l'omission du responsable de l'organisme public relativement à la demande. (…)
Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F-31 / *Loi sur l'accès à l'information et la protection de la vie privée*, L.R.S., 1990, ch. F-31	
24. (1) A person seeking access to a record shall, (a) make a request in writing to the institution that the person believes has custody or control of the record; (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and (c) at the time of making the request, pay the fee prescribed by the regulations for that purpose. (…)	**24. (1)** L'auteur de la demande d'accès à un document : a) s'adresse par écrit à l'institution qui, à son avis, a la garde ou le contrôle du document; b) fournit les détails suffisants permettant à un employé expérimenté de l'institution, à la suite d'une démarche normale, d'identifier le document; c) au moment de présenter la demande, verse les droits prescrits par les règlements à cette fin. (…)
(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).	**(2)** Dans le cas d'insuffisance de la description du document requis, l'institution en avise l'auteur de la demande et lui fournit l'aide nécessaire afin de formuler celle-ci à nouveau et de la rendre conforme au paragraphe (1).
Note: On a day to be named by proclamation of the act will be amended by adding:	*Remarque : Le jour fixé par proclamation, la loi sera modifiée en ajoutant:*
***60.(b.1)** requiring the head of an institution to assist persons with disabilities in making requests for access under subsection 24 (1) or 48 (1); [See: 2006, c. 34, Sched. C, ss. 9, 29 (1)]*	***60. b.1)** exiger que la personne responsable d'une institution aide les personnes handicapées à présenter une demande d'accès en application du paragraphe 24 (1) ou 48 (1); [Voir : 2006, chap. 34, annexe C, art. 9 et par. 29 (1).]*

4. An applicant may make Oral requests for access to a record if
(a) the applicant's ability to read or write English or French is limited; or
(b) the applicant has a physical disability or condition that impairs the applicant's ability to make a written request.

4. Peuvent être présentées verbalement des demandes d'accès à un document dans les cas suivants :
a) la capacité du demandeur de lire ou de rédiger en anglais ou en français est limitée;
b) le demandeur souffre d'une déficience physique ou d'un problème de santé qui l'empêche de présenter une demande écrite.

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

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

(3) In a request, the applicant may ask examination
(a) for a copy of the record; or
(b) to examine the record.

7.(1) Pour obtenir l'accès à un document, la personne doit s'adresser à l'organisme public qui, selon elle, a la possession ou le contrôle du document.

(2) La demande doit être formulée par écrit et contenir les détails suffisant permettant à l'organisme public d'identifier le document.

(3) Dans une demande, le demandeur peut solliciter l'examen :
a) d'une copie du document;
b) du document.

(4) Where the head of a public body contacts an applicant in writing respecting the applicant's request including
(a) seeking further information from the applicant that is necessary to process the request, or
(b) requesting the applicant to pay a fee or to agree to pay a fee, and the applicant fails to respond to the head of the public body, as requested by the head, within 30 days of being contacted, the head of the public body may, by notice in writing to the applicant, declare the request abandoned.

(4) Lorsque le responsable de l'organisme public communique par écrit avec le demandeur concernant sa demande, notamment pour solliciter les renseignements supplémentaires nécessaires au traitement de la demande ou le paiement, ou l'acceptation de payer, des frais et que le demandeur ne lui répond pas comme requis dans les 30 jours de la communication, il peut, par avis écrit au demandeur, déclarer la demande abandonnée.

(5) A notice given by the head of a public body under subsection (4) shall state that the applicant may ask for a review, under Part IV, of a declaration of abandonment of the applicant's request.

(5) L'avis donné par le responsable de l'organisme public en vertu du paragraphe (4) indique que le demandeur peut solliciter en vertu de la partie IV l'examen de la déclaration d'abandon de la demande.

8. (1) The head of a public body shall make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

8.(1) Le responsable de l'organisme public doit faire tous les efforts raisonnables pour aider le demandeur et lui répondre de façon franche, précise et complète.

(2) The head of a public body shall create a record for an applicant if
(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise; and

(2) Le responsable d'un organisme public doit créer un document pour le demandeur si :
a) le document peut être créé à partir d'un document sur support électronique sous la garde ou le contrôle de l'organisme public, au moyen de son matériel informatique et de ses logiciels

(b) creating the record would not unreasonably interfere with the operations of the public body.

habituels ainsi que de son expertise technique;
b) la création du document n'entraverait pas de façon déraisonnable le fonctionnement de l'organisme public.

12. (1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if
(a) the applicant does not give enough detail to enable the public body to identify a requested record;

12.(1) Le responsable de l'organisme public peut proroger le délai de réponse à une demande d'au plus 30 jours ou, sur permission du Commissaire, d'une période plus longue si :
a) le demandeur ne fournit pas les détails suffisants permettant à l'organisme public d'identifier le document demandé;

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

50.(1) Outre les fonctions qui lui sont attribuées par la partie IV, en matière de réexamen, le Commissaire a l'obligation générale de surveiller l'application de la Loi et veiller à la réalisation de ses objets, et il peut :

(a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records set out in any other enactment of Prince Edward Island;
(…)

a) effectuer des enquêtes pour vérifier la conformité à toute disposition de la Loi ou des règles relatives à la destruction des documents énoncées dans tout autre texte législatif ou réglementaire de l'Île-du-Prince-Édouard;
(…)

(g) bring to the attention of the head of a public body any failure by the public body to assist applicants under section 8; and

g) porter à l'attention du responsable de l'organisme public le défaut de cet organisme d'aider le demandeur comme le prévoit l'article 8;

(h) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this Act.

h) formuler des conseils et des recommandations d'application générale au responsable de l'organisme public sur des questions relatives à ses droits et obligations en vertu de la Loi.

(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that Resolution of complaints
(a) a duty imposed by section 8 has not been performed;
(…)

(2) Il est entendu, sans limiter la portée du paragraphe (1), que le Commissaire peut faire enquête sur toute plainte et tenter de régler toute plainte :
a) selon laquelle une obligation imposée par l'article 8 n'a pas été exécutée;
(…)

77. (1) The Lieutenant Governor in Council may make regulations
(…)
(f) respecting standards to be observed by officers or employees of a public body in fulfilling the duty to assist applicants;

77.(1) Le lieutenant gouverneur en conseil peut prendre des règlements :
(…)
f) relatifs aux normes que doivent observer les agents et les employés de l'organisme public dans l'exécution de l'obligation de prêter assistance;

Quebec / Québec

An Act respecting access to documents held by public bodies and the protection of personal information, R.S.Q. c. A-2.1 / *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels*, L.R.Q. c. A-2.1

42. To be receivable, a request for access to a document must be sufficiently precise to allow the document to be located. If the request is not sufficiently precise or if a person requires it, the person in charge must assist in identifying the document likely to contain the information sought. *(s. 95 mirrors section 42 for access to personal information)*	**42.** La demande d'accès à un document doit, pour être recevable, être suffisamment précise pour permettre de le trouver. Lorsque la demande n'est pas suffisamment précise ou lorsqu'une personne le requiert, le responsable doit prêter assistance pour identifier le document susceptible de contenir les renseignements recherchés. *(L'article 95 est équivalent pour les demandes d'information personnelles)*
84.1. Where a health services or social services institution referred to in the second paragraph of section 7, the Commission de la santé et de la sécurité du travail, the Société de l'assurance automobile du Québec, the Régie des rentes du Québec or a professional order provides a person with personal information of a medical or social nature which concerns him, it shall, upon the request of the person, provide him with the assistance of a professional qualified to help him understand the information.	**84.1.** Un établissement de santé ou de services sociaux visé au deuxième alinéa de l'article 7, la Commission de la santé et de la sécurité du travail, la Société de l'assurance automobile du Québec, la Régie des rentes du Québec ou un ordre professionnel qui fournit à une personne un renseignement personnel de nature médicale ou sociale la concernant doit, à la demande de cette personne, lui fournir l'assistance d'un professionnel, qualifié pour l'aider à comprendre ce renseignement.
138. The members of the personnel of the Commission must lend assistance in drafting an application for review to every applicant concerned who requires it.	**138.** Les membres du personnel de la Commission doivent prêter assistance pour la rédaction d'une demande de révision à toute personne intéressée qui le requiert.

Saskatchewan

Freedom of Information and Protection of Privacy Act, S.S. 1990-91, c. F-22.01
(Loi sur l'accès à l'information et la protection des renseignements personnels) [traduction non officielle]

6(1) An applicant shall: (a) make the application in the prescribed form to the government institution in which the record containing the information is kept; and (b) specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject matter to identify the record. **(2)** Subject to subsection (4) and subsection 11(3), an application is deemed to be made when the application is received by the government institution to which it is directed.	**6(1)** Le demandeur doit : a) présenter la demande sous la forme prescrite à l'institution gouvernementale où est conservé le document contenant les renseignements; b) indiquer l'objet du document sollicité en en précisant suffisamment la période, le lieu et l'événement pour permettre à la personne qui connaît l'objet d'identifier le document. **(2)** Sous réserve du paragraphe (4) et du paragraphe 11(3), la demande est réputée avoir été présentée lorsque l'institution gouvernementale à laquelle elle est destinée la reçoit.

(3) Where the head is unable to identify the record requested, the head shall advise the applicant, and shall invite the applicant to supply additional details that might lead to identification of the record.	**(3)** Lorsque le responsable est incapable d'identifier le document sollicité, il en avise le demandeur et l'invite à lui fournir des renseignements supplémentaires susceptibles de mener à l'identification du document.
(4) Where additional details are invited to be supplied pursuant to subsection (3), the application is deemed to be made when the record is identified.	**(4)** Lorsque le responsable sollicite des renseignements supplémentaires conformément au paragraphe (3), la demande est réputée avoir été présentée au moment où le document est identifié.
Territories / Territoires	
Northwest Territories / Territoires du Nord-Ouest *Access to Information and Protection of Privacy Act,* S.N.W.T. 1994, c. 20 / *Loi sur l'accès à l'information et la protection de la vie privée,* L.T.N.-O. 1994, c. 20	
6. (1) To obtain access to a record, a person must make a written request to the public body that the person believes has custody or control of the record.	**6. (1)** La personne qui désire avoir accès à un document présente une demande écrite à l'organisme public de qui relève, selon elle, le document.
(2) The request must provide enough detail to enable the public body to identify the record.	**(2)** La demande est rédigée en des termes suffisamment précis pour permettre à l'organisme public de trouver le document.
(3) The applicant may ask for a copy of the record or ask to examine the record.	**(3)** Le requérant peut demander une copie du document ou demander d'examiner celui-ci.
7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.	**7. (1)** Le responsable d'un organisme public doit fournir une aide raisonnable à tout requérant, et donner suite à chaque demande de façon ouverte, précise, complète et prompte.
(2) The head of a public body shall create a record for an applicant where	**(2)** Le responsable d'un organisme public prépare un document à l'intention du requérant dans le cas où, à la fois :
(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and	a) le document peut être préparé à partir d'un document informatisé qui relève de l'organisme public, en utilisant son système informatique et ses logiciels habituels, de même que les connaissances techniques à sa disposition;
(b) creating the record would not unreasonably interfere with the operations of the public body.	b) le fait de préparer le document n'entraverait pas de façon sérieuse le fonctionnement de l'organisme public.
(3) The head of a public body shall give access to a record in the Official Language of the Territories requested by an applicant where (a) the record already exists in the control of the public body in that language; or (b) the head of the public body considers it to be in	**(3)** Le responsable d'un organisme public donne accès à un document dans la langue officielle des territoires indiquée par le requérant dans l'un ou l'autre des cas suivants : a) le document existe dans cette langue et relève de l'organisme public; b) le responsable de

the public interest to have a translation of the record prepared in that language.	l'organisme public juge dans l'intérêt public de faire traduire ce document dans cette langue.
(4) An applicant shall not be required to pay a fee for the translation of a record.	**(4)** Aucun droit n'est exigible du requérant pour la traduction d'un document.
Nunavut *Access to Information and Protection of Privacy Act,* S.N.W.T. 1994, c. 20 / *Loi sur l'accès à l'information et la protection de la vie privée,* L.T.N.-O. 1994, c. 20	
6. (1) To obtain access to a record, a person must make a written request to the public body that the person believes has custody or control of the record.	**6. (1)** La personne qui désire avoir accès à un document présente une demande écrite à l'organisme public de qui relève, selon elle, le document.
(2) The request must provide enough detail to enable the public body to identify the record.	**(2)** La demande est rédigée en des termes suffisamment précis pour permettre à l'organisme public de trouver le document.
(3) The applicant may ask for a copy of the record or ask to examine the record.	**(3)** Le requérant peut demander une copie du document ou demander d'examiner celui-ci.
7. (1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.	**7. (1)** Le responsable d'un organisme public doit fournir une aide raisonnable à tout requérant, et donner suite à chaque demande de façon ouverte, précise, complète et prompte.
(2) The head of a public body shall create a record for an applicant where	**(2)** Le responsable d'un organisme public prépare un document à l'intention du requérant dans le cas où, à la fois :
(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and	a) le document peut être préparé à partir d'un document informatisé qui relève de l'organisme public, en utilisant son système informatique et ses logiciels habituels, de même que les connaissances techniques à sa disposition;
(b) creating the record would not unreasonably interfere with the operations of the public body.	b) le fait de préparer le document n'entraverait pas de façon sérieuse le fonctionnement de l'organisme public.
(3) The head of a public body shall give access to a record in the Official Language of the Territories requested by an applicant where (a) the record already exists in the control of the public body in that language; or (b) the head of the public body considers it to be in the public interest to have a translation of the record prepared in that language.	**(3)** Le responsable d'un organisme public donne accès à un document dans la langue officielle des territoires indiquée par le requérant dans l'un ou l'autre des cas suivants : a) le document existe dans cette langue et relève de l'organisme public; b) le responsable de l'organisme public juge dans l'intérêt public de faire traduire ce document dans cette langue.
(4) An applicant shall not be required to pay a fee for the translation of a record.	**(4)** Aucun droit n'est exigible du requérant pour la traduction d'un document.

Yukon
Access to Information and Protection of Privacy Act, R.S.Y. 2002, c. 1 / *Loi sur l'Accès à l'information et la protection de la vie privée,* L.R.Y. 2002, c. 1

6. (1) To obtain access to a record, an applicant must make their request to the records manager.	**6(1)** Pour avoir accès à un document, il faut en faire la demande au gérant des documents.
(2) A request for access to a record may be made orally or in writing verified by the signature or mark of the applicant and must provide enough detail to identify the record. If the request is made orally the person who receives it must make a written record of the request and the request is not complete and does not have to be dealt with until its written form is verified by the signature or mark of the applicant.	**(2)** La demande de communication d'un document peut être faite oralement ou par écrit et doit être attestée par la signature ou la marque de l'auteur de la demande; elle est présentée en des termes suffisamment précis permettant d'identifier le document. Si la demande est faite oralement, la personne qui la reçoit doit la consigner par écrit, mais la demande n'est pas complète et n'a pas à être traitée tant que l'auteur de la demande n'y a pas apposé sa signature ou sa marque.
(3) The applicant may ask for a copy of the record or ask to examine the record.	**(3)** L'auteur de la demande peut demander d'examiner le document ou d'en obtenir copie.
7. The records manager must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately, and completely.	**7** Le gérant des documents fait tous les efforts raisonnables pour prêter assistance à l'auteur de la demande et pour lui fournir une réponse franche, précise et complète.
10. The public body that has the record in its custody or control must make every reasonable effort to assist the records manager and enable the records manager to respond to each applicant openly, accurately and completely.	**10** L'organisme public dont relève un document doit faire les efforts raisonnables pour prêter assistance au gérant des documents et pour permettre à ce dernier de fournir une réponse franche, précise et complète à toute personne qui présente une demande de communication.

Other Countries / Autres pays

Australia / Australie
Freedom of Information Act 1982 (Cth.)
(Loi de 1982 sur l'accès à l'information) [traduction non officielle]

11. (2) Subject to this Act, a person's right of access is not affected by:	**11.(2)** Sous réserve de la présente Loi, n'ont aucune incidence sur le droit d'accès :
(a) any reasons the person gives for seeking access; or	a) les motifs de la demande d'accès;
(b) the agency's or Minister's belief as to what are his or her reasons for seeking access.	b) la croyance de l'organisme ou du ministre quant au motif de la demande d'accès.
15 (1) Subject to section 15A, a person who wishes to obtain access to a document of an agency or an official document of a Minister may request access to the document.	**15(1)** Sous réserve de l'article 15A, quiconque le désire peut solliciter l'accès à un document d'un organisme ou à un document officiel d'un ministre.
(2) The request must:	**(2)** La demande doit :
(a) be in writing; and	a) être présentée par écrit;

(b) provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, to identify it; and

b) fournir les renseignements raisonnablement nécessaires sur le document pour permettre à un agent responsable de l'organisme ou au ministre de l'identifier;

(c) specify an address in Australia at which notices under this Act may be sent to the applicant; and

c) indiquer une adresse en Australie où les avis prévus par la présente Loi peuvent être envoyés au demandeur;

(d) be sent by post to the agency or Minister, or delivered to an officer of the agency or a member of the staff of the Minister, at the address of any central or regional office of the agency or Minister specified in a current telephone directory; and

d) être envoyée par la poste à l'organisme ou au ministre ou livrée à un agent de l'organisme ou un membre du personnel du ministre, à l'adresse d'un bureau central ou régional de l'organisme ou du ministre qu'indique un annuaire téléphonique à jour;

(e) be accompanied by the fee payable under the regulations in respect of the request.

e) être accompagnée du paiement des frais fixés par règlement.

(3) Where a person:

(a) wishes to make a request to an agency; or
(b) has made to an agency a request that does not comply with this section;

it is the duty of the agency to take reasonable steps to assist the person to make the request in a manner that complies with this section.

(3) Lorsqu'une personne désire présenter une demande à un organisme ou lui a présenté une demande non conforme au présent article, il incombe à l'organisme de prendre des mesures raisonnables pour aider la personne à présenter la demande d'une manière conforme au présent article.

(4) Where a person has directed to an agency a request that should have been directed to another agency or to a Minister, it is the duty of the first-mentioned agency to take reasonable steps to assist the person to direct the request to the appropriate agency or Minister.

(4) Lorsqu'une personne a transmis à un organisme une demande qui aurait dû être transmise à un autre organisme ou à un ministre, il incombe à l'organisme qui la reçoit de prendre des mesures raisonnables pour aider la personne à transmettre la demande au bon organisme ou ministre.

(5) On receiving a request, the agency or Minister must:

(5) Sur réception d'une demande, l'organisme ou le ministre doit :

(a) as soon as practicable but in any case not later than 14 days after the day on which the request is received by or on behalf of the agency or Minister, take all reasonable steps to enable the applicant to be notified that the request has been received; And

a) dès que possible, mais au plus tard 14 jours après réception de la demande par ou pour l'organisme ou le ministre, prendre toutes les mesures raisonnables pour faire en sorte que le demandeur soit avisé de la réception de la demande;

(b) as soon as practicable but in any case not later than the end of the period of 30 days after the day on which the request is received by or on behalf of the agency or Minister, take all reasonable steps to enable the applicant to be notified of a decision on the request (including a decision under section 21 to defer the provision of access to a document).

b) dès que possible, mais au plus tard à la fin de la période de 30 jours suivant la réception de la demande par ou pour l'organisme ou le ministre, prendre toutes les mesures raisonnables pour que le demandeur soit avisé d'une décision relative à la demande (y compris la décision, fondée sur l'article 21, de suspendre l'accès à un document).

(6) Where, in relation to a request, the agency or Minister determines in writing that the requirements of section 26A, 27 or 27A make it appropriate to extend the period referred to in paragraph (5)(b):

(a) the period is to be taken to be extended by a further period of 30 days; and

(b) the agency or Minister must, as soon as practicable, inform the applicant that the period has been so extended.

16 (1) Where a request is made to an agency for access to a document and:
(a) the document is not in the possession of that agency but is, to the knowledge of that agency, in the possession of another agency; or

(b) the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made; the agency to which the request is made may, with the agreement of the other agency, transfer the request to the other agency.
(…)

(4) Where a request is transferred to an agency in accordance with this section, the agency making the transfer shall inform the person making the request accordingly and, if it is necessary to do so in order to enable the other agency to deal with the request, send the document to the other agency.

(5) Where a request is transferred to an agency in accordance with this section, the request is to be taken to be a request:

(a) made to the agency for access to the document that is the subject of the transfer; and
(b) received by the agency at the time at which it was first received by an agency.

(6) In this section, agency includes a Minister.

24 (1) The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request:

(a) in the case of an agency—would substantially and unreasonably divert the resources of the agency

(6) Lorsque, à l'égard d'une demande, l'organisme ou le ministre indique par écrit que, selon les exigences des articles 26A, 27 ou 27A, il est approprié de prolonger la période mentionnée à l'alinéa (5)b) :

a) la période est réputée prolongée d'une période supplémentaire de 30 jours;

b) l'organisme ou le ministre doit, dès que possible, en informer le demandeur.

16(1) Lorsque l'organisme se fait demander l'accès à un document et que le document n'est pas en sa possession mais est, à la connaissance de cet organisme, en possession d'un autre organisme ou que l'objet du document est plus étroitement lié aux fonctions d'un autre organisme qu'à celles de l'organisme visé par la demande, ce dernier peut, sur consentement de l'autre organisme, transférer la demande à celui-ci.
(…)

(4) Lorsqu'une demande est transférée à un organisme conformément au présent article, l'organisme effectuant le transfert en informe le demandeur et, si cela est nécessaire pour que l'autre organisme puisse examiner la demande, lui envoie le document.

(5) Lorsqu'une demande est transférée à un organisme conformément au présent article, elle doit être interprétée comme une demande :

a) sollicitant l'accès au document faisant l'objet du transfert auprès de cet organisme;
b) reçue par l'organisme à sa réception par le premier organisme.

(6) Dans le présent article, le terme « organisme » englobe un ministre.

24(1) L'organisme ou le ministre examinant une demande peut refuser d'accorder l'accès aux documents visés sans enclencher le processus de demande s'il estime que le travail que comporte le traitement de la demande :

a) dans le cas d'un organisme – entraînerait la réaffectation déraisonnable de ressources

from its other operations; or	considérables consacrées à d'autres activités de l'organisme;
(b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions.	b) dans le cas d'un ministre – entraverait déraisonnablement et considérablement l'exercice des fonctions du ministre.
(…)	(…)
(4) In deciding whether to refuse, under subsection (1), to grant access to documents, an agency or Minister must not have regard to:	**(4)** Lorsqu'il décide s'il refuse, en vertu du paragraphe (1), d'accorder l'accès aux documents, l'organisme ou le ministre ne peut tenir compte des facteurs suivants :
(a) any reasons that the person who requests access gives for requesting access; or	a) les motifs invoqués par le demandeur à l'appui de sa demande d'accès;
(b) the agency's or Minister's belief as to what are his or her reasons for requesting access.	b) la croyance par l'organisme ou le ministre des motifs de la demande d'accès.
(6) An agency or Minister must not refuse to grant access to a document:	**(6)** L'organisme ou le ministre ne peut refuser l'accès à un document :
(a) on the ground that the request for the document does not comply with paragraph 15(2)(b); or	a) au motif que la demande de document n'est pas conforme à l'alinéa 15(2)b);
(b) under subsection (1);	b) en se fondant sur le paragraphe (1).
unless the agency or Minister has:	L'organisme ou le ministre peut refuser l'accès dans les cas suivants :
(c) given the applicant a written notice: (i) stating an intention to refuse access; and (ii) identifying an officer of the agency or a member of staff of the Minister with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and (d) given the applicant a reasonable opportunity so to consult; and (e) as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.	c) il a donné un avis écrit au demandeur : (i) indiquant son intention de refuser l'accès; (ii) donnant le nom d'un agent de l'organisme ou d'un employé du ministre que le demandeur peut consulter en vue de présenter la demande d'une forme de nature à écarter le motif de refus; d) il a donné au demandeur une occasion raisonnable de consulter quelqu'un; e) dans la mesure où c'est raisonnablement possible de la faire, il a fourni au demandeur des renseignements l'aidant à présenter la demande sous une telle forme.
New Zealand / Nouvelle-Zélande *Official Information Act 1982* (N.Z.), 1982/156 (*Loi de 1982 sur les renseignements officiels*) *[traduction non officielle]*	
12. (…) (2) The official information requested shall be specified with due particularity in the request.	**12.** (…) (2) La demande doit énoncer avec suffisamment de précision les renseignements officiels sollicités
13. It is the duty of every Department, Minister of the Crown, and organisation to give reasonable assistance to a person, who— (a) Wishes to make a request in accordance	**13.** Il incombe à chaque ministère, ministre de la Couronne et organisme d'aider raisonnablement la personne qui souhaite présenter une demande conformément à l'article 12 de la présente Loi, qui

with section 12 of this Act; or

(b) In making a request under section 12 of this Act, has not made that request in accordance with that section; or

(c) Has not made his request to the appropriate Department or Minister of the Crown or organisation or local authority,—

to make a request in a manner that is in accordance with that section or to direct his request to the appropriate Department or Minister of the Crown or organisation or local authority.

a présenté une demande fondée sur l'article 12 de la présente Loi mais de manière non conforme à celui-ci ou qui n'a pas présenté sa demande au Ministère, au ministre de la Couronne, à l'organisme ou à l'autorité locale approprié à présenter une demande conforme à cet article ou de renvoyer la demande au Ministère, ministre de la Couronne, organisme ou autorité locale approprié.

15A. (1) Where a request in accordance with section 12 of this Act is made or transferred to a Department or Minister of the Crown or organisation, the permanent head of that Department or an officer or employee of that Department authorised by that permanent head or that Minister of the Crown or that organisation may extend the time limit set out in section 14 or section 15(1) of this Act in respect of the request if—

(a) The request is for a large quantity of official information or necessitates a search through a large quantity of information and meeting the original time limit would unreasonably interfere with the operations of the Department or the Minister of the Crown or the organisation; or

(b) Consultations necessary to make a decision on the request are such that a proper response to the request cannot reasonably be made within the original time limit.

15A.(1) Lorsqu'une demande présentée conformément à l'article 12 de la présente Loi est faite ou transférée à un ministère, un ministre de la Couronne ou un organisme, le responsable de ce ministère ou l'agent ou l'employé dûment autorisé par ce responsable, ce ministre de la Couronne ou cet organisme, peut proroger le délai prescrit à l'article 14 ou au paragraphe 15(1) de la présente Loi à l'égard d'une demande dans les cas suivants :

a) La demande vise un grand nombre de renseignements officiels ou nécessite une recherche au cœur d'un grand nombre de renseignements et le respect du délai initial entraverait de façon déraisonnable le fonctionnement du ministère, les activités du ministre de la Couronne ou le fonctionnement de l'organisme;

b) Les consultations nécessaires pour la prise d'une décision sur la demande sont telles qu'on ne peut répondre à la demande de façon appropriée et raisonnable dans le délai initial;

18A (1) In deciding whether to refuse a request under section 18(f), the Department, Minister of the Crown, or organisation must consider whether doing either or both of the following would enable the request to be granted:

(a) fixing a charge under section 15:

(b) extending the time limit under section 15A.

(2) For the purposes of refusing a request under section 18(f), the Department, Minister of the Crown, or organisation may treat as a single request 2 or more requests from the same person—

(a) that are about the same subject matter or about similar subject matters; and

(b) that are received simultaneously or in short succession.

18A(1) Pour décider s'il refusera une demande en vertu de l'alinéa 18f), le ministère, le ministre de la Couronne ou l'organisme doit déterminer si l'une des mesures suivantes permettrait l'acceptation de la demande :

a) l'établissement de frais en vertu de l'article 15;

b) la prorogation du délai prescrit par l'article 15A.

(2) Aux fins du refus d'une demande en vertu de l'alinéa 18f), le ministère, le ministre de la Couronne ou l'organisme peut considérer comme une seule demande deux ou plusieurs demandes faites par la même personne et qui :

a) portent sur le même objet ou sur des objets similaires;

b) sont reçues simultanément ou presque.

18B If a request is likely to be refused under section 18(e) or (f), the Department, Minister of the Crown, or organisation must, before that request is refused, consider whether consulting with the person who made the request would assist that person to make the request in a form that would remove the reason for the refusal.	**18B** S'il est probable qu'une demande sera refusée en vertu de l'alinéa 18e) ou f), le ministère, le ministre de la Couronne ou l'organisme doit, avant de la refuser, déterminer si la consultation de son auteur l'aiderait à la présenter d'une manière qui éliminerait le motif de refus.
United Kingdom / Royaume-Uni *Freedom of Information Act 2000* (U.K.), 2000, c. 36 (*Loi de 2000 sur l'accès à l'information*) *[traduction non officielle]*	
1(1) Any person making a request for information to a public authority is entitled—	**1(1)** La personne qui présente une demande d'information à une autorité publique a le droit :
(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and	a) de recevoir de l'autorité publique un avis écrit lui indiquant si elle possède les renseignements décrits dans la demande;
(b) if that is the case, to have that information communicated to him.	b) de se faire communiquer ces renseignements si tel est le cas.
(3) Where a public authority— (a) reasonably requires further information in order to identify and locate the information requested, and (b) has informed the applicant of that requirement, the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.	**(3)** L'autorité publique n'est pas tenue de se conformer au paragraphe (1) avant d'avoir reçu l'information supplémentaire qu'elle a raisonnablement sollicitée pour identifier et repérer les renseignements demandés et informé le demandeur de cette exigence.
8.(1) In this Act any reference to a "request for information" is a reference to such a request which— (…) (c) describes the information requested.	**8.(1)** Dans la présente Loi, la mention « demande d'information » fait référence à une demande qui : (…) c) décrit les renseignements sollicités.
16. (1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.	**16.(1)** Il incombe à l'autorité publique de fournir conseils et assistance, dans les limites du raisonnable, aux personnes qui prévoient lui présenter, ou lui ont présenté, des demandes d'information.
(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.	**(2)** En ce qui concerne les conseils ou l'assistance fournis dans un cas, l'autorité publique qui se conforme au Code de pratique visé à l'article 45 est présumée se conformer à l'obligation que lui impose le paragraphe (1) relativement à ce cas.
45 (1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I.	**45 (1)** Le secrétaire d'État publie, et peut modifier à l'occasion, un code de pratique guidant les autorités publiques quant aux pratiques qui devraient, selon lui, être suivies dans l'exercice des fonctions des autorités publiques selon la partie I.

(2) The code of practice must, in particular, include provision relating to—	**(2)** Le Code de pratique doit notamment comporter une disposition concernant :
(a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information to them, (…)	a) les conseils et l'assistance que fournissent les autorités publiques aux personnes qui prévoient leur présenter, ou leur ont présenté, des demandes d'information, (…)
(4) Before issuing or revising any code under this section, the Secretary of State shall consult the Commissioner.	**(4)** Le secrétaire d'État consulte le Commissaire avant de publier ou de modifier le code visé au présent article.
(5) The Secretary of State shall lay before each House of Parliament any code or revised code made under this section.	**(5)** Le secrétaire d'État dépose devant chaque chambre du Parlement le code ou le code modifié publié en vertu du présent article.
47.(1) t shall be the duty of the Commissioner to promote the following of good practice by public authorities and, in particular, so to perform his functions under this Act as to promote the observance by public authorities of—	**47.(1)** Le Commissaire doit promouvoir l'observation de bonnes pratiques par les autorités publiques et, en particulier, exercer les fonctions que lui attribue la Loi de manière à promouvoir le respect par les autorités publiques :
(a) the requirements of this Act, and	a) des exigences de la présente Loi;
(b) the provisions of the codes of practice under sections 45 and 46.	b) des dispositions des codes de pratique visés aux articles 45 et 46.
50. (1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.	**50. (1)** Toute personne (appelé le « plaignant » dans le présent article) peut solliciter du Commissaire une décision indiquant si, sur une question donnée, une demande d'information présentée par le plaignant à une autorité publique a été traitée conformément aux exigences de la partie I.
United States / États-Unis *Freedom of Information Act*, 5 U.S.C. § 552 (1966) (*Loi sur l'accès à l'information*) *[traduction non officielle]*	
(a) Each agency shall make available to the public information as follows:	**a) L'organisme met à la disposition du public les renseignements suivants :**
(…) **(3)(A)** Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.	(…) **(3) (A)** Sauf en ce qui a trait aux documents fournis en vertu des alinéas (1) et (2) du présent paragraphe et sous réserve du sous-alinéa (E), l'organisme met rapidement à la disposition de toute personne les documents visés par une demande qui (i) les décrit de façon raisonnable et (ii) est faite conformément aux règles publiées indiquant le moment, l'endroit, les frais (s'il y a lieu) et les procédures à suivre.

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request. (…)

(4) (B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. In addition to any other matters to which a court accords substantial weight, a court shall accord substantial weight to an affidavit of an agency concerning the agency's determination as to technical feasibility under paragraph (2)(C) and subsection (b) and reproducibility under paragraph (3)(B).

(B) Lorsqu'elle met un document à la disposition d'une personne en vertu de cet alinéa, l'organisme le fournit sous la forme ou le format demandé par la personne s'il peut facilement être reproduit sous cette forme ou ce format. L'organisme fait des efforts raisonnables pour conserver ses documents sous une forme ou un format permettant la reproduction pour l'application du présent article.

(C) Lorsqu'il répond en vertu du présent alinéa à une demande de documents, l'organisme fait des efforts raisonnables pour les chercher sous forme ou format électronique, sauf lorsque ces efforts entraveraient considérablement le fonctionnement de son système d'information automatisé.

(D) Pour l'application du présent alinéa, le terme « recherche » signifie examiner, à la main ou à l'informatique, les documents de l'organisme afin de repérer ceux qui sont pertinents pour la demande (…)

(4) (B) En matière de plainte, la Cour de district des États-Unis du district où le plaignant réside ou a sa principale place d'affaires, de celui où les documents de l'organisme sont situés ou du district de Columbia a compétence pour interdire à l'organisme de retenir les documents et pour lui ordonner de produire tout document qu'il refuse indûment de communiquer au plaignant. Dans un tel cas, la Cour entend l'affaire de novo et peut examiner le contenu des documents de l'organisme à huis clos pour déterminer si tout ou partie de ces documents peuvent être retenus en vertu de l'une des exemptions énoncées au paragraphe b) du présent article, et il incombe à l'organisme de démontrer le bien-fondé de sa décision. La Cour doit accorder un poids considérable non seulement aux autres éléments habituels, mais aussi à l'affidavit de l'organisme concernant la faisabilité technique en vertu de l'alinéa (2)(C) et du paragraphe b) et de la possibilité de reproduction en vertu de l'alinéa (3)(B).