

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 245-1998
July 7, 1998**

INQUIRY RE: The British Columbia Institute of Technology's failure to assist in response to requests for access to records

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on April 27, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry initially arose out of a request for review of the British Columbia Institute of Technology's (BCIT) failure to respond to requests for access, made by a representative of the BCIT Faculty and Staff Association (the applicant), to records in the custody or under the control of BCIT within the time period established under section 7 of the Act. The inquiry evolved into a consideration of BCIT's failure to assist the applicant under section 6(1) of the Act.

2. Documentation of the inquiry process

On May 5, 1997 the applicant requested the following records:

1. (a) "all contracts and agreements between BCIT and the Colegio Tecnico Escondida (Escondida Technical College in Chile) including contracts and agreements between these parties and third parties;"

(b) "all contracts and agreements to provide services or goods to BCIT or on BCIT's behalf in relation to work at the Escondida Technical College including contracts or agreements with sub-contractors and records of work performed;"

(c) “all documents setting out the corporate relationship between BCIT and TransTech Interactive Training Inc.;

(d) “all documents setting out the corporate relationship between BCIT and TTA Technology Training Associates Ltd.;

(e) “all contracts and agreements between BCIT and TransTech Interactive Training Inc. from January 1, 1996 to present and copies of all records of all work performed by TransTech for BCIT during the same period.”

On August 11, 1997 the applicant requested the following records:

2. (a) “any agreement related to the provision of e-mail and Internet access to BCIT students;

(b) “any agreement related to the provision of Lotus Notes to BCIT;”

(c) “any agreement related to the provision of IBM Learning Space to BCIT;”
and

(d) “any documents or agreements related to the provision of Interpreting Services Facilitator, including but not limited to the contracts of employment, funding letters, job descriptions, and reports.”

On September 15, 1997 BCIT responded to item (d) in request 2. On January 26, 1998 the applicant wrote to the Office of the Information and Privacy Commissioner (the Office) requesting a review of the deemed refusals by BCIT to respond to the requests dated May 5, 1997 (1 (a) - (e)) and August 11, 1997 (2 (a) - (d)). The ninety-day statutory period expired on April 27, 1998.

On April 22, 1998 BCIT delivered to the applicant a set of records which it believed responded to the applicant’s requests in full. On April 24, 1998 the applicant replied to the public body’s response of April 22, 1998. The applicant agreed that BCIT had responded adequately to request 2(d) on September 15, 1997 but stated that BCIT had not adequately responded to the rest of its requests on April 24, 1998, including a failure to respond to item (c) in request 2.

3. Issues under review and the burden of proof

The issue under review is the failure of BCIT to assist the applicant under section 6(1) of the Act, particularly with respect to BCIT’s exercise of its duties under sections 7 and 8. Initially, there was also an issue around BCIT’s deemed refusal to respond, under section 53(3). However, as BCIT disclosed records in response to the applicant’s requests, both in September 1997 and during the inquiry process, I do not need to deal with this issue at this time.

The relevant sections of the Act under review are as follows:

Duty to assist applicants

- 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.

Time limit for responding

7. The head of a public body must respond not later than 30 days after a request is received unless
- (a) the time limit is extended under section 10, or
 - (b) the request has been transferred under section 11 to another public body.

Contents of response

- 8(1) In a response under section 7, the head of the public body must tell the applicant
- (a) whether or not the applicant is entitled to access to the record or to part of the record,
 - (b) if the applicant is entitled to access, where, when and how access will be given, and
 - (c) if access to the record or to part of the record is refused,
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
 - (ii) 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 refusal, and
 - (iii) that the applicant may ask for a review under section 53 or 63.

How to ask for a review

53(3) The failure of the head of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record, but the time limit in subsection (2) (a) for delivering a request for review does not apply.

Section 57 is silent with respect to a request for review about the duty to assist under section 6 of the Act. However, as I decided in Order No. 110-1996, June 5, 1996, the burden of proof is on the public body in such circumstances. The burden is also on BCIT to show whether or not it met its duty under section 6(1) to respond within the time frames set out in section 7. (See Order No. 233-1998, April 30, 1998)

Section 57 is silent with respect to a request for review about the adequacy of a response under section eight. It is my view that the burden of proof is on the public body to demonstrate that its response under section 8 is adequate, because the public body is in the best position to provide information concerning these issues.

Under section 53(3) of the Act, the failure to respond in time is considered a decision to refuse access. Under section 57(1), where access to information in a record has been refused, it is up to the public body, in this case BCIT, to prove that the applicant has no right of access to the record or part of the record. However, for the reasons noted at the beginning of this section, I do not need to deal with this issue.

4. The records in dispute

As this inquiry is about the duty to assist, there are no records in dispute at this stage.

5. The applicant's case

The applicant is a labour union representing technology instructors and educational support staff at BCIT. A grievance officer representing the applicant made at least thirteen access requests to BCIT in 1997 covering a range of issues, but especially BCIT's relationship with IBM Canada, Escondido Technical College, and Internet service providers. (Submission of the Applicant, table of requests) The applicant's essential problem is that there have been substantial delays in responding to its requests. It received most of the records related to its requests only after the initiation of this inquiry.

The applicant also submits that BCIT has failed to provide access to requested records, has failed to provide any response to certain requests within the statutory time limits, has failed to assist the applicant, and has failed to provide information about whether access will be granted and on what basis. (Submission of the Applicant, pp. 1-2)

6. British Columbia Institute of Technology's case

BCIT's initial submission primarily commented on the Portfolio Officer's Fact Report in this case by indicating to my office that it had provided the applicant with some records in September 1997, that various other records would be delivered to the applicant within two days, that it would not disclose others, and that still other records did not exist.

7. Discussion

As noted above, BCIT has now responded to most parts of the applicant's requests. The applicant wishes me to order the production of the other records (perhaps additional ones) and "assume responsibility for their severance." However, there is an established procedure under the Act for the applicant to challenge, through my Office, the adequacy of responses to requests for review and any severing that has occurred. Such matters are not properly before me in this inquiry, which, as noted above, deals with the duty to assist applicants.

It is not clear on the basis of the evidence before me if BCIT provided the applicant with a response letter with the records. I agree with the applicant that there is an obligation on BCIT to indicate the sections of the Act that it has relied on, either to deny access to a record or to make severances. I cannot emphasize too strongly that there is an obligation on BCIT, not my Office, to take the initial steps in this regard, especially on the basis of section 6 of the Act.

In summary, BCIT has a duty under the Act to:

1. make every reasonable effort to assist applicants (section 6);
2. meet time limits for responding (section 7);
3. explain why records are not being disclosed and the sections of the Act relied on for severances (section 8).

The record of this inquiry indicates that BCIT has met almost none of its obligations to the applicant as outlined above. Thus the response that it has "replied in full" to the requests is clearly incorrect.

8. Order

I find that the British Columbia Institute of Technology has not fulfilled its duties to the applicant under sections 6, 7, and 8 of the Act in respect of the applicant's requests.

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section.

Under section 58(3)(a) of the Act, I require BCIT to perform its duties under section 8 of the Act by providing the applicant with a decision letter which fulfils the requirements of section 8(1) of the Act, including an itemized explanation of whether or not the applicant is entitled to have access to the records or parts of records it requested, a description of any applicable exceptions to disclosure, and a statement informing the applicant of its right to request a review of that response by my Office.

Under section 58(4) of the Act, I require BCIT to issue the decision letter described above and provide me with a copy of that decision letter within 14 days of the date of this Order.

David H. Flaherty
Commissioner

July 7, 1998