OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

BY FAX

May 10, 2002

Randy Christensen **FAX: 604-685-7813**
Sierra Legal Defence Fund
214 –131 Water Street
Vancouver, BC V6B 4M3

Martin Powell **FAX: 011-44-20-7354-7961**
Environmental Investigation Agency Ltd.
69-85 Old Street
London, UK EC1V 9HX

Jeffrey Loenen **FAX: 250-356-9154**
Ministry of Attorney General
Legal Services Branch
P.O. Box 9280
Stn. Provincial Government
Victoria, BC V8W 9J7

Terrence L. Robertson, Q.C. **FAX: 604-669-9385**
Harper Grey Easton
3100 – 650 West Georgia Street
Vancouver, BC V6B 4P7

Ministry of Water, Land & Air Protection ("Ministry") – Order 01-52 – OIPC File Nos. 11174 & 11322

1.0 BACKGROUND

On December 3, 2001, I issued Order 01-52 under the *Freedom of Information and Protection of Privacy Act* ("Act"). On January 2, 2002, the Ministry and the Ministry of Attorney General filed a petition for judicial review of Order 01-52. On April 16, 2002, another petition for judicial review was filed by the Guide Outfitters Association of B.C. ("Association") and two of its individual members, Peter Klaui and Brian Swift. (I refer below to these three petitioners, collectively, as the "Outfitters".) Both petitions for judicial review are scheduled to be heard together, for four days, during the week of May 13, 2002.

None of the Outfitters was a party in the inquiry under the Act which led to Order 01-52. The Association, however, did provide an affidavit in support of the Ministry's case in the inquiry, through the Association's general manager, Dale Drown. The Ministry submitted that affidavit in support of its position that access should be refused to the disputed information, *i.e.*, certain grizzly bear kill location data.

On May 3, 2002, I received from Terrence Robertson, as counsel for the Outfitters, a letter asking for a rehearing of the inquiry that led to Order 01-52. The request was shown as having been copied to my counsel (Susan Ross), to counsel for the public body (Jeffrey Loenen) and to one of the access applicants involved in the inquiry, Raincoast Conservation Society ("Raincoast"). On the same day I received that letter, I faxed it to the other access applicant, the Environmental Investigation Agency ("EIA"), in London, England. Although I understand the EIA has not entered appearances in the two judicial review proceedings, it is one of the two access applicants involved in Order 01-52. It was therefore a party, and did participate, in the inquiry that led to the order.

2.0 REQUEST FOR REHEARING

Terrence Robertson's May 3, 2002 letter includes the following passage:

> The Guide Outfitters' position is that they are individuals with interests which would be directly affected by Order 01-52, and as such, they should have been afforded the opportunity to make submissions in respect of that decision. It will argued [*sic*] at the hearing of the Petitions that the lack of notice by the Information and Privacy Commissioner ("the Commissioner") amounted to procedural unfairness and we would be seeking an Order from the Court to set aside Order 01-52, with directions to the Commissioner to conduct an Inquiry *de novo*, taking into account evidence and submissions of the Guide Outfitters.
>
> We were however alerted by Susan E. Ross, counsel for the Commissioner, that there may be opportunity for the Commissioner to reopen and reconsider its decision in respect of Order 01-52, given this new information. Following the adjournment application on April 19, 2002, Ms. Ross provided us with the decision *Zutter v. British Columbia (Council of Human Rights)* [1995] B.C.J. No. 626 (BCCA), which found that an administrative tribunal has equitable jurisdiction to reconsider to provide relief which would otherwise be available on appeal or judicial review.
>
> In the circumstances, we respectfully request that the Commissioner exercise its discretion to conduct a rehearing of the Inquiry resulting in Order 01-52, with consideration given to further submissions and evidence of the Guide Outfitters. We will be providing you by courier with our Petition and supporting affidavits of Mr. Klaui, Mr. Swift, and Mr. Dale Drown, the general manager of the Guide Outfitters Association of British Columbia. These materials set out the basis for the Guide Outfitters' objections to the release of the disputed records.
>
> Obviously there is some urgency with respect to this request given that the hearing of the petitions is set for May 13, 2002. We would kindly ask that the request by considered at your earlier opportunity.

The law seems clear enough that if a person who is required to be heard has not been heard, there is authority to re-open a matter without waiting for a Court order setting it aside or declaring it invalid. See *Trisec Equities Ltd.* v. *Burnaby-New Westminster Area Assessor* (1983), 45 B.C.L.R. 258 (S.C.); *Chandler* v. *Alberta Assn. of Architects*, [1989] 2 S.C.R. 848; and *Posluns* v. *Toronto Stock Exchange*, [1968] S.C.R. 330.

I nonetheless had some concerns about how to proceed in relation to the request for rehearing. First, I was concerned whether it was appropriate for me to consider a request for rehearing in the face of judicial reviews of Order 01-52 which were not only pending, but were scheduled to be heard imminently, beginning on May 13, 2002. Second, was it appropriate for me to consider a request for rehearing from persons who were not parties to the inquiry? Where there is a contested question, in the judicial review proceedings, as to whether the persons requesting the rehearing (here, the Outfitters) were required to be notified or extended an opportunity to participate in the inquiry at all – and this very issue is also the foundation for their petition for judicial review of Order 01-52 – was there any reason for the Court's determination of that question to be delayed or deferred to accommodate my reconsideration of the question?

In view of these concerns, I replied to the rehearing request the day I received it. My letter, addressed to counsel and to Martin Powell at the EIA, asked for their immediate input in particular, but not exclusively, on the following two points:

- Is it permissible, possible, necessary, appropriate or desirable for me to consider the request in Mr. Robertson's letter given the pending judicial reviews?

- The request for "a rehearing of the Inquiry resulting in Order 01-52" appears to be contingent upon a determination of whether Mr. Robertson's clients should, in law, have been afforded an opportunity to participate in the inquiry that was denied to them. Since issues of notice and participatory rights in relation to the inquiry are distinct from and preliminary to proceeding to reopen and rehear the inquiry, should the preliminary question not be dealt with first?

3.0 SUBMISSIONS

Late on May 6, 2002, I received responses from each of Terrence Robertson, Jeffrey Loenen and Randy Christensen. Mr. Robertson also couriered to me, as he had said he intended to do, copies of his clients' petition for judicial review of Order 01-52 and the three affidavits filed in support of that petition. On the morning of May 8, 2002, I also received a reply from Mr. Robertson to Mr. Christensen's response, and a response from the EIA. Late on May 8, 2002, I received a reply from Mr. Loenen to Mr. Christensen's response. Still later in the day, I received a reply from Mr. Christensen to Mr. Loenen's reply. I have outlined below the various positions communicated to me.

3.1 Ministry's Response – Jeffrey Loenen, on behalf of the Ministry, says the following:

> The Public Body submits that the only effect of the pending judicial review vis a vis the Commissioner's consideration of the Guide Outfitter's request is that the Guide Outfitter's request should be dealt with as efficiently and promptly as fairness would permit.
>
> …

> The Public Body submits that the question of the Commissioner's jurisdiction to conduct a rehearing in relation to Order 01-52 is the question which should be "dealt with first". However, it is submitted that although this question requires a consideration of the reason for the re-opening, the Commissioner's jurisdiction to conduct a re-hearing is not contingent on the Guide Outfitters establishing that they should, in law, have been afforded an opportunity to participate in the inquiry.
>
> The courts have been willing to imply a power of re-hearing in circumstances where a party has not been adequately heard by the tribunal, even though the circumstances may not amount to a breach of the duty of fairness (see Brown & Evans, *Judicial Review of Administrative Action in Canada*, in para. 12:6431; *Zutter* v. *B.C. (Council of Human Rights)*, paragraph 22, 23 (BCCA).
>
> Accordingly, it is submitted that the question of the Commissioner's jurisdiction to conduct a re-hearing is a question which should be dealt with first. However, this question depends on the Guide Outfitters actually establishing a breach of the duty of fairness in the same manner that they would be required to in order to succeed in their judicial review proceedings. For this reason alone it is important that the Commissioner consider and issue a decision with respect to the Guide Outfitters request for a re-hearing irrespective of the judicial review proceedings.

3.2 Outfitters' Response – Terrence Robertson has provided a slightly longer response. I will quote from it at some length. He says, on the basis of the *Zutter* decision, there is authority for the proposition that I can re-open an inquiry where it is in the interests of justice and fairness to do so. With respect to whether or how I should address the request for rehearing in the face of the pending judicial reviews, he says the following:

> Possible
>
> The concept of possibility presumably relates to time constraints. If a decision is not possible prior to the judicial review proceedings scheduled for May 13, 2002, my clients will have no alternative but to make an application to adjourn the hearing of the Petitioner.
>
> On April 19, 2002, the Ministry or Water, Land and Air protection and my clients applied for adjournment of the Ministry's application for Judicial review. The application was opposed by your counsel and counsel for one of the Applicants, Raincoast Conservation Society. The application for adjournment was predicated on the advisability of joinder of our application for judicial review to the Ministry application. Following the adjournment application, where both matters were adjourned to May 13, 2002, Mr. Randy Christensen, counsel for Raincoast, advised of his client's position that the Guide Outfitters had not exhausted all remedies available to them (i.e. an application to the Commission [*sic*] for reconsideration on the grounds of lack of procedural fairness). Mr. Christensen indicated that he would inform me of his position regarding exhaustion of internal remedies forthwith. Unfortunately we did not hear from Mr. Christensen who left shortly after on vacation and as a result we felt constrained to bring on our application for reconsideration.
>
> Appropriate or Desirable
>
> The remedy sought in our judicial review application is that the matter be referred to the Commissioner for reconsideration. Considerable court resources and expense will be

> involved in the four day hearing with four counsel representing the parties. It is submitted that it would be desirable and appropriate for the Commissioner to exercise his discretion if he has the jurisdiction to do so in order to avoid that expense and utilization of valuable judicial resources.

Mr. Robertson addresses the second point on which I specifically sought input as follows:

> In response to the second question, section 54 of the *Freedom of Information and Protection of Privacy Act* provides that the Commissioner must give a copy of the request for a review to the head of the public body concerned and any other person that the commissioner considers appropriate.
>
> It is our submission that given the affidavits filed by the Ministry and Dale Drown of the Guide Outfitters Association of British Columbia, the Commissioner should have been aware that the Guide Outfitters were persons directly and adversely affected by the outcome of the Inquiry. It [*sic*] those circumstances, it is our position that it was mandatory to provide notice and participatory status to the Guide Outfitters.
>
> We agree that the issues of notice and participatory rights in relation to the Inquiry are preliminary to the reopening and rehearing of the Inquiry. We further agree that the preliminary question should be dealt with first. We are of the view however that if the Commissioner finds that our clients were not given notice and were entitled to participate, it logically follows that the Commissioner would exercise its discretion to reopen and rehear the Inquiry.

He concludes by asserting that the denial of procedural fairness to his clients – consisting of their not having been given notice and an opportunity to be heard – constitutes an exceptional circumstance under which I should exercise discretion to re-open and reconsider, "rather than putting the parties to the expense of judicial review". He concludes, finally, by offering an implied warning, of sorts, against my unduly fettering the discretion said to be involved.

3.3 Raincoast's Response – Randy Christensen, on behalf of Raincoast, was able to respond to my May 3, 2002 letter on May 7, 2002. He says I have discretionary power to consider the request to re-open Order 01-52 if I consider that action appropriate. He emphasizes the consequences of prejudicial delay to his client as follows:

> Re-opening Order 01-52 would by necessity delay the judicial review proceedings scheduled in this matter, which will engender even further delay. Given the stage of public debate on this issue, any further delay of the 'sic' Raincoast's access request would be entirely at odds with the purposes of the Act. Therefore, Raincoast respectfully submits that any exercise of the Commissioner's discretion must ensure that no further delay is engendered.

Mr. Christensen also says the request to re-open should not be acceded to because it has not been made in good faith. He says the exhaustion of remedies issue is effectively being held up by Mr. Robertson's clients as a pretext for delay and their request for a rehearing is also merely calculated to delay the judicial review proceedings. Mr. Christensen also states that the Association's actual notice and participation in the inquiry should mitigate against my exercising discretion to re-open Order 01-52.

Mr. Christensen states that the question of Mr. Robertson's clients' right to notice and participation in the inquiry should be determined first, and on the basis of the information they have already submitted to me. Although his submission on this point is somewhat more detailed, the essential position taken is that "the request and materials submitted by the Guide Outfitters do not form a sufficient basis on which to re-open Order 01-52 and its request should be rejected on the basis that a *prima facie case* has not been established".

3.4 Outfitters' Reply – Terrence Robertson disputes as ill-conceived any suggestion that his clients' request for rehearing is, by design, aimed at needlessly dragging out the process for resolving the judicial review challenges to Order 01-52. He says he was unaware, before April 19, 2002, that I might have jurisdiction to re-open because Order 01-52 was made without giving necessary parties an opportunity to be heard. He says the following:

> It is much preferable to my clients to have the re-opening occur without judicial intervention and my instructions are if your decision is not available by Monday, May 13, 2002 to bring on an application for an adjournment of our petition pending your decision. If a favourable decision to re-open is received prior to that time our application for judicial review will be moot. If a decision is made not to re-open we will simply proceed with the judicial review application.

3.5 EIA's Response – Martin Powell, speaking for the EIA, opposes a rehearing of the inquiry. He offers a number of reasons why the Outfitters have no interest in the matter that would require them to be given an opportunity to be heard and why, in any event, they would not be harmed by the release of the requested kill location information. He also emphasizes, as did Randy Christensen on behalf of Raincoast, the risk that delay in the process for resolving the challenges to Order 01-52 will prejudice the EIA's ability to participate in ongoing forums concerning grizzly bear hunting. He says the following:

> In particular, the Chair of the latest BC Government appointed Grizzly Bear Scientific Advisory Panel has expressed an interest in receiving the analysis of the kill location data that we propose having done, even going so far as to advise on areas to look at in detail (email correspondence available).
>
> Given the weight that the new panel's report will carry in BC for public opinion and political credibility of the government on this issue, for the Canadian Federal Government's position, and that the European Union has also said it will base its final on whether to ban grizzly bear trophy imports on the panel's findings, it is of paramount importance that independent scientists have the information and time to analyze and submit it to the panel in time for its inclusion in the published report.
>
> However, the panel set a deadline of April 4 for submission of information to them from interested parties with a view to releasing their completed report in December. EIA believes that given the Chair's interest in the issue, they might be willing to extend the deadline a little, but given the sheer quantity of the data involved and the time it will take to enter it and complete an analysis, further delay such as that a rehearing of the inquiry would entail will certainly take us beyond that window of opportunity.

3.6 Ministry's Reply – Jeffrey Loenen takes great exception to the factual correctness of the assertions by Raincoast – and presumably those of the EIA – that analyses of the disputed kill location data by the access applicants is urgently needed and is desired by a provincial government grizzly bear scientific panel that is in the midst of crucial work at this very time.

3.7 Raincoast Reply – Randy Christensen has replied in kind to Jeffrey Loenen's objections.

4.0 DISCUSSION

I will now address the Outfitters' request for rehearing in light of the positions communicated in the above-described letters from counsel and from Martin Powell.

4.1 Threshold Issue – I agree that issues about whether the Outfitters have rights to notice of the inquiry which led to Order 01-52, and to participate in it, are preliminary to a re-opening and rehearing of the inquiry. If they were not entitled to any greater notice of, or an opportunity to participate in, the inquiry than they in fact enjoyed, that is the end of the matter.

I may well have discretion under some circumstances to re-open a concluded decision under the Act. In this case, however, an initial and threshold issue in relation to the request to re-open is whether, in Terrence Robertson's words, under s. 54 of the Act it was mandatory to provide notice and participatory status in the inquiry to the Outfitters.

4.2 Authority to Re-open – As I indicated above, the law seems clear enough that, if a person was not given an opportunity to be heard when that opportunity had to be extended – in this case under s. 54 of the Act – it is possible for the decision to be re-opened without waiting for a Court order setting it aside or declaring it invalid.

Having said that, I find somewhat confounding Jeffrey Loenen's statement that, on the basis of *Zutter*, I have authority to assent to the request for a rehearing of the inquiry on the basis of failure to extend to the Outfitters notice or participatory rights, or both, while such rights or entitlements would not be recognized by a Court on judicial review or by the law at all.

The *Zutter* case was itself a judicial review proceeding. Far from being a case where interests could be recognized by the Council of Human Rights, but not by the Court on judicial review, it was because the Court in *Zutter* did recognize the interests of justice and fairness involved that the judicial review in question was successful and relief in the form of quashing the Council's decision was given. Further, unlike this case, in *Zutter* there was no issue about the party status of the person, Zutter, who did not get adequate notice. Zutter was the complainant. He was entitled to notice and full participatory rights. The unfairness involved was not that the Council had failed to extend to Zutter an opportunity to be heard, but that his own counsel had failed to communicate representations from Zutter to the Council.

In short, I agree with Terrence Robertson that the issue of mandatory notice and participatory rights for the Outfitters in relation to the inquiry is preliminary to any re-opening and rehearing

of the inquiry. I also agree that this preliminary question needs to be addressed first. This is because it is only if his clients were denied notice and participatory rights to which they were entitled that I need to exercise a discretion to remedy such deficiencies by re-opening and rehearing the inquiry.

4.3 Exhaustion of Remedies – Taking Terrence Robertson's response and reply together, I will make two observations about the question of exhaustion of remedies. First, his clients do not want the prospects for success of their judicial review of Order 01-52 to be compromised by a contention that they have failed to exhaust alternate remedies because they did not, before invoking the supervisory jurisdiction of the Court, ask me to reconsider Order 01-52 on the ground they were denied mandatory rights of notice and participation in the inquiry. Second, rather then first pursuing their judicial review, his clients would prefer to achieve the right to be heard directly from me, if that right is going to be flow from this process.

Randy Christensen, counsel to Raincoast, strongly opposes the Outfitters' contention – made in their petition for judicial review and also in their request for rehearing – that under s. 54 of the Act they were required to be given an opportunity to participate in the inquiry which led to Order 01-52. He maintains that the request for rehearing, including any concerns about exhausting remedies, is simply a pretext for delaying the hearing of the petitions for judicial review of Order 01-52.

Judicial review is traditionally discretionary in nature; exhaustion of remedies is also a discretionary principle. The list of factors which should be taken into account in exercising discretion under the exhaustion of remedies principle is not closed. If a factor is relevant it should be considered. Recognized factors are: (1) the convenience of the alternative remedy; (2) the nature of the error involved; and (3) and the nature of the alternative decision-making body. See *Canadian Pacific Ltd.* v. *Matsqui Indian Band*, [1995] 1 S.C.R. 3.

The exhaustion of alternative remedies usually involves a discrete remedial level – such as an internal review body or a separate administrative tribunal – that has not already been engaged in a matter. This does not mean that a request for reconsideration by the original decision-maker could never be an adequate alternative remedy. Common sense suggests otherwise, and the class of factors that may be relevant to the application of the discretionary principle of exhaustion of remedies principle is not closed. The overall objectives of the principle, however, are convenience and efficiency, to ensure that judicial review is not resorted to needlessly, and to ensure that, when the principle is resorted to, the issues involved have the benefit of an adequate evidentiary record to which the expertise of relevant administrative and quasi-judicial decision-makers has been applied.

In this case, the Outfitters and Raincoast clearly disagree on the meaning of s. 54 of the Act, *i.e.*, on the issue of whether it imposed a mandatory requirement to notify and extend participatory rights to the Outfitters beyond the rights they in fact enjoyed. Regardless of how I resolve that disagreement now, in a reconsideration, it appears quite likely that the issue will still have to be resolved by a Court, at the instance of one or the other of these parties. Both parties seek, as they should, the most convenient and efficient resolution of the issue. The judicial review petition

brought by the Outfitters is ready to be heard in a few days time. The evidentiary material that has been put before me by Terrence respecting my reconsideration of the s. 54 issue is the same as that filed with the Court for the judicial review petition brought by the Outfitters. My counsel, Susan Ross, will appear in that proceeding and in the petition for judicial review brought by the Ministry and the Ministry of Attorney General. As in the recent case of *C.P.R.* v. *British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603, which considered the participatory rights of public bodies under s. 54 of the Act, I will instruct my counsel to make submissions on the s. 54 issue. I do not think that, in all of the circumstances, the principle of exhaustion of remedies should impede, or compel a delay in, the hearing of the pending judicial review proceedings. To be clear, in the circumstances of this case, I do not think the principle of exhaustion of remedies should require deferral of the hearing of the judicial review petitions respecting Order 01-52, either if no request for rehearing of the inquiry had been made at all or if the request was made too late in the day for my consideration and reply before the scheduled Court dates.

4.4 Notice to the Outfitters – Terrence Robertson has made the point that his clients would much prefer achieving the relief of giving them the opportunity to be heard through a decision from me rather than from a Court after a four-day hearing. I take it from his letters regarding the request for rehearing that, if I were to decide to rehear, his clients would like to receive that decision sooner rather than later, since my decision would render their judicial review petition moot. Further, it is always possible that I may be wrong in the conclusions set out above about the issue of exhaustion of remedies.

I have therefore decided to consider whether, based on provisions of the Act now raised by the Outfitters, they ought to have been given notice under s. 54 of the Act. The discussion that follows may reflect the speed with which I have had to prepare this decision and detailed reasoning that would otherwise be expressed may go unstated or be set out incompletely. Nonetheless, the following discussion is an attempt to give as meaningful a response, as circumstances permit, to the threshold issue on the request for rehearing that has so recently been made.

4.5 Participation in the Access Request and the Review and Inquiry Processes –

Section 54 of the Act reads as follows:

> 54 On receiving a request for a review, the commissioner must give a copy to
>
> (a) the head of the public body concerned, and
> (b) any other person that the commissioner considers appropriate.

Sections 56(3) to (5) and 56(5) are also relevant to the notice provision in s. 54. They read as follows:

> 56 …
>
> (3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for review must be given an opportunity to make representations to the commissioner during the inquiry.

> (4) The commissioner may decide
>
> (a) whether representations are to be made orally or in writing, and
>
> (b) whether a person is entitled to be present during or to have access to or to comment on representations made to the commissioner by another person.
>
> (5) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review may be represented at the inquiry by counsel or an agent. …
>
> 58. …
>
> (5) The commissioner must give a copy of an order made under this section to all of the following:
>
> (a) the person who asked for the review;
>
> (b) the head of the public body concerned;
>
> (c) any person given notice under section 54;
>
> (d) the minister responsible for this Act.

The Outfitters could not fall under s. 54(a). The question is whether they were "persons that the commissioner considers appropriate" under s. 54(b). This phrase, by definition, involves discretion on my part, or on the part of a person (usually a member of my staff) who is acting for me in a delegated capacity with respect to the processing of a request for review of a public body's access decision.

In this case, the Ministry apparently consulted the Association in connection with the Ministry's access request responses under s. 8 of the Act, in which the Ministry refused access, under s. 18 of the Act, to some of the information requested by the access applicants. In consulting the Association, however, the Ministry did not give notice to it under s. 23 of the Act. Section 23 only relates to the disclosure exceptions in ss. 21 and 22 of the Act. Section 23(1) and (2) specify when notice must or may be given by public bodies:

> 23(1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).
>
> (2) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 21 or 22, the head may give the third party a written notice under subsection (3).

A third party, under s. 21 or s. 22, who is given notice by a public body under s. 23(1) or (2) must be given written notice of the public body's decision about whether or not to give access to

the requested record or part of it. If the decision is to grant access, the person given notice has 20 days in which to request a review of that decision. These aspects of the process are provided for in s. 24(2) and (3) and s. 52(2).

If a public body believes that a disclosure exception other than s. 21 or s. 22 might apply, the public body may gather information or consult others in that regard, but there is no requirement in the Act for notice or giving an opportunity to be heard.

If a public body intends, at any time, to disclose information in the public interest under s. 25 of the Act, under s. 25(3) it must, if practicable, notify any third party to whom the information relates and the Commissioner.

In this case, the Association supported the public body's refusal of access to kill location data. This support was apparent from the affidavit of Dale Drown, general manager of the Association, which was relied upon by the Ministry in the inquiry before me. The access applicants' requests for review objected to the Ministry's decision to withhold part of the requested records.

The above-described provisions affirm that the Act contemplates that, if a public body decides it will, for any reason other than s. 25, release requested records, it may act on that decision without notice to anyone other than persons given notice under s. 23. Accordingly, if the Ministry had decided to release the information in dispute in Order 01-52 – again, other than under s. 25 – it could have done so without notice to the Outfitters, since they had not been given notice under s. 23. This release would have occurred without notice to, or any involvement of, my office.

In practical terms, when my office receives a request for review, my staff – usually a portfolio officer authorized to investigate and mediate under s. 55 – assesses who must or should be given notice of the request for review under the Act. This will include the head of the public body, the access applicant and any person to whom the public body has properly given notice under s. 23. There may be instances where it only becomes apparent at the review stage that a person was not notified by the public body under s. 23 when, as provided in s. 23, that person ought to have been. It is also possible that a public body may entirely overlook that the s. 21 or s. 22 disclosure exception might apply to some of the information involved. In such cases, the person who there is reason to believe might be a third party under s. 21 or s. 22 is given notice of the review under s. 54(b). These are only examples of when notice under s. 54(b) may be considered appropriate.

Although s. 54 speaks to notice that is to be given "on receiving a request for review", there may be cases in which the relevance of additional disclosure exceptions and the need for notice to further persons will only become evident at the inquiry stage. In those cases, when that notice determination is made, it is acted on by me, or my delegate if the inquiry function has been delegated to someone else.

Interventions may also be permitted at the inquiry stage. Interventions may be invited, sometimes after consultation with the parties to the inquiry. At other times, as with Court proceedings, individuals or groups may come forward and seek leave to intervene. Interveners

are expected to bring a broader perspective than the parties to the issues on the inquiry. The scope of participation for interveners may be more limited than for parties. Interveners are not interested or affected parties in the sense that the Act requires them to be given notice or participatory rights in inquiries. Their participation is at the discretion of the Commissioner, or my delegate where the inquiry has been delegated.

The Association was, in fact, clearly aware of the inquiry that led to Order 01-52. It was consulted by the Ministry before it made its decision to withhold part of the requested records under the s. 18 disclosure exception. The Association then provided the Ministry with an affidavit for the purposes of the inquiry that I conducted. The wording and content of the affidavit sworn by Dale Drown indicated that the affidavit was sworn by him in his capacity as general manager of the Association, and that he spoke on behalf of its membership. Had the Association, or any of its individual members, sought to intervene in the inquiry, I would have considered that request on the usual basis, *i.e.*, whether the proposed intervener has a broader or different perspective to bring to the inquiry. I note here that *Bibeault* v. *McCaffrey*, [1984] 1 S.C.R. 176, is an another example of where a discretionary level of participation may be extended to persons who do not have the status of interested parties under the applicable statutory scheme.

Section 15

Section 15 is a discretionary exception under the Act that relates to information the disclosure of which could reasonably be expected to be harmful to law enforcement. The decision to invoke this disclosure exception is made by the public body that has the custody or control of the record involved and that decision is discretionary. The public body may often find that consultation with other agencies or persons is of assistance in assessing whether s. 15 can or should be invoked in relation to all or part of a requested record. This is a judgment for the public body to make, and it does not involve a requirement for notice under s. 23. Nor, in my view, do third-party perceptions of the benefits or desirability of consultations by a public body in s. 15 cases trigger a right of, or appropriateness for, third parties to be given notice under s. 54(b) in relation to the s. 15 discretionary exception, which, under the Act, is invoked by a decision of the public body.

In any event, I gather from the materials provided to me by Terrence Robertson that his clients may believe that s. 15(1)(a) (harm to a law enforcement matter) or s. 15(1)(c) (harm to investigative techniques and procedures) ought to have been claimed in relation to the disputed kill location data. It is quite clear that the material before me in the inquiry and the further material provided by the Outfitters could not sustain the application of s. 15(1)(a) or (c) in this case. See, in particular, the decision in *College of Physicians and Surgeons of B.C.* v. *British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 726, at paras. 139 to 146, and my underlying decision, Order 00-08. See, also, *R.* v. *Mentuck*, [2001] S.C.J. No. 73, 2001 SCC 76. I can readily appreciate why the Ministry did not seek to rely on s. 15 as a basis for withholding the disputed kill location data. I do not consider that any interest based on this disclosure exception made it appropriate to give notice under s. 54(b) to any of the Outfitters.

Section 18

Section 18 is another discretionary disclosure exception. It relates to conservation and, like s. 15, the decision to invoke s. 18 is made by the public body that has the custody or control of the record involved. Section 18(b) was, in fact, the disclosure exception that the Ministry relied on both in its initial responses to the access requests and at the review and inquiry level.

The Act does not require public bodies to give third party notice in relation to s. 18. It appears the Association had actual notice here in any case, because the Ministry decided to consult with the Association and to involve it in providing evidence, in the form of Dale Drown's affidavit, in the inquiry.

I do not consider it was appropriate to give the Association or any of its specific members notice under s. 54(b) on account of the fact that the Ministry applied the discretionary exception in s. 18 to withhold the disputed kill location data and the fact that s. 18 was the disclosure exception in issue in the inquiry. They had no special interest, responsibility or right in relation to the s. 18 issue. Moreover, the Association on behalf of its membership was already aware of the inquiry and provided evidence to the Ministry for that purpose. It is also not apparent to me now that the Association, or Peter Klaui or Brian Swift, have advanced arguments or evidence relating to s. 18 that differs in a significant way from what was presented and argued by the Ministry in the inquiry that led to Order 01-52. This underlines, perhaps, the fact that the interests underlying s. 18 are essentially public in nature and this is why the scheme of the Act confers the role and discretion to assess and invoke those interests on public bodies, not third parties such as the Outfitters.

Section 19

Section 19, like ss. 15 and 18, is a discretionary disclosure exception. It relates to disclosure harmful to individual or public safety. Many of my remarks about ss. 15 and 18 also apply to s. 19.

Like the ss. 15 and 18 exceptions, the Act does not require public bodies to give third party notice in relation to s. 19. That section tracks traditional expectations that public bodies will exercise prudence in ensuring that their activities – which are supposed to be directed to the public good – do not put individuals, groups of persons or the general public in mental or physical danger. Section 19 effectively applies this concept to disclosure, under the Act, of information that is in the custody or control of public bodies.

The fact that the Act does not include s. 19 interests under the third party notice requirements in ss. 23 and 24 must be taken as a deliberate legislative choice. As I have already said regarding s. 15, a public body may find that consultation with others is of assistance in assessing whether s. 19 can or should be invoked in relation to all or part of a requested record. This is a judgment for the public body to make and it does not involve a requirement for notice under s. 23. I do not find it difficult, from the evidence that was before me on the inquiry, to appreciate why the Ministry did not rely on s. 19 in this case. I also do not consider that interests in relation to the s. 19 disclosure exception made it appropriate to give notice under s. 54(b) to the Association or any of its specific members.

Section 21(1)

Section 21(1) is a mandatory disclosure exception relating to business information, as defined in the section, of a third party. In order for this exception to apply, the requirements of ss. 21(1)(a), (b) and (c) must all be met. Given the material available to me, I will not attempt – nor is it necessary – to address each and every nuance of this disclosure exception.

The kill location data sought by the access applicants covers a period of 25 years. As I indicated in Order 01-52, the data was compiled from statutorily compulsory information reports from hunters (see s. 16 of the Hunting Regulation under the *Wildlife Act*, *i.e.*, B.C. Reg. 190/84). The data disclose, in the case of each kill, one of four kill types: animal control, hunter kill, pick up or illegal kill. The data do not, however, record the identities of the hunters required to report the raw kill information. Nor do the data record the guide outfitters who may have accompanied the hunters. In any case, given the age of the data, and assuming public body records would even make it possible to identify which individuals provided what kill information, many of the hunters or outfitters involved could be expected to be impossible or impracticable to locate or to be no longer living or in business.

I fail to see how the Association – which is not a hunter required to provide kill information pursuant to the compulsory inspection reporting system under the *Wildlife Act* and does not even represent all guide outfitters who accompany hunters – could possibly trigger the parameters in s. 21(1)(a) or (b) in respect of some or all of the kill location data that the Ministry withheld. I understand from the more recent affidavit of Dale Drown, provided to me by Terrence Robertson, that the Association believes that the kill locations are trade secrets or scientific or technical information of guide outfitters. Even if one assumes, for the purposes of argument, that this is a credible contention, these are not proprietary or near proprietary interests of the Association itself. I do not consider that the Ministry was required to give notice, under s. 23 of the Act, to the Association on the basis that it might be an affected third party under s. 21(1) of the Act. Nor do I consider that it was appropriate to give the Association notice under s. 54(b) on account of s. 21(1) third-party interests in the disputed kill location data.

Peter Klaui and Brian Swift are guide outfitters, not hunters. Peter Klaui has been a licensed guide outfitter since 1997. Brian Swift has been a licensed guide outfitter since 1992. Obviously, these men can have been connected as guide outfitters with only a small fraction of the kills recorded in the requested data. Further, as I have already noted, the data do not record hunter or guide outfitter identities. There is also the fact that the hunters who have paid for the guide outfitting services of either of these men are aware where they killed their bear and are required by law to report the location information to the Ministry. In the circumstances, I do not consider that the Ministry was required to give notice under s. 23 of the Act to Peter Klaui or Brian Swift on the basis that they might be affected third parties under s. 21(1) of the Act. Nor do I consider that it was appropriate to give them notice under s. 54(b) on account of s. 21(1) third party interests in the disputed kill location data.

Section 22

Section 22 is a mandatory disclosure exception relating to personal information the disclosure of which would be an unreasonable invasion of third party personal privacy. "Personal

information" is defined in Schedule 1 of the Act. Information must be recorded information about an identifiable individual in order to be "personal information". The Association is not an individual. Further, the disputed kill location data are not recorded information about identifiable individuals, including Peter Klaui or Brian Swift. I do not consider that the Ministry was required to give notice under s. 23 of the Act to the Association or to Peter Klaui or Brian Swift on the basis that they might be affected third parties under s. 22(1) of the Act. Nor do I consider that it was appropriate to give notice under s. 54(b) on account of s. 22(1) third-party interests in the disputed kill location data.

Section 25

As I indicated in Order 01-52, at paras. 145 to 149, the notice of inquiry was amended to include s. 25 of the Act after receipt of a letter from the Ministry saying that it suspected the access applicants would be raising it as an issue. As it turned out, neither of them raised s. 25 and I found that, had s. 25 been raised, the material in the inquiry did not establish that s. 25 required the Ministry to disclose the withheld kill location data. Quite apart from the factual question of whether any of the Outfitters were third parties to whom all or any of the disputed kill location data related under s. 25(3(a), I do not consider that the circumstances surrounding s. 25 either made it appropriate under s. 54(b) to give notice to the Association or to any of its individual members or would have required notice under s. 25(3), when there was never any decision on the Ministry's part to disclose information or by me to require the public body to disclose information under s. 25.

5.0 CONCLUSION

According to the principles of administrative law, in the absence of a statutory provision, any interested person generally has the right to make representations at a hearing. The Act contains specific statutory provisions for required notice and participatory rights in relation to the access request and review and inquiry processes. Those provisions must be construed in a harmonious and meaningful way, including when a discretion is conferred, as is the case under s. 54(b).

Many organizations and individuals may feel they are affected by disclosure under the Act of particular information in the custody or control of a public body. This is the nature of many public interests the Act seeks to balance. To a very significant degree, as the Act contemplates, the important role and right of assessing and invoking provisions of the Act relating to those interests rests with public bodies, not with third parties. This is consistent with traditional government authority over records in its custody or control that existed before the relatively recent advent of access to information legislation across Canada. This is also consistent with the exigencies of this statutory system. It simply is not tenable for every person who has an interest in the outcome of an access request or an inquiry under the Act to have a sufficient interest to attract a right of notice and participation. This reality is reflected in the specific required-notice provisions in the Act.

In closing, I consider the following passage from the judgment of the majority of the Supreme Court of Canada in *T.W.U.* v. *C.R.T.C.*, [1995] 2 S.C.R. 781, is instructive in this case:

> … it is important to note that a finding in the case at hand that the TWU was entitled to notice would have grave consequences that could paralyze regulatory agencies.

> Effectively, it would mean that all individuals with contractual relations with a regulatee would have to be given notice of regulatory proceedings concerning that regulatee if such proceedings were likely to affect, even indirectly, the person in question. Given the wide scope of many regulatory agencies, their decisions are likely to have an indirect effect on a large number of individuals in contractual relations with the regulatee. As a result, all such parties would have to be provided with notice of the regulatory proceedings. This is particularly problematic in light of the extreme difficulty of ascertaining exactly who these parties are in advance of the hearing and the possibility that, in the absence of notice, these parties would be able to challenge the legality of the regulatory decision. This could result in an endless series of challenges that would effectively paralyze regulatory agencies. Accordingly, the *audi alteram partem* rule should not be interpreted as requiring that notice be provided to parties indirectly affected by regulatory proceedings.

Yours sincerely

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

cc: Susan E. Ross
Morley Ross

/11322grizzdec.doc