**ISSN 1198-6182**

**Office of the Information and Privacy Commissioner**
**Province of British Columbia**
**Order No. 51-1995**
**September 14, 1995**

**INQUIRY RE: An objection raised by the Ministry of Environment, Lands and Parks with respect to the Jurisdiction of the Information and Privacy Commissioner to conduct an inquiry into fees charged by a public body for records available for purchase by the public**

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## 1. Description of the review

As Information and Privacy Commissioner, I conducted a preliminary written inquiry at the Office of the Information and Privacy Commissioner in Victoria on June 26, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of three requests for review submitted to this Office in January and February 1995 by the Western Canada Wilderness Committee (the applicant). The applicant is contesting the fees charged by the Surveys and Resource Mapping Branch of the Ministry of Environment, Lands and Parks (the Ministry) for digital data files of the TRIM (Terrain and Resource Inventory Mapping) program.

My jurisdiction to conduct an inquiry into this matter is the subject of an objection by the Ministry. Addressing that objection is the substance of this order and will determine whether my Office proceeds to schedule an inquiry on the substantive issues raised by the parties.

## 2. Documentation of the inquiry process

A Notice of Inquiry was issued to the parties to this inquiry on May 26, 1995. The Notice provided for a sequential series of submissions, in a submission - reply - rebuttal format. A Portfolio Officer's fact report was provided to the parties with the Notice of Inquiry and was accepted by them as accurate for the purpose of conducting this inquiry.

Interventions were also invited and received from the Freedom of Information and Privacy Association (FIPA) and the British Columbia Civil Liberties Association (BCCLA), both organizations having a history of involvement with, and a demonstrated interest in, the practical application of the *Freedom of Information and Protection of Privacy Act* (the Act). Bob Seeman prepared the submission for FIPA. Murray Mollard, Policy Director, made the submission for the BCCLA.

The inquiry process began on June 2, 1995 and concluded on June 21, 1995.

**3. The records in dispute**

The records in dispute are maps held in digital form. However, in this inquiry regarding my jurisdiction, the details of the records are not directly relevant, nor have I received specific evidence with respect to the characteristics or contents of the records.

**4. Issue under review at the inquiry**

The issue under review at this inquiry is whether I have jurisdiction under the Act to review a response to an access request which informs the applicant that the information requested is available for purchase by the public.

The section of the Act which addresses information available to the public is as follows:

20(1) The head of a public body may refuse to disclose to an applicant information

> (a) that is available for purchase by the public,
>
> ....

**5. The Ministry's case**

The Ministry's position is that I do not have jurisdiction to inquire into a matter regarding information that is available for purchase by the public outside the Act. (Submission on Jurisdictional Objection, p. 4) The records sought by the applicant can be categorized as records for sale to the public through sales outlets. In this connection, the Ministry cites section 2(2) of the Act:

2(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

The Ministry's position is that the "records held by the provincial government fall into three general categories: (1) records for sale to the public through sales outlets,

(2) records routinely available without a formal "FOI" request, and (3) records that must be requested under the Act. It argues that "the requested information is available for purchase by the public through Maps B.C. .... Therefore, the requested information falls within this first general category of records." (Submission on Jurisdictional Objection, p. 7) Dissemination efforts include a dealer network throughout B.C., the rest of North America, and abroad. In the interests of brevity, I discuss below other key parts of the Ministry's argument.

The Ministry has asked me to determine that I have no jurisdiction "to review the decision of the head relating to records that are available for purchase by the public from a sales outlet." (Submission on Jurisdictional Objection, p. 11)

**6. The applicant's case**

The applicant submits that I do have jurisdiction to conduct an inquiry into the matter before us. It notes that section 53(3) of the Act determines that a public body's failure to respond to a request made under the Act "is to be treated as a decision to refuse access to the record." Section 56(1) further requires me to conduct an inquiry where, as in this case, matters pertaining to a request for access were not settled by mediation.

In summary, all the prerequisites for jurisdiction of the Commissioner are present in this case: applicant, records, requests for access, deemed refusal of access, requests for review, failure to settle matters under review, and obligation of the Commissioner to hold an inquiry. (Reply for the Applicant, pp. 1-2)

The applicant also argues that there is no statutory basis for classifying government records into three categories.

The applicant advances a particular reason why good public policy requires that I should exercise jurisdiction in the present case:

The Act is specifically designed to provide a fair, systematic process for resolving disputes regarding public access to information. Ousting the Act would leave applicants for information of this type with no procedure for making their case and obtaining a remedy; precisely the problem the Act was designed to solve. (Reply for the Applicant, p. 8)

**7. The submission of the B.C. Freedom of Information and Privacy Association (FIPA) as an intervenor**

FIPA essentially argues that I do have jurisdiction in this case on the basis of public policy and sections 2, 3, 20, and 52 of the Act. In its view, the Ministry has made a decision on access to records in this case, the Commissioner has the power to review such a decision, and the records are in the custody and control of the Ministry. Finally:

Environmental decisions of government are currently among the most important and controversial governmental decisions and they affect many generations of British Columbians. The applicant organization was established specifically as an advocacy organization for the preservation of the natural environment. From a public policy perspective, it is important that the applicant have access to the independent review process of the commissioner's office to resolve the access issues raised by its request.

(See also BCCLA Intervention, pp. 9, 10)

**8. The submission of the B.C. Civil Liberties Association as an intervenor**

BCCLA argues that I have jurisdiction over the subject matter of this inquiry on the basis of sections 2, 3, 20(1)(a), 52, 55, 58 and 71 of the Act. (BCCLA Intervention, pp. 1-12) It further

argues that the Act itself is intended to provide a rational mechanism for dispute resolution of access requests, such as the present matter.

**9. Discussion**

***Section 20(1)(a): Available for Purchase by the Public***

I am of the opinion that I have jurisdiction over the question of when a record is "available" for purchase by the public and what availability means. It is my view that it was the intention of the legislature to cover, by this phrase, standard publishing programs of government of the type produced by, for example, communication offices attached to public bodies. The normal format is brochures, fact sheets, annual reports, Crown publications, and the like. Increasingly, information available on a World Wide Web Site would also fall into the category of publicly available information. The discussion of section 20(1)(a) of the Act in the *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, prepared by the Information and Privacy Branch of the Ministry of Government Services at C.4.11, p.5, supports my general characterization of what section 20(1)(a) was intended to cover.

Section 20(1)(a) provides an exception to access where information is available for purchase. In my view, the Commissioner must have jurisdiction to determine if this exception is being properly applied. Section 2(1)(a) further provides "for an independent review of decisions made under this Act."

I agree with the applicant's argument that:

(iv) Section 20(1)(a) of the Act provides that the head of a public body may refuse to disclose information "that is available for purchase by the public". This firmly establishes that the Act explicitly contemplates that information available for purchase is within the scope of the Act .... (Reply for the Applicant, p. 2; see Reply for the Ministry, p. 5)

***Section 2(2): Making Government Information Widely Available***

The Ministry has relied in part on this section, which I read differently than

the Ministry. The purpose of this section is simply to make sure that public bodies do not start insisting that applicants for information customarily make formal access requests for information that has traditionally been available by other means. I note with satisfaction that this has not happened since the Act went into effect. In my view, this section was not intended to place such records "outside the Act," as the Ministry has sought to argue, especially if the existing system stops functioning for that purpose.

In fact, I am more moved, in the present inquiry, by the second part of section 2. One of the fundamental goals of the Act is not to "limit in any way access to information that is not personal information and is available to the public." The current inquiry concerns a shift in the format of making certain records available to the public and, the applicant argues, has the effect of limiting public access, rather than enhancing it, because of cost considerations affecting the availability

of the finished product. I think this view is supported by one of the fundamental purposes of the 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,
>
> ...

I conclude that section 2(2) does not place the records in dispute in this inquiry outside the ambit of the Act. Thus, I reject the Ministry's interpretation of section 2(1)(e), which provides "for an independent review of decisions made under this Act."

In support of its reliance on section 2(2) of the Act, the Ministry has also quoted liberally from the federal Access to Information Guidelines of January 1991 in explication of the comparable section of the federal *Access to Information Act* with respect to what it means for something to be available in published form:

In this context "published" connotes a wide and general distribution of information so that it is made generally accessible or available to the public at large and not only to a special restricted segment of the public. (Submission on Jurisdictional Objection, p. 6)

I also agree with all of the following arguments made by the applicant:

> (iii) Section 3(1) of the Act defines the scope of the application of the Act quite clearly. It states, "This Act applies to all records in the custody or under the control of a public body, ... but does not apply to the following: ...". A list of exceptions follows, but note that information available for purchase is not included in the list of exceptions. As the information in question meets the definition of "record" under the Act and is not within the listed exceptions, it is clearly within the scope of the Act.
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> ....
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> (vi) The Ministry's interpretation of section 2(2) would lead to the absurd result that Part 3 of the Act, Protection of Privacy, would not apply to information that is available for purchase. Obviously, this was not the intention of the Legislature.
>
> (vii) The Ministry's interpretation of section 2(2) - that the mere assertion that requested information is available for purchase ousts the jurisdiction of the Commissioner - would lead to a second absurd result, namely, that the Commissioner would have no jurisdiction to inquire into whether or not the requested information is actually available for purchase. Clearly, the Legislature intended that disputes regarding such questions are to be addressed by the Commissioner.

(viii) The Ministry's interpretation of section 2(2) would lead to a third absurd result, namely, that the Commissioner would have no jurisdiction to inquire into the reasonableness of the availability of the requested information for purchase in the particular case. Presumably, the Legislature did not intend that government could defeat the purpose of the Act by charging an unreasonably high price for a particular document. Indeed, that is an issue in this particular case. (Reply for the Applicant, pp. 2-4. See also BCCLA Intervention, p. 6)

***Section 52: Right to Ask for a Review***

The Ministry cited section 52(1) to argue that I do not have a right to conduct a review in this case, because the response by the head of the public body to the applicant's request was not made under the Act. (Submission on Jurisdictional Objection, p. 10) This section reads in part:

52(1) A person who makes a request to the head of a public body, other than the commissioner, for access to a record or for correction of personal information may ask the commissioner to review any decision, act or failure to act of the head that relates to that request, including any matter that could be the subject of a complaint under section 42(2).

I am fully persuaded the subject matter of the present inquiry arose properly in the context of a request for access, to the head of a public body, for access to a record, which resulted in a "failure to act of the head that relates to that request ...." (See also Reply for the Applicant, pp. 2, 8; and BCCLA Intervention, pp. 8-9, 10)

I find it specious for the Ministry to argue that its responses to the applicant's requests "were not made under the Act, but in fact expressly indicate that the information sought is available to the public outside the scope of the Act." (Submission on Jurisdictional Objection, p. 10) I agree fully with the applicant that "[w]here the Act does apply to records, it applies even though the records are routinely available. Nothing in the Ministry's discussion contradicts this key point." (Reply for the Applicant, p. 6)

***Section 53(3): Deemed Refusals to Provide Access to Records***

This section reads as follows:

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.

The applicant argued that under this section I have jurisdiction to conduct an inquiry into the matter before us. The Ministry "submits that it would be improper to characterize its responses as deemed refusals under the Act. It is clearly not the intention of the Act to require public bodies to provide access to records under the Act that are already publicly available for purchase." (Reply for the Ministry, p. 3)

The applicant made a request for access to the records described earlier in these reasons. The Ministry did not provide the applicant with access to those records because it took the position that they were available for purchase. I have concluded that I have jurisdiction to determine whether section 20(1)(a) applies to the request for records in this case. The review under section 52(1) is a review of the Ministry's decision not to provide access as requested. In my view, section 53(3) does not apply.

**10. Order**

Under section 58(3)(a) of the Act, I have determined that I have jurisdiction under the Act to review a response to an access request which informs the applicant that the information requested is available for purchase by the public. I order the Ministry of Environment, Lands and Parks to proceed to an inquiry under section 56 of the *Freedom of Information and Protection of Privacy Act.*

September 14, 1995

David H. Flaherty
Commissioner